The International Law of
Territorial Waters
with special reference to the
coasts of Scotland

by

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PREFATORY NOTE.

In this exercise an attempt has been made to examine the international law relating to territorial waters as it affects Scotland. The restriction of the subject to its application to a relatively small portion of the maritime waters claimed as territorial precludes mention of much which would require notice in a more comprehensive study of territorial waters generally. Reference has necessarily been made to the practice of States in other parts of the globe with the twofold object of ascertaining where possible the law applicable to Scottish territorial waters and of obtaining a proper perspective of that law.

The work is divided into two parts. Part I is treated historically to illustrate, from the Scottish standpoint, the development of a situation which brought about freedom of the seas and the restriction of territorial waters. Part II deals with the modern international law as the essayist conceives it to be.

( In Part I the notes and references to the authorities have been placed in an appendix. In Part /
Part II, which was composed after Part I had been typed, the usual and more convenient form of footnotes has been adopted. It is trusted that no serious inconvenience will arise from the change. Publication of the essay is not contemplated.)
THE INTERNATIONAL LAW OF TERRITORIAL WATERS
with special reference
to the
COASTS OF SCOTLAND.

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International law admits the right of a State, part of whose natural boundary is the seashore, to exercise a jurisdiction upon the adjacent waters as if, though with qualifications, these marginal or coastal waters, termed territorial waters, were comprehended within the popularly accepted national boundaries. On the one hand, the rights comprised within this extended jurisdiction, their nature, and even the extent of the waters upon which there is a jurisdiction, are the subject of international controversy. On the other hand, by the universal consent of nations, it is settled that the high seas, that is the oceans apart from the territorial waters, are not subject to appropriation by any power as within its sovereignty or jurisdiction. Thus upon/
upon the high seas, a ship, in time of peace, is subject to the sole jurisdiction of the State whose flag she flies. Within the territorial waters of a State the ship is under the jurisdiction of that State for some, but by no means all, clearly defined or agreed purposes and yet remains under the jurisdiction of her own State. Thus the problem may be stated: What are comprised within territorial waters, apart from inland waterways which are excluded from the present essay, and what rights reside in and what duties are imposed upon States claiming territorial waters?

II This delimitation of the seas into territorial and extra-territorial waters, or high seas, was the compromise solution to the celebrated controversy as to the appropriation of the seas by the maritime powers, a controversy which raged from the Middle Ages to the close of the Napoleonic Wars when the pretensions to sovereignty upon the high seas were tacitly dropped. That controversy was

justly/
justly celebrated for, at one time or another, all the known oceans were the subject of claims by some State (1). Venice, the leading example of successful appropriation, secured the Adriatic; Genoa and Pisa contested the Ligurian Sea; Spain and Portugal divided the Atlantic and Pacific Oceans; Britain claimed the indefinite British Seas; and the Baltic formed a convenient appendage to Denmark and Sweden. The assertion and defence of these claims conditioned the whole course of European history and the victory of Mare Liberum laid the basis of the modern maritime international law (2). The controversy attracted the attention of the greatest scholars, particularly of the seventeenth and eighteenth centuries, who, sparing no effort in ransacking the treasuries of ancient literature, lore and poetry, the opinions of lawyers, history and fable, and even the sacred writ, sought to bend such heterogeneous material to the support of the side favoured, Mare Clausum or Mare Liberum.
It was a veritable 'Battle of Books' (3). The influence of these writers on the outcome of the controversy and on the shaping of international law merits more than passing reference and will be noted in due course. For the moment, it is sufficient to indicate that these jurists dealt with the appropriation of the vast oceans and, in so far as they touched upon the coastal waters, they did so but lightly. Sovereignty upon the coastal waters was then no novelty or the subject of controversy. It had been admitted by the early jurists, and claimed and exercised by monarchs. Until the major issue, the extravagant claims to the wide oceans, had been disposed of, there would have been but little point in dealing exhaustively with the narrower coastal waters.

III In view of these considerations it is proposed, in the first part of this essay, to sketch the history of the claims to maritime dominion until the close of the controversy of *Mare Liberum* versus *Mare Clausum*, and, in the second part, to/
to consider the evolution of the modern Territorial Waters with particular reference as to the coastal waters of Scotland.
SECTION II.

The EARLY MEDITERRANEAN CLAIMS to MARITIME DOMINION.

I. The Rhodian sea laws and the maritime legislation of the Greeks, as now available, are silent as to the status of the sea. The strongest argument against dominion on the sea was that this conception came much later. The root of the prevailing conception of the state was citizenship (1), not territoriality, a conception which did not become familiar until centuries after (2). It appears that the main military interest of these early communities in the sea, apart from the exigencies of naval warfare, was the securing of the safety of the sea to the commerce essential for the economic welfare of the ancient Greek communities. Safety on the sea involved the suppression of piracy, then popularly regarded, as with all early maritime communities, as a glorious means of enrichment for the chiefs/
chiefs and a provision for needy followers (3). The injunction to repress piracy was laid by the Amphictyonic Council not upon particular states but/upon all (4). The Greek community of states forming the Amphictyonic League recognised obligations inter se as States (5), but they were not conscious of them as rules of interstate obligation. They regarded them as rules applicable to all the Hellenes, common to all, like their civilisation, language, and religion (6).

II About twenty instances of the exercise of a dominion upon the seas by the Mediterranean peoples of the pre-Roman period are claimed by Selden (7), the leading advocate of Mare Clausum, but such instances scarcely bear out his contention. Instances, as they were, of temporary naval supremacy or commercial prosperity, they could not be transmuted by the forensic power of the pleader in subsequent ages, into maritime dominion. To permit this
it was necessary that the State, having the supremacy, had both the intention and the will to assert a dominion and that will was made evident by some act recognised as, at least, tending to constitute dominion. There was, it is true, a sufficient number of independent States to have made possible a competition for lordship of the sea (8), but the intention of acquiring dominion upon the seas, apart from the harbours and their immediate vicinity, was lacking. It had come to be, as with the great Hellenic games under the auspices of the temples, that these localities were sanctuaries for the trader. The dues levied were utilised, in part at least, for the upkeep of the harbours, and in this respect they may be said to be the prototype of the modern harbour dues (9). Beyond the limits of the harbour the trader was probably unprotected. There no State had a special or exclusive jurisdiction.

III/
III The extension of the Roman Empire over virtually the whole of western civilisation rendered 'international' law impossible. Consequently the dicta of the Roman jurisconsults as to the possibility of property in the sea, so confidently founded upon by the controversialists as to Mare Liberum, are scarcely relevant. Apart from there being confusion of ideas, of ownership and of sovereignty, there is no warrant for supposing that the jurisconsults, the framers of the Edicts, or the Emperors, ever had in mind the possibility of there being a number of sovereign States claiming rights in maritime waters. They looked at the questions raised from a different angle. The Civil Law was essentially municipal law (11), but by reason of being almost universally accepted into, or as the foundation of, the municipal systems, and in the absence of other doctrines, it came to furnish much of the material which the/
the States, with a growing consciousness of interstate obligations and rights, sought to incorporate into the edifice of International Law (12). The Civil Law was based on citizenship. It was personal law, as was all early law. When the Civil Law came to influence inter-state relations it was in atmosphere different from that in which it had been nurtured, in a feudalised Europe composed of sovereign or virtually sovereign States. It would appear to follow therefore that the Roman Empire cannot afford any useful material for the present purpose.

IV Out of the anarchy prevailing after the disintegration of the Roman Empire, there arose a situation peculiarly favourable to the assertion of claims to local jurisdictions, and, eventually to sovereignty upon the seas. There were three contributory causes. Although the Emperor of the Germans remained the figure head of a *speculative/
"speculative Sovereignty" (13) and the Papal See, out of regard to the spiritual welfare of Christendom, attempted to gain a universal authority in matters temporal, there was in fact, no central authority adequate to replace the Caesars (14). Feudalism, connecting for the first time personal rights and duties with definite parcels of land, became familiar (15). Jurisdiction preceded local autonomy, which waxed or waned inversely to the authority exercised by the sovereign power (16). Finally, of prime importance to the present essay, there arose a series of competing maritime communities. Their origin and destiny were conditioned by and reflected the advantages of geographical situation and the resurgence and expansion of commerce and industry to meet the needs of a wider civilisation. The absence of a powerful, central political authority and the other circumstances of the time required that Venice, Genoa, Pisa, Florence, Amalfi, progressive/
progressive communities, should undertake their own protection and shape their political and economic development.\footnote{17}{In the first place, shipping had to be rendered safe from the depredations of pirates and, in the second place, in accord with the economic ideas of the period, the commerce of the different regions had to be monopolised, so far as concessions could be obtained towards that end, or otherwise controlled by the State. There could have been no pretence at maritime sovereignty or exclusive jurisdiction upon the seas until the States had become familiar with the idea of exclusive State rights within territorial limits by land.\footnote{18}{Only when there had been some semblance of the regional monopolising of commerce, or a State had claimed to have appropriated some portion of the sea as within the jurisdiction or protection of the State, could maritime dominion, as distinct from naval supremacy, be admitted.}
V

Of these claims to maritime sovereignty there was none more prolonged, more firmly established or more highly prized by the advocates of *Mare Clausum* than that of Venice upon the Adriatic. Pisa and Genoa, her early rivals, laid some claim to the Ligurian Sea, but it was indefinite and never attained the same notoriety. Sovereignty, or, as it was at first, naval supremacy, was valued by the Venetians. Denied the heritage of the land, they perched their republic upon the mud banks and lagoons at the mouth of the Po and spread their dominions seawards. The Adriatic became peculiarly Venetian. It was an unique situation. Guard ships were placed upon the Adriatic to levy dues and regulate the shipping, irrespective of the State from whence it came or of its character. Irritated by these obstructions, other states protested, but Venice persisted in the maintenance of her claims to maritime dominion. Her naval power might/
might decline, her Rialto be deserted, her splendour be that of a glorious past, yet Venice could claim to be the "Queen of the Adriatic". Her 'dominion' was no longer naval supremacy. It had become maritime sovereignty in the modern sense and recognised as such by the neighbouring States.

VI The first step towards the acquisition of control upon the Adriatic was when Doge Orseolo II, about the year 1000, cleared the Dalmatian pirates from the Adriatic and Venice established a protectorate over the Greek Dalmatian cities. Her approaches thus secured, the wealth of Venice grew apace. It is from 1204, however, that her splendour is usually dated. It was then she shared lavishly in the spoils of Constantinople which Venice had assisted to capture. About that time too she acquired the Ionian Isles and Candia. The latter she granted out to Venetian nobles on a form of feudal tenure/
tenure which Venice had doubtless learned from the Frankish Crusaders. It is during this period, if a date must be assigned, that the Venetian aspirations to maritime sovereignty made their first appearance. The newly acquired islands formed a convenient base from which to control the Adriatic traffic. Moreover, trade became canalised. Genoa held the trade of the buxine in her hand; Venice directed her commerce to Acre and Alexandria. Both, and Pisa also, held certain concessions in Syrian towns not dissimilar to the Scottish staple at Campvere or the Hanseatic centres at Bruges and London. (19) In 1265, Venice took the far reaching step of legislating for and levying dues on the shipping upon the Adriatic (20). In 1274 Ancona complained that Venice had usurped the sovereignty of the Adriatic without legal justification. The upshot was that the Pope recommended Venice to the guardianship of the Adriatic against all pirates and disturbers.
disturbers of the peace and authorised the levying of dues to defray the cost of that service (21). Much has also been made of the annual ceremony of the espousal of the sea by Venice 'in real and perpetual dominion' as a symbol of the dominion of Venice upon the Adriatic. Instituted originally to celebrate the victories of Orseolo, it symbolised, in truth, the very real dependence of Venice upon the Adriatic for continued prosperity. Sovereignty might be read into the formula; the ceremony might well impress the citizens with a sense of their unique inheritance and the stranger with the peculiar nature of the dominion of the Queen of the Adriatic.

VII The salient features of the Venetian appropriation of the Adriatic were (a) there was a vital interest in maritime commerce, (b) naval supremacy was a necessary safeguard for the maritime commerce, and (c) the Adriatic Gulf was an easily defined area and at the very threshold/
threshold of the Republic. The jurists of the period, recognising the novelty and its possible permanency, sought to expand their jurisprudence to formulate principles which should govern the claims by all seaboard states. The Adriatic, being almost landlocked, lent itself to definition as to area, but the principle of appropriation of maritime waters having been admitted, the question arose as to how the seaboard states, not situated upon gulfs or bays stood. How far out to sea could they claim a jurisdiction? Jurists disagreed, and still disagree, as to the precise distance. The early attempts to attain certainty suggested limits which clearly were intended to afford the seaboard state a jurisdiction over the waters used by shipping, then chiefly coastal. Beyond that belt no innocent shipping voluntarily passed and the high seas were in truth a waste of waters. Consequently, there was no party interested in the high seas. It was only after improvements/
improvements in shipbuilding and navigation, permitting shipping to leave the coast, that claims to the high seas became possible. Then the issue of *Mare Clausum* v *Mare Liberum* was sharply raised.
SECTION III

The EARLY SCANDINAVIAN CLAIMS to MARITIME DOMINION.

I  The Baltic played much the same part in the development of medieval commerce in the north of Europe as the Mediterranean in the south and was likewise the object of claims by States. Less spectacular than those of Venice, and almost as indefinite as those of Pisa and Genoa, these Scandinavian claims yet merit notice here for it was rather from the practice of the northern States than from that of the southern that Scotland drew her inspiration as to maritime dominion. Proximity to the trading centres of the Baltic and the Low Countries induced the overseas trade of Scotland thither and the Scandinavian descent of the population of the Orkney Islands, the Hebrides, and the northern counties, facilitated the percolation of Scandinavian conceptions and/
and customs into Scottish thought and practice.

II The Scandinavian claims illustrate the two requisites for the initiation of the early claims to maritime dominion, viz., economic dependence of the population upon the sea and the dawning consciousness of the conception of territorial jurisdiction. The situation, near the sea, of such towns as Hamburg and Lübeck at points affording easy access for commerce to the hinterland, and the central situation of Wisby on the island of Gothland, convenient as it was for trade with both north and south shores of the Baltic, point to considerable maritime commerce (1). The widely scattered trading centres established by the Hanse towns and the concessions obtained in England, Flanders, Norway, Sweden, and Novgorod in Russia, indicate the international importance of that commerce; the power and influence wielded by the Hanseatic League and its members during a chequered career/
career (2) vouch the wealth derived from that commerce which depended largely upon the lucrative fisheries of Scania, Skanör and Falsterbo were thriving markets existing primarily for the herring fishery, and the cod fisheries of northern Norway supported the city of Bergen (3).

The other essential for these claims to maritime dominion, the conception of territorial jurisdiction, may, as in the instance of Venice, be attributed to feudalism.

The Waldermarian century (1157-1241) has been accepted as marking, as definitely as may be, the inception of a feudal organisation in Denmark; the thirteenth century saw the establishment of the roots of feudalism in Sweden and Norway (4). The same century marks the entrance on a large scale of the Scandinavian countries into European commerce. The introduction of the big staples into commerce marked a rudimentary regulation of that trade. Thus the stage was set in the thirteenth century/
century for the initiation of Scandinavian claims to maritime jurisdiction and dominion.

III  The earliest definite trading concessions were only obtained after the thirteenth century opened.

Lübeck, one of the foremost of the progressive towns on the southern shore, obtained trading privileges from Hacon, King of Norway, in 1247, from Eric, King of Denmark, in 1259 and in Sweden in 1261. Between the granting of these privileges and the mature claims to maritime jurisdictions which were eventually formulated there was indeed the gap of the centuries to afford a measure of the rate of progress. At first there was an 'invitation' extended by King Hacon to the merchants of the 'Slav' States to come and trade, an invitation which was followed in the next year by the grant to take fish on payment of dues according to treaty (5). In 1292, Eric of Norway granted safe conducts to the citizens of Bremen/
Bremen in return for a tithe on each last of herring (6), a privilege which was extended to the English two years later (7). There is no evidence in the grants themselves or in the conditions attached, so far as is known, to suggest any immediate intention to claim a jurisdiction over great stretches of water. Safe conducts, whether general or special, and licences to trade, afforded some slight security to the alien trader and therefore had a commercial value for him and were a source of income for the grantor. Before the sixteenth century had closed, however, there were definitely matured claims to maritime dominion distinguished by the attributes of sovereignty, viz., prohibition of navigation except to those privileged by grant and the levying of dues for licences to fish.

In 1415, Henry V of England, at the request of Eric, King of Norway, prohibited his subjects, on account of the injuries done to the inhabitants, from going to Iceland or other/
other islands belonging to the King of Norway and Denmark (8), in effect a repeal of the concession granted in 1294. Not until 1490, when a treaty was negotiated (9) were the English again permitted to sail freely to fish and trade, subject to payment of dues by them. What might be termed a confirmation of the admission of these Norwegian and Danish claims was made in 1586 by Queen Elizabeth, when, on the representations of the King of Denmark as to the conduct of her subjects, she, by Order in Council, warned them that the licences to fish would be withdrawn and those fishing without them punished. Her subjects were informed that the King was prepared to continue the privilege on condition that the excesses ceased, the licences were renewed every seventh year, and, of course, the dues were paid (10). This admission of the claims of Denmark was of great significance, as, shortly afterwards, Elizabeth was called upon to deny the right of any prince...
to appropriate the sea(11).

IV A letter dated 1562, from Eric XIV, King of Sweden, is illustrative of the maturity of the claims of that day (12). The burden of the letter is a complaint to Mary, Queen of Scots, that merchants of her realm had penetrated into the upper reaches of the Baltic, an innovation and an encroachment on the rights of other communities - Contra veterem consuetudinem et civitatum aliquarum privilegia. The object of the prohibition, it would appear, was to conserve the privileges of the staple ports of Reval and Wihburg. But a definite claim to sovereignty is also advanced, to translate very freely, viz., that our writ " may run no less upon the "sea adjacent to our dominions than upon the land, and "that we may legislate without hindrance for the needs "and the advantage of us and ours", - "ius ac potestas "sit, non minus in mare, quod ad nostrum spectat "dominium/
"dominium, quam in terra, nobis nostrumque incommodum et utilitatem, libere ordinandi ac dispondendi."

V These northern claims have been summarised as follows: "Denmark, Sweden and, later, Poland contended for or shared in the dominion of the Baltic. The Sound and the Belts fell into the possession of Denmark. The Bothnian Gulf passed under the rule of Sweden; and all the northern seas between Norway, on the one hand, and the Shetland Isles, Iceland, Greenland and Spitzbergen, on the other, were claimed by Norway and later by Denmark.... The Scandinavian claims to maritime dominion are probably indeed the most important in history. They led to several wars; they were the cause of many international treaties and of innumerable disputes about fishery and navigation; they were the last to be abandoned". (13)

SECTION IV.
It has not been considered necessary to enter minutely into these Scandinavian or Mediterranean claims to maritime dominion. It is, however, essential that it be recognised that they were the outcome of the economic and political circumstances of the time. Differences in detail there were. The Mediterranean region had cradled European civilisation; the Baltic peoples had been but recently admitted within the pale of the European States. The historical backgrounds differed; there were racial differences and no common tradition; the Mediterranean and Scandinavian groups were at the opposite ends of Europe. On the other hand there were common factors which were the essential conditions for the initiation and assertion of claims to maritime dominion. Both the Mediterranean and the Baltic were very important centres of maritime trade, the mainstay of the prosperity of the regions. Agriculture, as practised, could not by itself support/
support these progressive communities, which existed primarily by and upon mercantile activity. Venice and the other Italian seaports were the carriers between the East and the West. The Baltic was the centre which supplied Catholic Europe with fish and the products of the north. With the passing of these two sources of wealth decay set in.

II Protection of the shipping and the rooting out of the piratical bases were also necessary. Doubtless, these duties fell frequently upon the individual or groups of pioneers but there is ample evidence of the merchants binding themselves into associations for their protection upon the seas under a magistrate or admiral and of the State attempting the protection of the mercantile commerce within prescribed areas adjacent to the state. Of the latter, Venice affords an example. Letters of marque which persisted until modern times, whereby the State authorised/
authorised the individual or group to effect reprisals, were but a relic of the period when the State itself could not effect the remedy for injury done. The issue of letters of marque was an attempt to regulate 'self help'. As instances of associations and the concurrent attempt of the Sovereign to rid the seas of pirates, it may be mentioned that Margaret, Queen of Sweden, sought the help of England to suppress the notorious Victual Brothers, pirates when not employed by belligerents, but by 1490 the Hanseatic League had routed them from the seas (14). So too, the Scottish Convention of Burghs made feeble attempts under royal licence to suppress piracy off the Scottish coasts. Out of the ad hoc et pro tempore efforts of individuals or associations there could arise no claims to maritime dominion. State effort, being directed towards the control and protection of shipping primarily within the area adjacent to the state territory, the locus became/
became an important feature. As the exercise of a state jurisdiction on land came to imply dominion in the particular locality, so it was an easy step to regard the waters under the protection or control of the State as specifically appropriated by the State. The feudal dues were the symbol of jurisdiction and, where a substantially absolute or ultimate superiority was claimed, dominion and sovereignty. Consequently, where the feudal due or thelonium was exacted in the form of a tithe of the fish and merchandise landed in the port or territory, it would be an easy extension to claim dominion upon the fishing grounds also. Thus it appeared that the claim to maritime dominion could not arise until (a) there was a considerable volume of maritime commerce in the area claimed and (b) the State had claimed to exercise a jurisdiction, protective and/or fiscal, within that area.
Chapter II.

I  It cannot be expected that, in asserting jurisdiction upon the coastal waters, Scotland, an almost seagirt outpost of European civilisation, would be uninfluenced by the example of the continental states in appropriating the coastal and adjacent waters, if and when, the conditions which gave rise to the continental appropriations were also present in Scotland. The measure of the continental influence would be the strength of the contact made between the Scots and their continental neighbours in maritime and related subjects. The national characteristics and the local factors, political and economic organisations, were also of weight in the final determination of the reaction of these elements. It is felt that, in the study of the Scottish claims, there can be espied the personal or psychological factor in the attitude/
attitude of the burghs and the physical factor in the economic and geographical circumstances of the country. The interplay of these can be discerned as illustrating the natural growth of the Scottish claims, deeply rooted in the circumstances of time and place and affected by the past. Unfortunately, the available evidence bearing upon the earliest Scottish claims is of the scantiest. The casual and concomitant factors, local circumstances and continental influences are therefore of more than ordinary importance. If regard be had to these and to basic conditions, as shown by the Venetian and Scandinavian claims as discussed in the preceding chapter, for the formulation of claims to maritime jurisdiction, it is possible to assess, in some measure, the earliest Scottish claims and the extent to which they formed a basis for the definite assertion of the reservation of the coastal waters made in the opening decade of the seventeenth century. It may be said/
said that, on the whole, the evidence indicates that Scotland followed the example of those continental States with whose practice she was familiar and with which she had something in common.

II Scotland undoubtedly belonged to the family of European States. There was the common bond of allegiance to the Catholic Church; the local customary law was supplemented by the Civil Law as interpreted; the Canon Law and various feudal customs (1). Of greater importance was the growing body of mercantile law or the law of merchants, including maritime law, which, with but slight variation, from the necessity of an extending international commerce, was being almost universally adopted (2). Deep and wide were the differences between the towns in the various countries of Europe but they had the family resemblance. The towns were the pivot of commerce in the Middle Ages. A recent writer has remarked/
remarked, 'No more characteristic phenomenon of the prime of the Middle Ages can be found than the self-governing town. It existed, more or less fully developed, in the chief countries in the West, and we shall hardly err in attributing its rise and growth to economic causes of equally general prevalence. It was the resurgence of trade, of manufacture for a wide market, after the anarchic, miserable ninth and tenth centuries which produced town and townsman, merchant and craft. The conditions of the times imprinted on the medieval town other universal characters... The associated burghers replaced or competed with the feudal or kinship groups which preceded them. Local and personal law was the rule and the law of merchant and town took its place by the side of other local and class customs. Central Authority, in greater or less degree, was shattered, and the town, like the baron, obtained its fraction of autonomy/
autonomy. Whatever the degree of their independence, the shackled English boroughs, the French towns in all their varieties, the republics of Flanders and the Hanse, and the Italian communes, obey the same impulse and bear the same family resemblance' (3). Under so ample a description the Scottish burghs of the period prior to 1600 may be safely included. It came to be that in the hands of the burghs was concentrated the bulk of the trade, home and foreign, and subject to their almost unfettered restriction. (4). They sent missions to treat with foreign potentates for concessions for their burghers (5). Inevitably they must have learned from their travels and experience of the practice of the continental States. Indeed, conscious acceptance of continental standards is manifest. The Edinburgh Burgh Records commend the example of 'Bruges and uther syclyk guid townes' in the matter of the precedence of the guilds, themselves a feature/
feature of the organisation of the continental town.

Also, when an attempt was made to standardise the weights in use in 'the burghs, the French model was taken (6). It is important to note that the initiative in these matters was taken by the burghs who were perhaps the most interested parties in the foreign trade.

III. More germane to the present purpose, however, was the adoption referred to above of a body of maritime law and practice on all fours with that prevailing in the principal maritime States on the Continent. The process of adoption is disclosed in a statute of James I whereby the same law was to be observed towards shipwrecked strangers as was observed in their country towards Scotsmen (7). Welwod, recognising the universal acceptance of such a body of law, was able to collect the chief heads as far as he considered they had been adopted in Scotland - 'out of all the wretes authorizit be our natioun/
natioun I collectit briefly not only the remains of the Rhodian lawe as it is left intrepret to us be the Romaine lawers with the reulis of Olon receauit be our cuntrey men bot also the acts of Parliament with uthers rests of the Romain law concernand the Seafairing'. Welwod also refers to the admiral being the judge proper as to crimes committed upon the sea and 'as also be ye custome of uther nations quhom we follow in that erectioun judge in the ciuil causis bot without prejudice of the lawis and consuetud foresaid'. (8). The reservation would appear to be in respect of the Dean of Guild jurisdiction in civil causes between merchant and skipper. It may be noted that Welwod does not explicitly mention the instance of causes betwixt strangers within the port such as are referred to in the Leges Quatuor Burgorum and the possible explanation is that either these fell within the province of the Admiral or, as is more probable, the only point/
point of interest was the collection of the dues payable to the burgh or the fisc. (8). This surmise is quite consistent with the attitude of the burghs who were reluctant to interfere outside what concerned themselves immediately. They would not undertake the business of weaving in the reign of James VI. The burgess's trade was "negotiationun".

IV In seeking to place Scotland within the ambit of the movement towards the appropriation of maritime waters and thereby to evaluate the scanty evidence as to the earliest Scottish claims, due allowance must be made for the comparatively slight connection with continental States and also for the national characteristics which acted as a drag on the adoption of continental practices. In a country mainly agricultural in pursuits there could not be the same marked dependence upon foreign trade for the national prosperity which so actuated and distinguished the/
the claims of Venice and the Scandinavian States. The economic factor did not become prominent in Scotland until the dearth in the latter part of the sixteenth century. Fishing then became important as a means of supplementing the national resources and attained on that account unprecedented importance. The burghs were intensely interested in the sea fisheries as a source of gain and from the revenues derived from them the fishing burghs were enabled to pay the burgh ferme and other levies to the royal treasury. They gave voice to the complaints as to the foreign competition, and, in the circumstances, received a ready hearing. Privilege and monopoly permeated the whole of the burghal activities and therefore the claim to exclude the foreigner from the wealth which 'Providence had placed at the Nation's door' came readily to the burghs.

V. The comparative unfamiliarity with the sea was manifested/
manifested in another way. Undoubtedly the Scot was not a maritime adventurer in the same sense as the fishermen of England who sought the Banks of Newfoundland and the Icelandic waters or the Elizabethan seamen who tempted fortune upon the Spanish Main (10). On the contrary when emigration was ordered by proclamation to relieve the distress at home, the Scot was content to peddle his wares through Germany and Poland or seek military service abroad (11). The Scottish burghs set little store on naval strength. Piracy was an incidental means of gain, and the provision of convoys might well be stipulated for from their foreign clients (12).

VI. Another characteristic was the conservatism of the burghs. Not only was the privilege of overseas trade restricted as to person and time, but it was canalised to flow mainly to the staple port in the Low Countries. The staple was the pivot of their foreign trade/
trade, and that medieval institution the Scottish burghs maintained until the Napoleonic Wars (13). The burghs occupied a position of supreme but not exclusive importance in the matter of rights in the coastal waters. As one writer has said (14), "In all probability the burghs were the sole persons concerned in the question of rights in the territorial waters either as traders or as fishermen. It would then be no concern to the other Estates, the nobility or the church, what were the rights in the matter". The conservatism of the burghs must, therefore, have had some effect in delaying the formulation of definite claims to the coastal waters but, at the same time, it is to be expected that they would provide the first and the strongest impulse towards the appropriation of maritime waters for the purposes of fishing regarded as a commercial asset.

VII The phenomenon of maritime dominion in its initial/
initial stages was lacking in Scotland, namely evidence of a considerable sea power. From the ninth to the twelfth century the lack of sea power laid Scotland open to invasion by the hardy Norsemen who established themselves in the Western Isles and the counties north of the Moray Firth, at one time known as Broad Firth (15). Their power practically ceased after the defeat of King Haco at the Battle of Largs. Even a period of prosperity during the reign of David and his successor did not appear to mend matters. When the menace of piracy was virulent it was decided that the merchant fleet should not venture abroad but strangers should come to Scotland to trade (16). The Scottish fleet would then be safe in harbour. The internal situation in Scotland did not favour the creation of a great sea power. The disputed succession to the throne, the wars with England and religious troubles turned the attention of the King, the Nobility and the Church/
Church elsewhere than to the sea. Robert, the Bruce, applied his mind to the building of a navy; but in the succeeding reign it was found necessary to hire Flemish skippers from Berwick. They failed to drive off the English: only with the aid of a French naval squadron was this done. The short but bright period under Sir Andrew Wood brought some glamour and renown to a grateful country. The Scots navy probably reached its highest development during the reigns of James III and James IV. There was an alliance with France, England was exhausted by the Wars of the Roses, and, by 1489, it was reported that the Scottish Seas had been cleared of the English privateers. The duty of providing ships was laid upon the burghs. The legislation of 1493 and 1502, requiring all seaboard burghs to keep busses of not less than twenty tons, was for naval as well as for fishery purposes but the Scottish fleet of 26 vessels all told during
during the campaign which ended in Flodden in 1513 was quite ineffective. In the reign of Queen Mary there was no Scottish fleet of importance and the Government was required to rely upon extra-governmental aid. No preparations were made or available to meet any landing from the Armada in its progress round the coasts (17) and even when the King went to Norway to bring home his bride in 1589 he had to rely upon hired ships for a convoy (18).

VIII After the Union of the Crowns the same dismal tale must be told of dependence upon others for the ships which should have come from the national resources. During the War between England and Spain, Scotland was sorely distressed. Letters of marque were issued and three ships bought, but in 1627 the Privy Council complained that the Dunkirkers 'sink our ships in the very sight of the coast and all the while his Majesty's three war ships under the command of the Earl Marischal, have lain idle and unprofitable/
unprofitable in dry harbour, without any purpose as we conceive so to go to sea' (19).

IX. The repression of piracy off the national coasts elsewhere afforded a basis for State claims to maritime dominion. These claims were commensurate generally with the naval force available and utilised. The Scottish public records frequently refer to pirates but only occasionally to serious effort at the suppression of the menace. Indeed, circumstances tended to favour rather than to repress the evil. The inadequacy of the protection afforded under the aegis of the Crown necessitated that the shipping, unless under convoy as practised by the Dutch for their fishing fleets, should be adequately armed for defence (20). Thus there was placed in the hands of the less scrupulous skipper a means of adding occasional gain when opportunity offered. Also the practice of the times, due to inability to secure certain justice from foreigners and/
and their courts, allowed the injured party, under the authority of letters of marque, to indulge in reprisals against all and sundry of his opponent's nation. This general vicarious liability and its enforcement promoted private warfare having little to distinguish it from unrestrained piracy. Treaties of peace between Sovereigns were frequently endangered by the system of reprisals and were of no avail in stopping the private feuds between merchants of the different States. (21)

X. The measures taken to suppress piracy fell into two divisions according as to whether or not they rested upon or implied that the Sovereign had jurisdiction over the seas adjacent to his territory. Into the first division fall the remonstrances addressed to the Sovereigns as having a jurisdiction over their subjects and within their ports, and also the local attempts to prevent the harbouring of and the supplies to pirate ships (22). Into the second/
second, fall such measures as implied an active policing of the seas and, more particularly, the coastal belt. Those in the first division have no bearing upon the subject of this essay but the second class, in so far as it is supported by evidence, goes a considerable way towards founding a claim to maritime sovereignty. Regard, however, must be had to the efforts of individuals at self help and to the fact that pirates, being the common enemy of all States, might be engaged even outwith the areas which the Sovereign claimed or might have claimed to be within his dominion.

XI

In Scotland, in the period under review, the function of maintaining the security of shipping, that is, the measures comprehended in the second division, appears to have been shared by the king and the burghs. The efforts of the burghs and the king are best considered separately though, in fact, they were complementary, and,
at times, scarcely distinguishable. The burghs as the
Estate concerned with overseas trade might well express
dismay at the malignant growth of piracy. Their records
testify to this:--
"daylie seing the increas of troublis upon the mercantills of
"of this realme be the occasioun of the slaknes of
"prouisoun in resisting of the pyratis, quhais nomber and
"tyranny daylie increasis as said is, for remeid quhairof
"they all in ane voce consentis conclusis and grantis ane
"generall extent" not exceeding 3000 merks for this and
other purposes. On another occasion they contracted for
a ship for one third of that sum (23). While these
expeditions partake of the nature of private adventures
and therefore do not in themselves readily lend to the
foundation of claims to maritime dominion, yet neverthe-
less as the actions of the merchants might be reviewed in
the Courts and the Council Chamber, references to such
instances/
instances are not be be ignored altogether. However, as
the burghs were later to put forward the claim to reserved
waters, a claim which assumed major importance, the
operations of the burghs may well be dealt with later in
that connection.

XII The outstanding success of Sir Andrew Wood in
raising the Scottish Navy to some eminence and in
attaining security on the seas earned the gratitude of
the nation but more instructive for the present purpose
and of great significance is the decision of the Privy
Council under date 6th July, 1550 (24). The Council
considering "the gret enormiteis dalie done to our
Soverane Ladyis legis, als wele within hir awin watteris
and firthis as in utnair places, be schippis of Holand,
Flussing, and uthiris the Lawlandis of Flandaris,
subjectis to the Empriour nes thoch expedient to licence
the weire schippis of this realme sa mony as ar now in
ordiner/
ordiner, to pas furth in weirfar for stanching thairof"
but they had to find caution that they would not pass
"na uther way bot upon the cost and throw the watteris of
Scotland, quhill tha have owthir takyn or chasit the
saidis piratis furth of the boundis forsaidis" and were
to do no harm to friends or allies or confederates
especially "Franchmen, Ingilismen, Denismen, Swadynmen,
Emdein, Danskeinmen, Hamburch". The Privy Council
appear to have been at pains to circumscribe the sphere
of operations of the vessels and as to whom they were
to engage. This gives the record a peculiar value.
Their is, in the first place, a claim to maritime waters
on behalf of the Queen, - her own waters and firths and
the ships were to proceed along the coast and through the
waters of Scotland. The last phrase by itself might
mean no more than that the men of war were not to have a
roving commission but were to confine their operations
against such pirates as frequented the firths or lay just off shore out of sight of land. The records of 37 years afterwards note that the King and Council observe damage done by pirates "enemeyis to the commoun quietnes of all nationis nocht only againis the subjectis of this cuntrey, bot strangearis brigand hame victuallis now in this tyme of derth and scaerstie, the same pyrattis' nocht spairing sumtymes to repair to his Majesteis awne wattaris" while some lie outside attended by others who come into the ports. The highest construction that can be placed upon the significant passages in the decision of 1560 is that the Council claimed, the firths and possibly also the coastal belt to be under the sovereignty of the Queen. The restriction of the area of operations to chase the pirates beyond the bound mentioned and no further stimulates thought as to its purpose. It may have been considered unnecessary to widen the scope of the commission/
commission and the excerpt from the record of 1587, supports this but is not conclusive. Also the trouble with the Emperor at this time may have made it indiscreet to allow the ships to endanger themselves unnecessarily and, further, the Privy Council may have considered that their duty was done when they had scoured the seas over which they had or considered they had a special jurisdiction. Confirmation of the last would be interesting. The burghs, as will be seen, were to go some way towards it.

XIII The Treaty of Peace between the Emperor and the Queen in December of 1550, after referring to previous treaties, indicates that at least the firths were considered on both sides to be under the jurisdiction of the sovereign, and the treaty, being contemporaneous with the expedition authorised by the Council, has some value on that account. "And there should be, moreover, sincere neighbourhood/
neighbourhood and firm peace by land and sea, and fresh water\textsuperscript{6}, betwixt the said Emperor and Queen,..... so that the subjects of the said kingdoms ... should safely and freely and sincerely go unto, enter navigate and stay so long as they pleased to the said kingdoms, lordships, lands cities, towns and shores, harbours and bays whatever, without any safe conduct or general or special licence ... they paying the duties and customs of the country"

The Treaty also stipulates:-

ITEM: If any damage or hurt should be done by the tributaries, vassals and subjects of the one party to the countries, kingdoms, vassals, tributaries, or subjects of the other, in their persons, or goods, on land or sea, in that case, that party from whom the damage proceeds, shall be bound to compel the guilty to reparation and restitution with effect to the party lessed; and that conform to a certain contract and agreement betwixt Mary/
Mary, Queen of Hungary and Bohemia, and Governess of the Low Countries for his Imperial Majesty, and John Campbell, Ambassador, of King James, lately deceased, anno 1541, and afterwards confirmed by the said king and both parties should be at pains, that the pirates of whatever nation or kind, should be wholly extirpate from the sea and shores of the kingdom of either party, nor should they be received upon any terms into the lands or bounds of either party; and they should be bound to keep and defend the islands and districts of their jurisdiction against the incursion of whatever robbers or pirates by whom the subjects could any manner of way be damaged in their trading, navigation and fishing, And of those presumed to tum pirates, having no certain dwelling but betook themselves to desert islands or other unknown places, by whom the subjects of either prince, should receive damage, either party at the request of the other should be bound to betake themselves to common/
common arms, and should not leave off until these taken had suffered condign punishment. And they should proceed in the same manner against their sustainers and favourers, if any such were to be found in either of the princes dominions, and as the number and quality of ships to be furnished by the said princes when necessity required, should be treated and agreed to, and the fishing and the free use of the sea ought to be duly and sincerely observed conform to the said treaty of 19th February 1541, betwixt the said Mary, Queen of Hungary and the Ambassador of the King of Scotland.

Thus it would appear certain that the firths generally were regarded as within the jurisdiction of the sovereign of the adjacent territory. As early as 1484, the King's Franchise (jurisdiction) and waters extended to the Isle of May in the Firth of Forth (27). Mention is made frequently of 'fresh waters' in contradistinction to/
to the open sea but apart from the above instance where the island afforded a convenient boundary mark there is nothing to indicate whether a large bay such as the Moray Firth could be comprehended within Scottish jurisdiction. In 1535, in another case, the phrase, "into the firth (of Forth) and our soverane Lordis Wateris" is used identifying the jurisdiction with the Firth. (28).

XIV Three years later, a ship was reported to have been taken 'out of the se beside our soverane lordis north ile callit the Fire Ile when at the fisching in our said soverane Lordis north seis'. (29). In this latter instance the implication of a sovereignty over the seas is not conclusive evidence of jurisdiction. It was a case of piracy and a 'territorial' jurisdiction was unnecessary. It seems significant however that the phrase should be used in reference to the seas in the north around Shetland. These islands had been trans-
transferred first as a wadset or pledge from Norway to Scotland. As the Scandinavian States claimed and exercised an extensive maritime sovereignty it may have been argued that when the transfer took place the maritime jurisdiction went with them as a pertinent to the subjects. A later instance of the exercise of a feudal ownership over the island straits is recorded in 1597. In any case these waters may have been in a special position and it would be unwise to deduce from these two instances alone a general rule as to the other coastal waters.

XV In conclusion the above evidence considered indicates by beginning of the 15th century the conception of sovereign jurisdiction upon the clearly defined smaller bays and coastal indentations was familiar and had been adopted to some indefinite extent into the municipal law of Scotland. The jurisdiction had been recognised, equally generally and indefinitely, in a treaty with a leading/
leading maritime continental power. Beyond such a general and indefinite deduction it would appear unsafe to go. As to the coastal waters fringing the open sea it is possible that the Sovereign did or intended to claim a jurisdiction.
CHAPTER III.

THE SCOTTISH CLAIMS TO RESERVED WATERS UNTIL 1603.

1. The characteristic feature of the Scottish claims is that the fishing in the coastal waters, firths, and the sea lochs was reserved for the natives to the exclusion of the foreigner or 'stranger'. The foreigner was held to have no more right to win riches from the sea around the Scottish coasts than he had to share in the bounty of the soil. To permit any stranger to obtain sustenance and wealth from anything which could be claimed to be Scottish was repugnant to the monopolistic burghs. Consuetude, an important source of law, lent colour to the claim. The Scottish fishermen using light, one masted boats were confined to the comparatively safe inshore waters and the sea lochs where the best herring fisheries were; the foreigners, especially the Dutch, using large sea going vessels, were able to operate in the open waters. Undoubt-
Undoubtedly there were constant strife and bickerings
between the local fishermen and the intruding foreigners
seeking the migratory shoals but little could be achieved
by the burghs without the assistance of the Crown. When
a dearth came upon the land and the national resources
were strained, the cry went up that the foreigners were
taking the substance which Providence had placed at the
nation's door. The Privy Council were sympathetic. Further
the tax or assise of herring, the thelonum, and the burgh
tolls on the merchandise were sources of revenue to the
burghs seaports and directly or indirectly to the royal
treasury. Thus the matter touched the 'profit as well as
the honour of the King'. He depended too upon the fishing
burghs for the satisfaction of his naval requirements.

II. The conception of reserved waters was probably
not indigenous but it was fostered and at the same time
retarded in its growth by national circumstances. By itself
Scotland could not have achieved much; the absence of naval
force/
force adequate to establish the claims, as in the case of Venice, doomed the reservation of the waters to remain a theory and a practical failure. The conception was carried to England by James I after his accession to the throne of that country and there incorporated into his foreign policy. The Scottish conception gave impetus and direction to the negotiations with the Dutch on the subject of the licences for the fishing in the English coastal waters. The Scots had been aggressively jealous of the Dutch and resented any intrusion into the Scottish preserves; the English passively perceived that the herring fishing supplied the power and the wealth upon which the nascent state of Holland was ascending to a leading place as a maritime state, there later to compete with England. To curb that power was an essential object of mare clausum, to maintain it the leading purpose of mare liberum. Convenient and valuable was the Scottish claim to reserved waters to the advocates of mare clausum; its rebuttal desired by their opponents. Consequently/
Consequently the Scottish claim was referred to again and again in the disputes which followed in the seventeenth century.

III. The period up to the Union of the Crowns is the period of conception of the claim by the Scottish burghs. The claim was treasured by them, occasionally advanced in the Councils of the King and, in popular imagination, probably considered fairly established. Nevertheless, it was not yet to attain maturity. There was no glint of international outlook. The claim reflected a parochial, self-centred attitude of which there were examples in the Mediterranean and the Baltic States and in Scandinavian countries. In the second period, after 1603, there was a radical change. The burghs vigorously asserted their 'rights'. The Estates and the Commissioners lustily voiced the Scottish claims to the fisheries and it was echoed in the diplomatic circles of Europe. It achieved a place in the records of history which by the efforts of the Scots alone it could never have.
have attained.

IV. The origin of the rights of fishing in territorial waters of the Teutonic States has already been the subject of research. As the Scottish interests may well have drawn some inspiration from the early practices of these States the conclusions reached may be briefly stated.

"There is evidence," the writer says, "which points to, if it does not prove, the existence of property rights in bays and smaller indentations along the coast: the gulfs and great bays may also have been reduced to private property, with, perhaps, appropriate restrictions to guarantee their accessibility to the public.... The possession of fisheries in the sea, the grant of privileges and immunities in connection with the land and the cities on it which also had come into the lord's possession by virtue of a royal or imperial grant, the right to levy customs and taxes on foreigners - all of these rights and powers together would naturally produce in the mind of the ruler possessing them/
them a sense of proprietorship of the things over which he
exercised them. The theory of the extension of territorial
jurisdiction over the sea adjacent to the coasts had yet
(1245) to be formulated. Maritime jurisdiction of this
character and origin was exercised long before it received
recognition from the great jurists". (1)

V. There is indeed evidence of similar rights being
recognised in the Law of Scotland as applied to Orkney
and Shetland. These islands were not finally severed from
Norway and attached to the Scottish Crown until 1471 (2).
Even after that date, however, the islanders retained the
customs prevailing in Scandinavia (3). As each State, includ-
Scotland, adopted only such modified feudal customs and
conceptions as best suited its own constitution and circum-
stances, it does not necessarily follow that in Scotland
generally there was a recognised practice of granting to
vassals exclusive rights to the fishing on the firths. The
Regalia, in so far as they relate to the shore, ports, and
Royal fishes were/
were embodied in the law but they have no bearing on the subject of this essay. Apart from instances in Orkney, Shetland and the Western Isles, there is no clearly evidenced instance of property rights being granted in the herring and other fisheries.

VI. Feudal conceptions were operating in the reign of David I and it is then that the two solitary instances are to be found which have been held to show that at that date the sovereign claimed the fisheries in the firths. It is submitted that, on consideration of the evidence available, these two instances will not bear the weight of this construction. The Firth of Forth had for some time been frequented by native and foreign fishermen and the Firth of Clyde also about this time may have been a centre of activity. The Isle of May in the Forth and Dunbarton and Ayr on the Clyde were probably the centres upon which the fishing fleets concentrated. The two instances referred to were grants of fishings at these parts and both are to the Church/
Church. The first is contained in a charter dated 1132 to the monks of Holyrood Abbey and purports to confer, inter alia, the right of fishing for herring at Renfrew. Apart from the difficulty in construing this part of the charter, the passage in question is omitted in the confirmation. If there was any fishing near Renfrew, there would be no point in conferring specially a right enjoyed by all. On the other hand, it may have been that a tithe of the fish landed was intended. The second grant was the right to demand dues from those fishing, both natives and foreigners, around the Isle of May. That this grant was affirmed on several occasions would indicate that in practice the grant was ineffective. It is suggested that the object of the grant was to give the monks first claim to fish where many desired and to endow the monastery with a convenient source of revenue, namely a tithe of the herring caught around the island. In return for the payment the fishers doubtless had the good offices of the monks and/
and the facilities afforded by the island. The grant was not dissimilar to others made to the Church on the Continent by princes (5) but it cannot by itself be taken to prove a general practice in Scotland or as the first evidence of the reservation of the fisheries in the firths and inshore waters for the natives as a whole to the exclusion of the foreigners. The exceptional nature of the grant may be observed from another angle. In 1153, it was decreed that all goods brought by sea should be landed prior to sale except herring and salt which might be sold aboard vessels.(6). The exacting of tithes in such circumstances in respect of fish caught and exported by foreigners might be a matter of some difficulty. Indeed it is not until 1240 is there any notice in the parliamentary records(7) of a burgh tax on herrings and not until 1424 was there a general assise of herring levied, the tholonom of the Scandinavian and Baltic countries.(8). Everything points to the grant to the monastery as exceptional and in any case it would be unsafe to deduce from one solitary instance any/
any rule of general practice.

VII. In contradistinction to the lack of evidence as to the ownership or appropriation of the fisheries in the mainland firths, it is indubitable that the Orcadians and the Shetlanders, being of Scandinavian stock and outlook, following their traditions, regarded the fisheries about their islands as appendage to the land. This attitude is reflected in their charters. A commission appointing a sheriff in Orkney and Shetland speaks of all and sundry 'oure soverane lordis ilis, partis, boundis, and fischingis, landis and lordschippes baith by sey and land' (9).

The feudal rights in the sea are indicated in two charters at least; fishing rights in fresh and salt waters are confirmed in one to John Irving (1536) (10), and in the other the Fife fishing burghs agreed to pay the dues for fishing and other privileges. In the latter instance the details of the charges give the deed a ring of sincerity (11). Also, foreigners had to submit to heavier dues than those exacted from natives,
for, on appeal to the Privy Council, it was held that the right to levy dues from foreigners was a prescriptive right exercised by other princes (12).

VIII. Such limited grants could not substantiate the wider claims to reservation of the fisheries around the coasts of Scotland. In that connection there is conflict between what came to be the orthodox theory and the facts. The theory was essentially 'burghal', the facts almost, but not entirely, universally against the claim. The Estates might call upon the burghs to build busses to compete with the foreigners and the burghs might on occasion attempt to drive the foreigner from the fishing grounds but there was apparently nothing in the municipal law or in the records of the Council to prohibit the foreigner from the coastal waters of Scotland. It was a matter in which the burghs were primarily interested; political objects and considerations entered only occasionally.

IX.
The fifteenth century saw the initiation of a period of activity against the foreigner and towards fostering the fishing industry. The Scots were aggressive and had fallen into bad repute as pirates. The Hanse towns threatened to withdraw their trade. When the foreigner, in pursuit of the shoals of herring entered the inshore waters the natives harassed them. In 1410 William, Earl of Holland, authorised reprisals against the Scots for damage done to the fishing fleets. Six years later a treaty of peace was signed but the real cause of the trouble, the reservation of the fisheries, was unmentioned and unsettled, a precedent for similar occasions in future (13). The anxiety of the King for the industry and his profit is shown in a number of Acts. In 1424, the first actise was laid on herring. Acts were also passed to require the building of busses and other ships for the increase of fishing and foreign trade. Similar Acts followed in 1471 and 1493 (14) but the success of the experiment/
experiment may be doubted. The burghs in 1605 showed no inclination to build busses for the deep sea fishing. In 1447 an interesting Act was passed (15) requiring that the ordinances of the Privy Council as to the fishing in the West and at the Lewis be observed. The King was to grant no 'letters' in time to come. The tenor of the letters can only be surmised. They have usually been taken as applying to the fishing but the Act also refers to merchandise. Possibly the favour granted was exemption from dues or some statutory provision. There is nothing to support the theory that the letters had been licences to foreigners to fish in the west seas. They certainly fished at the Lewis without any permission from the King of Scotland. There is, however, a story recorded by Buchanan, but it is merely a tradition, that the priest at the Lewis claimed his tithe of the fish caught. Possibly the grievance arose out of grants of this nature. Certainly, much later, the Bishop of the Lewis claimed his tithe from the burghs and refused to forgo it on the landings of the Fishery Company despite the/
despite the Charter from Charles I granting the Company exemption from all dues (16). Economic motives are illustrated in an Act of 1488 restricting the buying of fish by foreigners to salted and barreled fish and then only at the free ports and burghs (17). The burghs were coming into their own and again and again they were to refer to this Act as if it were the very foundation and charter of all their privileges in connection with the fishing industry.

X. The interstate political factor is introduced about 1532, when, in pursuance of their alliance with the French, the Scots, under Robert Fogo of Leith, cruising along the coasts of the Low Countries, damaged the Dutch fishing fleets. Reprisals followed and the exasperated King James threatened to stop the whole of the Dutch fishing off the coasts of his Kingdom. Owing, however, to domestic troubles and difficulties with Henry VIII of England, the minatory declaration was not effected and the treaty which was concluded in 1541 left the position as it had been - unsettled. The sorry business/
business of molestation and reprisals was reenacted and another treaty was signed in 1550 (18).

Xi. As these treaties of 1541, 1550 and the later treaty of 1594 were to be repeatedly referred to and debated in the negotiations with the Dutch after 1609, their precise terms may be noticed. As to the first treaty of 1541, the Scottish Commissioner's instructions appear to have contained an item relating to the fishing but its tenor is unknown. The Queen of Hungary required that she be allowed six months in which to give her answer. Whether an answer was given is also unknown. Probably the instruction had for its purpose the exclusion of the Dutch from the 'land' fishing. On the other hand the Dutch would have considerable difficulty as to such a proposal, which might tend to curtail their activities in a national industry. The only point upon which there is any certainty is that the proposal was made by the Scots and that it was not altogether acceptable to the Dutch. However, the subject could not have
have been of prime importance for the treaty was signed without agreement on the point. The treaty of 1550 provided that, in the interests of fishing and navigation, the parties should be responsible for the suppression of piracy within their districts (jurisdictions) and on their coasts. Moreover, it provided that the provisions of the treaty of 1541 as to the fishings should be truly and sincerely observed. The Dutch claimed that these treaties secured for them the right of fishing off the Scottish coasts, a claim which the Scots denied. It is difficult to say which had the truth upon their side. The Scottish burghs bolstered up their claim to the reserved waters by declaring that the foreigners had never fished there. This statement was not consistent with the facts. They went further by declaring that the Dutch had agreed to keep more than eighty miles from the coasts (19). The treaty of 1594 was/
was merely a confirmation of the previous treaties and yet
the Dutch prized it more than the others as entitling them
to fish off the coasts of Scotland. The Scottish records
could not furnish a copy of the Treaty of 1594 when it was
required and there is no note that the Dutch furnished a copy.

In all probability both parties in the negotiations were
content to make the best construction of the treaties with-
out actually referring to the actual terms.

XII. A change was coming upon Scotland, the first effects
of which were now being felt. The Western States of Europe,
especially Spain, England, and what was to become the State
of Holland, were in the preliminary throes of political and
economic changes. Some Nations were to rise to greater
heights and others were to sink from positions of eminence.
These were the results to be brought about in the train of
the economic difficulties. The chain of consequences was not
to work itself out until England and Holland had contended
for the leading place in the list of maritime nations and it
had/
had been decided that England should have the premier place as the carrier of the World's maritime trade. In the near future, the Dutch, by frugality, efficiency, and improved methods in the curing and skill in marketing the fish, were to rise to power. The Dutch 'gold mine' was the fishing along the coasts of Britain (20). The Baltic fisheries had declined and along with them the towns which had depended upon them. In their place the Dutch towns had risen. The wealth of Spain drawn from the New World was not to save her from being crippled by the loss of the Spanish Netherlands and from the loss of prestige by the defeat of her Armada. The wealth of the New World was to foster a change from an economy suited to an agricultural community to a 'money economy'. Inevitably the gold of Spain could not be contained within the national bounds and the overflow was shared by the other nations. The colonisation of the New World, the expeditions of the Elizabethan seamen, and the opening of trade with the Far East despite Papal reservations/
reservations in favour of Spain and Portugal, were but symptoms that the countries of the Old World were seeking greater scope for their activities and room for expansion. There were difficulties. Old habits and traditions die hard. The King could not "live of his own," or at least/the accustomed revenue. Elizabeth, by a parsimonious economy, survived the storm; the adverse economic forces were too much for the Stuarts. Scotland, on the fringe of Europe, was not immune. In 1583, an Act, Jac. VI, 1583, c.32, was passed for the 'Annexatioun of the Propertie of the Crown that wes nocht annexet befoir' for remedy of the impoverished revenues of the Crown. As elsewhere there were the difficulties of adjustment. There was both unwillingness and inability to change. The old armour of Acts and methods suited to the thought and circumstances of days gone by were tried against the new and not understood economic forces. Acts to prevent the export of goods,
Licences granted, withdrawn and granted afresh, price fixing, proclamations commanding emigration, — follow in feverish succession and evidence the anxiety felt.

XIII. Only the various measures dealing with the fishing industry need be mentioned here in some detail. One of the chief troubles of the King and those interested in maintaining the burgh revenues was that greater profit was to be obtained from the export of fish than by catering for the home market. There had been a scarcity of herring and a series of Acts to secure the harvest of the sea for the native population and the benefit of the burghs.

In 1484 and 1491 the sale of fish to foreigners was forbidden (22), and in 1566 Loch Broom was closed to foreigners. In that year foreigners had most earnestly petitioned the Queen for licence to fish in the Loch. It has been surmised that the licences now sought were the 'letters' forbidden in the previous Act. The licences were refused/
refused on this occasion after consultation with the burghs, and the Council ordained that 'no strangers of whatever nation they be come to the lochs nor use the commodity of the fishing in any time to come, but the same be reserved for the born subjects of this realm'. Loch Broom thus appears to be the first authoritatively closed loch and exception to the general rule of freedom of fishing (24). Danao et dona ferentes. The licences may have been safe conduct. The Council were possibly influenced by the difficulty of maintaining peace in those distant parts. The burghs could be depended upon to maintain some sort of discipline amongst their own members but there could be no prospect of peace if foreigners were to be permitted to mix with the natives at such a distant 'national fishery' as Loch Broom. On the very same day as the Council closed Loch Broom, they, alarmed at the reports current abroad about the piracies committed by Scotsmen, revoked all letters/
letters of search, especially in Orkney, Shetland and Caithness (25). The warrants had been abused by the parties authorised to search for uncustomed and staple goods. In 1573 it was enacted that all fishers of herring and white fish within the firths and isles and upon the coast bring their catch to free burghs there to be sold so that the King's customs be not defrauded (of the assise of herring) and that the population be not 'fraustrat of the frute' of the sea (26). The Act was obviously designed to improve the revenue and, at the same time, to benefit the burghs who monopolised and controlled the sale. The Act was a failure and the statute of 1579 (27) to strengthen it likewise failed. Besides the attraction of the export market, the depredations and extortions of the islanders were sources of trouble to the burghs (28). In 1586 the king required licences to be taken out by the natives proceeding to the Loch Broom fishing (29). The sole purpose of this measure was the prevention of sales to foreigners. One
expedient was to require caution that a proportion of the
catch be brought to the burghs and also to restrict the
furnishings of the boats to prevent voyages to distant parts.

XIV. An Act of much the same tenor as its predecessors was
passed in 1584 requiring fishers residing within the
bounds of certain waters to take their fish to certain ports.

The object of the Act was to raise the revenue. The burghs
complained against its provisions and the inconvenience
of having to take the catch to a distant port instead
of to the nearest land for curing. The assise of herring
was levied on 'green', that is uncooked fish. The Privy
Council granted a decree against the burghs (31). The
Act did not apply to foreigners and the omission was remedied
in 1600 by an Act applicable to all persons "as well
strangers as native borne subjects of the realm". This Act
required licences for the export of herring (32). It is
doubted whether the assise of herring was ever levied on
fish taken by foreigners. The Dutch denied having

ever/
ever paid such a tax. The averment was not rebutted by
the English or Scottish Commissioners in the negotiations
after 1609.

XV. But the voice of the burghs had to be heard. All
unfreemen and slayers of white fish and herring were to
be inhibited from sailing with them outwith the realm and
not disposing them to free merchants, that is, the burgesses,
'as use hes bene' (33). Again the burghs complain of the
great hurt sustained by reason of the multitude of unfree
sailors and required the enforcement of the statutes against
all but freemen of the burghs (34). The tribulations of the
burghs continued and in 1591 it was 'statute and ordained'
that all merchants resorting to France and Flanders or any
part of the 'Ester Seyes' should at no time depart from any
burgh or seaport of the realm without special tickets of their
freedom to be exhibited at the port of call (35), a reenact-
ment of a provision of 1552 (35). In the matter of the reserv-
ed waters/
waters the burghs were bound to have been familiar with the practice of the Baltic States which restricted navigation within their waters. They would also be aware of the Ordinance of Philip, the Leges Nautiae, dated 1563, requiring that shipping be not molested within sight of his shores.

This was the Scottish 'land kenning' which was to be adopted as the limit of the waters reserved for the natives' fishing. Apart from the instance in 1550 mentioned above, there appears to be no such claim on the part of the Scottish Sovereign to have a special jurisdiction upon the coastal waters. The burghs had therefore to play a lone hand and it is evident that they continued to uphold in practice their theory that the fishing along the coast was reserved for them.

XVI. The pleas in a case of two English vessels returning laden to England with their catch, and seized by Thomas Davidson of Crail on the allegation that they had been fishing within Scottish waters, recited that "Albeit/
"Albeit it be of veritie that their fisheis within the saidis schippes wer gottin upon the mayne sey, outwith his Majesteis watteris and dominionis, quhair not onlie thay, but the subjectis of all utheris princeis hes had ane continuall trade and fisheing in all tyme bigane past memoire of man. And gevand the saidis fisheis had bene gottin in His Majesteis watteris, yit, in respect of the continuall trade quhilk all strangearis hes had thair in all tyme bigane, thair being na inhibitioin maid nor publissit to the contrair as yit, na sic preparative nor navaltie aucht to have bene usit on thame" (37).

The boats were ordered to be restored within twentyfour hours. The last plea in the defences is significant. Fishing in the Scottish waters had not been officially prohibited. It is unfortunate that the grounds of the decision were not recorded but the last plea does not appear to be contradicted by any known facts.

XVII. The position of the Scottish claims to territorial waters at the close of the sixteenth century may now be reviewed. Apart from the fishing there was no doubt that the waters around the Scottish coasts were free to
to the foreigner to navigate and the rights of a neutral in
the waters contiguous to his coasts had not been sharply
raised. Nevertheless the burghs appear to have been convinced
that the waters of the firths were reserves for their fish-
ing and the precedent of the closure of Loch Broom would
seem to imply that the Council were prepared to lend some
support. There had been negotiations and treaties with the
Dutch but the issue as to the fisheries had been left
unsettled. Whatever the policy of the Scottish Sovereign
may have been, it was in the Dutch interest that their fishing
be not restricted. In the northern and Outer Hebridean
fishing the foreigner was not penalised. Probably the
Scottish policy came to aim at the closing of the coastal
waters for fishing except for the natives. At the beginning
there would be free and unrestricted fishing for all but the
burghs later asserted a claim to the fishing where they
found that there was considerable profit to be obtained.
The sovereign probably sympathised but had not the power to
make/
power to make a closure of the coastal waters effective against the foreigner. Economic necessity and dependence upon the inshore fishing had not as yet pressed so hard as to force the issue to that extent.

XVIII. Failure to prove conclusively the reservation of the fisheries does not, however, negative the Scottish claim to maritime sovereignty. The subtle questions as to what was comprised within maritime sovereignty had not yet been raised. The extent of waters claimed and the exclusive jurisdiction exercised was a matter in the first place for the prince controlled by the circumstances of his State and in the second for those States who were affected and had the power to object. Nevertheless there was this much in common, all princes regarded it their duty to afford protection within the stretch of waters along their coasts. The limit of the jurisdiction claimed by Philip in 1563 was the 'land kenning'.
kenning'. Probably the Scottish sovereign considered that his jurisdiction was ample if it extended to a like distance from the shore. It was probably generally ample for the prevention of the hovering by pirates outside the ports and roadsteads. The performance of this duty and the incidental details, when ships were operating under royal warrants, is illustrated by contemporary reports worthy of full quotation. In the former the limitation of the special jurisdiction is evident. In the latter it is clear that the burghs had little to learn as to the manner in which the duty was to be carried out.

A. Item. Inlykemaner that it be proponit to my Loird RegentisG race and Loirdis foirsaidis, incais the Queenis Maiestie of Ingland will grant and consent that sum of hir schippis sall remane upon hir sea coastis and watteris for purging of the samyn of pyratis and uthereis wicked personis. That inlykewayis it may be grantit be hisG race and the Loirdis foirsaidis to the merchantis of this realme, uppon thair commoun chargis, to set furth ane schip with ane bark for purging of oure Soueranis watteris of the saidis pyrattis and wicked personis, and for convoying/
conveying the schippis of this realme langis the coast of Ingland, and utheris pairtis neidfull, from the danger of innemeis, during sic tyme as we fynd gude, that thay may imput and output at their plesouris, be the avyce and command of the saidis foure burrowis. And gif it biis found that be the Queene of Inglandis schippis the seas in thir pairtis beis clengit, than the schip and bark foirsaid upon the sute of the nyghtbouris (of) the burrowis of the north and west pairtis, to pas for clenging of thair seals and watteris, and sua be ordour be rady to serve quhair neid salbe gretest, be the avyce of the saidis foure burrowis.

(Records of the Convention of Burghs. 25th July, 1574.)

B. "At my first coming to Anstruther there fell out a heavy accident, whilk vexit my mind mickle at first, but drew me mickle nearer my God, and teached me what was to have a care of a flock. Anie of our an creare, returning from England, was beset by English pirate, pill(aged), and a very guid honest man of Anstruther slain therein. The whilk loon coming pertly to the very rood of Fittenweem, spulyied a ship lying therein, and misused the men thereof. This wrang could not be suffered by our men, lest they should be made a common prey to sic limmers. Therefore, purchasing a commission, they riggit out a proper flyboat/
flyboat, and every man encouraging another, made almainst the hail honest and best men in all the town to go in her to the sea. This was a great vexation and grief to my heart to see at my very first entry the best part of my flock ventured upon a pack of pirates, whereof the smallest member of the meanest was mair in valour (value) than a shipful of them. And yet I durst not stay some (un)less nor I stayed all, and all I durst not,......

The captain, for the time being, a godly, wise and stout man, recounted to me truly their hail proceeding. That they meeting with their admiral, a great ship of St Andrews, weel riggit out by the burghs, being fine of sail, went before her all the way, and made every ship they foregathered with, of whatsoever nation, to strike and do homage to the King of Scotland, shawing them for what cause they were riggit forth and enquiring of knaves and pirates. At last they met with a proud stiff Englishman, wha refuses to do reverence; therefore the captain thinking that it was a loon, commands to give them his nose-piece, the whilk delashit (discharged) lights on the tie of the Englishman's mainsail, and down it comes; then he yields, being but a merchant.

(Extract from Diary of Andrew Melville.
Chambers Annals of Scotland. Vol i. 176)

XIX. As Venice obtained the first responsible
recognition of her hold upon the Adriatic in consequence of her subduing the pirates so also might Scotland have secured a considerable stretch of coastal waters exclusively for herself. There is no evidence that Scotland did have the intention to claim the exclusive jurisdiction in the adjacent waters apart from the firths. The treaties with continental powers indicate that a special jurisdiction was conceded and accepted for the suppression of piracy. But there was also the duty laid upon the State whence the malefactor belonged to see that justice was done irrespective of the locus of the offence. There was thus two jurisdictions, a local and a personal. The remonstrances addressed to the King certify that the personal jurisdiction was intended to be exercised. There is nothing in the remonstrances as to the locus of the offences alleged except the termini of the voyages upon which the vessels were proceeding. It is also noted from the Admiralty Court Book that a jurisdiction was assumed in respect of operations off the coasts of England.
At the most then, it can be said that the King's jurisdiction upon the firths was clearly recognised as exclusive.

Upon the other coastal waters he had a special duty and jurisdiction in the suppression of piracy. That jurisdiction was not exclusive.

XX. Indeed the position would appear to be aptly illustrated from the jurisdictions exercised by James I upon the coastal waters of England. Arising out of his declaration of neutrality during the War between the Dutch and the Spaniards hostilities were prohibited in the King's Chambers, the bays, but belligerent operations elsewhere were not interfered with (40) even in the Narrow Seas or in the other coastal waters where English sovereigns had a jurisdiction against pirates, a jurisdiction which fell to them as the sovereign of the adjacent territory.
CHAPTER IV.

The early history of the English claims.

It may be premised that the English claims, no less than the Scottish and others, were the outcome of circumstances, including the past, fashioned by factors in the national life and developing and changing in accordance with the varying situations arising in the passage of time.

I. Generally the Scottish and English claims were not dissimilar; both admitted navigation of the coastal waters by the foreigner without restriction or impediment of dues; neither, as a rule, required licences to be obtained for the liberty of fishing(1) - all certain and the most notorious features of maritime dominion in the Middle Ages. The English and Scottish claims were thus distinct from the Venetian and Scandinavian which sought an extensive and absolute sovereignty in respect of the sea, a sovereignty no narrower in its application or embracing less than sovereignty/
sovereignty over landed territory. The similarity between the
Scottish and English claims was threatened towards the end of the period by the tendency of the Scots to close the fishing in the coastal waters against the foreigner; the English policy continued to pursue the primary object of protection and security with unrestricted freedom to the foreigner for trade and fishing. Undoubtedly, changing circumstances in England were to produce a situation favourable to the introduction by James I of the Scottish notion of reserved waters into English policy. The diverging tendency was due to keys to the different attitudes, the understanding of which are furnished by the appeals to national sentiment; in Scotland the plaint of the burghs was that the foreigner was taking toll of the wealth at nation's very door, and the 'meit out of thair mouths': the threat of danger to the sovereignty of the sea was a call to action in England (92). It was immaterial that the 'sovereignty of the sea' was sufficiently elastic to meet the varying needs of centuries/
centuries implying, as suited the occasion, the predominant sea power to secure the safety of the coast or the dominion upon the undefined British Seas so dear to the national pride.

II. The theme of the story of the English claims was the 'seas must be kept'. The possession of territory of greater or lesser extent upon the Continent from the Norman Conquest to the loss of Calais in 1558 called forth, from the twelfth century, large scale military expeditions which to be successful, demanded the unimpaired freedom of passage across the Strait of Dover and the English Channel. Sea power was essential, and therefore the English claims to maritime dominion may be expected, as in the instance of Venice, to appear in the guise of naval supremacy or to arise out of it. To have this command of the sea is the intent of the phrases 'to guard the seas', 'to guard the seas and the sea coasts' found in the old Admiralty records (3). The evidence indicates that they
probably implied no claim to exclusive jurisdiction or sovereignty at any time until Selden wrote against Grotius. It was for the purpose of providing the naval service that the Cinque Ports were favoured and developed. It was to the same end that the admiral was appointed in or before 1297, viz., to keep the peace of the seas (4). When these failed or proved insufficient the duty was contracted out (5).

Military expeditions apart, there was the ordinary mercantile traffic to be protected, not only in the Straits but elsewhere along the coasts. The Seas were in a very lawless state. "There was," says Nicolas, "for two or three centuries after the Conquest a formidable naval force, which was independent of both governments (of England and France), and which when not hired as auxiliaries by one of the belligerents in time of war, acted as their own interests dictated acknowledging no authority but the chief whom they elected, and, unrestrained by no national or moral law, inspired terror wherever they came and obtained/"
obtained the general name of pirates" (6). The Kingdom being divided by the Narrow Seas, for military purposes, in the interests of expanding trade and for the safety of the fisheries, it became more necessary that the menace of piracy should be stemmed. If it had been possible for the Scandinavian states and Venice to claim dominion upon the Sea on the ground that they ensured and maintained peace upon the sea there was no reason why England should not have aspired to similar dominion. The advocates of Mare Clausum would have it that the sovereignty was, in fact, exercised. So far as the evidence goes no such claims were asserted until a century afterwards. The jurisdiction upon the seas was not exclusive. The success of the operations were judged from the military point of view alone. If the King of England was, in fact, Lord of the Seas, it was in a military sense and not on the ground that the sea was within His Majesty's dominions.

III./
III. The advantage of dominant sea power was one to be exercised with caution. Any move towards the appropriation of the seas involving impediment to the other nations would have incurred their displeasure and combined their forces against the party appropriating. In theory the English King would have had some 'legal' authority in claiming the Narrow Seas and the Commons in 1420 were not in two minds on the matter. The jurists of the fourteenth century, whose authority was very considerable in the Mediterranean countries, and, at a later date, in the western states, had adopted a rule of the Civil Law, that applicable to rivers, to give the property in the seas to the sovereign possessing both shores. Founding upon this rule the Commons proposed that Henry V., being in possession of both shores of the Straits of Dover, should levy such taxes as he thought reasonable upon the shipping to maintain the naval guard. The King declined to adopt the suggestion (8). The jurisdiction of England upon the Narrow Seas was shared from time to time/
time, war and the weakness of the navy requiring, with other states.

IV. The English jurisdiction, proper and exclusive, begins to appear faintly about the beginning of the fourteenth century; at first uncertain but becoming bolder until in the reign of Elizabeth it was not afraid to declare itself to its strongest opponents, the policy of Spain and Denmark. The declarations of Elizabeth show that the English conception was dominion over a narrow belt of water burdened, in the interests of trade and commerce, by restrictions in favour of the non-national. It was a type of jurisdiction such as that claimed by Scotland, by France and by Philip in his Nauticae Leges to the Flemings in 1563 (9). There were thus three groups of States, the north and south groups, i.e. the Scandinavian and the Mediterranean, in favour of an extensive and exclusive maritime dominion and the middle group, the States around the North Sea, claiming only a moderate right/
right and respecting the interests of others, to all appearances the prototype of the modern territorial waters.

V. About 1303 in a draft of a submission of complaints to a tribunal to be composed of English and French Commissioners it was premised that England possessed an exclusive maritime jurisdiction and that the French Admiral had encroached thereon contrary to treaty(10). As, however, the document is only a draft it would be unwise to found too much upon it. The claim to an exclusive jurisdiction may not have been admitted by the French but on the other hand all the acts complained of, with one possible exception, took place within the areas which later came to be defined as the King's Chambers where the King of England was not denied an exclusive jurisdiction. The point of the plaint was that the King's jurisdiction had been breached by the acts. Nothing more is known of the events or what was the decision or even if the matter was referred to a tribunal. Selden surmised that the matter was too important to be settled by a tribunal and/
and that it was taken out of their hands. An equally probable surmise is that the matter was settled without resort to possibly any tribunal, / but in the ordinary manner by remonstrance. In such a set of circumstances speculation could be directed into any channel. There is certainly no conclusive evidence in the draft of a maritime jurisdiction extending far out to sea such as was afterwards claimed. In 1521, Wolsey, when acting as intermediary between the Emperor Charles V. and King Francis of France, stipulated in the treaty that there should be no hostilities in harbours, rivers, bays and roadsteads, especially in the Downs or any locality under the jurisdiction of the King of England. Aut alia loca maritima quaecumque jurisdictioni dicti Regis Angliae subjecta aliquam navem mercatoriam... (11). The restriction of the jurisdiction to harbours and their immediate vicinity, i.e., where the vessels sought safety, appears to have been no extraordinary claim. The hostilities were not hindered in the open seas. It was a jurisdiction which the Scottish courts had recognised in the Firth of Forth.
VI. The officer charged with the exercise of this jurisdiction would be the Admiral or his deputes. Edward III referred the question of regulating and strengthening the jurisdiction of the Office of Admiral to the Judges for consideration. The terms of reference leave no doubt as to the extent and nature of the jurisdiction, namely, the administration of the mercantile marine laws affecting such issues as arose between master and mariner and shipper. He had also a criminal jurisdiction, the duty of preserving peace and maintaining security for shipping upon the seas—all duties exercised by the admirals of other states. (12)

VII. Considerably later, in 1554, the Privy Council issued instructions to William Tyrrell, Vice Admiral, which indicate the duties appertaining to the office and the keeping of the seas at that time. He was to repair to the Narrow keep the Seas there to passage diligently and to do what he could for the defence of the passengers from Dover to Calais. He was also to defend the rest of the Queen's ships from all violence/
violence and wrongs, if any such were offered, himself offering no wrong to any nation so long as Her Grace continued in amity and peace with all princes. From other instruction issued about this time it would seem that a considerable part of the admiral's duty was the wafting or convoy of ships according to the instructions of the Privy Council, and on occasion the admiral was required to proceed down Channel to clear the pirates from the coasts. There is nothing to suggest that even in the Narrow Seas in Mary's reign her jurisdiction was supreme and exclusive.

VIII. Precisely when and how the English jurisdiction came to be so restricted cannot be definitely ascertained. Before 1605 the King's Chambers would appear to have been regarded as settled, perhaps indefinitely, by tradition. The incident of 1303 did not settle the restriction, for the Commons' solicitation in 1420 showed quite clearly that they intended dominion upon the Narrow Seas. If a definite date must be assigned, it may be suggested that the declinature of Henry V. at...
that time to possess himself of the dominion over the Straits
rendered it very difficult, if not impossible, for his
successors to resuscitate the claim. As it was the general
policy of his predecessors in favouring freedom for trade
and fishing left him little room for the exercise of discretion; the possible consequences of adopting the Commons' proposal gave no option but to decline.

IX. The confinement to the coastal waters of the operations against the pirates noted in the Scottish Privy Council instruction in 1550 does not appear to have had a corresponding restriction in the English commissions (14). Sometimes convoys were despatched with the fishing fleets as far as Iceland and Westmonie. These may have been exceptions as there is notice in the Statutes that the right of the Sovereign to the 'composition', probably tithe, fish was reserved when the other burdens were removed (15). In all probability, convoys were granted when the naval strength permitted to shipping approaching or leaving the coast. In
any case it was clear that in 1562 the harbours and their vicinity were in Elizabeth's opinion within the Sovereign's territory and dominion; her representations to the King of Denmark as to his right of property in the seas between Scandinavia and Iceland left no doubt that the English view was only in favour of a small stretch of coastal waters being included within the State jurisdiction. In 1562 Elizabeth informed Mary, Queen of Scots, (16) that some Englishmen had been despoiled when lying in a harbour at Westmonie "within the territory of our good brother, the King of Denmark". The law conceived as applicable is given in the letter: "The taking of the shippes within the harborough, domynion, and territory of the King of Denmarke cannot be justified in lawe, albeit the warres continued then (1558) betweene us and Scotlände. For the territory of an indifferent and mean prince is sauf conducte in lawe". Elizabeth furnished other examples of the firming of the attitude of England and the dawning of international law as distinct from
and on a higher plane than the 'practice of princes' (17).
Reference may be made to Elizabeth's famous reply to the
Spanish ambassador's request for the restitution of some of
the spoils obtained by Drake on the Spanish Main. 'That
the Spaniards by their harsh dealing against the English,
whom they had prohibited commerce contrary to the Law of
Nations had drawn these mischiefs upon themselves...Moreover
she understood not why her and other princes' subjects
should be barred from the Indies, which she could not
persuade herself the Spaniards had any rightful title to
by the Bishop of Rome's donation.... So this donation of
that which is anothers which in right is nothing worth,
and this imagery property cannot let, but that other
princes may trade in those countries and without breach
of the Laws of Nations, transport colonies thither,
where the Spaniard inhabit not, for as much as prescription
without possession is little worth, and may also
freely/
freely navigate that vast ocean, seeing that the use of the sea and air is common to all neither can any title to the ocean belong to any people or private man; for as much as neither nature nor regard of the public use permitteth any possession thereof. " (18)

X. The reference to the Law of "ations is interesting but so far from the rule being of general application or widely recognised even Elizabeth must have either had doubts in or judged it expedient to hold to the principle for some of the money was repaid to the Spaniards - and it was used against the English in the Netherlands (19). There was also a Mare Clausum in the north where Elizabeth was to make the same stand and in the end to concede the point as graciously as possible. The general course of treaties and negotiations involving the recognition by England of the practice of the Danish kings and other in the north of Europe in the regulation and restriction/
restriction of the fishing and navigation in those parts has been summarised by Fulton (20) but attention would be directed to the negotiations in 1599 arising out of the dispersal and destruction of the English fishing fleet at Iceland. The instructions to the ambassadors in 1602 are an admirable exposition of the principles upon which the freedom of the seas stood, but unfortunately, Elizabeth had to counter the precedents created by her predecessors. The envoys were to advance that the Law of Nations allowed fishing in the sea everywhere and the use of the ports and coasts of all princes in amity, which rights could only be lost by agreement or contract. If the Queen's predecessors had yielded in taking out licences for fishing it was more than was due by the Law of Nations. As for the property in the sea, in some small distance from the coast, it might have yielded some oversight and jurisdiction, yet princes did not usually forbid passage or fishing as was seen in the Queen's seas of England and Ireland, and in the Adriatic Sea of the Venetians.
Venetians; where she in her sea and they in their sea had the property of command yet neither she nor they had offered to forbid fishing in their seas, much less passage of ships of merchandise; the which by the Law of Nations could not be forbidden ordinarily; neither was it allowed that property in the sea for whatsoever distance merely on the ground of possession of the banks for if that were admitted then the seas would all have been possessed by some prince and no sea would have been common — an untenable position (according to the Civil Law). Therefore, the Danish claims to possess the waters between Iceland and Scandinavia could not be admitted. (The logic may have been sound but the reference to the Venetian licence to foreigners on the Adriatic was certainly unfortunate). Nevertheless, the instructions proceeded, should the King of Denmark be adamant and should he make a special plea for the reservation of the fishing, the envoys were, for the sake of amity, to concur in the issue of the licences but on the condition that neither/
neither the King's nor the Queen's name appeared on the licence. In effect, expediency had again been preferred to the theory and inclination.

XI. In forwarding the cause of the freedom of the seas with the possible reservation of a narrow belt for territorial waters, Elizabeth was but following out the policy of her predecessors and the practice of the States around the North Sea, Denmark being considered as within the Scandinavian group. The French Ordinances of the sixteenth and seventeenth centuries, regarding the office and jurisdiction of the admiral and for the regulation of mercantile marine affairs, might well have been Scottish or English Statutes (21), the language appearing applicable to the admiralties of all three States. In England it was debated in 1568 as to whether a prize was good if not retained in the possession of the captor for the space of twenty-four hours. It was concluded that to be good prize the vessel must be retained for that time. The French Ordinance contains a provision to the same effect/
effect. Then there is the phrase 'within or without the land' corresponding to the Scottish 'in fresh or salt waters', the areas within which the 'land fishing' was carried out.

The Ordinance of Philip offering his protection and forbidding hostilities within sight of the coast has already been mentioned. England had her narrow strip of coastal waters and Scotland was to claim her 'land kenning' waters as her own.

XII. The freedom accorded to the foreign fisherman illustrates the policy of successive sovereigns, a policy which allowed Elizabeth little option but to take her stand for the freedom of the seas even if it had not been that the bounds of her State were becoming too restricted for her subjects. The effects of that policy of toleration were also to be seen in the decay of the fishing ports and the fishing fleets.

XIII. There is not trace of any restriction ever having/
ever having been placed on the foreigner coming to the English ports, fishing beside the native, sharing in his fortunes and toiling together to reap the harvest of the sea. It has been suggested that this familiarity prevented the antagonism to the foreigner so characteristic of the Scottish fisherman of the period (22). The foreigner was more welcome in England and received more freedom to trade. If the alien merchant in Scotland was precluded from trading in the burghs except in bulk and then only with the free burgesses, his brother in England was fairly well protected.

ITEM. It is ordained that all manner of hosts, as well in the City of London, and the towns of Great Yarmouth, Scarborough, Winchelsea, and Rye, and also in all our other towns and places on the coast of the Seas and elsewhere through all the said realm, as well within liberties as without, shall from henceforth utterly cease and be amoved from their/
their noyance and wicked deeds and forestallings, and in especially they be inhibited by our Sovereign Lord the King, that they nor none of them, ... shall any further intromit to embrace herring or any fish or other victuals under the colour of any custom, ordinance, privilege, or charter before made or had to the contrary which by these presents be utterly repealed; or privily or apertly do or procure to be done any impediment to any fishers or victuallers Denizens or aliens being of the King's amity whereby they or any of them be compelled to sell their fish or other victuals, but where and when to any person whosoever they will within the said Realm at their pleasure.....(23)

But the alien was protected at his fishing by treaty rights which the Dutch had probably desired but never obtained from the Scots. 'All the ancient treaties', says/
says Meadows, (24), 'could meet with, concluded betwixt the several Kings of England and their old confederates, the Dukes of Brittany and Burgundy, which in those ages were the most powerful neighbours they had at sea, are all of the same tenor and run in the same form, viz., They covenant on both sides that their respective subjects should freely and without let or hindrance one of another, fish everywhere upon the seas, without asking any licences, passports, or safe conduct. This is the general form of them all. For example in the treaty betwixt Edward IV of England and Francis, Duke of Brittany, the Article, in French of that time, runs thus; That the fishermen, both of the Kingdom of England and the Dutchy of Brittany, 

aller par tout sur mer pour pêcher & gagner leur vivre, sans impecament, ou disturber de l'une partie ou de l'autre, & sans leur soit besoigne quil ceo requirir sauf conduct'.

Meadows then proceeds to recite some of the other treaties, including the Magnus Concursus of 1495. Nowhere, Meadows
adds, is there even a nominal price demanded for the right to fish; the liberty, so far as England was concerned was granted deliberately without pretence of prior claim or restriction.

XIV. The reason usually offered for the decay of the fishing ports of England was the decline in the amount of fish consumed after the dissolution of the monasteries and the slackness in observing Lent and the other fast days of the Church (24). There is probably a grain of truth in that assertion but it cannot explain why the foreigner should have supplied the English market with fish caught off the coasts of England and the English fleets decayed through lack of use. The Dutch were more progressive and they had an advantage, at least for a time, in improved methods of curing the fish (25). Possibly the indolence which was afterwards attributed to the English fishermen may have had some bearing. Whatever the causes bringing about the result, the fishing fleet was on the decline and
the navy was imperilled. Cecil, one of the most outstanding figures in the Royal Council during the reign of Edward and Elizabeth, undertook enquiries into the extent and the source of the trouble. As a remedy, the strict observance of Lent was enjoined (26) and even those of rank were brought before the Privy Council for their offences (27). Even the butcher who was licenced to supply the French ambassador's sick wife with meat was under observation lest he supply more than sufficient for her purposes! The Scottish scheme of the reservation of the fishing for the natives or the closing of the fishing to foreigners on the grounds that the coastal waters were within the dominions of the Queen as was the case in Denmark, could not have been attempted. Any such proposal would have struck at the Dutch with whom Elizabeth could not afford to quarrel in the face of the danger threatened from Spain. Instead, the solution attempted in Elizabeth's reign was the ousting of the foreigner/
foreigner from the home markets and the coasting trade.

In 1563 an Act 'Touching certayne Politique Constitutions
made for the maintenance of the Navye' was passed (28).

was granted
Exemption/from customs dues on fish caught and handled by
Englishmen; the purchase of fish at sea, with certain
exceptions, was forbidden; and the sales of fish by the
foreigner were seriously circumscribed. Further, the pur-
veyors for the royal establishments were to obtain
supplies only at agreed prices. Elizabeth, however,
retained her 'composition fish' payable by the fishers at
(24)
Iceland. The Act was unsuccessful. It cut deeply into
established custom and practices of trade. The foreigners
had been the chief suppliers of the markets and now they
were excluded. The demand for fish could not be met.
Licences had to be granted. The Act was unworkable. There
were further repercussions. The alien fishermen who had
up to the present worked peaceably with the native took
to destroying the nets and gear of the natives to their
great/
great discouragement. Nothing much was done for a remedy.

Elizabeth and her adviser, Cecil, continued their efforts
to increase the consumption of fish by enforcing the
'political lent' and to exclude the foreigner from the
home markets; they would not dare attempt to restrict his
fishing. There were others whose opinions were not weighted
by the responsibilities of office, namely the pamphleteers,
who wrote for the improvement of the fishing industry and
the strengthening of the navy. Some of the schemes which
these pamphleteers urged were to receive a trial in the
next two reigns. So far as the fishing industry was concern-
ed times were ready for a change.

The claims of England to the exclusive jurisdiction
upon the seas was thus restricted to a very narrow belt
around the coasts and bays. It was very similar to the
Scottish and equally indefinite. The sovereignty of the
sea which was to be claimed in later years had not existed.
There never was any intention to claim an exclusive maritime
dominion/
dominion until the Stuarts were riding to a fall. There had been times when the English navy had been of sufficient strength to have made a claim to the sovereignty of the sea effective in the manner of Venice upon the Adriatic. These were spasmodic periods of power but even then there was lacking the evidence of claiming that maritime dominion upon which Mare Clausum was made to rest.
CHAPTER V.

From Mare Liberum to Mare Clausum.

I. The issue of reserved fishing within the coastal waters was brought very early to the notice of James I after his accession to the throne of England. In 1604 when he sought to bring about a closer union of Scotland and England, the Scottish commissioners and, finally, the Scottish Estates required that the fishings along the coast for distance of a land kenning should be reserved for the natives where, it was claimed, foreigners had hitherto not been allowed to fish, a statement frequently made but of very doubtful accuracy. It was an argument which came easily to the lips of the burghs. The attempt at the closer union of the two countries failed but it familiarized James with the conception of reserved fishings. The prospect of a debatable issue, which, if carried, would enhance his prerogative was also to his liking. There was the/
the additional revenue to be obtained from the taxes or
other dues which were to be levied upon the poor foreign-
er for the privilege of fishing. Yet these alluring
factors alone, would not have been potent enough to
enable James, in less than seven years, to reverse the
policy which the English sovereigns had followed for
centuries. There was a rising feeling of jealousy of
and antagonism against the Dutch. They were represented
as aiming at the monopoly of the world's maritime trade
and as a danger to England. Finally, the common danger
of Spain which had drawn the Dutch and English together
had now passed, at least for the time being.

II. Remarking upon the successful fishing of the
Dutch there were a number of promoters of schemes to
force the Hollanders from the fishing grounds and the
markets (2). The schemes unanimously held out the
prospect of handsome profits; if, and it was the serious
difficulty of all the schemes, the Dutch could be
restricted/
restricted in their fishing. Other schemes rested on privileges being granted at the expense of the established companies of merchants who objected to the concessions to others. After consideration, on the pretence of bringing order into the fishing industry and the reviving of the coast towns, James issued his famous proclamation in 1609 requiring foreigners fishing off the coasts of Britain to obtain licences (3). There had been complaints of harsh treatment of the natives by the Dutch. The attention of James was also drawn to the fact that the Dutch laid a tax upon all fish imported by foreigners into their country and it was suggested that similar impositions should be levied in England against foreign caught fish. James, of course, was familiar with the assize of herring laid upon the fish brought into Scotland. The royal reply to the complaints was not the imposition of the desired tax but the proclamation - its authority, the royal prerogative, the exercise of his sovereignty upon his own waters in the interests of his own/
own subjects. The negotiations which followed were typical of later occasions when James was fortunate enough to bring the Dutch to discuss the subject of the fisheries. The Dutch argued that the proclamation impinged upon the principles of the Civil Law. The sea was free to all and to appropriate it would be contrary to use and custom. A prince might have some jurisdiction over the sea as far as he could permanently command by cannon stationed on the shore. (This was a novel conception until recently ascribed to Bynkershoek.) The impositions, the Dutch asserted, were contrary to the treaties subsisting between them, especially the Scottish treaties of 1541, 1550 and 1584 and the English treaties known as the Burgundy Treaties, the principal one relied upon being that of 1486, the Intercursus Magnus. In addition, and this was a real difficulty from the Dutch point of view, any restriction of the herring fishing would be inexpedient for it would spell ruin for the Dutch/
Dutch, so many of whom were dependent directly or indirectly upon the herring fishing. Later the Dutch declared that they would not pay a single herring. As to the arguments, the Civil Law was still the greatest authority in interstate issues. In the Scottish treaties there is no available evidence that the Dutch ever obtained a declaration of the same freedom and right to fish as they had obtained in the English agreements. The Dutch had certainly had the right or privilege recognised in the latter, a fact which was to prove the chief difficulty to the English negotiators. This difficulty was never satisfactorily overcome. The counter arguments of the English were that the practice of princes elsewhere admitted the appropriation of the seas and the right to levy dues from those fishing in the coastal waters. The Burgundy Treaties, it was averred, were no longer valid. The privilege had been conferred when the Dutch fishing had been innocuous; it was now harmful. The Dutch naively replied that it was open to the English to compete.
compete with them but it was a business which required skill. There were also lean years. The Scottish assise of herring was pressed upon the Dutch as showing the King's undoubted right to a tithe of the catch but the Dutch answered truthfully that the assise had been paid solely in respect of the fish landed from the east and west seas of Scotland and only by the natives. Meantime the operation of the proclamation had been suspended pending the completion of the negotiations. Events in Europe were to terminate the proceedings suddenly. The sudden death of Henry IV of France, the head of the Protestant League, altered the political situation in Europe and, in view of possible danger to the States and England, the issue of the proclamation was dropped. Substantially, victory lay with the Dutch.

III. In Scotland, James had suffered a rebuff at the hands of the burghs whom he desired to build busses for the fishing to compete with the Dutch. On being asked the number of busses they were willing to build, the burghs replied/
replied that they had more than sufficient of the ships best suited for the fishing in the lochs and at the 'back the Yles beyyd the Fleymeingis', which fishing, if the natives could be restrained from their depredations, would be lucrative, easy, and available all the year round. Further, the means were lacking to furnish all the available ships for that fishing and there was therefore little point in asking the burghs to undertake the less profitable fishing upon the main seas (6). It may be deduced from this that the Scottish fishing was still (1605) confined largely to the inshore waters.

IV. It had been a weakness in the arguments against the Dutch that the Scottish assise of herring had never been levied on the native fishermen in the northern waters. To remedy the omission, James granted the assise of herring to Captain John Mason who, with two ships of war, proceeded to collect the tax in the Orkney and Shetland Isles. The burghs resisted and obtained a decree of absolvitor from the Privy/
Privy Council. On account of this decision the Duke of Lennox, when the assise had been granted to him in 1614, was unable to have the grant confirmed by the Council in so far as the natives would be affected. The Privy Council pointed out to the King that the native fishermen ought to be encouraged and not discouraged. The Council evaded the issue as to the tax on the foreigners by saying that some, especially the Dutch, claimed to have had a royal patent allowing them to fish there without impediment; the terms of the deed were not known to the Council (7). The Dutch were referring to the treaty of 1594 of which there was no available copy in the Scottish archives.

V. Undaunted by this, and the feeling against the Dutch still running high, James granted the assise to the Duke of Lennox. Armed with a note from the Dutch ambassador, granted to facilitate the collection of dues for ground leave, anchorage and similar facilities, to which the Dutch had never objected, the Duke sent an agent to levy the tax and was successful/
successful. The consequent feeling in the Netherlands was bitter and in the following year when the agent, Mr Brown, reappeared for the purpose of collecting the tax he was mistakenly arrested and carried to Holland. It was a serious blunder on the part of the Dutch captains. The States expressed regret at the incident, made reparation but paid no dues.

VI. In the meantime the Scots fishermen had been fishing in the waters claimed as exclusively reserved by Denmark. Complaint was made to the Scottish Privy Council in 1618 (8) that the Scots had so injured the native fisheries that the fishermen could not meet their obligations. The Scots admitted having fished in the waters in question but, it was pleaded, they had been driven thereto upon necessity and by the violence of the Hollanders, who came yearly with two thousand sail, and above, within the King's waters, and within a mile of the 'continent' of Orkney and Shetland/
Shetland. The Dutch not content with the benefit that the liberty of fishing within the said bounds afforded yearly unto them did very heavily oppress His Majesty's poor subjects and fishers. The Privy Council thought the trials of the natives at home no warrant for their misdeeds elsewhere. The Scots were forbidden to fish within sight of the Island of Faeroe and were required to respect the fisheries there as reserved for the Danes as conform to the Law of Nations. At the same time, the Privy Council requested that the Dutch be asked to respect the Scottish waters within sight of the coast as reserved for the native fishing 'conform to the Law of Nations'. The Dutch asked for details of the charges against their fishermen, but, on the details being given, the grounds of complaint were seen to be very trivial. Nothing came of the claim to the reservation of the waters within a land kenning from the shore.
VII. Despite the complaints that the Dutch had impoverished the fishing and destroyed the nets (8) the Scottish Privy Council were reluctant to move alone in the matter. On being urged by the King to take steps to exclude the Dutch from the fishing within sight of land, the Council pointed out that the Dutch were a friendly power and that the matter really concerned both Kingdoms. They also requested that the Dutch should be asked to prohibit their fishermen from the waters claimed by the Scots in accordance with the Law of Nations. They also suggested that the King might threaten sterner measures. It was obvious that the Scottish Privy Council were not going to be responsible for any act which would lead to open hostilities. The Dutch on their part would not go as far as to prohibit their fishermen from fishing in the waters claimed by the Privy Council but they clearly forbade their fishermen to interfere with the Scottish fishermen. Indeed the fishing was claimed as a right on the usual grounds of treaties, long possession/
VIII. In a fit of energy James instructed the collection of the dues at the northern isles. Such dues were to be asked in a peaceful manner and what was offered was to be accepted without question(10). A ship was fitted out for the purpose although it must have been known to the Privy Council at the time that there were no Dutch fishermen in the northern parts at that period of the year. The precedent which James sought to establish was not created.

IX. About this time trouble had been brewing with the Dutch as to the whale fishing at Spitzbergen. The issue there was as to whether there were exclusive rights in the industry. The English had been established first. There were disputes as to who had the claim, if any, from the right of discovery. James went so far as to claim the waters around Spitzbergen as within his territorial waters.
There were the inevitable quarrels and reprisals. In the end the Dutch agreed to send envoys to treat with James. In anticipation of the envoys being empowered to treat of the principal outstanding questions, the fishing licences and the whale fishing, James had the Scottish records searched for precedents but without result. The Dutch were therefore to be called upon to produce their authority for their claims. However, the envoys arrived without authority to deal with the fisheries. Forceful language was used by James towards the States General. He would not be taught the Laws of Nations by them or their Grotius. It would be to the advantage of the Dutch to acknowledge his right or it might well come to pass that they would necessarily bear all the world before them with their *Mare Liberum* - might soon come to have neither *Terram et Solum* nor *Rerumpublicam Liberam*. The forceful terms somewhat dismayed the Dutch but they knew the character of the King and played upon the political difficulties.
difficulties of the time and the inexpediency of attempting a settlement of so controversial an issue in such circumstances.

X. James persisted in attempting to levy the dues of the assise in the north and the Dutch appear to have evaded the impost. During the later years of the reign the question of the rights in the coastal waters was not sharply raised. The Dutch diplomacy with its 'artificial delays, pretences, shifts, dilatory addresses, and the evasive answers' had attained its purpose.

XI. While the Scottish part in the herring issue had been prominent and had produced the very definite policy of the reserved waters, there was a crop of questions arising in England out of the King's proclamation of neutrality during the hostilities between Spain and her former provinces. The questions did not relate to the Scottish territorial waters but the rights and duties of a neutral were for the first time to be put upon a definite footing.
XII. The most important act of the King was the prohibition of belligerent acts within the King's Chambers or gulfs. In 1605 there were two proclamations forbidding hostilities in or warships hovering near the ports and roadsteads (12).

Instructions were also given that merchant ships were to be given a start of two or three tides over any warship which might have entered the harbour. Further, warships were not to be allowed to stay in harbour longer than was necessary for repairs or revictualling unless constrained to stay longer by stress of weather. A decided advantage was the publication of a map showing the prohibited areas. Hitherto, the areas of jurisdiction, if mentioned, were referred to in general terms. In all probability, as no objection appears to have been raised to the claims contained in the proclamations, the prohibition of hostilities and the extent of waters claimed as within the precincts of the ports together with the rules as to the departure of the ships of the warring States, the action of the King may be taken as tacitly approved.
by the States. They had their counterpart in the provision in the *Leges Nauticae* of Philip of 1563, when he prohibited hostilities within sight of his coasts. Gentilis, the advocate pleading the Spanish causes in the Prize Court, sought to have the English dominion extended beyond the limits in the proclamation to ensure a greater expanse of neutral and therefore safe waters for the Spanish ships. At the same time he was arguing that a prize ought to be liberated as soon as it was taken into the territorial (i.e.)

waters of a neutral. Thus it will be seen that recognition was now being extended to neutrality in waters beyond the actual harbours.

XIII. The effective exclusive maritime jurisdiction exercised by James was moderate and such as even the most ardent protagonist of *mare liberum* would have conceded. His attempt to exclude the foreign fishermen from the English coastal waters and the Scottish reserved waters had been unsuccessful. In that business he had gone far but had always stopped/
stopped short of that point where resort to the sword would have been inevitable. His successors were to know no such restraint. Three times within the next quarter of a century the Dutch and the English were at war. Where James had sent a pinnace with two pieces of ordnance or a notary to take instruments on the refusal to pay the assise of herring, Charles sent his fleet amongst the fishermen to enforce the Dutch to take out licences. He obtained but a paltry sum (14). The maintenance of the sovereignty of the sea was/declared policy of the King, Charles I, whose Chambers had been violated and upon whose shores the Dutch had landed an armed force to pursue and punish the pirates who haunted the English coasts. Charles was determined that he alone would ensure peace upon the English seas. Such was the excuse for the levying of the notorious ship money. A fleet was provided and the fleet achieved nothing. But it is unnecessary to enter into the details of the/
the political drama which followed. The fact that the Commonwealth was substituted for the Monarchy did not in the least affect the issue of the territorial waters. Nor is it necessary to recount the events in the naval warfare. The interest arises through the issue of the territorial waters being made unduly prominent in the struggle between the Dutch and the English. It was almost entirely an issue in which Scotland had little interest. There the fishery question was to be led to the front. Nevertheless this period represents a phase in the history of the evolution of territorial waters and cannot be passed without some mention. It is important that the result of the struggle was that Britain became the 'Mistress of the Sea'. Whatever policy she was to adopt towards territorial waters, and it was not Mare Clausum, would have great weight with other maritime nations.

Either England or the United Netherlands had to make way for the other. So bitter was the animosity of the part of the English that the officials at the Admiralty
and the officers of the fleet grasped every opportunity of impressing upon foreigners the dignity of the English dominion upon the seas. The measures such as requiring all ships to give the salute or 'vail' even in distant parts was most irritating and produced no result to the English except the satisfaction of their vanity (13).

XIV. Most, if not all admiralty instructions required that naval vessels should always receive the salute. This salute, or 'vail' was an old established measure adopted by vessels out to suppress piracy. It has been traced in England to the reign of King John. Vessels were then enjoined to drop the topsail and lie to the lee to facilitate the search of the ship, the examination of its papers and the establishment of its innocent character. Ships refusing to give the salute were regarded as pirates and treated accordingly. In time the vail or striking of the flag came/
came to be regarded as a token of respect or courtesy paid to the ships of a sovereign. To have failed to have granted such a small token would have been an offence and a slight upon the sovereign entitled to the salute. Thus there are instances before the reign of Charles I where the salute was to some extent forced from strangers approaching the English ports. The English ships had always expected the salute in the Narrow Seas but it may not have been accorded on every possible occasion. But formerly the salute had had no special significance. Ships of other states probably claimed the salute in the Narrow Seas or wherever they were operating. However, Charles I, the Commonwealth and Charles II contended that the giving of the salute recognised the sovereignty on the seas. The other nations appear to have continued to regard the vail as merely a token of respect. The Dutch declared their willingness to accord the salute, as a mark of respect to the Sovereign, even when their fleet should be far superior in numbers to the English,
but never as a token of their subscription to the English claim to the sovereignty of the seas (16). The French appeared more reluctant to accord the salute. Under the guidance of Richelieu, the French were building up a naval force and causing some anxiety to the English. Yet it

when

was ludicrous for the English ship money fleet which was to achieve so much cruised about the Channel and along the French coast looking for vessels to force them to strike and acknowledge the sovereignty of the King of England upon his seas. Richelieu discreetly kept his fleet out of the way. The pretensions to extravagant maritime sovereignty became still more ridiculous when the officers of the fleet demanded the salute not only upon the high seas but also in the harbours and under the forts of other sovereigns where obviously the English had no claim to dominion. Certainly, the instructions to the captains differed from time to time according to the caution of the royal advisers and the strength of the force against the English ships on the particular/
particular occasion. The absurdity of the construction placed upon the salute is evidenced by the action of Charles II in sending his yacht amongst the Dutch fleet in the hope that they would not strike. Failure to give the salute would have furnished him with a popular *causus belli*, so Charles conceived, thus enabling him to carry out his scheme for an alliance with France. William III also claimed that the failure to accord the salute was a *causus belli* against France.

XV. The requiring the vail was but a pretext and a sham; the struggle was to prohibit the Dutch the North Sea and the Channel, to achieve the ruin of their fishing and their maritime carrying trade. When these objects had been attained the freedom of the seas could be safely restored. The episode of *mare clausum* was but a passing phase. It was not maritime dominion which was at stake but maritime supremacy. The basis of the success of England was laid not by insisting upon the vail but by the genius of Cromwell in creating/
creating a navy, efficient and worthy of a leading maritime power. So great an issue could not be settled in one or two brief reigns. The coming storm had cast a shadow over the closing years of Elizabeth's reign; it had not finally passed away until the close of the Napoleonic Wars. The period from the reign of Charles I to the close of the reign of James II was the period of its greatest intensity; it was the time when the claims on the part of England to territorial waters were the most pretentious and the most vague. The 'Four Seas', the British Seas, may have been claimed to extend from Norway to Spain but the true measure of their extent was the strength of the navy.

XVI. Before passing to note the juridical controversy for which this period is famous there was one incident worthy of mention in connection with the territorial waters of Scotland and which represents the maturity of the Scottish claims and also the greatest extent of waters claim-
the Scots. The exclusion of the Dutch from the fishing, as a means of asserting some show of his maritime dominion was attempted by Charles I. As in the previous reign, plans were not long in being submitted for the restriction of the foreigners and the formation of a fishing company under royal patronage. In 1626 and 1628 proposals were before the Commons for the imposition of dues on fish handled by aliens, the proceeds of the tax to be used for the provision of a navy. The proposal to form the fishing company received the personal support of the King but Scotland was to be the stumbling block to the success of the company. The fishing around the Scottish coasts and particularly at the Lewis was desired. To obtain this, it was necessary that the Scottish Estates, the Scottish Privy Council and the Scottish burghs who held fast to the perennial claims to the reserved waters, be brought over to consent to forgo in great measure the claims which they had advanced whenever opportunity offered.
offered.

XVII. It so happened that the burghs were at the time protesting against the grant to the Earl of Seaforth of a charter to erect the town of Stornoway into a royal burgh and he had committed the heinous offence of introducing the Dutch into Lewis for the fishing. The burghs, apart from their opposition to the erection of the burgh which they considered a breach of their privileges, argued that the Dutch would destroy the native fishing and monopolise the whole of the trade of the seaports as they had done elsewhere. Surely this was an unintended tribute to the skill and energy of the Dutch. The Dutch, the burgh representatives said, had committed great oppression along the coasts. This was the first check to the scheme for the company. The Town Clerk of Edinburgh, Mr John Hay, being in London to make the protest against the Seaforth Charter, the opportunity was taken by the King to ascertain the profits.
profits likely to be obtained from the buss fishing in Scotland. A glowing account appears to have been given but, Mr Hay added, no foreigners had ever been allowed to fish within the waters reserved for the natives. If this barrier was not breached, then failure seemed certain for the company. Charles therefore wrote to the Privy Council of Scotland laying his plan for the fishing company before them and pointing out the benefits to be derived therefrom could not be 'dividedly enjoyed' by any one nation in particular. The danger was too obvious. The burghs had obtained the withdrawal of the charter, an insignificant difficulty compared with the withdrawal of the proposed scheme for a fishing company which, if pursued, would mean an end to their reserved waters and the privileges they had secured by statute. The burghs attempted to avoid the issue by asking that the Flemings be restrained from fishing within the reserved waters, that the projected company be abandoned and the fishing restored to the natives. 

Parliament/
Parliament lent its support. It was pointed out to the King that the fishing reserved was the 'land fishing' within the sea lochs and the isles and a coastal belt within a double land kenning of the shore. (This was a patent extension of the previous claims). It was also stated that the proposed company would be very inconvenient to the Estates and that the fishing had always belonged to the natives without previous interruption by the Dutch. This claim to an uninterrupted prescriptive right was inconsistent with the complaints made against the Dutch in the previous reign. There was no doubt as to the burghs taking their stand upon the abortive draft Treaty of Union of 1604.

XVIII. The King resolutely addressed a note personally commending the scheme of the company to the Scottish Privy Council and requiring haste in the appointment of plenipotentiaries to deal with English commissioners.

The envoys were duly appointed by the Scots, but the instructions as preserved in the records show that they were very definitely instructed as to what they were to require/
require and what they were to resist. The substance of the instructions were that the English were to be treated as foreigners in the matter of fishing rights. The instructions claimed more than usual: the Scottish territorial waters were now held to extend to the mid line between the coasts of Scotland and the Continent. This had been a familiar rule of the Civil Law applicable to rivers and frequently mentioned in connection with claims to maritime dominion elsewhere but this is the first occasion it has been authoritatively advanced in connection with the Scottish claims. It was their swan song. The instructions claimed in that the English had no right to fish there except by virtue of the company. The sacred reserved waters within the land kenning were as sacrosanct as ever; membership of the association was not sufficient to admit the Englishman to the right of fishing there. In consideration of allowing the project of the company to proceed, the Scots claimed the right to take part in the English pilchard fishing. Detailed particulars/
particulars of the fishing areas which the Scots considered must be reserved as the minimum required for their sustenance were demanded. The burghs, although they held it unnecessary, set out their demands in detail as required. This is interesting as it is the first authoritative, detailed statement of what the Scots considered reserved for the native fishing. The following 'chambers' were claimed:

on the east coast, from St Abbs Head to Red Head in Angus, from Buchanness to Duncansby Head; on the north and west, from the Stour of Assynt to the eastmost point of Lewis then south by a line fourteen miles seawards west of the Hebrides to Bara and thence to Islay, and from Islay to the Mull of Kintyre and across to the Mull of Galloway.

The area was increased by the inclusion of the shore waters within a line drawn fourteen seaward along those parts of the coast not included in the chambers. The chambers were also increased by drawing an ideal line fourteen miles seawards and parallel to the line between the
headlands. The Orkney and Shetlands were also encircled by a line fourteen miles seawards of the outer points of the islands. The Privy Council purported to revise the details but no substantial alteration was made.

XIX. Immediately the King set about taking the Council to task. He required the boundaries to be revised and the claim truncated. The resolution of the King somewhat dismayed the burghs. They conceded much but continued the claim to the Firth of Forth, the Moray Firth with the same limits, and the waters between the Mulls of Kintyre and Galloway. A strip of water was also claimed along the coast from the Red Head to Buchanness as essential to the natives and for the preservation of the salmon. The proposals were again revised and adjusted by the Council. Charles was still dissatisfied. He took a personal part in the subsequent negotiations, browbeat the opposition by threats of ignoring the reserved waters altogether on the ground that the reservation of the waters for the fishing was essentially
a matter for the exercise of the royal prerogative. In 1632 the charter for the company was granted. The Scottish claims had been whittled down to the Firth of Forth and the Firth of Clyde. The Moray Firth Charles would not admit.

XX. Inexperience and mismanagement assisted by the depredations of the Dunkirk pirates and an active hostility on the part of the Scots towards the company brought the Association into low water and it died a lingering death. The scheme for the promotion of the ill-starred company favoured by Charles, who could brook no restraint on his royal prerogative, called forth the last ounce of strength that remained in the Scottish claim to the reservation of the fisheries in the sea lochs and the coast waters. In the negotiations the claim became definite and as clearly delimited as the King's Chambers in England. There the delimitation was desired for the purposes of neutrality and/
and concerned only strangers. In the Scottish case the purpose was for the fishery reservation; the parties affected were the subjects of Charles's other kingdom. To have admitted the claim would have imperilled the scheme on which Charles had looked with more than ordinary favour. The 'reserved waters' never reappeared in their old form. There is however no reason to suppose that the reservation was not claimed against the other 'foreigners'. At any rate the Dutch appear to have been as anxious as ever to obtain some concession which would enable them to fish without interruption in the Scottish Coastal waters. It would seem to be the case that Charles II intended some grant to the Dutch which they would have prized; at least General Monk hinted that this was the intention of the King. If no grant was made then, it would seem certain that the citizens of Bruges were later granted a charter under the Great Seal to enable them to fish in any part of the Scottish waters. The right was certainly exercised.
exercised until 1848 when the government of the day held that the charter was spurious. At that date the object was to exclude the foreigner from the waters within three miles from the shore (22).
CHAPTER VI.

The juridical controversy and Welwod.

I. The controversy as to the freedom of the seas which raged throughout the period covered by the preceding chapter was justly famous, for not only was every maritime State interested in the discussion but also the leading jurists took some part in the wordy warfare. International Law emerged as a system (1). While the principal theme of the controversy was the freedom of the seas, the publication of De Jure Belli ac Pacis of Grotius in 1625, covering the whole ambit of international obligation as it was then understood, gave an impetus to the study of International Law as a systematised subject and not as a series of discrete heads. In addition, writers were now appealing to reason and to conscience; a moral basis was now built into the foundation of the new science. A comparisión between/
between the former attitude and that brought about by

Grotius may be obtained by reference to the arguments of

Grotius in his *Mare Liberum* and those of Welwod in his

*Abridgement*. Both touched upon the fisheries. Welwod

confines his arguments to the recognised authorities of

Scripture, the Civil Law, and the practice of princes. His

arguments are subtle if not always convincing. Grotius,

on the other hand, probably achieved more to his purpose

when he branded the anticipated attempts of James I to

levy dues from the poor fishermen as 'insanely cupid'.

It is probably not too much to say that no writer on

International Law has contributed as much to the welfare

of the Commonwealth of Nations as Grotius. His work has

been criticised and has aroused a controversy, the keenest

ever known in international law. That his work has been

so much canvassed is proof that it stimulated thought on

the subject. In *De Jure Belli ac Pacis* Grotius left a

monumental/
monumental work which posterity admires.

"The first systematic treatise (De \textit{Jure Belli ac Pacis}) had its birth in a court of justice; its principles are developed like the principles of law; they are studied in the universities of the world; they are applied in the chancellaries, in municipal courts of justice, and in our day an international court of justice has been established to apply them to disputes between States in the royal residence of the country of which Grotius was and remains one of its chiefest glories". (2)

II. If, however, attention be directed to the subject of the freedom of the seas, it will be observed how much the controversialists were enslaved to the views of their State. To this rule \textit{Sir Philip Meadows} would appear to have been an exception. The \textit{Mare Liberum} of Grotius was directed ostensibly to assist the Dutch against the Portugese claim to the maritime and commercial monopoly in the Far East. Possibly the reference to the fisheries was added as an after thought to meet the possible trouble with/
with England. Selden, the principal opponent of Grotius, wrote at the behest of Charles I; the Venetians defended their sovereignty on the Adriatic, and Welwod, the 'ingenious Scotch lawyer', argued in defence of the Scottish reservation of the coastal fisheries. It was small wonder that some of the arguments should be unconvincing and that the facts should be distorted to serve the purpose in hand. Nor was there any doubt as to the value and importance attached to *Mare Clausum* and *Mare Liberum* by the respective governments of England and Holland. The arguments culled from *Mare Liberum* were frequently on the lips of the Dutch envoys and Charles I ordered a copy of Selden's *Mare Clausum* to be preserved in the archives of the courts (3).

III. Both Selden and Grotius had their camp followers and there were distinguished writers amongst them as well as many whose name did no live for evermore. But if the essay/
essay of Bynkershoek, De Dominio Maris Dissertatio, a most impartial and persuasive work, is added to Mare Liberum. There is nothing fresh to be said for that side of the controversy: Mare Clausum contains all that could be advanced on the other. Unfortunately for Selden, Mare Clausum was not to become the permanent policy of Britain. Claims to extensive maritime dominion were tacitly dropped when the competition by the other States eased. It was a 'battle of books' in which the protagonists ranged themselves under their national banners.

IV. Apart from the short period when Cromwell effected a temporary union of Scotland and England, Scotland was a sovereign state although both countries owed allegiance to the same crowned head. The quarrel with the Dutch was essentially between England and Holland and, apart from the fisheries, Scotland had comparatively little interest in the maritime issues. Interruption of the sea borne trade/
trade, inconvenience and no great distinction were the lot of Scotland. William Weiwod was to bring some distinction to his country in the juridical controversy. Weiwod was well suited to play the part in presenting the arguments in favour of the Scottish reservation of the coastal fisheries. As Professor of Civil Law at St Andrews University, it probably fell to him to touch upon the Law of Nations in so far as it was included in the syllabus of the subjects offered at the University. At the same time he held an office in the Church which would bring him into contact with the seafaring population of the burgh (4). To this intimacy with the seafaring may be attributed Weiwod's first essay into the region of mercantile marine law, the Sea Lawe of Scotland, shortly gathered and plainly dressit for the reddy use of seafaring men, and published in 1590. It was an admirable, unpertentitious, little work of considerable value to those for whom it was intended, viz., merchant, master and mariner. The book nowhere touches/
touches upon the Law of Nations; its purpose did not require it.

V. A more ambitious book, the *Abridgement of All Sea Lawes*, followed in 1613, 'to mende a weake piece of labour', his *Sea Lawes of Scotland*. The book is really a compendium of the maritime laws and customs usually recognised by and affecting merchants and mariners engaged in foreign trade. In addition there are snippets from the Civil Law dealing with the sea and a chapter dealing with public or state ships. The most important chapter is the twentyseventh which contains the reply to *Mare Liberum*. The whole is wonderfully condensed. Welwod may have intended to serve two purposes with his new book, (a) to extend the usefulness of his former work by giving a summary of the laws and customs with which the mariner engaged in overseas trade ought to have been familiar, and (b) to direct the attention of the authorities and the people generally to the attack launched in *Mare Liberum* against their cherished reserved fisheries.
fisheries. It is in the second purpose that we are here most concerned. The dedicatory epistle discloses that Welwod himself had no doubt that this was the chief interest in his book. Strangers should be 'stayed from scarring, scattring, and breaking the shoals of our fishes; namely upon our coasts of Scotland'. That the book was written in English shows that it was intended for popular circulation in England and Scotland. It was dedicated not only to the Duke of Lennox, the Admiral of Scotland, but also to the admirals of England. It was probably the consciousness of the inadequacy of this reply to *Mare Liberum* that constrained Welwod to publish his *De Dominio Maris* two years later and in Latin, the appropriate medium to reach continental scholars.

VI. Apart from the twentyseventh chapter the book does not profess to deal with the Law of Nations. There is, however, one paragraph of passing interest as to whether
a naval prize, taken into the port or harbour of a neutral, should be released. Welwod, founding upon the Jus Postlimii of the Romans, argues that it should. The practice appears to have been recognised, for Gentilis at the time was arguing in the English Prize Courts that the neutral waters extended much beyond the limits of the King's Chambers as declared in the proclamation of James I in 1605. Such an extension would have been favourable to the Spanish ships seeking to escape the Dutch. Welwod merely mentions 'ports or roads' as the King's jurisdiction for this purpose. Probably he implied the vicinity of the ports. As already noted the King's franchise extended over the Firth of Forth as far as the Isle of May (5). Welwod wrote in very general terms and probably included the Firth as a 'road' as distinct from the open sea.

VII. It is in the twentyseventh chapter that Welwod rises to his height. It is avowedly a repudiation of the arguments/
arguments of Grotius. Welwod had just read a 'learned but subtle treatise (incerto auctore)' containing in effect a 'plaine proclamation of liberty common to all nations, to fish indifferently on all kinds of seas, and consequently a turning of undoubted proprieties to a community...'.

Welwod found no difficulty in enlisting the aid of Scripture and the Civil Law to confound the arguments of Grotius. At this point Welwod would appear to have been in general agreement with Grotius as to the freedom of the high seas. The difficulty was where did the territorial waters end and the high seas begin. "And therefore I would meet him (Grotius) with his deserved courtesie;' says Welwod, 'even to proclaime Mare Liberum also; I mean that part of the maine sea or Great Ocean, which is farre removed from the just and due bounds above mentioned, properly pertaining to the nearest lands of every Nation"
VIII. Welwod was a pioneer. Thomas Craig, his contemporary and one of the foremost of the Scottish institutional writers in his Jus Feudale, affords confirmation of the views of Welwod and of the scanty evidence and support to be derived from the municipal law. Not the least valuable feature of Craig's work was that he took a very wide view of the objects and purposes of law and illustrated his points by comparison with the practice of other States. He saw Law as a system evolved to meet the needs of the State and its civilisation. He recognised the handicaps under which his native State laboured. He was at one with Welwod in that respect. Navigation ought to be unimpeded, says Craig, but the oceans are by the practice of princes appropriated to the nearest mainland.

"Jurisdiction in the case of any offence committed at sea thus belongs to the king of the territory most nearly adjoining, who reckons that part of the sea his own. It must also be admitted that a particular State may prescriptively acquire right to a/
a particular portion of the sea; Venice for example claims the whole of the Adriatic, although it lies between the territories of other States.

SEA-FISHINGS.—The fisheries in those parts of the sea adjoining the coast belong without doubt to the country to which the coast belongs. We are only too familiar with the injury done to our sea fisheries by the Belgian fishermen who ply their trade round our islands. While it is true that the fishing in the sea is free to all, yet are the sea fisheries subject to prescriptively acquired rights and become open or restricted according to the sanction of customary possession" (6).

According to Craig, therefore, the Scottish fisheries were not restricted or reserved for the natives, since the Dutch also enjoyed them under circumstances which cause for objection by those who might but were unable to effectively object. The jurisdiction exercised by the Scottish sovereign has already been shown to have been meagre, not exclusive, and overshadowed by a personal as distinct from a territorial jurisdiction. Both Welwod and Craig sought to/
to apply continental practices and principles to the waters adjacent to the Scottish coasts. In this they had not very effective and immediate support. At the same time they may and probably did influence the Estates and the Privy Council. The maturity and definition which the Scottish claims to the reservation of the fisheries later attained were doubtless fostered by their writings.

IX. Two years later Welwod extended his twenty-seventh chapter of the Abridgement. He did not claim the De Dominio Maris to be a separate work, but, substantially, it was such. It was a more methodical presentation of his arguments. He takes Grotius to task on the fluidity of the sea and argues that man had attained sufficient knowledge to mark off limits thereon with ideal lines. On the point of the freedom of fishing, Welwod takes his stand on the belief that it is possible to exhaust the fisheries. Then there is the age long controversy as to the status of the sea under the/
the Civil Law, whether it was communis or res publica,
and according to the view taken whether it could be
appropriated. Such discussions based upon dicta inapplic-
able to the circumstances of the case could not lead to any
useful purpose. As to the limit of the Scottish reserved
waters Welwod is definite. The Dutch had agreed to keep
off at least eighty miles from the Scottish coasts and,
if carried into territorial waters by contrary wind they
had to pay a tax at Aberdeen; a castle had been built
there for that purpose. Welwod was here relying upon
tradition: tradition was very misleading where the burgh
privileges were concerned. There is probably little in
the story. The eighty miles limit was another version of
the provisions attributed to the treaties of 1550 and 1594;
storm stressed ships were usually favourably treated, and
having paid the harbour dues once, they were not called
upon to pay a second time if forced to return by stress of
weather. However, Welwod (and Craig) could say from first
hand/
hand knowledge that the Dutch fished within sight of the shore and that the Scottish fishermen were grieved by the proceeding.

X. Welwod did not affect the authority of Grotius. That was the task for Selden. Welwod could speak for the Scottish claims to the reserved fisheries and Selden could take the material for incorporation into his chapter dealing with Scotland in his *Mare Clausum*. Welwod did not have the erudition, nor the facilities for access to the records upon which the English claim to maritime dominion was to be based; nor did he have the favour of a king.

Nevertheless, the name of William Welwod cannot be omitted from any list of those taking part in the controversy. To Welwod belongs the distinction of publishing in collected form the national laws of Scotland relating to maritime adventure; he was the first of a long line of writers to challenge the views of Grotius and he was the only one...
against whom Grotius prepared a reply (7).
LETTER of ERIC, XIV. King of Sweden, etc, to MARY, Queen of Scots, relating to a recent practice of certain merchants, including some of the Queen's subjects, to exercise a right of navigation to parts of Muscovy subject to the King contrary to his interdict and the Emperor's. Letter dated Stockholm, 2nd October 1562.

(G.R. H. - State Papers Norway and Denmark, No.6.)

ERICUS Decimus quartus Dei gratia Suecorum, Gothorum, Wandalorumque Rex Serinissimae Principi, Dominae Mariae Scotiae Reginae, Sorori et consanguineae charissimae, Salutem et omni bonum nec non mutui amoris incrementum. Serinissima Princps, volumus pro mutua inter nos amicitia Serinissimam Vestram colare, mercatores quosdam annis iam hisce proxime elapsis navigationem contra veterem consuetudinem, et civitatum aliarum privilegia ad loca Muscovitidis subiecta exercere illisque omnis opus merces bellice apparatus apportare caepisse. Nos autem cum navigationem illam nostris subditis plurimum damno futuram prospeceremus interdicendam duximus, quod et superi oris proxima hieme omnibus illis significavimus, qui ad mare istud Germanicum sive Sarmaticum habitant eoque navigaturos potissimum arbitrabamus. Sic uti eandem navigationem Imperii Romani Caesar pariter nocituram Orbi Christiano oum intelligerit, non ita pridem etiam prohibuerat contra quam nostram et Caesareae/
Caesareae Serinitatis prohibitionem aliqui tamen pertinari avaritia induci navigationem eandem attentare adhuc nihil-ominus ausi sunt qui a nostris in mare ab id Thalassiarchis et ex invitoribus aestate haec elapsa intercepti sunt, quorum in numero aliqui ex Serinitatis Vestrae gentis hominibus etiam fuisse memorantur virum illos pro ea quae nobiscum, Serinitatis Vestrae, intercedit amicitia, suis cum bonis impune hoc tempore ut abire nostris sinerent mandavimus. Caeterum cum ex officio teneri nos sciamus, subditorum nostrorum commodo et utilitate ut consulamus, et illorum detrimenta seu incommoda tempesta quoque avertamus et quoad fieri a nobis queat propulsemus nobis preterea ius aepotestas sit, non minus in mare, quod ad nostrum spectat dominium, quam in terra, nobis nostrisque incommodum et utilitatem, libere ordinandi ac disponendi. Accedit quod nostris Revaliae nunc subditis polliciti simus, sua illis privilegia vos conservatos esse inter quae hoc vel precipuum ab Imperatoribus et regibus olim illis concessum continentur, ne ullis mercatoribus potestas sit ultra Revaliam et Wiburgum illo in mari suis cum mercibus navigandi. Sed quotquot propter Muscoviticas mercies aliunde ad loca illa navigaturi veniant, suas Revaliae vel Wiburgi naves exonerari et aliiis ibidem mercibus ex Muscovia illuc adventis vicissim onerari facere teneantur quibus privilegiis recens et inusitata haec navigatio nunc quasi ex diametro pugnare videtur. Idcirco denuo apud nos conclusimus, factum super haec re priuscum a nobis tum a sani imperii Caesare/
Caesare prohibitionem ratam omnino nos velle prestare, et nullo pacto permettere, ut impune quis ultra Revaliam vel Wiburgum eo in mari naviget. Ut igitur Serinissimae Vestrae subditis cuius nos amicitiam plurimi facimus tempestive adhuc hac re caveatur ne viz. interdicti huius ignorance in aliquod postea incurrant damnum vel detrimentum, sed navigationem ad locailla prohibita omnino vitandum soiant, duximus. Serinitati hoc Vestrae litteris hisce presentibus nunc significandum esse, petimusque per amice ut ultra Revaliam et Wiburgum navigationis in hoc mari prohibitionem a nobis factam omnibus iis denunciari publicariique facere, Vestra Serenissima non gravetur qui eiusdem Vestrae Serinitatis in Regno Muscovicais ob mercos in mare istud Sarmaticum navigare in animum indicat ne si contra interdictum alterius progrediantur a nostris eo in mari tunc exhibitoribus intercipiantur damnumque patiantur. Et ne occasionem de nobis conquerrendi ullus habeat quod viz. mercaturae illis in locis exercendae commoda per hoc interdictum intercipere studeamus, conclusum est nuper in pactis foedere quod cum Mosco ad plurimos annos duraturum pepigimus ut suas eius subditi mercis iuxta vetarum consuetudinem Revaliam et Wiburgum libere vehant ibidemque illas dividam et nostris Revaliae et Wiburgi habitantibus vicissim integrum sit ad portum Narven et loca vicinia proficisci et inde ad sua mercos reportare, et mercatoribus undeunque ad eos venientibus veteri more distrahere. Proinde poterunt et minore cum periculo et tanto fere/
fere cum fructu ac emolumento Revaliam vel Wiburgum navigare qui merces querunt Muscoviticas quam si Narven ad aliave Muscovitis loca subjecta navigarent propter ea quod et navigation Revaliam et Wiburgum usque multo brevior sit, et portus minus difficilis vel periculosus quam qui est Narve quod Serinitatis Vestrae subditis significari per amice cupimus Serinissima Principis soror et Consanguinea charissima, cupimus a Deo Opf. Max. ut eandem Vestrae Serinitatis ad sui suorumque salute perpetua prosperitate conservet. Datum in Regia nostra urbe Stockolmia 22 Octobris Anno Christi MDLXII

VESTER BONUS FRATER et CONSANGUINEUS

ERICUS

Ad mandatum Regiae

Serinissimae Principi Dominae Mariae Scotiae
Reginae Sorori et consanguineae Nostrae Charissimae
APPENDIX B.

Extracts from the contract between Patrick, Earl of Orkney and the Commissioners for the fishers from the burghs of Anstruther, Crail, and Pittenweem.

(Recorded in the Register of Deeds, Vol. 46, fol. 33 in H.M. General Register House, Edinburgh.)

September 21st, 1594, Edinburgh.

...... The noble lord "for avoiding and stenching all controversys, pleyis and questionis that hes arissen or may arryse heirefter betwixt the saidis parteis and thair successouris and to the effect that the inhabitantis of the saidis townes and thair successouris may peaceablie use and exerce thair traffick of fisching within the saidis countreyis for payment of the dueteis eftir specifeit peaceablie in all tywe comynge the said nobill lord... grantis full licence, libertie, freedom, facultie and power to the inhabitantis and indwelleres of the saidis townes of Craill, Anstrutheris and Pittenweem and thair successouris that shall hapin to fische within the saidis countreyis of Urknay and Zeitland... use thair traffick of fisching within the same, big fishearis houses for the making, packing, drying and wynning of fische that they sall hapin to slay".

The burghs were to be able to buy ale and pass and repass but were not allowed to fish with "greit lyneis within the/
the heidlandis of the saidis cuntrieys... and sall
nawayes slay small fishe within the sound, and wrayis
thairof bot sa mony as may serve to be thair bait
resonableie in tyme cuming".

They were to do no injury to the inhabitants or their
stock and do no "wrang, injurie or oppressioum to ony
strangerris being within the saidis cuntrieis as English-
men, Doucemen or utheris, or troubill thair schippis or
guidis in ony sort by ordour of law;

For the quhilkis causis the inhabitants of the sail
townes respective and thair sucessouris that sall happen
to fishe within the saidis cuntrieys of Orkney and
Zeitland or ony part thairof sall pay to the said nobill
Lord yeirlie the dueteis efter specifeit"

Then follow a scale of charges for fishing with greit
lines, ground leave within the floodmark and ground leave
above the flood mark.
APPENDIX C.

(a)

Extract from the Treaty of Binche, 1541.
(Dumont, Vol. IV, 208, 10th February 1540/41.)

... et quant du dernier Article de la Commission du Sr. de Limdy, Ambassadeur, concernant le fait de la Pescherie, ladite Dame Reine veuille par bonne & meure deliberation proceder entelles & semblables affaires, se sera informer sur le contenu dudit Article, pour après en ordonner comme il sera trouve être de raison, equité & justice d'une part & l'autre pour la conservation de la Paix & Amitié mutuelle desdits Sieurs ... ils seront delibérer les lettres pertinentes, le tout en dedans l'espace de six mois prochain après la datte de celles.

(b)

Extract from the Treaty of Binche - 1550.

The Latin version, in full, is given in Dumont, Vol. IV under the date 15th December, 1550)

ITEM. If any damage or hurt should be done by the tributaries, vassals, and subjects of the one party to the countries, kingdoms, vassals, tributaries or subjects of the other, in their persons, or goods, on land or on sea, in that case, that party shall be bound to compel the guilty to reparation and restitution with effect to the party lesed; and/
and that conform to a certain contract and agreement betwix't Mary, Queen of Hungary and Bohemia and Governess of the Low Countries for His Imperial Majesty, and John Campbell, Ambassador of King James, lately deceased, anno 1541, and afterwards confirmed by the said King, and both parties should be at pains that the pirates of whatsoever wholly nation or kind should be extirpate from the sea and the shores of the kingdom of either party, nor should they be received upon any terms into the lands or bounds of either party; and they should be bound to keep and defend the islands and districts of their jurisdiction against the incursion of whatever robbers or pirates by whom the subjects could any manner of way be damaged in their trading, navigation, and fishing. And those who presume to turn pirates, having no certain dwelling but betake the selves to desert islands or other unknown places, by whom the subjects of either prince should receive damage, either party at the request of the other, should be bound to betake themselves to common arms, and should not leave off until those taken had suffered condign punishment. And they should proceed in the same manner against the sustainers and favourers, if any such, were to be found in either of the Princes dominions; and as to the number and quality of ships to be furnished by the said princes when necessity required, should be treated and agreed to, and the fishing and the free use of the sea ought to be duly and sincerely observed, conform to the said treaty of 19th February, 1541........
APPENDIX D.

Act for the 'Annexation of the property to the Crown that was nocht annexit before' (Scots Statutes, 1593. c. 32. IV 28(a)).

Oure Souerane Lord and Estates of the present Parliament, Considering the dailie increase of his highness's chargis and expensis and diminution of his highness's rents of his property and commodities through unprofitable dispositions made thairof in tymbe began Thairof thinks expedient that the lands and lordships underwritten be annexed to the Crown and presently annexes to the Crown the same thereto following the example of his predecessors for the honourable support of his estate.... The assise of herring in the east and west seas.....

Appendix E.

Act of 1573 Jac. VI. c. 7. Ill. 83.

Anent the slauchter of Hering and quhyte fische and using of the samyn thairefter.

ITEM. Forasmekle as it is trewlie compleit how the hail slayaris of all kinde of Fisches within the Realme not regarding the Actis maid be our Souerane Lordis derrest Predecessouris of befoir Quhilk is that quhen Hering and Quhite Fische is slayne they aucht to bring the samyn to the
the next adjacent Burrowis and Townis quhair the
persounis slayaris thairof dwellis to the effect that our
Souverane Lordis lieges may be first servit and gif
be aboundance occurrit that thay might/saltit transportit
be fre Burgessis. Throw none doing of the quhilk oure Sou-
erane Lord is greitly defraudit of his Customes and his
hienes liegis wantis the frute of the Sey appointit be
God for thair nurishment and the Burgesses and fremen
of Burrowis disappointed of thair traffique and commod-
itie. THAIRFOLK our Souerane Lord with awise and consent
of my Lord Regentis grace the thre Estates and haill
bodie of the present Parliament Ordainis that all
maner of Fischeris that occupyes the Sey and utheris
persounis quhatsumever that happenis to slay Hering or
quhite fische upon the Coist or within the Ilis or out-
with the samen within the Fyrthis Bring thame to fre
Portis thair to be sauld commounlie to all oure Souerane
Lordis liegis and the rest to fre men quhairby his
Maiestes Customes be not defraudit and his hienes
liegis not frustrat of the commoditie appointit to thame
be God under pane ......."
PART I.

BIBLIOGRAPHY and ABBREVIATIONS.

A.

Unedited documents.

G.R.H.

Treaties and correspondence in H. M. General Register House, Edinburgh, relating to (a) Norway, Sweden and Denmark; (b) England, France, and the Netherlands.

ADIRRALTY COURT BOOK for the years 1551 - 1562, preserved in H. M. General Register House, Edinburgh. (Acta Curiae Admiralitatis Scotiae)

MSS. in Edinburgh University Library.

Sea Lawes of the Hanse Towns. 1597.

Maritime Lawes of Charles V. Roman Empeer, 1551.

MSS. in National Library, Edinburgh.


Admiralty Court Papers. 1751-1769. 29:2:12.


Mr Bedford's Book of ye Admiralty. Dedicated to Sir Leoline Jenkins.

Admiralitatis Collectio. 28:4:6 (Part of this is based with full acknowledgment upon Welwod's De Dominio Maris.)

Grant of Right to the City of Bruges to fish on the Scottish shore, dated 29th September, 1666. 25:3:4. S.82. 113-115.

Treatise on the Jurisdiction of the Admiralty of France. 29:2:12.

Some decisions of the Lords of Session in Maritime Cases.

Decisions of the Court of Admiralty from 5th June, 1673. 6:2:1.
Tractatus/
B. Edited Primary Sources.

Scottish.


P.C.R.S. Records of the Privy Council of Scotland.

S.P. Calendar of State Papers relating to Scotland.


English.


S.P. Calendar of State Papers.

C. Records printed other than under the authority of the Crown.


Edinburgh Burgh Records. do.


Navy Records Society. See Maraden and Scots Navy.

D. SECONDARY SOURCES.
D.

SECONDARY SOURCES.


Anderson (Commerce) An Historical and Chronological deduction of the origin of Commerce from the earliest accounts to the present time. London. 1764.
(This volume contains a reprint of Sir Philip Me(a)dow's Observations concerning the Dominion and Sovereignty of the Sea)

Baker, Sir Sherstor The Office of Vice Admiral of the Coast. (Privately printed) London. 1884.


Craig/
Craig, Thomas

**De Unione Regnorum.**
Published by the Scottish Text Society.

**Jus Feudale.**
Translation by Lord Clyde, President of the Court of Session, Edinburgh. 1934.

Davidson and Gray

The Scottish Staple at Veere,
London. 1909.

Dumont -

See Foedera

Erskine, John
Principles of the Law of Scotland,

Fenn, Percy T.
The Origin of the Right of Fishing in Territorial Waters.
Cambridge. 1926.

Fischer, Th. A.
The Scots in Germany.
Edinburgh. 1902.

Fleming, Arnold J.
Flemish Influence in Britain
Glasgow. 1930.

Fulton, Thomas W.
The Sovereignty of the Sea.
Edinburgh. 1911.

Gentili, Alberico

**Hispanicae Advocationis Libri Duo.**
New York. 1921.

Gibbon, Edward
The History of the Decline and Fall of the Roman Empire.

Glotz, Gustave,
Ancient Greece at Work.
Grant, I. F.
The Social and Economic Development of Scotland before 1603.
Edinburgh. 1930.

Grocius, Hugo.
Mare Liberum sive de jure quod Batavis competit ad
Indicam Commercio Dissertatio. 1608.
Translation with a revision of the Latin Text of
1633. Published by the Carnegie Endowment for

Published by the Carnegie Institution of Washington,
for the Carnegie Endowment for International Peace,
1925.

Hall, William E.
International Law, 8th edn.

Hautefeuille, L.B.
Histoire des origines des progres et des variations
du Droit Maritime International.
Paris. 1858.

Holdsworth, W.S.
A History of English Law.

Inch, G.P.
Scottish Colonial Schemes, 1620-1686.
Glasgow, 1922.

Justice, Alexander.
A General Treatise of the Dominion and Laws of
the Sea.
London. 1705.

Lawrie, Sir Archibald C.
Early Scottish Charters prior to A.D. 1153.
Glasgow 1905.

Maitland, William
The History of Edinburgh.
Edinburgh 1753.

Marsden,

Me(ad)ows, Sir P. See Anderson(Commerce)

Maine, Sir Henry


Mitchell, John M.
The Herring. Its natural history and national importance. Edinburgh 1854.

Motley, John L.
History of the United Netherlands from the Death of William, the Silent, to the Twelve Years' Truce. London. 1876.

The French edition had a map which is the most valuable portion of the book. (Edinburgh University Library)

Nys, Ernest.
Etudes des Droit international et de Droit politique 2me ser. 1901.

Pardessus, J.M.
Us et coutumes de la mer. Paris 1847.

Phillimore, Sir Robert

Phillipson, Coleman
The International Law and Customs of Ancient Greece and Rome. London. 1911.

Rooseboom, M.B.

Scots Navy.
The Old Scots Navy from 1689 to 1710. Navy Records Society. 1912.

Select Pleas.
Select Pleas.
Select Pleas of the Admiralty.
Selden Society publications Vol. VI. 1892.

Selden,
Mare Clausum seu De Dominio Maris.
London. 1635.

Smith, Simon (Agent of the Royal Fishery)
A true narrative of the Royal Fishings
of Great Britain and Ireland
London 1641.

Spottiswoode,
History of the Church of Scotland.
London. 1645.

Stair, James (Viscount)
Institutions of the Law of Scotland.
3rd edn.

Thorkelin, G. J.
Diplomatarum Arna Magnaenum exhibens Monumenta
Diplomatica. Leipzig 1786

Twiss, Sir Travers
The Black Book of the Admiralty;
Edited by Sir Travers Twiss.
Rolls Series. London 1871.

Walker, T.A.
Cambridge. 1899.

Welwod, William
De Dominio Maris Juribusque ad Dominium
 Praecipue Spectantibus Assertio Brevi
 et Methodica
London 1615.

Abridgement. An abridgement of all Sea Lawes.
London. 1636 edn.

Sea Law
/The Sea Law of Scotland.
Edited by T. Callendar Wade.
Scottish Text Society, Edinburgh 1932.

Wheaton, Henry
New York. 1845.
Notes.

Chapter I.

Section I.

(1) Hall. 178 s.40
(2) Hautefeuille Tit. I c. 2.
(3) Nys. 260 et seq. Under the title of 'Une Bataille des livres', Nys has given a pithy account of the controversy and the contestants.

Section II.

(1) Walker. 43
(2) Walker 43. s. 27.
(4) Walker 39
(5) Wheaton 14. enumerates five points dealt with by Amphictyonic Council which constituted the rudiments of Public Law
(6) Walker 42 & 43.
(7) Selden I. c.9. 10 &11. See also Justice, 40 et seq.
(8) Walker 51. s. 33.
(9) Glotz. 113.
(10) Walker 58 s. 37
(12) Maine. C. IV. 108 and Note p. 120 & 121
(13) do. c. IV. 108. Cambridge Medieval History V. 120.
(14) Cambridge Medieval History V. 212
(15)/
(15) Maine c. IV. 108.

(16) Cambridge Medieval History. V. 121 & VI. Intro. x & xi.

(17) Cambridge Medieval History. V. 226 as to the part played by the Italian seaports in the suppression of piracy.

(18) Maine. c. IV. 108,

Territorial sovereignty - the view which connects sovereignty with the possession of a limited portion of the earth's surface - was distinctly an offshoot, though a tardy one, of feudalism'.

(It is not to be supposed that the medieval lawyers were incapable of distinguishing between territorial sovereignty and feudal overlordship. Pollock's Note on page 122)

(19) Cambridge Medieval History. V. 328 et seq. Also VI. 474 and VII. 60.

(20) Justice. 72

(21) Justice. 76. contains a resume of the arguments used in this case and also the evidence in favour of Venice. He omits mention of the opposition with which Venice had to contend when making her supremacy effective on the Adriatic.

(Cambridge Medieval History VII. 60)
Section III.

(1) Cambridge Medieval History. vii. 216.

(2) do. vi. 130 and for the Hanseatic League generally, Vol. vii. c.VIII.

(3) do. vi. 391.

(4) do. vi 385 et seq.

(5) do. vi. 129 and also Thorkelin ii, III and 114. "... quo a telonii solutione, quae in capturam halecium fieri solet, eximuntur, donec pecunia a Norwegiis dictis civitatibus secundum foedum Calmoriae factum debita numerata fuerit".

"Teloneum or tonlieu confiscated for the use of the lord or territorial ruler part of all the merchandise transported by land or water was a feudal due.... a manifestation of the primitive economy of the locality" Camb. Med. Hist. VI. 515.

(6) Thorkelin ii. 131. "quibus thelonum quinque denariorum sterlini pro singulis alecium lastis solvi jubet"

Examples of the safe conducts to the Hanse towns are given on page 147 of Thorkelin (1294).

(7) Rot. Earl. IV. 79(b). It would appear from Foedera ii. 688 that Edward I was pleased to allow fishermen to come from Holland, Zealand and Friesland to Yarmouth to fish and prohibited the inhabitants from molesting them - a striking contrast to the conditions attached to the privileges accorded to the Englishmen in Norway.

(8) Foedera ix. 381

(9) db xii 381

(10) S.P. Dom. Eliz. clxxx 26

(11) Camden 225

(12) Appendix A.

(13) Fulton 4

(14) Samuel 82.
Chapter II.

(1) Craig 97  
Erskine 4  
Stair 4.1. 16.

(2) As to the ancient maritime codes see:  
Holdsworth i. 526-530  
Wheaton 106  
Walker 116

For a collection of the ancient codes see:  
Pardessus Us et coutumes de la mer.

There are several copies in mss. of these codes, mostly fragments, in the University and the National Libraries, Edinburgh. The handwriting is that of the late seventeenth century testifying to an increasing interest in the subject at that time.

(3) Cambridge Medieval History v. 208

(4) C.R.B. i. 21, 40, 74, and 388  
Grant 130-1  
Davidson and Gray ch. II.

(5) P.C.R.S. iv. 169, 231  
C.R.B. i. 16.

The political alliance with France also enabled the burghs to claim exemption from various imposts in that country.

(6) Edinburgh Burch Records i. 32.  
C.R.B. i. 76  
Fleming i. 11, 122, 127

(7) Scots Statutes 1430 c.15, ii.9.  
Bisset 2 Rolments, ii. 206

(8) Welwood. Sea Law Tit. 15

(9) The jurisdiction of the Admiralty Court was regulated in large measure by custom but was subordinated by statute to the Court of Session.  
Scots Stats. 1554, II 449 (b), 1592, c.79, iii.580  
1609, c.22. iv. 440

(10) Insh, Intro.

(11) Fischer 31  
(12) Yair 349  
(13) Rooseboom 236

(14)/
(14) Scots Statutes i. Preface by Cosmo Innes.

(15) Anderson i.498

(16) Davidson and Gray 47

(17) Chambers i. 186

(18) P.C.R.S. iv. 469 and 472

(19) For a general resume of the history of the Scottish Navy in this early period see Introduction to the 'Old Scots Navy' (Navy Records Society)

(20) P.C.R.S. i. 39

Fulton 70

(21) A number of remonstances passed about this time (1540-50). G.R.H. 11. q.4. 12. q. 7 &8.

(22) G.R.H. Letter from Christian III, King of Denmark, etc to Mary, Queen of Scots. Dated 24th May 1547. Letter from the Emperor to Arran as Governor to the Queen. 12. q. 8.

(23) C.R.B. i.27, 28, & 242. Several burghs declined to meet their obligations. ib. 286 Chambers. i. 176.

(24).EC.R.S. i. 104

(25) P.C.R.S. iv. 195.

(26) C.R.B.ii, 568. S.P. (Spanish) x. 197

See Appendix C.

(27) Acts of the Lords of Council - 14th July 1484. p.93

(28) do. - 23rd Feb. 1535/36 p. 450

(29) do. - 14th Jan. 1484 p.93

(30) See Appendix B. This is the earliest known charter in feudal form in connection with the lands in Orkney.

Chapter III./
Chapter III.

(1) Fenn 57

(2) Scots Statutes 1471, ii 102(b)

(3) The odal or udal tenure of land was formerly prevalent in Orkney and was recognised in the Law of Scotland. 1633, ch. 42. V.53 a.b.

(4) Maitland's History. 145. The Charter as given in Maitland is printed in Scots Statutes. See Lawrie's Select Charters-117 & 385. Fulton 59. While Fulton omits reference to the Renfrew instance notes and relies upon the grant in respect of the May Island fisheries. He assumes this to prove the early appropriation of the coastal fisheries. Anderson i. 66. has noted that St Columba claimed exclusive sealing rights probably at Coll. Monasteries frequently established fish preserves.

(5) Fenn 54

(6) Leges Quattuor Burgorum c.9. i. 334 (Scots Statutes) but was apparently altered by Stat. Gild. (c 26 i 435)

(7) Assise of David (Scots Statutes) c. 6. i. 668

(8) Scots Statutes 1424 c. 22.1.6

(9) Register of Privy Seal xiv. 83.

(10) Orkney. 221. As to the precise meaning which came to be attached to the feudal grant of fishing in fresh and salt water, See Stair, ii.3.69. The remarks of Stair may be taken to represent an authoritative view of the reservation of fisheries at a later date. 'Fishing in fresh and salt water carries with it salmon fishing rights in the seashore where the lands are erected into a barony or a dignity.... It is more dubious what the meaning of the right of fishing in salt water can import seeing there are common freedoms of every nation to fish in the sea and therefore needs no special concession from the King or other superior'.

(11) See Appendix B.

(12) P.C.R.S.x. 248.

(13) See para. xi as to the treaties of 1541 and 1550.
(14) Scots Stats.,
1471 c.10. ii.100
1493 c.20 ii 235
1505 c. 14 ii 242
C.E.R. ii 303
(15) do. 1487 c.18. 1483. c.15. 24. ii.179, 183, 237,
and 1535 c.18 ii 317
The Act of 1487 refers also to merchandise
See also 1493 c.15. 234 re sale of flour
(16) Fulton 83 & 242
C. E. R. ii 300 & 313.
(17) Scots Stats 1488 c.12. ii 209
(18) See Appendix C.

(18) See (26) Chap. II.
(20) Morley iv. 553-6 and 131. et seq.
(21) See Appendix D
(22) Prevention of the export of goods:
E.C.E.S. iv. 74, 104, 116, 123, 159, 181, 213,
365, 412, 599.
Licences and price fixing:
E.R.E. I. 555.

Emigration:
E.C.E.S. iv. 148.
(24) E.C.E.S. i. 482
(25) E.C.E.S. i. 481.
(26) Scots Statutes 1573. c.7. iii.83 ratified
1579. c.24. iii. 146
(27)
(27) Scots Statutes 1579 c.24, iii 146

(28) P.C.R.S. iv 121-5,
C.R.R. 402. Attempts were made to settle Lewis in 1599, 1605 and 1608. The writ of the Crown always ran weakly in those parts.

(29) P.C.R.S. iv 123

(30) Scots Statutes 1584 c.18 iii 302. The restriction as to the Forth ports was repealed 1585 c.11 iii 378

(31) P.C.R.S. iv 17

(32) Scots Statutes 1600 c.19 iv 250

(33) C. R. E. i 21

(34) C.R.R. i 19

(35) C.R.R. i 358. do. i. 12.

(36) Eynkeshoek. Questionum, i.8, p.59

(37) L.C.R.S. iv/Fulton 85 appears to have been misled as to the being no decision recorded.

(38) Craig. fol. 243

(39) Twiss. 75 as to fishery reserved by England

(40) Marsden i. xxiv

Chapter XVII

(1) The exceptions which, so to speak, went to prove the rule were the closure of Loch Broom in Scotland, and the granting of licences by Elizabeth and James in continuation of a former practice for the fishing at the Zowe Bank in the Channel.

Fulton 65

(2) Fulton 2

(3) do. 31

(4) Marsden i. Intro. x., 46 & 50

(5)/
(5) Marsden 1385
(6) do. Intro. i.
(7) Fulton 36
(8) Rot. Parl. iv. 126
(9) Bynkershoek, Questionum 59
(10) Boroughs 57 et seq. Fulton 43 et seq.
(11) Dumont. iv. 352
(12) Fulton 51-54. This clearly applicable to the Scottish Admiralty jurisdiction. See Admiralty Court Book.
(13) P.C.R.E. 20th May 1554. See also. 1576 pp. 178 and 193 & 201.
(14) Marsden i. 146
(15) 5. Eliz. c.5.
(16) Marsden i. 172
(17) do. i. 180 & 182
(18) Camden 225
(19) do. 225
(20) Fulton 110
(21) Translations and summaries by heads of the various French Ordinances in various MSS. in National and University Libraries.
Welwood, Sea Laws. Dedicatory Epistle.
(22) Fulton 76
(23) 6 Rich. II. Stat. c.10. confirmed. 1 Hen. IV. c.18
(24) Anderson (Commerce) ii, Append. 13
(25) Fulton. C. iii. contains an instructive resume of the difficulties and the remedies attempted.
(26) Motley, iii 23 et seq.
(27)/
(27) 33 Hen. VIII. c.2. - continued by various Acts until renewed for the last time by 1 Ma st. 2.15

(28) 1.C.E.I. 1543,1, 103, 104, 106, 112, 114. This would appear to have been a burst of energy on the part of the Privy Council. Most of the later mentions in the records are in connection with the applications for licences for exemption, 1.C.E.I. 1575, 62. & 1576, 300

(29) 5. Eliz. 5. See also. 13 Eliz. c. 11. s.5.

Chapter V.

(1) Scots Stats. 1607 iv. 362 (b) Craig

(2) Fulton. 136 et seq. In Chapters IV, V; et seq. Fulton has given the result of his special research into the history of the fishery problems of the Stuarts.

(3) Fulton 755.

(4) do. 145

(5) do. 156

(6) C.R.E. ii. 203

(7) C.R.E. ii. 455, C.C.R.S. x. 231. do. ii 540 Fulton 166

(8) C.C.R.S xi. 329

(9) National Lib. MSS. 31.2.16.

(10) C.C.R.S. xi 440

(11) National Lib. MSS. 31.2.16

(12) Marsden i 356

(13) Gentilis, Hispanicae etc. 4. c.s. 1. c.2.

(14) Fulton. 509

(15)/
The Vail was undoubtedly prized by England and also by other States but not to the same extent. Sir Philip Meadows was the first English writer to place a proper construction upon the differences between the Dutch and the English. 'The Dutch steer their course by the Pole Star of trade and not by the Punctilios of Honour.' Anderson (Commerce) Appendix.

The precise requirements varied but there is no gainsaying that the primary object was to permit of visit and search to establish the character of the vessel. The Venetians required that a boat be despatched to the examining ship with the ship's papers.

The French Ordinances have been noted by a translator: 'When any ship upon summons from man of war shall without resistance strike sail and show the pass, charter party and bill of lading there shall be no violence done' National Library MSS. 6.2.1.

It was agreed by England to give the salute to Venetian ships in the Venetian Waters. The Venetians even required the salute to be given to their State ships in Turkish waters but the practice was of doubtful authority. The Turkish patrol against pirates was ineffective and the Venetians assisted in the task. The Venetian justification was that the measure was aimed at the pirates. The English admiral was accused by the Venetians of attempting to persuade the Turkish admiral that his jurisdiction had been infringed by the demands of the Venetians. The Venetians did not rate the salute higher than a token of respect and it was in this sense that the English agreed to give the salute. State Papers (Venetian) 28th May 1605, 7th June 1605, and Instructions to the Venetian Commanders 24th September 1605.

See also Twiss. 143 & 144. Marsden Vol. i & ii. 'salute' and i. intro. xiii. Boroughs 31 et seq.

(16) Foedera. VI. II, 74, 422. VII.i. 44 & 253.
(17) Fulton. 216
(18) C.R.B. iii. 257 & 291
(19) Scots Statutes v. 220 (b) to 243 forms an almost continuous
continuous record of the proceedings of the Estates and the correspondence with the King.

(20) C.R.B. iii, 322 & 323
(21) Scots Statutes 1657, VI. ii, 908(a)
(22) National Library MSS 25:3:4. Fulton 461

Chapter VI.

(1) Grotius. De jure belli etc. Intro. xliii & xxix

(2) do. Intro. xxix. c.f. Walker 333-7 and Phillimore i. xxii.

(3) Fulton 366 & 369


(5) See page 56

(6) Craig Tit. 1.15.13

(7) Fulton 344