THE INTERNATIONAL LAW of TERRITORIAL WATERS

with special reference
to the

COASTS of SCOTLAND.

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The three mile limit appears in the fishery conventions with France. In 1848 the Board of Trade denied the right of any foreigner to fish within three miles of the coast of Scotland.

On the other hand, care was taken not to define the exact limit of territorial waters in the Territorial Waters Jurisdiction Act, 1878.

The policy of the British Government was to fix definite limits for specific purposes only.

The North Sea Convention indirectly determined the limit of territorial waters on the east coast of the British Isles for the purposes of fishing.

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PART II.

CHAPTER I.

The general historical background of the development of the International law of Territorial Waters.

I. In the period covered by the first portion of this essay, it had come about that almost all the seas were claimed to be under the dominion of one State or another, despite the obvious inability of the States to make the claims wholly effective and irrespective of the situation of the waters relative to the territory of the State.

In this, the second or modern period, maritime dominion
is admitted only over the narrow belt of waters immediately adjoining the territory of the State. The change was inevitable although the necessity was not immediately recognised. Towards the close of the earlier period, England, the staunch upholder of *mare clausum* in the home waters, had been no less energetic than the Dutch, the protagonists for *mare liberum*, in breaking the maritime, commercial and colonial monopolies of Spain and Portugal in the West and the Far East. The opinion has been expressed already that the controversy as to the British Seas was but a minor issue in the struggle between the Dutch and the English for place as the leading maritime nation. Other nations besides the Dutch had been affected,

affected, but affected only in proportion to the strength of their competition or possible competition with the English. As soon as the Dutch had fallen definitely behind so as no longer to be serious rivals, and the British fleets had proved their superiority over the other fleets of Europe during the Napoleonic Wars, the irritating demands for the recognition of the empty formalities, held to be symbolical of the British dominion on the British Seas, were tacitly abandoned. Indeed, it may be questioned as to how far the bombastic claims of Selden's *Mare Clausum* were ever authoritatively accepted in England as being endorsed by international law. The English Prize Courts were careful to restrict their jurisdiction for the purposes of neutrality to the areas delimited in

the royal proclamations prohibiting hostilities in the territorial waters as being within the King's dominions, viz., the King's Chambers, the harbours and their immediate vicinity. 3

The claims of the other European States to extensive maritime dominion quickly fell into abeyance or were replaced by assertions of sovereignty over very restricted belts of waters along their coasts. This process of restriction or substitution was materially quickened by (a) the British naval measures and success, (b) the writings of the jurists which influenced the policy of national executives, public opinion and the decisions of quasi-international prize courts, and (c) the revolutionary change in political and economic thought which favoured \textit{laissez faire} /

3/ Fulton. pp. 553 and 554.
faire to the detriment of monopoly and restriction, factors which had fostered the former extensive claims. To-day the right of the freedom of innocent navigation, even in territorial waters, is universally admitted.

II. It cannot be claimed that there has been a distinctive or considerable Scottish contribution to the development of the international law of territorial waters as understood to-day. As in the earlier period, the principal theme of international import to-day is the reservation for nationals of the coastal fisheries, particularly those in the Firths. On the one hand, there is a possibility that a Scottish national policy would have aimed at the reservation of a belt of waters of greater width than three miles from the shore, but, on the other hand, it may be doubted whether such a claim would have been accorded international recognition.
recognition. Similar issues have arisen elsewhere and have been the subject of interstate conventions. These, therefore, are of some importance as suggesting the international law applicable to the territorial waters of Scotland.

In regard to the other aspects of international law which come within the purview of this essay, the Scottish contribution is merged in that of Great Britain. The identity of Scotland as a sovereign power, obscured by the Union of the Crowns, was finally lost by the Union of the Parliaments. Thenceforth, the national policy and executive voice was that of Britain. There is, however, some evidence in the records of the Scottish Admiralty Court, which retained its prize jurisdiction until 4 1825, indicating that that Court, with little or no restriction/

4. 6 Geo. IV., Ch. 120, s.57
restriction imposed by the municipal law, was prepared to admit the persuasive force of the decisions of the English Admiralty Court, especially the opinions of Sir William Scott, the practice of foreign States, and the opinions of the leading jurists, the whole being interspersed with and eked out by the Civil Law. Bell, in his Commentaries, summarizes the sources of the maritime law of Scotland as being the ordinances and customs of maritime States as the most important, including therein the ancient codes of sea laws of Oleron and of Wisby, and the more modern Ordinance of Louis XIV with Valin's Commentary thereon. He adds the determinations of other marine and mercantile courts.

"But the decisions of the greatest authority are those of the High Court of Admiralty of England ... It is the greatest tribunal of maritime and international law, the functions of this high court have during the whole of an unexampled period of difficulty since the commencement of the revolutionary war with France been performed by a person the most eminently qualified to sustain the character of an international /
international judge .... Wherever those decisions (of Lord Stowell) touch any question discussed in our Courts their authority is received with profound respect."

As regards the jurists whose opinions might be referred to, Bell states that the list is too formidable to detail but he gives the principle ones including the English writers, Maline, Molloy and Beawes.

More instructive as to pleading, however, is the report of a case in Morrison's Dictionary. Here is a voluminous array of heterogeneous authority which includes reports of decided cases, references to treaties, opinions, codes of sea laws, different works of Admiralty and the Marine Ordinances of France, treatises on the Scottish Admiralty, Xenophon and the Holy Writ. We find the Questiones etc. of Bynkershoek and the works of Grotius and /

and Molloy cited with the Civil Law. Yet, against such pedantic pleading may be set the following passage illustrative of the new conception of an international law.

"But what is still stronger than a thousand opinions of lawyers and doctors, the general practice of both the British and French nations in the course of the present war is entirely agreeable to the suspender's doctrine and, in confirmation of this there is produced a certificate .... from ... the Procurator-General in the High Court of Admiralty in England and of the High Court of Appeal for Prizes.... certifying the condemnation of several vessels in the said High Court of Admiralty." "The authority of Albericus Gentilis and Bynkershoek... can have no influence against the general and later practice of nations."

But better still is the opinion of Judge Admiral Cay, who was the Scottish counterpart of Sir William Scott in England and who achieved in Scotland a measure of success in building up a body of jurisprudence relating to international and maritime law.

"The Law of Nations is a law of consuetude... Now I find that it has been the practice of the Courts of Admiralty everywhere.... It has been done by the English Court of..."

7. Benton v Brink (1761) Morrison p.11,949
of Admiralty sitting in London... (At this point it would appear from a note in the record that the Judge quoted verbatim from an opinion of Sir William Scott as given in Robinson's Reports, Vol.2. at page 209) ... For the same reasons more ably stated by that upright and learned Judge I am clear for repelling ...." (8)

These citations show that, as far as a purely Scottish authoritative organ of State could have assisted, the development of international law would have followed a course reflecting the general practice of nations and that international law, as interpreted in the national courts, would have been international in its breadth of outlook and interpretation. Unfortunately the decisions of the Scottish Admiralty Court were never reported.

III. To observe the first stages in the disintegration of the former vast maritime dominion claimed by Spain and Portugal, attention must be directed elsewhere than to Europe. /

8. See Appendix A.
Europe. As already mentioned, the Dutch and the English had breached with their trading stations the Portugese monopoly in India and the Far East; in the West the British, by the permanent possession of Jamaica, had shown the futility of the Spanish claims to exclusive rights in America.

The grant of the Assiento, first to Portugal then to France and, finally, by the Treaty of Utrecht, to Britain, together with the right under the same treaty to trade with one ship per annum with the Spanish American Colonies, were but wedges driven deeply into the regional commercial monopolies in the newer and more distant regions of the World.

Once the exclusive trading rights had vanished, there was no point in maintaining the claims to the right of exclusive navigation in those parts. The War of Jenkins' Ear might have been featured by the slogan of 'Free Seas or War'.

IV. But the greatest impulse to the development of the international law of territorial waters was derived from the naval wars of the eighteenth and nineteenth centuries. These wars raised acutely problems demanding the assistance of the new science of international law for their solution. The law so evolved was thus intimately related to a condition of belligerency and dealt especially with the particular problems thereof. The normal relation of States is peace. To bend to the requirements of peace the international law, thus developed out of war, to suit the altering circumstances of a family of States, is one of the problems of to-day. Under conditions of peace the development of international law is slower than during war; there is not the same urgency or incentive to States to act.
act. Nevertheless, the deliberate decisions of States and agreements entered into during peace must command greater voluntary respect and have a more lasting and greater influence upon other States, not necessarily parties to the conventions, than the hasty and not always unbiased decisions taken in the heat and passion of war.

V. As illustrating the factors arising from belligerency which have given substance and form to the international law affecting territorial waters, neutrality may be instanced. Formerly, neutrals were merely 'friends' with but faintly recognised rights and duties. Grotius, in his De Jure Belli ac Pacis, could exhaust them in one short chapter. So important did the rights and duties of neutrals become that it may be said the international law, in

11. Bk. iii, Ch. XVII.
in its earliest stages, centred round this conception. The American States were largely responsible for the prominence given to neutrality. Removed from the maelstrom of European strife, the United States, frequently neutrals, were at once the tribunal and legislators on the laws of neutrality. These States at the beginning of the modern period, fresh from their rebellion, sought to find a philosophical basis in current political thought for their attitude of neutrality during the war between Britain and France. It was provided by the theory of the unnatural freedom of the individual which formed the hypothesis of Rousseau's Social Contract and by the writings of Vattel. Founding on these the American States formulated and insisted upon the absolute impartiality of neutrals. Franklin acknowledged his indebtedness to Vattel; Jefferson and his successors /

12. Droit de gens, III, Ch. VII.
successors, exercising great influence in shaping the laws of neutrality, rediscovered the slogan of the 'Freedom of the Seas', which had first arisen in another connection, and adopted it to justify their theory of neutral rights. If the 'freedom' of the individual remained unimpaired, the neutrality of the State could not be compromised by the act of the subject. This principle has been received into international law but not without some qualifications.

The factor of territoriality was early introduced into the American view of neutral obligations. At first no objection was taken to belligerents setting up prize courts in neutral territory. Later it was forbidden. The arbitration consequent on the 'Alabama' incident has been accepted as settling that the acts of the individual on neutral /

13. Hall, pp. 96 and 97.
14. Moore Digest, vii s.1334.
neutral territory may compromise the neutrality of the State if these acts can be construed as making use of the territory as a base of military operations. In the Alabama incidents, the ground of complaint was the fitting out of a vessel for belligerent purposes, an act which is scarcely distinguishable from permitted manufacture and sale of munitions of war which was done by the neutral United States for the Allies during the European War.

VI. In Britain, the writings of Mill, Bentham and Adam Smith, reinforced by the adoption of Free Trade principles, reconciled British opinion to the abandonment of the former claims to maritime dominion. In Scotland the claim /

15. See Appendix J.

16. For American view of neutrality and manufacture of arms during and post European War, see International Reconciliation, 1928, p.364. - Mr Lansing, Secretary of State, to Mr Penfield, Ambassador to Austria Hungary, August 12, 1915.

17. V.M.S. Crichton, B.Y.I.L Vol. IX.
claim to the reservation of the fisheries within a land
kenning was dead. Scotland had gained nothing from the
Dutch Wars: the growing industries found the English col-
onial markets suddenly closed by the English Navigation
Acts. The Darien Scheme was promoted to offset these dis-
advantages and it failed. Innumerable other schemes were
suggested by pamphleteers to alleviate the distress and to
foster the revival of industry. The remedies finally
adopted by the Government took the form of subsidies and
exemptions from fiscal exactions. A Royal Patent was
granted for the formation of a Fishing Company. Of these
measures none affected foreign relations. Of the Scot-
tish /

18. For a bibliography of contemporary economic litera-
ture see Scott and the following Acts.
1698, c.45. also
1661, c.279.
1669, c.18.
1690, c.103.
1705, c.48.
1707, 7 Anne c.7, ss.8 and 15.
Mitchell. Book III.
Scottish claim that the fisheries within sight of the shore were reserved for the natives, only one mention has been found. In 1706 the Judge Admiral issued a commission to John Adair, Geographer of Scotland, to seize and bring into port any foreign vessels fishing within sight of the Scottish shore. The purpose of this commission at this late date is somewhat obscure and no satisfactory explanation can be suggested. It may have been intended to furnish a possible source of income for Adair, and, possibly, also for the Judge Admiral. The expenses and emoluments of Adair, at the time engaged upon a survey and publication of the maps of the coast, the salary of the Judge of the Admiralty Court, and moieties to other parties were met from the proceeds of a tunnage levy upon shipping.

The grant was renewed in 1704 for a period of five years. The fund had never been sufficient for its purposes and was /
was regarded by shipping as burdensome. In 1705, the Committee of the Estates on the Public Accounts reported that the fund had fallen into such extraordinary confusion that they despaired of ever bringing it to account. Adair and others had been collecting the dues on their own behalf and the Committee granted them a commission to continue to do so until 20th July, 1706. Six days after the commission expired the Judge Admiral issued his commission to Adair. So far as can be ascertained from the extant records of the High Court of Admiralty and of the Admiralty Court of the Regality of St Andrews, no causes were before these Courts for the enforcement of the alleged 'law'. The Judge Admiral's commission does not appear /

appear to have been noticed by any writer on the fisheries of Scotland or on the life of Adair. The most that can be said of Adair at this period was that he was an excellent but dilatory craftsman who overestimated his abilities of performance. The commission was perhaps issued upon a promise to make effective use of it but he had not the means to that end. He makes no reference to it in either his correspondence or his Will.

The issue of the commission by the Judge Admiral would appear to have been founded upon the old pretence of the burghs that the fishing within a land kenning was reserved for the natives. The law as to fisheries was

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22. Bannatyne Miscellany Vol. II. See also Scottish Geographical Magazine Vol. XXXII. Feb: 1918 and 'Early Maps of Scotland.'

23. Adair had to make use of hired boats for his survey and the dues under the levy on shipping from the terms of his Will would appear to have been collected by the collectors of customs at the ports. Commissariat Record of Edinburgh Vol. 87 Date - 17th December 1719. See also Appendix B. (2)
in a confused and obscure state. The Crown undoubtedly claimed a proprietary right in mussel scalps and oyster beds and they were the subject of grants to vassals, and the right of the Crown to the salmon fishing was, and is, well known. The dubiety was as to the white fishings.

There were plausible grounds for a popular conception that the white fishings in the sea could be owned. The right of the public generally to fish in the seas for other than the royal fishes was recognised, but prescriptive rights were not unknown and restrictions had been imposed and exactions demanded. At least one burgh, the Burgh/
Burgh of Crail, had illegally extended the grant in its charter of 1584 to an assise of herring and tiend fish brought into the port to cover all fish and lobsters taken between Arbroath and Dunbar, even if they were shipped without being brought into the port. The claim was characterised as being 'very singular, anomalous, and of an unfavourable nature' having been acquiesced in through ignorance and was repelled. In Bell's Election Law no fewer than twenty-six instances of infeftment in white fishings are noted between 1639 and 1704 but the same writer offers a very reasonable explanation and reconciliation with the general conception of freedom of fishery in the open sea. Shore stations may have been so convenient and extremely well adapted for particular fishings as.

27. p. 52, See Bell's Princ. s.646.
as to become, in popular thought, so connected with the fishings that they were regarded as units. The rent paid by the fishermen for the shore facilities of curing then came to be regarded as a consideration for the right of fishing which, in fact, it was not. The point is illustrated by the opinion of Lord Medwyn in the Commissioners of Woods and Forests v. Gammell. There, the early grant of tiend fish to the Monks on the Isle of May was regarded as a precedent validating all the subsequent grants of an apparently exclusive right of fishery in territorial waters. It is suggested that, had the opinion of the Admiralty Court in the case of the Burgh of Crail been brought to the notice of his Lordship, his opinion would have been more guarded. The question of the nature of the right of

28. 1851. 13 D. 855 at p. 873.
of the subjects to take white fish from the territorial
waters was raised but not decided in the later case of the
Duchess of Sutherland v Watson. Whatever, the restric-
tions may have been, all restrictions and exactions from
natives for the white fishings were abolished by the Act,
29 Geo,II. c.23. As a matter of interest, none of the
authorities cited above mentioned the old limit of the
land kenning but adopted, sometimes unequivocably, the
three mile limit for territorial waters. There was, how-
ever, no limit of territorial waters mentioned in the
opinions of the Admiralty Court on the subject of fisheries
at that period nor in the early grants of fishery referred
to by Lord Medwyn.

VII. The restriction of territorial waters generally to a
narrow belt /

29. 1868. 6 Macph. 199.
belt ex adverso of the territory of the State was confirmed in substantial measure by British naval exigencies during the Seven Years' and Napoleonic Wars and the fishery disputes with the United States. The root principle of Pitt's policy during the former war was, firstly, to concentrate the fighting energies of the nation upon naval operations which would prevent the French sending aid to their colonies, and, secondly, to subsidise his allies by land. Even in former wars the predominance of the British navy had been manifest; that predominance was to be developed into overwhelming supremacy. The aggressive measures adopted by Britain irritated the neutral powers whose opposition found expression in the Armed Neutralities of the North; the insecurity of their rights was proved by the destruction of the Danish fleet in the neutral port of Copenhagen. For the time being Britain was virtually dictator /
dictator on the seas. To fulfil its allotted mission the British navy required the fullest freedom for action: any admission of the former claims to extensive maritime dominion, e.g. of the Scandinavian Powers, would have been incompatible with that need of the British navy, now in a position to enforce compliance with its views. Opinion, however, was now less favourable to the former claims. Indeed, the neutral nations, in their declarations of neutrality, after the manner of the Stuart declarations in England, had, sua sponte prohibited hostilities in their coastal waters. It was only a matter of time until the same limits were adopted for "reserved" fishing. Thus a modus vivendi was found which, in the restriction of territorial waters to a narrow belt of coastal waters, was /

30. Fulton, pp. 567 and 568.
was consistent with the principles which were now being advanced by the more enlightened jurists. Expediency and reason combined to overthrow the former claims to extensive maritime dominion.

VIII. Between the Napoleonic War and the European War of 1914-19, there was no maritime war of major importance. The American Civil War, the Spanish-American and the Russo-Japanese Wars, however, produced a crop of incidents touching territorial waters, and international law was thereby further developed. Interstate arbitrations on the interpretation of treaties during the intervening periods assist in the development, and the close of the European War, a testing time for international law, afforded a convenient moment for taking stock of the position reached. It appeared that the international law of territorial waters /
waters had been so far settled by practice as to admit of codification. Unfortunately the Second Commission (Territorial Sea) of the Hague Conference for the Codification of International Law had to register disagreement as to the width of territorial waters. While agreement was reached upon the other aspects it was conditional on unanimity being attained in respect of the breadth of territorial waters. Consequently, it must be presumed that the whole project of codification has to this extent failed.

It would appear that the Commission desired to settle permanently the width of territorial waters for all coasts at three, six or twelve miles. Questions may be asked, whether any of these limits could have adequately met the changing

changing needs of the community of States. Would it not have been preferable to have sought a formula admitting a limit variable and suitable to the needs of all ages and all States or, at least, providing for the revision of the 'limit' in the light of agreed principles? Bynkershoek's dictum, 'imperium terrae finitur, ubi finitur armorum vis' was definite in principle but elastic: the three mile limit, the eighteenth century application of the principle giving it fixity, is still strenuously advocated and opposed in the altered circumstances of the twentieth century. International Law as a dynamic force rarely admits of statement in specific terms as having reached finality and in detail must rather seek expression in fundamental principles which, in their generality, are so equitable as

as to be accepted by States as binding. A specific extent of territorial waters whether of three, six or more miles in breadth will not meet with the approval of all States.

IX. The restriction of the claims to coastal waters is now so settled that no counter proposal would be regarded seriously. Yet, as has been remarked, the shadows of a former greatness have sometimes been embarrassing. In 1803 negotiations with the United States were broken off because Britain could not see the way clear to concede freedom from search upon the British Seas. Until 1805 the Admiralty Regulations contained an injunction to the British commanders to require the salute of the Vail in the British Seas. Hall surmises that, as no protests were lodged by foreign powers, the injunction could not have been observed.

33. Hall, 185.
been observed. The abortive Russian Ukasse relating to the Behring Seas Fisheries attempted to resuscitate in 1821 the limit of 100 Italian miles for territorial waters suggested by the early Italian jurist, Bartolus. Even as recently as 1914, the Privy Council had occasion to remark that Selden and Hale were no longer authorities on British maritime dominion and that the 'British Seas' did not now have the same connotation as in the eighteenth and nineteenth centuries.

X. The dictum of Hall as to the progress of international law generally is particularly appropriate in respect of the special branch dealing with territorial waters.

"Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning/"

beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple with the fundamental facts in the relation of States ..." 36

But it would be idle to pretend that this progress has been unchecked. In regard to territorial waters, there have been marked changes: we cannot be certain that we shall not see changes in the near future. It is no longer possible to say that, because a particular bay or stretch of water was claimed to be a King's Chamber and therefore within the territory of the State in the seventeenth century, it must still be regarded as within the territorial waters of Britain. Historical precedent is still respected. The modern jurist enquires, however, the nature of the right claimed, whether it is admissible having regard to its purpose and the rights of other interested States, whether it meets the requirements of the modern world and whether it is consistent with the already accepted principles of international law.

CHAPTER II.

The Sources and Evidence of the Modern International Law of Territorial Waters.

I. The scientific development of international law has been dated from the Grotian era but is not until the French Revolutionary Wars that we find incontrovertible evidence in the conduct of States of the existence of a controlling body of rules relating to territorial waters, as now understood, which States felt themselves obliged to observe, and did commonly observe, in their relations with each other.

The philosophical basis of international law had been previously laid by the jurists, of whom Grotius was the most illustrious.

1. Moore, Digest 1.s.1; Westlake i. p.12; Walker, i.Ch. iii; Wheaton i.p.9; Oppenheim i.p.63; Holland, Studies in International Law; p.23, prefers Albericus Gentilis as the father of international law.

2. Adapting Hall's definition of international law, p.1; Wheaton i.p.5; Moore Digest, i. s.i; West Rand Gold Mining /
illustrious. This period of belligerency provided the first real test of the extent to which their doctrines were to receive the common assent of the Powers.

II. Since several of the issues as to territorial waters, e.g. their extent, are disputed, it is necessary that the sources and evidence of the law should be determined.

It is generally agreed that, in the absence of a superior legislative power, custom is the primary source of international law with possibly, as a secondary source, certain treaties of almost universal force accepted as declaratory of international law. Some writers, e.g. Moore, would have

3. Pitt Cobbett 1, 6 and 7, Wheaton 1, 10, Hyde 1, s.3, Holland Jurisprudence Chap. V, 1, Oppenheim 1 s.15 and 16, West Rand Gold Mining Co. v Rex, cit. sup. e.f. Hall, pp.7-12 For a criticism of the practice of stressing certain treaties as a source of international law. Also Corbett.B.Y.I.L. Vol VI, for an examination of the sources and evidence of international law. Horimer, EK.I.
would add the writings of jurists, municipal law bearing upon international conduct, and decisions of judicial tribunals, while Westlake would add 'reason' as extending the existing law with modifications to new cases and fresh situations.

III. A custom, to have the force of law, must be a usage or course of conduct which all States acknowledge to be binding upon themselves in their relations inter se. It must be distinguished from mere usage, which States are free /

4. Digest, i s. 1.
6. 'The function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find - exactly as in the mathematical sciences - the solution of the problem' (Eastern Australasia and China Telegraph Co. Ltd. (1922) Nielsen p. 75).
See also the opinion of Lord Alverstone C.J. in the West Rand Gold Mining Co. v. Rex 1905, 2 K.B. at page 402.
free to follow or not as they think fit, for there is lacking the essential element of law. As Westlake puts it, 'Custom is not to be confounded with mere frequency or even habit of conduct .... Custom is that line of conduct which the society has consented to regard as obligatory.' There may be competing usages and the fittest may ultimately prevail and be appealed to in a dispute, though not infrequently violated. Finally, it may be said to take the obligatory character of custom. Such is binding upon States: membership of the community of States necessarily implies the acceptance of the obligations of international law whatever they be, and whether acceptable or otherwise to the particular State.

IV. It /

8. Pitt Cobbett i. p.5.
9. Moore Digest i, s.1.
IV. It is a matter of no inconsiderable difficulty to ascertain whether usage has ceased to be inchoate custom and has fully matured into law. The test usually applied is that the usage must have been approved by the concurrent sanction of civilised nations or the general consensus of opinion within the limits of European civilisation. Formative factors are long continuous usage but more so the number of states adopting it.

"Unanimous opinion of recent growth is a better foundation of law than long practice on the part of some only of the body of civilised States. But it must be remembered that as no nation is bound by the acts of other countries in matters which have not become expressly or tacitly a part of received international usage, the refusal of a single State to accept a change in the law prevents a modification agreed upon by all other States from being immediately compulsory, except as between themselves. . . . . The acts of minor powers may often indicate the direction which it would be well that progress should take, but they can never declare the actual law with so much authority as those done by the States (the Great Powers) to whom the moulding of law has been committed by the force of irresistible circumstances". (13)

10. Moore, Digest 1, s.l.
11. Westlake 1, 16.
12. See /
Much the same view is expressed by Pitt Cobbett.

"If the usage in question has become the predominant usage, and if, in fact, it prevails amongst the great majority of States, it is conceived that it may fairly be regarded as part of international law, even though an exceptional practice may still be followed by a few States, especially if these be of minor importance". (14)

V. Whether a particular usage has been or has not been agreed to as law is thus a matter of evidence. The Permanent Court of International Justice, erected under the provisions of Article XIV of the Covenant of the League of Nations, for guidance with respect to international law and the relative weight to be attached to the various expressions of it, is to apply the order following:

1. International conventions, whether general or particular /

12. See opinion of Gray J. in The Paquette Habana (1900) 175 U.S. 677 at p. 694.; and Westlake 1. 17 "Time cannot supply the want of general agreement."
particular, establishing rules expressly recognised by the contesting States:

(2) International custom as evidence of a general practice which is accepted as law:

(3) The general principles of law recognised by civilised nations:

(4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations - as subsidiary means for the determination of the rules of law.

Having regard to the origin of the Court and the eminence of the panel of jurists who drafted the rules, these rules or criteria for the evidence of international law must /

16. "Though the law of nations be the general rule, yet it may, by mutual agreement between the two powers, be varied or departed from; and where there is an alteration /
must be received with profound respect.

VI. The first rule raises no difficulties other than those of interpretation of treaties between the parties and their application to the set of circumstances in the case before the Court.

VII. The second and third rules bristle with difficulties for they imply the ascertainment of custom, - the unwritten law. In their generality they enjoin resort to all those sources from which the evidence of international law is to be sought. These have been enumerated by Westlake as

17. International Law 1, 16.
as follows:

"The best evidence of the consent which makes international law is the practice of States appearing in their actions, in the treaties they conclude, and in the judgments of their prize and other Courts, so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as their actions and the judgments of their Courts have not been encountered by resistance or protest from other States. Even protest and resistance may be too feeble to prevent general consent being concluded from a widely extended practice....

Special authority is often claimed for the practice of those States which are most concerned with a particular branch of international law, as for that of the chief maritime powers with regard to the laws of maritime wars."

By themselves rules (2) and (3) afford but little in the way of exact guidance on any point not covered by settled law. Rule (3) requires more consideration. It rests upon the hypothesis, no longer doubted, that there is a philosophical basis or set of principles to which international law conforms - not upon the thesis that there

18. See also the Scotia (1871), 14 Wall. 170 referred to in Moore Digest, i. s.1; Wheaton i. pp.16 & 17; Balfour's Practicks - Sea Laws incorporating the French Ordinances of the 16th century into the Law of Scotland. Sir M. Gwyer (British delegate) at the Conference for the Codification /
there is a body of law common to all systems of municipal law. A few States cannot create obligations for the whole world. The Court is not, however, expressly prohibited from considering municipal law, if, apart from its origin, it can be held to be pertinent to the issue and if its inherent principle has received the commendation of States generally. The essence of the difficulty in the application of rules (2) and (3) is that international custom and general principles of law recognised by civilised States are matters of evidence. The evidence, in the absence of express acknowledgment to be bound, can only be deduced from a consideration of acts of state and the 'subsidiary means for the determination of the rules of law', viz., judicial decisions and the teaching of publicists.

19. Moore, Digest, i.s.l.
VII. There rises at once the question of the weight to be attached to each item of evidence and the sufficiency of the whole. Deliberate acts of state, including treaties, municipal laws, ordinances and instructions to agents of the State, and declarations of responsible officials, if purporting to be in conformity with international law, may be accepted as declaratory of the national view of the law applicable to the particular issue and it may be assented to by other States as a correct interpretation of the law. States, however, cannot be held to be bound because they have remained silent and have made no immediate protest. In every case the circumstances attending the act of state must be considered, e.g. whether it purported to apply a rule of international law. In the case of judicial tribunals, /
tribunals, the standing of the Court, its composition, the source of its jurisdiction and any restrictions imposed thereon must be kept in mind when assessing the value of the decision. The judgment must be impartial and within the terms of the reference. As a rule, the opinions of international tribunals, such as the Permanent Court of International Justice, will be received with greater respect than those of a national Court. It would appear that, with the British and American Courts and jurists accustomed to regard precedent as binding, greater weight is to be attached to decisions of tribunals than to the opinions of recognised publicists. National Courts, being creatures of national law whose sanctions depend upon /

20. In the remit to the Arbitration panel the parties may state the rule they desire to have applied, e.g. in the Alabama, See Appendix J., Wheaton i, 20; Hall 193; Lorimer, BK.I, Ch.IV.

21 Wheaton i. 12.
upon national law, can only express the national view and whether that view is in conformity with the true international law can be determined only by the methods applicable to every other principle of international law.

In as much as international law is a matter of evidence in the Courts and as foreign relations are within the province of the executive, it may sometimes happen that the Court is misled by a bias to national policy and expediency being introduced into the evidence placed before it by the executive and the final decision is therefore not /

"It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a Kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the Law of Scotland."

23. Reg. v Keyn cit. sup. at p. 154. The Zamora, cit. sup.
not free from taint. Occasionally municipal Courts have been drawn into discussing rules of international law where the issue and the decision did not extend beyond municipal law. In such instances, however, enlightened the remarks may be, they command the respect due to obiter dicta only.

IX. Prize Courts, essentially municipal Courts whose decisions are dependent upon municipal legal sanctions, frequently declare that they administer international law. The American Prize Courts early proclaimed their allegiance /

24. See The Fagernes [1927], p. (C.A.) 311. The executive may intervene after the decision and render the judgment null as in the case of Mortensen v Peters (1906) 8 F. (J.) 93.
25. Instances of this are to be found in Reg. v. Keyn cit. and Mortensen v Peters cit. sup. Lord Advocate v Clyde Navigation Tram. (1891) 19 L. 174. Lord Advocate v Wemyss 2 F. (H.L.) 1.
allegiance to the English prize law and would appear to profess to administer international law. They are, nevertheless, bound by municipal law.

The British Prize Courts, since the definite opinion of Lord Stowell in The Maria down through a series of decisions extending to the present time, have professed that the substantive law administered by them is international law. This view was endorsed by the government in 1916.

The ordinary Courts in Britain hold themselves to be bound by municipal law where there is a statutory enactment.

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27. The Nereide, 9 Cranch 383, 422.
   The Scotia (1871), 14 Wall, 170, 187; referred to in Moore's Digest s.l.
   Cunard Steamship Co. v Mellon (1923) 262 U.S. 100
29. (1799) 1 C.Rob. 340 at p. 349 (a).
30. The Recovery (1807) 6 C. Rob. 841 at 848 (b).
   The Fox (1811) Edward 311.
   The Marie Glæser, 1 Lloyd P.C. 56; The Odessa, 1 ib. 301 at p. 326; The Zamora IV ib. 62 at p. 91.
enactment, and that considerations of international law are, in those cases, irrelevant. A similar view was expressed by the British Foreign Office as to Prize Courts and was definitely accepted by the Privy Council in two recent cases, the Zamora and the Bathori.

X. The shackles of municipal law upon the British and American Prize Courts, are, however, of the lightest. Dictation from their Sovereign is largely as to procedure, the substantive law being drawn from international law. The commission issued to the Prize Court prior to the Naval Prize Act, 1864, followed a stereotyped form very closely, to proceed upon all manner of captures...

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32. Reg. v Keyn, cit. sup.; Mortensen v Peters, cit. sup.
33. Parl. Papers, cit. sup.
34. The Zamora, IV Lloyds P.C. 62 at p. 91. The Bathori, [1934] A.C. 91
according to the course of Admiralty and the law of nations.

Continental Prize Courts take a different view as to the law they are to administer, and as to their functions. The German Courts hold that they are required merely to pronounce whether the capture was legal within the terms of the municipal ordinance and instructions, but Gardner points out that, in the result, the difference is merely in emphasis and not in substance. The French Courts during the European War were less rigorous in their application of the municipal law where international law was more favourable to the neutral. The Belgian Court appears to have considered that international law overrode municipal law. Thus there is a series of national courts all dealing somewhat differently with similar subjects.

35. Quoted in The Zamora, cit. sup. at p. 86.
subjects in international law but using different methods and giving varying emphasis to sources and to the evidence of the law applicable in each case.

XI. There cannot be any doubt, however, that, if the occasion arises, a national Court such as a Prize Court, may, by eminent judicial fairness as between neutral and belligerent and close conformity with the rules of international law as already established, give greater definition to that which was in doubt and, in time, their decision may be homologated by the conduct of States similarly circumstanced. It was thus with the judgments of Lord Stowell whose opinions were received with the greatest respect by other tribunals, especially those of the English-speaking nations, and by writers on international law of other countries.
"If the talents and celebrity of Lord Mansfield have contributed to raise the Common Law Courts in public estimation have not the celebrated judgments of Lord Stowell, the Judge of the English High Court of Admiralty, reflected the highest honour on that Court in England as well as in other countries?" (38)

On the whole it may be safely affirmed that there has been no radical change since the position was summarised by an American Court in 1815.

"The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with every respect. The decisions of the Courts of every country show how the law of nations, in a given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this".

XII The Scottish Admiralty Court, while it retained its jurisdiction, was happily circumstanced for dispensing international /

37. See Bell, Commentaries III. IV. Intro. For modern appraisement, see Sir Erle Richards, in B.Y.L.L. (1920-21); Moore, Arbitrations vol. IV p.31; Lauterpacht, B.Y.L. 1929, p.65.
38. Law Tract, Report by the Faculty of Procurators before the Scottish Admiralty Court, at p.22.
39. Thirty Hogsheads of Sugar v Boyle. 9 Cranch 191 at page 198 per Marshall C.J.
40. The prize jurisdiction was abolished by 6 Geo.IV.c.129. s.57, and the other jurisdictions transferred to the Court of Session by I Will. IV. c.69.
international law. It was in no way trammelled by municipal law. It was not only a court of prize, it also included within its jurisdiction all causes arising from mercantile adventures. Further, there being a deficiency in the Institutional Works as to this branch of the law, the Court had to resort to the great body of law which formed a *jus gentium mercatoriumque*, the ancient maritime codes of the Mediterranean and the codes of the western nations.

The Scottish Court of Admiralty reached the peak of its efficiency under Judge Admiral Cay (contemporary of Lord Stowell) of whom Bell has said,

"He directed his particular attention to the reformation of the Court during the few years he sat there, and had he survived, would have succeeded in greatly augmenting its importance and usefulness. He bestowed exemplary care in deliberating on the cases which came before him, and above all, seems ever to have had in his mind that most salutary of all judicial maxims, to preserve, as far as just principle would permit, uniform consistency, not only with former determinations in his own Court and in the Court of Session, but with those of England and other European States". (42).

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42. Bell Commentaries III,IV. Intro. Note 2 on p.547 (7th edn.)
An indirect tribute to the efficiency of the Court was the paucity of appeals to the Court of Session.

Unfortunately as the Scottish Admiralty decisions remained unreported, practitioners relied upon private collections of notes. In these circumstances the Scottish Admiralty did not influence the development of international law beyond the immediate jurisdiction of the Court.

XIII. There remains to be discussed the writings of jurists as affording evidence of the rules of international law. As already mentioned, greater weight is accorded these in countries which do not regard themselves as thirled to precedent.

Chancellor /

43. See Law Tract at p. 20
44. See Bib. For part I of this essay under MSS in National and University Libraries. Morrison's Dictionary (printed 1801) and "MSS Abbreviate in Faculty Library" appear to have been the chief works of reference for previous decisions.
Chancellor Kent, founding on the opinion of Lord Mansfield in *Triquet v Bath*, has stated the American view as follows:

"In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent Statesmen, and the writings of distinguished jurists are regarded as of great consideration in question not settled by conventional law. In cases where the principle jurists agree the presumption will be very great in favour of the solidity of their maxims; and no civilised nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law." (46)

But these works, however, are no resorted for the speculations of the author concerning what the law ought to be but for trustworthy evidence of what the law really is.

The view of the British Courts is that a consensus of opinions of jurists is not binding upon the Court but is evidence of the agreement of nations. It is recognised

45. 3 Burrows, 1478
46. Commentaries i.18, Adopted by Gray J. in *The Paquette Habana* (1900) 175 U.S. 677 at p. 701.
47. Hilton v Guyot 159 U.S. 113, quoted in *The Paquette Habana*, cit. sup. at p.700
that publicists perform a further function in helping to create the opinions by which the range of international law and consensus is enlarged, but in this respect, they cannot be regarded as recording international law.

XIV. Hence it may be concluded that, before a rule or principle can be advanced as a rule of international law, it must be shown to be a rule of conduct which the States regard as obligatory. Where such a test fails it must be considered whether there is a sufficient consensus of opinion amongst the States as to lead to an inevitable conclusion that the rule must be regarded as obligatory upon all. Treaties and conventions, being binding only upon the parties /

49. *West Rand Gold Mining Co. v. Rex.* cit.sup. per Lord Alverstone at page 402.

Lorimer Bk.I. p. 57 at 49; took rather a despondent view of the power of jurists to develop international law but was in no doubt as to their potential value in moulding public opinion (p.87).
parties to them, should not be extended to others who have refrained from assenting to them until it is clearly shown that the principle underlying the treaty provisions has been accepted into the corpus of international law as applicable to all States. In assessing the evidence of international law, each item must be examined as to its origin and particularly as to whether it has been approved by the Powers generally. In selecting the items from which evidence may be deduced, it is sufficient that they be acts of state, of the executive or the judicial organs, or that they be pronouncements of parties specially qualified to speak to the subject: it is pre-eminently necessary that the weight to be accorded to the evidence and the sufficiency thereof be carefully considered.

XV. While this essay is concerned primarily with the international
international law relating to the coastal waters of Scotland, that law is to be sought, not only in the acts of state of Britain and declarations of British policy, but also in the conduct of States in regard to coastal waters throughout the world. International law is too universal to be viewed from any one national standpoint.

50. Moore's, Digest, Preface, p. iv.
CHAPTER III.

The Juridical Status of Territorial Waters.

I. Four principal categories of waters require to be distinguished; (a) inland waters lying within the ordinarily accepted frontiers of the country, (b) territorial seas, lying between the inland waters and the high seas, (c) an adjacent or contiguous zone on the high sea and (d) the high sea itself. The first category comprehends inland waters, ports, harbours and roadsteads which are admitted to be within the territory of the State and are therefore outwith the scope of this essay; the high sea is also excluded. Whether categories (b) and (c) or category /

category (b) alone constitute the territorial waters of Scotland is a matter for consideration.

The term 'territorial sea' was preferred to 'territorial waters' by the Second Commission of the Conference for the Codification of International Law held at the Hague in 1930 under the aegis of the League of Nations. 'Territorial waters' was the term employed by the committee of experts in the basis of discussion, has been sanctified by use in such international conventions as that of the Hague Convention, No.XIII, of 1907 relating to the rights and duties of neutrals and in the Air Navigation Convention of Paris of 1919, and is the term usually employed by English writers. The term 'territorial sea' is to be understood as including not only the marginal, adjacent, or coastal sea but also the gulfs and estuaries such as the Scottish firths. If inland waters and the high sea be excluded from the term, no misconception will arise./
II There is no definition of the juridical status of territorial waters which has met with universal approval. There is substantial agreement, however, as to the rights exercised by, and the duties imposed upon, States in respect to these waters: the differences of opinion as to the underlying legal principles are due to the methods of approach and emphasis. While Ortolan has remarked, "Aujourd'hui les discussions sur le domaine et sur l'empire des mers...... sont reléguées dans le pur domaine de l'histoire," we find the debate continued in the twentieth century as to whether/

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2. 'National waters' has been used as synonymous with 'inland waters' and 'territorial waters' and is therefore not used here. See Hurst, B.Y.I.L (1922-23)

whether the territorial sea can be appropriated, the argument introducing such points as the fluidity of the waters, the exhaustibility or otherwise of the fructus, the lack of a natural boundary if the territorial sea is considered part of the territory of the State, and whether the high sea is res communis or res nullius — familiar subjects with Welwod, Craig, Selden and Grotius. Yet the 'Battle of Books' is so far over that there are now only skirmishes between outposts. States are but little influenced in their policy by such considerations, yet the question is so far unsettled in some respects that the Judicial Committee of the Privy Council in 1914, despite the trend of municipal legislation, decisions of municipal Courts and the efforts of publicists, declined to express any view as to whether the sub-soil of territorial waters /

4. Fauchille i. 2, 127 et seq.; Lapradelle Lectures 18 & 19
waters was the property of the territorial sovereign.

III. It is unanimously agreed that the State, when exercising a jurisdiction upon territorial waters, is acting in a sovereign capacity; but it has been denied that the rights so exercised constitute sovereignty in the sense of the plenitude of the sovereign rights of a State. Restrictions upon that sovereignty must be admitted, not the least being that flowing from the vested right of innocent navigation vested in foreign merchantmen. Accordingly, the sovereignty has been described as imperfect, incomplete, attenuated or diminished.  

IV. Lapradelle, /  

5. Attorney General for Canada v Attorney General for British Columbia 1914 A.C. 153
The Conference for the Codification of International Law of Territorial Waters considered there was not much authority for the proposition but accepted it.

6. C.f. discussion of Second Commission of the Conference for the Codification of International Law, cit. sup.
IV. Lapradelle, followed to some extent by Fauchille, takes the extreme view that the coastal State has only a bundle of servitudes - 'un faisceau des servitudes' or 'un ensemble des droits'. He takes for his premises that the territorial sea is not physically or juridically a distinct entity; it is merely part of the main ocean.

The physical nature of the territorial waters it is unnecessary to discuss, they form part of the main sea, but it is important that mariners and others who have occasion to use the coastal waters can, with exactitude, ascertain their

7. R.D.I.P. vol. v. 264 et seq. & 309 et seq. See also Kolli, 3. p. 202
8. Les Principes etc. lect. 18 & 19.
9. Do. lect. 19, at p. 5: 'La mer territoriale n'est pas une entité distincte, ni au point de vue physique ni au point de vue juridique.'
10. Do. at p. 8 & 9; 'C'est une partie de l'ensemble de la mer sur laquelle s'exercent des droits qui sont des droits particuliers - une responsabilité d'Etat.'
their position relative to the coast. Their rights and duties are thereby determined, e.g., whether they may fish there or not, according as to whether they are upon the high sea or in territorial waters. States are vitally concerned in the protection of their rights between which and the fluidity of the waters there is no necessary relationship. The jurisdiction of the coastal State is not avoided by the physical nature of its territory, air, land, or water. Lapradelle must take as part of his premises that the high sea is *res communis*. With him the right of navigation upon the whole ocean, including the other uses of the sea, are paramount. Nevertheless, the interests of the coastal States and the practice of nations cannot be ignored; therefore he must admit these rights as a bundle of servitudes in favour of the competing interests of the littoral State.
V. Publicists are divided on the validity of the doctrine of servitudes in international law and those who accept it do not agree as to what does constitute a servitude.

Oppenheim, McNair, Hyde, Stowell and Shucking accept the doctrine but Hall and Pitt Cobbett condemn it with faint praise. It is at this point that Fauchille parts company with Lapradelle; and Pearce Higgins, in his edition of Hall's work, notes the tendency to drop the doctrine from international law. List and De Louter reject the doctrine.

VI For /

11. 1. 364-372.
12. B.Y.I.L. Vol.VI.
14. 59.
15. His dissenting opinion in the Wimbledon Case before the /
VI. For tests of a servitude, Hyde, founding on the opinion of the Arbitration Tribunal in connection with the North Atlantic Fisheries, suggests (a) that there should be permanence in the sense that the right should not be dependent upon the continuance of the same sovereign regime, that and (b) the grant should be of a sovereign right and not merely for economic or other advantage of like nature. Hall considered the right of innocent navigation, which all States possess over all territorial waters, the most important remaining servitude in international law. Yet Pitt Cobbett and Oppenheim draw the distinction between those rights which arise from express or conventional grant /

15. contd. the Perm. Ct. of Intern. Justice in 1923 was based on the doctrine of servitudes.
16. p. 203
17. i. 114.
18. Oppenheim i. 365
20. See works cit. sup. for references on the points mentioned here.
grant and those which accrue from the law of nations as natural and inherent; the latter they do not regard as servitudes. Thus Hall's most important servitude is not regarded as such by these writers.

VII. The decisions of international arbitration tribunals appear to depend upon there being an express grant of a servitude but, in the case of the Wimbledon, the Hague Tribunal, in the majority opinion, considered that it was immaterial whether Germany had by Art. 380 of the Treaty of Versailles granted a servitude. It was clear, in their opinion, that a right had been conferred upon all States. The most authoritative, but not exhaustive, opinion /

21. See summary by McNair. op. cit., and also, generally, Reid.
22. pp. 10 & 11 (1910)Cmd. 5396. Oppenheim considers that publicists will not be unduly influenced by the opinion (I. 365.)
opinion is that of the Hague Permanent Court of Arbitration in regard to the North Atlantic Fisheries. In this instance, after the case for the acceptance of the doctrine of servitudes had been most ably presented by the American advocates and denied by the British, the Court rejected the idea mainly upon three grounds: (a) that a servitude in international law predicated an express grant of a sovereign right; (b) the doctrine of servitudes originated in the obsolete conditions prevailing in the Holy Roman Empire; and (c) that, being ill suited to the principle of sovereignty which prevails in States under a constitutional government and to the present international relations of sovereign States, it had found little support amongst publicists.

VIII. Coastal States do exercise certain sovereign rights e.g., /
e.g., legislation, regulation and control of shipping in the territorial waters but these are not servitude rights.

The first objection to the theory of servitudes is that it ignores the historical development of the rights of States in maritime waters. Navigation, particularly in the coastal belt, was formerly strictly controlled and it is only within modern times that the freedom of navigation has been universally admitted. It is not the littoral State which has obtained a prescriptive servitude right, but the community of maritime States.

The second objection is that to segregate States into dominant and servient groups is repugnant to the modern concept of sovereignty. The theory of servitudes is unnecessary; it is inadequate. International law imposes duties upon the States as to the waters under their dominion, which duties may be enforced by the sanctions of international law.
law. To overcome this difficulty, Lapradelle adjoins a supplementary theory of the mutual responsibility of the States to undertake these duties\(^{23}\). Obviously we are departing from the doctrine of servitutes.

The third objection to Lapradelle's theory is that merely to list the rights actually exercised by a coastal State over the adjacent waters does not advance any juridical principle to which the present or future alleged rights may be required to conform. In the absence of such principle, the legality of a course of conduct cannot be proved or disproved.

IX. The 'systeme du droit de conservation' favoured by Fauchille\(^{24}\) is similar to Lapradelle's theory in that it premises /

\(^{23}\) Lapradelle Lect. 19
\(^{24}\) i.2. 147 et seq.
premises the territorial sea to be part of the main sea -
'la mer libre'. It rests upon the sound proposition that
self-preservation is a fundamental right of States. A
State is authorised to take all measures destined to as-
sure its existence, and to defend itself against all acts
which might diminish or harm any of its essential elements,
viz., its territory, its population and its material re-
sources. While these rights cannot always be exercised
upon the territory of another State, as such exercise
might in turn impinge upon the fundamental rights of that
State, they can be exercised upon the sea which belongs
to no one State. It is admitted that this system or
theory is less extensive than that of sovereignty and
territory which is to be discussed later, but it certainly
goes far to explain the justification and purpose of the
rights of the coastal State over its territorial waters.
Many of the present rules of international law can be shown to conform to the theory. The theory suggests a plausible reason why ships of war driven by enemies into territorial waters are not disarmed, viz., they cannot be regarded as having entered the territory of the neutral State. It is argued that, if the territorial waters do form a portion of the territory of the neutral, on the analogy of forces on land, belligerent vessels should be immediately disarmed. But it is suggested that the genesis of this grant of asylum is founded in history dating from at least the sixteenth and seventeenth centuries and is now sanctioned by the usage of even those States who claim that territorial waters do, in fact, form part of the national

25. See Proclamation by James I, 1605. Marsden i. 356-8; Balfour's Præsticks Sea Laws, c. 118. (1524)

See also Treaties of Peace with Sweden (1654) Appendix C.) and with Denmark (1660-1) (Appendix D).
national territory. Further, a belligerent vessel may enter the port of a neutral Power, admittedly within the territory of the neutral, and there remain for restricted periods, without being liable to be disarmed. If Fauchille's theory is carried out to its conclusion this result would not be possible.

X. The prohibition of belligerent acts in the territorial waters of a neutral Power, according to the theory of the right of preservation, is a matter of defence of the interests of the coastal State, e.g. to prevent material damage to the inhabitants. Consequently, it is held incorrect to speak of these territorial waters as 'neutral waters'. This conclusion, if adopted, would jettison a very useful concept which States have come to regard as a rule of law. It follows from the theory /
theory, if rigorously applied, that, since it is only the defence of the neutral territory which is involved, the neutral State alone can have a locus standi to object to acts compromising its neutrality. This cannot be reconciled, however, with the duty imposed by international law upon the neutral to prevent such acts, for, in the event of the neutral failing in the duty, the aggrieved State itself may, as an interested party, intervene and apply the sanctions permitted by international law.

XI. A further difficulty emerges in fitting the theory to the scheme of things as they exist. Many of the principle maritime States of Europe and America recognise and uphold a narrow limit of waters, called by them territorial waters, as sacrosanct for the purposes of neutrality and the /
the exclusive right of fishing. They have further provision for their executive government extending their jurisdiction over a wider belt to prevent the infringement of their fiscal, sanitary and other laws. To cite one example, the natives are precluded by municipal legislation from trawling in the Moray Firth: foreign fishermen are not subjected to a restriction of the like extent; the latter may fish outside the three mile limit measured from the 'treaty' base line, i.e. where the entrance to the bay first narrows to ten miles.

The executive, by their action, following on the decision of the Court in Mortensen v Peters and by the declarations in the House of Commons, showed that the Government consider they do not have power in international law to exclude the foreign fishermen from the whole of the Firth.

26. See 'Contiguous Zone' post p. 103
If the theory of the right of 'conservation' had been applicable, the exclusion of the foreigner would have been competent, since the object of the legislation was to protect the national and, indirectly, the North Sea fisheries. For the above reasons the theory of 'droit de conservation' must be rejected as inadequate.

XII. The two theories stated above start from the premises that the territorial waters partake of the same juridical status as the high sea and, therefore, cannot be appropriated by the coastal State as part of its territory or as under its sovereignty. These views ignore, indeed they are contrary to, the historical development of the law relating to territorial waters. As already indicated in Part I of this essay, States were urged /

27. See Chap. IV. Sect. B.
urged by the prospect of economic advantage to claim parts of the seas or to assert a control over them. As that control, in many cases, was unreal, burdensome to the State without adequate compensating advantage, and irksome to strangers, as in the case of the Scottish fisheries and the English claims to the dominion upon the British Seas, States generally came to restrict their claims to meet the needs of the community of maritime States and their own immediate and reasonable necessity. Such moderate claims were never denied by the most ardent advocates of *Mare Liberum*. As Hall has remarked,

"The true key to the development of the law is to be sought in the principle that maritime occupation must be effective to be valid". Bynkershoek held that the sea,

having /

28. See Ch. IV.
29. p. 189.
having no boundary, could not be possessed merely by intent without the actual possession and suggested that generally the control ceases where the power of weapons ends. Until the recent emergence of the school of thought, of which Lapradelle and Fauchille are the leading representatives, the juridical status of the territorial waters was viewed almost entirely from the angle of the coastal State and how far it could effectively appropriate an extent of waters.

XIII Other opinions which have received considerable support from writers on the juridical status of the territorial waters are (a) that they are under the sovereignty of the coastal State or that the State has a right or rights of sovereignty; (b) that the State has a right of property or that the territorial waters form part of its territory; /
territory; or (c) that the State has merely a right of jurisdiction thereon. These terms when applied to territorial waters have been regarded as analogous, as there is general agreement as to the essential nature of the group of rights which they connote.

XIV. If, as suggested, States sought to appropriate the seas for the purpose of economic advantage, the term "property" would appear to have the sanction of history. It was the basis of the Scottish claims to the reservation of the fisheries, supported by Welwod, Craig and the Scottish Estates. The theory was given prominence by Valin in his Commentary on the French Marine Ordinance of 1681,

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31. League of Nations C. 351 (b) M. 145 (b) 1930 V. page 37
32. Sur la pêche.
and by Vattel, and has been unequivocally accepted by Hall. In favour of this theory, it has been pointed out that the territorial belt could be dominated from the land by artillery posted on the shore or by an oversight from the land, thus giving the adjacent State a title to possession of the waters so dominated. The increased range of artillery no longer bears any relation to the restricted territorial waters and the ratio has long since ceased to hold. The theory of state proprietary rights gives adequate support to the modern claims of States to reserve for their nationals the coastal fisheries and justifies the municipal law thereon. In this de facto universal reservation of coastal fisheries for nationals there:

33. Bk. i. ch. xxiii s.287. His theory is based on a supposed original plentitude but with an increased population and relative scarcity ownership had to be introduced.
34. p. 190 et seq. Fauchille (i.2,133) contains a list of publicists who subscribe to the doctrine but Fiore mentioned therein rejects the doctrine- see para. 276. Oppenheim (i. 333) may be added to the list.
35. Scots
there is at once the evidence of the motive, the intention and the will to treat territorial waters in this respect as 'property'. So close is the relationship that the territorial waters have been described as an appurtenance or accessory to the land. So much are the territorial waters an accessory of the land that they cannot be alienated separately from the coast.

XV. Various objections have been taken to the theory of the right of property, but many of these objections, e.g., the 'eight heads' of Fauchille, could be levelled against the theory that the territorial waters form part of the territory.

35. Scots Law - Erskine, Institut. II. i. 6; Bell's Principles para. 629; Rankine Ch. XV; British view generally see Hurst. B.Y.L. vol. IV; British Constitutional Law see Sir J. Salmond Law Quarterly Review Vol. xxxiv (1918) p. 235; see Moore, ii s. 145 for American view.
36. Hyde i. s. 141, Fauchille I. 2. p. 133
territory of the State. Indeed it is not always clear that a distinction between 'property' and 'territory' is intended. These objections will be considered in connection with the theory of 'territorial sovereignty'.

38 Lapradelle, in support of his theory that the territorial sea cannot be appropriated, takes his stand on the ground that the physical character of the sea precludes the sovereign from granting a right of property to an individual. Therefore, he contends, there being no right of individual property, the sovereign cannot possess a right of property in the thing. This conclusion is not necessarily valid.

To cite one example from the municipal law of Scotland, the Sovereign is considered to be vested in a right of property in the Regalia Maiora but he cannot alienate or grant /

38. Les Principes, etc. Lecture 19.
grant a right of property therein to an individual. The Court of Session in Lord Advocate v. Clyde Navigation Trustees, decided that the Crown had a proprietary right in the bed of the landlocked and other bays inter fauces terrae and that the public had merely the right of navigation and fishing. As to whether a similar right exists in the territorial waters along the open coast has never been expressly decided although there are dicta to that effect, e.g., Cunningham v Assessor for Ayrshire, sometimes founding upon the case of the Lord Advocate etc. cit. sup. although the Lord Ordinary there explicitly stated that that point was not in issue.

Again the case of Lord Advocate v. Wemyss Trustees, where the issue was in regard to coal under the Firth of Forth /

40. (1895) 22 R. 596.
41. 2 F. (H.L.). 1.
Forth and not under the open sea, Lord Watson stated that he knew of no principle in the Law of Scotland which would prevent the Crown from granting a lease to work the minerals under the territorial waters, a right by occupation in international law. There is no lack of evidence of grants by the Crown to vassals of exclusive property in mussel and oyster beds 42, but, as already mentioned, there was dubiety as to the right of exclusive fishing, apart from salmon fishing. Whatever the common law may have been, all restrictions on the right were removed and exactions forbidden by the Act, 29 Geo. II. c.23. The fishings referred to in the Act were the white fishings "in all and every part of the seas, channels, bays, firths, lochs, rivers, or other/
other waters where such fish are to be found, on the
coasts of that part of Britain called Scotland, and Orkney,
Shetland and all other islands belonging to that part of
Great Britain called Scotland. "All were freed from re-
striction, any law, statute or custom to the contrary not-
withstanding." While the above opinions of the Courts are
but obiter dicta as to international law, the legislation
indubitably implies a proprietary right of disposal.

But we should not be content with only the municipal
Law of Scotland, even if in point, as proof of a principle
of international law; in this instance the dicta and the
legislation mentioned are consistent with the opinions of
the jurists and the recognised practice of States.

Lawrence says the rules of international law on the re-
servation of the fisheries within the /

42. contd. Gammell, 1851. 13.D. 355. at p. 373 founds
upon the grant to the Isle of May Monks which is open
to criticism, See part I p.66. See Bell's Election Law
p.52. for alleged infeftments (1639-1704) in white fish-
ings.
the territorial waters are simplicity itself.

Within the territorial waters the subjects of the littoral State have the exclusive right of fishing except where the State has either expressly or tacitly admitted foreigners to that privilege. The difficulties are introduced by conventions and the lack of a universally accepted limit of territorial waters. Outside these waters all may fish without permission of any adjacent State.

There is probably no more settled rule in international law than this exclusive right to the products of the territorial waters. States are reluctant to part with it and where necessary reserve it in treaties.

Similarly, since Vattel's work was accepted as authoritative /

44. p. 189 Vattel i. ch. xxiii; Hautefeuille p. 20.
45. See Appendix U for recent examples. Also Fiore ss. 267 & 268.
authoritative on the point, no one has or would challenge
the right of the coastal State to appropriate the oysters
and other fructus of the bed of the territorial sea. In
these instances the State is clothed with all the insignia
of ownership. These rights, so far as the writer is
aware, have never been challenged though claims have arisen
under conventions or on grounds of acquiescence of the State,
to a right to participate therein. Navigation is the only
other use to which the territorial waters may be put.

It must be admitted that the right of innocent passage
must be accorded to all in times of peace, but it is true,
though less obvious, that the coastal State may regulate
the exercise of the right, so long as the regulation be not
oppressive. Apart from this conditional right, States
generally /

46. i. ch. XXIII.
47. North Atlantic Fisheries Arbitration (1910) Cmd. 5396
and case of David J. Adams; Neilsen p. 534.
generally have no rights in the territorial waters of another. Lapradelle's objection that the State can have no right of property in the territorial waters must, it is considered, be repelled. If there is a servitude right over territorial waters, it is the right of innocent navigation. The rights of the littoral State cannot be described as servitudes. On the other hand, if it be assumed that the State has merely the right of 'conservation' or a bundle of servitudes, then the question may be legitimately asked: what are the territorial boundaries or limitations to those rights? If protection of...
of interests only is the object of the right, then the modern restricted limits are totally inadequate; 'Conservation' was the plea in justification advanced by the United States for their prohibition of sealing outside the territorial waters in the Behring Sea and was rejected by the Arbitration Tribunal. The State has only the right to protect its interests to the extent and in the manner permitted by international law. Neither the theory of Lapradelle or of Fauchille, though their views must be received with the utmost respect, appear to define in all its aspects the rights of States in respect to the waters termed 'territorial waters' around their coasts; Fiore, who would admit the State to have juridical

49. The prohibition of the pollution of maritime waters within 50 or even 150 nautical miles of coasts was envisaged at the International Conference at Washington in 1926. (1926) Cmd. 2769.
juridical possession of the territorial waters; denies the right of property, thus bringing out the distinction between 'possession' and 'ownership'. If, however, the territorial waters are accessory to the land they partake of the same juridical character, in which case 'possession' must surely give place to the superior right of 'ownership'. The term 'property', implying 'State property' or ownership in international law, is perhaps an unhappy term as it is liable to be confused with 'State property' held by the State as representing the community, not in the capacity of a sovereign State in active relation with other sovereign States. The term 'property' is, therefore, not preferred and is discarded as inadequate to define the rights of the State in respect of territorial waters.

XVI. The /

51. paras. 276 & 1039.
of the problem XVI. The solution of the juridical status of territorial waters is to be found in the fact that the State, in respect thereof, is acting in a sovereign capacity, in all circumstances exercising sovereign rights in relation to the other States, and, as a member of the community of States, subject to the duties and obligations imposed upon the State members by international law. The theory of the 'droit de conservation', the theory of the right of property, and the theory of the right of jurisdiction— all recognise, in gremio, this sovereign capacity of the coastal State. Lapradelle's theory does not deny it.

The obligations imposed by International law in respect of territorial waters have grown out of custom long observed as binding and adapted in the practice of States to meet the special needs and circumstances of maritime dominion. In its uncertainty in detail the international law of territorial /
territorial waters discloses an attempt to reconcile the
sovereign necessities of the territorial State and the
frequently competing demands of the community of States.

XVII The theory of the right of sovereignty has an ancient
lineage also. It has the support, frequently qualified,
of the great majority of publicists. Bynkershoek con-
sidered that there was nothing in the Law of Nature or in
the Law of Nations, or even in the Roman Law, that stood
in the way of sovereignty over the sea. But the sea must
be possessed (dominated from the land); fishing and navi-
gation were not sufficient for the acquisition of sovereignty.
The qualification that the right exercised was 'a right of
sovereignty' /

52. Fiore, para. 276; Shucking - League of Nations, C. 351
(b) M. 145 (b) 1920 V. page 13.
54. De Dominio etc. Ch. IX
sovereignty' was advanced towards the close of the eighteenth century by Von Bar and adopted by the Institute of International Law at the sessions of 1894 and 1925 and, finally, it appears to have been the view of the majority of States at the Conference for the Codification of International Law in 1930. For the moment it need only be noticed that the reluctance to grant the right of sovereignty without qualification is due to the recognition of substantial restrictions upon the rights of the State law and the duties imposed by international law. Nys, for example, considers these restrictions to be such as to warrant a denial of sovereignty. The argument of Nys means that there can be nothing corresponding to the radical right. At what point then does the sovereignty of a State /

56. Lapradelle, Lect. 19
57. Institute of International Law p. 113, Revue 1925. p.186
58. League of Nations. cit.sup.
State vanish owing to treaty concession? It is not that the sovereignty has been lost but merely that the State has obliged itself as to the particular manner in which the sovereignty shall be exercised. In the post-1918 period, the series of Peace Treaties and conventions under the aegis of the League of Nations have imposed many restrictions and obligations upon States which cut deeply into the previous freedom and sovereignty of States. Yet it has not been concluded therefrom that the States have been degraded from sovereign rank.

XVIII. The chief objections to the right of exclusive or full sovereignty are the duty of allowing merchant ships of

59. e.g., the clauses of the Versailles Treaty imposing restrictions upon the strength of Germany's armed forces. c/f. the Opinion of Tribunal in re North Atlantic Fisheries that the partition of sovereignty does not follow from treaty concession. (1910) Cmd. 5396. pp. 12 & 13.
of other States to navigate the territorial waters and the absence of a universal jurisdiction over ships of whatever nationality which pass through the territorial water belt.

In the first place, the term 'exclusive sovereignty' in its former absolute connotation is no longer applicable to States: all are under the obligations imposed by international law. To-day 'exclusive sovereignty' can mean only 'sovereignty exercisable in accordance with international law'. The description of the state sovereignty over the territorial waters as 'limited, attenuated or diminished', while plausible, is erroneous in that it rests upon an impossible hypothesis. These terms imply that there is or can be an ideal State untrammelled in its sovereignty.

60. 'Sovereignty' within the limits of the State, internal sovereignty, is not under consideration here as that falls within the province of constitutional law and jurisprudence.
sovereignty by any restriction or obligation towards other States. From the point of view of international law no such State can exist. It is a condition of the membership of the community of States that all States, called independent States, have undertaken to observe, in their relations inter se, to observe as binding those rules or customs and express contractual obligations which form the corpus of international law. Even if a State is obliged to permit 'innocent passage' upon the territorial waters, it does not thereby lose its sovereignty in respect thereof any more than in former times a neutral State, which had obliged itself to permit of the passage of the troops of a belligerent, lost its right to be deemed a neutral. The right of innocent passage and the admission of the jurisdiction of the flag State are concessions granted, without detriment to the interests of the territorial State, in the interests /
interests of inter-state commerce, concessions necessary in a community of States economically interdependent. They cannot be deemed substantial derogations from state sovereignty. The flag State may exercise a jurisdiction over the crews and vessels in transit upon the territorial waters of another State even in foreign ports, but that permissive jurisdiction may be ousted by the exercise of the superior territorial jurisdiction of the coastal State should its interests be endangered. The inroad of the right of innocent navigation is of fairly recent date. In the treaty between Britain and Sweden in 1654 it is the subject of express contract and the parties engage themselves to further the object not only in their own appropriated waters but also in the Mediterranean and other European waters /

61. See post Chap. V.
waters; a similar engagement was made in the treaty with
the Danes in 1660. Provisions as to innocent navigation
in territorial (coastal) waters do not appear in the
American Treaty of 1815 nor in any later commercial treaties
entered into by Britain. The rule of law is now so uni-
versally recognised that express contract is unnecessary;
but it does not thereby follow that the universal appli-
cation of the rule has nullified the sovereignty of the
littoral State.

'The territorial sea must be considered as constitu-
ting a part of the domain of the State to which the coast
belongs. By virtue of this eminent domain, every State
has the exclusive right to provide for the security and
defence of its territory, the protection of the private
interests of its citizens, the free carrying on of commerce,
and the protection of the general and fiscal interests of
the State. (64) The State cannot subject merchant ships
crossing territorial waters to the payment of any fees or
be regulated to render transit oppressive or difficult!(65)

66
Ortolan /

62. See Appendix C.
63. 'Ports and rivers', see Appendix H.
64. Fiore p. 178 para. 265
65. Fiore para. 278
66. I. oh. 8.
Ortolan, who denies the right of property, admits that, for defence, the State has over the navigable waters of the coastal seas a right of empire, a power of legislation, supervision, and jurisdiction conformable to the rules of international law. Wheaton, accepting the same rights with the addition of fishing and the duties imposed by law upon a neutral, considers that they do constitute sovereignty over territorial waters. The right of self-preservation and the protection of its interests (except where restrained by international law) is a fundamental right of sovereignty. Apparent restrictions thereupon and obligations imposed by law upon the State do not rob it of its sovereignty. A neutral State retains very wide powers upon its territorial waters. Finally, the exercise /

67. i, 368. See also Van de Wetering in Revue (1923) p. 35; Hyde i. s. 141.
68. Moore, Digest. i. s. 4
exercise of a jurisdiction of the flag State is not prohibited but only permitted and personal, applying only to the vessels under the national flag and is not distinguishable in its broad features from that exercised, with consent, in the ports and harbours of another Power. On the contrary, the jurisdiction of the littoral State in the territorial waters may be applicable to all within the belt and that jurisdiction, it is held, is sovereign.

XIX. The most appropriate definition of the juridical status of the territorial waters is that they are under the territorial sovereignty of the adjacent State. This definition postulates that the territorial waters are assimilated to the land in the sense that the State has the exclusive jurisdiction as to legislation and control together/

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69 Institute of International Law, p. 144; See also Appendices C-H and B.Y.I.L Vol.1, p.45 re Foreign ships in territorial waters.
together with the exclusive proprietary rights.

"Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so called natural frontiers as recognised by international law or by outward signs of delimitations that are undisputed... or by acts of state within fixed boundaries." (70)

Also:

"Territorial sovereignty involves the exclusive right to display the activities of States". (71)

The State exercises an exclusive legislative and police control: it has the exclusive right to the fructus: it may exclude from the belt those who may give cause for complaint: it displays the activities of a State within a delimited area. At the same time /

70. Max Huber, Arbitrator in the Island of Palmas Case. Hague Court Reports (Scott) (2nd Series) p. 92

71. do. p. 93. There is perhaps no more concise statement of the British case for sovereignty upon the marginal belt than the speech of the Lord Chancellor in the debate on the first reading in the House of Lords of the Territorial Waters Jurisdiction Bill, subsequently the Act of 41 & 42 Vict.o.73. Hansard 3rd ser. vol. 237, 1601.
time, recognition as a sovereign State is conditional upon the obligations viv-à-vis other States imposed by international law being fulfilled within the sovereign jurisdiction. The needs of each locality differing, the details of the legislation affecting territorial waters must be determined by each legislature according to its own view, and, so long as exercised in a reasonable manner, will be acquiesed in. This sovereign power exercised by the State upon its territorial waters is, in its nature, no way different from that exercised upon its domain on land. The apparent modifications and derogations are imposed by the rules of international law derived from custom and express compact and suited to the /

72. Stowell, 51; See Appendix R. (Temporary Fisheries Agreement between the U.S.S.R. and the United Kingdom) which was a compromise arranged following upon a difference of opinion as to the extent of territorial waters. 73. League of Nations Conference for the Codification of International Law. C. 230, M.117, 1930. v. p. 6.
the peculiar needs of the community of States upon the territorial waters which may form part of the ocean highway.

XX. The use of the term 'territorial sovereignty' serves to distinguish between the jurisdiction exercised upon the waters immediately adjoining the open coast and those functions of defence upon the contiguous zone which States claim to be within their power. The first distinction to be drawn is that the duties of the neutral coastal State are not pretable in this outer belt which neither the State nor other States consider to be within the territory or exclusive territorial jurisdiction. Conversely, no State can claim the respect due to neutral territory in that belt.

74. See post. pp. 103-110
in that belt.

XXI. The conception of the contiguous zone has been developed as it has become more and more recognised that to restrict the territorial waters along the open coast to three miles breadth does not provide adequate scope for the protection of the country's interest. So varied are the requirements of modern times, that it is difficult to envisage a limit which will meet every apparent necessity without throwing an undue burden of police upon the coastal state. Apart from the situations created by the important factors of the increased speed of transport, including aircraft, the possibility of international action to prevent the pollution of the sea with oil from vessels within fifty miles or even one hundred and fifty miles of the coast was mooted at an international conference at Washington /
Washington in 1926. Considerations of this burden of police influence the policy of Great Britain in adhering to the principle of restricted territorial waters, but, at the same time, a willingness has been expressed to meet the special needs of particular States by conventions for specific purposes. It is undoubtedly true, however, that a State may, without objection being raised by others, take measures within the contiguous zone to frustrate any expedition clearly intended to inflict damage to its territory or its citizens or to breach the revenue or sanitary laws. The State, so to speak, anticipates the injury. Consequently, there is to be found in the municipal law of the United Kingdom and the United States, provisions for the extension of the jurisdiction in respect of foreigners beyond /

75. (1926) Cmd. 2769. pp. 369 et seq.
beyond the normal limit of territorial waters. Lawrence states what appears to be the British view—that these acts of the State are tolerated not as rights but out of courtesy, i.e. the comity of nations. As Sir Charles Russell put it in his evidence before the Arbitration Tribunal for the Behring Sea dispute; 'I will suggest that the very idea of defensive regulation or defensive act, repels the idea of cut and dried formulated rules.' The British Hovering Acts aim at preventing acts within the jurisdiction but do not extend the limits of territorial waters.

XXII. The right to take steps to prevent ships 'hovering' outside

77. Parl.Papers, United States No.4. (1893) at p.60. Wheaton i. 367. See also following notes.
78. Lawrence, p. 182; Le Louis (1817) 2 Dobson 210 at 245; Halleck i, 168; Twiss (Peace) 310; Westlake i.75; Stowell, 323-326; League of Nations C. 351 (b). M(b) 1930. V. p.126; Jessup. Chap.ii. For an examination of the practice /
outside the limits of territorial waters with a view to smuggling or to prey upon the shipping issuing from the ports was early recognised in the Law of Scotland and England. Oppenheim took the view that, as the municipal laws had been in existence for some hundred years, they had probably hardened into a rule of customary international law. The weight of opinion and municipal law certainly favoured that conclusion, yet, when the issue was raised sharply in connection with the enforcement of the prohibition laws of the United States consequent on the passing of the 18th Amendment of their Constitution, it was /

78. contd. practice of various states.
79. Parl.Papers, United States, No.4. (1893) p.60.
80. (Scotland) Morrison's Dictionary (1713) 11940; British Hovering Acts, 1736 (9 Geo.II. ch.35), 1784 (24 Geo.III. ch.47), Now repealed by and partly reenacted by the Customs Consolidation Act, 1876 (39 & 40 Vict. ch.36, s.179); United States - See Hyde i. s.234.
81. Marsden, ii. 217-8
82. Oppenheim, i, 340.
was seen that the United Kingdom took their stand upon the principle that the preventative jurisdiction, involving a right of search upon the portion of the high seas outside the territorial waters as ordinarily understood, was not a right conferred by international law but only an exercise of the sovereign function of State-protection beyond the territorial jurisdiction, tolerated out of courtesy and the desire to facilitate the administration of municipal law designed for the social improvement of the community. To obtain a right in law required an express compact. Accordingly, a treaty was entered into between Great Britain and the United States which served /

83. (1924) Cmd. 2063. See Hansard, House of Lords. Fifth Series 1923, vol. 54. 714-732 where the international law was discussed by the Foreign Secretary, by Earl Birkenhead and by Earl Grey, a former Foreign Secretary.
served as a model for other treaties between the United States and other European countries. Likewise, a treaty was entered into between Britain and Finland to the same end. Similarly, a convention was arranged amongst the Baltic States, conferring a special jurisdiction outside the ordinary limit of territorial waters for the suppression of the liquor traffic. In the treaties to which the United States and Britain were parties, it is expressly affirmed, as a principle of international law, that the proper limit of territorial waters is three miles from the shore. Such an explicit treaty declaration must override any inconsistent pronouncement by their municipal Courts or officials. That other States are not content with /

84. See Jessup p. 234 for a list of the American treaties.
85. (1932-33) Cmd. 4436.
with such a narrow margin of waters was disclosed at the Conference for the Codification of International Law in 1930. Some States were in favour of a restricted belt of territorial waters with a special jurisdiction upon the contiguous zone, while others sought to extend the territorial waters for all purposes, that is, to have one belt only. If the views of the leading European and American nations and of Japan are correct - they cannot be ignored - then the contiguous zone does not form part of the territorial waters proper. In that zone the State has not the exclusive sovereign rights, but only the same rights as it possesses upon the high seas with such additional jurisdiction in respect of the vessels of other nationalities as can be obtained by compact with the States /

87. *League of Nations C.351.* (b) *M.* (b) 1930. *V.* p.123 et seq.
States concerned. In the respect that such treaties confer a special jurisdiction upon the high seas for definitely agreed purposes, they do not differ from the North Sea Fisheries Convention and the recent Agreement between the United States and Canada for the Preservation of the Halibut Fisheries of the Behring Sea which confer a concurrent jurisdiction upon the signatory States upon the high seas, but reserve to the coastal State the exclusive jurisdiction in the territorial waters. It follows that the contiguous zone is not within the territorial waters of the State, but, on the contrary, forms part of the high seas for juridical purposes.

XXIII. Max Huber's suggested criteria in the Island of Palmas /

88. Appendix S. (4)
89. Appendix N.
Palmas case for the recognition of territorial sovereignty are satisfied in the case of territorial waters, i.e. exclusive sovereignty exercised over a delimited portion of the surface of the globe and recognised by all interested States. It has been objected that to concede that the territorial waters form a part of the territory of the State is invalid, because the boundary of the State then becomes a hypothetical line, 'une ligne de respect', upon the high seas. The objection cannot be sustained on that ground. It is true that there is no rule of international law determining precisely the limit of the territorial waters of all States but there can be no question that the minimum claimed is the breadth of three miles from low water mark along the open /

90. cit.sup.
92. See post Chapter IV.
93. Moore's Digest, 1. s.145; League of Nations, cit.sup.
open coast. Other States which claim a greater extent have, on occasion, stated very definite limits. That being so, there is no more objection to the adoption of an arbitrary boundary on the sea than there is to the adoption of a line of latitude for a boundary between the United States and Canada.

XXIV. The objections offered by Fauchille to the theory of the absolute territorial sovereignty in the marginal sea have been divided into eight heads, viz. on the assumption that the territorial waters form part of the territory (absolute property) of the State it would follow that:

(1) The coastal State may interdict or prohibit all vessels from its waters. It will only be a concession to admit the vessels of strangers.

(2) Admission /

(2) Admission will be on such terms as the State may devise including payments for harbourage, customs, etc. The waters will be really a part of the national territory and there will be a right to take protective measures so that there must be another zone for that purpose.

(3) The civil and criminal jurisdiction for all acts, including the acts on board private ships and even the reservation of jurisdiction and pursuit of pirates, must be exclusively with the territorial State.

(4) The territorial State must be left to fix the details of the ceremonial to be observed by ships in respect to its flag.

(5) The coastal State as the proprietor is entitled to the exclusive enjoyment of the produce of the coastal waters and may take the appropriate steps to protect them. For a like reason, it may reserve the coastal shipping /
shipping for its own subjects.

(6) The bordering State may dispose of the territorial sea like any other portion of its territory.

(7) Birth upon a vessel within the territorial waters makes the party a national of the coastal State.

(8) In time of war it will be necessary for the State to observe that its maritime frontier is not traversed by any party of the belligerents as otherwise it must take steps to disarm them as in the case of the land frontiers.

Of these objections, heads (5) and (8) have already been dealt with, the former in connection with the theory of the right of property and the latter in connection with Lapradelle's theory of servitudes in favour of the adjacent State.

XXV. The first and second objections arise out of the right /
right of innocent navigation. It is replied that it was formerly the practice to impose restrictions upon shipping within the appropriated seas, these restrictions being imposed primarily in the conceived interests of the State, such as the possible enrichment from dues or for services rendered. This right was recognised until patent abuse led to its abrogation.

"For more than two hundred and fifty years no European territorial marginal waters which could be used as a thoroughfare, or into which vessels could accidentally be driven or stray, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right therefore must be considered to be established in the most complete manner." (98)

The words used in the phrase 'right of innocent passage' refer to the character of the passage not to the character of the ship; indirectly it emphasizes the right of the coastal /

95. See ante pp 67-70 and 78-90.
96. See Part I.
97. Craig, i, 16.17; Bell's Principles Para. 640 (Danish Sound Dues abolished in 1857).
98. Hall, p. 197. See also Stowell; p. 149.
coastal State to protect itself and its interests, whether the vessel be private or public. Further, the vessels are subject to such reasonable restrictions and regulations as to navigation and sanitary precautions as the state may impose. Whenever the interests of the State are threatened or the peace of its waters is broken, the right of navigation is lost, for it is no longer innocent passage, and the vessel becomes subject to the full extent to the jurisdiction of the State. While it is a duty, however slight the burden be, imposed by international law to allow this freedom of passage, the rights of the coastal State are so far predominant that, despite the declaration in Articles 10 of Convention XIII of the Hague to the effect that the mere passage of a belligerent /

100. See Jessup p. 33, who would distinguish between 'jurisdiction' and 'control'.
belligerent men-of-war and their prizes do not violate the neutrality of a Power, it has been held that States, even in time of peace, may, and in practice do, regulate the passage and entry of foreign warships into its ports.

In time of war the regulations may be very stringent. Holland, in 1914, closed its maritime waters to belligerent men-of-war, and Norway, in 1916, excluded belligerent submarines from territorial waters. The right of innocent passage is conferred by international law but it does not follow that, because there is a corresponding duty imposed upon the State to allow the right to be exercised, its territorial sovereignty is thereby avoided. Indeed, the general /

101. contd. would have prohibited a neutral from refusing the right of passage. The Article as adopted is a compromise.
102. Vattel ii, s.123; See Treaties in Appendices C & D.
103. Oppenheim, ii. p.437; See also Chap VI.
general tendency is to grant, on a basis of reciprocity of treatment, the freedom and privileges as are accorded to national vessels even in the ports which are acknowledged to be within the territorial jurisdiction.  

XXVI. As to the exercise of a criminal and civil jurisdiction by the coastal State, head (3) of the objections, it may be said generally that a vessel entering the territorial waters of another State voluntarily subjects itself to the jurisdiction of that State, but it must be left to the State to judge, in its discretion, whether it will exercise a jurisdiction. Generally, the State will act only if its interests are threatened or the peace of its waters /


105. Cunard Steamship Co. v. Mellon (1923) 262 U.S. 100 Moore's Digest s.144 quoting Institute of International Law /
waters disturbed. Mere transient innocent passage does not impinge upon the interests of the State and any officious /


"His Majesty's Government do not deny the strictly legal right of the United States or any other country to impose its jurisdiction on all ships whether national or foreign within its territorial waters. His Majesty's Government themselves claim that right and it is even the case that some of the provisions of the British Merchant Shipping Acts are such that ships visiting ports in the United Kingdom must comply with them before entering and after leaving the jurisdiction. These provisions, however, relate solely to the safety and welfare of the ship, crew and passengers. Similar provisions exist in the legislation of the United States and other countries and they are generally recognized as reasonable.

It is, however, equally well recognized that the circumstances of ships, travelling as they do from port to port in many different countries, are peculiar and that to subject them to all the different and often conflicting requirements of the various jurisdictions which they may enter, would create an impossible situation. Consequently, as a matter of international comity and practice, the maritime Powers refrain from imposing their jurisdiction on foreign ships except for the purposes stated above, namely the safety and welfare of the ships, crews and passengers. The principle was well stated in the dispatch of October 28, 1852, from Mr. Conrad, when Acting Secretary of State, to the United States minister at Madrid, wherein he writes:--

"You will state that this government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports. That nevertheless those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilized nations. That those usages are well known and /
officious interference would be regarded as unjustified and open to possible objection by the flag State. There is no point in a State attempting, even if it were possible and convenient, which it is not, to impose its domestic laws other than navigation rules upon a vessel merely passing through its waters. Under the Territorial waters Jurisdiction Act, the fiat of a Secretary of State is necessary before a prosecution can be instituted for an offence alleged to have been committed within British territorial waters. The purpose of this provision is to reserve /

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105. contd. and long established and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation."

The United States Government have indeed given recent proof of their fidelity to the same principle, in exempting ships trading between the United States and Italy from the strict application of the Volstead Act, on the ground that Italian law requires the provision of a certain amount of liquor on such ships.

In informing you of the above I am directed to express the earnest hope that means may be found to modify the present application of the Volstead Act to British ships, and thus to remedy what is, in effect, an unwarrantable interference with the domestic concerns of British ships on the high seas."
reserve to the State, acting through the executive, the right to decide whether it is expedient in the interests of the State or of its nationals that the jurisdiction should be exercised in a particular instance. In brief, the jurisdiction, civil or criminal, is of the nature of a *jus merae facultatis*. It is the elementary right of protection which is the essential element of Fauchille's own theory of 'droit de conservation' and, when exercised, is effective to exclude the jurisdiction of the flag State.

XXVII. There is no point in the seventh objection advanced.

While there are many rules common to most nations whereby the status of nationality is determined, ultimately, it must /

106. Fiore p. 306, would have variable limits.
107. 41 & 42 Vic. c. 73.
108. This jurisdiction of the Coastal State is discussed more fully in Chapter V.
must rest with each State to claim allegiance from a party on the grounds of parentage or place of birth. Nationality is frequently the subject of conventions to avoid dual nationality or statelessness arising from municipal laws of States being in conflict. Naval ceremonial, head (4) of the objections, is of so little importance in these modern times that it need not be discussed.

XXVIII. In conclusion, Fauchille's sixth objection, that the State ought to be able to dispose of its territorial waters in the same manner as any other part of its territory, overlooks the very special connection between the coast and the territorial waters which are regarded in international law as effering to the land as an accessory or appurtenance of the coast. In such circumstances the accessory /

accessory and necessary adjunct can only be alienated with the principal subject, the coast. These objections by Fauchille to the right of territorial sovereignty upon the territorial waters rest upon the premise that 'absolute sovereignty' is vested in the State but, as already stated, no nation, as a member of the society of States, is possessed of such unrestricted sovereignty. The State retains its sovereignty, but it has duties, as well as rights, imposed by international law.

XXIX There is ample, it is suggested, conclusive evidence that the whole course of conduct of States in respect to territorial waters has been based upon and regulated by the belief that they possess the right of territorial sovereignty upon these waters. It is the consequence, de jure, of State appropriation of the marginal seas and bays.
Without this conception, States could not reserve for their nationals the exclusive right to the products of these waters: neither could they competently reserve to themselves the right of exclusive legislation for police and other sovereign purposes upon the territorial waters. Municipal legislation affecting territorial waters is essentially territorial except where it is expressly stated to apply to nationals only. Any party entering the waters subjects himself to the jurisdiction of the adjacent State. It is as between territorial sovereigns that the long series of treaties have been entered into conferring or regulating rights and duties of States in territorial waters. It is because of

110. Oppenheim, i. p. 334.
112. See Appendices C - N for example.
of this territorial sovereignty that the coastal State is liable in international law for dereliction in the duty to protect the interest of others whose sovereign jurisdiction is excluded. The territorial waters of a neutral State take the same juridical status as the territory and are equally sacrosanct: hostilities are strictly prohibited therein: the belligerent rights of visit and search and of capture lapse as soon as the pursued enters the neutral territorial waters.

XXX. The conception of territorial sovereignty and its limitations upon territorial waters may be illustrated by two early opinions of the United States Supreme Court, which, in their generality, are today of unimpaired validity.

"The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or the rights of any other nation, within its own jurisdiction". (113)

113. The Appollon (1824) 9 Wheaton 362. at p. 370
"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers (in territorial waters) in a manner not consonant to the usages and received obligations of the civilised world." (114)

XXXI. The essential element of the locus in questions involving the immunity claimed for neutral territorial waters is stressed in the classic opinion of Sir William Scott in the /

114. The Exchange (1812) 7 Cranch 116 at page 136.
"The first fact to be determined is, the character of the place where the capturing ship lay; whether she was actually stationed within those portions of land or water, or something between land and water, which are considered to be within the limits of Prussian (neutral) territory? On this point, I am inclined to think . . . she was lying within the limits, to which neutral immunity is usually conceded."

XXXII. Direct evidence of the right of territorial sovereignty as a rule of international law, is afforded by a long series of decisions in the Prize Courts, that no private party can claim the restoration of a vessel taken by an enemy in neutral waters; only States whose sovereignty has been disrespected have a locus standi to claim restitution in the courts of the neutral. This was noted in the case of the Twee Gebroeders. In the case of The Bangor the point was put thus by Sir Samuel /

115. 1800 3 Rob. 162. at p. 163.
116. Cit. Sup.
117. [1916] P. 181 at p. 185
Samuel Evans.

"No proposition in international law is clearer, or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State and not as to the enemy".

Precisely in point is the opinion of Lord Stowell in the case of the Eliza Ann.

"A claim has been given by the Swedish consul for these ships and cargoes, as having been taken within the territories of the King of Sweden, and in violation of his territorial rights. This claim could not have been given by the Americans themselves, for it is the privilege, not of the enemy, but of the neutral country, which has the right to see that no act of violence is committed within its jurisdiction".

An early Scottish case, Hunter v Count de Bothmer, may be noted as of interest. There, a British ship, having been recaptured 'within the limits' of a neutral port', was ordered to be restored to the neutral power. The King of Denmark /

118. (1812) 1 Dods 244; See also Lord Stowell's opinion in the Vrow Catharina (1803) 5 Rob.15 considered in the Dusseldorf (1920) A.C. 1034; The Valeria (1920) P. 81 and The Fellworm (1922) 1 A.C. 292.
119. Morrison's Dictionary Appendix - Prize Case 52, p. 11957 (1801); See also Benton v. Brink (1761) Morrison's /
Denmark claimed restitution on the grounds of alleged violation of the "neutrality subsisting between the two Kingdoms".

This rule is not affected by any provision of the Hague Convention No. XIII of 1907. It was followed at the instance of the Norwegian Consul-General in London in the Dusseldorf during the European War. The rule rests entirely upon the rights and duties consequent upon the territorial sovereignty of the adjacent neutral State in respect of the territorial waters. Article 1 of the Convention XIII (Rights and Duties of Neutral Powers in Maritime War) of the Second Hague Peace Conference, 1907, speaks of "Sovereign rights... in neutral waters" which would /

119 contd. Morrison: 11949, where a prize had been taken "within the limits of the port" but the capture was, on appeal, allowed by the King of Denmark.
would seem to indicate that the States themselves consider their sway over the maritime belt to be of the nature of sovereignty.\textsuperscript{121a}

XXXIII. It is a sovereign duty to protect the State from threatened or possible danger, and, as has already been noted, action may be taken to this end before the vessel enters the territorial waters. In addition to the evidence afforded by the 'hovering' Acts of various States the right may be illustrated by the incident of the Keärsage.\textsuperscript{122}

In this incident, the French Government, considering that the Keärsage, a belligerent vessel, would be engaged as soon as it left the sanctuary of the neutral waters, convoyed it beyond that limit to secure that no hurt should.

\textsuperscript{121a} Hague Conference Reports p. 841
\textsuperscript{122} Pitt Cobett, II 409.
Moore's Digest i 65150
should happen within their jurisdiction. The American Government, on their part, while advising their commander to be discreet, vigorously protested against the action of the French as unwarranted and without sanction in international law. The French did not claim a territorial jurisdiction in the matter beyond the limits of the territorial waters but they claimed the right to ensure that no danger could arise from hostilities near them.

XXXIV. The published instructions and opinions of American statesmen are especially clear as to territorial sovereignty.

"The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised........" (123)

"The exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers and adjacent parts of sea enclosed by headlands; and also, to the distance of a marine league, or as far as a cannon-shot /

123. Moore Digest ii. s. 145
shot will reach from the shore along its coasts." (124)

The American view is unchanged. In the case of the Cunard
Steamship Company the Court said:

"It is now settled in the United States and recognised
elsewhere that the territory subject to its jurisdiction
includes the land areas under its dominion and control,
the ports, harbours, bays and other enclosed arms of the
sea along its coast, and a marginal belt of the sea ex-
tending along its coast outwards a marine league or three
geographic miles."

The American delegate to the Conference for the Codifica-
tion of International Law held to this view.

XXXV. The British view, as contained in the Territorial
Waters Jurisdiction Act, is dressed with ample authority
in respect of the British territorial waters.

"The /

124. Do. Mr. Buchanan, Sec. of State to Mr. Jordan,
Jan. 23rd, 1849.
125. (1922) 362 U.S. 100
127. 41 & 42 Vic. c.73
128. For opinions of publicists see generally 'Hurst',
"Whose is the bed of the Sea" B.Y.I.L. (1923-24)p.34
See p.164 as to the cases on the extent of the terri-
torial waters of Britain.
"The territorial waters of Her Majesty's dominions', in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence within the jurisdiction of the admiral, any part of the open sea within one marine league measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

XXXVI. This Act does not deal with the jurisdiction upon bays. The much discussed case of Reg. v. Keyn which prompted the Act touched upon the criminal jurisdiction of the municipal Courts under the municipal law in respect of the open sea only. This was the sole point raised by the case. The value of the opinions of the members of the Court upon international law have been overrated. It cannot be too strongly stressed that the judgment was passed solely upon a domestic issue peculiar to English municipal law: the opinions for and against a jurisdiction in international law were obiter dicta only. The decision /

129. (1876) 2 Ex. D. 63.
decision of the Court being that they had no criminal jurisdiction upon the territorial waters of the Kingdom, the sovereign legislature proceeded in the Act to confer that jurisdiction to which the State claimed to be entitled by international law. From the care bestowed upon the drafting of the Act, it must be held to have been the considered view of the British government as to the then state of international law.

The British view generally as to the territorial sovereignty of the State upon the territorial waters was advanced in the British Argument submitted to the Behring Sea Arbitration Tribunal. They claimed the /


131. Parl. Papers, United States, No. 4. (1893) pp. 39-63
the right in law to appropriate the coastal waters and to legislate for the fisheries for all persons, British and foreign. They also legislated for their nationals beyond the limits of the territory but such legislation, even though in its terms applicable to all, had never been applied to foreigners outwith the territorial waters. The British legislature and the Courts had proceeded upon the maxim extra territorium jus dicenti impune non paretur. It was upon the same principle that the executive acted and act in refraining from applying to foreigners the regulations as to methods of fishing in the Moray Firth. In brief, the British view has been and is invariably in favour of territorial sovereignty upon the territorial waters: beyond these limits the jurisdiction is personal.

XXXVII. The /

132. See post at pp. 213 et seq.
XXXVII. The post-European War period has given a number of treaties and conventions which expressly state that the adjacent State has the right of territorial sovereignty upon the territorial waters or contain terms from which this right must be concluded. The convention of 1920 relating to Spitzbergen, to which nine States were signatories, while conceding to these many of the rights in territorial waters usually reserved entirely for nationals, recognises, "subject to the stipulations of the present treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitzbergen" and "the territorial waters". Territorial sovereignty is preserved in the recent treaties and agreements between (a) Canada and the United States in regard to the Halibut Fishing in the North.

133. See Appendix K.
North Pacific Ocean and (b) The United Kingdom and the U.S.S.R., in regard to navigation and fishing.

XXXVIII. Finally, the Paris Convention of 1919 for the Regulation of International Air Navigation, to which twenty States were signatories, by its first Article stipulated that "The Contracting States recognise that every State has exclusive sovereignty in the air space above its territory and its territorial waters". This principle has been generally adopted in subsequent national legislation of both signatory and non-signatory powers, and by Britain in subsequent treaties touching international navigation. It necessarily follows that these signatory States, while legislating for the air, are

thirled /

134. (1925) Cmd. 2377.
137. Jessup. 116
138. Austria (1932-33)(Cmd. 4435) 'Art. 1. For the purpose
thirled to the principle of sovereignty over territorial waters and that sovereignty is 'territorial'.

XXXIX. It would appear, therefore, from the above summary of those acts of State and State organs, which are the best evidence of the rules of international law, that the juridical status of the territorial waters is that these are under the territorial sovereignty of the adjacent State; that territorial sovereignty is to be exercised subject to the special rules of international law applicable to the territorial waters.

138. contd. of the present convention the term 'territory' means the United Kingdom .... including the territorial waters adjacent thereto'
CHAPTER IV.

The Extent of Territorial Waters.

I. There is no more controversial topic in the law of territorial waters than their extent. It has received greater or less attention from all writers on the law of territorial waters: it was the rock upon which the Second Commission of the Conference for the Codification of International Law in 1930 foundered. To re-examine in all its historical detail a subject already so well explored would serve no useful purpose in this essay which is primarily concerned with the law applicable to waters around the Scottish coasts. Nevertheless, to obtain a proper perspective /

2. See Fulton Pt. II, Chaps. I & II and Jessup, Ch. I et passim.
perspective some reference to the views and practice obtaining elsewhere must be made.

Section A.

The Marginal Sea.

I. Perels has stated concisely the raison d'être of the territorial sea as being (a) the security of a maritime State requires the possession of its marginal waters and (b) the surveillance of ships which enter these waters, whether passing through or stopping there. These are demanded in order to guarantee (a) the efficient police, (b) the development of the bordering State and its political, commercial and fiscal interests, and (c) the enjoyment of the possession of territorial waters serves to sustain the population on the coast, and, the writer would add, to provide a nursery for seamen. The extent to which a State may appropriate the waters has been stated equally concisely by a recent writer.
"The international interest, although conserved by such action (state-control over the marginal seas) on the part of the individual State, was, however, also solicitous that the extent of the water area be narrowly limited and sharply defined. Thus it was not the extent or the width of the marginal sea which an adjacent State was capable of occupying, but rather the amount which it could occupy without obvious detriment to the society of nations as a whole, which was, and yet remains, an object of concern."

Conjoined, these two statements set out the practical difficulties of international law as to territorial waters.

II. We find in the earliest period of the régime of restricted territorial waters that the object or purpose held prior place. Thus, in the Stuart proclamations of neutrality the limits of waters within which hostilities were prohibited were so reasonable that no objection was raised by other States; yet the claim to the sovereignty of the more extensive British Seas was continued. In the /

3. Moore, Digest i. s. 144; Hyde, i. s. 141.
the northern seas the Powers sought to avoid the burdens of an extensive jurisdiction for neutrality and, at the same time, to retain the profits from their former extensive reserved fishings. The conception of a territorial sovereignty, with its necessary implications of definition of territory or area of jurisdiction, was probably then scarcely developed. Maritime boundaries were assigned in particular places for particular purposes.

III. It was clear, however, that the opinions of jurists and the practice of States were disclosing an unanimity in favour of the restriction of the claims to the marginal seas to a very narrow limit. The difficulty for

5. Fulton 567.
6. Do. 573; One may ask whether this idea of different zones of 'territorial waters' for specific purposes has not been recently resuscitated by Norway for, according to recent press reports, that State claims exclusive fishery limits but reserves for further declaration the limits for neutrality. Vide "Scotsman", 20th August, 1935.
the maritime States was the absence of a natural boundary.

The 'land kenning' was familiar in Scotland and in the Low Countries but there is no evidence that it was universally recognised. It was not, so it would appear, regarded as authoritative in Scotland. In the case of Benton v Brink in 1757, it was argued that because a vessel had been taken within a German mile from a neutral Danish port the capture had been void but the Court did not see fit to take cognisance of the plea.

IV. The range of cannon had been advanced by the Dutch as the limit in their disputes with England but it was not until the late eighteenth century that the recognition

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7. *Morrison's Dictionary* p. 11949. (The decision went upon the principle that the competent foreign Court had passed judgment and it could not be reviewed elsewhere.)

of this limit of cannon-range became somewhat general and then chiefly in the Mediterranean and in the treaties which followed upon the Armed Neutrality of 1780. It was by no means universally recognised. The limit of ten leagues, obviously unrelated to the then range of cannon was adopted in a Treaty (1784) between Spain and Tripoli.

In such circumstances Bynkershoek's aphorism, *terrae dominium finitur ubi finitur armorum vis*, appeared to give the States a needed clue to a scientific limit to the waters which could be appropriated by the adjacent State. Standing alone the dictum was unsatisfactory, especially when it is recollected that perhaps the most lucrative of the Scottish fisheries on the west Coast of Scotland were in parts where the shore was /

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9. Fulton 571; See also Pistoye p.93 for a list of treaties of this period and a summary of the relevant provisions.
10. Martens, Receuil 2nd edn. iii. 760
11. *Quaestiones etc.* cap. viii; see *De Domino etc.* Bk. II cap. xxii p. 329, where he indicates cannon range.
was relatively uninhabited and least under the sway and control of the Government. Hautefeuille clarified the rule by adding that it is immaterial whether the coast be inhabited or not; the respect is due not to the risk of damage by cannon shot but out of respect to the friendly people.

V. Vattel, whose influence, as already noted, was very great in the American States and elsewhere, put the proposition more generally that, between nation and nation, the most reasonable rule which could be laid down was that the sovereignty of a State over its marginal waters extended as far as it was necessary for its safety and as far as it could be effectively maintained for lawful ends.

\[\text{12. p. 417.}\]
\[\text{13. i. 23. s. 289.}\]
It was probably due to the States acting upon this principle that the claims to the 'historic bays' came to be substantiated. In the French Wars, however, there was need for definite instructions for naval commanders and these were less concerned with bays than with the marginal seas which could not be so easily distinguished from the open sea. The lack of unanimity as to the extent of territorial (neutral) waters was reflected in the instructions of Jefferson, the American Secretary of State. He reserved the claim of the United States but, for the moment, he advised a conciliatory attitude, remarking:

"You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league........... The President gives instructions to the officers ... to consider those heretofore given them restrained for the present to the distance of one sea league or three geographical miles from the seashore..."
Mr Jefferson, when President, considered extending the limit to the Gulf Stream but, apart from such an absurd proposal, the United States throughout these wars adhered to the minimum three miles.

VI. The introduction of the three miles limit into the English Law of Prize is usually ascribed to the opinions and decisions of Lord Stowell, then Sir William Scott, in various cases at this time, for instance *The Anna*, where he accepted Bynkershoek's dictum as a rule of law and added that since the introduction of firearms that distance (cannon-shot) had been usually recognised to be about three miles from the shore. As shown by his opinion in *The Twee Gebroeders*, he would not be very meticulous as to /

15. 1805 5 Rob. 372.
16. 1800, 3 Rob. 162.
to the measurement. The accuracy of three miles as the extreme cannon range in that period has recently been doubted. Whatever the origin of the three mile limit, possibly it was then regarded as ample for the protection of the coast, it was no doubt commended to mariners and others interested by its simplicity and definition of 'cannon shot', a term essentially vague and never satisfactory.

VII. It is important to note that it was not until a later date that the three mile limit was mentioned tentatively in the diplomatic negotiations in connection with the fishery problems which formed part of the legacy of the wars with the United States. In the negotiations between /

17. League of Nations, Sir Maurice Gwyer at p. 140 C. 351 (b). M.145(b) 1930.V.
18. Ortolan i. 158. and Halleck, i. 167.
between Britain and that country, the former offered the liberty of fishing to the American citizens on the Banks of Newfoundland and in the Gulf of St Lawrence and all the coasts belonging to Britain but at a distance of three leagues except off the Island of Cape Breton where the limit proposed was fifteen leagues. Finally, however, the Americans were conceded unrestricted fishing rights with only minor reservations. 19

VIII. The Peace negotiations after the war of 1812-14 disclosed a firming of the British attitude and we find the British Ministers pressing for a "fair equivalent" of the fishery privilege. Lord Bathurst is reported to have 

19. See Moore's Digest i. s.162, for the documents and history of the negotiations and the North Atlantic Fisheries Tribunal Award (1910) Cmd. 5396, pp. 7-14 for a construction of the treaties.
have said that while the British Government did not intend to interrupt American fishermen "in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore, it could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories."

The resulting Treaty of 1818 cannot be regarded as settling more than a dispute between two States which had much in common and which had been until recently united in a common allegiance. The legal issue was not so much the extent of territorial waters but whether the former exceptionally favourable treaty of 1783 had been abrogated by the war of 1812-14. Britain grew willing to concede something and the United States to take less. In the end the United States retained the right to fish anywhere /

20. See Appendix I.
between Britain and that country, the former offered the liberty of fishing to the American citizens on the Banks of Newfoundland and in the Gulf of St Lawrence and all the coasts belonging to Britain but at a distance of three leagues except off the Island of Cape Breton where the limit proposed was fifteen leagues. Finally, however, the Americans were conceded unrestricted fishing rights with only minor reservations.

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19. See Moore's Digest i. s.163, for the documents and history of the negotiations and the North Atlantic Fisheries Tribunal Award (1910) Cmd. 5296, pp. 7-14 for a construction of the treaties.
prescription but it bears a striking resemblance to the provisions of the treaty with Britain in 1818. On the British Government asserting sovereignty over the Falkland Islands they claimed against the United States the limit of three miles everywhere.

X. The incident of the attempted exclusion of non-Russian nationals from the Behring Sea sealing area and the subsequent treaties indicate how unreliable was the treaty of 1818 as indicating that Britain and the United States regarded the limit of three miles for the reservation of the fishing as a settled rule of international law. The Ukasse of Emperor Alexander in 1821 treated the Behring Sea as mer fermée to the extent of closing the

22. Moore's Digest, i. s. 171 at pp. 381, 383 et seq. and 389.
the coastal waters for a distance of one hundred Italian miles. The United States met the pretension by the pertinent remark that the sea at latitude 51° N was 4,000 miles broad and, in regard to the prohibition as to the approach to the coast, the American citizens would remain unmolested in the prosecution of their lawful commerce. In the subsequent American treaty of 1824 with Russia no limit was mentioned but, in the draft treaty with Britain, the limit was stated at two leagues. The British Plenipotentiary at St Petersburg, however, when the terms of the American treaty became known, was instructed to omit the limit as immaterial: "The law of nations assigns the exclusive sovereignty of one league to each power on its own coasts without any specific stipulation". The real reason for the omission was that the British government feared /

feared the American treaty contained more advantageous terms. There was no understanding on the part of the Russian and British governments as to the three mile limit. It was not mentioned by the British plenipotentiary during the negotiations and the Russian government, who had adopted the limit of "cannon range" in their instructions to their naval officers, declined to enter into a supplementary declaration on the point.

XI. The American government appears to have adhered to the principle of the three mile limit, refusing to concede the claim of Spain to a six miles belt around Cuba, until, after the cession of Alaska, the possible extermination /

24. Parl. Papers (1893) (c.6918)(c.6920)(c.6921) are founded upon for the facts mentioned in this paragraph. 
25. United States suggested to Britain a zone of five miles. Moore's Digest. i. s.152.
extermination of the seal industry and the protection of American interests roused Congress to take action. An Act was passed applicable to all the dominions of the United States in the waters of the Behring sea. About 1886 British ships were seized and penalised for sealing in contravention of the Statute, though more than three miles from the shore. To the British protests the United States advanced a plea of special circumstances on the analogy of the British claims over the pearl fisheries of Ceylon which were well outwith the ordinary limit. The plea was absurd seeing that America had successfully assisted to oppose a similar claim on the part of Russia whose rights, with their limitations, it had obtained by cession. The terms of the reference to arbitration, /

26. Parl. Papers, United States No. 4. (1893)
27. Vattel, i. xxiii, s. 237.
arbitration, Article 5, read, "Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States when such seals are found outside the ordinary three mile limit?"

XII. The term 'ordinary' certainly describes the limit as between the parties to the case; its inclusion in the reference as an agreed fact precluded any consideration by the tribunal of what was the rule, if any, of international law on the point. The British and American Governments have continued in their relations to act upon the assumption that the three mile limit is a principle of international law and it may therefore be regarded as settled /

settled as between these two nations, that this limit prevails until due notice to the contrary has been given.

XIII. Internationally, it may be said that the United States considers the rule as binding in the absence of a recognised rule of law. The Courts appear to have followed the Executive's lead in this matter. At first, they applied the three mile rule, but, when the seizures were made in the Behring Sea, they conveniently applied the Statute, forgetful, for the moment, of their former rule of the three mile limit. That episode closed, they returned to their former practice, the latest decision being that arising out of the Prohibition Act, Gunard Steamship.

29. See (1924) Cmd. 2063, and Appendix N.
30. Parl.Papers, United States. No.4. (1893), and Neilsen p.448 for arbitration awards.
   In the incident of the Sea Bride (1863) the U.S. claimed that "cannon-shot" was more than three miles but this was repudiated by Britain. Lawrence p. 138.
claims against the signatories a limit of three miles only.

Norway, while admitting the three mile limit to be widely recognised, claims that geographical circumstances entitle her to special consideration. The population being almost wholly engaged in fishing and the hinterland affording no alternative means of livelihood, it would jeopardise their livelihood if the fishings around the coasts and in the fiords were opened further to all and sundry by a strict adherence to a limit of three miles. It is much the same consideration, the extension of the reserved waters, which leads Norway to measure the distance from the furthest out rock at any time uncovered by the tide. Norway would appear to hold that the three mile rule applies to the coasts of Britain for, while not a party /

33. League of Nations cit. sup. See speeches of Sir Maurice Gwyer (Britain) at p.140 and M.Raestad (Norway) at p. 143.
party to the North Sea Convention, a protest was successfully lodged against the conviction of a Danish skipper of a Norwegian vessel for fishing just outwith the three mile limit in the Moray Firth. Norway also resisted the proposed Russian limit of twelve miles. In the case of The Loekken, however, Norway accepted the three mile limit for neutrality but insisted upon a reservation of her rights in the liquor treaty with the United States in 1924. It is doubtful at the moment whether the British Government admits the special claim of the Norwegian Government to a four mile limit for fishing and the matter is the subject of negotiations.

Sweden /

34. Mortensen v. Peters (1906) 8. F (J.) 93; and Hansard (Commons) vol. 170. col. 472.
35. Hansard (1923) (Commons) vol. 163. p. 960
38. Jessup. 294. (Sweden also reserved rights).
39. See Letter from British Foreign Office dated 22nd February, 1935 - Appendix 0.
Sweden is in much the same position as Norway. The German Prize Court, founding upon the fact that the Swedish Ordinance, fixing the limit at four miles for the purposes of neutrality, had not been recognised outside Scandinavia and that Britain had refused to admit the extension of territorial waters by the Argentine and Uruguay governments beyond three miles, adhered to the three mile limit in the cases of the Elida, the Gefion, and the Dux.40 The French Council of Prizes, on the other hand, in the Heina was prepared to admit the Danish rule of four miles had it been relevant to the case.41

XV. France, in this matter of the extent of territorial waters, is distinguished by its inconsistency. The United States took the view that Valin's limit of six miles in his Commentary on the Marine Ordinances of France was authoritative.42 In the law of 1888 arising out of the North Sea Convention, the fishery limit /

40. Garner 225 & 226
41. Moore Digest i.s. 145.
limit, not necessarily the limit of territorial waters, was fixed at three miles. In 1800 it had been decreed that captures made within half a league of the coast were invalid but two leagues were to be the limit of asylum. In 1854 the cannon range was adopted to be changed to the three miles in 1901. Again, the decree of October 18, 1912, asserts that, for the purpose of Convention XIII of the Hague Conference of 1907, the French territorial waters extend out to a limit of six marine miles. At the same time, instructions were given that other limits claimed by States before the opening of hostilities were to be respected.43 By a Decree of March 3, 1922, a limit of six miles was fixed for reserved fishing, but presumably the rights of signatory States under the Convention of 1882 are still intact. The point is, France appears to consider the limits of territorial waters to be a matter for national determination and that different bounds may be adopted for particular purposes.

XVI/

43. Jessup p.18 et seq.
XVI. Portugal and Spain show a stubborn consistency in refusing to accept a limit of less than six miles. The claim of Spain was resisted in respect of Cuba by both/United States and Britain. The latter has been most antagonistic to the claim of Portugal. The Portuguese claim, like that of Norway, is based on the fact that, owing to the very small continental shelf in her seas, the fishing areas off shore are so restricted that the exclusive reservation of almost the whole fishing is necessary for the support of the coastal population.

XVII. Some indication has already been given that the British view favours the three mile limit. It is favoured by all the leading British publicists, e.g. Hall, Twiss, Phillimore, Oppenheim /

44. Moore Digest i.s. 146.
45. Jessup, p. 41.
46. League of Nations cit. sup. p. 137.
47. p. 191
48. Peace - 292
49. i., 276.
It is the view taken in the municipal courts of the extent of the Crown's jurisdiction where no other maritime limit is expressed in the statutes; it is the view adopted by the writers on the Law of Scotland: in fact, the three mile limit is nowhere else more favoured than in the United States, Japan and Britain.

XVIII. In regard to the municipal decisions, it may be remarked that many of the authorities advanced are merely dicta. Thus in the Leda Dr Lushington claimed that the term 'United Kingdom' included the waters to a distance of three miles from the shore. In the Whitstable Fishery case, which dealt with possible damage to fishery beds from ships' anchors,
it was said that the bed of the territorial sea was vested in the Crown, and Lord Chelmsford remarked, 'The three mile limit depends upon a rule of international law, by which every independent State is considered to have territorial property and jurisdiction in the sea which washes their coasts within an assumed distance of a cannon shot from the shore'. The same view is expressed by Rankine as applicable in Scotland. "It is a rule common to English and Scots Law that the ownership of the British Seas,......within the limit (three miles) thus drawn, is vested in the Crown, both the water, with its products, and uses and the soil beneath it". But Rankine was relying upon dicta of Lord Wensleydale in Gammell v Commissioners of Woods and Forests. That case did not deal with any question of international law but with the right of a subject to /

56. 11 H.L. Ca. 192. This subject is debated in B.Y.I.L Vol.4 by Hurst, 'Whose is the bed of the Sea'.
57. Ch.XV.
58. 3 Macq. (H.L.) 419 at 465.
to the salmon fishing along the open coast where stake nets could be fixed. In the case of Lord Advocate v Clyde Navigation Trs.\(^{59}\) which dealt with the right of the Crown to interdict the deposit of dredgings from the Clyde in Loch Long, a mere two miles wide, there are dicta, expressly stated by the Lord Ordinary to be obiter, as to the territorial waters within the three mile belt on the open coast. These dicta appear to have been founded upon in subsequent pleadings and opinions as an authoritative statement of the breadth of the territorial waters of Scotland. They are not founded upon by the essayist as an expression of a rule of international law. Likewise the dictum of Lord Watson in Lord Advocate v Wemyss Trs.\(^{60}\) is not in point.

"I see no reason to doubt that by the law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown".

This /

\(^{59}\) (1891) 19 R. 174.
\(^{60}\) (1900) A.C. 48 at p. 66.
This case concerned coal seams underneath the Forth and not under the open sea. It resembles the issue which gave rise to the arbitration concerning the submarine minerals opposite the Duchy of Cornwall. The Cornwall Submarine Mines Act, 1858, passed to give effect to a recommendation of the arbitrator, did not profess to deal with an international law issue. It is suggested that these very definite opinions as to the three mile limit, while of weight in questions arising in municipal law, have as yet no authority as to the extent of territorial waters in international law.

XIX. The three mile limit became important with the fishery convention with France in 1839 by Article IX of which the fishing was reserved for nationals within three miles of the shore. Other foreign fishermen were not affected. This convention was unpopular with the Scottish fishing population who considered /
considered the restriction insufficient for their needs and as having been entered into to favour the English south coast fishermen.\(^{61}\) In 1848 the Board of Trade informed the Scottish Fisheries Board that the Government did not recognise the right in any foreigner to fish within three miles from the Scottish coast. This would appear to have been inconsistent with the charter granted to the citizens of Bruges\(^{62}\) and the Treaty with Sweden in 1656.\(^{63}\) This three-mile limit has ever since been regarded as the \textit{minimum} for reserved fisheries.

A further convention was entered into with France in 1867 when the three mile limit was readopted. This treaty was not ratified by France.\(^{64}\)

XX. Before the next fishery convention dealing with the North Sea was effected, the very important Territorial Waters Jurisdiction/

\(^{61}\) Fulton p. 609 et seq.
\(^{62}\) See Part I, p. 150 and Fulton p. 616.
\(^{63}\) See Appendix F.
\(^{64}\) Parl. papers (1882) Commercial No. 24.
Jurisdiction Act 1878 was passed. The relevant portion of the Act has been already quoted and it would be only reiterated here that the limit of the territorial waters claimed was purposely left undefined. As Lord Halsbury, who had charge of the Bill, said later:

"In that Act they took care specially to avoid any measurements. The distances were left at such limit as was necessary for the defence of the realm; then the exact distance was given for the particular purpose in view."

Lord Salisbury in the same debate said,

"Great care was taken not to name the three miles as the territorial limit."

Equally important was the declaration of the Lord Chancellor (Lord Hershell):

"He was far from saying that the three miles was to be the limit of territorial waters for all time. Originally the distance was fixed by gunshot, and it was always said that the distance a gun could fire to was three miles. How far this principle was to be extended, and whether it was to be extended indefinitely, was a question for consideration, and it was a question which would not be without difficulty."
XXI. From such declarations it may be deduced (a) that the limits in the fishery conventions before and after that date were to be considered as specified only for the particular purpose mentioned in the convention, and (b) that generally the British government preferred to retain an open mind on the subject.

XXII. To return to the fishery conventions, the most important to date and still subsisting dealing with the Scottish waters is that of the North Sea Convention of 1882. Article 1 proceeds:

"The provisions of the present Convention, the object of which is to regulate the police of the fisheries in the North Sea outside territorial waters, shall apply to the subjects of the High Contracting parties". 68

Indirectly the convention thus defines the limits of territorial waters for the purpose of the convention since it had /

68. The Convention is contained in the Sea Fisheries Act, 1883 46 & 47 Vic. c. 22 Sch. I, art. 1.
had to define the limits within which the provisions were operative. So far as these related to the open coast of Scotland, the boundaries of the North Sea were defined as follows:—

On the West:

(2) by the eastern coasts of England and Scotland;

(3) by a straight line joining Duncansbay Head (Scotland) and the southern point of South Ronaldsha (Orkney Islands);

(4) by the eastern coasts of the Orkney Islands;

(5) by a straight line joining North Ronaldsha Lighthouse (Orkney Islands) and Sumburgh Head Lighthouse (Shetland Islands);

(6) by the eastern coasts of the Shetland Islands;

(7) by the meridian of North Unst Lighthouse (Shetland Islands) as far as the parallel of the 61st degree of latitude.

Of the questions of international law discussed by the conference of delegates of the signatory powers, only that of the limit of territorial waters is of interest here. The conference assumed that there was a belt of territorial waters and /
and that the coastal State had the sole right of police jurisdiction therein and that the State was capable of enforcing it. In the preliminary draft convention submitted by the British Government the limit of territorial waters was purposely left undefined; the other delegations insisted upon a definite measure. The limit on the Scottish coasts was finally fixed at three miles east of the lines mentioned above. It was essentially a compromise and from the minutes it is clear that the conference was concerned with a limit of exclusive jurisdiction for the reservation and police of fisheries only. The contention that the Skagerack fisheries were purely national fisheries was rejected; the British delegation, now standing alone, accepted the French proposal of the three mile limit when the latter conceded in part the British claim to bays which the British on principle had desired to except from the convention. The important point in the discussion is that the British /
British Government were reluctant to fix a definite limit of territorial waters but when no alternative was offered, they accepted readily the three mile limit.\textsuperscript{69} Too much importance, however, must not be attached to the fact that the limit of territorial waters was in the nature of a compromise. When the question was next under the joint consideration of the Powers, following on the conviction and release of Mortensen, a Danish skipper, for trawling in the Moray Firth, they entered into a further convention in 1908 pledging themselves to uphold and maintain the \textit{status quo} in the North Sea.\textsuperscript{70} The limits of exclusive fishery, therefore, definitely determined against the signatory powers.

XXIII. The signatory States to the convention were Great Britain, Germany, France, Belgium, Denmark and the Netherlands.

\textsuperscript{69} Parl. Papers (1882) Commercial No. 24 at pp. 13, 17, 47, 52 & 53. and Appendix P.

\textsuperscript{70} See Appendix T
Sweden and Norway, while participating in the negotiations declined to sign: they claim a four mile limit. This is the latest and most important treaty delimiting the reserved fisheries around Scotland. The resulting position would appear to be that the signatory States are excluded from fishing within three miles of the eastern coasts of Scotland, elsewhere their rights are determined by international law generally. While the conventions with France of 1839 and 1867 state the fishing is to be free outwith the three mile limit along the whole of the coasts of either country for the nationals of the other,\footnote{See Article 2.} the application of the conventions to coasts other than the North Sea shores is more than doubtful. As the compacts were for the purpose of regulating the police of the fisheries in the North Sea outside territorial waters, it cannot be held that the term 'whole of the coasts' should be extended /
extended beyond those shores which are relevant to the treaty.\(^\text{72}\)

In any case, these earlier treaties would appear to be superseded by the Convention of 1882.

XXIV. In continuation of the policy of defining territorial waters for particular purposes only, there was inserted in the Merchant Shipping Act, 1894,\(^\text{73}\) a provision to the effect that a ship, which had wronged any British subject in any part of the world, if found in the territorial waters of the United Kingdom within three miles of the shores, might be arrested to found jurisdiction.

XXV. The British government appears more recently to have determined to advance the three mile limit as a principle of international /

\(^{72}\) This was the reason for the provision in the Herring Fishery (Scotland) Act, 1889 of scheduled areas on the west coasts for the regulation of trawling: (1889)Hansard Vol. 337 p. 975. Belgium obtained a most favoured nation treaty in 1852 and is similarly situated to France.

\(^{73}\) 57 & 58 Vic. c.60 s.688.
international law. With the exception of Italy where, for reasons of policy a four mile limit was admitted, the British Government during the European War denied the right of any nation to extend the limits of its territorial waters beyond three miles from the shore.\(^7^4\) Finally, in the treaties with Finland and the United States\(^7^5\) it was stated that the parties adhered to the principle that three miles was the proper limit of territorial waters. In the Temporary Fisheries agreement with the U.S.S.R.\(^7^6\), Soviet Russia reserved the claim regarding extended territorial waters but admitted the British to the right of fishing up to three miles from the coast. It will be seen, therefore, that wherever a limit has been fixed by Britain for particular purposes and claimed to be a limit of territorial waters.

\(^7^4\) See ante p. 160
\(^7^5\) See Appendix Q (Finland) (1932-33) Cmd. 4436.
\(^7^6\) See Appendix R.
terриториal as distinct from personal jurisdiction, the limit adopted has been three miles.  

XXVI. While it would appear that the three mile limit has the greatest support and might be accepted as the common limit the successful opposition of other States at the Conference for the Codification of International Law would preclude any assertion that it is a rule of International Law.

XXVII/

76a. The statements made by the British Ministers of State are not always to be relied upon. For instance, the Under Secretary of State for Foreign Affairs, in connection with the proposed treaty with the United States said, "His Majesty's Government have always maintained that by international law and practice the general limit of territorial jurisdiction is three miles, but from time to time claims to extend the three mile limit have been advanced by different States. Such claims, which amount to annexation of the high seas, could only be made effective by international agreement". (Hansard, 1923, Vol. 163. Col. 961).

The three mile limit, it has been noted above, has been accepted by Great Britain only when it became imperative to fix a limit for a specific purpose; otherwise the policy of the Government on former occasions and in the later case of the Pagernes (1927) P. (C.A.) 311) have declined to mention a definite limit.

XXVII. There is a minor problem arising out of the adoption of a fixed limit of three or four miles, as the case may be, for territorial waters. What is the datum line from which the measurement is to be taken? The historic phrase 'from low water mark' is usually taken to mean the low-water spring tides and probably there is no doubt on the point. Some States issue charts with the line marked thereon and this has the advantage of being definitive where there are shifting shoals and the shore line varies. It is not known that such conditions exist on the coast of Scotland. Doubtless the charts issued by the Hydrographic Department of the Admiralty would be accepted as authoritative evidence of the coast line at any particular point.

XXVIII. Islands are to be regarded as part of the territory.

Difficulties /

Difficulties arose out of this in connection with the French agreement of 1839 but were remedied in the North Sea Convention of 1882. A more difficult point came before Lord Stowell in the case of the Anna where, on the principle of alluvium and increment, he held that mud banks resorted to for fowling and composed of debris and river deposits at the mouth of the Mississippi were to be considered as part of the territory and the three miles to be measured from that point. In the case of islands which lie outside the belt of territorial waters, as measured from the mainland, they draw to themselves a belt of territorial waters and in the case of an archipelago the distance is measured from the islands lying farthest out from the centre of the group.

XXIX. /

79. Appendix S(4).
80. (1805) 5 Rob. 373.
81. R. v. The John J. Fulton (1917) 16 Exc. C.R. 331
   See also the North Sea Convention of 1882. Appendix P.
82. Hyde l.s.145; For Orkney and other Scottish Islands see Appendix P.
XXIX. Norway has a peculiar base line of measurement. It is claimed that the limit should be determined from a straight line drawn between the farthest out islets which are permanently visible. It is understood that this system of measurement has caused difficulty and is at present the subject of negotiations between the Norwegian and British governments. The claim is not without some support, as the United States in 1869 suggested that the territorial waters of Cuba might be reckoned from the various islets or keys which surrounded the island.

XXX. The datum line may be of some importance in connection with the Scottish lighthouses such as the Bell Rock, Dubh Artach, and the Skerryvore. The Bell Rock Lighthouse is built upon rocks exposed at low tide at certain seasons and the Skerryvore and Dubh Artach upon rocks permanently exposed and

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83. See Appendix O.
84. Moore Digest i.s. 146 Parl. Papers (1882) Commercial No. 24 re mud banks at mouth of Elbe.
are situated well outwith the ordinary three mile limit. Trawling is prohibited around Skerryvore and Dubh Artach but not around the Bell Rock, probably because the datum line adopted in the North Sea Convention, which applies to that area in which the Bell Rock is situated, included islands but not rocks as was done in the later convention regarding the Icelandic fisheries.

XXXI. There is but little authority on the subject of lighthouses built on islets and that authority is conflicting. Wheaton considers the claim to territorial waters around lighthouses reasonable, though doubted. In a recent American case, decided in a lower Court, the plea of territoriality was rejected in the case of a beacon built upon a rock wholly submerged.

85. The Bell Rock is about twelve miles east-south-east of Arbroath and the Skerryvore about the same distance south-west of Tiree. Dubh Artach is fifteen miles from Colonsay. (It is understood, unofficially, that the Scottish Fishery do not regard rocks exposed only at certain periods as islands on the ground that they are uninhabited but Skerryvore and Dubh Artach are not inhabited except by lightkeepers!)

86. (1903) Cmd. 1530
87. i. 369
submerged. The British view, and the instances of Skerryvore and Dubh Artach are consistent with it, was stated by Sir Charles Russell in the Behring Sea Arbitration as follows,

"I wish to point out that... if a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has created it, it has, incident to it, all the rights that belong to the protection of the territory - no more and no less.... That point has never been doubted and if it were, there is ample authority to support it. The right to acquire by the construction of a lighthouse on a rock in the ocean a territorial right in respect of the space so occupied is undoubted." 89

Oppenheim and Westlake disagree with this categorical statement. The latter's ground is that it is not normally possible to fortify a lighthouse but admits that it is entitled to require that none should approach near enough to cause damage. 90 The ground of criticism appears invalid: sand and other banks do not lend themselves for gun emplacements but they nevertheless have to be taken into account in determining/

88. United States v. Henning quoted by Jessup 68.
89. I. Moore Arbitrations 901 quoted by Jessup p. 69.
90. I. 190.
determining the datum line for the limit of territorial waters. Fauchille agrees simpliciter with Sir Charles Russell. Oppenheim would assimilate lighthouses to lightships. The purpose is the same but there is a difference between a lighthouse permanently fixed, being built upon the rock, and a lightship which may be unmoored at will or may drift from its station. It is merely a vessel riding at anchor and it has never been claimed that a lightship forms part of the territory of the State, though the territoriality of a ship may be a convenient fiction for some purposes. In all probability the opinion of Sir Charles Russell states the view correctly as to lighthouses. There is only one lightship in Scottish waters, the North Carr, stationed within three miles of Fife Ness.

91. 1.2.130
92. 1.341
93. During the European War the British ships, Strathdene and West Point, the Norwegian ship Knutsen and the Dutch ship Blommersdijk were sunk near the Nantucket Lightship by German submarines. *Wheaton* 1.369.
the lightship Ness. In all probability it would not be claimed to affect the datum line for the same reason as the Bell Rock and on account of the precedent in which it was declared that the Seven Stones Rock, a reef never uncovered and marked by a lightship, would not be regarded as within British territorial waters.}

XXXII. It is legitimate to enquire whether the territorial waters of a State may be extended and, if so, on what conditions. Hautefeuille, adopting the longest range of cannon as the limit of territorial waters, could, with propriety, at that time, hold that further extensions could not be justified and were not legitimate. But the three miles limit no longer approximates to the range of guns. Spain claimed to extend the territorial waters pari passu with the increasing range of /

94. Hansard (1903)(Com) vol. 120 p. 679
95. p. 20.
of artillery but the right was denied by Britain and the United States
denied by Britain and the United States. No State today claims that right. Several States at the Conference for the Codification of International Law in 1930, on other grounds, were strongly in favour of an extension of territorial waters even beyond the six miles limit recommended by the Institute of International Law in 1894. A number of States have in fact made provision in their municipal law which amounts to a substantial, recent extension of their territorial waters. There are certainly practical grounds for an extension and possibly a division of the territorial waters into zones for particular purposes.

The

96. Moore Digest i.s. 146.
97. League of Nations C. 230.M.117 1930 V.
98. Institute of International Law p. 114.
99. Fauchille i.2. pp. 135 & 163.
100. Revue, 1925, p. 189. Treaty between Holland and Mexico where three zones are distinguished: (a) zone of sovereignty, (b) customs zone, (c) zone for fishing and sanitation. It would seem that the first zone is the only part constituting territorial waters. Revue, 1927, 123 et seq. contains an excellent statement against the three mile limit.
XXXIII. The British delegate at the Conference for the Codification of International Law, stated that Britain was against any extension of territorial waters beyond the three mile limit but his government would be prepared to enter into treaties with other Powers to confer rights in the open sea for particular purposes. An extension of territorial waters would lay too onerous a burden upon a neutral power. The British suggestion appears to indicate the probable line of development with a view to securing adequate protection to maritime States without the burdens attendant upon territorial sovereignty. At the moment, preventative and protective action in the contiguous zone can be taken only with a due sense of responsibility and liability to account to the flag State. The case of the S.S. Coquitlam is in point. It was held that the right to make a seizure in the contiguous zone implied /

101. Cit. sup. x.
102. Nielsen 450.
implied (a) the evidence of certain facts which \textit{prima facie} create liability to seizure, (b) facts which there is good reason to believe will be established though not yet actually proved, and (c) the doubt must be as to the existence of the fact, not as to its wrongful character.

XXXIV. The three mile and the four mile limits now rest wholly upon use and wont and general recognition. These limits can be departed from only after due notice or special agreement\textsuperscript{103}. States are entitled to rely upon the continuance of a long established practice and any sudden alteration to their disadvantage would be good grounds for protest. It would appear to be the case that the British Government were unwilling to accept the recommendation of the Mackenzie Committee to close the Moray Firth against foreign trawlers because lucrative /

\textsuperscript{103}. Ortolan l. 112 \ Westlake i. 169 \ Hall p. 192 \ Fiore ss. 272-3 \ Pitt Cobbett i. 135 \& 143. \ Neilsen p. 534. Case of David J. Adams.
188.

lucrative fishing areas elsewhere e.g. in Iceland, would be thereupon closed to the British\textsuperscript{104}. In brief, no State may, by unilateral action, extend its territorial waters without the consent, express or implied, of the other States interested in maintaining the status quo\textsuperscript{105}.

Section B.

The Scottish Firths.

I. To a country, such as Scotland, where the coast is indented by large bays and estuaries and an important section of the community is dependent upon the fishing for their livelihood, the extent to which bays may be or are appropriated as territorial waters is of great importance. The importance is enhanced when, by municipal legislation, the national is prohibited from trawling within large expenses of the bays, but the foreigner, not being subject to the jurisdiction if

\textsuperscript{104} Report of the Scottish Departmental Committee on Trawling and Policing of Scottish Sea Fisheries pp. 32 & 56.

\textsuperscript{105} Appendix T.
the waters are not territorial, suffers from no similar restriction unless prohibited by a treaty. The problem of appropriation of bays has arisen in connection with the Norwegian fiords and the Icelandic bays. The decision of the Hague Permanent Court of International Justice in regard to the fishery rights of the United States of America in the bays and waters of Eastern Canada and Newfoundland is also germane to the issue. This essay is not primarily concerned with these non-Scottish waters but they are mentioned to indicate the issue to be of international and economic interest.

II. The controversy as to the freedom of the seas did not touch bays of moderate size. The sailing ship, directing its course from headland to headland, was interested in bays as places of shelter, never refused in modern times, or as means of
of access to the ports which clustered the shores at the points of entrance to the hinterland. The question of the freedom of navigation in bays therefore did not arise. On the other hand, the population along the shore was particularly interested in the maintenance of the peace of the waters and the conservation of their means of livelihood. The State was further interested in the bays as forming an aisle into the vulnerable heart of the country. As a result, as was recently said,

"the individual State has, in practice, enjoyed much latitude in determining what bays or arms of the sea penetrating its territory may be regarded as a part of the national domain and dealt with accordingly". ¹

So much have gulfs and bays been held to be part of the national territory that they have been described as national waters in contra-distinction to territorial waters of the marginal sea². This conception of a special status of bays is:

1. Hyde i.s. 146
is supported by the adoption of a special datum line, either a line across the mouth of the bay or between the points nearest the entrance where the shores converge to a certain width. Within the line the waters are termed 'national', outwith the line or seawards, 'territorial'.

III. Generally, however, the questions which have arisen as to bays fall into three classes; (a) the reservation of fisheries, (b) the violation of neutrality and (c) the invocation of the criminal or civil jurisdiction of the Courts of the adjacent State. In every case there is present the preliminary issue of whether the bay has been appropriated as territorial. Apart from the historic bays, that issue turns upon the extent or size of bay which may be held to be appropriated.

IV /

3. See Appendices S (2), (3) & (4).
IV. Upon this point there is no rule of international law.

As it was put in the Direct United States Cable Company v Anglo-American Telegraph Company⁴ and quoted with approval in Mortensen v Peters⁵:

"It does not appear to their Lordships that jurists and writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of judicial determination."

Criteria were suggested by the tribunal in the North Atlantic Fisheries Arbitration as follows:

"The interpretation must take into account all the individual circumstances, which for any of the different bays are to be appreciated, the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general"⁶.

⁴ (1877) 2.A.C. 394 at 420.
⁵ (1906) 8.F.(J) 93 Hurst in B.Y.I.L. (1922-23) considered there was no dubiety about the British practice but his article was written before the case of the Fagernes [1927] P.(C.A.) 311.
⁶ North Atlantic Coast Fisheries Arbitration (1910) Cmd.5396 Mis. No. 3.
V. The earliest jurists distinguished bays according to their size, the larger they assimilated to the open sea, the smaller they held to appertain to the State whose shores enclosed them. The classification was too vague as no definite measurement was indicated to determine the division between the small and the large bays. Vattel\textsuperscript{7} enquired whether the entrance could be defended. Hale, an English jurist, asserted the factor of visibility of opposite headland\textsuperscript{8}. Defensibility depended upon the range of cannon, an indefinite distance, and visibility varied from day to day and hour to hour as well as with the human factor. Ortolan\textsuperscript{9}, more precise, adopted twice cannon shot distance of three miles as the maximum width of bays which could be appropriated. The majority of jurists have followed the ratio of Ortolan in this matter, adopting double

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7. i.Bk. XXIII § 291
8. De jure maris etc. IV.
9. i. p. 143.
their proposed limit of the territorial marginal sea as their proposed maximum limit for the appropriation of bays\[10\]. Some writers, e.g., Oppenheim\[11\], Lawrence\[12\], Westlake\[13\], Hall\[14\], Birkenhead\[15\], Wheaton\[16\] and Hyde\[17\], even if they suggest a limit, take the view that the question of what bays are, or may be appropriated is not settled by international law. It is even doubtful whether all the bays which have been claimed as appropriated in the past would now be so regarded\[18\]. Generally, defensibility is a criterion with most jurists, but even that is not final and conclusive.

"It /

\[10\] Fauchille i.2.p.373. Westlake i. 191 & 203. Fiore s.275
\[11\] i. 342-346
\[12\] p. 140
\[13\] i. 191 & 203
\[14\] p. 193 & 197
\[15\] p. 105
\[16\] i.p. 367
\[17\] i.s. 146

In re the Bristol Channel.
"It is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow the claim being brought to any other test than that of accepted usage".

VI. 'Accepted usage' is undoubted in the case of the historic bays, that is, those which have long been recognised as appropriated. But these bays are few and the jurist and the statesman must legislate for the general as well as for the particular. It is this necessity for a general rule which has given birth to suggested limits of double the width of the territorial marginal sea as determining the extent to which bays may be claimed as territorial. Such a rule, being merely an application of the limit of territorial waters following the sinuosities of the coast, disregards the very special national /

19. Westlake i.192 De Latour i. 385 'le mot golfe est tres vague'.
national interests in these waters and there must be an extension. Recognition of this need is the justification of the arbitrary limit of ten miles as a datum line which has been adopted in the French Fishery conventions\textsuperscript{20}, the North Sea Convention\textsuperscript{21}, the Treaty of 1901 with Denmark as to Icelandic Fisheries\textsuperscript{21a}, and applied in the award of the Permanent Court of International Justice in the North Atlantic Fisheries\textsuperscript{22} case.

VII. The practice of States in the appropriation of bays has varied and it is this variation and present unsettled position which lie\textsuperscript{*} at the root of the difficulty of jurists in attaining a degree of unanimity.

\textsuperscript{20} See Appendix S(2)(a) & (3)
\textsuperscript{21} do. (4)
\textsuperscript{21a} (1903) \textit{Cmd.} 1530.
\textsuperscript{22} \textit{Parl. Papers. Miscell. No. 3 (1910) Cmd.} 5396 p. 22.
VIII. The history of the development of the law as to British bays may be dated from the proclamation of James I in 1604 claiming the King's Chambers as neutral waters within his sovereign jurisdiction. These bays or chambers were delimited by drawing ideal lines from headland to headland around the coast. This proclamation contained the first authoritative claim to the sovereignty over bays defined according to the 'headland' theory. So moderate were these claims in those times that no objection was raised by other States: indeed, they were recognised as competent by the Dutch. The same idea is expressed by Stair as the law of Scotland:

"The /

23. De Latour describes these claims as 'pretensions' (i.p.386); see also Fulton 123
24. Marsden i.487 The Hollander contended that by the law of nations no prince could challenge further into the sea than he could command with a cannon, except gulfs within their land from one point to another.
25. II. I. 5
"The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is enclosed, in bays, creeks, or otherwise is capable of any bounds or meiths, as within the points of such lands, or within view of such shores, then it may become proper, but with the reservation of passage for commerce, as in the land".

Bell, in his Principles, is less precise:

"The Sovereign ... is proprietor of the narrow seas within cannon-shot of the land and the firths, gulfs and bays round the kingdom".

IX. The corresponding provision in the English common law is attributed to Lord Hale in his De Jure Maris.

"That arm or branch of the sea which lies within the fauces terrae where a man may reasonably discern between shore and shore, is or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner".

Although /

26. s. 639
27. l. c.4. This principle of Hale has been held by Hurst (B.Y.L.L. Vol. III) in an Article on the territoriality of bays as being definitive of the law on the subject but it is suggested that the principle stated has reference primarily to the jurisdiction of English institutions which were not comparable with their Scottish counterparts. The Scottish Courts, including the Admiralty Court, exercised a jurisdiction mainly customary and not founded upon statute as in England. The principle is now merely of historical interest. See e.g. Appendix S. (1)
Although Hale's principle has been approved in cases before the Courts, it cannot be held to have represented a principle of international law in the late eighteenth century or to have covered the King's Chambers, such as the Bristol Channel stretching from Lands End to Milford Haven. Stair represented, more properly, the practice of States in that early period and Stair was preferred in the case of Mortensen v. Peters in 1906.

X. In the Treaty of Paris of 1763 there was special provision allowing the French to fish within three leagues of the coast in the Gulf of St. Lawrence. This has been regarded by Fauchille as proving that at that time the Gulf of

28. See Hurst cit. sup.
29. (1906) 8 F. (J) 93
of St. Lawrence formed part of the British territory. In 1780 Denmark declared the Baltic a closed sea; in 1794 Sweden and Denmark agreed and bound themselves to preserve the peace of the Baltic as a closed sea. The Russian Tzars always regarded the Gulf of Riga and the Gulf of Finland as territorial waters. The Soviet today claims wide bays in the Arctic Ocean as territorial waters and have sustained the claim against the British Government who have perforce attained their end by temporary agreements as to the limits of reserved fishing grounds and navigation. In 1906 Italy legislated for the territoriality of gulfs of twenty miles at their entrance. Norway claims the Varanger Fiord, 32 miles wide.

Passing to America, Hudson Bay is claimed by Canada, though that

30. Fauchille i.2.375
31. De Martens Rec. 2nd edn. iii 175
32. De Martens Rec. 2nd edn. V. 606
33. Fauchille i.2. 379
34. See Appendices L & R.
35. Fauchille i.2. 379; and re declaration by Italy in 1914
36. Wheaton i.365
that claim is disputed by the United States. In all probability the claim is well founded, as, by the treaty of 1818, the fishing rights conceded to the United States citizens were expressly without prejudice to the exclusive rights of the Hudson Bay Company. Owing to the little amount of the shipping in the Bay, the question has not yet been acutely raised and the issue, therefore, must be held unsettled. Finally there are the instances of the historic bays of varied extent which have been admitted as territorial waters. These instances, it is suggested, would point to the decision of the High Court of Justiciary in Mortensen v Peters, which, although reached upon other grounds, treated the Moray Firth as territorial waters, being consistent with previous interpretations of international law.

37. Wheaton i.365
38. See B.Y.I.L. Vol. XV; Appendix I
39. (1906) 8 F.(J) 93.
XI. However diverse the practice of nations has been, and is, the British view can now be ascertained and regarded as settled within limits from a review of the international issues which have arisen within comparatively recent times in connection with the fisheries in the North Sea and the North West Atlantic and the historic bays. These bays are Delaware and Chesapeake Bays claimed by the United States, and the St. George's Channel, Bristol Channel, Conception Bay, Bay of Chaleurs and Miramichi Bay claimed by Britain.

XII. The case for the historic bay rests upon the former general power of States to appropriate the bays around the coast and to exercise the right of sovereignty thereon. So far as the claims may now subsist, they must be regarded as relics of a former age. It has been argued\(^{40}\) that there must have /

\(^{40}\) Mr Root before the North Atlantic Fisheries Tribunal \(\text{Jessup. 370 et seq.}\)
have been specific and indubitable acts of appropriation on
the part of the State and, the writer would add, acquiescence,
express or tacit, on the part of other States in bar to
objection on their part to the appropriation. The jurisdiction
in the King's Chambers was in former times effectively
exercised. Kent claimed very extensive stretches of waters
for the United States by application of the headland principle
but the claim was too extravagant and his opinion has not been
endorsed by the practice of the United States or subsequent
American writers. The action of the British executive in
cancelling the effect of the decision of the Court in the case
of Mortensen v Peters and the declaration of the Attorney
General in the case of the Fagernes that sovereignty would
not now be claimed over the Bristol Channel would appear to
confirm.

41. Marsden i.p. 484 and ii 242-3; Direct United States Cable
Co. v Anglo-American Telegraph Co. (1877) 2 A.C. 394
42. Commentaries i. 29 & 30. Jessup, p. 359 considers that undue
weight has been attached to the opinion of Kent on this
matter.
43. (1906) 8 F.(J) 93
44. (1927) P. (C.A.) 311.
confirm the opinion of Hall\textsuperscript{45} that the Crown would not now claim the King's Chambers as within its sovereignty.

XIII. Delaware Bay was decided to belong to the United States in the case of the Grange\textsuperscript{46}. The bay is only ten miles wide\textsuperscript{47} and, in all probability, would even now be acceded to the United States although the United States Attorney based his pleas upon the opinions of the older publicists\textsuperscript{48}.

In the case of the Alleganean, Chesapeake Bay, twelve miles wide, the territoriality of which was called in question, was held to belong to America\textsuperscript{49}. The most important case decided in a British Court related to Conception Bay in Newfoundland. The bay is about fifteen miles wide. In this case the authorities in the law of nations and the Common Law of

\textsuperscript{45} P. 194. See also Pitt Cobbett i.148

\textsuperscript{46} Moore Digest i.p. 735. Moore Adjudications Vol.4. p.130

\textsuperscript{47} Wheaton i.366

\textsuperscript{48} Moore Digest i.S.153.

\textsuperscript{49} Moore Digest i. § 153.
of England were examined and reviewed\textsuperscript{50}. After noting that there appeared to be no unanimity among text writers and jurists as to the dimensions and configuration which would lead to the conclusion that a bay is or is not a part of the territory of the adjoining State\textsuperscript{51}, the opinion proceeded:

"It seems to (their Lordships) that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland".

XIV. Contemporaneous with these decisions which have led to these bays being classed as historic, there was a counter tendency to restrict the claims to limited areas in the larger bays in the matter of the exclusive right of fishery. In the conventions with France in 1839 and 1867, the datum line for the /

\textsuperscript{50} Direct United States Cable Co. v Anglo-American Telegraph Co. (1877) 2 A.C. 394 at 420

\textsuperscript{51} See ante p. for a fuller quotation.
the bays of less than ten miles width at the entrance was
taken to be the line joining the headlands. The North Sea
Convention of 1882 followed this as a precedent but is more
precise as to the larger bays:

"As regards bays, the distance of three miles shall
be measured from a straight line drawn across the bays,
in the part nearest the entrance, at the first point
where the width does not exceed ten miles." 52

This was a compromise between the French proposal that the
limit of territorial waters should follow the sinuosities of
the coast except in bays with an entrance of less than ten
miles width and the British proposal to omit all bays from the
Convention on grounds of principle. 53 The provision of the
Convention did not state a rule of international law.

XV. /

52. Appendix S (2), (3) and (4). See also Treaty with Denmark
re Icelandic Fisheries (1903) Cmd.1530.
XV. This policy of restriction of the limits of exclusive fishery rights in bays was occasionally followed by Britain in the dispute with the United States as to the interpretation of the Treaty of 1818. The tribunal which arbitrated upon this long vexed question was called upon to lay down rules for the guidance of the parties for the determination of the bays for which the award did not expressly provide. They were amply aware of the difficulties of the situation for they declared that:

"admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign in a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but ..... no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty." 55

The tribunal adopted as a general principle the rule that

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54. Moore Digest i. § 149. For the diplomatic correspondence see Moore Digest i.s. 165. Fauchille i.2.373-8. For award see Parl. Papers (1910) Cmd. 5396. 55. (1910) Cmd. 5396 p. 20.
the three mile limit should follow the sinuosities of the coast and in the case of bays should be measured from a straight line across the body of water at the place where it ceased to have the configuration of a bay. To apply this principle to the case before them, the tribunal adverted to the various treaties entered into by Britain with the European Powers in which the ten mile rule for bays had been adopted. The tribunal also considered that there was evidence that a similar rule had already been followed by the parties to the case, Great Britain and the United States. It was declared that;

"though these circumstances are not sufficient to constitute this a rule of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions, has already formed the basis of an agreement between the two Powers". 56

XVI. In the meantime the issue as to the territoriality of bays was raised in connection with the prohibition of trawling

56. (1910) Cmd. 5396 p. 22.
in the Moray Firth. While the North Sea and the other conventions specified the limits of the exclusive right of fishery on the Scottish east coast, it did not follow that these limits were coincident with the limits of territorial waters. France and Denmark, as was noted, do not regard them as coincident and have fixed other limits of territorial waters for other purposes against the signatory powers.

Although the executive took a different view, the British legislature appeared to be of the same mind for, by section 7 of the Herring Fishery (Scotland) Act, 1889, the Fishery Board for Scotland were empowered to close for trawling the whole of the Moray Firth inshore of a line drawn from Duncansby Head to Rattray Point, a distance of 72 miles. The necessary bye-law/

57. Mortensen v Peters (1906) 8 F.(J) 93. For general resume of the controversy see Mackenzie Commission Report Ch. VI.

58. See ante p.158 and 161

59. 52 & 53 Vict. c.23. The executive denied that this or similar legislation had ever been enforced against foreigners; Behring Sea Arbitration. Parl. Papers United States (No. 4) (1893) pp. 51 & 56 et seq.
209.

bye-law was made and confirmed in 189260. Beyond the limits of the reserved fishing grounds and within the limits of territorial waters, if they extended beyond the limits in the conventions, the territorial State retained the right to legislate for the fisheries so long as the legislation was reasonable and not biased against foreigners protected by treaty. Nor was the legislation contrary to international law. Each signatory to the North Sea Convention had been notified of the action of the Fishery Board; none had demurred and all had tacitly respected it. Norway was not a signatory to the convention and several Grimsby-owned trawlers, to avoid the restrictions imposed by the convention and the municipal law, had been registered in that country. For years before 1906 there had been no trawlers in the Moray Firth except the pseudo-Grimsby trawlers61. It may therefore be concluded that the legislation was /

60. Appendix S (6)
61. The details of the events leading up to the prosecution of Mortensen and subsequent events are given by Mackenzie Commission Report Ch. VI.
was competent and not contrary to the existing treaties.

XVII. In 1906 a Danish skipper of a pseudo-Grimsby trawler registered in Norway was convicted of an offence under the byelaw referred to above in that he had trawled at a point five miles east by north of Lossiemouth and outwith one marine league but within ten miles of the adjacent coast. Norway lodged a formal protest against the jurisdiction of the Court and the case was appealed to the High Court of Justiciary. The question to the Court was whether, having regard to the provisions of section 10 of the Sea Fishery Regulations (Scotland) Act, 1895, the conviction and sentence imposed were legal and competent. The Bench were unanimous in their decision to uphold the jurisdiction of the inferior Court. The statute standing, the competence of the legislature

or /

62. C.f. Oppenheim 1. 345
63. Appendix S (5)
or the validity of the statute could not be canvassed in that Court as contrary to international law.

"It is trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal can be made. International law, as far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the Law of Scotland". 64

It was equally clear from the opinions that, after a consideration of the authorities, the Court held the Moray Firth exhibited all the characteristics which distinguished a territorial bay.

Lord Justice General

"I cannot say that there is any definition of what fauces terrae exactly are." 65

Nevertheless, founding upon Stair, 66 he had no difficulty in holding that the Moray Firth was within the latter's definition of the territory of the State.

64. Lord Justice General Macdonald (1906) 8 F.(J) 93 at p. 101.
65. do. at p. 102.
66. II.I.5.
Lord Kyllachy remarked

"It, however, seems to me vain to suggest that according to international law there is any part of the Moray Firth which is simply an area of open sea .... For prima facie at least, the whole Firth is, as its name bears, a 'bay' or 'estuary' formed by two well marked headlands, and stretching inwards for many miles into the heart of the country."

In all probability, had the executive not intervened, this decision of the Court would have classed the Moray Firth as an historic bay.

C'est l'acquiescement de certains Etats à la réclamation de souveraineté élevée sur ces baies par la nation riveraine et l'absence de protestation des autres Etats contre cette réclamation qui en ont fait des baies historiques et leur ont donné le caractère territorial.

XVIII. There was certainly evidence of acquiescence on the part of the signatory States to the North Sea Convention and Norway protested upon a technicality in circumstances where the comity of nations might have dictated another course.

67. (1906) 8 F.(J) 93 at p. 105
68. Fauchille i.2.381

The view of the Government departments concerned in territorial waters was stated by the Under Secretary of Foreign Affairs (Lord Fitzmaurice):

"Apart from special treaties territorial waters comprise: (1) the waters which extended from the coast line of any part of the territory of a State to three miles from the low-water mark of such coast-line; (2) the waters of bays, the entrance to which is not more than six miles in width, and of which the entire land boundary forms part of the territory of a State. However, by custom, by treaty and by special convention, the six mile limit has been extended to more than six miles."

69. Hansard 4th ser. vol. 191,8C61;7745 et seq. for discussion.
However, the application of the rule as stated by Lord Fitzmaurice to bays was later denied. The 'ten mile' rule adopted in the North Sea Convention for the reservation of fisheries in bays had been objected to by Britain as a surrender of fishing rights and as contrary to the laws of nations. The remedial measure, the Trawling in Prohibited Areas Protection Act, 1909, merely prohibited the landing in British ports of fish taken by foreign trawlers in those areas where that method of fishing was forbidden to the natives. It did not interfere with the foreigner in his right to fish there. It is held that the remedy is conclusive evidence that the British Government did not consider they had power to regulate the fishing beyond the treaty limits.

XIX. As confirming this conclusion, notice may be taken of the collision case of the *Fagernes*. The locus was at a point in the Bristol Channel /

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70a. 9. Ed. 7. c.8
71. [1927] P.(C.A.) 311
Channel about 10\(\frac{1}{2}\) or 12\(\frac{1}{2}\) sea miles from the English coast and 9\(\frac{1}{2}\) or 7\(\frac{1}{2}\) sea miles from the Welsh coast. The Bristol Channel at that point is about twenty miles wide and had been included in one of the King's Chambers. On being pressed by the Court as to whether the locus was within the area claimed to be within the territorial sovereignty of the Crown, the Attorney General stated that he was authorised to affirm that the spot, where the collision was alleged to have occurred, was not within the limits to which the territorial sovereignty of His Majesty extended. 72.

XX. There has been no authoritative declaration by the British Government as to the specific rules which they would apply or do apply for the determination of what bays or to what extent the larger bays around the British coasts are regarded /

regarded as territorial. The King's Regulations and Admiralty Instructions of 1899 declared that territorial waters included the ports, harbours, bays and mouths of rivers and adjacent parts of the sea enclosed by headlands belonging to the same State, but this declaration was dropped in the 1906, 1913, and 1926 editions. The term 'territorial waters' was used in the regulations framed under the Defence of the Realm Act, 1914, but nowhere is it defined.

XXI. In this matter of bays, as in the case of the marginal sea, it must be taken that the question has not yet been authoritatively settled. Having regard, however, to the action taken by the executive government in the Moray Firth case and to the declaration by the Attorney-General in the Bristol Channel case, conjoined with the policy as to the marginal sea, it would appear to be an inevitable inference that

that British policy is now in favour of very restricted territorial waters, both in the marginal sea and in bays. What these limits are is more difficult to say, but it would seem to be that only the minimum accepted by States would now be regarded by Britain as satisfactory, viz., the three mile limit for the marginal sea and the six mile datum line for bays. A more extensive jurisdiction for particular purposes is only to be obtained by express convention. If this conclusion is correct, (the practice of States elsewhere shows that it does not constitute a rule of international law) then the Firth of Forth, the Firth of Tay, the Moray Firth and the Firth of Clyde, except in their upper reaches, cannot be regarded as territorial. In view of the action taken in the Moray Firth case and the Bristol Channel case, another State might well, should question arise, assert that Britain is 'personally barred' from asserting exclusive sovereignty over these firths or /
or other Scottish firths beyond the minimum of territorial waters, as determined by the six mile rule.
CHAPTER V.

State Jurisdiction in Territorial Waters in time of Peace.

I. The conclusion was reached in a previous chapter\(^1\) that the littoral State possesses, upon its territorial waters, the exclusive right of sovereignty, restricted in the exercise thereof only by the rules of international law. This jurisdiction comprehends the measures for the protection of the State, the interests of the citizens (and ressortissants), and commerce\(^2\): it is an exclusive jurisdiction as regards 'mere matters of police and control'. Thus the State may regulate pilotage, make regulations for customs and sanitary matters, laws concerning stranded goods and the like\(^3\). It is not possible, however, to compile an exhaustive list of the functions of the State in territorial waters nor is it necessary/

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1. Ch. III
2. Fiore ss. 265 & 266
3. Oppenheim i. 338. See also Fauchille i.2. 1092.
necessary having regard to the juridical status of these waters, if the essayist's conclusion is sound. The sum total of the functions and rights of the State are those remaining open by international law to the State as a sovereign power. It may be pointed out, however, that the powers are seldom prominently displayed; the tendency is to hold the jurisdiction in reserve and to accord the utmost freedom consistent with the well-being of the State and its subjects.

II. The restrictions upon the territorial sovereignty of the littoral State, imposed in the interests of the community of States, are but the recognition of the fact that the territorial waters form a physical part of the high seas and frequently a portion of the great ocean highway of international commerce, the innocent use of which is not antagonistic to the local

4. See, for instance, the convention as to International Regime for Maritime Ports, (1925) Cmd. 2419
local interest and in no way imposes a burden upon the territorial sovereign. Accordingly, while it is a moot point as to the extent to which passing vessels are subject in practice to the territorial jurisdiction, it is now clear that the territorial sovereign may not levy dues of passage or other charges except for specific services rendered to the ship itself.

III. A distinction has been drawn between 'jurisdiction', meaning subjection to the local Courts, and 'control', implying subjection to the regulations of the executive and administrative departments of government. Territorial waters have also been divided into zones for different purposes, e.g., customs and sanitation. These, however, are but expedients to cloak with /

6. Jessup xxxii 182 & 183
with authority invalid attempts to extend the limits of territorial waters. The protective acts of the sovereign outwith territorial waters cannot purport to be the exercise of a territorial jurisdiction. The distinction between 'jurisdiction' and 'control' is unnecessary and misleading. A sovereign territorial jurisdiction postulates the power to legislate for and to control all persons within the area of jurisdiction. The form of the control, the sanctions to be applied and the manner of their application must be left to the discretion of the State, subject only to the dictates of international law and the comity of nations. The jurisdiction upon territorial waters is not, in essentials, different from the jurisdiction on land.

IV. It is not a question of the right of the State to exercise /

exercise the jurisdiction in the territorial maritime belt but whether it is expedient to do so in all the circumstances. This proposition is well founded.

"As a general rule, the jurisdiction of a nation is exclusive and absolute within its own territories, of which harbours and littoral waters are as clearly a part as the land. Restrictions may be imposed upon it by treaties and a few have been yielded by common consent, and this have come to be regarded as rules of international law...... Circumstances might render it proper to forego the exercise of the right ..... but still the right would exist, and it would be at our option to yield or enforce the exercise of it." 9

The same idea was expressed in the case of the Belgenland 10.

V. In Britain and France the matter is regulated by municipal law. The controlling British statute, the Territorial Waters Jurisdiction Act, 1878 11, which has been referred to already, authorises the exercise of a criminal jurisdiction in respect of offences committed within the British territorial waters. Bays are covered by the common law and are not referred to in the /

9. Mr Macey to Mr Clay. 1855 Moore Digest ii. s.204
11. 41 & 42 Vic. c. 73. See supra p. 133 & 169
the Act. Before the jurisdiction under the Act can be invoked, apart from the preliminary investigation, the imprimatur of a Secretary of State is required. In France the relative enactment is dated 2nd July 1916, modifying Art. 85 of the decree of 24th March, 1852 as amended by the law of 15th April, 1898.

"toute personne, même étrangère, embarquée sur un navire français ou étranger, qui, dans les eaux maritimes et jusqu'à la limite des eaux territoriales françaises, ne se conforme pas aux règlements ou aux ordres émanant des autorités maritimes et relatifs, soit à la police des eaux et rades, soit à la police de la navigation maritime, est punie...." 12

VI. The essence of these municipal enactments and the common law where there is no express enactment is that the exercise of the jurisdiction is under the control of the State. Finally, this jus merae facultatis inherent in the littoral State is the basis /

12. Fauchille i.2. 1093. See Charteris B.Y.I.L.(1920-21) for an examination of the legal position of merchantmen in foreign ports and harbours where the British and French systems are stated.
basis of the State's rights in the marginal sea and other territorial waters conceded by those publicists who do not admit the exclusive right of sovereignty of the coastal State.  

VII. In essence, the rights exercised by the State over the maritime domain are the same as those over the territory of the land; the apparent peculiarities are due to the jurisdiction being exercised over ships and those aboard them and to the littoral State being relatively uninterested in anything in the foreign ship which has no effect beyond the vessel. A recent American writer has put it thus:

"The jurisdiction exercised by the State is proportionate to the interest in the conduct of the ship or its occupants."  

VIII. Upon the high seas the ship, in default of a local jurisdiction,

14. Hyde i.s. 226
jurisdiction\textsuperscript{15} is under the control and protection of the flag State which, in turn, expects and requires due allegiance. It may be that none of the crew or passengers aboard are of the same nationality as the flag\textsuperscript{16}, nevertheless, the ascription of a nationality to and personification of a ship is a convenience and, indeed, a necessity. The privileges and respect due to the vessel on the high seas and in foreign parts are referable to the national flag she carries; it distinguishes belligerent from non-belligerent property. The vessel itself is a mere chattel and those aboard a small organised community of private persons collaborating temporarily for purely private ends. They voluntarily submit themselves to the jurisdiction of the flag State for the duration of the voyage but otherwise retain their nationality and personal allegiance to their sovereign. The fiction that the ship forms a floating portion of/
of the State territory is false and probably would not now be seriously advanced. Hall, after a very critical examination of the theory concludes,

"The fiction is meaningless unless it conveys that the merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of extraterritoriality, which of course cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied by important States and jurists of weight".

The writer is wholly in agreement with the above conclusion. The fiction of territority of vessels is untenable. Carried to /

17. Nys ii.158. Hall 302 says that this theory cannot be traced back further than that depository of bad law - the Silesian Loans. Pitt Cobbett i.284. Fauchille i.2.1017. Cunard Steamship Co. v Mellon, 1923, 262 U.S. 100. Lorimer Vol. I. pp.252 & 253 wholeheartedly supports the conception of extraterritoriality of vessels in foreign ports.

18. Hall 305. Hall notes in a footnote (p.305) that the vivacity with which Great Britain prosecuted the right of search and the impressment of British seamen serving on American vessels drove the Americans into the distinct policy of asserting the territoriality of the ships. This view would not appear to be consistent with the American opinions cit infra - but see Moore Digest i. § 174.
to its extreme, the theory would avoid the right of a belligerent to visit and search all vessels upon the high seas and the bottom would fall out of the law of contraband.

"All ships which sail upon the territorial sea are like the waters which carry them within the jurisdiction of the territorial sovereign."

IX. The act of voluntary entrance into the territorial waters of another State implies the subjection of the ship to the territorial jurisdiction of the State. During the ship's stay the protection of the State may be demanded or reparation required where there is neglect. Correlatively, the ship is bound to yield obedience to the local sovereign in so far as this may be required. This is no novel proposition. Reference need only be made to the early treaties of commerce and navigation entered into by Britain with other States.

Down /

20. Cunard Steamship Co. v Mellon, 1923 262 U.S. 100 and The Zamora (1916) 2 A.C. 77
21. See Appendices C, D, and E.
Down through the ages until the recent case of the Cunard Steamship Co. v Mellon in 1923, the attitude of the United States has been repugnant to the theory of the territoriality of vessels.

"It is part of the law of civilised nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two nations have come to some different understanding or agreement; for, as was said by C.J. Marshall in the Exchange, it would be obviously inconvenient and dangerous to society and would subject the law to continued infraction, and the government to degradation, if such merchant did not owe temporary and local allegiance, and were not amendable to the jurisdiction of the country .... As the owner has voluntarily taken his vessel for his own private purpose to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection and to which he becomes entitled.

X. While Britain claims a concurrent jurisdiction with the littoral State over British vessels it concedes full weight to

22. 7 Cranch 144.
23. Mr Bayard, Secretary of State to President. 1887. Moore Digest ii.s.175. Phillimore (i.483) and Wheaton (i.236-239) adopt this view.
the local territorial jurisdiction. In the case of Reg. v Lesley\textsuperscript{24} the Court said as to the jurisdiction of a foreign power in respect of a British ship:

"We assume that in Chile the act of the Government towards its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign State, yet in other respects, she is subject to the laws of that State as to acts done to the subjects thereof. We assume that the government could justify all that it did within its own territory and we think it follows that the defendant can justify all that he did there as the agent for the government, and under its authority .... But an English ship upon the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amendable to English law as they would be on English soil."

XI. While it rests with the coastal State in its discretion to exercise the jurisdiction, it may be said that a State usually does regulate pilotage and anchorage in territorial waters, that is traffic and navigation control which also facilitates the enforcement of the customs and public health regulations /

24. (1860) Bell C.C. 220.
regulations. Beyond such "police" measures designed for the regulation of traffic, the safety of the vessels and their passengers, the legislation of the littoral State, in so far as it touches aliens, would not normally go. It would be impossible to require every tramp steamer to comply with all the diverse domestic laws of each State at whose ports it might touch.\(^25\) Lex non cogit ad impossibilias; and States prefer to encourage not to impede international commerce. It is otherwise with the coasting trade or cabotage. It is a national concern and the State may also admit or exclude, in the absence of treaty provision to the contrary, foreign vessels from the coasting trade as distinct from overseas carrying trade.\(^26\)

XII /

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\(^26\) Oppenheim's definition (i.p.746) is accepted. See also League of Nations for a further discussion of the term 'cabotage'. The subject is fully discussed by Oppenheim loc. cit. and is here referred to brevitatis causa.
XII. It may be regarded as doubtful as to when a State may interfere with the interior economy of a foreign vessel in territorial waters or attempt to enforce municipal law as to the complement of the crew and loading provisions. The United States formally protested against the application of the provisions as to the Plimsol Line (load line) to their ships in territorial waters but the British reply took as the justification the interests of humanity and the matter was dropped. The decision in the case of the Cunard Steamship Co. v Mellon and the subsequent treaties, essentially partaking of the semblance of a compromise, imply that the other States concerned admitted with reluctance the right of the territorial State to enforce its municipal laws even to regulating the domestic economy of the foreign vessels within its ports and territorial waters. A more doubtful exercise of jurisdiction is /

27. Moore Digest ii.204.
28. cit. sup.
29. See ante. pp.119 & 120
is the application of municipal law to effect an amendment of contracts entered into elsewhere between members of the crew, e.g., as to seamen's wages. Whether the jurisdiction should be exercised is largely a matter of policy but it would appear to be settled that the territorial sovereign may subject all vessels entering the territorial waters to the local requirements. As, however, the local sovereign is but little concerned with ships which, although entering the territorial waters, do not actually enter the ports, the jurisdiction is not likely to be invoked except for reasons of high policy.

XIII. To this general rule that all vessels are subject to the jurisdiction of the territorial State, one exception must be.

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30. As to "Prohibition Laws see Wheaton i.271 re Seamen's Wages.
31. Moore Digest ii.s. 204 re Shipping contracts (Harte Act) Hyde i.ss. 226. As to infringement of patents see Stowell 147.
32. See ante. p.222
be admitted. Ships which have involuntarily entered the territorial waters of another State, e.g., by stress of weather or force majeur must be treated as in need of assistance and according to the dictates of humanity. This rule of international law is not called in question\(^{33}\). If, however, the vessel has been hovering off the coast with a view to the infringement of the municipal laws it cannot claim exceptional treatment should it be forced by unforeseen circumstances to seek the shelter of the State which it had designed to wrong\(^{34}\).

XIV. The right of the littoral State to exercise a criminal jurisdiction is disputed by those who deny the exclusive sovereignty of the State upon the territorial waters. The justification for their view is the infrequent exercise of

\(^{33}\) Oppenheim i. 340, 432 & 450. Hall 527

\(^{34}\) Stowell 155.
the jurisdiction in territorial waters. As pointed out above, however, the option of exercising the jurisdiction rests with the territorial sovereign. Much may happen aboard a ship, passing through or anchored in territorial waters, unknown to those on shore and it would be a decided inconvenience, if not an impossibility, for the territorial sovereign to subject such vessels to strict supervision. The jurisdiction is nevertheless well founded.

"If the United States claim jurisdiction over all offences committed on board of foreign private vessels in their harbours or waters, they cannot, with consistency, assert to have their citizens exempt from the jurisdiction of the local authorities when they commit similar offences in foreign ports.

"The question of jurisdiction has been under the consideration of the Supreme Court of the United States. The views expressed by that Court are those which this Government approves, and is disposed to abide by its intercourse with foreign nations...."

"We should undoubtedly deny the right of any power to demand the exemption from trial and punishment by our Courts, of one of its subjects, who had committed a crime on board a foreign vessel in one of our harbours, though the offence should be one which only affected the officers, crew or company of that vessel. Circumstances might render it proper to forego the exercise of the right to try such an offender, but still the right would exist."35

In /

35. Moore Digest ii. s. 204.
In the American view, if the municipal law has been breached, it is immaterial what the offence may be termed.

XV. Instances of offences where the territorial sovereign may clearly exercise a jurisdiction are those (a) which may endanger the public safety or breach the peace, (b) offences initiated outside the ship and terminated aboard, and (c) where the commander of the vessel invokes the aid of the territorial sovereign. An offender may be pursued and taken off the ship for an offence committed outside the ship but within the territory of the State; the territorial State must allow the judicial machinery to function when requested by a foreigner including a ship, who alleges to have been wronged by another foreigner within the State's jurisdiction.

36. Moore Digest ii. s. 175
XVI. In many States this criminal jurisdiction is regulated by treaty and in others by municipal law; in all it entails, as a rule, the exercise of the discretion of the State. In British territorial waters, the matter is regulated both by treaty, e.g. the North Sea Convention of 1882, and municipal law, e.g. the Merchant Shipping Act of 1894. The British Territorial Waters Jurisdiction Act, the principal British enactment as regards a criminal jurisdiction on the marginal seas does not apply to bays. The omission was deliberate as the latter were understood to be covered by the existing common law. This was the view taken in the case of R. v Cunningham and was referred to with approval in the case of Mortensen v Peters. This Act, the Territorial Waters Jurisdiction Act, has called forth protests from many writers as

38. Fauchille 1.2. 1094
40. (1906) 8 F.(J) 93.
as contrary to Article 6 of the Resolutions of the Institute of International Law passed at the session of 189441: on the other hand, it has received the commendation of others, e.g., Oppenheim, as a powerful factor in initiating a uniform basis in the practice of States where there was none42. The essential points in the Act, for the present, are (a) the jurisdiction is expressly claimed and (b) it rests with the administration to say, after the preliminary investigation, whether the jurisdiction is to be exercised.

41. Institute of International Law p. 113 et seq.
Art. 6. Les crimes et délits commis à bord de navires étrangers de passage dans la mer territoriale par des personnes qui se trouvent à bord de ces navires, sur des personnes ou des choses à bord de ces mêmes navires, sont, comme tels, en dehors de la juridiction de l'État riverain, à moins qu'ils n'impliquent une violation des droits ou des intérêts de l'État riverain, ou de ses ressortissants ne faisant partie ni de l'équipage ni des passagers.

42. Oppenheim i. 339
XVII. In theory then the jurisdiction is absolute, and the exercise thereof is within the discretion of the State. When the jurisdiction should be exercised and the extent to which it should be exercised are governed by practical considerations, namely, the degree to which the interests of the State are affected and whether, in all the circumstances, it is reasonable and expedient to require submission to the jurisdiction. The right is not lost by non-user or by only occasional exercise if the suspension of the jurisdiction can be explained by circumstances43.

XVIII. An ancillary right is granted to the territorial State where a foreign vessel, having committed an offence in the territorial waters, seeks to escape therefrom to avoid the consequences of the act. The vessel may be pursued immediately upon

upon the high seas. This right of the territorial sovereign, acting through those whom he has commissioned for this purpose, must be distinguished from preventative action taken upon the high sea to forestall an act or intended act which would injure the State or its inhabitants. In the former case, the offending party is within, or held to be within the jurisdiction, in the latter, the vessel is outwith the limit of territorial jurisdiction.

XIX. The salient points of this right of pursuit from the territorial waters, called 'hot pursuit', have been concisely stated by Hall.

When

44. p. 309. See also Jessup p. 107. Oppenheim i. 429.
"When a vessel, or someone on board of her, while within foreign territory commits an infraction of its laws, she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be effectively exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or the persons on board might be doubtful."

Should the pursued vessel reach the sanctuary of territorial waters of another State the pursuit must be abandoned out of respect to the sovereign jurisdiction. The remedy is then to be sought by extradition or diplomatic representation. As was said in the case of the Itata:

"It would be monstrous to suppose that (United States) revenue officers were authorised to enter into foreign ports and territories for the purpose of seizing vessels which had offended against (United States) laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations."

45. Oppenheim 1.429
46. Jessup IIII quoting story J.
The arrest to be valid must have been effected in the course of the pursuit. It cannot be abandoned and then renewed; it must be continuous\textsuperscript{47}. The right was recognised by the Institute of International Law at their session of 1894 but with the proviso that the capture should be immediately notified to the flag State\textsuperscript{48}. Westlake endorses the claim to effect an arrest in the circumstances as being "necessary to the effective administration of justice and to secure enjoyment of fishery rights in time of peace."

It is in connection with the latter that cases of Scottish interest are most likely to arise in normal times.

\textbf{XX.} A doubt has been expressed by \textit{Pitt Cobbett}\textsuperscript{49} and \textit{Hyde}\textsuperscript{50} as to whether this power to arrest is, in international law, a /

\textsuperscript{47} \textit{Pitt Cobbett} i.175.
\textsuperscript{48} \textit{Institute of International Law} p. 113. Art. 8.
\textsuperscript{49} i. 175-6
\textsuperscript{50} i.s.236
a right or merely a jurisdiction permitted by the comity of
nations. The ground for this dubiety is to be found in the
oral opinion expressed by Sir Charles Russell in the proceed-
ings before the Behring Sea Fur Seal Arbitration Tribunal 51.

"I will state, although not exhaustively, some of the
leading conditions. For instance, one condition is that
it must be a hot pursuit, - that is to say, a nation
cannot lie by for days or weeks and then say: 'You,
weeks ago, committed an offence within our waters, we will
follow you for miles, or hundred of miles, and pursue you.'
As to that it must be a hot pursuit, it must be immediate,
and it must be within limits of moderation. In other
words we are still considering the character of the act
which is not defined by international law, which is not a
strict right by international law, but which is something
which nations will stand by and see done, and not inter-
pose if they think that the particular person has been
endeavouring to commit a fraud against the laws of a
friendly Power".

XXI. Westlake 52 is of the opinion that Sir Charles would
have advanced a right, not a permission, if he had to give a
more considered opinion. In any case, the Courts and the

Governments /

51. Quoted by Jessup p. 106.
52. i. 178. The British Government in the recent diplomatic
Correspondence arising out of the sinking of the
"I'm Alone" took the words of Sir Charles Russell as
being a true statement of the British view. U.S.
Arbitration Series No. 2.(4) at p. 46.
Governments of both the United States and Britain have held and acted upon the assumption that there is a right. It has, at least, the sanction of general if not universal usage and, until disavowed may be regarded as a rule of international law conferring a right. Nor do the decisions in the arbitration regarding the James Hamilton Lewis and the C.H. White breach the rule as has been alleged. In those instances, the pursuit had not been commenced within territorial waters but outside by vessels which had been cruising on the high seas. The arrests were made on mere suspicion that an offence had been committed within territorial waters. The arbitrator was not called upon to endorse the validity of the rule as to hot pursuit. That issue did not arise.

53. Pitt Cobbett i. 179
54. Moore Digest i.s. 173 is relied upon for the facts and the decision. Jessup (108) misunderstands the case. See also Westlake (i.178) for the correct perspective. No protest was lodged by the United States against the pursuit and damage inflicted by the Canadian patrol in the case of the Silvan which was discovered fishing in Canadian territorial waters. U.S. Arbitration Series No. 2. (4) pp. 141 et seq.
XXII. The rule has been extended to include cases where the vessel may be held to be constructively present in territorial waters when the offence was committed, e.g., where the crime was perpetrated from the ships boats although the vessel itself may have been outside the territorial limits\textsuperscript{55}.

Lord Salisbury in the \textit{Araunah} is very definite:

"Even if the \textit{Araunah} at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed licence warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters."

XXIII. This right of hot pursuit and its extension to cover constructive presence became prominent in the cases of arrest of foreign vessels said to have been attempting to breach the American Prohibition Laws\textsuperscript{56}. In the first important case, the \textit{Grace and Ruby} which was seized outside the three-mile limit, the

\textsuperscript{55} The \textit{Araunah}. Moore Digest ii. S.316. See also other cases cited by Jessup at p. 112.
\textsuperscript{56} For the facts reliance has been placed upon Jessup.
the ship's dory and part of the crew had been arrested within territorial waters in the act of attempting to breach the municipal law. The government, in reply to the British protest, founded upon the precedent of the *Araunah* and the matter was dropped.

XXIV. The Court's decision in the *Grace and Ruby*, however, was founded upon the doubtful case of *Church v Hubbart* and might well have been passed over had the decision in the later case not been regarded as a binding precedent. The Court held that the validity of the original seizure was immaterial when the ship is in the possession of an official of the Court and no plea in bar of the jurisdiction could be considered in such circumstances. This was surely a perversion, if not a denial, of justice. Even the subsequent ratification of the seizure by the government could not validate.

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57. *Hansard* 5th Series Vol.163. Col. 968
58. 2 *Cranch* 187
59. *Jessup* 275
validate that which was invalid in international law in a question with foreigners seized outwith the territorial jurisdiction.

The case of the Henry L. Marshall is also typical of others. British registration of the vessel had been obtained under pretences amounting to fraud. In this and other cases, the British Government refused to recognise the British registration of the vessels, holding that, in their view, the vessels were still American ships and therefore under the sole jurisdiction of the United States.

One /

61. Jessup. (p247) in his anxiety to support his thesis of the rectitude of the United States' exercise of a jurisdiction under the Prohibition Acts in seizing vessels anywhere, even upon the high seas, oversteps the mark in his criticism of the case of the Henry L. Marshall. With the British denial of the British registration of the vessel, the case, so far as Britain was concerned, was closed. They rightly refused to be drawn into controversy or to express views upon hypothetical cases. Jessup contends that the British Government were bound to uphold the fraudulent registration and cites the case of Mortensen v. Peters (1906) 8 F. (J) 93. But the registration of vessels is regulated by municipal law. The Norwegian Government, in the case of Mortensen, considered the Norwegian registration valid; and the Norwegian Government must be presumed to be the best judge of its laws.

Similarly /
Similarly with the British Government, it should not be expected to homologate and encourage frauds upon its laws in order that citizens of other States might wrong their country.

This view is not inconsistent with the findings in the case of the I'm Alone that the tribunal might enquire into the beneficial or ultimate ownership of the vessel although registered under the British flag. The British contention was that the matter of registration and the penalty for fraudulent registration were matters for the municipal law of each State and to make the suggested enquiry was to subject the Sovereign to the jurisdiction of the tribunal without the Sovereign's consent, that is, contrary to law. It was clear from the Commissioners' answer that they desired to ascertain these facts in order to consider the measure of damages to be awarded in respect of certain aspects of the claim for the illegal sinking of the vessel. In this the Commissioners acted upon grounds of expediency and not of law. They did not found upon the registry of the vessel being irregular but, as the ultimate owners were American citizens engaged upon attempts to wrong their State, they did not award any damages for the loss of the vessel or cargo as that would have entailed a payment by the United States; not by the owners who were attempting a crime against the State, and the enrichment of and not an indemnity to Britain for the loss of the vessel. On the other hand the registry of the vessel was respected for the sinking of the vessel was found illegal and suitable acknowledgment of the wrong required. (United States Arbitration Series No. 2 (7)).
One cannot cavil at the judgments of the American Courts who, perforce, had to administer the law of the State as they found it, in respect of vessels seized beyond the accepted limits of territorial waters. In the *Grace* and *Ruby*, the opinion was expressed that it was for the political department to say as to the limits of shore waters within which foreign vessels infringing the laws of the State should be seized: the Courts could not refuse to adjudicate upon cases brought before them or to apply the law as they found it whether in conformity with international law or not.

The executive, however, rectified the matter by Treasury Order dated November 9, 1922\(^62\).

"November 9, 1922.
The Collector of Customs,
New York.

Sir,

This Department is in receipt of your telegram of 8th instant, relative to the seizure of the British auxiliary Schooner M.M. Gardner, on September 13, 1922.

It appears from your report that the seizure was made outside the three-mile limit, and that while the master admitted unlading part of the cargo beyond the three-mile limit there is no evidence that the vessel was communicating with the shore by means of her own boats or equipment.

Under these circumstances it is the desire of the Department of State and the Department of Justice that all foreign vessels so seized shall be released, and you will be governed accordingly. A report to the Department should be made in each instance.

Respectfully,

A.W. Mellon,
Secretary."

It is suggested that the Treasury's interpretation of the rule of international law as to constructive presence was eminently reasonable. It may be presumed that where the ship's own boats or crew are used in the commission of the offence within territorial waters there is the unity of control which makes for 'constructive presence'. In all other
other cases, e.g., where other boats are employed and the leading parties are stationed on the vessel itself and may be proved to have had full control of the operations, it is a matter of evidence and proof as to whether there is in fact sufficient grounds for holding the vessels to have been constructively present in the territorial waters.

XXV. Question may be put as to whether the rule of hot pursuit with all its attendant conditions still holds in the light of changed circumstances brought about by the increased speed of vessels and improved means of communication such as radio-telegraphy and telephony. The recent cases and the decision of the arbitration as to the Canadian Schooner, I'm Alone, which was sunk after several days of pursuit well away from the locus of the alleged offence, would appear to show/

63. See U.S. Arbitration Series No. 2 (1)(2)(3)(4)(5)(6) & (7)
show that the rule must be still restricted in its application and applied with moderation. States are naturally reluctant to allow their vessels to be interfered with on the high seas and the only other solution is the possible extension by treaty of the limits of territorial jurisdiction to meet special difficulties which may frequently recur. This was the solution adopted by the United States and Finland\(^64\).

XXVI. The principal restriction upon the territorial sovereignty of the littoral State is the right of innocent territorial passage through the waters by foreign merchantmen. There may be little modern conventional authority on the subject but the right is universally admitted in the sense that innocent passage is never refused. Territorial waters, in this respect, have fallen into the general term of the high seas.

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\(^{64}\) See Appendix Q. Finland (1932-33) Cmd. 4436, and Treaty of Helsingfors of 19th August, 1929 between the Baltic States. De Mortens Nouv Rec. 3\(^{e}\) Ser. p. 131.
In the words of Hall\textsuperscript{65} who regards the right as a servitude\textsuperscript{66} and whose opinion as to it being an indubitable right is endorsed by other leading jurists\textsuperscript{67} including the Institute of International Law\textsuperscript{68}, the position may be stated thus:–

"In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an unappropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation ..... For more than two hundred and fifty years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidently stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right must therefore be considered in the most complete manner."

XXXII. It has been doubted whether this right is of very great importance or whether its denial would cause serious injustice\textsuperscript{69} as the deviation from the course of a vessel to avoid

\begin{thebibliography}{99}
\bibitem{p. 197} p. 197
\bibitem{p. 203} p. 203
\bibitem{Pitt Cobbett i. 153. Phillimore i. 278. Westlake i.193-4
Hyde's 154. Moore Digest i.s. 144 at p. 700. League
of Nations C. 230 M. 117.1930 V. p. 8.}
\bibitem{Institute of International Law p. 113 et seq.}
\bibitem{Mr Miller (U.S.A.) League of Nations p. 58 C.351(b)M.
145(b) 1930.V. Stowell 148.}
\end{thebibliography}
territorial waters would be very slight. On the other hand, there is no point in the territorial sovereign objecting. Any action on his part to that end might have the inconveniences arising from reciprocity of treatment by other States.

XXVIII. 'Innocent passage' does not include passage through the territorial waters in order to enter or to depart from a port of the territorial State; it covers only those ships which, in the course of their voyage, find it convenient to traverse the territorial waters of another nation without touching any part of the coast. Should the vessel anchor, except as an act incidental to the ordinary course of navigation, it ceases to be engaged in 'innocent passage' and its rights and duties are regulated in the same manner as any other vessel in territorial waters.
XXIX. While the tendency today is to grant equality of
treatment in maritime trade\(^{70}\) to all nations on the basis of
reciprocity including harbour, light, and pilotage dues, no
State could now levy dues for the passage of vessels through
territorial waters. In the marginal sea collection would be
difficult and, since the abolition of the Sound dues in 1857,
the last instance of the exercise of the right to collect such
dues from vessels passing through territorial straits, any
attempt to resuscitate the practice of former times would meet
with the united opposition of all interested maritime Powers\(^{71}\).

XXX. Passing vessels are not, however, exempt from the
local regulations affecting navigation or purposed to protect
the

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\(^{70}\) See, for instance Convention on the International Regime
of Maritime Ports (1925) Cmd. 2419.

\(^{71}\) Craig 1.16.17 admitted the legitimacy of the Danish Sound
dues as payment for services rendered but objected to
them as a source of profit to the State. See also
Phillimore i. 255. Oppenheim i.349. Pitt Cobbett i.153.
Moore Digest i.s. 134. Institute of International Law
p. 113 et seq. "The interests of the whole world are
concerned in the possession of the utmost liberty of
navigation for purposes of trade by the vessels of all
States." Hall 198.
the interests of the inhabitants of the coastal State. These local laws may be said to cover regulations for (a) the safety of the traffic and traffic channels; (b) the protection of the waters of the coastal State from pollution and (c) the protection of any exclusive fishing or other rights which the coastal State possesses. Further, while the territorial State may seldom exercise the right, passing vessels are liable to visit and search if such be considered necessary to establish the innocence of the passage. Such a right, if exercised without reasonable cause, would lead to justifiable protest by the flag State. Finally, should any vessel or person /

72. The Conference for the Codification of International Law (Second Commission) were generally in favour of the British view from which these are taken. League of Nations C.351(b) M.145(b) 1930 V. Halleck i.168-9 Lawrence p. 184. Fiori paras. 277 & 278. Vattel i. § 123 The Zamora + Lloyd's P.C. at p. 100. Lord Chancellor in the debate on the Territorial Waters Jurisdiction Bill. Hansard 3rd Ser. V.237 p.1601 et seq.

73. Neilsen p. 450 and case of "I'm Alone" U.S. Arbitration Series No. 2(1) and (4).
person aboard her do any act prejudicial to the littoral State or infringe any of the regulations above mentioned the passage ceases to be innocent and the jurisdiction of the State may be exercised to its full extent.

XXXI. The right of innocent navigation then amounts to this, no State may exclude any merchantman of another State from passing through the territorial waters in the course of trade so long as the local regulations as to navigation and the preservation of the rights of the State are observed, and no exaction may be demanded except such as may have been incurred by the vessel as an ordinary obligation for specific services rendered to the ship. As a restriction upon the exclusive territorial sovereignty, the right of innocent passage is thus of little importance.
XXXII. Jurists differ as to whether men-of-war have the right of innocent passage like the peaceful merchantmen. Innocent passage is, in fact, never denied in time of peace but States do purport to regulate it. Hall\(^74\) is against the concession on the grounds that the world wide interests in the freedom of navigation for the advancement of commerce are absent in the case of warships. Westlake\(^75\), and he is followed by Pitt Cobbett\(^76\), points out that warships are frequently engaged upon the most peaceful of missions when they ought to be entitled to the right of passage. Lawrence\(^77\) also stresses the fact that the term 'innocent passage' refers to the character of the passage and not to the quality of the vessel. Fauchille\(^78\), since he holds that the State does not have the right of exclusive sovereignty over the territorial waters /

74. p. 198
75. 
76. l. 149. See also De Louter i. 260
77. s. 88
78. i.2.1006
waters, concludes that a warship has a right of passage so long as the security of the littoral State is not endangered. At the same time he recites a lengthy list of municipal regulations which would appear to show that the State does claim to control the entry and stay of foreign warships in the territorial waters.  

XXXIII. The reason for the special treatment accorded to foreign warships is that the ship has been commissioned by the State and carries the pennant of the State. It is a representative of the sovereign no less than an ambassador but, because it is an armed force, other States are not bound to receive it into their territorial waters or ports. As was said by Mr Root:

"Warships /

79. i.2.1008 et seq.
80. Moore Digest ii.§ 254. Parlement Belge (1880) 5 P.D.197
"Warships may not pass without consent into this zone (territorial waters), because they threaten. Merchant ships may pass and repass because they do not threaten." 81

When warships enter the waters of a friendly power they are admitted only on licence, express or implied. This is clear for many States determine the number which may be admitted and the conditions to be observed. The terms of the Treaty of Peace between the United Kingdom and Sweden dated 1654 82 is substantially similar to the municipal law enacted by several European and American States in the twentieth century 83. Apart from the restriction as to number of vessels to be admitted at any one time and a requirement of prior notice of approach, the conditions to be observed by the foreign warships aim at avoiding any cause for complaint on the grounds of conduct.

81. Jessup 120
82. Appendix C.
83. Fauchille cit. sup. Hall p. 198 (note). Moore Digest i.s.134 and ii.s.253 re the special case of the Dardanelles, regulated by treaty.
conduct prejudicial to the security, health of the community, or good conduct in the territory of the littoral State.

XXXIV. The ship of war of a foreign Power is to be received with all the respect due to the direct representative of an equally independent sovereign and treated with the courtesy due to such\textsuperscript{84}; the vessel cannot be subjected to any form of judicial process. This was the finding of the American Court in the leading case of the \textit{Exchange}\textsuperscript{85}, which has been accepted as authoritative in international law. Courtesy and respect impose a correlative duty upon the visiting vessel to observe the local regulations and if it fails to do so, may be required to depart from the territorial waters. The vessel is not under the jurisdiction of the littoral State; a suit against

\textsuperscript{84. Vattel iv.c.7 s.92 re ambassadors.}
\textsuperscript{85. (1812) 7 Cranch 116, 135.}
the vessel would not lie at the instance of a subject; his
plea for redress should be addressed to the sovereign of the
flag State. To submit the vessel to any judicial process
would be a serious derogation from the sovereignty of the
State to which the vessel belongs.

XXXV. It is not that the warship constitutes a part of the
territory of its State. The fiction is needless. The
relationship is that of host and guest, regulated by courtesy.
The ship may not be subjected to search but the purpose is
achieved by obtaining an assurance on the point at issue from
the officer in command of the vessel. Etiquette requires that
his word be accepted.

XXXVI. The exemption from the local jurisdiction is not to
be /

86. Moore Digest ii. § 254. An instance of constraint was
characterised as an "unparalleled insult".
aboard a public ship be taken to afford an asylum for any fugitives from justice but a distinction is drawn between criminals and political refugees. The latter may be received at the discretion of the flag State if they present themselves. The surrender of the former if aboard the warship may be required but may not be effected by force, the latter, while granted an asylum, may not be invited and any attempt to do so would be cause for requesting the vessel to depart as having abused the hospitality of the State and in breach of the understanding upon which the ship was admitted.

XXXVII. Warships are therefore in a special position. They cannot be regarded as having the right of innocent passage since their admission to territorial waters and ports may be and is regulated by the territorial State. Out of regard to their...

87. Hyde i.s. 254. See Moore Digest ii.s.254 for Lord Stowell's opinion on the point.
88. See Pitt Cobbett i. 273-4 where this is fully discussed.
their being public ships in the service of their sovereign and out of respect to him, they are exempt from all judicial process but, at the same time, courtesy requires that the vessels in turn respect the local regulations and hospitality extended. It is not to be assumed, however, that a private party who has been injured, e.g., by a collision due to negligent navigation of the public vessel is without a remedy. It is not to be sought in the local Court but by representation to the sovereign of the flag State. On his part, to see justice done, he may agree to a submission of the claim for adjudication to a tribunal who may hear evidence and apply suitable ordinary rules of law, e.g., *lex loci delicti commissi*.

Such voluntary submission is in no way derogatory to sovereignty, on the contrary it is a commendable act on the part of the custodian of justice.

XXXVIII/

89. *Neilsen* pp. 427 & 452
XXXVIII. Assimilated in many respects to warships are the vessels of a State which, while bearing a commission from the sovereign and flying his pennant, engage in trade in competition with the ordinary merchantmen. In the leading British case of the *Parlement Belge*\(^90\) the following was expressed:—

"The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the State. It seems very difficult to say that any Court can enquire by contentious testimony whether that declaration is or is not correct. To submit to such an enquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be enquired into .... Whether the ship is a public ship and is used for national purposes seems to come within the same rule."

This special consideration accorded to public vessels is a consequence of the absolute independence of every sovereign authority which induces every sovereign to respect the independence of every other sovereign State, and to decline to exercise, by means of the municipal Courts, any rights of territorial /

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\(^{90}\) (1880) 5 P.D. 197 at p. 219.
territorial jurisdiction in respect of any property of other
sovereigns which may happen to be within the State's territory.
The same concession is accorded even to rulers who have
pledged themselves not to exercise the full rights of
sovereignty. It is sufficient if the British Government
has accorded the State provisional recognition as independent
and sovereign but insufficient if the parties are those with
whom the government are merely co-operating against an
established government.

The issue has assumed considerable importance since the
practice of States to engage in trade was widely extended
during and since the war of 1914-19. Nevertheless, the same
principles of exemption have been adhered to by the British
Courts even in respect to vessels of the Soviet Russia which
nationalised

91. Mighell v Sultan of Johore (1894) 1 Q.B. 149 affirmed in
the case of Duff Development Co. v Govnt. of Kelantan
[1924] A.C. 797.
P. (C.A.) 95.
nationalised the whole mercantile marine. In an early case the principle of exemption from jurisdiction was applied to exempt from judicial process even the cargo of private persons carried in a warship. The American Courts appear to follow the British rule in this matter. The inequity arising from placing such government trading vessels in a privileged position as compared with the vessels owned or chartered by private parties has led to some States, e.g. Italy, to deny the full benefit of exemption. Germany is precluded by the Treaty of Versailles from claiming exemption for trading vessels should the State engage in trade. The International Maritime Conference of 1922 and 1926 recommended that governments should accept full liability in respect of ships and cargo as if their vessels were private ships excepting always /

93. The Jupiter (1924) P. (C.A.) 236
94. The Constitution (1879) 4 P.D. 39
95. Wheaton i. 241-2
always (a) warships and (b) other vessels employed solely on government work proper. While the recommendations represent a consummation which equity suggests and were supported by the British Imperial Conference of 1926, the Convention has not yet been accorded the approval of the British sovereign legislature. In these circumstances, the practice of States varying and looking at the inequity of exemption on a large scale, it may be assumed that, in international law, the matter is, at present, unsettled.

XXXIX. Finally, there is the class of public vessel engaged upon scientific and philanthropic missions. These are universally granted exemption from the local jurisdiction out of respect not only to the sovereign employing them but also to their humanitarian mission.

96. (1926) Cmd. 2768 pp. 56 & 57
97. For a review of the attitude of various States towards this question up to 1924, see Matsunami.
CHAPTER VI.

State Jurisdiction in Territorial Waters in time of War.

I. It need only be remarked that, in time of war, the territorial waters of a belligerent, vis-a-vis the other belligerents, form part of the theatre of war indistinguishable from the high seas. As regards neutrals, the waters retain their status under the territorial sovereignty of the littoral State. The maintenance of the security of the belligerent State, however, becomes of paramount importance and all other interests are subordinated thereto. Thus the neutral may find the regulation of shipping in the territorial waters of a belligerent more stringent, and, compared with the comparative freedom allowed in time of peace, oppressive. Portions of the coastal waters may be closed to navigation and the approach to fortified places prohibited. Nor is the property of the neutral secure for, in a pressing emergency, it may be requisitioned.
requisitioned by the belligerent government under the *jus angariae*.

II. But if the territorial waters of a belligerent are thus given over to war and scarcely distinguishable from the high seas, it is otherwise with the waters under the territorial jurisdiction of a neutral sovereign. In no other branch of the law relating to territorial waters has there been so many changes and, at times, uncertainty.

"The laws (of neutrality) contain some of our oldest and some of our youngest chapters of our science.... It sets forth principles that have been consecrated by general assent, and principles which are still warmly supported and fiercely decried. High ethical considerations have moulded some parts of it, while others have arisen from the conflict of opposing self-interests."  

In time of war when passions are roused and national resources strained for the conflict, the belligerent sovereign, jealous /

2. Lawrence p. 582. See also Westlake ii. 162-3 for the importance of a high ethical standard on the part of neutrals.
jealous of his dignity and cause, is critically watchful of those 'who are on neither side'; the neutral, on the other hand, while neutrality may have been and may yet be commercially profitable, courted and perhaps distrusted by both sides, must guard his steps, must observe a high standard of conduct, and be vigilant in enforcing his rights lest by negligence therein he be condemned as unneutral. Such factors have assisted in the rapid development of and change in the laws of neutrality.

III. Streaks of light preceded the dawn of the modern law which may be dated from the French Revolutionary Wars. But every war of considerable importance has brought about some further development. In the old sea laws of Scotland as early as 1542 we read:

"War/"

"War being between the King of France and the Emperor, and peace being between this realm and France, no Frenchman may take any ship, goods or gear, pertaining to any of the Emperor's lieges, within our sovereign Lord's seas or waters, and having our sovereign Lord's safe conduct. And if any such ship happens to be taken, she ought to be restored and delivered again; for she is not just and lawful prize."

In the proclamations of the Stuarts from 1604 onwards, there is a decided modern ring - the prohibition of hostilities within the sovereign jurisdiction, the regulation of the admission of prizes and warships, even the prohibition of the fitting out of ships for the use of the belligerents, - points which have but recently been recognised as components of the laws of neutrality. As late as 1757, however, the Scottish Courts appear to have circumscribed the territorial jurisdiction and lightly regarded the sanctity of territorial waters.

"The province of the (prize) Courts in such a (neutral) State is only to try whether or no the peace of the port has been violated by the capture. If this has been the case they ordain him to restore the possession; if not, they leave it as they found it."

4. Holdsworth V. 48-49 vi. 308-309
5. Benton v Brink, Morrison p. 11949
IV. Bynkershoek\(^6\) and Vattel\(^7\) formulated rudimentary conceptions of neutrality. The early jurists, recognising the then practice of States, were forced to admit degrees of neutrality, perfect neutrality, imperfect neutrality which in turn could be subdivided into impartial, allowing the passage of belligerent troops through the territory, and qualified, that is where prior conventions as to subventions were allowed full force. Perhaps one of the best of the early statements, emphasising as it does the rights as well as the duties of the neutral State, is that given by Von Martens:

>If a State observes a strict neutrality,

"it has the right to insist upon being treated as neutral by the powers at war; and, consequently, those powers ought to desist from all violences towards it, except such as absolute necessity may authorise".

"To /

\(^6\) Questiones etc. i.c.9
\(^7\) iii s.103.
"To observe an entire neutrality, a State must abstain from warlike expeditions. It must grant or refuse nothing to one of the belligerent powers, which may be useful or necessary to such power in prosecuting the war, without granting or refusing it to the adverse party; or at least, it must not establish an inequality in order to favour one of the parties more than the other.

"The moment a neutral power deviates from these rules, its neutrality is no longer entire, but limited: and, indeed, though neutral States sometimes promise more, and enter into a conventional neutrality, a limited neutrality is all that the laws of neutrality impose." 

"The laws of nature forbids the belligerent powers to continue hostilities in the territory or in the parts of the seas, under the dominion of a neutral Power." 

The right of the neutral to be allowed to remain at peace and his duty not to sit as judge between the parties to the quarrel are brought out by Ortolan.

"Lorsque deux puissances se font la guerre, ceux des autres Etats qui, avant que cette guerre surgit, etaient simplement amis de l'une et de l'autre, ont le droit incontestable de demeurer tels pendant qu'elle dure; mais pour conserver ce caractere, c'est pour eux un devoir non seulement de s'abstenir rigoureusement de toute participation a la guerre, mais encore de ne s'immiscer en rien dans la querelle des belligerants, et tout en maintenant avec chacun d'eux les relations ordinaires de l etat de paix, de ne rien faire en faveur de l'un qui puisse tourner au detriment de l'autre."

8. VI.c.VI.a1 and a2.
9. do. s.6
10. ii. p.77
V. The condition of neutrality requires also the recognition of the rights of the belligerents and this implies the tacit acquiescence of the neutral in many acts which, in the normal times of peace, would not be tolerated. This factor of acquiescence is emphasized by the more modern writers, such as Hall\textsuperscript{11}, Holland\textsuperscript{12} and De Louter\textsuperscript{13}. The two factors of impartiality and acquiescence are the foundation of the laws of neutrality. The details which form the superstructure will be considered below but it may be stated here that the approach to the idea of strict neutrality was rapid from the French Revolutionary Wars until the attempt to codify the law as to maritime warfare was undertaken in the Hague Convention, No. XIII, of 1907. As several of the belligerents in the war of 1914-19, had not ratified any of the Conventions and Britain had not ratified the convention for the adaptation of the

\begin{footnotes}
\footnote{11. pp. 96 & 97.}
\footnote{12. Moore Digest vii. s.1288}
\footnote{13. De Louter ii. 433.}
\end{footnotes}
the principles of the Geneva convention to maritime warfare, the Conventions were not legally binding on any of the belligerents; yet, only in rare instances, did any belligerent take advantage of this circumstance to avoid the obligations which they imposed, and in all controversies the rights and privileges established by the conventions were invoked wherever applicable. It may therefore be assumed as probable that, except where there was express reservation by a State to particular provisions, Convention XIII represents rules of international law. Since then there has been an apparent retrogression. The conduct of the northern European States during the war of 1914-19, evidencing a preference to Germany and her Allies, portended a return to the former imperfect neutrality. The obligations undertaken by the members of the League of Nations to permit of the passage of troops through the

the territory of the State when required by the League and 15
to adopt other methods of coercion would seem to require a 
reconsideration of the content of the concept of impartiality
which lies at the very root of neutrality. The extent to
which a revision will be required will depend upon the
fortunes of the league and the attitude of States towards the
fulfilment of their obligations should occasion arise; both
are topics outside the province of international law.

VI. Nevertheless, while the instability of the law of
neutrality is recognised, the definition propounded by
Oppenhein would appear to be the most comprehensive and still
valid:

"Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents, such attitude creating rights and duties between the impartial States and the belligerents." 16

VII. /

15. Art.XVI of the Covenant of the League of Nations. (1921)
Cmd. 151, Misc. No.3 (1919)
16. ii. p.400; c.f. Fiore s.1791 and ss.1799-1807. The
definitions of Woolsey(p.262), Taylor(p.651) and Lawrence
(p.582) are inadequate as they fail to import the oblig-
ations of States inter se. Lorimer's definition( vol.ii
pp. 121 & 122) would justify every State sitting in judg-
ment on the belligerents and thereafter taking sides in
the quarrel. This definition is not without interest in
the present dispute between Italy and Abyssinia.
VII. The primary right of the neutral State is that its territory and sovereignty be respected by the belligerents. There is no better established rule than that belligerents must cease from hostilities within the territorial waters of a neutral. As Sir William Scott put it in the case of the Vrow Catharine\(^{17}\) (approved in the case of the Dusseldorf\(^{19}\)):

"The sanctity of a claim to territory is undoubtedly very high.... When that fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred wilfully and not merely through ignorance, he would be subject to farther punishment."

It was the declared policy of the United States in 1793 not to "see with indifference its territory or jurisdiction violated by either of the belligerents"\(^{19}\).

This rule now rests upon the Hague Convention of 1907\(^{20}\):

"Belligerents /

\(^{17}\) 5 Ch. Rob. 15, 16.
\(^{18}\) [1920] A.C. 1039. See also the Scottish case of Hunter v Bothner (1764). Morrison 11957.
\(^{19}\) Moore Digest vii. s. 1334.
\(^{20}\) Convention No. XIII. Arts. I and II. Scott's Reports p. 841.
"Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

"Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territory of a neutral Power, constitutes a violation of neutrality and is strictly forbidden."

As it was put in the Report to the Conference, the prohibition comprehends not only such acts as combats but also capture and the exercise of visit and search. These are absolute obligations upon the belligerents.

Bynkershoek is the only jurist of note who would admit that pursuit might be continued *dum fervet opus* from the high seas into the territorial waters of a neutral power, but the practice of States is clearly against him. Even action under the "influence of a patriotic and commendable zeal to bring to punishment/"

21. Questiones etc. l.c.8.s.5 Hautefeulle p. 418, says this appears to be a grave error on the part of Bynkershoek.
punishment those who had offended against the laws of both countries" will not excuse the breach. The capture must be legally complete while both captors and captured are outwith territorial waters. No particular formula is necessary to establish the fact of capture. The evidence must show there has been a submission to the will of the capturing vessel and a clear abandonment of any attempt to escape. Thus, a capture was held invalid where the vessel had hauled down its flag and had apparently stopped the engines but declined or failed to alter its course and drifted into neutral territorial waters before the boarding party could take possession.

Territorial waters of a neutral may not be used as a station for belligerent vessels from which they may habitually proceed to intercept approaching vessels while still outwith the

24. dp As to liability to arrest of fishing vessels drifting into territorial waters, see The Frederick Gerring Jr. (Neilsen p. 575)
the territorial limits. To do so would be making the territory of the neutral a base of operations for proximate acts of war.

VIII. The neutral State may take active measures to prevent the violation of its neutrality in territorial waters. It may lay automatic contact submarine mines, provided the other States are notified, but they may not be so laid as to benefit only one party to the detriment of the other as was done by Sweden in closing the Koglund Channel leading to the Baltic which favoured Germany to the disadvantage of the Allies. As Oppenheim points out, Article 4 of the Hague Convention No. VIII of 1907, as with the other provisions as to mines, proved valueless during the war of 1914-1925.

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25. The Anna (1805) 5 Ch. Rob. 373. The Twee Gebroeders (1800) 3 Ch.Rob.162. The Vrow Catharina (1803) 5 Ch.Rob.15. But see Garner pp. 232 & 233 where the German and French view would appear to be against the admission of even a chance occasion of a belligerent vessel proceeding from territorial waters to effect a capture.

25a. Oppenheim ii. p.261
Convention XIII a neutral Power may regulate the admission of belligerent warships to the ports and roadsteads and may refuse admission to one who has been negligent in respecting the particular regulations or who has violated the neutrality of the State. Such regulations were made, at the instance of the Allies during the recent war by Norway, Sweden, Spain, and Holland in respect of submarines traversing the territorial waters. Finally, the fact of a neutral power repelling even with force, attacks on its neutrality cannot be considered a hostile act. As this is purely a defensive measure the force employed must be restricted to the degree necessary to preserve the neutrality intact.

IX. In the event of the neutrality being violated, it is open to the neutral State to require reparation. Indeed, if there has /

has been negligence or fault on the part of the State in enforcing recognition of and respect for its neutrality, that State might justly be held to have forfeited its right to be treated as a neutral by the belligerent States which have been injured by the breach or negligence of the neutral State.\footnote{28}

The form which reparation should take must vary with the circumstances and no rule is possible. It is to be noted that as between belligerents a capture in the territorial waters of a neutral State is valid according to the British and American view and it is only at the instance of the neutral sovereign that the capture may be declared invalid.\footnote{29}

\footnote{28. Birkenhead p. 316. cf. letter of Sir Leoline Jenkins. He would not advise the manner or time of demand for reparation for an insult to the sovereign - (Quoted Moore International Adjudications, Vol. 4 p.496.)}

\footnote{29. The Anne (1818) 3 Wheat. 435 at p. 447. Sir William Peel (1866) 5 Wall. 517 at p. 536. The Adela 1867, 6 Wall. 266. The Achaia; V. Lloyd 68. The Bangor [1916] p. 181 at p.185. See also Hague Convention No. XIII Art. 3.}
"No proposition in international law is clearer or more surely established, than that a capture made within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful, and it is only by the neutral State concerned that the legal validity of the capture may be questioned. It can only be declared void as to the neutral State and not as to the enemy."

This view is not shared by the German Prize Courts. They hold that they have no power to adjudicate upon the validity of prizes taken within the territorial waters of a neutral State; the result is that all prizes proved to have been taken in neutral territorial waters are illegal. The intervention of the neutral State is unnecessary. The French Prize Council appears to have adopted a similar view30. In all probability, though slight differences of opinion were revealed on the Commission which drew up Convention XIII, the neutral State ought to use all the means at its disposal to obtain the release of the prize illegally taken30a.

X./

30. Garner p. 228
X. It is important to note, therefore, that it is only the sovereignty of the neutral State which requires to be vindicated. As regards the belligerent State which has been injured in the property of its subjects, there may be a question of indemnity as the vessel was *sub protectione regis*\(^{31}\), but any plea for vindictive damages cannot be entertained\(^{32}\). It is sufficient for the vindication of the neutral sovereignty that the _status quo_ be restored. Thus, if the prize voluntarily comes within the jurisdiction of the neutral State whose neutrality has been violated it is required to release the vessel and intern the prize crew. On the other hand, if the vessel is out with the jurisdiction, its release together with the crew and equipment should be demanded\(^{33}\). The question of the amount of damages, if any, to be awarded was discussed in the American /

\(^{31}\) _The Valeria_ [1921] A.C. 477

\(^{32}\) _Moore Digest_ vii. s. 1325

\(^{33}\) _Hague Convention No. XIII_, Art. 3. See note (30a) ante.
American case of *La Amistad de Rues*\(^34\).

"The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations: ....But this Court have never yet been understood to carry their jurisdiction, in case of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. ... We consider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents...... All that justice seems to require is that the neutral nation should fairly execute its own laws and give no asylum to the property unjustly captured."

The application of the rule, where the violation of the neutral territory was unintentional and the vessel subsequently lost by natural causes while being taken to a belligerent’s port for adjudication, is illustrated in the recent British case of the *Valeria*\(^35\).

"In/

\(^{34}\) (1820) 5 Wheat. 385.

\(^{35}\) The *Valeria* [1921] 1 A.C. 477 at 485. See also the case of the *Dusseldorf* [1920] A.C. 1034; and the American case of the *Florida* (1879) 101 U.S. Report 37. Moore Digest vii. s. 1334.
"In the present case the capture was within territorial waters and the only wrong that can be vindicated is the wrong to the sovereignty of His Majesty the King of Norway... Restitution of the vessel is a restoration of the status quo, but payment of her value in money would either leave in the hands of the Norwegian Government a profit on the whole transaction, which is a contradiction of the whole idea of indemnity, or would constitute them agents or trustees for the German owners, who on receipt of the money would be recompensed for that which was no wrong to them, so that again the principle of indemnity would be departed from."

Precisely what damages would be allowed where the violation of the neutrality was intentional, is unknown, except that costs would appear to be allowed in addition to simple restitution. The point has been raised but not settled.36

XI. Oppenheim's definition of neutrality postulates duties imposed upon the neutral as well as rights conferred.37 If the fundamental right of the neutral State is to be allowed to remain at peace with all nations it is the correlative and insistent duty to maintain a strict impartiality and to recognise /

36. The Dusseldorf [1920] A.C. 1034
recognise the rights of the belligerents. The neutral is entitled to take measures for the defence and security of the State and the preservation of its neutrality. But these measures, especially those which are discretionary, must not have the effect of favouring one belligerent at the expense of the other. Thus the closing, by mines, in 1916 of the Kogrand Channel leading to the Baltic Sea, and the restriction of its use to Swedish shipping, forcing the Allied ships to use the outer channel which was closely patrolled by the Germans, was of more than doubtful legality and in fact was a breach of Swedish neutrality. The neutral State may not allow its territory or waters to be used as a base for military operations nor allow assistance to be granted thereon for proximate acts of war. On the other hand, the neutral, although /

38. (1917) Cmd. 8478.
although at peace and on the friendliest terms with the belligerent powers, is entitled to close the territorial waters and ports to vessels of war in the interests of its own safety, and even to deny to belligerent vessels the asylum and protection of a friendly power. In the absence of a definite closure, however, the ports and waters of the neutral may be used by belligerent vessels subject to the restrictions imposed by local regulations and international law. Such, generally, are the duties directly or indirectly imposed upon neutral States in respect of their territorial waters and sanctions at the option of the belligerents are admitted by international law in the event of wilful failure or negligence on the part of the neutral State.

XII. As an ancilliary means of enforcing the national duty of impartiality, a neutral State may, but is not required by international /
international law, to prescribe the rules, neutrality laws, to be observed by the subjects and others within the jurisdiction. These rules, while purporting to be the national interpretation of international law vary greatly from State to State. In Britain, the first real neutrality law was the Foreign Enlistment Act, 1819\textsuperscript{39}, which, on being found defective, was replaced by the Foreign Enlistment Act, 1870\textsuperscript{40}. This Act has been supplemented as occasion required by proclamations of neutrality suitable to the circumstances of the time.

In the United States, the common law proving inadequate, the first Neutrality Act was passed in 1794 and, like the British Act, has been replaced by more adequate provisions in the Act of 1800. These American statutes are important in the history of the law of neutrality as they prepared the way,

\begin{itemize}
\item \textsuperscript{39} 59 Geo. III c. 60.
\item \textsuperscript{40} 33 & 34 Vict. c.90
\end{itemize}
by setting up a higher standard than that previously observed, for many of the now accepted rules of international law as to the duties of neutrals in maritime war. As in Britain, these statutes are supplemented by neutrality proclamations 41.

XIII. In other States the practice varies; some issue proclamations of neutrality with little or no detail and rely almost entirely upon international law and the municipal law where applicable 42. As neutrality is a relationship between States, the situation is governed by international law and not by municipal law: the proclamations of neutrality are but the national view of what international law is (or ought to be) and their validity, in a question with belligerent States, is to be judged by the standard of international law.

"The /

41. Pitt Cobbett ii. 509. Wheaton ii. 971 et seq. Moore Digest vii.s.1320
"The measure of a neutral's obligations is to be found in the rules of international law, and it cannot shelter itself by the allegation that its own legislation imposes a laxer standard on its subjects."

"The duties of neutrality by the law of nations cannot be expanded or contracted by national legislation."

On the other hand, if a higher standard is prescribed it is in the option of the belligerents to hold the neutral to it.

XIV. Apart from the maintenance of a strict impartiality, the primary obligations of a neutral sovereign are (a) that the territory must not be used as a base for military operation, and (b) assistance for proximate acts of war must not be rendered to the belligerents. The two are frequently indistinguishable.

43. Moore Digest vii.s.1291.
44. Rolin pt. 3 pp. 58-59 considers the imposition of a higher standard of conduct inconvenient and dangerous.
XV. Furnishing military aid, which is prohibited, is to be distinguished from granting limited assistance to men of war which have entered the neutral jurisdiction to obtain sufficient navigation supplies to carry them to their nearest home port. The prohibition extends to the original fitting out or arming of a vessel for belligerent purposes. This is strictly forbidden by the American neutrality laws\(^45\), and the British Foreign Enlistment Act, 1870\(^46\). Article 8 of the Hague Convention No. XIII of 1907, which now governs the matter, is to the following effect:

"A neutral power is bound to take full notice of and to prevent the departure of a ship which has been fitted out or is thought to be fitted out to prey upon the shipping of another State at peace with the State. It is also required to prevent the departure of a vessel which has been in whole or in part equipped within its jurisdiction for the purposes of war."

This rule originated in a British protest against the preferential facilities claimed by France in 1793 to enlist men and /

\(^{45}\) Moore Digest vii. s.1294.  
\(^{46}\) 33 & 34 Vic. c. 90. ss. 10 & 11.
and to commission vessels in the United States. The latter held that the raising of forces within the jurisdiction was an exclusive right of sovereignty and denied the claim. Hall\textsuperscript{47} remarked as to this:

"The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."

The policy was ahead of the common law of the United States and the first Neutrality Act was passed to give effect to it.

The British Government, in the Terceira incident\textsuperscript{48} took a similar view that the recruitment and fitting out of an expedition within the jurisdiction was illegal. They took a further step when they accepted and agreed to be bound by the provisions.

\textsuperscript{47} Quoted by Moore, Digest viii. s. 1295.

\textsuperscript{48} Phillimore iii. p. 287.
provisions of the Treaty of Washington, 1871, although the principles stated in its provisions were novel and not recognised as rules of international law at the time of the Alabama incident which occasioned the treaty. Nevertheless, despite the novelty, the British Government agreed to be judged upon the issue that a neutral nation was bound to exercise due diligence to prevent the fitting out by subjects, within the ports, of vessels for sale and intended to take part in belligerent operations. Into the unsatisfactory aspects of the treaty and of the subsequent arbitration it is now unnecessary to enter for to-day the soundness of the principles enunciated in the treaty would not be questioned.

XVI. The difficulty is the application in practice of the rules that material assistance must not be rendered by the neutral.

neutral to the belligerents nor the neutral territory used as a base. Thus, it is permissible for neutral subjects to trade in arms and in munitions of war with a belligerent even although the other party may, by force of circumstances and the fortunes of war, be precluded from taking advantage of the market: yet the neutrals may not, as a commercial venture, undertake to build warships for a belligerent. When, therefore, Germany and Austria protested to the United States while still neutral during the World War, against the shipment of munitions to the Allies, the United States replied that they were but following precedent and were not required by international law to prohibit their subjects from exporting arms. Hall considers this trade by the subjects of the neutral State to be perfectly legitimate on the grounds that States do not usually engage /

51. Westlake ii. 251. Hyde ii. s.870. Wheaton ii. 934-6
Lorimer ii. p. 161, whose opinion on this point is very strongly endorsed by Rolin Part 3, p. 188.
engage in such trade and the same duties of impartiality are not imposed upon the subjects. The latter are entitled to continue, subject to the hazards of war, their trade with the belligerents. The distinction between the supply of arms and the supply of fighting craft is historical rather than scientific. The licence to trade in arms, being now sanctioned by Article 7 of the Hague Conventions Nos. V. and XIII. of 1907 must be admitted as a right continued in international law. For the purpose of the subject of this essay, however, the material point is that the licence to trade in arms does not permit the neutral subject to throw munitions of war and other supplies into a belligerent warship within the neutral jurisdiction. Actual delivery, if the neutrality of the State is to be maintained, must be made outwith the neutral State. Within the neutral jurisdiction, the State is sovereign and the

the belligerent has no right of visit and search. The right may be exercised on the high seas up to the very limit of territorial waters and the neutral cannot complain of the exercise as illegal\textsuperscript{55}. The belligerent has thus a right and, according to the fortunes of war, a possible means of preventing the assistance being afforded to the enemy. It is otherwise with assistance actually rendered within the neutral jurisdiction. There, the belligerent must rely, in the first instance, upon the neutral sovereign ensuring that no assistance is directly afforded to the enemy within the neutral jurisdiction\textsuperscript{56}.

XVII. The amount of supplies and fuel which may be allowed to belligerent vessels by neutrals must be limited, as otherwise the fighting efficiency of a warship would be restored

\textsuperscript{55} See Garner \textit{Int. Law.} ii. 443 re complaint by United States against the hovering of the British Ships outside American territorial waters.

\textsuperscript{56} c.f. Hall 97.
and the neutrality impaired. According to Articles 19 and 20 of Convention XIII a belligerent warship may be supplied with sufficient fuel and provisions for the crew to take her to the nearest port and may not be again supplied in any port of the neutral State within three months. Articles 19 and 20 were not ratified by all the States parties to the Convention and, therefore, the provisions are not binding. Thus, much is left to the discretion of the neutral State. The intent, however, is clear; it is to prevent the neutral territory being converted into a base of military operations. 57 The issue was raised in the Russo-Japanese War by the provisioning and refuelling of the Russian fleet during its long voyage from Libau to Vladivostock to engage the Japanese. During the voyage the Russian fleet had to depend upon the hospitality of the neutral States and the Japanese protested against the apparently excessive /

excessive liberality of the French ports. When the belligerent comes within the neutral jurisdiction the supplies can be controlled, but it is otherwise when the supplies are taken out by ships chartered, in the ordinary course of trade and possibly clearing with false papers, to transfer the cargo upon the high seas. Extensively practised, it would render nugatory the municipal regulations and convert the territory into a base of operations. The point is not without importance as both the German and British vessels in the Pacific during the War of 1914-19 obtained supplies locally over a prolonged period. The American and Chilean Governments took the view that there had been a violation of the spirit if not the letter of international law and took appropriate steps to prevent further breach of the neutrality. The neutral State

58. Hall 725. The British instructions were to allow only sufficient fuel to carry the vessels to a home port or some named nearer neutral destination. Smith & Sidley pp. 134 & 494-498.
59. Pitt Cobbett ii. 484.
has no right to infer evil intent from a single innocent act performed by or on behalf of an armed force or vessel; but, if he finds that the act has been performed several times and that it has always prepared the way for warlike operations, he may fairly assume that a like consequence is intended in all cases to follow, and he ought to prevent it being done in his territory for it is then being used as a base for belligerent operations.

XVIII. As neutral territory may not be used as a base of military operations, so it is not permissible for a belligerent to set up prize courts in neutral territory or in vessels stationed in neutral waters. A neutral State is bound to see that its neutrality is respected. The rule as to the non-establishment of prize courts in neutral territory was not always

60. Hall. 725. 'The minimum number of repetitions constituting the offence cannot of course be determined.' Wheaton ii. 965. 'Continued use is, above all things, the crucial test of a base.' Holland quoted by Smith & Sidley p. 497.
always recognised. Sir William Scott, however, in the Flad Oyen held this setting up of judicial tribunals within the territory of a neutral to be contrary to the usage of the nations and inconsistent with the principle that the prize proceedings, being always in rem, it was necessarily presumed that the body or substance of the thing was in the country of the belligerent captor. A similar principle was adopted by the United States in the case of the Betsy and the power to set up prize courts in the neutral United States was denied France through their Minister, M. Genet. It would appear, however, that it was the locus of court which was material and not the place of detention of the vessel. The legitimacy of the practice of disregarding the place of detention of the prize /

61. Wheaton ii 964, and see the early Scottish case of Benton v. Brink. (1761) Morrison, 11949
63. (1794) 3 Dallas 6.
64. Moore Digest vii. s. 1295.
65. Henrick and Maria 4 C. Rob. 43. Hudson v Guestier (1808) 4 Cranch 293. See Appendix A where Judge Admiral Cay followed English precedent in this matter.
prize was endorsed by Article 23 of the Hague Convention XIII but reservations were made by the United Kingdom, United States, Japan, and Siam. It would therefore appear that, so far as Britain is concerned, both the prize and the Court must be within belligerent jurisdiction.

XIX. Article 5 of the Hague Convention XIII prohibits the erection by belligerents of wireless station or other means of communication in neutral territory or waters for communication with belligerent forces. It is not that the neutral is prohibited from using or permitting the stations within the jurisdiction to be used for communication with the belligerent powers. By Article 8 of the Convention No. V, "the neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables, or of wireless telegraphy apparatus belonging to it, or to companies /
companies or private individuals." The prohibition extends to the establishment of stations before or during war for purely military purposes 66 and communication with the military forces. It is the duty of the neutral to see the prohibition is effective even to requiring all wireless apparatus on board vessels in territorial waters to be dismantled 67.

XX. A neutral State is under no absolute obligation to afford an asylum to those belligerents who may flee into the neutral territory; it is optional but, if granted, it must be with strict impartiality. Men of war may be excluded in time of peace and therefore in time of war. The right of asylum, when conceded, is usually regulated by municipal rules 68. Conventional provisions of international law are contained in Articles 9 and 12 of the Hague Convention No. XIII but they draw /

66. Art. 3 Hague Convention No. V.
67. Garner Inter. Law ii. 410 et seq., and Wheaton ii. 933-4 for breaches of neutrality in this respect during recent wars.
68. Oppenheim ii. 464-5. Garner Inter. Law ii. 419-430 considers this a "right" of asylum.
draw no distinction between belligerents seeking shelter from ordinary distress or in flight before a superior enemy. Belligerents' vessels are entitled to the usual privilege of stay of twenty-four hours or such longer time as may be necessary to execute the repairs allowed by the neutral. These repairs must not be of such a nature or extent as to restore the fighting efficiency of a ship crippled in battle but merely such as will enable it to reach the sanctuary of a home port. The distinction has been described as between 'civilian' or 'navigation' and 'military' repairs. It is impossible to define these terms closely and each case must be considered on its merits. In unexceptional circumstances and in the absence of a local regulation, a warship belonging to a belligerent Power may be allowed to stay no longer than twenty-four.

four hours in a neutral port. This is known as the rule of "twenty-four hours stay".

XXI. The neutrality of a State is not violated by the passage of belligerent vessels through its territorial waters but it is in the option of the neutral State to prohibit or to regulate impartially the passage of such vessels in these localities. Submarines present a special difficulty and it has been questioned whether they should be admitted to the privileges of surface craft. In August, 1916, the Allies proposed to the neutral Powers that no asylum be granted to submarines. Submarines differ from the ordinary surface craft in that they may escape observation and control by submerging and their national character may be difficult to establish.

establish. There was no uniformity of practice during the war of 1914-19. The United States rejected the Allies' proposal and admitted German submarines to territorial waters; Norway, by decree of 13th October, 1916, and Sweden, by decree of 19th July, 1916, forbade all belligerent submarines from entering territorial waters except by reason of force majeure; and Spain by decree of 29th June, 1917, prohibited entry under any circumstances. The variety in practice merely emphasizes the discretionary power of the neutral State to regulate, with strict impartiality, the passage of belligerent warships through the territorial waters. The law as to submarines cannot be said to be clarified by the Washington Treaty of 1922.

XXII /

74. Oppenheim ii. 466-7. Hall 754.
XXII. There is the further rule of international law as regards warships in territorial waters, viz., the rule of twenty-four hours interval. Apart from the exception as to lengthened stay for the purpose of repairs or refuelling where the local regulation prohibits refuelling before a ship has been within the port a certain period, e.g., twenty-four hours, the stay of a belligerent vessel within the neutral jurisdiction may be further regulated to allow an enemy vessel which had entered previously to have a start of twenty-four hours before the second com'er is allowed to depart. In its earliest form, this rule was the start of two or three tides mentioned in the Stuart proclamations of neutrality. The modern precise limit of twenty-four hours is dated from the Tuscarora and the Nashville incident when the former practically instituted a blockade of the latter in British territorial waters. The rule was adopted in the Suez Canal Convention and in the Treaty / 76. Pitt Cobbett ii. 478-9
Treaty between Britain and the United States regarding the Panama Canal. It is now embodied in Article 16 of the Hague Convention No. XIII and is commonly known as the "rule of twenty-four hours' interval". In the event of the warship failing to depart as required, the vessel must be disarmed and rendered incapable of proceeding to sea and the crew interned. Prisoners of war are also to be released.\(^77\).

XXIII. Protection may also be afforded on somewhat similar conditions to prizes brought into the port of a neutral on account of unseaworthiness, stress of weather or want of provisions or fuel\(^78\) but the hospitality of the port must not be abused.\(\)

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77. Westlake ii. 237
78. Art. 21 Hague Convention No. XIII. See Garner p. 233 for the interesting case of a vessel, the \textit{Sudmark}, taken as prize, and detained for a night in the territorial waters of the flag State, and not thereby released under the \textit{jus postlimini}. As an isolated case the decision is of doubtful weight as indicating a rule of international law.
abused. Thus it may not be assumed that, even where there is a prior convention or treaty to this effect, a prize may be taken to a neutral port for detention for the duration of the war. The prize must be released and the prize crew interned\(^\text{79}\).

Under the customary law, it was within the discretion of the neutral State as to whether prizes should be admitted. Pitt Cobbett\(^\text{80}\) considers that the admission of prizes should not be allowed except when in distress. The vessel is out with the jurisdiction of the neutral State but has not yet been adjudged just prize to the captor. The British rule, first adopted in 1861 and followed in subsequent wars, is to exclude prizes altogether except in cases of distress\(^\text{81}\).

\[\text{XXIV/}\]

80. Pitt Cobbett ii. 491. Also *Wheaton* ii. 1005.
81. As to the policy of Italy, Japan and other States see *Wheaton* cit. sup.
XXIV. The responsibility of the neutral State does not extend to every unneutral act which may possibly take place within its jurisdiction. The Treaty of Washington of 1871\(^8\) required that the neutral State exercise due diligence to prevent the breach of the neutrality. The standard of 'due diligence' is unsatisfactory. To what standard is it to be related? The discussion of the point before the Geneva arbitration tribunal and the decision of the tribunal showed how unsatisfactory was the criterion or standard of 'due diligence'\(^83\) and a serious divergence in views upon the point.

Equally unsatisfactory, in the writer's opinion, is the standard suggested by some publicists, as being that of good will and good faith, both necessary elements, or the standard of care taken by the prudent party in his own affairs\(^84\). They are

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\(^82\) Appendix J.

\(^83\) Parl. pp. N. America No. 2 (1872) U.S. case at p. 41 and No. 3 (1872) British counter case p. 21. Wheaton ii. 967

\(^84\) Wheaton ii. 987. Oppenheim ii. 501.
are equally vague. Article 25 of the Hague Convention, No. XII, which now governs the matter, merely requires that the neutral State use all the means at its disposal to prevent the breach of its neutrality, a rule and standard of conduct of easy application. This, in substance, was the British thesis maintained before the Alabama Claims Commission.

XXV. So much is it the duty of the neutral to observe a strict impartiality, including the prevention of the use of the territory as a base of operations, that sanctions are permitted by international law. Some remedies are primarily at the instance of the neutral State and only indirectly if at all at the instance of the belligerent wronged by the negligence of the neutral, e.g., the release of prizes taken in violation of the neutral sovereignty and found within the jurisdiction or by demanding the release of those detained elsewhere. The measure/

85. See ante p. 278 et seq.
measure of the neutral's responsibility, however, being to use all the means at his disposal to prevent the violation of the neutrality, where the State is relatively weak and the coastline being long and broken and lending itself to violations of neutrality, circumstances may be such that the belligerent, without in any way compromising the neutrality, may assist by stepping in and effecting its own remedy. Such action on the part of the belligerent is in the nature of vicarious enforcement of neutrality against which neither the neutral State nor the other belligerents can complain. On the other hand, where the violation of neutrality has been deliberate and the neglect of the neutral State wilful the ultimate sanction always open to the wronged belligerent is a declaration of war against the neutral, though expediency and policy, which are outwith the province of international law, may induce the offended State to /
to adopt less drastic measures\textsuperscript{86}.

XXVI. It is sometimes said by writers\textsuperscript{87} that, where the belligerent vessel seeks to rely upon its own power for protection rather than upon the neutral State in whose territory it may be, the neutral State is freed from further responsibility. These opinions are based upon the arbitral award in the case of the General Armstrong, an American privateer which was destroyed by a British squadron in the Portugese port of Fayal. The award was against the United States on the ground that the privateer had not sought the protection of the local authorities before and in anticipation of hostilities\textsuperscript{88}. The writer agrees with Oppenheim\textsuperscript{89} that it would be unwise to

\textsuperscript{86} The 'benevolent' neutrality of the northern European States towards Germany during the war of 1914-19 called forth numerous protests by the Allied Powers who might have taken, but refrained from other measures. See Oppenheim ii. p.493 et seq.

\textsuperscript{87} Hall 747. Pitt Cobbett ii. 416.

\textsuperscript{88} Moore Digest vii. s. 1335.

\textsuperscript{89} ii. p. 498. See also Westlake ii. 232 and Birkenhead 316.
found upon this one instance as formulating a rule of international law. It may be that the neutral is freed from further responsibility where the local sovereign is able to afford adequate protection and a belligerent commences hostilities within the jurisdiction under the mistaken impression of superior force or tactical advantage. On the other hand, the neutral is entitled to claim that the neutral jurisdiction be respected and the rule which would be drawn from the precedent of the General Armstrong case is therefore not one to be lightly advocated.

XXVII. Vicarious enforcement of neutrality and self-redress at the instance of a belligerent are, when restrained within due bounds, indistinguishable. The neutrality is only violated

90. The Anne Wheaton 435.
91. See Moore Digest vii.s.1335 for early examples of violations of neutral territory and their repercussions.
92. Pitt Cobbett (ii. 420) while anticipating that a distinction should be drawn does not appear to differ substantially from this view. See also Stowell 312.
violated where excessive measures have been taken. Of this
two illustrations may be given. In the first, the destruction
of the Russian ship, Ryeshitelni, which sought shelter in the Chinese
(neutral) port of Chefoo, the Japanese acted under the mistaken
impression that the local authorities were only conditionally
neutral and had failed to disarm the vessel. The Japanese,
by a misunderstanding of the facts, had violated Chinese
neutrality. The second instance, that of the Dresden, is
illustrative of self-redress within moderation. The German
having cruiser, Dresden, sought refuge in Cumberland Bay within
Chilian territorial waters, was denied a stay of eight days
for repairs and allowed only the usual twenty-four hours' stay.
Five days later, when a British squadron appeared before the
port, the Dresden was still flying her colours and had her guns
trained. She refused to surrender and the British opened fire,
whereupon/

whereupon the vessel was blown up. Upon the protest of the Chilian government, Great Britain apologised but pointed out that in this and other instances the Chilian government had been unable to enforce its authority to maintain its neutrality and the action of the British commander was not unwarranted.

XXVIII. As a rule, the sanction applied by the belligerent wronged by the neglect or impartiality of the neutral, is effected through diplomatic channels and may vary from a formal protest and requirement of an apology in less serious delinquencies to a declaration of war where the wilfulness and /

94. (1914-16) Cmd 7859.
Garner (International Law: ii. pp. 420-1) describes the Dresden incident as "the most flagrant violation of Chilian neutrality" but it is clear from the previous instances mentioned by him that the local authorities were too weak to prevent the German vessels from making Chilian territory a base of operations. The Chilian government protested to Germany against the prolonged stay of the Dresden and its failure to disarm a fact which the German government did not deny but held to be justified. In such circumstances the British commander appears to have been justified by international law in the action taken.
and the seriousness of the breach of neutrality is considered to oblige such an act. The duty of the neutral State is to make reparation and the ultimate sanction of international law is war. 95.

95. Oppenheim ii. 405. Hall 747.
APPENDIX A.

EXTRACT from MS Collection of Admiralty Decisions

' The Law of Nations is a Law of Consuetude. The practice then, on which neither party has chosen to give me any aid is and must be decision of the Law. Now I find that it has been the practice of Courts of Admiralty everywhere to pronounce sentences of condemnation on vessels lying extra territorium provided the Court Exercise in its jurisdiction sitting with the proper territory of the Belligerent Country by a native of which, or a person in the service of which, the prize was taken.... (As to the production of the ships papers being sufficient to found jurisdiction) I do not say that the practice has been frequent - it has, however, been done by the English Court of Admiralty sitting in London...' (Sir William Scott's opinion in the English precedent appears to have been quoted at this point from "Robertson's (sic) Reports Vol. 2 at page 209")" (The Christopher 2 C. Rob. 209.) 'For the same reasons more ably stated by that upright and learned Judge I am clear for repelling .......

(Date 7th August, 1801)
Commission of the Judge of Admiralty to John Adair.

AT EDINBURGH the twenty sixth day of July jvij and six years the Commission underwritten was presented and ordered to be recorded off the which Commission the tenor follows. By the Judge of the High Court of Admiralty of the Kingdome of Scotland. THESE are Granting Warrand and Commission to John Adair, Geographer, for the said Kingdom of Scotland To Seize upon and bring in All Ships belonging to Forreigners that are found fishing within any Lochs, Creeks, Bayes or Rivers of this Kingdome or within sight of the Shoar and to secure the samen Ships, ane or mae, in safe harbours And thereafter transmit ane accompt thereof to the high Court of ADMIRALTY that their case may be Tryed and Determined Conforme to Law. Given under my hand and seal of the office of Admiralty At Edinburgh this Twentie sixth day of July One thousand seven hundred and six years. Sic subscribitur

JAMES GRAHAM

Locus
Sigilli

(Extracted from Admiralty Court Record of Commissions. Vol. i. p.51)
Copy of letter supplied by Mr Harry R.G. Inglis, F.S.A., F.R.G.S., The original in the General Register House could not be located when this essay was being written.

ADAIR'S LETTER  Edinburgh 2nd June 1713

My Lord

I had the honour of yours, and as your Lordship requires, an account of the Surveys, I have made or drawn out of the Coast and Islands of Scotland (which are not printed) is sent. The Surveys of the South and West Coasts, and Frith of Clyde, are in the greatest forwardness, and so will require the least time, and expense to finish them. They are very necessary for carrying on trade, and with the description will make a compleat part or volume, which in my humble opinion, will please better and be of greater use, than should publishing separated Maps.

My Lord there is a considerable sum of disbursed money resting as wil appear by precepts of privy council, and Thesaury and stunted accounts. And I never had one farthing for pains, which shd Garhament(?the government) did truly consider and designed a full recompence as appears by thir Act the 26th August 1704. But the English and Irish Ships, after the Union not paying the deuty then imposed all was frustrated: However if the government shal think fit to appoint a fund to finish the part above proposed /
proposed I shall let all my claims stand till that be done.

And as to the Survey of the West and North West Islands of Orkney and Zetland which will require the constant attendance of a good vessel or pinnace, if those be furnished by the government: and a suitable number of seamen to manage them my purpose(d) expense will not be great.

My Lord, I have never doubted of the subscription for the Survey of Clackmannanshire, and country about Stirling, but having gone to East Lothian about the end of March to finish some work I had in hand there the weather in April proved so cold that soon after I was attacked in my right arm and hand by a rheumatick pain, that not only hindered my being west long agoe, but also this volume which in all deuty should have been made sooner, I am now much better, so shall set about the work with all diligence and do my best to recover any time that is lost.

I hope your Lordship will pardon this from

my Lord

your Lordships

most humble and

most obedient servant

John Adair

Edinburgh

the 2nd June 1713.
APPENDIX C.

(Handbook of Commercial Treaties (1931) p. 644).

Extracts from the Treaty of Peace and Commerce between the United Kingdom and Sweden. - Signed at Upsal, April 11, 1654.

Art. 3. The said Protector and Commonwealth, and the said Queen and Kingdom, shall take diligent care, that, as much as in them lies, all impediments and obstacles be removed, which have hitherto interrupted the freedom of navigation, and commerce, as well between both nations, as with other people and countries within the dominions, lands, seas, and rivers of either, and shall sincerely endeavour to assert, maintain, defend, and promote and afore-said liberty of navigation and commerce, against all the disturbers thereof, by such ways and means as either in this present treaty or hereafter shall be agreed upon; neither shall they suffer, that either by themselves, their subjects and people, or through their default, anything be done or committed contrary hereunto.

Art. 5. No merchants, captains, and masters of ships, marines, nor any persons, ships, goods or merchandise, belonging to either confederate, shall ... within any of the lands, havens, searoads, coasts, or dominions of the other, for any public service or expedition of war, or any other cause .... be seized, embarked, arrested, forced by violence /
violence, or be any way molested or injured! Provided only such arrests, as are conformable to justice and equity, be not hereby prohibited, so be it they are made according to the ordinary course of law, and not granted upon private affection or partiality, but are requisite for the administration of right and justice.

Art. 6. (After stating that vessels forced to seek refuge in the harbours and roads of the other were to be received hospitably and allowed to depart without payment of customs or duties, the article continues) Provided they do nothing contrary to the laws, ordinances, and customs of the place, which the said ships shall enter into or abide in.

Art. 9. The said confederates, and all and singular their people and subjects may safely and freely put in with their ships, and arrive at each other's ports, havens, and shores, and there stay, and thence depart, they carrying themselves peaceably and in conformably to the laws and customs of the respective places, and not disturbing the freedom of commerce therein. In like manner, the ships of war shall have free access to the ports of either, there to stay, and come to anchor; but not in such numbers as shall occasion manifest suspicion, without the leave and consent of that confederate first obtained to whom /
whom the port belongs, unless compelled there to by tempest, force, or danger of the sea, in which case they shall signify to the Governor or chief magistrate of the place, the cause of their arrival, and shall continue there no longer than the said Governor or chief magistrate shall permit. Observing always and everywhere the laws aforesaid, and such as shall hereafter be agreed upon.

Art. 15. It being the primary intent of this league and amity that each confederate, their people and subjects, might enjoy such freedom of navigation and commerce, as is described in the foregoing articles, within the Baltic, Sound, Norther, Western, and British Seas, Mediterranean, and Channel, and other the seas in Europe; therefore all sincere endeavour shall be used on both sides by common advice, aid, and assistance, that the aforesaid mutual liberty of navigation and commerce be established, promoted, and, as occasion is, defended, against all the disturbers thereof, who shall go about to interrupt, prohibit, hinder, or restrain and limit the same to their own will and pleasure, in prejudice of the said confederates. And either part shall, with all willingness or readiness, promote the good and prevent the hurt of each other; saving the treaties which either nation hath made with other kingdoms, commonwealths and nations........

Art. 16 /
Art. 16. For what concerns other commodities, which ships of war may enjoy, and the laws by which they shall regulate themselves when they arrive in each other's ports and harbours; and what concerns commerce to be exercised in America, as also the advantages of the herring and other fisheries, the erecting staples for trade, and other things and conditions, which shall be found requisite for the better clearing of the foregoing articles, resolution shall be had therein according to what shall be agreed upon in a distinct and peculiar treaty or contract.
APPENDIX D.

Handbook of Commercial Treaties, p. 146.

Extracts from Treaty of Peace and Commerce between the United Kingdom and Denmark. - Signed at Whitehall, February 13, 1660-1

Art. 6. It shall be free for the subjects of both Kings to come with their merchandise, as well by land as by sea, into the kingdoms provinces, mart-towns, ports and rivers of the other...... paying the usual customs and duties, saving always the sovereignty and right of either King, in their kingdoms, provinces, principalities, and territories respectively.

Art. 14. (Vessels were to be received if forced into harbour for refuge but were prohibited from entering into trade and from doing) anything repugnant to the laws, statutes, or customs of that place and port where they shall arrive.

Art. 20. It is covenanted and agreed that the subjects and people of either party shall always have free access to the ports and coasts of the other confederate; and it shall be lawful for them to abide there, and thence to depart again, and also to pass through the seas and territories whatsoever of either King respectively, (doing no damage /
damage or prejudice), not only with merchant ships, but also with men-of-war.... so as they exceed not the number of six men-of-war, if they come in of their own accord, nor stay longer in or about the ports than will be requisite to repair their ships, and furnish themselves, with victuals or other necessaries: and if upon occasion they would approach such ports with a greater number of men-of-war, they shall by no means be permitted to enter, unless timely notice of their coming be first given by letter, and leave obtained of those to whom the foresaid ports belong; but if they be driven by violence of storm, or other urgent necessity to seek shelter, in such case, without any notice given before hand, the ships shall not be restrained to a certain number, but with this condition, that their commander shall, immediately upon their arrival, acquaint the chief magistrate or the governor of that place, port, or coast where they arrive, with the cause of their coming, neither shall he stay longer there than the chief magistrate or governor will permit, and shall neither do nor attempt any hostile act in the ports whereinto he shall repair, nor anything prejudicial to that ally unto whom the ports belong.

Art. 22. (Provides for the payment of the Sound Dues)
APPENDIX E.

Handbook of Commercial Treaties, p. 151.

and

Extract from Treaty of Peace/Commerce between the United Kingdom and Denmark - Signed at Copenhagen, July 11, 1670.

Art. 5. It shall be lawful for the subjects of both Kings, with their commodities and merchandise, both by sea and land in time of peace, without licence or safe conduct, general or special, to come to the kingdoms, provinces, mart-towns, ports and rivers of each other, and in any place therein to remain and trade, paying usual customs and duties; reserving nevertheless to either prince his superiority and regal jurisdiction in his kingdoms, provinces, principalities, and territories, respectively.

Art. 10. The subjects of either Crown trading upon the seas, and sailing by the coasts of either kingdom, shall not be obliged to come into any port, if their course were not directed thither; but shall have liberty to pursue their voyage without hindrance or detention whithersoever they please.........
APPENDIX F.

Handbook of Commercial Treaties, p. 652.

Extract from Treaty of Commerce between the United Kingdom and Sweden. - Done at Westminster, July 17, 1656.

Art. 10. It shall be free for the subjects of the most serene King of Sweden to fish and catch herrings and other fish in the seas and on the coasts which are in the dominion of this republic, provided the ships employed in the fishery do not exceed 1,000 in number; nor while they are fishing shall they be in any ways hindered or molested, nor shall any charges be demanded on the account of the fishing by the men of war of this republic, nor by those who are commissioned privately to trade at their own expense, nor by the fishing vessels on the northern coasts of Britain, but all persons shall be treated courteously and amicably, and shall be allowed even to dry their nets on the shore, and to purchase all necessary provisions from the inhabitants of those places at a fair price.

Note: (Sweden declined to adhere to the North Sea Convention.)
APPENDIX G.

Handbook of Commercial Treaties, p. 173.

Exchange of notes between the United Kingdom and Denmark respecting the Treatment of British Subjects, Companies and Vessels in Eastern Greenland.

No.2.

Danish Minister for Foreign Affairs to Earl Granville.

(Translation)

Copenhagen, June 4, 1925.

My Lord,

In reply to the note which you were good enough to address to me on the 23rd April last, I have the honour to inform you that the Royal Government will accord to British Subjects, companies and vessels in East Greenland most favoured nation treatment in every respect and particularly as regards access to the coast and to the adjoining territorial waters, as regards hunting and fishing, as regards the right of occupying sites in virtue of usage, as regards the right of establishing meteorological, telegraphic or telephonic stations, and as regards the right of constructing installations for scientific and humanitarian purposes.....
APPENDIX H.
Handbook of Commercial Treaties, p. 698.

Art. 1. There shall be between all the territories of His Britannic Majesty in Europe, and the territories of the United States, a reciprocal liberty of commerce. The inhabitants of the two countries respectively shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any part of the said territories respectively; but subject always to the laws and statutes of the two countries respectively.
Extract from Convention between the United Kingdom and the United States, - Signed at London, October 20, 1818.

Art. 1. Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind, on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle, and then north-wardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company. And that the American fishermen shall also have liberty, for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland. /
Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits. . . . . .
APPENDIX J.

Handbook of Commercial Treaties, p. 706.

Extract from Treaty between United Kingdom and the United States. - Signed at Washington, May 8, 1871.

Art. 6. In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent with as the arbitrators shall determine to have been applicable to the case: -

Rules.

A neutral Government is bound -

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal /
renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article 1 arose, but that her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers and to invite them to accede to them.
APPENDIX K.

Handbook of Commercial Treaties, p. 831

Extracts from Treaty Regulating the Status of Spitzbergen and conferring the Sovereignty on Norway. - Signed at Paris, February 9, 1920.

(Parties:
United States, Great Britain, Denmark, France, Italy
Japan, Norway, Holland, and Sweden).

Art. 1. The high contracting parties undertake to recognize, subject to the stipulations of the present treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitzbergen, ...........

Art. 2. Ships and nationals of all the high contracting parties shall enjoy equally the rights of fishing and hunting in the territories specified in article 1 and in their territorial waters.

Art. 3. The nationals of all the high contracting parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fiords and ports of the territories specified in article 1; subject to the observance of the local laws and regulations, ....
APPENDIX L.

Handbook of Commercial Treaties, p. 618.

Extract from the Temporary Commercial Agreement between the United Kingdom and the Union of Soviet Republics.
- Signed at London April 16, 1930.

Art. 3. (After conferring the right of most favoured nation treatment upon vessels their cargoes and passengers) -

Note 1. - Nothing in this article shall be deemed to confer on the vessels of either party the right to carry on fishing operations in the territorial waters of the other, or to land their catches in the ports of the other, nor shall it entitle British vessels to claim any privileges which are, or may be, accorded by the Union of Soviet Socialist Republics to the fishing fleets of countries situated on the Arctic Ocean.
APPENDIX M.

Extract from Convention between Great Britain and Finland

London. 13th October 1933.
(1932-33 Cmd. 4436)

Art. 1.

(1) The High Contracting Parties declare that it is their firm intention to uphold the principle -

(a) that three miles extending from the coastline outwards and measured from low water mark constitute the proper limits of territorial waters; and

(b) That, in the absence of an agreement between them to this effect, neither of them can exercise jurisdiction over the vessels of the other outside the limits of territorial waters, except in the course of a hot and continuous pursuit of a vessel duly and lawfully commenced within the territorial waters and continued into the open sea.
TREATY SERIES No. 18 (1925).

TREATY
BETWEEN
CANADA AND THE UNITED STATES OF AMERICA
FOR
Securing the Preservation of the Halibut Fishery of the North Pacific Ocean.

Signed at Washington, March 12, 1923.
(Ratifications exchanged at Washington, October 21, 1924.)

Presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty.

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Signed at Washington, March 2, 1923.

[Ratifications exchanged at Washington, October 21, 1924.]

His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India, and the United States of America, being equally desirous of securing the preservation of the halibut fishery of the Northern Pacific Ocean have resolved to conclude a Convention for this purpose, and have named as their plenipotentiaries:

His Britannic Majesty: The Honourable Ernest Lapointe, K.C., B.A., LL.B., Minister of Marine and Fisheries of Canada; and
The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE 1.

The nationals and inhabitants and the fishing vessels and boats of the Dominion of Canada and of the United States, respectively, are hereby prohibited from fishing for halibut (Hippoglossus) both in the territorial waters and in the high seas off the western coast of the Dominion of Canada and of the United States, including Behring Sea, from the 16th day of November next after the date of the exchange of ratifications of this Convention to the 15th day of the following February, both days inclusive, and within the same period yearly thereafter, provided that upon the recommendation of the International Fisheries Commission hereinafter described this close season may be modified or suspended at any time after the expiration of three such seasons, by a special agreement concluded and duly ratified by the High Contracting Parties.

It is understood that nothing contained in this Article shall prohibit the nationals or inhabitants and the fishing vessels or boats of the Dominion of Canada and of the United States, from fishing in the waters hereinbefore specified for other species of fish during the season when fishing for halibut in such waters is prohibited by this Article. Any halibut that may be taken incidentally when fishing for other fish during the season when fishing for halibut is prohibited under the provisions of this Article may be retained and used for food for the crew of the vessel by which they are taken. Any portion thereof not so used shall be landed and immediately turned over to
the duly authorised officers of the Department of Marine and Fisheries of the Dominion of Canada or of the Department of Commerce of the United States. Any fish turned over to such officers in pursuance of the provisions of this Article shall be sold by them to the highest bidder and the proceeds of such sale, exclusive of the necessary expenses in connection therewith, shall be paid by them into the treasuries of their respective countries.

ARTICLE 2.

Every national or inhabitant, vessel or boat of the Dominion of Canada or of the United States engaged in halibut fishing in violation of the preceding Article may be seized except within the jurisdiction of the other party by the duly authorised officers of either High Contracting Party and detained by the officers making such seizure and delivered as soon as practicable to an authorised official of the country to which such person, vessel or boat belongs, at the nearest point to the place of seizure, or elsewhere, as may be mutually agreed upon. The authorities of the nation to which such person, vessel or boat belongs alone shall have jurisdiction to conduct prosecutions for the violation of the provisions of the preceding Article or of the laws or regulations which either High Contracting Party may make to carry those provisions into effect, and to impose penalties for such violations; and the witnesses and proofs necessary for such prosecutions, so far as such witnesses or proofs are under the control of the other High Contracting Party, shall be furnished with all reasonable promptitude to the authorities having jurisdiction to conduct the prosecutions.

ARTICLE 3.

The High Contracting Parties agree to appoint within two months after the exchange of ratifications of this Convention, a Commission to be known as the International Fisheries Commission, consisting of four members, two to be appointed by each party. This Commission shall continue to exist so long as this Convention shall remain in force. Each party shall pay the salaries and expenses of its own members and joint expenses incurred by the Commission shall be paid by the two High Contracting Parties in equal moieties.

The Commission shall make a thorough investigation into the life history of the Pacific halibut and such investigation shall be undertaken as soon as practicable. The Commission shall report the results of its investigation to the two Governments and shall make recommendations as to the regulation of the halibut fishery of the North Pacific Ocean, including the Behring Sea, which may seem to be desirable for its preservation and development.

ARTICLE 4.

The High Contracting Parties agree to enact and enforce such legislation as may be necessary to make effective the provisions of this Convention with appropriate penalties for violations thereof.
This Convention shall remain in force for a period of five years and thereafter until two years from the date when either of the High Contracting Parties shall give notice to the other of its desire to terminate it. It shall be ratified in accordance with the constitutional methods of the High Contracting Parties. The ratifications shall be exchanged in Washington as soon as practicable, and the Convention shall come into force on the day of the exchange of ratifications.

In faith whereof, the respective plenipotentiaries have signed the present Convention in duplicate, and have thereunto affixed their seals.

Done at the City of Washington, the second day of March, in the year of our Lord one thousand nine hundred and twenty-three.

(L.S.) ERNEST LAPOINTE.
(L.S.) CHARLES EVANS HUGHES.
Sir,

With reference to your letter of the 23rd ultimo requesting certain information in connexion with a thesis upon which you are engaged, I am directed by Secretary Sir John Simon to inform you that all the documents in the case of the "I'm Alone", the Canadian vessel which was sunk in 1929 by the United States Coast Guard vessel "Dexter", have now been released for publication. I am to suggest that copies of the publications may be obtained on application being made direct to the Superintendent of Documents, Government Printing Office, Washington, D.C.

2. As regards the question of fishing in Norwegian territorial waters, I am to state that no agreement has yet been concluded in the matter between His Majesty's Government in the United Kingdom and the Norwegian Government, since the Norwegian claims have never been officially formulated. It is expected, however, that the Norwegian Storting will formulate their claims very shortly.

I am,

Sir,

Your obedient Servant,

W.M. Newlands, Esq.,
79, Hillview Road,
Corstorphine,
Edinburgh,
12.

(Note. The Norwegian Storting have passed a decree as to the exclusive fishery limits but it is reported in the press that the British Government have made representations against the claim. Vide Scotsman 20th August and 14th September, 1935.)
APPENDIX L

MAP OF SCOTLAND

Showing areas closed to Trawling and Seine Net Fishing (1923.)

REFERENCE

Areas round coast closed to Trawling.

Parts of areas closed to Trawling in which seine flounder net fishing is permitted by Byelaw of Fishery Board for Scotland.

Areas of sea, bay, strait, channel, or river, on which seine flounder net fishing by or in which seine fishing by or in vessels not propelled by steam is permitted by Byelaw from 28th September of each year to 28th February following.

SOUTH ORKNEY & SHETLAND ISLANDS
APPENDIX M.

MAP OF MORAY FIRTH

Note. Dotted line indicates exclusive fishery limits.

Ordnance Survey, 1925.
APPENDIX P (2)

Map of Moray Firth showing area within which trawling is prohibited and

Limits of exclusive fishing.

(From Report of Departmental Commission on the Policing of Scottish Sea Fisheries.)
United States No. 1 (1924)

Convention

between

the United Kingdom and the United States of America

respecting the

Regulation of the Liquor Traffic

Washington, January 23, 1924

Presented by the Secretary of State for Foreign Affairs
to Parliament by Command of His Majesty

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or through any Bookseller

1924
Reprinted 1932
Price 1d. Net

Cmd. 2063
CONVENTION BETWEEN THE UNITED KINGDOM AND THE
UNITED STATES OF AMERICA RESPECTING THE REGULA-
TION OF THE LIQUOR TRAFFIC.

Washington, January 23, 1924.

His Majesty the King of the United Kingdom of Great Britain
and Ireland and of the British Dominions beyond the Seas, Emperor
of India;
And the President of the United States of America;
Being desirous of avoiding any difficulties which might arise
between them in connection with the laws in force in the United States
on the subject of alcoholic beverages;
Have decided to conclude a convention for that purpose;
And have appointed as their Plenipotentiaries:
His Majesty the King of the United Kingdom of Great Britain
and Ireland and of the British Dominions beyond the Seas, Emperor
of India:
The Right Honourable Sir Auckland Campbell Geddes, G.C.M.G.,
K.C.B., his Ambassador Extraordinary and Plenipotentiary to
the United States of America:
The President of the United States of America:
Charles Evans Hughes, Secretary of State of the United States:
Who, having communicated their full powers found in good and
due form, have agreed as follows:—

ARTICLE 1.

The High Contracting Parties declare that it is their firm intention
to uphold the principle that three marine miles extending from the
coastline outwards and measured from low-water mark constitute the
proper limits of territorial waters.

ARTICLE 2.

(1) His Britannic Majesty agrees that he will raise no objection to
the boarding of private vessels under the British flag outside the limits
of territorial waters by the authorities of the United States, its
territories or possessions in order that enquiries may be addressed
to those on board and an examination be made of the ship's papers
for the purpose of ascertaining whether the vessel or those on board
are endeavouring to import or have imported alcoholic beverages
into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

**Article 3.**

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions, on board British vessels voyaging to or from ports of the United States, or its territories or possessions, or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

**Article 4.**

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but
the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

**Article 5.**

This treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the treaty shall lapse.

**Article 6.**

In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty the said treaty shall automatically lapse, and, on such lapse or whenever this treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this treaty not been concluded.

The present convention shall be duly ratified by His Britannic Majesty and by the President of the United States of America, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the present convention in duplicate, and have therewith affixed their seals.

Done at the city of Washington, this twenty-third day of January, in the year of our Lord one thousand nine hundred and twenty-four,

(Seal) A. C. GEDDES.
(Seal) CHARLES EVANS HUGHES.
Treaty Series No. 22 (1930)

TEMPORARY FISHERIES AGREEMENT

between the

GOVERNMENTS OF THE

UNITED KINGDOM

and of the

UNION OF SOVIET SOCIALIST REPUBLICS

Signed at London on May 22, 1930

Presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty

LONDON:

PRINTED AND PUBLISHED BY HIS MAJESTY'S STATIONERY OFFICE

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15, Donegall Square West, Belfast;
or through any Bookseller.

1930

Price 1d. Net

Cmd. 3583
Temporary Fisheries Agreement between the Governments of the United Kingdom and of the Union of Soviet Socialist Republics.

Signed at London on May 22, 1930.

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, being mutually desirous to conclude as soon as possible a formal Convention for the regulation of the fisheries in waters contiguous to the Northern coasts of the territory of the Union of Soviet Socialist Republics, have meanwhile decided to conclude the following temporary Agreement to serve as a modus vivendi pending the conclusion of a formal Convention:

      ARTICLE 1.

(1) The Government of the Union of Soviet Socialist Republics agree that fishing boats registered at the ports of the United Kingdom may fish at a distance of from 3 to 12 geographical miles from low water mark along the Northern coasts of the Union of Soviet Socialist Republics and the islands dependent thereon, and will permit such boats to navigate and anchor in all waters contiguous to the Northern coasts of the Union of Soviet Socialist Republics.

(2) As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles.

(3) As regards the White Sea, fishing operations by fishing boats registered at the ports of the United Kingdom may be carried on to the north of Latitude 68° 10' North, outside a distance of 3 miles from the land.

(4) The waters to which this temporary Agreement applies shall be those lying between the meridians of 32° and 48° of East Longitude.

ARTICLE 2.

Nothing in this temporary Agreement shall be deemed to prejudice the views held by either contracting Government as to the limits in international law of territorial waters.

ARTICLE 3.

The present temporary Agreement comes into force on this day and shall remain in force until the conclusion and coming into force of a formal Convention for the regulation of the fisheries in waters contiguous to the Northern coasts of the territory of the Union of Soviet Socialist Republics, subject, however, to the right of either contracting Government at any time to give notice to the other to...
terminate this Agreement, which shall then remain in force until the expiration of six months from the date on which such notice is given.

In witness whereof the undersigned have signed the present Agreement, and have affixed thereto their seals.

Done in duplicate at London, in the English language, the twenty-second day of May, One Thousand Nine Hundred and Thirty.

A translation shall be made into the Russian language as soon as possible and agreed upon between the Contracting Parties. Both texts shall then be considered authentic for all purposes.

(L.S.) ARTHUR HENDERSON.
G. SOKOLNIKOFF.

Protocol to Article 1 (1).

The permission accorded by the Government of the Union of Soviet Socialist Republics in paragraph (1) of Article 1 of the present temporary Agreement to fishing boats registered at the ports of the United Kingdom to navigate and anchor in all waters contiguous to the Northern coasts of the Union of Soviet Socialist Republics shall not be deemed to entitle such fishing boats to navigate or anchor in inland waters or in other waters of the Union of Soviet Socialist Republics which are or may be closed to foreign vessels in general.

Done at London, the twenty-second day of May, One Thousand Nine Hundred and Thirty.

(L.S.) ARTHUR HENDERSON.
G. SOKOLNIKOFF.

Protocol to Article 1 (4).

The Government of the United Kingdom adhere to their view as to the right of fishing boats registered at the ports of the United Kingdom to fish in waters to which the present temporary Agreement does not apply and reserve the right to reopen the question of the limits specified in paragraph (4) of Article 1 of the present Agreement in the negotiations for the formal Convention referred to in the preamble to the present Agreement.

Done at London, the twenty-second day of May, One Thousand Nine Hundred and Thirty.

(L.S.) ARTHUR HENDERSON.
G. SOKOLNIKOFF.
APPENDIX S

Extracts from the Statutes affecting fishing in the territorial waters of Scotland.

(1)

Herring Fishery Act. 1808 (48 Geo. III, c.110)

Jurisdiction of sheriffs in Scotland extended. Sect. 60

'And whereas it may be useful to provide a jurisdiction for preserving order and settling disputes among persons carrying on the fishery for herrings on the coast and in the lakes of Scotland; be it therefore enacted That the jurisdiction of the sheriffs and stewarts depute of Scotland, and their substitutes, shall be extended over all persons engaged in catching, curing, and dealing in fish in all the lochs, bays, and arms of the sea within their respective counties and stewartries, and also within ten miles of the coasts of their said counties and stewartries, .................................

(2)

Sea Fisheries Act. 1843. (6 & 7 Vic., c. 79) (Schedule)

Art. II. 'The limits within which the general right of fishery is exclusively reserved to the subjects of the two Kingdoms respectively are fixed (with the exception of those in Granville Bay) at three miles distance from low water mark.

With /
With respect to bays, the mouths of which do not exceed ten miles in width, the three mile distance is measured from a straight line drawn from headland to headland.

Art. III. The miles mentioned in the present Regulations are geographical miles of which sixty make a degree of latitude.'

Art. LXXXV and Art. LXXXVI

These regulate the rights and duties of fishing boats which may enter the territorial waters of the other State.

2(b)

Herring Fisheries (Scotland) Act, 1867 (30 & 31 Vic., c.52)

Section 11. 'Unless there is anything in the context repugnant to such construction, the following words in this Act shall have the meanings hereby assigned to them:

The words "the Coasts of Scotland" shall mean and include all bays, estuaries, arms of the sea, and all tidal waters within the distance of three miles from the mainland or adjacent islands.'

(3)

The Sea Fisheries Act. 1868 (31 & 32 Vic., 45) (First Schedule)

Convention between Her Majesty and the Emperor of the French relative /
relative to Fisheries in the Seas between Great Britain and France.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of the French, having charged a Mixed Commission with preparing a revision of the Convention of the 2nd August 1839, and of the Regulation of June 23 1843, relative to the fisheries in the seas situated between Great Britain and France; and the members of that Commission having agreed upon certain arrangements which experience has shown would be useful...... their said Majesties have judged it expedient that the arrangements proposed by the said Commission should be sanctioned by a new Convention, ......

Art. 1. British fishermen shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark, along the whole extent of the coasts of the British islands; and French fishermen shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coast of France which lies between Cape Carteret and Point Meinga.

The distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

The miles mentioned in the present Convention are geographic miles, whereof sixty make a degree of latitude.'

(This Art. is repealed provisionally by 46 & 47 Vic., cap. 22, sec. 30.)

The Sea Fisheries Act, 1883. (46 & 47 Vic., c. 22)

Section 28 "In this Act, -

x x x x x x x x x x x x x x x

'The expression 'exclusive fishery limits of the British Islands' means that portion of the seas surrounding the British /
British Islands within which Her Majesty's subjects have, by international law, the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any Foreign State, includes, as regards the sea-fishing boats and officers and subjects of that State, the portion so defined:

First schedule.

Article I.

'The provisions of the present Convention, the object of which is to regulate the police of the fisheries in the North Sea outside territorial waters, shall apply to the High Contracting Parties.

Article II.

'The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

As regards bays, the distance of three miles shall be measured from a straight line drawn across the bays, in the part nearest the entrance, at the first point where the width does not exceed ten miles.

The present Article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs.'

Art. IV.

For the purpose of applying the provisions of the present Convention, the limits of the North Sea shall be fixed as follows:

3. On the West:-
(2) By the eastern coasts of England and Scotland;
(3) By a straight line joining Duncansby Head (Scotland) and the southern point of South Ronaldsha (Orkney Islands);
(4) By the eastern coasts of the Orkney Islands;
(5) By /
(5) By a straight line joining North Ronaldsha Light-house (Orkney Islands) and Sumburgh Head Light-house (Shetland Islands);

(6) By the eastern shores of the Shetland Islands;

(7) By the meridian of North Unst Lighthouse (Shetland Islands) as far as the parallel of the 61st de-gree of latitude

Sea Fisheries Regulation (Scotland) Act, 1895, Sec. 10 (1)

'The Fishery Board may, by byelaw or byelaws, direct that the methods of fishing known as beam trawling or otter trawling shall not be used in any area or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast, to be defined in such by-law, and may from time to time make, alter, and revoke byelaws for the purpose of this section...........

(3) Provided that no area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882.

(4) Any person who uses any such method of fishing in contravention of such byelaw, shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds...

Bye-law (No. 10) made by the Fishery Board for Scotland, under the powers conferred on the Board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889, and the Herring Fishery (Scotland) Act Amendment Act, 1890.

Article II.

Whereas by the Act 52 & 53 Vict. cap. 23, being the aforesaid Herring Fishery (Scotland) Act, 1889, it is enacted that the Fishery Board for Scotland may by Bye-law or Bye-laws direct that the method of fishing known as beam
beam trawling or otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined "in such Byelaw," it is hereby declared that the foregoing provision shall apply to the whole area above specified....

Art. III.

Within the aforesaid area, as above defined, no person, unless in the service or possessing the written authority of the said Fishery Board for Scotland, under the hand of the Secretary thereof, shall at any time from the date when this Bye-law shall come into force use any beam trawl or otter trawl for taking sea fish. ....

Art. IV.

This Bye-law shall come into force from and after the date of its confirmation by the Secretary for Scotland.

(The Byelaw was confirmed on 22nd November, 1892).
Extract from Declaration and Memorandum between the United Kingdom, Denmark, France, Germany, The Netherlands, and Sweden concerning the Maintenance of the Status Quo in the territories bordering upon the North Sea. Berlin, April 23, 1908.

"Animated by the desire to strengthen the ties of neighbourly friendship existing between their respective countries, and to contribute thereby to the preservation of universal peace, and recognising that their policy with respect to the regions bordering on the North Sea is directed to the maintenance of the existing territorial status quo.

Declare that they are firmly resolved to preserve intact, and mutually to respect, the sovereign rights which their countries at present enjoy over their respective territories in those regions."

(1908) Cd. 4288
Note of provisions of miscellaneous treaties subsisting between Britain and other States other than parties to the North Sea Convention of 1882 relating to the reservation of fisheries in territorial waters.

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C. Miscellaneous

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