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Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

APPENDIX TO EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

VOLUME I - TESTIMONY

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DIRECT EXAMINATION OF LYMAN B. KIRKPATRICK, JR.

67 BY MR. CLAGETT:

Q. Will you please state your name and address and describe your background and experience? A. My name is Lyman B. Kirkpatrick, Jr. I am a Professor of Political Science and a University Professor at Brown University in Providence, Rhode Island. I reside in Narragansett, Rhode Island.

I was born in Rochester, New York, and I graduated from the Princeton University School of Public and International Affairs in 1938. As a student at Princeton, I majored in International Relations in the Department of Politics and wrote my thesis under Professor Edward S. Corwin on the subject of "The Power of Congress in Foreign Relations."

Upon graduation from Princeton, I worked for the United States News Publishing Corporation in Washington in a variety of capacities, but primarily in the field of reporting on foreign relations and international affairs. In
68 the period from 1939 to 1942, I was also the Washington Editor and Publisher of a newsletter originating in London called "The Whitehall Letter", a weekly analysis of world affairs.

In 1942, I joined the Office of Strategic Services, and served with that organization throughout the war, primarily in Europe. I was Chief of the Reports Division in London from 1942 to 1944 and then the Intelligence Officer of the OSS Unit assigned to the First United States Army for the landing in Normandy. In August of 1944, in Normandy, I was recruited by the staff of the Twelfth

U.S. Army Group to become the Intelligence Briefing Officer for General Omar N. Bradley. I served in this capacity until the end of the war in Europe, at which time I was reassigned to the China-Burma-India theatre, but due to the Japanese surrender, never served in that area.

On leaving the Army with the rank of Major, I returned to the United States News Publishing Corporation and served as a writer on a new magazine called "World Report" (One of the predecessor magazines to the present "U.S. News & World Report"). In this capacity, I covered the Department of State, the Congressional foreign relations committees, and other developments in international affairs.

In January of 1947, I was asked to take leave from the
69 United States News to assist in the organization of what has become the Central Intelligence Agency. That leave lasted for 18 years. In the CIA, I served initially as the Chief of the Domestic Office for the Collection of Foreign Information in the United States. From 1950 to 1951, I was the Executive Assistant to the then Director of CIA, General Walter Bedell Smith. In 1951 and 1952, I was the Assistant Director in charge of the office responsible for all intelligence collection throughout the world. From 1953 to 1961, I served as the Inspector General of CIA responsible for inspecting every aspect of all of its operations – in the United States and overseas. In this capacity, I personally made inspection trips throughout Africa, Latin America, Asia and Europe.

In 1961, I was appointed Executive Director-Controller of CIA, the third ranking officer in the Agency. This position, in effect, is the General Manager of the agency responsible for its day-to-day activity under the policy direction of the Director.

For my work in CIA, I received in 1960 an award from the Civil Service League as one of the 10 outstanding officials of the U.S. Government. In 1964, I received one of

the four Presidential awards for Outstanding Federal Civilian Service, the highest honor for a career civilian in the government.

70 In 1965, I resigned from CIA to fulfill a life-long ambition to teach and accepted a University Professorship at Brown. In this capacity, I have developed four courses. One is entitled "American Security Policy," which treats all aspects of our international relations ranging from defense policy through diplomacy to intelligence operations and military affairs. This course largely deals with a study of the military-industrial complex, including many aspects of federal-state relations such as the allocation and regulation of natural resources. A corollary of this course is one entitled "Communist Cold War Operations," which analyzes in detail the foreign relations of the Soviet Union and other Communist countries. My two seminars deal with "Problems of National Strategy" and "Domestic Decision-Making." In the former, which is a graduate seminar, we deal with aspects of problems in the defense and diplomatic establishments. In the "Domestic Decision-Making" seminar, the emphasis is primarily on internal affairs, but these include such matters as the defense budget, the draft, regulation and allocation of natural resources, and so on.

In addition to these courses at Brown University, I also present two courses at the Naval War College in Newport, Rhode Island, dealing with cold war operations and prob-
71 lems of national security. During the academic year 1971-1972, I am taking leave from Brown University to occupy the Chester A. Nimitz Chair of Political and Social Philosophy at the Naval War College.

My books include The Real CIA, Captains Without Eyes: Major Intelligence Failures in World War II, American Defense Policy (a text prepared for the United States Navy to use as a prototype for the presentation of courses on

American security policy), and Russian Foreign Policy Under Czar and Commissar (to be published in 1972). I have also written numerous articles for various publications: for twelve years I wrote "Armies of the World" for the Encyclopedia Britannica Yearbook; I wrote a series of 12 articles for the Naval War College on cold war operations, and an article in "Military Review" on "The U.S. Intelligence System." I am contemplating a study next year on "The Military Professional" and have proposed the establishment at Brown of a Center for Strategic Studies.

Among the organizations to which I belong are the Military Division of the International Studies Association, the American Academy of Political and Social Science and the Political Science Association.

* * * * *

72 A. I am a member of the Board of Visitors of the Defense Intelligence School in Washington. I have lectured regularly at the Foreign Service Institute of the Department of State, the International Police Academy of A.I.D., and the Army War College.

* * * * *

Q. Professor Kirkpatrick, the United States has claimed
73 in the present case an exclusive right to develop the resources of the seabed of the continental shelf adjacent to the Atlantic Seaboard beyond three miles. The Atlantic Seaboard States have denied that claim and assert that such exclusive rights belong to individual States as to various portions of the seabed which may in some instances extend substantially beyond the three-mile coastal belt. Do you have an opinion whether the sustaining of such exclusive claims of the States would adversely affect the United

States in the conduct of its foreign relations and if so, would you state your opinion and the reasons for it? A. I do not believe that upholding the claims of the States would adversely affect the conduct on foreign relations by the United States. A succession of events since 1945 had made such State claims even more consistent with the federal power over international affairs. It is now internationally recognized that the exclusive right to develop the resources of the Atlantic Seaboard continental shelf resides in this country. The question whether development is by the Federal Government, the States, or private operators under the auspices of either, is an internal matter which would not affect the conduct of foreign relations.

On September 28, 1945, President Truman proclaimed
74 that the United States regarded the resources of the subsoil and seabed of its continental shelf as "appertaining" to the United States. The proclamation appears in the Federal Register, Vol. 10, p. 12303. In succeeding years foreign states made similar or more extensive claims asserting their authority over their own continental shelves; many of those claims were in this hemisphere.

In 1953 the Outer Continental Shelf Lands Act made explicit this country's exclusion of other nations from development of our continental shelf resources, by reaffirming United States authority over those resources and establishing a satutory regime for their disposition.

In 1958 the Geneva Convention on the Continental Shelf recognized the exclusive claims of coastal nations over the seabed resources of their respective continental shelves. The Convention is set forth in Volume 15 of United States Treaties (Part I) at page 471. The United States and a large number of foreign states are parties to that Convention, including France, Great Britain, the Soviet Union, Canada, and Mexico. These states are listed in Department of State Treaties in Force, pp. 324-25 (1971). It

is therefore far less likely now than ever before that the principle of this country's authority to exclude other na-
75 tions from development of our continental shelf will be the subject of international dispute.

This is not to say that the Convention has eliminated the question of continental shelf resource rights from international affairs. On the contrary, there is at present, for example, controversy regarding the definition of the seaward limit of the shelf for purposes of delimiting the exclusive development rights of coastal states. The matter has been discussed recently by the Special Subcommittee on the Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs in its Report on the Outer Continental Shelf, 91st Cong., 2d Sess. pp. 7-16 (1971).

For present purposes, however, what matters is that this nation has asserted its authority over the adjacent continental shelf vis-a-vis all foreign powers. It is my understanding that the States do not claim for themselves any more than that the United States claims for itself. Nor would it be possible as a practical matter for the States to claim more since it is the United States' assertion of these claims in the international community which makes those claims effective.

This country's authority over the continental shelf being
76 established, whether the shelf is developed under the authority of the Federal Government or under that of the States is essentially an internal matter not affecting the interests of foreign states and thus not involving the foreign relations of the United States. This distinction – between (1) the claims of this country to shelf resources as against all other countries and (2) the question how those resources should be allocated between the Federal Government and the States – is well grounded in both practice and common sense. President Truman's Executive Order 9633,

issued in connection with his 1945 proclamation referred to above and reported at Vol. 10, p. 12305 of the Federal Register, made clear that he viewed the two matters as entirely separable. That Executive Order stated that this country's assertion of authority over the continental shelf resources was not intended to prejudice the respective claims of the Federal Government and the States to "the ownership or control of the sub-soil and seabed of the continental shelf within or outside of the three-mile limit."

This position – that the allocation of shelf resources between the Federal Government and the States does not involve foreign relations matters – was adopted explicitly by the United States Department of State in testimony of
77 Jack B. Tate, Deputy Legal Adviser, in 1953 to the Senate Committee on Interior and Insular Affairs concerning legislation affecting the submerged lands. The testimony appears in the volume titled Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13, 83d Congress, 1st Sess. (1953). Mr. Tate in the testimony just mentioned, stated as follows at p. 1067.

"Mr. Tate. *** We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.

* * * * *

"Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the seabed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by

the President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?

"Mr. Tate. The Chairman is correct in that statement."

78 I, of course, am not a lawyer and cannot comment on the legal aspects, but in my judgment this is a correct analysis of the situation so far as the practicalities and customs of international relations are concerned.

In the same hearings Mr. Tate repeatedly made the point I made a few moments ago, that as an international matter no State can make a greater territorial claim than that made by the United States. Hearings, pp. 1053, 1059-60.

This evaluation was carried forward in the Submerged Lands Act which emerged from the congressional inquiry in which Mr. Tate testified. That legislation conferred on the respective adjacent coastal states the right to develop the seabed resources of the continental shelf out to a distance of three miles in most cases and, as matters eventuated after appropriate judicial proceedings, three marine leagues into the Gulf of Mexico in the case of Florida and Texas.

Thus Congress obviously concluded that no interference with federal control over foreign affairs would result from recognizing State ownership to that extent.

Operational control of such resources even beyond the three-mile/three-league limit is not confined to the United States and its agencies. Under the Outer Continental Shelf Lands Act, these resources can be developed under lease

78-A by private individuals. There is no reason why a State

could not undertake such development under the legislation. If Congress has consented to such a course, as it has, it is difficult to see how direct State ownership of these resources poses any substantial difficulty for federal interests in the conduct of foreign relations.

The possibility that property claimed by citizens of the United States may become a subject of dispute with foreign nations or their citizens can, of course never be foreclosed. However, in view of the firm status of this country's claims to the seabed resources of our continental shelf, such disputes seem less probable than disputes respecting American vessels in foreign ports, American property in foreign countries, and property subject to contract between Americans and foreign nationals. Indeed, the boundary lines of the States of this country which border Canada and Mexico may at times involve negotiation and agreement with those countries.

In my opinion, the powers exercised by the Federal Government have been ample to secure the foreign relations interests of the United States where the ownership of property by organizations or individuals under the protection of the United States has become involved in disputes with foreign nations or where other foreign relations
79 interests are involved. While I cannot speak as a lawyer would concerning the precise terms and limits of these federal powers, the number and variety of powers which the Federal Government exercises are patent: direct authority over foreign relations, commerce with foreign nations, treaties, imports and exports, defense, taxation and eminent domain.

The development by the States of the resources in question will, therefore, not involve the interposition of the States between the United States and foreign nations. When the country speaks officially to other governments, it does

so through the Federal Government which is entrusted with authority over foreign affairs under our Constitution. There is no reason why any other course would be adopted in connection with continental shelf resources.

As a practical matter the development of the continental shelf seabed resources will largely if not entirely be carried on by private enterprises, whether their leases or licenses run from the United States or the States. Such designated rights were granted to private developers by the States well before the 1953 federal legislation. Since that time substantial leasing to private developers has been done by the Federal Government and today "(t)here is an extensive record of outer continental shelf mineral leasing for oil and gas resources," quoting in the words of the U.S. Public Land Law Review Commission in Vol. 1 of its Study of the Outer Continental Shelf Lands of the United States, p. 462 (1968).

The salient fact is that those private lease operators will be doing the same work whether the resources appertain to the Federal Government or the States. If in the event of dispute the United States does not wish to sponsor particular claims or positions of American private operators in the international community, it will not do so whether it or a State is the lessor.

It is also my view that there is no reason why State ownership of the resources should prevent any international arrangement which the United States may promote or adopt for the governance of seabed resources or other uses of the seas. In this connection, I should note that President Nixon, on May 23, 1970, proposed that all nations renounce by treaty their rights in the seabed beyond a water depth of 200 meters and further proposed an international authority to explore for the benefit of all nations the resources of the seabed beyond that depth.

Assuming that any of the submerged lands claimed by
81 the States lie beyond the 200 meter isobath, I cannot imagine that the powers of the United States previously mentioned – I refer in particular to the treaty power – are not adequate to ensure that such lands be included in such a proposal. The United States compromises claims of its citizens against foreign nations in general settlements; it affects the legal liabilities of its soldiers through status of forces agreements; it confers diplomatic immunity on foreign nationals who might otherwise be subject to suit in this country, and State courts and other State authorities must recognize that immunity. Whatever the technicalities of procedure, the Federal Government is in no way helpless to protect its foreign relations interests in the development of shelf seabed resources, whoever may possess them.

I have, in considering the general question posed to me, examined testimony presented in Congress at the time the Submerged Lands Act and Outer Continental Shelf Lands Act were passed. This testimony includes not only the Senate hearings previously mentioned but also testimony which appears in the volume titled Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary on H.R. 2948, 83d Congress, 1st Session (1953).

Examination of this testimony does not indicate any
82 significant foreign policy objection to State as opposed to Federal control over the resources in question. It is true that questions were raised about the wisdom of recognizing state boundaries as such beyond three miles. This is an objection now laid to rest, I believe, by the clear distinction, since confirmed by the 1958 Convention on the Outer Continental Shelf, between territorial waters and the continental shelf. Moreover, the questions raised were directed to legislation which might have appeared to

validate boundary claims of the States, in the sense of boundaries of territories under full territorial sovereignty, no matter how far they extended.

Both the testimony of Mr. Tate quoted above and the legislation which ultimately evolved show that the question how State control of continental shelf seabed resources might affect such foreign relations interests was a subject of attention. Among the many witnesses who testified before the Senate Committee were the Secretary of the Navy, the Attorney General, the Secretary of the Interior, the former Solicitor General of the United States, and two representatives of the Legal Advisor of the Secretary of State. Witnesses of similar stature appeared in the House hearings. Under the circumstances, the lack of mention of
83 any significant foreign policy objection to State ownership of seabed resources as such seems to me powerful evidence that no such objection exists.

Q. In asserting the claims described in the preceding question, the States may assert that they possess historical boundaries in the ocean extending the same distance seaward as the continental shelf lands whose resources they claim. Do you have an opinion whether the assertion of such boundaries would prejudice the foreign relations, defense or other interests of the United States and, if so, will you state that opinion and the reasons for it? A. In my opinion, a recognition of State boundaries as described in your question will not prejudice any such interests, it being understood that such boundaries delineate State authority over seabed resources. If State boundaries were claimed for other purposes, such as to establish the right to exclude foreign vessels from the ocean surface in that area or to assert exclusive property rights to the fish and like resources of the water above the seabed, then a different question would be posed.

It is certainly true that the boundaries in the sea, so far as they assert rights beyond property ownership of seabed resources, are an important and presently disputed subject
84 of international relations. Many different positions have been taken by various countries concerning, for example, the distance from the coastline within which the foreign fishing vessels require permission to operate. No firm international accord has been reached on the limits of boundaries for this and similar purposes.

The different positions taken by foreign states on the boundaries of their respective "territorial seas" are illustrated readily. As of 1965, 41 foreign states claimed a three-mile limit, 20 claimed a six-mile limit, 34 claimed 12 miles (including the Soviet Union and Mainland China), and 12 claimed other distances ranging from four miles to 200. This data is taken from the Department of State's Geographic Bulletin No. 3 (1965). In August 1970, at a Congress held in Peru, fourteen nations declared that all nations have a right to claim as much of the sea and seabed near their coasts as necessary to protect valuable resources.

The latest effort to reach uniformity on this question of the boundaries of "territorial seas" was at the 1958 Geneva Conference on the Law of the Sea. It failed because a two-thirds vote could not be achieved for a United States proposal that the territorial sea be universally fixed at six miles with an additional six-mile contiguous zone
85 for fishing rights.

The interests of the United States are certainly involved in determining where territorial-sea boundaries lie, to protect American interests in fishing, to secure the right of passage of our naval vessels, and for similar purposes.

The use of the term "boundaries" for various different purposes is well established. The Convention on the Continental Shelf itself makes clear that the distance that it

established for exclusive coastal state jurisdiction over seabed resources is limited to those resources and does not embrace other interests of the kind just mentioned. The Submerged Lands Act and the Outer Continental Shelf Lands Act adopt a similar approach in distinguishing exploitation of mineral resources from other rights in the ocean. Thus State ownership of the submerged lands would not encroach upon such basic American principles as freedom of the seas and limiting territorial waters to the minimum.

So long as the State boundaries involved in the question which you have posed are directed only to secure such resources I do not believe their assertion differs in practical consequence from any other phrasing of the States' claim to such resources. Such boundaries would not,
86 for example, affect the right of passage possessed under international custom by foreign vessels over the waters of the continental shelf. While I conceive it to be most unlikely that a State would ever seek to interfere with such passage, my present point is that international interests of this kind do not depend upon whether or not submerged lands are being developed, or by whom, and that boundaries demarcating seabed development rights do not imply the assertion of boundaries for other purposes.

Indeed, foreign merchant vessels possess a right of passage within the three-mile limit for most purposes. The Congress has expressly provided for State ownership of seabed resources as well as other state authority to the three-mile limit. The Submerged Lands Act actually speaks of the three-mile limit in the Atlantic as representing the "seaward boundary of each original coastal State." The same provision itself states that it is not designed to prejudice the existence of any State's seaward boundaries beyond that distance. So it seems clear that Congress did

not believe state boundaries beyond three miles, at least for some purposes, would be inappropriate.

Q. Do you have an opinion whether the States' claims would interfere with the defense or other military interests of the United States were those claims sustained and,
87 if you have such an opinion, would you state that opinion and the reasons for it? A. In my opinion, State ownership and development of the seabed resources of the continental shelf need not interfere with the defense of the United States or other military interests of this country, in view of the powers exercised by the Federal Government which are ample to protect those interests.

The ocean area adjacent to the coasts of this country is, of course, of great importance to the security of this country, but hardly more so than the on-shore lands within the boundaries of the States. Military activities are carried on in this ocean area and fixed military installations may be necessary there, while the activities of other governments or of private citizens in this ocean certainly may affect this country's defense. Once again, this is no less true of activities carried on within the land area of the United States itself.

The powers exercised by the Federal Government which I have already referred to are in my opinion adequate, whether the Federal Government or the States own and develop the submerged lands in question, both to authorize
88 activities by the military authorities in the ocean above the continental shelf and to prohibit activities by the States or by American citizens that are contrary to the defense interests of this country. In time of war or national emergency, and even in peacetime to the extent necessary for defense, local and private interests yield to the military needs of the nation.

In this regard, undue emphasis should not be placed on the need for Federal power. In my experience, the States

of this country have cooperated significantly of their own volition where activity in the interests of national defense called for action or restraint by individual States.

In fact, cooperation between the Federal Government and the States and shared responsibility has been the premise of the Submerged Lands Act. Thus, within the three-mile belt on the Atlantic Coast, the States possess the right to develop seabed resources while the United States has retained control over the same area for purposes of commerce, navigation, national defense, and international affairs.

For example, ever since 1899 the Secretary of the Army has had an absolute right to prohibit placement of any structures in or over navigable waters of the United States, including the three-mile coastal belt. This authority is found in Section 10 of the Rivers and Harbors Act of 1899, which
89 is reprinted in section 403 of Title 33 of the United States Code. Thus in the three-mile belt, although the States possess the seabed resources, the Secretary of the Army has a veto power over construction of structures and therefore over means of exploiting the resources.

The premise that an allocation of responsibilities is feasible has recently been emphasized by the federally sponsored Report of the Commission on Marine Science, Engineering and Resources, which has been reprinted as House Document No. 91-42, 91st Congress, 1st Session (1969). In discussing the future of the coastal zone, the Report (pp. 56-57) proposes new federal and state machinery for cooperation based on the recognition that:

"The states must be the focus for responsibility and action in the coastal zone. . . . An agency of the state is needed with sufficient planning and regulatory authority to manage coastal areas effectively and resolve problems of competing issues.

* * * * *

"However (the States) will need Federal assistance and support and the Federal Government must assure the protection of national interests in the coastal zone."

This cooperative approach, which allots resource development to the States and preserves defense functions to the Federal Government, can operate as easily beyond three miles.

The three-mile belt of the ocean immediately adjacent to the coasts of this country represents the area of the sea frontier traditionally regarded as most critical to the defense of the United States. In supporting my conclusion to the questions you have posed, I believe it is significant that the Congress, in the Submerged Lands Act, has entrusted the seabed resources of this belt to the States and in the Gulf of Mexico has countenanced the claims of Texas and Florida to three marine leagues. If State development of these resources so close to shore is feasible in terms of the defense interests of this country, I believe that it follows that development of resources beyond three miles is also feasible.

At the same time the traditional importance of the three-mile belt has diminished because modern military technology permits activities of foreign nations carried on on the high seas far from our shores to pose very significant threats. Thus, ballistic missiles can be fired from the ocean at great distances from their targets. While these developments enlarge the danger to our country, they diminish the importance of a fixed belt of the ocean closely adjacent to our coast as a military boundary of unique significance to national defense. The exploitation of the resources of the seabed of the continental shelf could enhance the defense of the United States by providing added facilities for detection of submarines and other fixed installations of early warning.

The legislative testimony taken in 1953, which I have previously commented upon, contains some discussion pertinent to the relationship between defense interests and State

development of seabed resources. In the House hearings previously cited the Secretary of the Navy was represented by Admiral Nunn, the Judge Advocate General. After endorsing the decision to confer resource development rights on the States as the legislation contemplated the following colloquy occurred (House Hearings, p. 212):

"Mr. Hillings. And the Navy also, as I understand your testimony, makes no contention that the national defense program will suffer in any way if these oil deposits are developed under State ownership and supervision, rather than Federal ownership?

"Admiral Nunn: That is correct, sir. The Department of Navy makes no such contention as that. It does urge, however the desirability of proceeding with the development of all petroleum resources, and we are conscious of the difficulties
92 of doing that under the auspices of the Federal Government, particularly within the historical boundaries of the states."

I see no reason why the policy views represented by Admiral Nunn's testimony are not applicable to the submerged lands now claimed by the Atlantic States. In fact, it appears that various drafts of the legislation pending before Congress when Admiral Nunn spoke contained no three-mile limit on Atlantic submerged lands to be recognized as State property but contemplated recognizing State possession of all such lands within State historical boundaries (House Hearings, pp. 2-171).

* * * * *

I should add at this point that my examination of the legislative testimony suggested no substantial reason why the defense interests of the United States would be hazarded by recognition of the State claims here involved, just
93 as it suggested no such reason relevant to foreign relations interests.

A statement by Secretary Forrestal to the Committees on the Judiciary, 80th Congress, 2d Session, read in part (Hearings on S. Res. 1988, p. 607 (1948)):

"It is the view of the National Military Establishment that development of the tidelands areas should proceed as rapidly as possible and that all necessary action should be taken to permit rapid development of those areas. Delays in the development of the oil potential in the tidelands is considered contrary to the best interests of the United States from the viewpoint of national security. . . . I do wish to emphasize that underdeveloped oil fields provide no power for the machines of either war or peace."

The seabed resources of the continental shelf are themselves important to our national defense to supplement supplies of oil and other mineral resources. Within the land boundaries of the United States these resources are generally within the boundaries of the individual States and have been developed under the authority of the States, the Federal Government reserving certain petroleum deposits for its own future military use. In the future these resources which the States have principally managed in the past must
94 come increasingly from the ocean seabed.

The resources of the seabed are vast and their full extent is only beginning to be measured. As the United States Geological Survey recently summarized in the concluding chapter of its study entitled "Potential Mineral Resources of the United States Outer Continental Shelf" (1968): "Even if usable shelf resources were to consist only of the petroleum fluids, however, their potential contribution to the Nation's future security and prosperity would be enormous and would more than justify the efforts to bring about their efficient development."

Our technological ability to exploit these resources is increasing apace. A producing oil well is now in operation over a deposit 300 meters beneath the surface of the sea

and in 1968 a deep sea drilling project successfully drilled sediment cores from 2,500 feet below the ocean floor working in depths up to 17,600 feet. New York Times Almanac, 1971 p. 343. With man's demand for energy resources outdistancing available supplies, the greatest untapped areas are under the sea.

As previously indicated, the Department of Defense has gone on record to the effect that exploration and exploita-
95 tion of these materials in peacetime is essential to our military strength. To the extent that State development of seabed resources of the continental shelf would promote such exploration and exploitation, I believe such development would affirmatively contribute to the military interests of this country. State development has served the military capability of this country in the past on land and I would expect it to continue to do so in the future to the extent the states are permitted to develop areas of the continental shelf.

Q. Do you have an opinion whether the assertion of State police powers over certain conduct occurring in the area of the seabed of the Outer Continental Shelf and any artificial structures affixed to it would interfere with the foreign relations, defense or other interests of the United States and, if you have such an opinion, would you state it and the reasons for it? A. My opinion is that there would be no such adverse effect. The Convention on the Continental Shelf itself recognized that the coastal state exercises over the continental shelf "sovereign rights" for purposes of exploring and exploiting its natural resources. Whether the law generally applicable to such
96 activities is federal, State, or some admixture of the two, does not by itself seem to me to have any significant effect upon federal interests.

Congress itself in the Outer Continental Shelf Lands Act provided that the governing substantive law for the Outer

Continental Shelf should be the law of the respective adjacent State with certain limited exceptions affecting federal interests. So far as these interests exist, I believe the federal powers already discussed are adequate to secure them.

Once more it is pertinent to note the analogy between the situation on-shore and in the ocean. Many of the powers exercised by the States within their settled boundaries have consequences for foreign relations, defense and other interests of the United States. At the same time the United States is able to protect those interests by overriding legislation, recognition of sovereign immunity, treaties, condemnation of property for military installations, and similar means. I see no reason why this same approach is not adequate for the continental shelf resources.

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DIRECT EXAMINATION OF MORTON J. HORWITZ

109 BY MR. CLAGETT:

Q. Professor Horwitz, would you please state your name, background and experience? A. My name is Morton J. Horwitz. I am Assistant Professor of Law at Harvard Law School. I teach courses in American Legal History and English and American Constitutional History.

I received my B.A. from The City College of New York in 1959, a Ph.D. in government from Harvard University in 1964, and LL.B. Magna Cum Laude from Harvard Law School in 1967. My doctoral work was in the area of constitutional history and the history of political thought.

I am a member of the Massachusetts bar. In 1967-68 I served as law clerk to Judge Spottswood W. Robinson,

III, of the United States Court of Appeals for the District of Columbia Circuit. From 1968 through 1970 I was Charles Warren Fellow in legal history at Harvard
110 Law School. I was appointed in 1970 to the Harvard Law School faculty.

I am a member of the Selden Society, a group of scholars interested in English legal history, and of the American Society for Legal History, the closest American counterpart to the Selden Society. I have written a number of articles, the latest of which is "The Emergence of an Instrumental Conception of American Law, 1780-1820," to be published this summer in Perspectives in American History, which contains considerable material dealing with English law of the 17th and 18th centuries.

* * * * *

111 Q. In your opinion, are there special difficulties associated with ascertaining English law and practice in and before the 17th and 18th centuries that would make it useful for the Court to hear the testimony of an expert? A. Yes, I believe there are several difficulties in ascertaining English law in this period. First, there is the very difficult problem of sources. Before the advent of printing in England – that is, before the end of the 16th century – all sources of English law are in manuscript form. I have studied a number of manuscripts which still have not been published. Of even greater significance, however, is the fact that even the published sources are usually not found among materials with which modern lawyers are familiar. With the arguable exception of Coke's Institutes no general treatise on English law makes its appearance until Blackstone's Commentaries in 1765. The result is
112 that there is no generally agreed-upon source of English

law until the late 18th century. One must therefore begin a rather difficult search among technical and specialized treaties written beginning in the 17th century. Moreover, when we come to the very important abridgements – the main general source of English law in the period in question – it is the legal historian who can sort out the contemporaneously influential abridgements, such as those by Rolle, Bacon, Viner and Comyns, from the flood of unreliable and pedestrian manuals on English law that simultaneously appeared.

Above all, however, the main consequence of the lack of general legal treatises in the 17th and 18th centuries is that we must often find the true scope of the law in the practice of the period, which is a rather formidable task. Thus, it is necessary to do extensive research in the various calendars of British public documents, such as State Papers, Domestic and Colonial; Treasury Papers and Books; Acts of the Privy Council, etc.

A second difficulty requiring expertise deals with the reading of manuscript sources. Not only are these sources difficult and time-consuming to find, but they are often impossible to read for one not familiar with the writing style of the period. Some of them are written in Media-
113 eval French.

A third problem arises from difficulties associated with the rather technical and archaic legal formulations characteristic of the period. For example, in the area of admiralty jurisdiction, the numerous issues that turn on whether the Admiral had jurisdiction "within the body of a county" are not at all apparent to a modern lawyer unfamiliar either with English legal institutions of the 17th century or with the historical significance of the great battle to limit the jurisdiction of admiralty.

Finally, in my opinion the main justification for expert legal testimony in this area is that it is so difficult for one not familiar with the historical context of ancient legal doctrines to extract from stark and unadorned hornbook statements the subtlety, richness, texture and actual social significance of particular legal rules. Not only do the meaning of words, technical as well as untechnical, change, but legal conceptions themselves change unannounced. Thus, it is primarily in their historical context that these legal formulations can really have any meaning for us today.

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119 Q. Professor Horwitz, do you have an opinion as to English law and practice of the 17th and 18th centuries concerning ownership of the seabed under the high seas off English coasts? If so, will you state it? A. Under
120 English law and practice of the 17th and 18th centuries, ownership of the seabed under the high seas off English coasts was vested in the Crown. The precise distance this ownership extended from the coast was a matter of some uncertainty. But that English law then recognized Crown proprietary rights in the seabed is altogether clear. I would propose to use the term "marginal sea" to mean that belt of water to which such rights extended, incorporating in that term the uncertainty as to precise distances.

Q. Please explain the basis for your opinion. A. First, let me provide some of the background. Although the question of ownership of the seabed first became of central significance in English law during the 17th century as a result of controversies over fishing rights, the boundaries of coastal lands, and the jurisdiction of admiralty, there was a much older English legal tradition recognizing the

King's sovereignty over the English seas. For example, one scholar traces the origin of the English Admiralty Court to the King's assertion of sovereignty over the sea during the years between 1340 and 1357. He writes:

"Its origin was intimately connected with the claim made by Edward III. and his progenitors to be sovereigns of the sea. The phrase 'sovereignty of the sea' is variously expressed in documents of the period as 'superioritas',
121 'custodia', or 'Admirallatus maxis', and the institution of a Court of Admiralty to deal with piracy and other offenses committed at sea was the outward and visible sign of the existence of the sovereignty to which the kings of England laid claim. The battle of Sluys left Edward III. in a position to enforce this claim by the institution of an Admiralty Court, of which the principal function was to keep the king's peace upon the sea." Reginald G. Marsden, ed., 1 Select Pleas in the Court of Admiralty, p. xv. Maine et al., Ex. No. 200.

Sometime in the first half of the 17th century, there was discovered in The Tower of London a manuscript proclamation by King Edward I (1272-1307) entitled "De Superioritate Maxis Angliae & jure officii Admiralitatis in eodem," in my Latin, "Of the Superiority Over the English Sea and the Office of Admiral." The proclamation, first translated by Sir John Boroughs in his The Soveraignty of the British Seas (1633) (1651 ed.), pp. 28-42, Maine et al., Ex. No. 177, 176, was of great influence in the 17th century, especially after it appeared in the posthumous edition of Lord Chief Justice Coke's *Fourth Institute,* first published in 1644, at pp. 142-45. Maine et al., Exhibit No. 183. The proclamation, dated by Boroughs at around 1299, declares "that . . . the Kings of England . . . have been in peaceable possession of the Dominion of
122 the Sea of England, and of the Isles being in the same . . . "

Boroughs trans., pp. 29-30. It was frequently cited in the 17th century as demonstrating the long-standing claims of the Crown to sovereignty over the sea.

Another historian confirms the early assertion of royal authority with respect to fishing.

"The English kings had since the time of Edward III. definitely asserted their claim to sovereignty in the seas lying about the coasts of their kingdom. Edward III. issued a proclamation making this claim, and had his right admitted by the Treaty of Paris, 1360; this same right was upheld by Henry V., (1413-22), Henry VI., (1422-61), and Henry VII. (1485-1509)" John Rawson Elder, *The Royal Fishery Companies of the Seventeenth Century*, p. 4. Maine et al., Ex. No. 186.

Q. Is there other evidence before the 17th century of King's ownership of the land beneath the sea? A. One of the more impressive statements is that of Mr. Stuart A. Moore. *Moore's History and Law of the Foreshore and Sea Shore and the Law Relating Thereto* (London, 1888), Maine et al., Ex. No. 203, represents the first comprehensive restudy of the original manuscript records since the work of Sir Mathew Hale (circa 1667). Written to refute royal claims to the land between high and low water
123 mark, it is consistently hostile to unsupported assertions of ownership by the Crown. Nevertheless, Moore maintained that the King "has the soil of the sea by his prerogative, and may grant it to a subject." Moore, *supra*, at p. 418. And he states that he has found "many cases" before the 17th century that "show that oyster grounds, which are below low-water mark, pass by grant." Moore, *supra*, at p. 418 n. 1. Indeed, Sir Mathew Hale himself, about whom I shall have a good deal to say in a moment, concluded that the King owned the seabed on the basis of his study of records going back as far as Edward I (1272-1307).

Q. When does the issue of the King's ownership of the seabed begin to become central in English law? A. Well, the first important treatise on the subject was written by Thomas Digges during the reign of Queen Elizabeth in 1568 or 1569. It is important to keep in mind, however, the then recently discovered invention of printing, which accounts for the absence of printed sources before the end of the 16th century. In any case, Digges' treatise, entitled "Arguments Proving the Queens Maties Propertye in the Sea Landes and and Shores Thereof," reprinted in Moore, *supra,* fully sustains the Crown's assertion of propriety in the sea. Digges stated, in part:

124 "And in this estate regall of Englande wee see that the Kings of most auncient times haue in the right of theire crowne helde the seas abowte this Ilande so proper and entire unto them . . .

* * * * *

"For yt is a sure Maxime in the Common Lawe that whatsoever lande there is wthin the kinges dominion whereunto no man cann iustly make propertye yt is the kinges by his prerogatiue." Moore, *supra,* at pp. 187, 203.

Q. What was the occasion for the writing of Digges' treatise? A. The purpose was primarily to assert the King's right to ownership of the foreshore, the land between high and low water mark. Now, this claim was not yet clearly established in English law at the end of the 16th century. It is therefore important to see how Digges attempted to deduce the disputed claim from the indisputable proposition that the Crown owned the marginal sea. Treating the sea and the foreshore alike, Digges first dealt with the sea, stating that as the chief of all the waters it should belong to "the cheefe the Kinge himself." He then

argued that under the civil law islands arising in the sea belong to the King as well. Finally, he maintained that there was no difference between islands and the foreshore,
125 which also belong to the King. He concluded that the King owned the property in the sea and its shore "not only from the lowe water marck downward but also upward to the full sea. . . ." Moore, *supra,* at pp. 185, 187, 191-192.

Q. Is there other evidence in the 16th century confirming Digges' view of the law? A. Yes. It appears to be universally acknowledged during the reign of Queen Elizabeth (1558-1603) that the Crown owns the seabed in the marginal sea. For example, in the admiralty case of Officium Domini c. Dulinge (1591), printed in Reginald G. Marsden, ed., 2 Select Pleas in the Court of Admiralty, 1547-1602 (London, 1897), Maine et al., Ex. No. 201, grantees of the foreshore bring an action against Dulinge for erecting a weir without having obtained a license from the admiral. It was argued that the Crown owned the sea and hence the foreshore, as follows:

"Firstly, that you know or believe that, as well our most serene lady Elizabeth, queen of England that now is, as all and singular her illustrious and invincible progenitors and predecessors, kings of England, from and for time whereof the memory of man runneth not to the contrary, have in right of their royal prerogative (and) in right of their kingdom ever been lords and owners, as also she, our lady Elizabeth, queen that now is, is
126 now owner and proprietor of the sea adjacent to and encircling and washing (the shores of) the realm of England, at least for 300, 200, 100, 50, 40, 30, 20, or 10 miles from the land or shore, towards the deep sea, and of all and singular the rights, privileges, fruits, emoluments, hereditaments, profits, royalties, and lordships, whatsoever

they may be, arising coming and issuing from the said sea and shores, and of all lands lying beneath and under the sea, and overflowed by it, and also of the public rivers and ports in all and singular the maritime parts of the kingdom of England, and of all edifices, structures, things, and engines, used for catching fish or for any other purpose, built, placed, and existing, on the said shores of the sea or in the said harbours, lands, and places, at least within the ebb and flow of the sea, up to full sea mark; and further, that they have of their royal (and) general prerogative, for all time possessed, occupied, and held, the profits of (all) fisheries and salt ponds, and other the revenues therefrom received, or in any way issuing and arising (therefrom), and (also) all and singular the premises, the things, rights, privileges, profits, and other royalties or lordships (aforesaid), whatsoever they may be, as also she, the lady queen of England that now is, has for all time possessed, occupied, and held (the same), and
127 throughout all the time aforesaid have been and are commonly deemed, held, and reputed as owners, proprietors, possessors, (and) occupiers of all and singular the premises, as also she, the aforesaid lady the queen that now is, has been and is commonly called, deemed, held, and reputed." Reginald G. Marsden, 2 Select Pleas in the Court of Admiralty, 1547-1602, pp. 174a-174b. Maine et al., Ex. No. 201.

Another late 16th century treatise writer, William Welwood, confirms the Crown's claims in his An Abridgment of all Sea-Lawes (1590). Maine et al., Ex. No. 209. In the 1613 edition, Welwood reasserts the views of Bartolus, who "extends and allowes for Princes and people at the sea side, an hundreth miles of sea forth from their coasts" if they can extend protection that far. *Id.* at p. 69. Distinguishing between the marginal and main seas, he

recognizes freedom of the seas only in "that part of the maine sea or great Ocean, which is farre removed from the just and due bounds above mentioned. . . ." *Id.* at p. 72.

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128 Q. Professor Horwitz, now perhaps we are in a position to explore your opinion about English law and practice in the 17th and 18th centuries. Did the earlier view that the King owned the seabed of the marginal sea continue through that period? I might interpolate for the record a slight change in the phrasing of that question from the mimeographed version. A. Yes, in fact, it was frequently reiterated and elaborated upon during this period and became of major practical significance as well.

Q. On what do you base this opinion? A. First, there are dozens of treatise writers of the period who acknowledge the King's sovereignty, dominion and ownership of the seabed. Second, there are hundreds of official acts based on a recognition of this position. Third, there are a number of judicial pronouncements recognizing the Crown's proprietary interest in the seabed.

The first important treatise of the 17th century con-
129 sisted of a series of lectures on the Statute of Sewers delivered at Gray's Inn in 1622 by Serjeant Robert Callis. Callis stated that by the common law of England the seas around the British Isles, together with the shores, belonged in property to the King. Callis stated in part (1647 ed.), Maine et al., Ex. No. 178:

"First, touching our Mare Anglicum. . . . the King hath therein these powers and properties, videlicet.

1. Imperium Regale.
2. Potestatem legalem.

3. Proprietatem tam soli quam aquae.
4. Possessionem & proficuum tam reale quam personale.

"And all these he hath by the Common Laws of England. In the 6.R. 2. (6th of Richard the Second), Fitz. Prot. 46. it is said, "That the Sea is within the Legiance of the King, as of his Crown of England; this proves that on the seas the King hath dominationem & imperium ut Rex Angliae, and this by the Common Law of England." *Id.* at p. 17.

* * * * *

"So I take it I have proved the King full Lord and owner of the seas, and that the Seas be within the Realm of England; and that I have also proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Customes, and Prescriptions, that the Government therein is by the Common Laws of this Realm . . . But the King hath neither the properties of the Sea, nor the real and personal profits there arising, but by the Common Laws of England, . . . for no Law gives the King any soil but only the Common Laws of England." *Id.* at p. 19.

Q. What was the occasion for Callis' lectures? A. The question of the extent of the King's ownership of lands under the sea was no abstract issue for 17th century jurists. The increasing activities of the Commission of Sewers in draining and improving lands made it necessary to determine the Commission's jurisdiction. As early as 1598, the Crown expressed concern over "the loss of the Commonwealth by continuing those grounds under water, and the loss and decay of outfalls to the sea; of the rich

profit which would arise by their recovery, and the multitude of people which might be relieved and nourished thereby. . . . " S.P. Dom., Eliz., CCLXVIII, p. 115. Maine et al., Ex. No. 213.

Callis' lecture was undertaken to determine the extent of the Commissioners' jurisdiction under the Statute of 23 Hen. VIII, which set up the Commission. He argued that this statute "hath his extent within all the Realm of England," Callis, *supra*, at p. 20, and, as we have seen, concluded "that the Seas be within the Realm of *Eng-*
131 *land.* . . . " *Id.* at p. 19. Finally, he maintained that "the grounds gained from the Sea pertained to the Queen," *id.*, a conclusion which, as we shall see in a moment, had vast practical significance for 17th century England.

Q. Are there other English treatise writers of the 17th century who follow Callis' conclusion? A. In Gerard Malynes, Lex Mercatoria (1622), Maine et al., Ex. No. 197, the author distinguishes between dominion over the main sea and the marginal sea, recognizing the King's propriety over the latter, but not over the former. *Id.* at p. 186.

John Boroughs, in The Soveraignty of the British Seas Proved by Records, History, & the Municipale Lawes of this Kingdome (1633) (1651 ed.), Maine et al., Ex. No. 177, begins his treatise with the following assertion:

"That Princes may have an exclusive property in the soveraigntie of the severall parts of the Sea, and in the passage, fishing & shores thereof, is so evidently true by way of fact, as no man that is not desparately impudent can deny it." *Id.* at p. 43.

At another point he states:

"By all which presidents it is manifest that by the
132 common Law of the land the King is proprietory Lord of our seas; that the seas of England are under the legeance of the King, that the King is the soveraigne conservator

of the peace as well upon the sea as land; That not onely things floating on the superficies of the water but such as lye upon the soile or ground thereof, belong properly unto the King . . . *Id.* at p. 92.

In *the First Part* of the Institutes of the Lawes of England (1628), Lord Chief Justice Edward Coke declared:

". . . if a man be upon the Sea of England, he is within the Kingdome or Realm of England, and within the ligeance of the King of England, as of his Crowne of England." *Id.*, Section 439, at p. 260(b). Maine et al., Ex. No. 182.

In The Fourth Part of the Institutes of the Lawes of *England* (1644) Lord Coke, as I previously observed, published the full text of the then recently discovered Proclamation of Edward I, *De Superioritate Maris Angliae.* This record, Coke concluded, demonstrates "the great prerogative and interest that the King of England hath in the Seas of England, and . . . the antiquity of the Court of the Admiralty of England. . . ." 4 Inst. p. 142.

The two most important and influential English treatises of the 17th century on this subject are John Selden's
133 Mare Clausum (1635) and Lord Chief Justice Mathew Hale's famous work De Jure Maris (c. 1667). Selden's treatise was a political work designed to answer the arguments in favor of freedom of the seas in Hugo Grotius' Mare Liberum (1609). Not only were Selden's pronouncements "a definite expression" of the views of Charles I, but they "were in great measure merely a reiteration of those opinions concerning the rights of the kings of England to the hereditary sovereignty of the sea" that had been expounded by James I twenty years before. Elder, *supra*, at p. 70.

The first English translation of Selden's Mare Clausum by Marchamont Needham in 1652 was appropriately

entitled Of The Dominion or, Ownership of the Sea. Selden argued "that all kinds of Law, even the most known and approved, . . . do acknowledg and allow a proprietie and private Dominion over the Sea, as well as the Land." *Id.* at p. 3. (All quotes are from the Needham edition.) Citing historical sources, he concluded that the rulers of England

"have enjoied the Dominion of (the) Sea by perpetual occupation, that is to say, by using and enjoying it as their own after a peculiar manner, as an undoubted portion either of the whole bodie of the estate of the British Empire, or of som part thereof, according to the state and condition of such as have ruled it; or as an insepar-
134 able appendant of this Land. Lastly, that the Kings of Great Britain have had a peculiar Dominion or proprietie over the Sea flowing about it, as a Bound not bounding their Empire, but (to borrow the Terms used by Surveiors of Land) as bounded by it; in the same manner as over the Island it self, and the other neighboring Isles which they possess about it." *Id.* at p. 182. Maine et al., Ex. No. 204.

Q. So Selden conceived of the Sea as part of the territory of the Crown? A. That is correct.

Q. Does Selden recognize any limits to the King's Dominion? A. Yes, but they are rather vague. First of all, he limited his own claims to the Four Seas. "The Sea encompassing great Britain," he wrote, "which in general wee term the British Sea, is divided into four parts, according to the four Quarters of the World." *Id.* at p. 182. Thus, for example, he claimed dominion of the sea all the way to the French coast.

One other important limitation should be noted, however. Selden was prepared to concede that the extent of dominion was an empirical question to be determined by historical fact. Arguments for dominion, he acknowledged,

"are not to bee derived altogether from a bare Occupa-
135 tion or Dominion of Countries, whose Shores are washed by the Sea: But from such a private or peculiar use or enjoiment of the Sea, as consist's in a setting forth Ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it; in receiving such Profits and Commodities as are peculiar to every Kinde of Sea – Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure." *Id.* at p. 188. As a result, he was prepared to "make diligent inquirie" into those indicia of dominion mentioned above. *Id.* at p. 188. Thus it is careless, in my opinion, to assume that Selden thoughtlessly laid claim to everything in Britain's name.

Q. Does Selden deal with actual exploitation of the sea-bed? A. Yes, he does – at great length. First, it should be emphasized that the Selden-Grotius dispute arose out of the English-Dutch contests in the early 17th century over fisheries, about which I will have a good deal to say in a moment. Second, in Mare Clausum one of Selden's main arguments is that there must be a property right to the seabed because its products are not inexhaustible. Because of fishing, he states, "less profit ariseth. . . . " This "more evidently appear's in the use of those Seas, which produce Pearls, Coral, and other
136 things of that Kinde. Yea, the plentie of such seas is lessened every hour, no otherwise then that of Mines of Metal, Quarries of stone, or of Gardens, when their Treasures and Fruits are taken away." *Id.* at p. 141.

Q. Is Selden's analogy of pearls and coral to undersea mines usual in this period? A. Yes, I have found many 17th and 18th century sources which conceive of undersea fishing in the same terms as mining.

For example, a manuscript entitled "The Incomparable Benefitt of the Fishery in his Maties Seas – I might add here this was a manuscript that I saw before I realized it was reprinted in Elder – written during the reign of Charles II observes that the Dutch called their herring fisheries "the principle golden myne of the United Provinces." Elder, *supra,* at p. 122.

Q. Can you briefly describe Selden's influence on the modern law of the sea? A. Professor Fenn, in his The Origin of The Right of Fishery in Territorial Waters (1926), Maine et al., Ex. No. 188, concludes "that the basic principles maintained by Selden, apart from his extreme claims, more nearly approximate the principles of modern international law touching territorial waters, than do those advanced by Grotius." *Id.* at p. 196.

137 Professor Fulton in his work on The Sovereignty of the Sea (1911), Maine et al., Ex. No. 189, observes "that Mare Clausum became in a sense a law-book, an authoritative work to which eminent lawyers, as Lord Chief-Justice Hale and Hargrave, appealed as proving the existence and the legality of the rights of the crown of England to the dominion of the British seas. Even as late as the year 1830," he concludes, "this doctrine held its place in certain recognized treatises on the law of England, together with Selden's definition of the extent of those seas." *Id.* at p. 374.

Q. You mentioned Lord Chief Justice Mathew Hale's treatise, De Jure Maris, along with Selden's work as the two most influential 17th century works on the extent of the Crown's ownership of the seabed. Can you discuss Hale's contribution? A. Hale's De Jure Maris was written in manuscript form around the year 1667. Though it was well known throughout the late 17th and 18th centuries, it was first published in Hargrave A Collection of

Tracts Relative to the Law of England (1787). Maine et al., Ex. No. 194. Although there was once a dispute over the authorship of the manuscript published by Hargrave, that controversy seems to have been put to rest by Moore's discovery of a similar, earlier, manuscript indisputably written by Hale as early as 1636. See Moore,
138 *supra,* at pp. 318, 370; Fulton, *supra,* at p. 543.

Hale's treatise, unlike Selden's, was not a work of international law but of the common law of England in its municipal or internal sense. Though Hale accepted Selden's broad conclusions, his treatise was not motivated by international political considerations. Thus, more realistically than Selden, Hale acknowledged the Crown's sovereignty and ownership of the seabed only in the narrow sea adjoining the coast of England. He wrote:

"The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not.

"This is abundantly proved by that learned treatise of Master Selden called Mare Clausum; and therefore I shall say nothing therein, but refer the reader thither.

"In this sea the king of England hath a double right, viz, a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with." 1 Hargrave, *supra,* at p. 10.

Q. Before we continue this survey of the treatise literature, perhaps you would describe the legal controversies
139 of the 17th century in which these treatises played a part.
A. The first important controversy, which, as we have seen, led to the publication of such books as those of Welwood's Boroughs' and Selden's, concerned disputes over fishing, mainly between the English and the Dutch.

The claims to British sovereignty over the sea were based on the actual practice of the 17th century. For example, there is considerable evidence that other nations regularly submitted to licensing of their fishermen by English authorities. Here is Professor Elder's description:

"That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary (1553-58) when the fishermen of the Low Countries wished to seek new fishing grounds, there was granted to King Philip's subjects in Flanders a twenty-one years' lease of the fishings about the North Coast of Ireland, this lease being granted in consideration of a fine and £1000 paid annually to Sir Edward Fitton, Treasurer for Ireland. A like privilege to fish in the Irish seas was granted under similar conditions by the same queen to 'The Company of the Old Hans'. Foreigners desirous of fishing in English waters were, at this time, regularly granted licenses at Scarborough Castle." Elder, *supra,* at pp. 4-5.

140 When in 1635 – the same year as Selden's Mare Clausum was published – Charles I demanded that all Hollanders fishing in the North Sea should be licensed by him, he was merely reasserting, Professor Elder tells us, "this ancient right of the English kings to demand payment from foreigners for the privilege of fishing in the seas surrounding the English dominions." *Id.* at p. 5. "No foreigners had fished off the island of Lewis till 1594 when the Hollanders began to fish in the seas about the island by virtue of a license, which kept them, however, at a distance of twenty-eight miles from shore." *Id.* at p. 6. "It had always been understood that for a certain distance from the shore the fishing was reserved for native fishermen; the exact distance had varied considerably with varying conditions. . . ." *Id.* at p. 9.

Professor Elder does give us some general idea of the extent of the Crown's assertion of dominion. When the Dutch asked and received permission to fish in Scottish waters in 1594, it was agreed that they should not come "within the sight of the shoar. . . ." *Id.* at p. 9. An instruction to an English official in 1618 fixes the limit of Dutch fishing at 14 miles from the British coast. *Id.* at p. 10. When in 1622 the Dutch gave orders "that Dutch fishing vessels were not to approach so near the land as to give offense to British fishermen," Elder observes, they
141 were "thus tacitly agreeing to respect the ancient rule that foreign fisherman should not come within the sight of the British coast." *Id.* at p. 12. Finally, two manuscripts written in 1618 each state that up to that date the Dutch had stayed at least 40 miles from the British coast. *Id.* at pp. 19, 26.

The second important legal controversy of the 17th century concerned the boundaries of coastal lands, which, as I have already suggested, induced Digges, Callis and especially Hale, to write their treatises. One legal issue, as I previously indicated, concerned ownership of the land between high and low watermark. But that issue is relevant to our inquiry only to the extent that the answer to it was deduced from propositions about ownership of the seabed.

Another related question, however, is central to our inquiry. That dealt with ownership of so-called derelict land or lands from which the sea had receded due to changes in the tide. The most important decision upholding the Crown's right to derelict lands was rendered in *The King v. Oldsworth, Hillary* 12 Charles I (1636-37). Here, too, I have seen the manuscript. The decision is fully described by Sir Mathew Hale in De Jure Maris (c. 1667), published in 1 Hargrave, *A Collection of Tracts*

Relative to the Law of England, p. 31 (1787), where he
142 writes: "(T)he true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the King's, it cannot become the subject's because the water hath left it." Hale's conclusion is confirmed by a report of a further hearing of the same case in the Exchequer Chamber in Trinity, 13 Charles I (1637). One of the decisions for the King, by Baron Trevor, is reported as follows:

"The first point: that the King has such land jure coronae: As the King is supreme upon the land, so he is upon the sea; . . . and all the land at first was derived out of the Crown, and the case is the same in all commonwealths in foreign nations. Also the King, by his prerogative, has all things of excellency, as royal mines, so the sea being the chiefest and most excellent of waters . . . for the same reason the King shall have it . . . "

* * * * *

"Thirdly: The Question whether custom shall prevail against the King, negatively. For as the sea was in the King when it was parcel of the sea; now, when it is made parcel of the dry land, it shall not be taken from him; and the reason is, because the King shall be preferred
143 in such case. . . . " Moore, *supra,* at pp. 302-03.

Q. I believe that should have read "as the land was in the King." You said "as the sea." A. That is correct.

The books are filled with grants by the King of derelict lands. Indeed, one case turned on interpreting the King's grant of "all soil ground, sand, and marsh land contiguous to the premises now overflown, or which at any time in

the future should be recovered by the withdrawal of the sea." *Attorney General v. Sir Edward Farmer,* 2 Lev. p. 171, Maine et al., Ex. No. 159, 2 Mod. p. 106. Maine et al., Ex. No. 158, Sir T. Raymond p. 241 (1676). (The original is: "omne solum, fundum, terram, arenam, terram mariscal, contigue adjacen, praemissis, quae modo inundat, vel aqua maris cooperta existunt, et quae and aliquod tempus imposterum recuperat forent per relictionem maris. . . .") After the grant, 100 acres became derelict and the question was whether they belonged to the King or the patentee. Two of the reports state that the case was adjourned without result. 2 Mod. p. 106, Sir. T. Raymond p. 241. The third report indicates that nothing passed because the words of the grant were too general. 2 Lev. p. 172. But it is especially noteworthy that both sides conceded the King's power to grant lands under the sea. In his argument for the King, Lord Holt declared:

144 "This grant is of part of the sea, which being parcel of the prerogative, ought to be expressly named; and the sea is the soil of the king, Selden's Mare Clausum 223. . . ." Raymond, p. 241.

For the grantee, it was argued:

"Here is a capacity in the King, because he is absolute lord of the British seas, as appears by Selden's Mare Clausum, he may grant part of his marine patrimony as well as his lands. 2. Here is a person capable to take; subjects are capable of a property in the sea. . . ." Raymond pp. 241-42.

There are hundreds of 16th and 17th century royal grants of either overflowed lands or lands that were reclaimed from the sea. One of the earliest was a 1571 grant by Queen Elizabeth to Thomas Digges of "all such lands in or adjoining the County of Kent heretofore covered by the sea and by work of God or otherwise

'inned' or recovered from the sea. . . . " Patent Rolls, 13 Eliz., pt. ix., p. 297. Maine et al., Ex. No. 214. In 1603 the Crown made a grant of "Ballingmarsh, and other lands in Kent gained out of the sea." S.P. Dom., Jac. I, 1623-25, Vol. 11, p. 531. Maine et al., Ex. No. 215. In 1616 we find a grant to Henry Gibb "of lands called Brading, Isle of Wight, which have been much overflowed by the sea, and are to be inclosed at his expense." S.P. Dom., Jac. I., LXXXVIII, p. 381. Maine et al., Ex. No. 216. In
145 1623 we find a warrant to Charles Barrett "to recover marsh lands left by the sea. . . . " S.P. Dom., Jac. I., CXLVIII, p. 625, Maine et al., Ex. No. 217. In 1639 the King claimed "certain lands in Guernsey" that "have been for sundry years past, overflowed by the sea, and that the same are, by the laws and customs of the island, belonging to us, to dispose of." S.P. Dom., Car. I., CCCCXXIX, p. 534, Maine et al., Ex. No. 218. By the end of the century, hundreds of grants of derelict lands had been made. In 1694 Attorney General Ward informed the Lords of the Treasury that if "any land is derelict by the sea, such derelict lands doth of common right belong to the Crowne. . . ." 1 Cal. Treas. Papers, p. 383. And as the century came to a close there was a continued outpouring of royal grants of derelict lands. See, *e.g.*, 1 Cal. Treas. Papers, pp. 537-38 (1696) Maine et al., Ex. No. 219; 2 Cal. Treas. Papers, pp. 233-34 (1697-98). Maine et al., Ex. No. 220.

Q. Are there other treatise writers who affirm the King's ownership of the seabed? A. Let me emphasize that there are dozens more in 17th and 18th century England. For a general survey of the treatise literature, I refer you to Fenn, *supra,* pp. 150-233, and Fulton, passim.

Q. Can you discuss some of the more prominent?
146 A. In 1665, Robert Codrington wrote His Majesties Propriety and Dominion of the British Seas Asserted. Maine et al., Ex. No. 181. He declared:

"First, that the Sea by the Law of Nature and Nations is not common to all Men, but is capable of Private Dominion, as well as the Land.

". . . Second, . . . that the King of Great Brittain is Lord of the Sea Flowing about, as an Inseparable and Perpetual Appendant of the British Empire." *Id.* at p. 1.

In 1676, Molloy wrote De Jure Maritimo et Navali or A Treatise of Affaires Maritime and of Commerce, in which he recognizes the King's ownership of the sea. Professor Fulton notes that "it was for a long time considered the standard work on the maritime law of England, and went through many editions . . ." Fulton, *supra,* at p. 514.

Sir Philip Medows, in his Observations Concerning Dominion and Sovereignty of the Seas (1689), Maine et al., Ex. No. 202, while urging that England and Holland define by treaty the respective limits of their dominion over the sea, nevertheless maintained that "every Prince, whose Country adjoyns to the Sea, . . . has some portion of the Sea belonging to him in property, as an accession of the Land, or appendant to it, or rather incorporated with it, like Veins and Arteries, integral Parts of the same Body."
147 *Id.* at pp. 42-43. Moreover, he was clear that "he who affirms a Sea-Dominion, and by it understands anything less than Property, embraces a Cloud for Juno." *Id.* at p. 9. The difficulty was that "there be no certain Standard in Nature, whereby to ascertain the precise Boundaries of that peculiar Marine Territory, I am now speaking to, which belongs to every Prince in Right of his Land; yet, by Treaty and Agreement, they may easily be reduced to certainty. For, as to the Judgment and Opinion of private Persons, we cannot fetch from thence any true measure; for though they all agree unanimously, that there is something due of Right, yet they vary in the Quantum, or How much." *Id.* at p. 43.

Beginning with Chief Justice Rolle's Abridgment (1668), – again, here is a case of translation – there is a stream of authority by English text writers affirming the Crown's ownership of the seabed. See 2 Rolle Abridgment, p. 170. Maine et al., Ex. No. 206.

All of the four most influential English common law text writers of the 18th century concur in this conclusion.

First, Mathew Bacon, in his New Abridgment of the Law (1736) (2d ed. 1759), Maine et al., Ex. No. 171, wrote:

"It is universally agreed, that the King hath the Sovereign Dominion in all Seas and great Rivers; which is
148 plain from Selden's Account . . .; and therefore the Territories of the English Seas and Rivers always resided in the King.

"And as the King hath a Prerogative in the Seas, so hath he likewise a Right to the Fishery and to the Soil; so that if a River as far as there is a Flux of the Sea leaves its Channel, it belongs to the King." 4 Bacon's Abridgment p. 156.

Next, Charles Viner, in A General Abridgment of Law and Equity (1742), Maine et al., Ex. No. 208, wrote:
"The Sea is not only under the Dominion of the King . . . But it is also his proper Inheritance; and therefore the King shall have the Land which is gained out of the Sea. . . ." 16 Viner Abridgment p. 576.
"(T)he Sea is of the Allegiance of the King and Parcel of his Crown of England." 16 Viner Abridgment p. 577.

Third, Sir John Comyns, whose Digest of the Laws of England appeared in 1762, stated:
"The King and his Progenitors have at all Times been Lords of the Sea. . . .
"And therefore, the Dominion of the whole Sea which surrounds England belongs to the King. . . .
"And the Ligeance or Dominion of the Sea belongs to the King, as to his Crown of England. . . .

149 "And therefore, the King gives License to the Men of Zeland, etc. to fish in his Sea. . . ." 4 Comyns p. 388 (1766 ed.). Maine et al., Ex. No. 185.

Finally, Sir William Blackstone in his 1765 Commentaries on the Laws of England recognized the King's ownership of lands under the sea, writing:

". . . But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King: for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry." 2 Blackstone Commentaries p. 262, Maine et al., Ex. No. 174.

Q. Before we leave the treatise literature is there anything you wish to add? A. I have intentionally saved for last a review of the admiralty treatises of the 17th and 18th centuries because they raise some technical problems which I thought best to discuss separately.

First, let me state generally that all of the writings on admiralty of the period recognize that the King exercises sovereignty and ownership of the Sea.

Sir Henry Spelman's "Of the Admiral-Jurisdiction and the Officers Thereof" was written sometime before 1643,
150 the year of his death. It was first published in The English Works of Sir Henry Spelman (1723). Maine et al., Ex. No. 207. Spelman wrote:

"(T)he the Soyle of the Shore and Sea adjoining, is now the King's, and particular Lord's according to their Titles. . . ." *Id.* at p. 229.

In 1663, Richard Zouch, in his The Jurisdiction of the Admiralty of England Asserted, Maine et al., Ex. No. 212, wrote:

"(T)hat the Kings of England . . . time out of mind, have been in peaceable possession of the Sovereign Dominion

of the Sea of England, and of the Islands therein situate . . . that (the Admirall of the Sea deputed by the King of England, and all other Admiralls appointed by him, and his Ancestors, heretofore Kings of England, have been in peaceable Possession of the said sovereign Protection. . . . " *Id.* at pp. 19-20.

* * * * *

"First it appears by antient Record of the time of King Edward the first, De Superioritate Maris (of Superiority over the Sea), That it was acknowledged by the Deputies of the parliament of England, and of divers other Nations, That the Kings of England time out of mind injoyed the Dominion and Soveraignty of the English Seas. . . . " *Id.* at p. 38.

One year later John Exton published his The Maritime
151 Dicaeologie or Sea-Jurisdiction of England (1664). Maine et al., Ex. No. 187. He stated:

"(T)he King of England and his predecessors, . . . have had the supreme Government of the English Seas, and the Islands thereof. . . .

"(T)hese things I have cited out of Mr. Selden not only to shew here for my purpose, that the Kings of England have had from antient times the power and dominion over the British Seas . . . England's Admirals have likewise as antiently had jurisdiction under them over those maritime affairs, which fell sub isto regimine & dominio." *Id.* at pp. 22-23.

The same assertion of the Crown's sovereignty over the sea appears in John Godolphin, A View of the Admiral Jurisdiction, pp. 28-30 (1661) (2d ed. 1685). Maine et al., Ex. No. 191.

Let me emphasize at this point that these admiralty tracts were an accurate expression of the legal practices in the late 17th century. We have, for example, "A Charge given at an Admiralty Sessions held at the Old-Baily" by Sir Leoline Jenkins, who was judge of the Admiralty Court from 1664 to 1668 and probably the greatest admiralty judge in English history. Jenkins carefully distinguished between the Crown's dominion over the territorial sea and a more modest concurrent jurisdiction in the seas beyond. Jenkins declared:

"Every Englishman knows, that his Majesty hath an undoubted Empire and Soveraignty in the Seas that en-
152 viron these his Kingdoms, which by the ancient Statute Laws (18 Edw. I), are called the quatuor Maria, by Foreigners and by our modern Treaties, the British Seas. . . .

"But besides these four Seas, which are the peculiar Care, and as it were, Part of the Domaine of the Crown of England, his Majesty hath a Concern and Authority (in Right of his Imperial Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over. . . .

"This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in Concurrence with all other Soveraign Princes that have Ships and Subjects at Sea. . . ." 1 Wynne, The Life of Sir Leoline Jenkins, pp. xc-xci (1724) Maine et al., Ex. No. 210.

These views of the 17th century admiralty writers continued into the 18th century. In 1713, Sir Charles Hedges, Judge of the Admiralty Court, wrote to Josiah Burchett, Secretary of the Admiralty, after the Lords of Admiralty asked his opinion as to the limits of the British seas. Hedges had no doubt that the four seas "are within her Majesty's sea dominions, as queen of Great Britain." He

noted that "All nations pretend to dominion at sea on their coasts; some extend it to no further than they can reach, some sixty miles, some a hundred or more, with
153 regard to the seas which wash their borders, or opposite shores." Though he could not fix the exact boundaries of British dominion, he concluded "that the British sovereignty has in all ages been asserted to the utmost extent of those seas which have been possessed by the Brittains and Irish in the vast oceans of the North and West." R.G. Marsden, ed., 2 Documents Relating to Law and Custom of the Sea pp. 231-33 (1916). Maine et al., Ex. No. 199.

Q. You mentioned a moment ago that you had reserved your discussion of admiralty writings for the end of your survey of the treatise literature because there were technical questions that you wished to discuss. Can you tell us what these technical problems are? A. Most of the admiralty treatises just referred to were written in the midst of the great 17th century controversy over the jurisdiction of admiralty. It is necessary, I think, to review this controversy in order to correct certain misconceptions that appear in the English case of Queen v. Keyn, L.R. 2 Exch. Div. p. 63 (1876) Maine et al., Ex. No. 160.

Q. Can you briefly describe that case? A. By a 7-6 vote, the court held that the Central Criminal Court had no jurisdiction to try a foreigner for a manslaughter committed on board a foreign ship sailing within three
154 miles of the English coast. In several of the majority opinions, especially that of Sir Alexander Cockburn, there is puzzling language indicating that the realm of England stops at low water mark. What I hope to show is that it would be a serious misreading of history to follow the majority's conclusion that admiralty did not have jurisdiction over cases of this sort or to concur in the court's assertion that the traditional jurisdiction of admiralty was not regarded as territorial.

Q. Can you give us your reasons for this conclusion? A. There are two separate lines of historical development I should like to examine. The first deals with restrictions imposed on the land jurisdiction of admiralty, mainly during the 17th century, though with strong roots earlier. The second deals with the transfer of the criminal jurisdiction of admiralty to royal commissioners and then to the regular criminal courts of England.

In two statutes passed during the reign of Richard II, Parliament attempted to limit the jurisdiction of admiralty. 13 Rich. II., c. 5. (1389); 15 Rich. II., c. 3 (1391). The latter statute denied the Admiral jurisdiction over "all manner of Contracts, Pleas, and Quarrels, and of all other things done, or arising within the bodies of Counties, as well by Land as by Water. . . ."

These statutes became the basis for the great struggle in the early 17th century led by Sir Edward Coke to restrict the land jurisdiction of the Admiral.

Q. What were the reasons for the struggle? A. First, as Coke pointed out (4 Inst. p. 134), The Admiral could not have jurisdiction "within any County of the Realm" because there was no trial by jury in admiralty. The County, it should be emphasized, was the administrative unit out of which juries were chosen. Second, as we shall see in greater detail in a moment, there was great opposition by the common lawyers to application of admiralty civil law doctrines within the land jurisdiction of common law courts.

Q. What conclusions do you derive from this branch of your historical survey of admiralty? A. There is much talk in the 17th century about admiralty's jurisdiction being limited to "outside the Realm," which apparently has misled many modern jurists such as Sir Alexander Cockburn in Queen v. Keyn into believing that

the Admiral's jurisdiction was conceived of as being extra-territorial. In fact, however, the "out of the realm" formulation had an entirely different meaning for the 17th century jurist. It was only a short-hand for "out of the
156 body of a county of the Realm" which in turn merely raised the problem of the absence of jury trials in admiralty. Since there was no county from which a jury could be assembled, there could be no jury trial according to the common law model.

On the other hand, 17th century jurists recognized that the "out of the realm" formula did not deny a conception of the territorial seas, for it only meant that the territorial sea was "out of the body of a county of the Realm." Callis, for example wrote:

"But yet I am likewise of opinion, That a new Island risen from the bottom of the sea, although it be within the Realm, yet it is neither within county, Parish nor Town of this Realm, till the King by his Edict or Proclamation have so declared it." Callis, supra (1647 ed.), at p. 22. (Maine et al., Ex. No. 178.)

Similarly, Sir Mathew Hale was explicit in asserting that "the narrow sea, adjoining the coast of England, is part of the wast and desmesnes and dominions of the king of England, whether it lie within the body of any county or not." 1 Hargrave, Law Tracts, p. 10. (Maine et al., Ex. No. 194.)

Even so staunch an opponent of admiralty's inland jurisdictional claims as Sir Edward Coke agreed that the Admiral's jurisdiction in the narrow sea was within England's territorial waters. Thus, while Coke opposed all in-
157 land admiralty jurisdiction because the Statutes of Richard II restricted the Admiral to cases outside "bodies of counties," he nevertheless agreed that "if a man be upon the Sea of England, he is within the Kingdom or Realm of

England. . . . " First Institute, pp. 260(b)-261(a), Sec. 439. (Maine et al., Ex. No. 182.)

In conclusion, the fact that the Admiral's jurisdiction was occasionally spoken of as being "outside the Realm" should not mislead us into believing that admiralty jurisdiction was regarded as extra-territorial within the narrow seas.

Q. Can you now discuss the transfer of criminal jurisdiction from admiralty? A. This is a crucial step in any understanding of Queen v. Keyn. The first change occurrs in the statute 28 Henry VIII, c. 15 (1536), which recited that "traitors, pirates, thieves, robbers, murderers, and confederates upon the sea" often escaped punishment because under the civil law administered by admiralty judgment of death could be entered only after the defendants either confessed their offenses or these offenses were proved by impartial witnesses.

The statute required that the King appoint Commissioners to try most major offenses committed at sea, ac-
158 cording to the common law" as if any such offences had been committed or done in or upon the land . . . " It further provided for trial by jury.

The statutes of 5 Elizabeth, c. 18 (1562-3), and 39 George III., c. 37 (1799), further expanded the jurisdiction of the Commissioners to include all crimes.

Finally, the statute of 4 & 5 William IV., c. 36, s. 22 (1834), places all offences formerly within the admiralty jurisdiction in either the Central Criminal Court or the ordinary judges of the land.

In Queen v. Keyn, Sir Alexander Cockburn declared that the result of the case turned on determining what the ancient admiralty jurisdiction encompassed. If there was jurisdiction in admiralty before the Statute of 28 Henry VIII, c. 15 (1536), to try foreigners for crimes

committed on the seas, then he conceded that this power over criminal offenses was transferred to Commissioners under the 1536 Statute. Likewise, he conceded that this jurisdiction would again have been transferred from the Commissioners to the Central Criminal Court by the Statute 4 & 5, William IV, c. 36, s. 22. Here are Cockburn's words (2 Exch. Div. at pp. 168-69):

"We must, therefore, deal with this case as one which would have been under the ancient jurisdiction of
159 the admiral. But the jurisdiction of the admiral, though largely asserted in theory, was never, so far as I am aware – except in the case of piracy, which, as the pirate was considered the communis hostis of mankind, was triable anywhere – exercised, or attempted to be exercised, in respect of offences, over other than English ships. No instance of any such exercise, or attempted exercise, after every possible search has been made, has been brought to our notice. Nor, for the reason already given, could such jurisdiction be so exercised consistently with legal principle. And though, by 25 Henry 8, c. 15 (sic) " – that should be 28 – "the trial of offences previously within the jurisdiction of the admiral was transferred to commissioners to be appointed by commission from the King, under which the trial was to be held in such county as the commission should direct, and, 'according to the common course of the laws of the realm, used for such offences when done upon the land within the realm,' it is, I think, beyond dispute, that all that was effected by this statute, or by those that have succeeded it, as regards jurisdiction, was a transfer of the criminal jurisdiction of the admiral, such as it was, to Courts proceeding according to the ordinary procedure of the common law – not an extension of it. The statute created no new offence, effected no extension of jurisdiction. It simply transferred the jurisdiction

of the admiral, talem qualem, to the Common Law Courts,
160 to be exercised according to the procedure of the common law. As to this the received authorities are, as I shall have occasion more fully to shew hereafter, entirely agreed. The Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, which gives power to try 'offences committed on the high seas and other places within the jurisdiction of the Admiralty of England,' has, obviously, carried the matter no further. If the admiral had not jurisdiction as to offences committed on foreign ships, the commissioners, to whom the jurisdiction was transferred by the statute, must be equally without it."

Cockburn disputes the clear statement in 2 Hale, Pleas of the Crown, p. 12, that admiralty exercised such territorial criminal jurisdiction. He argues that, of the eight cases cited for Hale's proposition, "four were cases of piracy, which may have been dealt with on the principle that piracy is triable anywhere and everywhere (and, in any case,) two of the latter cases (may have been) committed within the body of a county, and therefore triable at common law." 2 Exch. Div. at p. 163.

Q. Does the historical evidence support Cockburn's understanding of the history of admiralty's criminal jurisdiction? A. No, I believe it does not. First, it seems
161 to me that Cockburn has strangely altered the burden of historical proof. It is very clear, it seems to me, that the Statute of 28 Hen. VIII, c. 15 (1536), intended to transfer admiralty jurisdiction over "traitors, pirates, thieves, robbers, murderers, and confederates upon the sea" without regard to nationality. We have already seen that there is an abundance of evidence demonstrating that the narrow seas were conceived of as part of the territory of England. And since admiralty records only begin in 1524, failure to find any confirmatory evidence among the very

sparse records still in existence for the period before 1536 ought not to alter the very explicit statement of the statute. In any event, as I shall show, there is some additional affirmative evidence of the practice before 1536. And there is good reason to believe that virtually all major offences committed on the seas by foreigners were indiscriminately punished as piracy.

Now, let me refer to the evidence that I have suggested. First, I have been able to find two cases in which foreigners were prosecuted for crimes before 1536. In 1370, Hugo de Peyntour, a Venetian, was tried in admiralty for both treason and piracy. He was acquitted by a jury of merchants and others. 1 R.G. Marsden, Select Pleas in The Court of Admiralty, p. xlvii. In 1455 Runball Harrysone,
162 a Dutchman ("Duchemanus"), was tried for murder before the Admiral. He too was acquitted. 1 The Black Book of the Admiralty, p. 255 (ed. Sir Travers Twiss). Maine et al., Ex. No. 173.

Q. For the reporter, Professor Horwitz has an additional sentence, not in the prepared testimony, which he would like to add at this point. A. In this connection, I would like to add one comment not in my prepared testimony. The report of Harrysone's trial referred to him as Runball Harrysone, Dutchman of Ipswich. It is barely possible that he was an English subject of Dutch origin, but it is more likely that he was an alien resident at Ipswich.

In addition, there still exists a document written in 1361 in which King Edward III revokes a Commission to try crimes committed on the seas. The grant of the Commission was occasioned not only by piracy but by the murder of 100 people aboard a ship going to Flanders. While the original commission gave the common law judges jurisdiction "to hear and determine according to

the law and custom of our realm diverse trespasses and felonies committed and perpetrated . . . by certain of our subjects and others, upon the sea, against certain merchants, as well English and foreign . . . ," the Commis-
163 sion was recalled because "according to the law and custom of our realm, felonies, trespasses, or injuries done upon the sea ought not to be dealt with or determined before our justices at the common law, but before our Admirals according to the maritime law . . . " Thus, it seems fairly clear that admiralty power was not limited to English nationals before 1536. 1 R.G. Marsden, Law and Custom of the Sea. pp. 84-89. Maine et al., Ex. No. 198.

There is considerable evidence in the 17th century that confirms the general power of admiralty to try foreigners for crimes within the territorial seas. A 1681 Statute of Scotland, where the Stat. of 28 Henry VIII did not apply, grants to the High Admiral jurisdiction:

". . . for the more ready and quick dispatch of justice in maritime and seafaring causes, foreign and domestic, whether civil or criminal, within this realm, and over all persons in so far as they are concerned in the same, both to natives and strangers . . . " Baker, The Office of Vice-Admiral of the Coast, p. 125, Maine et al., Ex. No. 172.

That the admiralty criminal jurisdiction in the 17th century continued to be based on a territorial conception within the narrow seas can be seen from the various writings of the great admiralty judge, Sir Leoline Jenkins (1664-1668). In "A Charge given at an Admiralty Session
164 held at Old-Baily." Jenkins underlined the identity between the land jurisdiction of common law courts and the sea jurisdiction of Admiralty. He declared:

"Therefore you must take this one general Rule along with you, that whatever is Treason, whatever is Felony . . .

whatever is Misprison, or an Abuse committed upon the Land, and is enquirable by a Jury within the Body of a County, the same Thing being committed upon the Sea, or within the Limits of this Commission, must be reputed and adjudged Treason, Felony, Misprison, Offence, Misdemeanour, Nusance, Abuse, etc. it is the same Thing it carries with it the same Guilt, it is liable to the same Degrees of Punishment, and you are bound to enquire of it, and present it." 1 Wynne, The Life of Sir Leoline Jenkins, p. xcvii. Maine et al., Ex. No. 210.

Among the papers of Sir Leoline Jenkins, we find two more instances of foreigners being tried by admiralty commissioners for criminal offenses other than piracy. In a letter to Sir Thomas Exton, which appears to have been written in 1677, Jenkins advises Exton on a charge he is about to give to a grand jury. Although the defendant's nationality is not stated, the first subject of the charge strongly indicates it involved a foreigner, for there is a
165 long discussion of punishment for not striking the flag to acknowledge the Crown's sovereignty. Of the second subject, mayhem, Jenkins writes:

"For the Mayhem, that the Admiral hath Cognisance of it, if committed upon the High Seas . . . Therefore you may give it in Charge to the Jury, to enquire of all Mayhems committed within the Jurisdiction of the Admiralty. If they find the Fact, it is my humble Opinion, that as to the Form of the Indictment, the Verdict, and whole Manner of Proceedings, it ought to be the very same as if the Indictment were preferr'd at the King's-Bench, for a Mayhem committed within the Body of the County of Middlesex. . . ." 2 Wynne, The Life of Sir Leoline Jenkins, p. 709. Maine et al., Ex. No. 211.

In a second case, Jenkins advises the Lords Commissioners of the Admiralty concerning charges to be levelled

against a Dutch captain, who had detained and robbed two English ships. There is, however, no mention of bringing piracy charges. Jenkins writes:

"As for the Way of punishing the Captain, for his Violences and Menaces of Torture and Death; as also those of his Officers, for torturing our Pilot with such barbarous and unmanly Cruelties; the regular Way is, at a Sessions of Oyer and Terminer for the Admiralty (under
166 the statute of 28 Hen. VIII.)." 2 Wynne at p. 774.

The failure to consider the issue of nationality in discussions of admiralty criminal jurisdiction continued into the 18th century as well. In 1725, the English Attorney and Solicitor-General were asked for an opinion on the power of the common law court to punish a person who from the shore of the colony of Barbadoes had fired on a ship about two miles into sea, killing one mate and wounding another. Without at all considering the question of nationality, the crown law officers wrote:

"We are of opinion, that the (person) who fired the shot cannot be tried for the death of the mate in any court of common law, but that he ought to be tried for the same either in the court of admiralty at Barbadoes, or by special commission under statute of 11th and 12th W. 3. cap. 7 (which, in effect applied the statute of 28 Hen. VIII to the English colonies) which is now the most known and usual method of proceeding in cases of felonies done upon the sea in those parts." Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, p. 525. Maine et al., Ex. No. 180.

Still another piece of evidence suggests that in the 18th century lawyers acknowledged the power of admiralty to try criminals for sea crimes without regard to nationality.
167 In 1761, the King's Advocate, Attorney and Solicitor-General delivered an opinion to the Lords Commissioners

for Trade and Plantations concerning which court had jurisdiction to try "the master, mate, and several of the crew of a privateer, charged with the murder of some men" on an English ship within New York Bay. Nowhere does the opinion even allude to the nationality of the defendants. Yet, the Crown law officers declared:

"We are of opinion, that the statute 28 Henry VIII. does extend to the case of murder committed any where on the high seas; and consequently that a commission might issue in the present case. . . ." Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, p. 526.

In conclusion, let me state that although the evidence is not overwhelming, to the extent that the majority decision in Queen v. Keyn turns on the historical scope of the admiralty criminal jurisdiction, it is probably incorrect.

Q. Apart from the question whether Queen v. Keyn was rightly or wrongly decided, is the decision inconsistent, in your opinion, with the proposition that the Crown as a matter of English law owned the seabed under the English marginal seas? A. No, my opinion is that the decision is entirely consistent with the proposition that the Crown owned the seabed under the marginal seas.

168 Keyn is a decision dealing with the sole question whether, without a statute conferring jurisdiction, the Central Criminal Court had jurisdiction to try a foreigner for a crime under English law which was committed on board a foreign ship within three miles of the English coast. The Court held that in absence of a statute, the Central Criminal Court had no jurisdiction to try a foreigner in such circumstances.

A close examination of the opinions shows that the question of criminal jurisdiction was the only question involved in the case. Furthermore, such an examination

shows that all of the judges acknowledged Crown rights in the the marginal sea, and that a majority of them considered that the marginal sea was part of the territory of England.

Judges Lindley, Denman, Grove, Amphlett, Brett and Coleridge, the six dissenters, held that there was jurisdiction in the court. Their decisions supported the existence of a territorial sea.

Lindley, J., held that there was criminal jurisdiction, noting that:

"It is laid down in English law books of the highest authority that the seas adjoining the English coast are part of the realm of England, and are subject to the dominion of the Crown. Indeed there is considerable author-
169 ity for stating that those seas are to some distance part of the property of the Crown, subject to the right of the public freely to navigate them." 2 Exch. Div. at p. 86. Maine et al., Ex. No. 160.

He stated that it is not necessary for the purposes of the case to affirm this latter proposition to its full extent and it is sufficient to show that the English criminal law extends over the seas in question. *Id.*

Lindley cited with approval Bishop's Criminal Law S. 104 (5th ed.) to the effect that "the sea adjoining the coast is within the territorial sovereignty which controls the adjacent shores." 2 Exch. Div. at p. 89. He also stated that "the weight of authority is entirely in favour of a general dominion for all purposes consistent with peaceful navigation." *Id.* at p. 90. He concluded his opinion by holding:

"(T)he waters around the coasts of England are under the protection of English law, and . . . all persons, whether English or foreign, who recklessly navigate those waters and thereby cause others to lose their lives, are punishable by the criminal law of this country." *Id.* at pp. 98-99.

Denman, J., held that there was jurisdiction on two grounds: (1) that the offense was committed on board a
170 British ship because the defendant rammed a British ship causing a death on the British ship, and (2) that a foreigner committing manslaughter in the course of navigation of a foreign ship within three miles of the coast is subject to criminal jurisdiction. *Id.* at p. 108. As to this second branch of his decision he stated that he agreed with the judgment of Sir Baliol Brett. *Id.* I will discuss Brett's opinion shortly.

Grove, J., held that there was jurisdiction in this case. He held that there is jurisdiction within the marginal sea subject to a right of passage; but that the right of passage must be "exercised, with due regard to the safety of the subjects of the nation over whose territorial waters the right is to be used." *Id.* at p. 114.

He reviewed the publicists and categorized them as follows:

"1st. Those who affirm the right in what are generally termed territorial waters to extend at least to the distance at which it can be commanded from the shore or as far as arms can protect it.

"2ndly. Those who, assigning the same origin to the right, recognized it as being fixed at a marine league of three geographical miles from the shore.

"3rdly. Those who affirm the right to be absolute
171 and the same as over an inland lake, or, allowing for the difference of the subject-matter, as over the land itself.

"4thly. Those who regard the right as qualified: And the main if not only qualification that seems to me fairly deducible from the authorities is, that there is a right of transit or passage, and as incident thereto possibly a right of anchorage when safety or convenience of navigation requires it, in the territorial waters for foreign ships." *Id.* at p. 110. He also stated:

"In addition to the authority of the publicists, this three-mile range, if not expressly recognized as an absolute boundary by international law, is yet fixed on, apparently without dispute, in Acts of Parliament, in treaties, and in judgments of courts of law in this country and America." *Id.* at p. 111.

He cited with approval the English case of Whitstable Fishers v. Gann, 11 C.B. (N.S. 337), which stated: "The soil of the seashore to the extent of three miles from the beach is vested in the Crown." 2 Exch. Div. at p. 112.

Amphlett, J.A., held that there was jurisdiction in this case. He drew the following conclusions from the opinions of "almost every accredited writer on international law who has dealt with this question of maritime territory" (*id.* at p. 122);

172 "1. That all these writers, and, as far as I can see, with complete unanimity, acknowledge the right of a maritime state to an extension of their territory over some portion of the adjacent sea.

"2. That, although there is found a great variety of opinion among these writers as to the distance to which such maritime territory should be allowed, not one of them puts such distance at less than three miles.

"3. That all the earlier writers, including Grotius, the vigorous adovcate of the free navigation of the high seas, and many of the later writers, maintained that within the zone of three miles the state had, without qualification, a proprietary, as well as a territorial, right, so that it might at its pleasure exclude foreign ships from passing along the same; but that others of the later writers contended that the state had a territorial, but not a proprietary, right over the zone, or that, at all events, the innocent use of the zone by foreign ships for the purpose of navigation could not without wrong be interfered with.

"4. That not one of the last-mentioned writers maintained that the sovereign state had no jurisdiction to
173 prevent what I may call external wrong committed by them on board a foreign vessel within the zone. Indeed the writers most relied upon for the defence, such as Ortolan and Calvo, I think, imply, if they do not say, the contrary, for while arguing against the right of the maritime state to exclude foreign ships from the zone, they all appear to me to admit in substance that they have the right to make laws of 'police and surety.' " *Id.* at pp. 122-23.

Brett, J.A., also held that there was jurisdiction. After reviewing the foreign commentators, he concludes:

"(A)ll foreign writers on international law . . . agree in asserting that, by the consent of all nations, each, which is bordered by open sea, has a right over such adjacent sea as a territorial sea, that is to say, as a part of its territory; and that they all mean thereby to assert that it follows, as a consequence of such sea being a part of its territory, that each such nation has in general the same right to legislate and to enforce its legislation over that part of the sea as it has over its land territory." *Id.* at p. 135. And he further stated that while there is some dispute among writers as to the extent of the teritorial sea, "all are agreed as to three miles." *Id.* at p. 136. He then held:

"Considering the authorities I have cited, the terms used by them, wholly inconsistent, as it seems to me, with
174 the idea that the adjacent country has no property, no dominion, no sovereignty, no territorial right; and considering the necessary foundation of the admitted rights and duties of the adjacent country as to neutrality, which have always been made to depend on a right and duty as to its territory, I am of opinion that it is proved that, by the law of nations, made by the tacit consent of substantially all nations, the open sea within three miles of the

coast is a part of the territory of the adjacent nation, as much and as completely as if it were land a part of the territory of such nation." *Id.* at p. 143. He said that this is subject to the right of free navigation of all nations, if such navigation is with an innocent or harmless intent or purpose. But such right of free navigation, he said,
"by no means derogates from the sovereign authority over all its territory of the state which has agreed to grant this liberty, or easement, or right to all the world." *Id.* at p. 144.

Lord Coleridge, C.J., held that there was jurisdiction in the case. He declared,
"I think the offence was committed within the realm of England; and if so, there was jurisdiction to try it." *Id.* at p. 152.

175 The offense was committed within three miles of the low-water mark and, therefore, he said, upon English territory. *Id.*

He stated that Brett and Lindley
"have shewn that by a consensus of writers, without one single authority to the contrary, some portion of the coast waters of a country is considered for some purposes to belong to the country the coasts of which they wash." *Id.* at p. 153. He noted that Lord Coke, Lord Stowell, Dr. Lushington, Lord Hatherley, L.C., Erle, C.G., and Lord Wensleydale had squarely held that
"the realm of England, the territory of England, the property of the State and Crown of England over the water and the land beneath it, extends at least so far beyond the line of low water on the English coast as to include the place where this offence was committed." *Id.* at p. 155.

I have just examined the opinions of the six dissenters who held that there was jurisdiction in the case. Their opinions show that they believed that there was a territorial sea of at least three miles in width.

I will now examine the judgments of the seven Judges who held that there was no jurisdiction – Bramwell, Lush, Phillimore, Kelly, Cockburn, Pollock and Field.

Two of these, Bramwell and Lush, seem clearly not to
176 have based their conclusions on a denial of the conception of a territorial sea.

Bramwell was of the opinion that since there was great uncertainty on the question of the historical bounds of England's sea criminal jurisdiction, the decision ought to be left to Parliament. He appears to have reached his decision on the very narrow ground that all ambiguity in a criminal statute should be resolved against the State. If the law were clear, he wrote,

"we ought to declare it, regardless of consequences. But if it is a measuring cast which opinion is right, I think we ought to leave it to the legislature, and not make a law ourselves with imperfect powers. On the ground, then, that no such jurisdiction as now claimed has ever been claimed before, I hold that none exist." 2 Exch. Div. at p. 150.

There is nothing in Bramwell's opinion that even remotely suggests that he deduced this conclusion from a denial of a conception of a territorial sea, let alone that he believed the Crown had no rights in marginal waters.

Lush affirmatively believed that there was clearly a conception of territorial water in international law. He wrote:

"I think that usage and the common consent of nations,
177 which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt

of sea is under the exclusive dominion of the State." 2 Exch. Div. at pp. 238-39.

However, Lush seemed also to believe that it was beyond the historical function of the common law to define the extent of the State's sea dominion. He wrote: "(T)he dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II. the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is
178 out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament." 2 Exch. Div. at p. 239.

Thus, the opinions of both Bramwell and Lush clearly recognize that Parliament has power over the territorial sea. Both voted to dismiss the indictment because of their view that the court lacked jurisdiction in the narrow, technical sense of that term. More significantly, neither opinion is ultimately grounded upon a rejection of the historical conception of Crown rights over the marginal sea, and at least Lush expressly recognized the existence

of those rights. The result is that there was a clear majority of the Court which recognized a territorial conception of the sea.

There is language in the judgments of the remaining five judges that does deny a fully territorial conception of the marginal sea. There are reasons, however, for doubting the force of some of this general language. (Such language
179 is in any event pure dictum with respect to Crown proprietary rights, since they were in no way involved in the case.)

For example, at least four of these five judges believed that Parliament had the power to impose criminal jurisdiction on foreigners for acts committed in the marginal sea. Sir Alexander Cockburn's opinion, in which Pollock and Field concurred, explicitly stated that Parliament could confer such jurisdiction. 2 Exch. Div. at p. 231. Phillimore appears to have agreed. *Id.* at pp. 68, 83-86. Kelly said nothing on this point.

Further, Sir R. Phillimore expressly recognized important Crown rights in the marginal sea. In answer to his own question, "Is a state entitled to any extension of dominion beyond low-water mark?" (*Id.* at p. 71), he replied:

"(T)he answer may be given without doubt or hesitation, namely, that a state is entitled to a certain extension of territory, in a certain sense of that word, beyond low-water mark." *Id.*

Later, he amplified this view:

"The consensus of civilised independent states has recognised a maritime extension of frontier to the distance of three miles from low-water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent state.

180 "It is for the attainment of these particular objects that a dominium has been granted over this portion of the high seas." *Id.* at p. 81.

He then stated that the state does not, however, have all the same rights of jurisdiction and property over this belt of sea as it has over land; the state has the right to refuse passage to foreigners over its territory by land but does not have the same right to prevent the passage of foreign ships over the marginal portion of the high seas. The defense and security of the state do not, he stated, warrant the exclusion of peaceable foreign vessels from passing over these waters, and the custom and usage of nations has not sanctioned it. *Id.* at pp. 81-82.

Thus Phillimore did not, even by way of dictum, say anything inconsistent with recognition of some Crown proprietary rights in the marginal sea; he said only that the Crown's rights are founded on defense and security and that they are different from Crown rights on land in that they are limited by, at least, the right of passage of foreign ships.

Kelly, C.B., held that there was no jurisdiction in the case. He stated that he agreed substantially with the opin-
181 ions of both Cockburn and Phillimore. He also said that he had participated in the preparation of the opinion of Phillimore and that Phillimore's judgment could be taken to be "his judgment and my own." *Id.* at p. 151. Kelly, therefore, held, along with Phillimore, that while there are some acknowledged Crown rights in the territorial or marginal sea, those rights are subject to the right of free passage.

Kelly's opinion shows that he limited his holding to the nonexistence of criminal jurisdiction over foreign ships and based the holding on the right of free passage: "(I)nasmuch as it cannot be disputed, that the high seas, that is to say, all the whole seas of the world below low-water mark, are open to the whole world, and that the ships of every nation are free to navigate them, I hold that no one nation has the right to exercise criminal

jurisdiction over the ships of other nations, or the subjects of other nations within such ships, navigating the high seas, that is, passing through the high seas (without casting anchor or stopping) between one foreign port and another, unless by treaty, or express agreement, or unless by some uniform, general, and long-continued usage, evidenced by the actual exercise of such jurisdiction acquiesced in by the nation or nations affected by it." *Id.* at p. 151.

182 Kelly acknowledged a jurisdiction for some purposes, other than criminal jurisdiction over foreigners on foreign ships, within the territorial sea:

"The limited jurisdiction exercised within three miles, or some other space or distance, for some purposes has been established and sanctioned by a long-continued actual exercise of it by the one nation, acquiesced in by all others against or in respect of whom it has been claimed. But the right to seize and try in England for an offence committed on the high seas by a foreign commander of a foreign vessel on a foreign voyage, can, in my opinion, no more exist than the right to seize and try in England any foreigner for an act done in his own country, a foreign territory, which act may happen to constitute a criminal offence by the law of England." *Id.*

Cockburn, C.J., held that there was no jurisdiction in the case. Analysis of this opinion shows that Cockburn did not hold that there were no Crown rights in the marginal sea. It is true that Cockburn based his holding in part on the conclusion that the marginal sea was not within the realm in the sense of full territorial sovereignty – just as, I might remark in passing, the modern view of rights in the continental shelf does not involve full territorial sovereignty. However, Cockburn's opinion acknowledges the existence of Crown rights in the mar-

183 ginal sea for purposes other than criminal jurisdiction over

foreigners on foreign vessels. He made it clear that the case involved only the question of criminal jurisdiction over foreigners on foreign ships in the marginal sea in the absence of a statute, and not the question of dominion over the marginal sea for other purposes:

"This unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local state, may go far to shew that, by the concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to shew that, in the absence of such legislation, the ordinary law of the local state will extend over the waters in question – which is the point which we have to determine." *Id.* at p. 193.

Much of the evidence cited by Cockburn establishes the existence of Crown rights and was distinguished by him merely on the grounds that it was not evidence specifically for criminal jurisdiction in the particular circumstances of this case. For example, in reference to legislation dealing with foreign shipping, he stated:

"(I)t is undoubtedly a strong assertion of dominion over foreign ships, and is a striking instance of the adoption of the three-mile principle. It may, however, be doubted
184 whether the enactment would apply to a ship on a foreign voyage." *Id.* at p. 218.

He acknowledged the statement of Dr. Lushington in The Leda, Sw. Adm. 42, that "the limits of the United Kingdom (are) the land of the United Kingdom and three miles from the shore." And he distinguished it on the following grounds:

"We have here to a certain extent a judicial recognition of the three-mile principle, but the decision had not, it should be observed, any reference at all to foreign ships." 2 Exch. Div. at p. 223.

He distinguished the case of General Iron Screw Colliery Co. v. Schurmanns, 1 J.&H. 180, on similar grounds:

"There is here, no doubt, a clear recognition of the three-mile principle for certain purposes; but, as in the preceding case, the foreigner was seeking redress by the application of the local law. . . . (T)he language of the learned Vice-Chancellor is certainly very far from saying that the sea in question, without the intervention of the legislature, is to be taken to be the territory of the local state for all pruposes whatsoever, so that, independently of legislation, the local law will apply universally within it." 2 Exch. Div. at pp. 224-25.

Similarly, he acknowledged the statement of Erle, C.J.,
185 in Whitstable Fishers v. Gann, 11 C.B. (N.S.) 387, that " '(t)he soil of the sea-shore to the extent of three miles from the beach is vested in the Crown. . . .' " 2 Exch. Div. at p. 228. He then cited The Saxonia, 1 Lush. Adm. 310, which, he said, involved a collision occurring in the Solvent within 3 miles of the shore. The Judicial Committee of the Privy Council, he said, held that, as foreign ships had the right of navigating through this water, such a ship passing through it was not affected by the rules as to navigation established by the Merchant Shipping Act. He then said:

"This case is a very strong authority for the position that a foreign vessel having a right of passage within 3 miles of the shore, and not being bound to a British port, cannot be held liable under the local law by an English Court." 2 Exch. Div. at p. 228.

The use of *The Saxonia* to distinguish Whitstable Fishers shows that Cockburn was deciding only the narrow question of jurisdiction over foreigners on foreign vessels in territorial waters and, further that he based that decision largely on the existence of the right of free navigation over such waters, a right which does not deny the rights of the coastal state within such waters for other purposes.

Cockburn indicated that the prior judicial decisions he
186 had discussed had no relevance because of the very narrow question presented:

"One common observation arises on all these decisions, though, perhaps, not on all these dicta. They all arise on the construction of Acts of Parliament. In no instance has the judge been called upon to decide how far without legislation the law of this country can be applied to foreigners on the littoral sea, which is the question we are called upon to decide. They are, therefore, but of little avail to the decision of this question." *Id.* at p. 229.

He similarly dismissed learned writers on the marginal sea on the grounds that they were not dealing with the jurisdictional question involved here:

"None of these writers, it should be noted, discuss the question, or go the length of asserting that a foreigner in a foreign ship, using the waters in question for the purpose of navigation solely, on its way to another country, is liable to the criminal law of the adjoining country for an offence committed on board." *Id.* at p. 192.

* * * * *

187 The writers cited by Cockburn provide persuasive evidence of the existence of extensive rights of the coastal state in the marginal sea. To give just one example, Cockburn characterizes the writing of the publicist M. Hautefeuille in terms which are strikingly similar to modern concepts of the Continental Shelf:

". . . M. Hautefeuille argues that the products of the sea are not inexhaustible, and that the pursuit of them requires to be kept under proper regulation; while the people in possession of the shore are deeply interested in possessing the adjoining waters also, in order to protect themselves against pirates. Hence the distinction

between these waters and the open sea; hence the former may be possessed and considered as an accessory to the shores they wash." *Id.* at p. 184.

Cockburn summarized the authorities, acknowledged their persuasiveness for some purposes and distinguished them on the ground that they did not go as far as to
188 give criminal jurisdiction in the case at bar:

"Taken together, decisions and dicta no doubt shew that the views and opinions of the foreign jurists as to a territorial sea have been received with favour by eminent judicial authorities of this country, and that the doctrine respecting it has been admitted in the construction of statutory enactments; but none of them go the length of establishing, or even suggesting, that, independently of statute, the criminal law of England is applicable to the foreigner navigating those waters." *Id.* at p. 229.

Cockburn further acknowledged several instances in which "the legislature has applied the principles of three-mile jurisdiction." *Id.* at p. 219. He distinguished them by noting that, with the exception of the penalties imposed for violation of neutral duties or for breaches of the revenue and fishery laws, there had been "no assertion of legislative authority in the general application of the penal law to foreigners within the three-mile zone." *Id.* He indicated that a court should not make the whole penal law applicable to foreign vessels within three miles of the coasts, when the legislature has failed to do so. *Id.*

It is true that Cockburn spoke of "vain and extravagant pretentions" as to certain rights in the sea which "have
189 long since given way to the influence of reason and common sense." *Id.* at p. 175. These pretentions to which he referred, however, were, *e.g.*, the claim of England "to maintain the freedom and security of navigation all the world over," the claim of Venice to the Adriatic, of Genoa to the Ligurian Sea, and of the Portuguese "to

bar the ocean route to India and the Indian Seas to the rest of the world." *Id.* at pp. 174-75. He went on to state that there is no longer such broad jurisdiction, particularly over foreigners. *Id.* at p. 175.

I now turn to Cockburn's treatment of the Act of Parliament of 21 & 22 Vict. c. 109 ("The Cornwall Submarine Mines Act") (1858). 2 Exch. Div. at pp. 199-202. Maine et al., Ex. No. 166. This Act confirmed the arbitration award in a dispute between the Crown and the Duchy of Cornwall concerning the right to minerals, first, between high and low-water mark, and second, below low-water mark. Maine et al., Exs. Nos. 167, 169. The award of Sir John Patteson, the arbitrator, decided, first, that the Duchy was entitled to minerals between high and low-water mark and second that "the right to the minerals below low-water mark remains, and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark, and extended below it." Maine et al., Ex. No. 168. The Act of 21 & 22 Vict. c. 109 confirmed this arbitration award. Concerning the
190 rights to minerals below low-water mark, the Act recited: "All Mines and Minerals lying below Low-water Mark under the open Sea, adjacent to but not being Part of the County of *Cornwall,* are, as between the Queen's Majesty in right of Her Crown on the one hand, and His Royal Highness *Albert Edward* Prince of *Wales* and Duke of Cornwall in right of His Duchy of *Cornwall* on the other hand, vested in Her Majesty the Queen in right of Her Crown as Part of the Soil and territorial Possessions of the Crown."

Cockburn attempted to limit the force of this parliamentary recognition of the Crown's ownership of the seabed and, with all respect, I believe he is completely unconvincing. Taken in the context of centuries of English law and practice recognizing the Crown's ownership of the

seabed, his expression of surprise at this parliamentary result is very difficult to understand.

While Cockburn does thus seem to deny Crown rights of property in the seabed of the marginal sea, his statements on that question are clearly dicta. Cockburn's view that full territorial sovereignty did not extend to the marginal sea was probably crucial to his decision on the narrow issue of criminal jurisdiction which was before the Court. But his views on the question of Crown property rights in the seabed were plainly not crucial to
191 that decision.

Pollock, J., and Field J., concurred without opinon in Cockburn's judgment. *Id.* at p. 239.

From this examination of the opinions in Queen v. Keyn, it is clear, I believe that the decision, to the extent to which it deals with the existence of Crown rights in adjacent waters as distinguished from the criminal jurisdiction of English courts over foreigners on those waters, supports the existence of such Crown rights, including proprietary rights in the seabed under such waters.

I would like to point to just two important pieces of evidence which were never alluded to in *Queen v. Keyn* and which might well have changed the result. In 1848, under Customs Regulations, the limits of the Port of Dover were declared to extend three miles out to sea. This would have included the area in which the collision in *Keyn* took place. This fact alone, it would seem, should have been determinative of the result in the case. Furthermore, in 1833 the Select Committee on British Channel Fisheries stated that it understood that "one league from the shore at sea is considered to be the territory of the adjoining country." Parl. Pap. vol. 14, No. 676, p. 59 (1833).

BY MR. CLAGETT:

192 Q. How have Parliament and the English courts treated the decision in *Queen v. Keyn*? A. The narrowness of the decision in *Keyn* is made clear from later cases. *Harris v. The Hamburg-Amerikanische Packetfahrt Actiengesellschaft,* 2 C.P.D. 173 (1877). Maine Ex. 161, deals with the same accident as that involved in *Keyn*. Lord Coleridge, C.J., Grove, J., and Denman, J., who were on the court which decided *Keyn*, interpreted that case as dealing with jurisdiction of the court. Although Lord Coleridge said in colloquy that the majority of the judges in *Keyn* were of the opinion "that the territory of England stopped at low-water mark," *Id.* at 177, he immediately thereafter stated in the text of his opinion that the *ratio decidendi* of *Keyn* is that

"*for the purpose of jurisdiction* (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark." *Id.* Grove, J., said "I am of the same opinion." Denman, J., said:

"The case of *Reg. v. Keyn* clearly goes the length of holding that, for all purposes, apart from any express statutory provision, the moment you get *beyond low-water mark you get beyond the jurisdiction within which the Queen's writs run.*" *Id.* at p. 178.

193 Two years after *Queen v. Keyn* was decided, Parliament repudiated that decision by enacting the Territorial Waters Jurisdiction Act, 41 & 42 Vict. c. 73 (1878). Maine et al., Ex. No. 170.

The Preamble declares;

"Whereas the rightful jurisdiction of Her Majesty her heirs and successors, *extends and has always extended* over the open seas adjacent to the coasts of the United

Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions. . . ."

Section 2 declares:

"An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

Section 7 declares in part that:

"for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured
194 from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions. . . ."

It is apparent from the Territorial Waters Jurisdiction Act that Parliament did believe there had always existed territorial waters below low-water mark. The fundamental point of Cockburn's analysis in *Queen v. Keyn, supra,* was that there could be no such jurisdiction exercised over foreigners "consistently with legal principle," *Id.* at p. 169, unless such jurisdiction were exercised within English territory. But the Act expressly states that the Crown's jurisdiction "extends and has always extended" over the territorial sea. In short, the highest authority in England, Parliament, overruled the decision of the Exchequer Division.

Professor John Bassett Moore has stated of the Territorial Waters Jurisdiction Act:

". . . the government and Parliament of Great Britain, after the decision in *Queen v. Keyn*, considered it imperative to adopt legislation nullifying its effect for the future,

besides declaring it wrong as to the past." 7 *The Collected Papers of John Bassett Moore* p. 294.

English courts since that time have frequently reaffirmed the classical position that the Crown owns the soil under the marginal sea.

195 In Lord Fitzhardinge v. Purcell, 2 Ch. 139, 166-67 (1908), Maine et al., Ex. No. 164, Mr. Justice Parker gave this summary of the common law position: "Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and a fortiori the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of "incrementa maris" seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Carta, operate to the detriment of the public right
196 of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject

in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

The Judicial Committee of the Privy Council has also affirmed the Crown's common law right to property below low-water mark and in 1916 applied it to Indian territorial waters. *Secretary of State for India v. Chelikani Rama Rao,* L.R. 43 Indian Appeals 192 (1916) Maine et al., Exhibit No. 165. The Judicial Committee expressly followed the views enunciated by Lord Hale in the 17th century and expressly rejected the contrary dictum of Sir Alexander Cockburn in *Queen v. Keyn* as against principle. It wrote:

"It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a res nullius. As to practical results: The confusion that might be produced by leaving islands, emergent with-
197 in the three-mile limit, to be seized by the first comer is clear beyond controversy." *Id.* at pp. 201-02.

It further emphasized the fact that *Keyn* was a decision on admiralty jurisdiction, and not a decision as to rights over the seabed:

"It should not be forgotten that (*Reg. v. Keyn, supra*) had reference on its merits solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.

"When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound." *Id.* at p. 199.

Two Scottish cases decided at the end of the 19th century also reject the dictum of Sir Alexander Cockburn in *Queen v. Keyn.* In *Lord Advocate v. Clyde Navigation Trustees*, 19 Rettie p. 174 (1891), Maine et al., Ex. No.
198 162, the judge, Lord Kyllachy, stated:
"Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing?

"I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent extra *commercium*; but none the less is it, in my opinion, a proprietary right – a right which may be the subject of trespass, and which may be vindicated like other rights of property." *Id.* at p. 177.

In the second Scottish case, *Lord Advocate v. Wemyss,* A.C. 48 (1900), Maine et al., Ex. No. 163, concerned with submarine mineral deposits, Lord Watson declared:

"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 be-
199 neath it, are vested in the Crown." *Id.* at p. 66.

Q. Perhaps at this point it would be useful if you were briefly to summarize your conclusions as to the

holding in *Queen v. Keyn* and its significance with respect to the question with which we are here concerned, namely, whether the Crown owned the marginal sea in the 17th and 18th centuries. A. I would summarize my conclusions as follows:

1. Plainly, the only issue in the case was whether English criminal courts had jurisdiction, in the absence of statute, over crimes committed by foreigners within three miles of the English coast. On that issue the court held by a vote of 7 to 6 that there was no such jurisdiction. I believe, for the reasons I have stated, that this holding was probably incorrect. At most, on the specific issue it decided, *Queen v. Keyn* represents the law of England only for a brief period in the late 19th century, not in the 17th and 18th centuries. And as we have seen, the decision was promptly repudiated and overruled by Parliament.

2. The holding that there was no criminal jurisdiction over foreigners in the absence of statute neither required, involved nor implied a decision or a belief contrary to the existence of Crown rights, including property rights, in the marginal sea. In fact, the opinions taken as a whole
200 strongly support the existence of such rights. A clear majority of the court – the six dissenters plus Lush – expressly held that the marginal sea out to at least three miles constituted territorial waters and a part of the territory of England. Five of the other six judgments all recognized the existence of some Crown rights in the marginal seas; the remaining opinion, that of Bramwell, simply did not address the question. Moreover, it was repeatedly recognized in both the opinions of those who held there was jurisdiction and those who held there was not that in the past England had made very wide claims to ownership and sovereignty over what were sometimes called the

"narrow seas." See, *e.g.*, p. 70 (Phillimore), p. 109 (Grove), p. 119 (Amphlett), pp. 174-78, 195-96 (Cockburn). Thus it was recognized that in the crucial period for our purposes, the 17th and 18th centuries, the law of England was that the Crown had very broad rights in the marginal sea, and that the law of England had changed in the 19th century in the direction of limiting those rights. Cockburn recognized that broad claims of sovereignty were made as late as the reign of Charles II (p. 174). There is nothing in any of the opinions which indicates that the broad claims asserted as law in the 17th and 18th centuries had been limited prior to the period in
201 which the American colonies became independent.

3. Several of the opinions recognized that the existence of property rights of the Crown in the seabed, as distinguished from criminal jurisdiction over foreigners, was not at issue in the case and that there was no need to decide it. See p. 86 (Lindley), p. 109 (Grove); *cf.* p. 134 (Brett). It is true that dicta in Cockburn's opinion are adverse to such property rights, but that opinion represented the views of only 3 of 13 members of the court, and in any event the dicta in question were plainly unnecessary to the holding. The decision, therefore, cannot be said to be adverse to the existence of such property rights, even as a matter of 19th-century law, let alone as a matter of the law of the 17th and 18th centuries. Especially as to that earlier period, as I have indicated, the opinions recognize that the Crown had such rights of property.

4. The holding in the case – that the English criminal courts had no jurisdiction in the marginal sea over foreigners in the absence of statute – was based on considerations which have nothing to do with property rights in the Crown and which are not at all inconsistent with

recognition of such rights. The principal reason for rejecting criminal jurisdiction relied on by most of the opinions
202 which held there was no jurisdiction was that it was thought to be inconsistent with the right of innocent passage of foreign ships through territorial waters, particularly in the absence of a statute explicitly warning foreigners that the courts of England would assert such jurisdiction. Whether or not the majority judges were correct in believing that criminal jurisdiction over foreigners is inconsistent with the right of inoncent passage, that issue plainly has nothing to do with Crown ownership of the subsea resources of the marginal seas. Such ownership could not be said to be in any way inconsistent with the right of innocent passage.

Q. Are you familiar with the Australian case of *Bonser v. La Macchia,* 43 Austl.L. J. Rep. 411 (1969), and the Canadian case, *Re Off-Shore Mineral Rights of British Columbia,* (1967) Canada L. Rep. 792, 65 D.L.R.2d 353? U.S. Exhibits 18, 34. A. Yes, I am.

Q. In your opinion, are these cases inconsistent with the opinion you have stated as to the English law of the 17th and 18th centuries? A. No, it is my opinion that they are not. Both cases are similar to the present case to the extent that they involve, in the Canadian case, a dispute between state and national governments over which government owns off-shore mineral rights and, in the
203 Australian case, a dispute over the power to regulate offshore fisheries. Both cases do deny the claims of the states. Yet clearly the Australian case, and perhaps the Canadian case, were ultimately decided on a theory of the special juridical relationship between the individual states there involved and the Crown before these states became part of a sovereign national government. The essential ratio decidendi of neither case turns on a rejection of a conception of Crown rights in the marginal sea.

Of the five judges of the Australian High Court who decided the case of *Bonser v. La Macchia,* two, McTiernan, J., and Owen, J., never mentioned *Queen v. Keyn* in their opinions. A third, Kitto, J., believed it was not good authority. "(T)he view for which *Reg. v. Keyn* is cited," he declared, "cannot be regarded as established." 43 Austl. L.J. Rep. at p. 285.

The two remaining judges, Barwick, C.J., and Windeyer, J., referred favorably to *Queen v. Keyn,* but neither, I hope to show in a moment, ultimately based his decision on the view that English or Australian territory stops at the water's edge or that the English Crown had no property rights in the seabed.

Although Barwick does appear to agree with *Queen v. Keyn,* it is clear from his very superficial treatment of that
204 case that he did not rest his decision on its holding. For immediately after his short reference to the English case, he stated:

"But whatever the correct view as to the dominion of the bed of the sea under territorial waters, the question remains whether that area, whether of water or subjacent land, was vested in a colony as part of the territory of the colony." *Id.* at p. 278.

And Barwick proceeded to hold that the Crown never vested ownership of the seabed in the Australian states before Australia itself became sovereign.

That Barwick did not follow *Queen v. Keyn* can be seen also in his ambiguous treatment of the effect of the Territorial Waters Jurisdiction Act on the question. While he suggested that Parliament "was intending in passing (the Act) to take advantage of international comity, rather than to assert and implement a territorial claim to the bed of the sea," *Id.* at p. 279 – a spurious interpretation of the words of the Act, I believe, as I have indicated

above – he conspicuously refused to rest his decision on that interpretation. Barwick wrote:

"But, if contrary to my own impression, the Territorial Waters Jurisdiction Act (*supra*) was based upon a
205 claim to territorial ownership of the seabed below the territorial waters the claim was one made by and for the benefit of the Imperial Crown." *Id.* at p. 279.

Barwick made clear that his decision turned on the particular experience of the Australian colonies, which were not granted territorial rights over the territorial sea or seabed:

"The instruments setting up the (Australian) colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters." *Id.* at 278.

Barwick further pointed out that the Australian colonies were never sovereign. *Id.*

In short, Barwick returned to the *ratio decidendi* of the Australian High Court's decision that I suggested earlier: that the Crown never granted its territorial sovereignty or proprietary rights to the individual Australian states.

A similar process of reasoning is evident in the opinion of Windeyer, J. Though he appears to agree with the views of Sir Alexander Cockburn in *Queen v. Keyn,* Windeyer candidly recognized that the Territorial Waters Jurisdiction Act reversed that decision. "It was a case," he observed,
206 "in which . . . 'the voices of infallibility by a narrow majority' stated the law of England in a way which Parliament very promptly corrected." *Id.* at p. 292.

Ultimately, Windeyer's opinion turns on his view that the Territorial Waters Jurisdiction Act did not confer the Crown's sovereignty over territorial waters, or proprietary rights in the seabed, upon individual Australian states. He wrote:

"I reject altogether the proposition that the Colony or State of New South Wales has or ever had in any strict sense dominion over the adjacent sea which was, within the statutory description in the *Territorial Waters Jurisdiction Act,* territorial waters of Her Majesty's dominions. Sovereign rights in respect of these waters resided in the Imperial Crown." 43 Austl. L.J. Rep. at p. 294.

Windeyer made it clear that the decision in *Bonser v. La Macchia* did not present the issue of proprietary rights and interests in the bed of the sea:

"Now, notwithstanding the obvious physical relationship, and the generally assumed legal relationship, between ocean waters and the earth beneath them, I think that what are Australian waters for the purpose of the Commonwealth power over fisheries can be decided without any
207 final pronouncement concerning proprietary rights and interests in any part of the bed of the ocean, whether the continental shelf or some narrower belt from the land." *Id.* at p. 291.

I note also that Windeyer warned that there should not be a false analogy between the experience of the American and Australian States:

". . . nothing is added to political stature by a false description, which is perhaps the result of a supposed analogy, obviously fallacious in law and in historical fact, with the States of the United States of America." *Id.* at p. 294.

In sum, I believe all of the opinions in *Bonser v. La Macchia* are consistent with the classical common law conception of crown proprietary rights in the seabed.

The Canadian opinion, *Re Off-Shore Mineral Rights of British Columbia,* does contain the statement that "the majority opinion" in *Keyn* held that "the territory of England ends at low-water mark." 65 D.L.R.2d at p. 364. The Court so stated in spite of the facts that there was

no single "majority opinion" in *Keyn*, and of the 13 judgments rendered a clear majority – the 6 dissenters plus Lush – expressly rejected the view that the territory of England ends at low-water mark. Only Cockburn and the two judges who concurred in his opinion expressed
208 that view, and as has been seen, even they recognized some Crown rights in the marginal sea. The Canadian court's remark quoted above follows immediately after the court set out the opinion of Lush, J., in full, including Lush's statement that territorial waters are "British territory, as being under the exclusive dominion of Great Britain," but that they were "out of the realm" for purposes of criminal jurisdiction. Since the Court singled out Lush's opinion for approbation, it appears that either the Court failed to grasp the distinction Lush was making, or else its own opinion was not intended to be inconsistent with the Crown's "dominion" which Lush recognized.

Taken as a whole, the Canadian opinion is unclear as to whether it represents a misreading of *Queen v. Keyn* as holding that the Crown had no property rights in the marginal sea – which *Keyn* certainly did not hold – or whether the fundamental reason for the decision was that, even though the Crown may have had such rights, it had never transferred them to British Columbia. There is much in the opinion to support the view that the Court's conclusion was based on the particular history of British Columbia. The Court pointed out that it was not until 1849 that a civil Government was established by the Queen for the Colony of Vancouver Island, the predeces-
209 sor of British Columbia. 65 D.L.R.2d at p. 357. The Act of August 2, 1858, "to provide for the Government of British Columbia" defined the Western boundary of the mainland Colony of British Columbia as "the Pacific Ocean." *Id.* Parliament in an 1863 Act "to define the

boundaries of the Colony of British Columbia" defined the western boundary of the Colony as "the Pacific Ocean." *Id.* at pp. 357-58. The Act of 1866 for the union of Vancouver Island with the Colony of British Columbia defined the western boundary of British Columbia in the same way. *Id.* at p. 358. No changes in the boundaries took place at the time of Confederation. *Id.*

It is my understanding that evidence will be presented relating to the American colonies which will show specific delegations of power over the marginal sea and seabed in charters to the civil governments of those colonies. If so, then this history is materially different from the historical record of British Columbia relied on by the Canadian Court – which history, it said, did not reveal any grant to British Columbia of "rights to which the British crown was entitled under international law." *Id.* at p. 367.

The Canadian Court supported its conclusion by noting legislation which is inconsistent with a theory that in 1878 British Columbia possessed as part of its territory the solum of the marginal sea, *e.g.*, the Territorial Waters
210 Jurisdiction Act, which would have applied the law of England, not Canada, to a crime committed within a league of the coast of British Columbia; and early Canadian legislation such as "An Act respecting the Customs" (1867) which deals with vessels "hovering (in British waters) within one league of the coasts or shores of Canada," and "An Act respecting fishing by foreign vessels" (1868) which empowers the Governor to grant licenses to foreign vessels to fish "in British waters, within three marine miles of any of the coasts, bays, creeks or harbours whatever, of Canada." *Id.* at p. 365. This evidence, of course, has no application to the experience of the American colonies.

The Court acknowledged that the Territorial Waters Jurisdiction Act recognized a territorial sea. "(I)ts effect," the Court stated, "was that the United Kingdom clearly claimed jurisdiction over a territorial sea in respect of the Dominion of Canada." 65 D.L.R.2d at p. 374. Nevertheless, the Court held:

". . . we are of the opinion that the territorial sea lay outside the limits of the Colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. We are also of the opinion that British Columbia did not acquire jurisdiction over
211 the territorial sea following union with Canada. *Id.* at p. 373.

Finally, the Court remarked:

"We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the Colony rights to which the British crown was entitled under international law but the historical record of the Colony does not disclose such action." *Id.* at p. 367.

In short, neither the Australian nor the Canadian case is necessarily inconsistent with the view that there was a marginal sea in which the Crown was vested with both sovereign and proprietary rights. Both cases, however, held that such rights never passed to the individual states but only to Canada and Australia when they themselves became sovereign.

The last aspect of the question is beyond the scope of my research and hence I do not have an opinion on whether there are differences between America on the one hand, and Australia and Canada, on the other, that would justify a different conclusion.

I understand that at a later point there will be expert testimony addressed precisely to this issue of whether

there is historical evidence for the proposition that the
212 Crown's ownership of the seabed passed from the Crown to the respective American colonies or states.

I note that, just as *Keyn* was a decision establishing the law in the nineteenth century, so too the relevant period under discussion in the Canadian and Australian decisions was the nineteenth century. They do not, therefore, have application to the period of American history relevant to the case at bar.

* * * * *

Q. Let us now return once again to the original question concerning English law and practice in the 17th and 18th centuries. Apart from the treatise literature, is there other evidence in this period to show that the Crown exercised ownership over the seabed? A. I referred earlier to the great controversy over fishing rights during the 17th century. In passing, I tried to show the extent to which English kings well before the 17th century
213 claimed ownership over fisheries and the right to license foreigners in the King's seas. Now, let me refer in a more systematic fashion to the most important of the numerous documents during the 17th century that firmly established the conception of a territorial sea in English law.

The single most important and influential official pronouncement during the 17th century asserting the English Crown's sovereignty over the sea is the Proclamation of James I on May 6, 1609. Maine et al., Ex. No. 221.

The Proclamation recited that no foreigners "be permitted to fish upon any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adiacent, where most usually heretofore any fishing hath bene . . ." unless they first received a license from the English authorities.

It is not too much to say, I think, that this Proclamation formed the foundation of English legal policy towards the sovereignty of the seas during the 17th and 18th centuries. And as I indicated previously, foreign nations – even the Dutch, at whom it was principally aimed – largely acquiesced in the licensing scheme enunciated in the Proclamation.

The next important royal pronouncement is that of
214 Charles I in 1636, "A Proclamation for restraint of Fishing upon His Maiesties Seas and Coasts without Licence." Maine et al., Ex. No. 222.

The Proclamation recited the earlier statement of James I, noting that the Crown had "expected a voluntary conformity" to James' licensing provisions. But since under that voluntary scheme, "all the inconveniences which occasioned that (1609) proclamation, are rather increased than abated," it was necessary

"to renew the aforesaid restraint of fishing upon our aforesaid Coasts and Seas, without licence first obtained from us. . . ."

Moreover, the King resolved

"to keepe such a competent strength of Shipping upon Our Seas, as may (By Gods blessing) be sufficient . . . to hinder such further encroachments upon Our Regalities. . . ."

There is considerable evidence that the two Proclamations became the basis of English law and practice during the 17th and 18th centuries. For example, in a 1635-36 Report by the Lords of Admiralty to the King on the question of whether the Crown could license Dutch fishermen, it was stated:

". . . they were all of opinion that the right and royalty of fishing upon his Majesty's coasts belongs to him by in-
215 heritance, so that he may justly prohibit or license strangers. . . . Are of the opinion that it should be intimated

to the Minister of the United Provinces residing here that the King is resolved to defend those fishings in the same manner as the hereditary right of any other of his dominions. . . . " S.P. Dom., Car. I., CCCXIII, 210 (1635-36), Maine et al., Ex. No. 223.

Another important document [–here, again, the manuscript is the source–] "Propositions for Fishing" (1633), by Secretary of State Sir John Coke begins:
"The greatnesse & glorie of this Kingdom of great Brittaine consisteth not so much in the extent of his Mte. (Majesty's) territories by Land as in the soveraintie and command of the seas." S.P. Dom., Car. I., CCXXIX (1633) (original manuscript). Maine et al., Ex. No. 184.
The document assumes the Crown's undisputed right to exclude foreigners from fishing, urging the King that the Dutch "be brought to pay his Majesty his ancient rights; and to acknowledge his Majesty's sovereignty. . . . "

Let me again emphasize that there are dozens more documents in the period after the Charles I Proclamation of 1636 which base Crown rights to exclude fishermen on a theory of Crown ownership of the territorial sea.

It is interesting that later during the Civil War, Com-
216 monwealth and Protectorate period (1642-1660), there were many official warnings to preserve "the ancient and indubitable" dominion of the sea. S.P. Dom. Commonwealth, 1649-50, pp. 484-85, Maine et al., Ex. No. 224. At the end of the English Civil War, Professor Elder tells us, "Cromwell . . . had scarcely commenced to rule before . . . he gave . . . orders (to naval officers) 'to guard the North Sea and mackarel fisheries,' and 'to maintain the sovereignty of the commonwealth in the seas.' " Elder, *The Royal Fishery Companies of the Seventeenth Century*, p. 85.

Between 1667 and 1684, Charles II delivered a series

of neutrality proclamations. The preamble to the Proclamation of March 12, 1683/4, begins:

"Whereas the safeguard and protection We owe to such of Our own Subjects, and to all others in League and Amity with Us, as pass and repass the Seas belonging to these Our Kingdome, have been always a principal part of Our Royal care and concern. . . ." Maine et al., Ex. No. 225.

The Charter of the Royal Fishery of England, Patent Rolls, 29 Car. II., pt. X (1688), printed in Carr, *Select Charters of Trading Companies* at pp. 196, 201, Maine et al., Ex. No. 179, also acknowledged the royal ownership of fisheries. The charter granted not only the right to fish in rivers, creeks, and arms of the sea, but also "in
217 and upon the main seas or any part thereof. . . ." The Charter also granted the power

"to build and make wharves and stocks for the use of the said Company and their successors in and upon and out of any of the wastes commons or waste grounds of Us our heirs and successors adjoining unto or upon any public rivers or seas within any of our Dominions. . . ."

Q. Besides fishing, is there any evidence that there was a conception in the 17th and 18th centuries of actual exploitation of the seabed? In other words, apart from international claims, do you have evidence that the legal pronouncements concerning ownership of the seabed had actual domestic consequences in the 17th and 18th centuries? A. First, let me add another word about fishing. These legal rules also affected rights in disputes solely involving English nationals. For example, here is the full report of the King's Bench Division case of *Johnson v. Barret,* Aleyn 10, 82 Engl. Rep. 887 (1646):

"In an action of trespass for carrying away soil and timber, &c. Upon trial at the Bar the question arose upon a key that was erected in Yarmouth, and destroyed by the

bailiffs and burgesses of the town; and Rolle said, that if it were erected between the high-water mark and low-water mark then it belonged to him that had the land
218 adjoyning. But Hale did earnestly affirm the contrary, viz: that it belonged to the King of common right. *But it was clearly agreed, that if it were erected beneath the low-water mark, then it belonged to the King.* It was likewise agreed that an intruder upon the King's possession might have an action of trespass against a stranger: but he could not make a lease, whereupon the lessee might maintain an *ejectione firma*."

In *The Case of the Royal Fishery of the Banne,* Dav. Rep. 149, 80 Eng. Rep. 540 (1610), translated in Angell, *The Right of Property in Tide Waters* appendix pp. 35, 38 (1826), Maine et al., Ex. No. 157, the Privy Council determined the King's ownership of a fishery in a tidal river by relying on the Crown's ownership of the bed of the sea. The Council concluded that "the sea is of the ligeance of the king as of his Crown of England . . . and therefore the king shall have the land which is gained out of the sea. . . ."

The fact that domestic fishing rights were derived from the King also can be illustrated by two grants from Charles II. In 1674, we find a Royal Warrant to prepare a grant from the King to James Herbert and his heirs "of the sole and several fishing and dredging as well for oysters as other fishes of what nature or kind soever within the
219 great waters, river or branch or arm of the sea called the East Grounds. . . ." 4 *Cal. Treas.* Books p. 633, Maine et al., Ex. No. 226. The next year Charles II issued a "Warrant for a lease [(for sixty-one years)] to Edward Villiers and Richard Brett of all channels, creeks, banks or beds of sand ouse, oyster layings or beds of oysters, and marshes belonging to the Lord High Admiral or the

Lord Warden of the Cinque Ports on the coasts of Essex and Kent. . . . " S.P. Dom., Car. II., p. 541 (1675). Maine et al., Ex. No. 227.

In short, fishing rights, especially rights to oysters and pearls on the sea-bed, were constantly thought of as entailing ownership of the seabed, and, indeed, were often spoken of in terms of "mining" undersea "treasures."

Apart from fishing rights, the most important domestic consequence of these legal doctrines concerned the right to the ownership of derelict lands, as I indicated previously. A vast number of titles to land were determined in the 17th century on the basis of the doctrine that the Crown owned the bed of the sea.

But there are still other important areas of English domestic law that were affected by the doctrine of Crown ownership of the seabed. For example, in 1619, Sir Henry Marten, Judge of the Admiralty Court, reported that "A committee was appointed in the late Lord Admiral's time, to decide whether the right to some bars of silver, taken up from a wreck off the coast of Cornwall, belonged to the Lord Admiral or the Prince. Two out of the three judges decided in favour of the Admiral. . . . " S.P. Dom. Jac. I., CXI, p. 97, Maine et al., Ex. No. 228. The Prince is the Duke of Cornwall, who evidently was claiming the silver as a right of wreck by virtue of his ownership of the adjoining land. The Admiral was asserting rights in the Crown.

In 1626, the Lord Warden of the Cinque Ports allows a diver "for iron ordnance taken out of the sea a fourth part, and a third for brass." S.P. Dom., Car. I, XXV, p. 313, Maine et al., Ex. No. 229. Two years later, the King grants to two persons the privilege of "finding ambergris, and recovering gold, silver, ordnance, and other things belonging to his Majesty now sunk in the sea, for

the term of 31 years, reserving a tenth to the Crown." S.P. Dom., Car. I., XCI, p. 536 (1628), Maine et al., Ex. No. 230. In 1638, the King granted to Robert Earl of Ancram "power to find out ambergis within his Majesty's dominions, and to recover things out of the sea, which belong to his Majesty, for 31 years, reserving to his Majesty a tenth part." S.P. Dom., Car. I., CCCXXCIII, p. 527, Maine et al., Ex. No. 231.

221 All of these grants were based on the legal rule that ownership of the seabed was vested in the Crown. There are many more such grants in the 17th and 18th centuries.

Q. Is there any evidence of actual undersea mining in the 17th and 18th centuries? A. Yes, I have found two clear examples and perhaps a third. By and large, however, undersea mining was not economically or technologically feasible until the 19th century, and the Cornwall Submarine Mines Act, 21 & 22 Vict. c. 109 (1858), to which I referred previously, is the first legal recognition of the beginning of widespread undersea mining.

The importance of the examples I have of undersea mining in the 17th and 18th centuries is in demonstrating, first, that undersea mining was known when royal charters granting rights to mines in the sea were drafted in the 17th century, and, second, that exploitation of land under the sea had begun before American independence.

The earliest undersea coal mining I have been able to discover was commenced around 1588 at Culross, Perthshire, in Scotland by Sir George Bruce. The mine had two "pits" or entrance shafts, one on the shore and one on a small island near the low-water mark. In the course of thirty years the mine was worked to a distance of over a mile under the seabed, but the works were brought to

222 an end in March, 1625, when a great storm flooded the mine. Galloway, *A History of Coal Mining in Great Britain,* pp. 55-56 (London, 1882); Maine et al., Ex. No. 190; Beveridge, *Culross and Tulliallan,* p. 140 et seq. (Edinburgh, 1885). A contemporary account by John Taylor, who visited the mine in 1618, described the situation of the mine:

"They following the veine of the mine, did dig forward still; so that in the space of eight-and-twenty or nine-and-twenty yeeres, they have digged more than an English mile under the sea, that when men are at worke belowe, an hundred of the greatest shipees in Britaine may sail over their heads." Beveridge, *Culross and Tulliallan* at pp. 157-60.

In 1729, we find a similar undertaking in a coal mine begun at Whitehaven in Cumberland, England, by Sir James Lowther. Lowther was one of the founders of "The Governor and Company for Making Iron with Pit Coal," chartered by the Crown in 1692. Patent Rolls, 5 Wm. & M. pt. vii. The lands about Whitehaven had originally belonged to the priory of St. Bees, and from the earliest times coal had been worked along the seashore. Hay, Whitehaven, pp. 16-17, 21, 49 (Whitehaven, 1966). Maine et al., Ex. No. 195.

Lowther's mine was begun at Salton within twenty yards of the high-water mark, and when the shaft had been sunk to forty-two fathoms a blower of gas was
223 pricked. The gas was piped to the surface by a two-inch square wooden pipe and was used for various laboratory experiments. There is no indication, however, that the pipe was extended below the low-water mark. Hay, supra, at pp. 49-50; Galloway, *supra,* at pp. 94-97; Hull, *The Coal Fields of Great Britain,* pp. 34-35 (London, 1881). Maine et al., Ex. No. 196.

The coal mine, however, was dug out to sea. Hull tells us:

"Sir John Clerk, in a letter to a friend, written in 1739, gives an interesting account of the collieries of Whitehaven. The coal-beds, even at that time, were worked far under the sea, so that, as the writer observes, Sir James' riches in part swim over his head, for ships pass daily above the very ground where his colliers work." Hull, *supra,* at p. 34.

By 1765 some of the shafts were a mile and a half long and three-quarters of a mile under the sea. Hay, *supra,* at p. 49.

There is also some inconclusive evidence that there was undersea mining of saltpeter in Virginia and in England during the 17th century. In 1686-87 the Crown authorized a 51-year grant to Christopher, Duke of Albermarle, of

"all mines of gold and silver and royal mines whatsoever and of all mines of lead, tin, copper, and other mines of
224 what nature or kind soever; and of all mines, minerals or veins of saltpeter and of all earths, soils or ground for the making of saltpeter; and all mineral earths, stones and salts whatsoever, whether already opened or discovered or not, 'within all and every our Plantations or Colonies in America (Our Colonies of New England, Virginia and all parts northward of our Colony of Carolina only excepted): with free liberty etc. to him, his agents or nominees to search for, dig, open etc., and to take the gold, silver, lead, tin ore, saltpetre etc.; and to make mouths, drains levels etc; as largely as is in our power to grant such license or authority'. . . . " 8 *Cal. Treas. Books* pp. 1231-32. Maine et al., Ex. No. 232.

The grant of rights to saltpeter is especially interesting for as early as 1630 the Virginia Governor Sir John Harvey

informed crown officials that he "hopes to discover a saltpetre mine in the Bay." S.P. Col., 1629-30, #83. Maine et al., Ex. No. 233. Similarly, in England, overflowed lands were being granted by the King for extracting salt. In 1636-37, the King granted letters patent of incorporation for making salt with the "understanding that the success of this design depends chiefly upon the choice of marshes which are or have been overflowed with the salt water of the sea. . . ." S.P. Dom., Car. I, CCCXLIV, p. 371. Maine et al., Ex. No. 234. Earlier the King had commanded the Governor and Council of Virginia
225 "to take especial care" in the making of, *inter alia,* "bay salt." S.P. Col., 1626-28, #32, p. 86 Maine et al., Ex. No. 235.

Q. Now that we have established that in the 17th and 18th centuries there was a conception of ownership of the marginal sea, can you state whether it was also understood that the seabed was capable of being granted by the Crown? A. Yes, it was universally acknowledged that the Crown could grant aways its property rights to the seabed in the same way as it made any other grant of territory.

Sir Mathew Hale not only expressed the prevailing view, but his clear statement on the subject around the year 1676 is especially important in confirming the legal basis of those Crown grants of territory made during the 17th century. Hale wrote that although the Crown had a *prima facie* right in the seabed, a subject might gain such a right in two ways, by grant or by long usage:

"1st. By the King's charter or grant; and this is without question. The King may grant fishing within a creek of the sea, or in some known precinct that hath known bounds, though within the main sea. He may also grant that very interest itself, viz. a navigable river that is

an arm of the sea, the water and soil thereof." 1 Hargrave, *Law Tracts,* p. 17. Maine et al., Ex. No. 194.

226 We have already seen that in the 17th century the King made numerous grants of so-called derelict lands from which the sea had receded. Similarly, in many 17th century charters, we find evidence of royal grants of territory in both land and sea.

Q. So, there was no notion of the seabed as being an inalienable part of the nation's sovereignty? A. No, in the 17th and 18th centuries the King's dominions were thought of in essentially feudal terms. The King's sovereignty was not an abstract notion, but rather based on ownership and possession of property. Writing in 1670, Sir Leoline Jenkins put it most vividly. The King's seas, he declared, "are, as much as that watery Element is capable of being so in its Nature, no less a Domain of the Crown, than the Honour of *Greenwich*, or Manor of *Eltham.*" 2 Wynne, *supra,* at p. 698. This, of course, was the theory underlying royal grants of territory in the New World to individuals or groups of individuals.

Q. Can you describe some of these grants? A. I understand that later expert testimony will systematically discuss these charters, but in my opinion it is clear that these grants reflected the prevailing view that the Crown could alienate portions of the marginal sea.

227 As early as 1578, Queen Elizabeth granted to Sir Humfrey Gilbert letters patent "for the inhabiting and planting of our people in America." These patents conveyed "All the soyle of all such lands, countries, & territories so to be discovered or possessed . . . with the rites, royalties and jurisdictions, as well marine as other, within the sayd lands or countreys of the seas thereunto adjoying, to be had or used with ful power to dispose thereof, & of every part thereof in fee simple or otherwise. . . ."

Patent Rolls, 21 Eliz., pt. iv, printed in 8 Richard Hakluyt, *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation,* pp. 17, 18. Marine et al., Ex. No. 193.

The Gilbert patent granted the power to govern "in causes capitall or criminall, as civill, both marine and other" [and to rule all those who] "shall at any time hereafter inhabite any such lands, countreys or territories. . . or that shall abide within two hundred leagues of any the sayd place or places, where the sayd sir Humfrey . . . shall inhabite within sixe yeeres. . . . " *Id.* at pp. 20-21.

In 1583, Gilbert granted Sir Philip Sydney rights to discovery of "anything not before discovered or inhabited by said Sir Humphrey," reserving to himself "two-fifths of
228 gold, silver, pearl, and precious stones" that might be discovered. S.P. Col., Add. 1574-1674 (America & W. Indies) #28. Maine et al., Ex. No. 236. In that same month, Sydney conveyed similar rights "with all commodities . . . both by sea and land" to Sir George Peckham. S.P. Col., Add. 1574-1674 (America & W. Indies) #29, Maine et al., Ex. No. 236. Upon Sir Humphrey's death, his brother Adrian and other individuals in 1584 received a patent of discovery which included "all manner of privileges, prerogatives, jurisdictions and royalties both by sea and land." *Patent Rolls,* 26 Eliz., pt. viii, printed in 7 Hakluyt, *supra,* at 375, 377, Maine et al., Ex. No. 192. In the first Gilbert patent, the queen reserved "the fift part of all the oare of gold and silver . . . there gotten." 8 Hakluyt, *supra,* at p. 18. In the second, she reserved only a tenth part of all "golde and silver oare, pearles, jewels, and precious stones, or the value thereof." 7 Hakluyt, *supra,* at p. 377.

Again in her 1584 patent to Sir Walter Raleigh, the Queen granted all the land that he might discover "with the right, royalties, franchises, and *jurisdictions, as well*

marine as other within the saide landes, or Countreis, *or the seas thereunto* adioyning. . . . " Like the grant to Sir Humphrey Gilbert, Raleigh was given the power to govern "within . . . two hundredth leagues" of any place of settlement. 2 Poore, *Federal and State Constitutions of*
229 *the United States,* pp. 1379-80. Maine et al., Ex. No. 205.

The grant to the Newfoundland Company in 1610 conveyed various capes and bays on the Atlantic Coast "together with the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid . . . And also all the lands soil grounds havens ports rivers mines, as well royal mines of gold and silver as other mines, minerals pearls and precious stones woods quarries marshes waters fishings huntings hawkings fowlings commodities and hereditaments whatsoever, together with all prerogatives jurisdictions royalties privileges franchises and preeminences within any the said territories and the precincts thereof whatsoever and thereto or thereabouts both by sea and land. . . . " The Company also received the power "to dig and to search for all manner of mines of gold silver copper iron lead tin and other minerals as well within the precincts aforesaid as within any part of the main land not formerly granted to any other. . . . " *Patent Rolls,* 8 Jac. I., pt. viii, printed in Cecil T. Carr, *Select Charters of Trading Companies,* pp. 51, 53, 57. Maine et al., Ex. No. 179.

Charter grants, however, did not always contemplate conveyances of the sea. On the other hand, those grants that included portions of the sea were regarded as conveyances of territory. In one of the earliest colonial dis-
230 putes over fishing rights, the Privy Council noted in 1621 that "it was thought fitt, that the said Colonies should fish att Sea within the limitts and bounds of each other reciprocally. . . . " 1 *Acts of Privy Council* (Col.), #65, pp. 40-41, Maine et al., Ex. No. 237.

I shall make only passing reference to the Virginia Charter of 1606 and 1609. The 1606 patent gave the first Virginia Company rights to

"enjoy all lands, havens, rivers, mines, minerals, waters, fishings, commodities, and hereditaments whatsoever, for fifty English statute miles along said coast of Virginia and America towards the West and South-west, and for fifty like miles towards the East and North-east, with all islands within one hundred miles, directly over against the same Sea Coast, and, directly into the main land for one hundred like miles. . . ." S.P. Col., Add. 1574-1674 (America & W. Indies) #48, p. 32. Maine et al., Ex. No. 238.

The 1609 grant included

"those lands in Virginia, from Cape or Point Comfort along the coast to the northward 200 miles, and southward 200 miles, and into the land from sea to sea, also all the islands within the 100 miles along the coasts of both seas (as well as) all the soils, havens, minerals, waters, privileges, &c. whatsoever, is (in?) as ample manner as his
231 Majesty has granted to any Company or Adventurer into foreign parts. . . ." S.P. Col., Add. 1574-1674 (American & W. Indies) #49, Maine et al., Ex. No. 238.

Q. And what do you conclude from this partial survey of Crown grants of territory in the New World?

A. There is no question in my mind that the law and practice of 17th century England conceived of the marginal seas as being Crown property that could be granted away. Most of the grants of territory that I have seen included the adjoining marginal sea within the scope of the grant. Nor is this surprising, since fishing as well as the search for pearls and valuable minerals were a very important reason for making these grants in the first place.

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CROSS-EXAMINATION OF MORTON J. HORWITZ

332 BY MR. RASHKOW:

Q. In the conduct of relations with other countries, did Queen Elizabeth make any assertions of sovereignty over the sea? A. I believe there are a number of cases, again, in Elder where there is evidence that Queen Elizabeth, in line with her predecessors and her successors, did insist that she had the right to license and to restrict entry by fishermen into the Queen's seas.

Q. Can you refer to any of those cases? A. One of the important indications, I think, of English policy during the time of Elizabeth is a tract, treatise by Dr. John Dee, which Fulton cites on pages 99 and following. The book was published in 1577. It was entitled General and Rare Memorials Pertaining to the Perfect Art of Navigation.

Q. This was Dee's book? A. That's right. Its better known title, Professor Fulton tells us, is The British
333 Monarchy. Dee argued that the rights of fishing were enjoyed as securely and freely from us by strangers as if they were within their own King's peculiar sea limits. Professor Fulton says that Dee was the first English writer who claimed sovereignty of the seas and the fisheries for England. I think on the basis of those other authors I have mentioned that that is not true. What is significant about Dee's publication in 1577 during the Elizabethan period is that it is very unlikely that such a work would have been published without the active consent of the Crown. It seems very clearly to me to indicate that Dee's work was solicited by and encouraged and approved by the Crown.

Q. I presume you have Fulton's book before you and you are reading from that? A. Yes.

Q. Would you read the last sentence on page 104 through the top of 105? A. You mean beginning with "within"?

Q. Page 104 of Fulton, "Dee's work," bottom of page 104. A. Fulton said, "Dee's work was premature. His proposals that Elizabeth should tax foreigners for Fishing in the British seas and exercise jurisdiction over
334 foreign vessels passing through them remained as much a dream as the scheme of Hitchcock." Now, let me comment on my evaluation of Professor Fulton. The first point that I think that needs to be made is that Fulton's work clearly acknowledges that from the time of James I's proclamation in 1609 the Crown claimed sovereignty of the territorial, the marginal sea. At most Professor Fulton's argument comes down to the fact that from 1609 there was such an assertion of Crown sovereignty. But I think Professor Fulton does not fully state the entire picture. His work is a frankly revisionist book. He does attempt to deal in his first two chapters with arguments that others have made asserting the sovereignty over the British seas. His attempt to is emphasize discontinuity between 1609 and before, rather than the continuity that other authors have seen in the development of English law.

Q. Excuse me for a moment. I am wondering how relevant the discussion generally on Fulton's treatment of the law of the sea is to the question that I asked you wherein you cited Fulton, and I asked you to refer to another statement, about a specific proposition. A. The reason I cited Fulton was that the book is available. The Dee book is not available. Therefore, we have to rely on
335 on Fulton's statement of the book. I would not have otherwise referred to Fulton at all. I referred to Fulton only to find the quotation from Dee. Next, you asked me

to read a passage from Fulton wherein he evaluates that book. To the extent that that leaves a misconception I must then go on to explain Fulton's attitude towards the Elizabethan period and that was what I was proceeding to do.

Q. All right. A. I think it has to be understood that Professor Fulton wrote this revisionist work in 1911. His argument was that starting in 1609 the Crown made much greater claims to sovereignty than before. And for this purpose he seeks to show that in the pre-1609 period there was no assertion of sovereignty. As I stated, he attempts to show perhaps 50 instances wherein other authors have assumed that there was evidence of sovereignty, that in these 50 instances there was in fact no evidence of sovereignty. He has a very difficult burden to meet, and it seems to me we must evaluate each of these specific items one by one, which is rather time consuming. But I should say that there are three books that have appeared since Fulton wrote his work in 1911. There is Elder in 1912. There is Potter in 1924. And there is Fenn in 1926. And all of these works do go back to the pre-Fulton opinion that there were assertions of sovereignty by the
336 Crown before James I ascended the throne. It seems to me scholars who have evaluated this evidence have come to the conclusion that Fulton's revisionist work has not held up. Now, I should add finally that it is true that after 1609 the Crown made greater claims to dominion over the sea than before. That for reason of prudence and self interest the Crown often didn't make its maximum assertion in the pre-James I period. But I think it is wrong to evaluate the evidence as Professor Fulton does, and to try to conclude that there is no evidence that the claim of sovereignty over the seas before James I ascended the throne.

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DIRECT EXAMINATION OF
PHILIP C. JESSUP

469 BY MR. CLAGETT:

Q. Would you please state your name, background and professional qualifications and experience? A. My name is Philip C. Jessup. I completed my nine-year term as a Judge of the International Court of Justice at The Hague on February 5, 1970. From October 1, 1970 to September 30, 1971, I was Whitney Shepardson Senior Visiting Research Fellow at the Council on Foreign Relations in New York City. I live in Norfolk, Connecticut.

470 I was born in New York City on January 5, 1897. I received my A.B. degree from Hamilton College in 1919 after having spent one year in the United States Army with service during World War I in Belgium and France. In 1924 I received the LL.B. degree from Yale and an M.A. from Columbia University. In 1927 I received the Ph.D. degree from Columbia. I have thirteen honorary doctorates from American colleges and universities and four from universities in other countries.

In 1924 I was appointed an Assistant to the Solicitor of the United States Department of State. I resigned in 1925 to begin teaching international law at Columbia University and I remained there on the Faculties of Law and of Political Science, being Hamilton Fish Professor of International Law and Diplomacy from 1946 to 1960. I also taught the course on Admiralty for several years. On leaves of absence from the University, I was assistant to Elibu Root at the Conference of Jurists on the Permanent Court of International Justice in Geneva in 1929; personal Legal Adviser to the United States Ambassador to Cuba in 1930; Chief of Division, Office of Foreign Relief, Department of State, 1943; Assistant Secretary-General of

the first Council Session of UNRRA, 1943 and of the Bretton Woods Conference, 1944; Assistant on Judicial Organization to the United States Delegation at the UN Conference in San Francisco, 1945; United States Represen-
471 tative on the United Nations Committee on the Progressive Development of International Law and its Codification, 1947; United States representative at various sessions of the UN Security Council and General Assembly, 1948-1953. I was United States Ambassador at Large, 1949-1953. I have been Chairman of the Chile-Norway Permanent Conciliation Commission since 1958.

I was admitted to the Bar of the District of Columbia in 1925 and to the New York Bar in 1927. I was a member of a New York law firm from 1927 to 1943. I am a former President of the American Society of International Law and am now Honorary President of that Society and of the Americian Branch of the International Law Association. I am a member of the Institut de Droit International and was a Vice-President from 1959 to 1961. I was a member of the Curatorium of the Hague Academy of International Law from 1957 to 1968. I am a member of the American Academy of Arts and Sciences and of the American Philosophical Society.

The list of my publications which is Maine et al. Exhibit No. 368, is taken from Vol. 62 of the *Columbia Law Review*, No. 7, pp. 1124-1131 (1962), an edition which was dedicated to me. Since then, the Columbia University Press has published (1971) a book entitled *The Price of International Justice.* My *A Modern Law of Nations,* first published
472 in 1947, was reprinted by Archon Books with a new Preface in 1968. Translations of books I have written have appeared in German, Spanish, Portuguese, Arabic and Korean.

My first specialization in the international law field was in international maritime law, and in 1927 my *The Law of*

Territorial Waters and Maritime Jurisdiction was published. In 1929 I delivered a series of lectures at The Hague Academy of International Law under the title *L'Exploitation des Richesses de La Mer.* (All lectures at the Academy at that time had to be in French.) I have written various articles on particular aspects of the subject since that time. A related specialty has been the law of neutral rights and duties, especially at sea. Beginning in 1935, I edited for the Columbia University Council for Research in the Social Sciences, four volumes on *Neutrality, Its History, Economics and Law.* Vol. I, entitled "The Origins," I wrote jointly with Professor Francis Deak; I was the author of Volume IV, entitled "Today and Tomorrow." I was also Rapporteur for the Harvard Research in International Law in preparing the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, published in 1939. My researches in the origins of the law of neutrality included
473 studies in the French Bibliotheque National, the Archives de La Marine and the British Public Record Office, all with special reference to neutral rights and duties at sea from the 17th century onward. I have lectured at the Naval War College and the National War College and during World War II was Associate Director of the Naval School of Military Government at Columbia University and Consultant to the Navy Department.

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BY MR. CLAGETT:

Q. Judge Jessup, the defendant states in this action claim that each of them, as a matter of English and colonial law, in the 17th and 18th centuries acquired rights in the seabed and subsoil of the Atlantic continental shelf ad-
474 jacent to their land territories. If the states are correct in

that contention as a matter of English and colonial law, is it your opinion that international law in the 17th and 18th centuries permitted the assertion and ownership of such rights by coastal states? A. Yes, my opinion is that it did.

Q. Would you please explain your reasons for that answer? A. Let me begin by putting the matter negatively: international law in the period under discussion contained no principle prohibiting the assertion and exercise of such rights. International law has developed around the central theme of the sovereignty of States. There is a classic statement of the Permanent Court of International Justice in the *Lotus* case:

"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot
475 therefore be presumed." (Case of the *S.S. "Lotus"*, 1927 P.C.I.J., ser. A, No. 10, at p. 18, 2 Hudson, *World Court Reports* 23, 35 (1935).)

It is irrelevant to the juridical position to which your question was addressed that scholars have regretted the dominant role of state sovereignty as tending to inhibit the development of a system of international law which would limit the use of armed force by states and thus contribute to a more peaceful world. The fact is that in the 17th and 18th centuries, ideals such as those expressed in this century since the establishment of the United Nations were not accepted as part of the international legal system. A state's freedom to act or to claim legal

rights or privileges in the 17th and 18th centuries could be denied only when it could be shown that some established rule of international law, whether customary or conventional, limited the state's freedom.

The standard expression of the sources of international law is now found in Article 38 of the Statute of the International Court of Justice. The Statute of the Court, according to Article 92 of the Charter of the United Nations, "forms an integral part of the present Charter." The Charter, having been duly ratified as a treaty by the United States, is under the Constitution part of the supreme
476 law of the land and its provisions are therefore to be accorded due importance in the courts of the United States. Article 38 of the Statute, in paragraph 1 thereof, reads as follows:

"The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Although general multipartite conventions of a "law-making" character have become increasingly utilized especially in the 20th century – as for example the Geneva Conventions of 1958 on the law of the sea, to which reference will be made later – no such general treaty or convention (the terms are interchangeable) bearing on the

rights of states to the seabed of their continental shelves
477 was in existence in the 17th or 18th century. What Article 38 of the Statute of the International Court of Justice calls "particular" conventions are agreements to which two or perhaps more individual states are parties. I know of no treaty binding any of the states involved in the Atlantic area (*e.g.*, England, France, Spain or others) which had been concluded and was in force in the 17th or 18th century which limited or purported to limit the rights of littoral states in their adjacent seabeds. I shall explain later about the Anglo-French treaties regarding the enjoyment of oyster fisheries off European and British coasts, but I do not consider that those treaties qualify the statement just made.

So far as international custom is concerned, the fact that resources of the continental shelf, such as are known today, were in large part not familiar to states in the centuries in question is not evidence that a restrictive customary rule had developed. I shall call attention shortly to examples which, on the contrary, show that states did claim and exercise rights to exploit known resources of the adjacent seabeds in the period under consideration.

My use of these examples will be similar to the purpose stated by Professor Carl M. Franklin in his volume of the International Law Studies of the Naval War College 1959-1960 on "The Law of the Sea: Some Recent
478 Developments" (Naval War College Blue Book Series Vol. 53, pp. 31-32, 33):

> ". . . the purpose is to underscore the fact that for centuries man has been concerned to a modest extent – meaning within the limits of his existing technology and consonant with his needs – with the exploitation and control of some of the resources of the sea bed, both within and without territorial waters. Further, it has been

our purpose to emphasize the fact that historically states have generally recognized the priority of the coastal state to exclusive rights over the sedentary fisheries resources of the sea bed beyond the limit of territorial waters, particularly where there has been effective and continued use. Continued recognition of this priority of the coastal state to the sedentary fish on the continental shelf is articulated in the Geneva Convention on the Continental Shelf.

". . . Other underseas mines, principally coal, which represented 19th century claims by states to subsoil resources of the continental shelves, although often not extending beyond the limit of territorial waters, were those of Australia, Canada, Chile and Japan, as well as many others in England besides the Cornwall mines. These claims were based upon the recognized right of a coastal state to occupy the subsoil under the high seas by the extension of mining installations whose entrance was
479 located on the coastal state or in the territorial waters thereof.

"Were these 19th century claims to the submarine subsoil resources, and the earlier claims of states to resources of the sea bed (*i.e.*, sedentary fisheries), precursors of the present day continental shelf proclamations? It is submitted that they were, despite obvious differences between the early claims to the resources of the sea bed and subsoil and those of the mid-twentieth century."

It is true that there was established in international law, as early as the 17th century, a general principle of freedom of the seas. Attempts by some states, in the 15th and 16th centuries particularly, to claim sovereignty over vast expanses of ocean had been definitely rejected by the international community by the17th century.

It would be quite misleading to intimate that unanimity on the law of the sea can be found in the writings of learned scholars through the centuries, even though the International Court of Justice is instructed by its Statute (*supra*) to apply "the teachings of the most highly qualified publicists of the various nations" – albeit *"as subsidiary means* for the determination of rules of law." (Emphasis added.) Many modern writers fail to emphasize that some of the widely quoted views of eminent jurists
480 were written as part of the supporting arguments in briefs for positions of their governments in disputes with other states. Notably, it is familiar, but not always mentioned, that the *Mare Liberum* of Grotius was in essence a brief for the Dutch East India Company and that Selden's *Mare Clausum* was a reply brief on behalf of the King of England. This is not to say that such juridical and professorial opinion is valueless, but it may require evaluation. The Supreme Court has said that the works of writers on international law "are resorted to by judicial tribunals, not for speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana,* 175 U.S. 677, 700 (1900).

Q. You have written rather extensively on subjects closely related to that now under consideration. Would you please summarize the evolution of your own thinking and writings so far as they concern rights in the marginal sea? A. In 1927 I published my first detailed study of the law of territorial waters under the title *The Law of Territorial Waters and Maritime Jurisdiction* (G.A. Jennings Co., New York 1927). The work was begun in 1923 and was completed in partial fulfillment of the requirements for the degree on Ph.D. in international law at Columbia University, where I was then a lecturer in

481 International Law. As a result of my investigations and studies over these four years I reached certain conclusions about then existing rules of international law. Among these conclusions were the following:

"The subject of Territorial Waters has by no means been neglected by writers on international law. In fact, few topics have provoked more controversy or elicited more divergent views and opinions. The practice of nations viewed over a period of two hundred years ranges from one extreme to the other. It is possible to take several positions relative to the extent of the territorial sea or relative to the nature of the jurisdiction therein, and to support them all by fairly numerous illustrations drawn from international events, ancient or modern, and by the authority of text writers. One might be led to the conclusion that this is evidence that there is no rule of law upon the subject, but it is believed such a conclusion is unjustified and is the result of a limited perspective of a very wide field. . . .

"It is the writer's opinion that the greater part of the disagreement as to the extent of territorial waters is due to a failure to analyze various national claims, and still more basically, the concept of jurisdiction. . . .

482 "There is a vital distinction between that maritime belt which is claimed as a part of the territory of the state and the limited rights of control or jurisdiction claimed upon the high seas. . . . If one starts with the proposition that the littoral state has only a 'bundle of servitudes' over the territorial waters, one is naturally unable to see much distinction between claims to a three-mile and to a twelve-mile zone. Similarly if one posits merely certain rights of control or jurisdiction therein. But if, on the other hand, one maintains that each maritime state may rightly claim as a part of its territory

a certain maritime belt, then the distinction becomes clear. It is this latter hypothesis which is believed to be sound, historically, theoretically and according to international practice. It will be pointed out that within three miles of the coast, a state may under international law, exercise any jurisdiction and do any act which it may lawfully do upon its own land territory. Exception must be made to this general statement only in favor of the servitude known as the right of innocent passage." (Jessup, *supra*, pp. xxxi, xxxii and xxxiii-xxxiv.)

I noted that on its land territory, a state's freedom to act is similarly limited by the international law establishing
483 diplomatic immunities.

I pointed out that opposition to the propositions just set forth could be traced to the feeling that any admission of a right to perform acts on the high seas seemed to smack of the ancient historic and discredited claims to sovereignty over vast expansions of ocean, in other words, to run counter to the hallowed tradition of "the freedom of the seas." But this is not the case. The law of territorial waters came into existence at least as early as the 17th century to strike a balance between the exaggerated claims to great stretches of high seas and the need to afford some protection to the shore and littoral interests.

In the lecture which I gave at The Hague Academy of International Law in the summer of 1929, under the title "L'Exploitation des Richesses de la Mer" ("Exploitation of the Riches of the Sea"), 29 *Recueil des Cours* 401, 419, I referred to and reiterated the distinction which I made in 1927 in my *Law of Territorial Waters*; the context at The Hague was the discussion of fisheries and I stated:

". . . on peut établir ceci: le droit international accorde à chaque Etat un privilége d'exclusivitè sur toutes

les pecheries dans un rayon de trois milles de ses côtes. . . on admette que certains actes de caractère juridique puissent être accomplis par un Etat maritime dans les hautes
484 mers adjacentes . . . "

(". . . this point can be established: international law grants to each State an exclusive privilege over all fisheries in a zone of three miles from its coasts. . . . it is admitted that certain acts of a juridical character can be performed by a maritime State in the adjacent high seas . . . ")

The exclusive control of fisheries, in this context, was the symbol of sovereignty and three miles was the declared limit. At the same time, it was admitted that certain types of acts could be legally performed on the high seas adjacent to the coasts.

In 1947, in *A Modern Law of Nations* (The MacMillan Co., New York, Seventh Printing 1959), although the book did not include any detailed treatment of martime law, I recalled at p. 46 n. 13 the liquor-smuggling treaties concluded by the United States. I described these treaties in my book on *Territorial Waters* (*supra*). Five of them contain the provision:

"The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters." (U.S. Tr. Series No. 685).

I cited these treaties as examples of "statements embodied
485 in treaties which continue to have evidential value quite irrespective of the continued validity of the treaties in which they were originally embodied." I distinguished such treaties from those which, as William E. Hall pointed out (in his *International Law*, 7th Ed. 1917, Introductory Chapter pp. 7-12), "are often concluded for the purpose

485 of enabling the contracting parties *inter sese* to share advantages not bestowed, or to escape restrictions imposed, by customary international law." (As quoted from my *Law of Territorial Waters* p. xxxii. The liquor treaties and their negotiation are analyzed in that book *Id.*, Chapter V.)

In 1959, in "The United Nations Conference on the Law of the Sea." 59 *Columbia Law Review* 234, 241-243, I wrote:

"The territorial sea represents the historic balance between the needs of the coastal State and the international community's rights and interests in the freedom of the high seas. The ILC proposed and, subject to a minor drafting change, the Conference adopted. . . . the sound principle that the sovereignty of the State extends over the territorial sea, its bed and subsoil, and the airspace above. The controversy continues to range over the breadth of the territorial sea. . . .

"The present writer continues to adhere to a long-held conviction that much of the controversy over the
486 breadth of territorial waters has been due to a failure to distinguish among the various rights which a coastal state has or may exercise on the waters adjacent to its shores." (citing my book on *The Law of Territorial Waters* xxxi-112).

In 1961, in an editorial comment entitled "The Law of the Sea Around Us" (55 *Am. J. Int'l L.* 104, 106-107), I cited admiringly (although with certain points of disagreement) the articles by Arthur Dean, the Chairman of the United States Delegation to the Second Geneva Conference on the Law of the Sea, entitled "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas" (54 *Am. J. Int'l L.* 751 (1960). I ventured to take issue with certain statements of the Supreme

Court of the United States in *United States v. Louisiana, Texas, Mississippi, Alabama and Florida* (363 U.S. 1 (1960)) and I wrote

". . . the court could not wholly ignore the law of nations. If the Court had had the advantage of reading Mr. Dean's article, or a few of the sources which he cites, it would scarcely have made the statement that 'the concept of the territorial sea did not arise in international law until after this country achieved its independence'.[5] The Court might have found of particular interest the
487 earlier insistence of neutral states on their 'territorial right' in the marginal sea.[6] The Court, it may be noted, did make use of some of that extraordinarily competent documentation prepared for the International Law Commission and the Conference by the United Nations Secretariat.[7] It is submitted that the Supreme Court also revealed its lack of understanding of the law of territorial waters on a point which was of importance to its decision. The Court said:

" 'Early in this country's history, the modern notion had begun to develop that a country is entitled to full territorial jurisdiction over a belt of waters adjoining its coast. However, even this jurisdiction is limited by the

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"[5] 363 U.S. 1 at 74, 80 Sup. Ct. 961 at 1002.

"[6] See, for instance, footnotes 28-31 of Mr. Dean's article.

"[7] Among the latest items prepared and furnished to the conference were the "Synoptical table concerning the breadth and juridical status of the territorial sea and adjacent zones," A/CONF. 19/4, Feb. 8, 1960, "Supplement to Laws and Regulations on the Regime of the Territorial Sea," A/CONF. 19/5, Feb. 10, 1960, and addenda thereto; and Supplement to the Bibliographical Guide to the Law of the Sea, A/CONF. 19/6, Feb. 1, 1960, and addendum thereto."

right of foreign vessels to innocent passage. The extent to which a nation can extend its power into the sea for any purpose is subject to the consent of other nations, and
488 assertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a "national boundary." '[8]

"The Supreme Court itself has clearly recognized that territorial waters are part of the territory of the United States, *e.g.*, for the application of the 18th Amendment and the Volstead Act.[9] The restriction on the exercise of jurisdiction which is imposed by the right of innocent passage does not mean that the rights in territorial waters are any more limited than those on the land territory, where the exercise of jurisdiction is limited by such rights as those of foreign embassies. So far as appears, the Supreme Court does not deny that inland waters are within the 'national boundary' and it seems to recognize that the line marking the seaward limit of inland waters
489 may be drawn across the mouth of a bay.

"Similarly, at the Conference on the Law of the Sea many delegations blurred the distinction between the coastal state's national boundary on the seaward edge of the territorial sea and the various jurisdictional rights which

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"[8] 363 U.S. 1 at 34, 80 Sup. Ct. 961 at 981.

"[9] *Cunard Steamship Co. v. Mellon,* 262 U.S. 100 (1923) reprinted in 17 A.J.I.L. 563 (1923).

may be exercised upon the high seas. The final compromise proposals advanced jointly by the United States and Canada, in which the distinction is clearly made between the six-mile territorial sea and the additional belt of six miles in which special fishery rights may be exercised, are based upon the distinction. So is much of the United States argumentation such as that concerning rights in the airspace above territorial waters. It is unfortunate that the majority of the Supreme Court did not in this respect share the view of Mr. Justice Black, who said: 'We may agree with the Government that the term "boundary" was used here in its usual sense to mean the limit of territory, which in the case of a coastal boundary, would mean the outer limit of the territorial sea'."[10]

The Harvard Research in International Law is the prime example of a cooperative effort of international lawyers in the United States to contribute to the effective codification of international law as initiated under the League
490 of Nations and now continued effectively by the International Law Commission of the United Nations. The Harvard Research in International Law was organized in 1927 by Professor Manley O. Hudson of the Harvard Law School, later a judge on the bench of the Permanent Court of International Justice and subsequently a member of the International Law Commission. The Research (to use a short label) was modeled on the procedures of the American Law Institute. There was a general Advisory Committee of 44 jurists and scholars of which the first Chairman was George W. Wickersham. After 1936, Charles C. Burlingham became chairman. The reports of the Research took the form of Draft Conventions with elaborate Commentaries and bibliographies; they were published separately

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"[10] 363 U.S. 1 at 89, 80 Sup. Ct. 961 at 1010."

and as Supplements to *The American Journal of International Law.* For each topic there was a Reporter, at times with an Assistant Reporter, and a special Committee of Advisers. I was from the outset a member of the General Advisory Committee, was Reporter for three different projects and served on the Advisory Committee of other projects. I wish to comment here on two of the projects.

One of the first three Draft Conventions published in 1929 concerned the Law of Territorial Waters (*Am. J. Int'l L.* (Spec. Supp. 1929), p. 241). Professor George Grafton Wilson of Harvard and of the Naval War College
491 at Newport was Reporter; I was a member of the group of Advisers. I call attention to four articles on the Draft Convention.

Article 1

"The territorial waters of a state consist of its marginal sea and its inland waters."

Article 2

"The marginal sea of a state is that part of the sea within three miles (60 to the degree of longitude at the equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river mouth."

Article 13

"The sovereignty of a state extends to the outer limit of its marginal seas."

Article 20

"The navigation of the high sea is free to all states. On the high sea adjacent to the marginal sea, however, a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection."

The Comment under Article 2 contains the following passage (p. 250):

492 "There has been dispute as to whether the three mile limit for the marginal sea is established in international law . . . The practice of states reveals no general acquiescence in the inclusion of a belt of more than three miles in width. No state claims less than three miles. This difference of opinion is due to the uncertainty in the past with reference to two matters – first, the nature of the power of the littoral state over the marginal sea; second, the possibility of action to be taken on the high sea at greater distance from the land with respect to certain matters.

"The definition in Article 2 must be read in connection with Articles 13 and 20. By Article 13 of this convention, it is definitely provided that the sovereignty of the littoral state extends over the marginal sea, and by Article 20 it is provided that states may for their security take measures on the high sea adjacent to marginal sea." (*Id.* at 250-51).

In the Comment under Article 13 it is stated:

"The enjoyment of sovereignty over the marginal sea is so dependent upon a state's sovereignty over its land territory that perhaps the conception of marginal sea should not be treated as an independent conception." (*Id.* at 289; *see* U.S. Reports at 293-94).

The American Law Institute preferred to use the term
493 "Foreign Relations Law" instead of "International Law." I was a member of the Advisory Committee on its Restatement on this subject, *Restatement (Second) Foreign Relations Law of the United States* (1965), which defines "territory":

"§ 11 . . .

"The territory of a state consists of:

(a) its land areas;
(b) its internal waters and their beds;
(c) its territorial sea and the bed of the territorial sea; and
(d) the subsoil under, and (subject to the limitation indicated in Section 16) the air space above, (a), (b), and (c)."

In Section 15, the Restatement avoids commitment on the three-mile rule by stating:

"(2) A state does not violate the rights of another state under international law by setting the breadth of its territorial sea at three nautical miles."

But the Comment reveals that this wording was taken from the Geneva Convention of 1958 and the Comment continues:

"b. *Three-mile limit.* The Convention defines the outer limit of the territorial sea in terms of its 'breadth.' . . . The Convention does not purport to state what the breadth of the territorial sea is. It is universally recognized
494 that the breadth of the territorial sea may extend to three nautical miles. No claim to a greater breadth has received sufficient acceptance internationally to be a rule of international law."

Under Section 21, the Restatement recognizes the right of a state to prescribe and enforce necessary rules of law on the high seas contiguous to its territorial sea.

Section 23 makes the following provisions regarding the Continental Shelf:

"§23. Continental Shelf

(1) A state has jurisdiction to prescribe and to enforce rules of law concerning the exploration and exploitation of the continental shelf off its coast and beyond the outer limit of its territorial sea.

(2) This jurisdiction does not affect the legal

status of the superjacent waters as high seas or that of the airspace above the waters.

(3) The exercise of this jurisdiction must be consistent with the requirements of international law stated in the Convention on the Continental Shelf of April 29, 1958.

"Comment:

a. *Nature of jurisdiction in continental shelf.*

The rule stated in this Section gives to a state jurisdiction
495 in the continental shelf off its coast only for the purpose of exploring and exploiting its natural resources. This jurisdiction is exclusive in the sense that the state may preclude others from exploring or exploiting the resources of the continental shelf. Jurisdiction over the continental shelf does not depend on occupation or express proclamation."

The subject of the continental shelf will be dealt with later in this testimony.

I was the Reporter for the Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, published in 1939 (33 *Am. J. Int'l. L.* 167 (Supp. 1939)). That draft clarifies a legal point which I believe has caused much confusion in some writings about territorial waters. Article 15 lays down one of the basic rules of the law of neutrality – a rule which has been acknowledged and widely respected since at least the 17th century:

"A belligerent shall not commit within neutral territory any act the tolaration of which by a neutral State would constitute a nonfulfillment of its neutral duty." (*Id.* at 178).

And the Comment notes that "This article states from the standpoint of belligerent duty a proposition reciprocal to that contained in Article 6." (*Id.* at 335). Article 6 reads:

"A neutral State shall use the means at its disposal to
496 prevent within its territory the commission of any act the toleration of which would constitute a nonfulfillment of its neutral duty . . . ." (*Id.* at 176).

It was this principle which was invoked by the United States against Great Britain in the famous *Alabama Claims Arbitration,* as a result of which Great Britain paid the United States $15,500,000 damages for the losses inflicted by Confederate cruiser *Alabama* which the British had allowed to be outfitted in a British port. (See Jessup, *The Price of International Justice,* Columbia University Press, New York 1971, pp. 2-5. See also Article 7 of the Harvard Research Draft.)

Finally, as a member of the International Court of Justice I joined in its judgment of 1969 in the *North Sea Continental Shelf Cases,* [1969] I.C.J. 1, which I shall discuss later in this testimony.

Q. You have mentioned international law relating to ports and other coastal waters, and to neutrality. Is there other learning in this area which bears on the rights of coastal states in the adjacent seas? A. Yes. The principle to which I referred a moment ago is the one involved in the very many incidents which are often noted
497 in writings on territorial waters, namely, the question of hostile acts or the capture of a ship as a prize in neutral territorial waters – that is, in the neutral territory. Although the following statement is addressed specifically to a capture within a "port or harbour," the prize cases in many countries from the 17th century on show that it was recognized to be applicable to any capture within neutral territorial waters, although at particular times and in particular places there may have been disagreement as to the outer limits of those territorial waters. The statement is by Paul writing from Doctors' Commons in 1740:

"By the laws of nations, the Princes and States noways engaged in the present war ought to preserve the neutrality of their several ports and harbours. To that end care must be taken that no prize should be attached, seized, or taken within the harbours of Princes and States in amity with the King of Great Britain or the Spanish King, or within shot of their cannon. (The cannon-shot rule as the measure of the breadth of territorial waters was then in vogue.) If any ship be taken within the limits of a port or harbour, it is a violation of the neutrality of the place, and upon complaint and proper proof, the party grieved ought to have restitution by the authority of the Prince
498 or State where such violence was committed." (Burrell, Reports of Cases Determined by the High Court of Admiralty (1758-1774), ed. by R.G. Marsden (1885) pp. 355, 356, as quoted in Jessup and Deak, *Neutrality, Its History, Economics and Law,* Vol. I *The Origins,* New York, Col. Univ. Press 1935, p. 255, citing also other cases from the British law reports and MSS in the British Record Office.)

It should be noted that the terms "port," "harbour" and "haven" were used in the 18th and 19th centuries to indicate sea areas much more extensive seaward than we are accustomed to associate with those labels. Thus under a warrant of 1848, the "Port of Dover" extended three miles out to sea. (See *infra,* p. 41, comment on *The Franconia.*)

An old English law dictionary (*A New Law Dictionary and Institute of the Whole Law,* by Archibald Brown, London, 1880, Second edition) defines "PORT" as follows: "PORT. A port is a haven, and somewhat more. 1st. It is a place for the arriving and unlading of ships or vessels. 2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege. 3rd. It hath a ville, or city, or borough, that is, the *caput portus,* for the receipt

of mariners and merchants, and the securing and vending of their goods, and the victualling of their ships. So that a port is *quid aggregatum,* consisting of somewhat that is
499 natural, viz., an access of the sea, whereby ships may conveniently come; safe situation against winds, where they may lie, and a good shore where they may well unlade; something that is artificial, viz., quays, and wharves, and cranes, and warehouses, and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi, jus mercati*, and divers other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles; as the port of London, in the time of King Edward I., extended to Greenwich; and Gravesend is also within the port of London; so the port of Newcastle takes in all the river from Sparhawk to the sea (Hale, *de Portibus Maris,* para., sec. c.2; Hall on the Seashore, 2nd ed., by Loveland)."

In 1614, Raleigh, in his *History of the World,* referred to "a Harborow of great capacitie, being in former times but an open bay." (*A New English Dictionary*, 1909, Vol. V. under "Harbour".)

This point of terminology is important because it gives significance to the provisions of various treaties of the late 18th and early 19th centuries which reveal an appreciation of the fact that states had rights and interests in sea areas
500 off their shores, which rights and interests they could, in treaties, bargain off to other states. I cannot define the exact mileage which may have been in mind when the treaty terms were employed, but I submit that the drafters had in mind something less than the earlier claims to vast oceans but something definitely more than inland waters and, it is reasonable to assume, more than territorial waters *stricto sensu.* I give the following examples from United States treaties alone:

Treaty of Amity and Commerce with France, Feb. 6, 1778, 8 Stat. 12. By Article VI the King of France agrees to protect and defend American vessels "being in his ports, havens, or roads, or on the seas near to his countries, islands, cities or towns." In Article VII the United States undertake the same obligation. In Article IX each party agrees to refrain from fishing "in the havens, bays, creeks, roads, coasts or places" which the other holds or shall hereafter hold. By Article X the United States agree not to disturb French subjects "in the enjoyment and exercise of the right of fishing on the banks of Newfoundland, nor in the indefinite and exclusive right which belongs to them on that part of the coast of that island which is designed by the treaty of Utrecht, nor in the rights relative to all, and each of the isles which belong to his Most Christian Majesty, the whole conformable
501 to the true sense of the treaties of Utrecht and Paris."

Treaty of Amity and Commerce with the Netherlands. Oct. 8, 1972, 8 Stat. 32. Article V provides that each party shall defend and protect vessels of the other "in their ports, roads, havens, internal seas, passes, rivers, and as far as their jurisdiction extends at sea."

Treaty of Amity and Commerce with Sweden, April 13, 1783, 8 Stat. 60. Article XX provides for assistance in case any vessel of either party shall be distressed, "on the coasts or under the dominion of either of the parties." Article XXIV deals with vessels of either party "coming upon any coast belonging to the other, but not willing to enter into port."

In Article I of "Separate Articles" to this treaty, Sweden is bound to protect vessels belonging to citizens of the United States "which shall be in the ports, havens, roads, or on the seas near the countries, islands, cities, and towns of His said Majesty. . . ." Hunter Miller, 2 *Treaties and*

Other International Acts of the United States of America (1931), p. 145.

Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, 8 Stat. 80. By Article I his Britannic Majesty acknowledges the United States, which are enumerated, as "free, sovereign and independent States." Article II pro-
502 vides that the boundaries of the United States are to include "all islands within twenty leagues of any part of the shores of the United States." Article III confirms to citizens of the United States "the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use . . .; and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America."

Treaty of Amity and Commerce with Prussia, July & August 1785, 8 Stat. 84. Article VII provides that each party shall endeavour to protect and defend vessels of the other "which shall be within the extent of their jurisdiction, by sea or by land." Article IX deals with vessels in distress "on the coasts or within the dominion of the other." Article XII provides that vessels of each party "may navigate freely to and from the ports and on the coasts" of the other.

Treaty of Amity, Commerce and Nagivation with Great Britain, Nov. 19, 1794, 8 Stat. 116. Article III provides that citizens of each party may "navigate all the
503 lakes, rivers, and waters" of the other. Article XXV provides that neither party shall permit ships or goods of the other "to be taken within cannon-shot of the coast."

Letter from Thomas Jefferson to George Hammond, Sep. 5, 1793, 8 Stat. 132 (annexed to the Treaty with Great Britain of 1794). "We are bound by our treaties with three of the belligerent nations, by all the means in our power, to protect and defend their vessels and effects in our ports, or waters, or on the seas near our shores. . . ." Subsequently reference is made to prizes which "are in our ports or waters."

Treaty of Friendship, Limits and Navigation with Spain, Oct. 27, 1795, 8 Stat. 138. By Article VI each party undertakes to protect and defend vessels of the other "which shall be within the extent of their jurisdiction by sea or by land." Article X deals with vessels of either party in distress "on the coasts or within the dominion of the other." Article XVIII deals with vessels "either sailing along the coasts or on the high seas," implying that coastal waters are not part of the high seas.

Convention with France, Sept. 30, 1800, 8 Stat. 178. Article XVIII refers to ships "either sailing along the coasts, or on the high seas." Article XXVII provides that "neither
504 party will intermeddle in the fisheries of the other on its coasts, nor disturb the other in the exercise of the rights which it now holds or may acquire on the coast of Newfoundland, in the Gulph of St. Lawrence, or elsewhere, on the American coast, northward of the United States. But the whale and seal fisheries shall be free to both in every quarter of the world."

Convention to regulate Commerce between the Territories of the United States and of his Britannick Majesty, July 3, 1815, 8 Stat. 228. Article 3 provides that freedom of commerce "is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories."

Convention with Great Britain of Oct. 20, 1818, 8 Stat. 248 (1848). Article I confirms and defines the rights of United States citizens to take fish off the coasts of Newfoundland and Labrador. "And the United States hereby renounce, forever, 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."

I add a further example of insistence upon the sanctity of neutral waters.

504-A In 1656, the States General resolved to restore a ship which had been captured "within the Vlie and in the mean time word shall be carried to the Ambassador of Spain, that this state doth not desire such fights or prises should be made within the Vlie." (Jessup and Deak, *supra,* p. 253, citing Thurloe, *A Collection of State Papers* (1742), Vol. 5 p. 549). It is difficult to tell the exact geographical nature of the Vlie and the spot at which the capture was made due to the numerous shiftings in the Dutch coast over the centuries; see *Encyclopedia Britannica,* 11th ed. Vol. 28 p. 1049.

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Q. Would you please state your opinion concerning the existence, in the 17th and 18th centuries, of exclusive rights to the continental shelf in favor of the adjacent coastal sovereign as a matter of international law? A. Throughout modern history there has been a consistent awareness – perhaps to a surprising degree, given the limited means of exploitation until very recently – of the importance of sovereign states of the sea and seabed

adjacent to their coasts. Through the 16th century many states, of which England was perhaps the most conspicuous, did not confine their claims to the adjacent seas but
505 asserted sovereignty over vast stretches of the high seas. In the 17th and 18th centuries the principle of freedom of the seas triumphed, and the earlier claims to sovereignty became appreciably more modest.

But it would be a great error to conclude that, when the doctrine of a territorial sea, limited to a narrow belt which eventually became fixed at three miles, crystallized in the 18th and 19th centuries, that development represented an *expansion* of state jurisdiction. To the contrary, it represented a *curtailment* of it. In the 17th and 18th centuries the general view was that a coastal state possessed sovereignty, ownership or jurisdiction in the waters adjacent to its coast, out to a distance which was not wholly fixed but which was in many instances more than three miles. Obviously, how far such claims could lawfully extend depended in large part on the geography and history of the area in question. In the English Channel, for example, English rights could not extend more than half way, and even to that extent were considered limited by the doctrine of freedom of the seas and the right of passage through straits or other waterways connecting high seas, so that England could not lawfully have prohibited all foreign ships even from half of the Channel. But on a coast such as the Atlantic coast of North America,
506 claims to 50 or 100 miles of sea or even more – which were in fact made – would not have been, and were not, considered unlawful in the 17th and 18th centuries, so long as the right of free navigation was not interfered with and any established fishing rights were respected. Certainly there was no recognized doctrine of international law at that time which prohibited claims to such a

distance of a limited sort which did not interfere with acknowledged rights of other states. To repeat, the 19th and early 20th century concept of a rather narrow belt of territorial waters – as narrow as three miles – represented not an expansion but a curtailment of sovereign rights as they were conceived in the preceding centuries. The curtailment occurred because of insistance by powerful maritime states, including Britain and the United States, on the principle of freedom of navigation and of fishing. For that reason the 19th century doctrine did not deny that states possessed jurisdictional or property rights beyond territorial waters so long as the rights of other states to navigate and to fish were not precluded. The exclusive right to exploit, or to regulate the exploitation of, seabed resources does not, generally speaking, even now interfere with the rights of other states on the sur-
507 face or in the waters where swimming fish are customarily taken, and the type of such exploitation as was practical and practiced up through the 19th century – and which I shall describe later – involved even less interference. Hence there was nothing in the 19th or early 20th century international law which prohibited exploitation of the seabed, and it may be fairly said that this right survived the curtailment of the ancient claims to vast expanses of ocean whichwere no longer supportable under the international law of that period. As we shall see shortly, where there were seabed resources beyond territorial waters which were capable of exploitation, the coastal state invariably asserted and exercised the right to regulate and profit from such exploitation. Even in the period which took the most restrictive view of sovereign rights in the sea – the 19th and early 20th centuries – I am unaware of any significant challenge to the assertion of such rights as contrary to international law. I can

say with considerable confidence that at no time has international law prohibited such assertion and exercise.

In the period 1940-60, the technological possibilities for exploitation of the resources of the continental shelf had become so great that it was felt desirable to make
508 more formal, systematic and explicit the nature and extent of the rights to those resources of the adjacent states. I do not regard that development as new international law springing out of nothing, and contradicting what had been the international law theretofore. Quite the contrary, and I shall explain that this view of mine is also the view expounded by the International Court of Justice in the *North Sea Continental Shelf Cases,* [1969] I.C.J. 1.

These conclusions are reinforced, I think, as to the Atlantic continental shelf of the United States by evidence concerning the negotiation of the Peace of Paris of 1783, by which Britain recognized and confirmed the independence of the thirteen United States. As I have already mentioned, Article II provides that the boundaries of the United States are to include "all islands within 20 leagues of any part of the shores of the United States." Read *in vacuo* these words are doubtless ambiguous as to whether the "boundaries" were also to encompass the intervening sea and seabed, but there is extrinsic evidence which makes it clear that they were. The whole matter of the status of "Mitchell's Map" of 1755 in the treaty negotiations is extensively dealt with by Hunter Miller in 3 *Treaties and Other International Acts of the United States of America*
509 (1933), pp. 319-56 (Maine et al. Exhibit No. 355). (See also Moore, *International Adjudications* (1929), Vol. 1, pp. 6-10, 63-67, 144-59, 241-51, 266-67, 289-90, 373-81, 387-97, 436-41, 491; Vol. 2 (1930), pp. 7, 13-20, 329.) When the northeastern boundary question arose between Great Britain and the United States, their agreement of 1827 to

submit the question for arbitration included a provision (Article IV) that "the Map called Mitchell's Map, by which the Framers of the Treaty of 1783 are acknowledged to have regulated their joint and official Proceedings, . . . shall be annexed to the Statements of the Contracting Parties. . . ." (*Id.* at 321). Rarely in the history of international law has a map not annexed to a treaty received such explicit recognition in a subsequent treaty as having "regulated" the negotiations. Miller and Moore give ample additional evidence showing that the drafters of 1827 were quite correct in their judgment of the importance of Mitchell's Map.

The fact of crucial importance is that there have survived, and today exist, copies of Mitchell's Map used by both the American and the British negotiators at the 1782 Peace Conference, and that on both these copies there were drawn the boundary lines established by the Peace of Paris, including lines in the sea eastwards of
510 the coast of the United States and running all along its length. These lines are obviously rought attempts to mark a boundary 20 leagues from the coast of the United States. The British copy of the map, called the "King George Map" since it was the personal property of the king, has written along the boundaries, including the boundary in the sea, the words "boundary as described by Mr. Oswald," who was the chief British negotiator in 1782. (*Id.* at 337-38; a copy of the King George Map is Maine et al. Exhibit No. 327.) The American copy of the map (see 3 Miller at 341-42) has the words "Mr. Oswald's Line" written by the sea boundary in the handwriting of John Jay. (This "Jay copy" of Mitchell's Map is Maine et al. Exhibit No. 339.)

These maps make it clear that, as between Great Britain and the United States, the Peace of Paris fixed boundary

lines off the American coast 20 leagues into the sea. Whether or not these were regarded as boundaries for *all* purposes, whether or not the drafters of the Treaty would have regarded the United States as having full territorial sovereignty within these boundaries, and whether or not they could be regarded as implying that the United States had no seabed or subsoil rights extending *beyond*
511 20 leagues (all these points could be disputed at length), I have no doubt that the boundary lines were understood, at least, as confirming the exclusive rights of the 13 United States in the seabed and subsoil within 20 leagues of the coast.

Q. Are the developments in international law relative to the continental shelf, or the seabed outside territorial waters, unique, or have there been comparable developments in regard to the law applicable to other areas?
A. There are certain parallels between the development of the international law relating to airspace and the development of the rights of states over their continental shelves.

"Before the day when controlled movement above the earth's surface became a practical reality, there was a widespread belief that airspace, at least that above what was needed for common activities on the ground, was free for the peaceful use of all. This hypothesis was advanced by Grotius, for example, and, despite recognition by some scholars and statesmen of the potential danger of the use of aircraft in warfare, it was still urged by Fauchille and others in the early years of the twentieth century." (Jessup and Taubenfeld, *Controls for Outer Space and the Antarctic Analogy*, p. 201 (1959)).

In the earlier discussions of air law there was much reliance on doctrines of Roman law, just as there was in
512 the treatment of territorial waters. Much reliance is placed on analyses of Roman law in the scholarly book of Percy

Thomas Fenn, Jr., *The Origin of the Right of Fishery in Territorial Waters* (1926). (Fenn published an article on the same subject that same year in the *American Journal of International Law;* it is not always easy to tell which was written first or to what extent one actually duplicates the other. Both writings have since been cited almost at random.) In early studies of air law, much was made of the Roman law maxim *cujus est solum est usque ad coelum et ad inferos,* although the height of the sky and the depth of hell were not capable of precise identification. The actual legal problems at first, in private law, dealt with overhanging caves, branches and the like (cf. Lauterpacht). *Private Law Sources and Analogies of International Law,* Sect. 48 (1927)). Eventually the Supreme Court of the United States had to determine whether the flight of shells on a naval artillery range, when over private land, constituted an invasion of private property rights. *Portsmouth Co. v. United States,* 260 U.S. 327 (1922). The international law problem was rapidly settled in favor of the principle of national sovereignty over the superjacent airspace, as soon as military aircraft became active in
513 World War I. The principle of respect for neutral territory came into play. "The Netherlands, Switzerland, Denmark, Norway, Sweden, Spain and Italy, Roumania, Bulgaria, and China, while still neutral, showed by words or acts or both that they adhered to the principle of prohibition of belligerent air entry, coupled with the obligation of the neutral State to intern any aircraft and airmen effecting entry in face of such prohibition." Spaight, *Air Power and War Rights* (1933), p. 421, quoted in Harvard Research, *Neutrality, supra,* p. 766, where further citations are given. (For the evolution of the international air law see in general Mateesco, *Droit Aerien Aeronautique* (Evolution-Nouvelle Orientation) (1954), *passim.* See also McDougal, Lasswell & Vlasic, *Law and Public Order in Space* (1963).)

It is notable that the British Air Navigation Act, 1920, asserts that "the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, *and has always extended*, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." (1 *Oppenheim's International Law* 518 (8th ed. Lauterpacht 1955).) The words I have underscored recall that the same retrospective assertion – that sovereignty has always extended over territorial waters as well as the
514 land – was made in the Territorial Waters Jurisdiction Act of 1878 by which Parliament overruled the narrow majority of the Court in *The Franconia, Queen v. Keyn,* (1876) 2 Exch. Div. 63 (Maine et al. Exhibit No. 160).

Q. The *Franconia* decision, and the arbitral award in the *Abu Dhabi* arbitration, have been relied on by the United States in support of the proposition that the concept of continental shelf rights is a new one. Would you comment? A. It is unnecessary here to review the *Franconia* case in detail since it has already been explained fully in previous testimony in this case. But it will serve to emphasize the retrospective national British assertion in the Act of 1878 if one recalls the comment by Judge John Bassett Moore in his dissenting opinion in the case of *The Lotus* in the Permanent Court of International Justice in 1927:

"The sense of surprise, and indeed of apprehension, with which the judgment was received by the bar and the public, was expressed by Lord Cairns, then holding the high office of Lord Chancellor, who, in presenting in the House of Lords the bill by the enactment of which, under the title of the 'Territorial Waters Jurisdiction Act, 1878', the law as previously understood was reestablished, declared that, while the question 'at first sight' appeared to be and no doubt was a question of law, 'he rather

515 thought that it was a question of that which had been described as the first law of nature – the law of self-preservation'; and, while remarking that, but for the case of the *Franconia,* it would 'hardly have been necessary to detain their lordships by offering any observations', said that it would have been 'fortunate for the vindication of the law' if the fact had been brought to the attention of the Court that by a warrant published in 1848, under the Customs Regulations Act of that year, the limits of the Port of Dover were declared to extend three miles out to sea, thus covering the waters in which the *Strathclyde* was sunk. Lord Selborne, a former Lord Chancellor, supporting the view of Lord Cairns, stated that, until he read the judgment in question, 'he had not supposed that there was any doubt among lawyers' as to the existence of the right of sovereignty over territorial waters (Hansard, Parl. Debates, Vol. 237, 3rd series, pp. 1601-1616). Indeed, on a careful study of the case, it is difficult to avoid the conclusion that the vote of the majority was in no small measure determined by a powerful, but composite and somewhat torrential opinion of eighty pages delivered by Sir Alexander Cockburn, then Chief Justice of the King's Bench, the disturbing effects of which it was necessary to remove in order that the majestic stream of the common law, united with international law, might re-
516 sume its even and accustomed flow. This was done by the Act of Parliament above mentioned which declared that the 'rightful jurisdiction' of Her Majesty not only extended *but had 'always extended'* over her coastal waters, and made British criminal law applicable to all offenses committed on the open sea within a marine league of the coast measured from low-water mark." *(The Lotus, supra,* at pp. 74-75, 2 Hudson, *supra* at pp. 71-72; Emphasis added.)

In summary, one may merely add the accurate analysis of Smith:

"Technically the opinion of the majority amounted to no more than a decision that the jurisdiction asserted by the Crown was not conferred by any existing English statute, and therefore it is not strictly a decision upon the broader question of international law. Of the seven judges composing the majority five were of opinion that it was competent for Parliament, without violating the law of nations, to confer such jurisdiction, if it saw fit to do so. In other words, eleven out of the thirteen judges were agreed that territorial waters were within the sovereignty of the riparian state, and of these eleven six held that the existing provisions of the English criminal law conferred sufficient jurisdiction to punish the offence in question." (2 Smith, *Great Britain and the Law of Na-*
517 *tions* 138 (1935)).

I refrain from any detailed analysis of the recent Australian and Canadian cases *Bonser v. La Macchia* (1969) 43 A.L.J.R. 275; *In Re Ownership of Off-Shore Mineral Rights* (1968) 65 D.L.R. (2d) 353, discussed by O'Connell, "The Australian Maritime Domain," 44 *Australian Law Journal* 192 (1970) and in articles he cites, because they, like *The Franconia,* hinge on questions of constitutional law rather than international law, despite some dicta to be found in the opinions. In contrast to the international status of the thirteen American colonies, which will be noted, O'Connell points out that the provinces and colonies of Australia and Canada "were never nations" (*supra,* p. 196).

As for the well-known award in the *Abu Dhabi* case, *In the Matter of an Arbitration between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheikh Skakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi*

and Its Dependencies, Aug. 28, 1951, 1 Int'l & Comp. L.Q. (1952) 247, Lord Asquith of Bishopstone, the arbitrator, held that a concession agreement of 1939, by which the ruler granted the company an exclusive right in "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area," was not in-
518 tended to grant rights in the continental shelf outside territorial waters. In the course of his opinion Lord Asquith indicated his belief that no concept of continental shelf rights existed in 1939. I believe that he did not adequately appreciate the rules and principles of international law or the background of relevant international practice. He may have been too much absorbed in a semantic issue, namely the use of the term "continental shelf," which, to be sure, was not in common use in 1939. But the history of the pearl fisheries in the Persian Gulf which I shall describe shortly proves that the Arabian sheiks, chieftains and other rulers had asserted and maintained claims to the exploitation of the riches of the seabed, irrespective of the limits of territorial waters, for centuries before the conclusion of the contract involved in the arbitral award. No distinction in the legal principle applicable can be made between exploitation of pearl fisheries and drilling for oil. In any case, Lord Asquith's comments on the shelf "are *dicta* unnecessary to his decision." (Richard Young, Editorial Comment in 46 *Am. J. Int. L.* 512, 514 (1952).) Friedmann, Lissitzyn and Pugh suggest that Lord Asquith's view be compared with that of the International Court of Justice in the *North Sea Continental Shelf Cases,*
519 where The Court said these rights of the coastal state "exist *ipso facto* and *ab initio.*" (Friedmann, Lissitzyn and Pugh, *International Law, American Casebook Series,* 562 (1969).)

Q. Would you please continue with your analysis of the nature and development of the doctrine of continental shelf rights? A. To return for a moment to the development of the rule of international law under which a state has sovereignty over the superjacent airspace, the situation is one in which the law followed possibilities of use or exploitability. At one stage, a learned assemblage of international lawyers supported the position that a state was sovereign up to a height equal to the top of the Eiffel Tower since that was the highest point which man had utilized. There developed, with the increase of air power, a considerable discussion in the literature as to the dividing line between the air-space, which admittedly was under the sovereignty of the subjacent state, and "outer space" which was alleged to be *res communis* or *res nullius.* As man's capacity to "exploit" outer space increased, attempts to limit the reach of national sovereignty diminished and were superseded by agreements such as the multilateral Treaty on Principles Governing the
520 Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, done at London, Moscow and Washington Jan. 27, 1967 (18 U.S.T. 2410, T.I.A.S. No. 6347. Text and annotations in Friedmann, Lissitzyn and Pugh, *supra*, at pp. 637 ff.)

Although the use of air-space has been subjected to various regulations by treaties, there has been no abandonment of, or legal limitation upon, the basic concept that the state is sovereign over its air space. The same development has been witnessed in regard to the continental shelf in the sense that with the expansion of facilities for exploitation there have been extensions, within the provisions of the Geneva Convention of 1958, of the area over which the state is recognized to have sovereign rights. But as one passes beyond the continental shelf to the deep

seabed there are at present international negotiations – in which the United States is taking a leading part – looking toward the possible conclusion of international conventions which can be likened to the Treaty of Outer Space in the sense that it is contemplated that there shall be no national appropriation in that outer area. At this time, however, no final result of these discussions has been achieved and the outer limits of the shelf have not yet received final legal definition in precise measure.

521 The fact that international law limited the breadth of territorial waters to three miles, but never established an upper limit to the state sovereignty over the air space, is due to the fact that as state exercises of power and authority spread out from the shore, they began to come into conflict with the rights of other states to the freedom of the high seas, whereas even the uppermost flights of aircraft did not run counter to any comparable established international right in outer space. As will be pointed out later in this testimony, when international attention was directed to regulating the extent and use of the continental shelf, it was agreed that the resources of the continental shelf could be exploited beyond the three mile limit of territorial waters, since such exploitation involved no unjustifiable interference with the free use of the surface of the high seas for navigation and fishing. It will also be pointed out that from ancient times, before the term "continental shelf" came into general usage, international law recognized the right of littoral states to exploit and to control the exploitation of riches on and in the bed of the sea, such as pearl oysters, coral, sponges, as well as coal, tin and other mines dug out from the shore. This recognition was also due to the fact that such sub-surface exploitation did not interfere with acknowledged rights of other states to navigate or to fish upon
522 the high seas outside territorial waters. Whether the

international community will come to agree that mutual interest suggests setting a further outer limit for the exploitation of the continental shelf, while conceding general rights and interests in the deep seabed, has still not been revealed; and speculation on that subject is outside the range of this testimony. I merely note at this point that the general agreement that the exploitation of the resources of the shelf may, without a violation of law, involve some slight interference with navigation on the high seas, is comparable to that rule which permits the enforcement of anti-smuggling laws, for example, beyond the limits of territorial waters.

The classic statement of the criterion to be applied to such actions on the high seas is that of Chief Justice Marshall:

"If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

"In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the government will be assented to." (*Church v. Hub-*
523 *bart,* 6 U.S. (2 Cranch) 187, 235 (1804).)

The applicability of the general reasoning behind this much-quoted statement will be apparent when I later discuss the general international acquiescence in the exercises of state authority outside of territorial waters to protect the exploitation of resources of the seabed such as pearls, sponge, coral, etc. The same can be said about the provision in Article 5 of the 1958 Geneva Convention on the Continental Shelf, which stipulates that "The exploration of the continental shelf and the exploitation of its natural resources must not result in any *unjustifiable* interference with navigation, fishing . . . " etc. (Emphasis added).

Q. It has sometimes been argued that the continental shelf was incapable of ownership before 1945, and that only between then and 1958 did a new doctrine of international law arise which for the first time recognized or permitted exclusive rights in the shelf on the part of the coastal sovereign. It is also sometimes said that, even if international law before that time permitted certain appropriations of the shelf, it required actual physical occupation. Would you comment? A. It is scarcely surprising that much writing about the continental shelf takes the Truman Proclamation of September 28, 1945 as a point
524 of departure. That Proclamation did not, however, "make" the law on the continental shelf, nor was it the first evidence that states claimed the right to exploit the resources of the shelf. The International Court of Justice in the *North Sea Continental Shelf Cases,* [1969] I.C.J. 1, 32-33, made the following statement regarding the Truman Proclamation:

"A review of the genesis and development of the equidistance method of delimitation . . . may appropriately start with the instrument, generally known as the 'Truman Proclamation', issued by the Government of the United States on 28 September 1945."

(It must be noted that this passage from the Judgment is introduced (in Para. 47) by a reference to the actual issue before the Court, which was the lateral delimitation between adjacent continental shelves; the Court was not called upon to consider, and did not pronounce on, the question of the date at which international law recognized the right of coastal states to utilize the resources of the continental shelf.) The Court then continued to pronounce as follows:

"Although *this instrument was not the first or only one to have appeared,* it has in the opinion of the Court

a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable
525 over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and *the chief doctrine* it enunciated, namely that of *the coastal State as having an original, natural, and exclusive (in short a vested)* right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf." (Emphasis added).

If the right had been "created" in 1945, it would hardly have been described as already "vested." The Court then continued to refer specifically to the question of delimitation of lateral boundaries.

Throughout the judgment, the Court's reasoning is consistent with and, indeed, built upon the concept that rights in the continental shelf are inherent and therefore have always existed and cannot be assumed to have been newly created after 1945. The following extracts reveal this fact: "19. More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Conven-
526 tion, though quite independent of it, – namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.

In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent . . ." (*Id.* at p. 22.)

"39. The *a priori* argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view
527 which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. . . ." (*Id.* at p. 29.)

"41. As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other instruments – terms such as 'near', 'close to its shores', 'off its coast', 'opposite', 'in front of the coast', 'in the vicinity of', 'neighboring the coast', 'adjacent to', 'contiguous', etc., – all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. . . ." (*Id.* at p. 30.)

"43. More fundamental than the notion of proximity appears to be the principle – constantly relied upon by all

the Parties – of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating
528 this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because – or not only because – they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. . . . " (*Id.* at p. 31.)

"95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of plat-
529 form which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the

definitions to be found on page 131 of Volume I of the Yearbook of the *International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong."

"96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose
530 continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ingored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal regime of the continental shelf is that of a soil and a subsoil; two words evocative of the land and not of the sea." (*Id.* at p. 51.)

The two opening sentences of Section 96, just quoted, may be misunderstood. The Court says "the contiguous zone and the continental shelf are . . . concepts of the same kind" in the sense that both are instances "of

encroachment on maritime expanses which, during the greater part of history, appertained to no one."

The interpretation of this statement requires an explanation of the "contiguous zone," to which I have not previously referred *eo nomine.*

Article 66 of the Geneva Convention on the High Seas reads as follows:

"THE HIGH SEAS

531 "SECTION II. CONTIGUOUS ZONE – Article 66

1. In a zone of the high sea contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

It will be noted that a limit of 12 miles is given as the maximum extent of this "contiguous zone." In my opinion, it would have been more in accordance with customary international law had the Conference adopted Chief Justice Marshall's criterion in *Church v. Hubbart,* of what is "reasonable and necessary." (See p. 522, *supra.*) But the "contiguous zone" as a defined geographical area is part of the Geneva "doctrine" and as an area or "zone" might be considered as an "encroachment", even though the right to exercise a certain protective jurisdiction on the adjacent high seas, can well be considered "inherent" in the coastal State.

532 I have pointed out (*e.g.*, pp. 480 ff.) that in my writings since 1927 I have emphasized what I believe is the correct distinction between the belt of territorial waters which is properly considered part of the territory of the coastal State, and the various rights which the State may exercise on or under the high seas outside territorial waters. Those rights include the enforcement of anti-smuggling laws on the surface of the seas, and the exploitation of sea-bed resources. I quoted (at pp. 486-489) from my article in the 1961 Volume of the *American Journal of International Law* a passage which concluded that at the 1958 Geneva Conference on the Law of the Sea, the distinction between the territorial sea and the rights in the adjacent high seas, was blurred.

I quoted, at p. 522, the classic statement of Chief Justice Marshall in *Church v. Hubbart* that the exercise of rights seaward of the limits of the territorial sea, varied in "different seas add on different coasts." I shall point out later in some detail how the exercise of rights to exploit resources of the seabed and subsoil varies from coast to coast around the world. Thus pearl fisheries have been and are exploited near Ceylon and India, but not near Norway and Sweden. Sponges have been and are fished off Mediterranean coasts, but not off the coasts of the North Sea. Mines were dug out under the sea from
533 the coast of Cornwall but not of Provence.

Although the Court, as has been noted, was far from suggesting that rights to the continental shelf did not exist before the Truman Proclamation of 1945, it did take into account the fact that the Geneva Conventions generalized the recognition of coastal states' rights outside the edge of the territorial sea, both in regard to the seabed and in regard to the contiguous zone which is measured on the surface of the sea. It is in this sense that I understand the reference to "a recent instance of encroachment."

The dominant principle underlying the judgment is that the rights to the continental shelf "exist *ipso facto* and *ab initio,*" and are "an inherent right." In the light of this controlling concept, the opening sentence of Section 96 of the Judgment must be construed to read so that the "which" clause qualifies 'maritime expanses" and not "the continental shelf." The sentence might be rewritten as follows:

"There are maritime expanses which, during the greater part of history, appertained to no State and the doctrine of the continental shelf is a recent instance of encroachment on those maritime expanses."

Although the English text of the Judgment is authori-
534 tative (see p. 54 of the Report), the official French text, in my opinion, reinforces my reading of this passage.

I cannot read the Judgment as intimating that over a long historical period the continental shelf or adjacent seabed and subsoil was *res nullius* open to "occupation" by any state. All the evidence refutes such a concept.

Any right to state jurisdiction or control outside territorial waters could be described as an "encroachment" on the high seas, in the sense that it is a limitation on the rights of all states to universal and unrestricted use. The "doctrine of the continental shelf," as a *doctrine* under that name, is "recent", but the rights to that adjacent seabed and subsoil are "inherent" and existed *"ab initio."*

In speaking of an "encroachment" on the high seas, the Court necessarily had in mind the provisions of the Convention on the Continental Shelf which permit the construction of necessary installations so long as they do not "result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea." The authorization of such constructions was not explicit in the customary international law which recognized the right of the coastal state to exploit the resources of the

seabed, but it is a part of the "doctrine of the continental
535 shelf" as elaborated in Geneva in 1958.

Throughout its decision in the *North Sea* case, the International Court paid close attention to the work of the International Law Commission and to the Geneva Conference on the Law of the Sea of 1958, which took the work of the ILC as the basis for its deliberations.

The International Law Commission began to study the law of the continental shelf in 1950. (See its Report for its Third Session, 2 *Yearbook of the International Law Commission 1951,* Documents of the Third Session, pp. 141 ff.) In its first draft of Article 1 of a Convention on this subject, it provided:

"As here used, the term 'continental shelf' refers to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and the subsoil."

It is to be noted that two principles stand out in this draft:

i) the draft refers to an area "outside the area of territorial waters"; and

ii) it uses the test of exploitability.

The reason for the limitation under i) is explained in
536 the comment (p. 141):

"9. The continental shelf referred to in this article is limited to submarine areas outside territorial waters. Submarine areas beneath territorial waters are, like the waters above them, subject to the sovereignty of the coastal State." This is a point of prime importance. The ILC, like the Truman Proclamation, carefully avoided claiming sovereignty over the high seas above the continental shelf but outside the territorial waters. We have here, therefore,

a principle that there is a right of exploitation of the sea-bed which does not come into conflict with the principle of the freedom of the seas, but, like the established claims to customs and similar protective measures on the surface of the high seas outside the three mile limit, there is here posited a right to take measures outside the three mile limit *underneath* the high seas.

In its comment on its Article 2, which asserts the right of "control and jurisdiction" (the terminology adopted in this first stage), the ILC comment states at p. 142:

"5. The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine area in question would be practically impossible; nor should recourse be had to a fictional occupation. The right of the coastal State under article 2 is also independent of any formal assertion of
537 that right by the State."

This point concerning the absence of need for occupation is, as will be seen, strongly emphasized by the International Court in its Judgment.

In its definitive 1956 Report, the ILC embodied in Article 68 (which had been Article 2 in the earlier drafts) the following conclusion:

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

Paragraph (7) of the Commentary to this article provides:

"The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

(UNGA OR: Eleventh Session Supplement No. 9 (A/3159), p. 42.)

At the 1958 Geneva Conference on The Law of the Sea, the Fourth Committee dealt with the continental shelf. Its deliberations are in Vol. VI of the Official Records of the Conference. The Cuban Delegation proposed that the above text of paragraph (7) of the Commentary be included as an additional article (*op. cit.* p. 139). The Representative of Cuba who sponsored this proposal was Dr. F.V. Garcia Amador, Chairman of the ILC in 1956
538 and author of *The Exploitation and Conservation of the Resources of the Sea* (2nd enlarged ed. 1959, but first published in Spanish in 1956). As this proposal was debated in the Fourth Committee of the 1958 Conference, the discussion turned on the issue whether this should be a separate article or should be included by the Drafting Committee as a paragraph of Article 68. The latter course was followed. The Cuban proposal was adopted in the Committee by 41 votes to 7 with 12 abstentions. There was practically no support for the idea that occupation was or should be necessary.

The rationale of this provision, which is retained as paragraph 3 of Article 2 of the Convention on the Continental Shelf signed at Geneva on April 29, 1958 and ratified by the United States on March 24, 1961, is fully set forth by Professor Hersch Lauterpacht, who had been a member of the ILC and who became a member of the bench of the International Court of Justice. The following extracts are from his article "Sovereignty Over Submarine Areas," *supra.*

"VII. *'Occupation' of submarine areas*

"It has been suggested that, regardless of the form of words used, the rights of exclusive control and jurisdiction claimed in the submarine areas are rights indistinguishable from sovereignty. It has also been submitted

that such rights are not inconsistent with the reasonably
539 interpreted conception of the freedom of the seas. We may not inquire what, in addition to the decisive text of reasonableness and the fact of its having become part of the practice of states, is the legal basis of the asserted title, conceived as a territorial title, to submarine areas. The main argument, other than that based on the freedom of the seas, which has been raised against the acquisition of title over submarine area is that international law requires effective occupation as a condition of valid acquisition of territorial title and that no such effective occupation is possible with regard to submarine areas. That argument is based on two assumptions. The first is that the principles applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. The second is that effective occupation is, according to international law, invariably and rigidly a condition of acquisition of territorial sovereignty. Both these assumptions are unwarranted.

"Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. For it is clear that in all cases in which the title to submarine areas has been proclaimed there has
540 been no approximation to effective occupation. There has been only a proclamation and, in some cases, a conferment of concessions in respect of the areas in question. This absence of effective occupation is in no way fatal to acquisition of territorial title over submarine areas. For modern international practice does not invariably consider effective occupation to be a condition of acquisition of

title. As it is occasionally put in a more circuitous fashion, the requirement of effectiveness of occupation is a matter of degree. Even that attenuated condition of effectiveness represents an over-simplification of the true legal position. What is true is that, *all other things being equal,* effective occupation constitutes, except as against the lawful sovereign, a title superior to any competing title. To that extent – but to that extent only – is it possible to consider as accurate the statement that international law has discarded discovery, purely symbolic occupation (which does not differ in nature from pretensions based on mere discovery) and similar claims, including that of contiguity, as a valid source of territorial title. Thus in modern international judicial practice the border-line between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration. In
541 the judgment given in 1933 in the case between Denmark and Norway concerning the *Legal Status of Eastern Greenland* the Permanent Court of International Justice, after laying down the general principle that a claim to territorial title based upon continued display of authority must show 'the intention and will to act as sovereign, and some actual exercise or display of such sovereignty'. proceeded to qualify very substantially the requirement of 'some actual exercise or display' of authority. It said:

> 'It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.'

The principle that the requirement of 'some display of authority' may be reduced to the bare existence of a claim was shown clearly in the way in which the Court dealt with the title of Norwegian Kings in the sixteenth century, from which the Danish title was subsequently derived:

'That the King's claims amounted merely to pretensions is clear, for he had no permanent contact with
542 the country, he was exercising no authority there. The claims, however, were not disputed. No other Power was putting forward any claim to territorial sovereignty in Greenland, and in the absence of any competing claim the King's pretensions to be the sovereign of Greenland subsisted.'

Moreover, the Court held, with regard to the much later period between 1721 and 1814, that as there had been no claim to sovereignty by any other Power, and in view of the arctic and inaccessible character of the uncolonized part of the country, mere acts of legislation were sufficient evidence of effectiveness. Neither was the Court prepared to exact a substantially higher degree of effectiveness with regard to the modern period covering the nineteenth and twentieth centuries and immediately preceding the dispute. It considered as sufficient such manifestations of display of sovereignty as acts of legislation concerning navigation in the seas around Greenland and the conclusion of commercial agreements referring to Greenland.

"Even less exacting, if possible, in the matter of the requirement of effectiveness, was the award by the King of Italy, acting as Sole Arbitrator, in the *Clipperton Island* case between France and Mexico in 1931. That case is occasionally referred to as an example of the elasticity
543 of the notion of occupation. Upon analysis, it is an instance of a situation in which international law dispenses

altogether with the requirement of effectiveness. In that case the actual display of state activity by France consisted in the drawing up, by a Lieutenant of the French Navy, acting upon instructions of the French Minister of Marine, of a proclamation of French sovereignty over the islands; in taking geographical notes; in an unsuccessful attempt to reach the shore; and, in 1897, in an inquiry addressed to the Government of the United States as to the activities of certain American citizens in connexion with the island. The Arbitrator decided that the island belonged to France. After holding that 'the actual' and not the nominal, taking of possession is a necessary condition of occupation', he proceeded to base his decision on the rule that 'if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby established'. Yet it is clear that there was in this case nothing in the nature of an initial taking of possession in the ordinary sense of the word. There was a symbolic
544 act, a proclamation. Such symbolic act cannot, without doing violence to language, be regarded as occupation. The *Clipperton Island* case shows that the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title. Such areas are not only those which are uninhabited, but also those which are normally uninhabitable.

"The judicial and arbitral decisions referred to above demonstrate the advisability of viewing the principle of effectiveness against the background of the historic circumstances which gave rise to it. It was conceived as a check upon the fanciful arbitrariness of pretensions inimical

to a reasonable apportionment of the normally inhabitable territorial domain of the world and productive, by their very excess, of uncertainty and friction. But it is not a magic formula applicable to all situations. If so applied it can be maintained only by dint of being used, in the end, in a sense contrary to its natural connotation. The futility of the mechanical application of the notion of effectiveness was demonstrated in an instructive manner in the discussions preceding the general recognition of the sovereignty of states over the air. It was argued by international lawyers of distinction that as the air is incapable of effective occupation it was incapable of appropriation. To speak of occupation of submarine areas
545 is to use language even more unreal than that referring to occupation, as a basis of territorial title, of arctic and antarctic regions. States have indeed put forward claims – not altogether uncontroverted – to the latter, but they have not based them on any principle germane to occupation, effective or fictitious. In doing so they have by implication rejected the notion of occupation as an invariable basis of title. The same applies to the various proclamations relating to submarine areas. There is no element of occupation, in a sense consistent with the ordinary meaning of the word, in the British proclamations concerning the continental shelf in the Bahamas, Honduras, Jamaica, and the Falkland Islands. To say that a proclamation amounts to occupation, or that it constitutes the first step to occupation giving an 'inchoate title' is, in fact, to deny that occupation is necessary. A proclamation is a means by which a title, claimed or acquired, is announced. It is not a *source* of a title or a means of acquiring it. That does not mean that it is meaningless or unnecessary. When the Rulers of various Sheikdoms in the Persian Gulf were advised in 1949 by the British authorities that the issue of a proclamation is a pre-requisite of their effective assertion of rights over the adjacent

submarine areas, the advice was given in deference to an
546 obvious proposition of order and orderliness which requires that a person – or a state – asserting a claim, however inherently valid, must make his claim known by a formal pronouncement or notification. This is so especially if the subject of the claim in question is novel in character, undefined in extent, and likely to require determination in relation to similar claims by other persons or states. Accordingly, the issue of the proclamations of the continental shelf in no way militates against the view that they were of declaratory character in relation to what was considered to be a title claimed or acquired by or belonging to the state by reference to a legal basis other than occupation.

"The International Law Commission not only put on record, in its Report to the General Assembly in 1950, its view that the exercise of control and jurisdiction over the continental shelf 'was independent of the concept of occupation'. It had previously adopted a text stating that 'the submarine area (sea-bed and subsoil) of the Continental Shelf off the coast of a littoral State and outside the area of its territorial waters is subject *ipso jure* [(*sc.* without a proclamation)] to the control and jurisdiction of the littoral State'. The Commission had no difficulty in thus disposing of the idea of 'notional occupation' which in effect amounts to a denial of the necessity of
547 occupation. In the long run little purpose is served by adhering to words deprived of their content. Those who, apprehensive of the seemingly limitless comprehensiveness of the rival doctrine of contiguity, are inclined to see in occupation the only legitimate mode of acquiring title to submarine areas, find themselves in a dilemma which can be solved only by dint of a verbal nicety. As no effective acts of occupation (in the ordinary sense of the word),

concurrently with the act of proclamation of title or at any ascertainable period in the foreseeable future, are possible in relation to contiguous submarine areas, it is found necessary to fall back upon the barest minimum of occupation which reduces occupation to a shadow of its natural meaning, namely, to a proclamation and, possibly, the granting of concessions. But this is the very question which is at issue, namely, whether the state is in the position to rely on a valid legal basis and title for issuing the proclamation and the granting of concessions. There is little persuasive force in an attempt at juridical analysis which proceeds, in effect, as follows: 'The State is entitled to issue the proclamation annexing the continental shelf and to grant concessions over it if it occupies it to the extent of issuing the proclamation and granting concessions.' The tautologous nature of the solution emphasizes its essential unhelpfulness. For the same reason it seems unhelpful to answer the question whether a state is entitled to exercise sovereignty, *i.e.*, display state activities, by explaining that it is entitled to do so if it displays state activities, by legislating, granting concessions, and concluding treaties. There would be an element of consistency – though, it is believed, of misguided consistency – in the view that as the occupation of submarine areas is impossible there can be no title over them. But there is probably no more than dialectics in the attempt to combine the requirement of occupation with a denial of it by reducing it to a formal claim in the form of a proclamation.

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"However, the defect of the attempt to base the title to submarine areas on occupation is not only one of logic. If 'occupation' thus conceived were the true basis of the legal claim to the adjacent submarine areas then there would be nothing – save the extra-legal remedies of intervention or

self-preservation on the part of the coastal state – to prevent distant and strategically and economically powerful states from 'occupying' the adjacent submarine areas of other states by proclaiming their annexation and by emphasizing the 'effectiveness' of the title thus claimed to have been acquired by granting concessions, by legislating in respect of them, by concluding treaties – with states
549 willing to do so – relating to the submarine areas thus acquired, and, eventually and after a long period of uncertainty, to proceed to the actual exploitation, possibly in active competition with other states, of the submarine areas in question. Wide and disturbing possibilities of friction would thus be opened not only as between the coastal state and its more or less distant neighbours but also between the neighbours themselves. These possibilities are probably present to the minds of the adherents of the 'occupation doctrine'; for eventually they fall back upon contiguity. However, there may be an element of artificiality in an argument which starts from the proposition that 'contiguity is a dangerous doctrine unless confined within the principle of effective occupation' and ends by reducing the 'effective occupation' to a proclamation which, however, can be issued only by the coastal, the contiguous state. It may be essentially unhelpful to rely, as a check upon exorbitant claims of contiguity, on the doctrine of occupation – of effective occupation – and to proceed to argue that the effectiveness required is the effectiveness of a 'symbolic act of appropriation in the form of a proclamation' which can issue only from the coastal state. It may be tempting, in that predicament to invoke the authority of the Permanent Court of Interna-
550 tional Justice in the case of the *Legal Status of Eastern Greenland,* as well as the award in the case of the *Clipperton Island* case, as supporting the proposition that full

effectiveness of occupation is not essential. Actually these decisions demonstrate more than that. They show that there are situations in which occupation, in the normal meaning of the words, is not required at all and in which the conception of occupation is a more or less deceptive figure of speech. If this is so with regard to inhabited or sparsely inhabited territory, it is particularly true in relation to uninhabitable areas such as the sea-bed and its subsoil.

"Neither can the difficulty be obviated by relying on the somewhat nebulous notion of 'inchoate title' as applied to claims based on discovery. The latter, it has often been said, gives an 'inchoate title' which must be confirmed by use and settlement and which is lost if not thus confirmed. The doctrine of 'inchoate title' has often been invoked in diplomatic correspondence and arbitral proceedings and has been the subject of an occasional judicial *dictum*. In the only arbitral decision in which it was directly applied – namely, in the *Island of Palmas* arbitration – it was applied in the sense that the 'inchoate title' was held to have lapsed in view of the proved adverse claim based on effective occupation. In the nature of things there can be no
551 question, in the matter of submarine areas, of any loss of the 'inchoate title' by adverse occupation by another state. The very object of the proclamation is to make such adverse occupation impossible. Can it be said that the 'inchoate title' over the submarine areas will be lost if it is not followed by actual exploitation or exploration? To whom will it be lost? What is the reasonable period within which such exploitation or exploration must materialize? With regard to 'inchoate title' generally, writers have discussed the question whether some such period as twenty-five years is sufficient. Hall, in a careful treatment of the subject, suggested that an 'inchoate title' is good, as against

another occupying state, for such time as 'allowing for accidental circumstances or moderate negligence', might elapse before a force or a colony are sent out to some part of the land intended to be occupied; and that 'in the course of a few years the presumption of permanent intention afforded by such act dies away'. The quotation shows the degree of the applicability of the doctrine of inchoate title to submarine areas. Will the granting of concessions – a measure easy of accomplishment – suffice to perfect or keep alive the title? If not, within what period must the concession be followed by operations which are not purely nominal? That question can be put
552 even more pertinently in relation to 'exploration' conceived as a manifestation of an effective exercise of the right of occupation. What international or national authority will exercise the power of exacting the penalty for inefficiency of failure? These questions could be multiplied. They are sufficient to show the inadequacy of the notion of 'inchoate title', conceived for entirely different circumstances, to a situation in which international law, if it is to be of assistance, must supply the necessary element of precision and stability as distinguished from an infusion of uncertainty and potentialities for conflict.

"On the other hand, it is possible to use in this connexion the term 'inchoate title' in a specific connotation different from that with which it is usually associated. It is possible to say that the littoral state is entitled *ipso jure* to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'. The language thus used may not be wholly devoid of artificiality inasmuch as it identified the dividing line between a full and an 'inchoate' title with a purely formal act which can be accomplished with a stroke of the pen. However, there

is room for the argument that there is no compelling
553 necessity in relation to an entirely novel situation to use terms in full conformity with their accepted meaning. Moreover, the formula may be useful inasmuch as it emphasizes the importance of and necessity for an express declaration even if conceived as a purely formal act.

"The theory of occupation as the legal basis of the claim to submarine areas has been favoured largely for the reason that it supplies an alternative to exorbitant and altogether undefinable claims based on contiguity and continuity. However, it may be a mistake to attempt to provide a legal basis for new problems in international law in such a way as to eliminate all possibility of abuse. No legal doctrine can by itself do away with that possibility. There is no compelling necessity to conjure dangerous vistas of unchecked nationalistic expansion following in the wake of the principle of contiguity. Such expansion – which, in terms of law, must remain a *brutum fulmen* – can equally well take place on the purported basis of fictitious and nominal, or 'notional', occupation. The claim to sovereignty or to exclusive rights over the high seas is unlawful whether it is put forward under the colour of contiguity or occupation accomplished by an act of appropriation in the form of a proclamation or enactment. The claim to territories already occupied or administered by another state is as groundless when put forward by reference to contiguity as it is when advanced
554 by reference to notional occupation in the form of a proclamation or a prior title based on discovery. In so far as occupation means effective occupation – and that is its only natural meaning – it is not applicable to the continental shelf and to submarine areas generally. In so far as it is used in a figurative sense, *i.e.*, as a mere claim to be substantiated by no more than a proclamation or

a similarly nominal act such as the granting of concessions it is so elastic and as open to abuse as the doctrine of the contiguity of the coastal state. The latter, at least, has the merit of using terms in their ordinary connotation. It will now be considered to what extent that doctrine has in actual practice been made the basis of the assumption of title to submarine areas and to what extent such practice can find support in the notion of contiguity and continuity as reasonably adopted to the circumstances of the case." (Lauterpacht, "Sovereignty Over Submarine Areas," *supra*, pp. 415-23, footnotes omitted.)

Much the same point regarding the absence of need for occupation is made by Waldock in "The Legal Basis of Claims to the Continental Shelf," 36 Grotius Society, *Transactions for the Year 1950* (1951), 115, 116-18, 141, quoted in 4 Whiteman, *Digest of International Law* 742-43 (1965).

555 Lauterpacht was no longer on the bench when the Court handed down its 1969 judgment in the *North Sea Continental Shelf Cases*, but the Court took the same view, finding no need for occupation as a basis for a claim to the continental shelf. The Court said (in section 19 of the Judgment):

"In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised." (*North Sea Continental Shelf*, [1969], I.C.J. 1, 22.)

To return to the 1950 Report of the ILC, it is also important to note Point 6 of its Commentary:

"6. The Commission has not attempted to base on customary law the right of a coastal State to exercise control

and jurisdiction for the limited purposes stated in Article 2. Though numerous proclamation have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community."

556 One reason why the ILC avoided reliance on the "numerous proclamations . . . issued over the past decade" undoubtedly was that many of these proclamations, departing from a fundamental thesis of the Truman Proclamation, implied or actually asserted sovereignty over the high seas above the continental shelf – a thesis which the ILC stoutly rejected. Indeed, at this stage, the ILC even avoided describing the right of the coastal state in the continental shelf as a "sovereign" right; changes were made in this approach later.

At the eighth plenary meeting of the United Nations Conference on the Law of the Sea, 22 April 1958, there was a discussion of the report of the Fourth Committee (U.N. Doc. A/CONF 13/38 p. 11). The principal discussion turned on the terminology in Article 68 of the draft convention as reported by the Fourth Committee. The draft had used the expression "exclusive rights" to describe the rights in the continental shelf. The representative of India proposed that the expression "sovereign rights" should replace the expression "exclusive rights," thus restoring terminology which had been adopted by the International Law Commission. After the debate the Indian proposal was adopted by 51 votes to 14 with 6 abstensions. This outcome of the debate apparently was influenced by the view expressed by the representative of the United States (altering the position it supported in

557 the Fourth Committee), namely that Article 69 of the

draft clarified the problem of the legal status of the waters and air space above the continental shelf and that therefore the word "sovereign" could be used to describe the rights in the continental shelf without the risk of impairing the legal status of the superjacent waters and air space. (Para. 51, p. 13-14. The text of Articles 68 and 69 as adopted by the Fourth Committee will be found at page 91 of the same volume. In the text of the Convention on the Continental Shelf, as adopted by the conference at its eighteenth plenary meeting, the Articles are re-numbered and the statement about "sovereign rights" is found in Article 2, Para. 1 and the statement about the legal status of the superjacent waters is in Article 3; *id.* p. 142.)

The ILC's denial of any effect upon rights on the surface of the high seas is affirmed in Articles 4, 5 and 6 of this first draft and in the comments on these articles. It should be noted, however, that the ILC did not commit itself to the position that in dealing with the law of the continental shelf it was exercising its powers to envisage "the progressive development of international law" rather than its "codification." According to the leading book about the ILC:

558 ". . . at its 236th meeting on 10 August 1953, the Commission debated the questions whether its draft articles on the continental shelf were more in the category of progressive development than codification. . . . In his draft report, as Rapporteur of the Commission, Professor Lauterpacht had drawn attention to the dual nature of the articles on the *Continental Shelf* as codification and progressive development, while perhaps emphasizing their character as codification. . . . Mr. Sandstrom, recalling that the Commission had regarded the draft articles on the *Continental Shelf* as progressive development . . .

proposed that the Commission's Report should recognize their character as progressive development. . . . The Commission first accepted Mr. Sandstrom's proposal by a vote of 4-3-3 and then reversed itself to adopt, by a vote of 7-2-1, a recommendation that the General Assembly adopt the Commission's Report on the subject by resolution (without specifying whether it was acting under Article 16 [progressive development] or Article 23 [codification])." Briggs, *The International Law Commission*, 294-295 (1965).

As I analyze the debates in the ILC and at the Geneva Conference, I reach the conclusion that the difference of opinion on this point is to be explained as follows:

The draft convention on the continental shelf and the final convention contain a mixture of provisions, some of
559 which were clearly statements of existing law (and therefore within the ILC's task of "codification"), while others were contractual arrangements to be applied by the parties in the future ("progressive development"). This point is clearly brought out in the judgment of the International Court of Justice in the *North Sea Continental Shelf Cases, supra.* The Court had to decide whether Article 6 of the Convention, which includes the equidistance rule for demarcating the limits between the continental shelves of adjacent states, was a statement of existing customary law or merely a conventional rule to be adopted by parties to the Convention. The Court attached importance to the fact that Article 12 of the Convention specifies the articles of the Convention to which states, in ratifying, may, if they choose, attach reservations. The Court pointed out that Article 6 is one of the articles to which reservations may be made and continued:

"speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain

limits, be admitted; – whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot
560 therefore be the subject of any right to unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention 'other than to Articles 1 to 3 inclusive' – these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent airspace." (*North Sea Continental Shelf*, [1969] I.C.J., 38-39 §63.)

The Court did not seek to specify which of the customary rules indicated dealt with "received" customary
561 international law and which dealt with "emergent" rules, but I believe it to be true, and to be clear from other passages of the judgment which have been quoted, that the basic proposition that states have rights of exploitation in the continental shelf outside territorial waters was

accepted by the Court as an established rule of customary international law.

For the sake of completeness, I should mention one other development at the 1958 Geneva Conference on the Law of the Sea. I have been discussing the Convention on the Continental Shelf which was debated in the Fourth Committee of the Conference. The Third Committee, which dealt with Fishing and the Conservation of Living Resources, considered an article proposed by the International Law Commission as Article 60 of its draft, entitled "Fisheries Conducted by Means of Equipment Embedded in the Fl Floor of the Sea". (*Official Records of the Conference,* Vol. V, p. 134. The debate on this article is in the same volume at pp. 95ff. The text as adopted by the Committee is at p. 161.)

The topic was a special one on which the Indian delegation took a leading role in the discussion, explaining that "for centuries" their fishermen had used permanent equipment consisting of stakes and other items on the bottom of the sea coast near shore, where the waters were shallow. Other delegations expressed a comparable
562 interest. The text adopted shows the special character of this type of fishing and need not be confused with the discussion of the exploitation of shells, coral, sponges, etc. attached to the seabed. Article 60 of the draft adopted by the Third Committee of the Conference reads as follows:

"Article 60

1. The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided

that non-nationals are permitted to participate in such activities on an equal footing with nationals except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals. Such regulations will not, however, affect the general status of the areas as high seas.

2. Fisheries conducted by means of equipment embedded in the floor of the sea in this article means those using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently, or if removed, restored each season on the same site."

563 It will be noted that the right safeguarded here is one based exclusively on long usage. While it is true that a similar type of argument has been used in connection with the exploitation of the riches of the sea on the sea-bottom, Article 2 of the Convention on the Continental Shelf, is based, as the International Court stressed, on inherent right and does not depend on occupation, actual or notional. Article 60, above cited, assumes an actual occupation through fixtures on the bottom.

* * * * *

564 Q. You have referred several times to a long-established and generally acknowledged right of coastal sovereigns to the exclusive right to exploit (or to regulate the exploitation of) resources of the bed of the marginal sea, extending beyond territorial waters. Can you supply more detailed information as to specific cases where such rights have been asserted and recognized? A. The distinction between on the one hand, the rights of a state in the belt of territorial waters, both with respect to navigation and to fisheries therein, and on the other hand, the rights of a state to exploit any accessible resources of the seabed

adjacent to its coast, whether within or without territorial waters, has been recognized in international law over the centuries. Writer after writer has quoted with approval the statement of Vattel: "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become
565 property?" (Vattel's *The Law of Nations* was published in 1758. The standard edition is Fenwick's translation in *Classics of International Law* (1916). The quoted passage from sec. 287 of that edition is reprinted in Crocker, *The Extent of the Marginal Sea* 457 (1919).) Vattel was extensively relied on by the Founding Fathers in the United States and by the Supreme Court. See Nussbaum, *A Concise History of the Law of Nations,* 160-162 (rev. ed. 1954). In relation to Vattel's authority during the early years of the United States, and in general in relation to that period's respect for international law, I call attention to Professor Edwin D. Dickinson's tabulation of the citation of the great classic writers on international law. Dickinson reports:

"While influences of this kind cannot be measured statistically, the following tabulation is at least a suggestion of the use made of classical treatises, and of the relative influence of the different publicists, in cases before the Supreme Court of the United States at the end of the 18th and the beginning of the 19th century. The figures are compiled from the first seventeen volumes of the court's reports, covering the years from 1789 to 1820. Eighty-two cases were found in these volumes involving more or less important questions of international law. The figures in parentheses indicate the number of instances in which the
566 publicist named was . . . quoted, or paraphrased . . . *Quoted or paraphrased* in opinion: Grotius (2), Bynkershoek (8), Burlamaqui (2), Ruthersforth (2), Vattel (22)." Dickinson, "Changing Concepts and the Doctrine of Incorporation"

26 *Am. J. Int. L.* (1932) p. 239 at 259, note 132. Other studies of a comparable character are cited by Nussbaum, *supra.*

The statement of Vattel is quoted, *inter alia,* in one of the most frequently cited modern articles on the subject of rights in the seabed, namely the article by Sir Cecil Hurst entitled"Whose is the Bed of the Sea?" 1923-24 *Brit. Y.B. Int'l. L.* 34. This was published long before the discussions which have been inspired by the Truman Proclamation of 1945. Sir Cecil Hurst, whose "Services to International Law" are described by Sir Eric Beckett, in XXVI *Brit. Y.B. Int'l. L.* 1 (1949), was elected a judge of the Permanent Court of International Justice in 1929. He served for fifteen years and was President of the Court from 1934 to 1936. At page 40 of his article, *supra,* he said that Vattel's statement:

"ceases to cause any dificulty to even the stoutest upholders of the principle that the limits of the territorial belt are not more than three miles if it is realized that the exclusive right to the pearls to be obtained from the banks flowed from the ownership of the bed of the sea
567 where the banks were situated, and not from any claim to maritime jurisdiction over the waters.

"The instances where ancient usage justifies a claim to sedentary fisheries outside the three-mile limit do not seem to be numerous, and of those which are known some appear to be situated in bays or gulfs which are claimed as part of the national territory by the State contiguous to whose shore they lie. For instance, the chank fisheries and the pearl fisheries in the Gulf of Manaar have been the subject of regulation by local ordinances, etc. throughout the nineteenth century. The pearl and chank fisheries in the Gulf of Manaar were claimed from early times by the successive Portuguese, Dutch and British

masters of the neighbouring territory, and there can be little doubt but that a good title to the ownership of these beds can be made out, based on long-continued occupation. Both the Gulf of Manaar and Palk's Bay, the two great bays which divide India from Ceylon and are separated from each other by the long stretch of islets known as Adam's Bridge, would probably be claimed as part of the national territory, and not part of the high seas at all. Palk's Bay at any rate has now been held by the Madras Courts to be an integral portion of the British Dominions and if the question arose a similar decision might possibly be given as to the Gulf of Manaar. Even
568 if it were not, however, the claim to the ownership of the pearl and chank beds in that gulf could be based on long usage and uncontested enjoyment; and the right to legislate with regard to these beds could be rested on the ground of their ownership.

"Another instance which can be cited, and one where there is no doubt that the site forms part of the high seas, is that of the oyster beds off the east coast of Ireland. By the Sea Fisheries Act of 1868 power was taken to issue an Order in Council enabling the Irish Commissioners to regulate the dredging for oysters on any oyster beds within a distance of twenty miles seawards from a straight line between Lambay Island and Carnsore Point. Some of these banks were between ten and twenty miles beyond the three-mile limit.

"The above are instances where the State interested formed part of the British Empire. The same principle must of necessity apply also to sedentary fisheries on banks claimed by foreign Governments. The Bay of Tunis has, for instance, claimed the exclusive right to the sponges on a bank outside the three-mile limit off the coast of Tunis by the continuous and unquestioned enjoyment of

the *fructus* of these banks. Such enjoyment would constitute a title to the bank which foreign States would no doubt recognise and would oblige their nationals to recog-
569 nise. Similarly, Mexico is said to have legislated for regulating pearl fisheries off the Mexican coast though outside the three-mile limit." (1923-24 *Brit. Yr. Bk. of Int'l. L.* 34, 40-41.) (Footnotes omitted.)

I have quoted Sir Cecil Hurst because his article is so widely known and because the passage quoted furnishes a ready reference to some of the more important evidence of international practice. However, Hurst's language may be read to imply, though it is not the only possible reading, that he regarded the continental shelf as *terra nullius* except for isolated instances where actual occupation had been established. For reasons I have already stated, I would disagree with such an implication.

I would observe that the type of example mentioned by Sir Cecil Hurst, and which I intend now to expand upon, all falls into the category of "international custom, as evidence of a general practice accepted as law," which Article 38 of the Statute of the International Court of Justice recognizes as a principle source of rules of international law. Given the absence, until very modern times, of a system of international adjudication, it has always been recognized that in the absence of treaty there is no better way of establishing an international right then to show a widespread practice by states of asserting and
570 exercising such a right, especially when coupled with an absence of protest by other states.

The British claim to oyster fisheries is not wholly clear. There were long disputes with the French over the oyster fisheries lying off Jersey and other channel islands. The early history of these disputes involved to a large extent the general problem of the extent of territorial waters; it

is thoroughly described in 2 Smith, *Great Britain and the Law of Nations* 144 ff. (1935). To some extent oyster fisheries were involved in the dispute between those two countries over the Minquiers and Ecrehos islets, upon which the International Court of Justice issued a Judgment on November 17th, 1953. This dispute involved a sifting of claims going back to feudal times. It touches on the Anglo-British Treaty of 1839 concerning the oyster fishery between Jersey and the neighboring French coast. The Court remarked: "The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that question to the question of sovereignty over the Ecrehos and the Minquiers." ([1953] I.C.J. 47, 59.)

Sir Cecil Hurst's statement about the oyster fishery is supported by expert testimony given to a British Parliamentary Select Committee on Oyster Fisheries in 1876. The expert witness, John A. Blake, was then Inspector of
571 Irish Fisheries and had been Chairman of an 1868 Commission to study oyster culture in England and France. He testified:

"[W]hen I was a Member of this House, [House of Commons] I was to some extent instrumental, with the assistance of others, in getting a clause inserted in the Convention Act, which enables us to have a close season off the coast of Wicklow for 20 miles out, and that was subsequently confirmed by an Order in Council . . . so that those deep-sea beds extending from 12 to 15 or 18 miles are under the operation of a statutory close season." (Report from the Select Committee on Oyster Fisheries, etc. in *Reports from Committees,* Session 8 February-15 August 1876, Vol. XII, p. 166, 167.) (Maine et al. Exhibit No. 336).

The Sea Fisheries (Ireland) Act, 1868, authorized the Irish Commissioners to regulate the dredging for oysters on oyster beds seawards from a straight line between Lambay Island and Carnsore Point. The Act is 31&32 Vict. c.45. (Maine et al. Exhibit No. 337.) The British Argument in the Bering Sea Arbitration contends that the regulation of the Irish oyster fisheries was not applied to other than British boats, but admits that the Order in Council, mentioned by Blake, authorized application to foreign boats. If no other boats were specified it must have been that foreign fishermen respected the British close season; the
572 cooperative arrangements with the French at the time suggest this to be the case. (The British Argument is reprinted in 2 Smith, *supra*, at p. 410.)

Despite the ready acceptance of Vattel's dictum and reiterated references, particularly to the pearl fisheries of Ceylon and the sponge and coral fisheries of the Mediterranean, most of the many references to the justifiability of such claims to seabed resources outside territorial waters, such as Sir Cecil Hurst's language which I have quoted, fail to indicate how numerous and how varied were these seabed "fisheries." One need not give an encyclopedic account to demonstrate the acceptance of the international law respecting the coastal state's right to such resources. However, it should be noted that national claims have been established to such resources as edible oysters, pearl oysters, mother of pearl, chanks, amber, sponge and coral. I am not discussing so-called bottom fish or crustacea, like crabs which move about on the ocean bed, although their status was also discussed at the 1958 Geneva Conference on the Law of the Sea. But wherever a substance of value was attached to or growing out of the seabed, its exclusive utilization by the coastal inhabitants or authorities seems to have met with no international protest. This

statement is not invalidated by the fact that bargained
573 agreements between states for the use of fisheries, especially when the limits of territorial waters were controverted, at times included the edible oyster fisheries.

Although I do not attempt to collect and balance off all or even a great number of international law writers, I do call attention to the French jurist, Professor Gilbert-Charles Gidel, who many at the Geneva Conference on the Law of the Sea considered to have very great authority. Professor Gidel distinguishes between the bed of the sea and the subsoil beneath the bed, although it seems obvious that if one recognizes legal rights to the exploitation of the bed, as Gidel does, one would recognize rights to the subsoil *a fortiori*. Such recognition, indeed,is accorded by the history of the mines dug out under the seabed, as I will point out later. In a passage I have already quoted from the *North Sea Continental Shelf Cases,* the International Court of Justice said "the legal regime of the continental shelf is that of a soil and a subsoil. . . ." ([1969] I.C.J. 1, 51).

Gidel, as just stated, distinguishes between the bed of the sea and the subsoil beneath the bed (*le fond et le tréfonds*). (1 Gidel, *Le Droit International Public de la Mer* 507 ff. (1932).) He states that work on the bed of the sea necessarily causes some impact, however small, on the utilization of the high seas. However, he says this ob-
574 servation does not apply to the subsoil. He concludes that all state activities regarding the subsoil of the high seas are legal under international law if they do not involve any appreciable repercussion, actual or probable, on the bed of the sea. (*Id.* at p. 508.) He advances one other limitation, namely that they must not impinge upon comparable activities of other coastal states on some opposite shore. Apparently he holds that such subsoil operations of

state A should stop at the opposite border of the territorial waters of state B. In this connection he discusses various undersea coal mines (*Id.* pp. 510-511).

Gidel says that sedentary fisheries have not given rise to many difficulties in international practice and that such difficulties as have existed have been easily adjusted (*Id.* at pp. 488 ff.) He refers to the oyster fisheries off the coast of Ireland which extend beyond the three mile limit. As an exception to the fishery treaties between the United Kingdom and France, especially those of 1843 and 1867, provision was made to prohibit French participation in those fisheries. (*Id.* at p. 490-91.)

He discusses the fisheries off the coast of Tunisia, particularly the sponge banks and the coral, describing how they have been regulated by the Tunisian government without
575 serious international difficulties. (*Id.* at pp. 491-93.)

He also discusses the Ceylon fisheries, quoting liberally from Sir Cecil Hurst's familiar article, *supra*. He also cites Fulton, *The Sovereignty of the Sea* 697 (1911) (Maine et al. Exhibit No. 338) and Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 16 (1927), on the Australian fisheries. He is inclined to minimize the importance of the famous statement by Vattel, *supra,* (Gidel, *supra,* at pp. 496-7) and concludes that sedentary fisheries constitute an exception to the principle of the freedom of the sea. (Gidel, *supra,* at p. 500.) However, he does emphasize the importance of long use without objection.

I quoted Vattel's famous statement in my *The Law of Territorial Waters and Maritime Jurisdiction,* p. 14. (The translation I used has an unimportant variation from that quoted by Sir Cecil Hurst.) I discussed the Irish oyster fisheries, relying on the account in Fulton, *supra,* pp. 619-621. Fulton mentions at page 620 that "on the coast of

France a large area, extending much beyond the three-mile limit, was reserved to French fishermen on account of the valuable oyster-grounds it contained."

It is true that British claims to the pearl fisheries of Ceylon were bolstered in the 20th century by assertions
576 of a prescriptive right and by arguing that their locations in Palk's Bay or the Gulf of Manaar placed them in so-called territorial bays or "historic bays" where states have specially acknowledged rights. Hackworth quotes parliamentary materials to demonstrate this:

"With respect to the extent of jurisdiction claimed by Great Britain for pearl and chank fisheries the following extracts from the proceedings in the House of Commons, on May 2, 1923, are pertinent:

Mr. Trevelyan asked the Under-Secretary of State for the Colonies how far out to sea at the furthest point the prohibition of chank fishing reaches from the coast of Ceylon; and to what vessels the prohibition applies?

Mr. Ormsby-Gore: It is estimated by rough measurement that the line in the Gulf of Manaar mentioned in my reply to the hon. Member's previous question on this subject is at its furthest point 25 miles from the coast of Ceylon. The prohibition applies to all vessels of all nationalities and is imposed for the protection of the pearl banks which, as the hon. Member is aware, are located on the bed of the sea. Chanks are not strictly fish, but their shells are collected for ornament. The justification for this prohibition is based on rights over the fisheries enjoyed in uninterrupted and undisputed proprietorship by succes-
577 sive rulers, native, Portuguese, Dutch and British, since period prior to the development of the doctrine of the 3-mile limit.

Parliamentary Debates, H.C., 5th Ser., vol. 163, cols. 1417-1418. In an oral answer in the House of Commons

on May 30, 1923, the British Under Secretary of State for Foreign Affairs (McNeill) stated:

". . . As regards the last part of the question, pearl fisheries stand on a different footing to the ordinary kind of fishing in the waters of the sea, because the banks where the pearl oysters lie must be treated as part of the bed of the sea. For many centuries the pearl banks off the coast of Ceylon have been claimed as subject to the sovereignty of the rules of the neighbouring territory and subject therefore also to their control. Some of these banks are more than three miles from the shore, but where they are situated under the high seas the claim to sovereignty and control is limited in extent to the area of the banks, and does not affect the rights of navigation or of ordinary fishing in the waters over the banks. (*Parliamentary Debates,* H.C. 5th ser., vol. 164, cols. 1261-1262." II Hackworth, *Digest of International Law,* 679 (1941).

But it appears that exclusive claims to the exploitation of
578 the pearl and chank fisheries were never challenged internationally, even when asserted by the Portuguese and the Dutch from about the sixteenth century, when the law on the territoriality of bays was by no means well defined. The earliest conflicts were over the adjacent lands, wrested, for example, by the Dutch from the Portuguese, and not over the pearl beds and banks themselves which had been claimed also by the native kings and princes of Ceylon and India. All the accounts indicate that from earliest times the pearl fisheries were a source of Government revenue, usually rented out by government for a stated fee or percentage of the take. At certain periods, governmental rights were exercised by the East India Company.

An old account of Ceylon tells how the Dutch specified their acquisition of rights to the pearl fisheries in a treaty

with the King of Candy. (Percival, *An Account of the Island of Ceylon,* (1803) p. 22; Maine et al. Exhibit No. 340, p. 22.) On the established usages regarding agreements with native Governments in Asia, see Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* pp. 6 ff. (1938).

The criterion of exclusivity was essentially that of exploitability. The early accounts are concerned largely with the depth of the water and the diving capacities of the native divers, rather than with the distance of the pearl
579 banks from shore. But the Ceylon pearl fishery's principal bank is said to have lain "out at sea about twenty miles." (Maine et al. Exhibit No. 340, p. 60.) Others are described as "on the bottom of the sea from ten to twelve miles or more from the shore." Steuart, *An Account of the Pearl Fisheries of Ceylon* (1843) (Maine et al. Exhibit No. 341, p. 7).

In a "Report on the Pearl Banks . . . to His Excellency Jan Schreuder, Governor and Director of the Island of Ceylon," 20th June 1757 (Appendix to Steuart, *supra*, p. 37 ff.), it is stated that "the exact situation of the Manaar banks is known only to the Master Attendant of Jaffna . . . and that with the exception of that person there are none here who could point out the Reef." (S.A. Hemme, "Report on the Pearl Banks of Ceylon," 20 June 1757, in Appendix to Steuart, *supra*, pp. 37, 39, Maine et al. Exhibit No. 341, p. 39.) It is further stated that certain banks are "farther out in the sea . . . by 12 or 13 and 14 fathoms." (*Id.*) At another place it is said that a certain bank was situated "to the depth of 6, 7, 8 and 9 fathoms" and was "9 miles in circumference". (*Id.* at pp. 39-40.) The report further states that certain "reefs . . . lie too far from the Company's [Dutch East India Company's] nearest shore, insomuch that a whole day is required for

the purpose of going to and from this spot, consequently
580 I think it advisable, in order to avoid all unnecessary broils with the Court of Kandy, to dispense in future with the inspection" of the banks in question. (*Id.* at p. 40). The earlier rights of the "Court of Kandy" were unquestioned. (*Id.*).

Steuart's Appendix also includes an "Extract from Mr. McCulloch's Commercial Dictionary. Article 'Pearls'," (*Id.* at p. 76), which describes the pearl fisheries of the Persian Gulf. The main banks are said to be "not far distant from the Island of Bahrein, on the West side of the Persian Gulf, in lat. 26 50' N. lon. 51 10' E. . . ." (*Id.* at p. 77). Other oysters "are fished in the sea near the islands of Karrak and Corgo . . ." but there "the water is too deep to make fishing for them either very profitable or easy. Besides, the entire monopoly of the fishery is in the hands of the Sheik of Bushire, who seems to consider these islands as his immediate property." (*Id.*) There is a description of the diving in water "about 7 fathoms deep." (*Id.*) The same article refers to valuable pearl fisheries on "the Coast of Columbia" (*sic.*) as well as off Panama, and says that "the best fishery ground is said to be in from 6 to 8 fathoms water." (*Id.* at p. 78).

An extract from Robertson's Report on Ceylon Affairs
581 to the English Secretary of State for the Colonies in August 1799 is included in the Appendix. (*Id.* at pp. 83-91). Here it is said that there are fourteen banks from which pearl oysters are taken and that they are "in a space extending from North to South forty miles, and from East to West about 24 miles in the part that is the broadest, and in a depth of water that varies from three to fifteen fathoms." (*Id.* at p. 83). Reference is made to the fact that "ever since the conquest of Ceylon" by the British there had been arrangements designed "to draw as

great a revenue as possible from" the oyster fishery. (*Id.*). Figures are given for the revenue thus derived by the British Government from 1796 through 1798. (*Id.* at p. 88). There is further reference to an historic claim to a share in the fisheries by "the Nabob of the Carnatic of one sixth, as Lord Paramount." (*Id.* at p. 90). It is recommended that some small vessels "well manned and armed with a few guns" be stationed permanently to keep the banks from being plundered and disturbed "and to guard the fishery from being interrupted or molested by any French cruizers that might run up the Gulf of Manaar." (*Id.* at p. 91). This last point does not suggest that France disputed the British right to claim the pearl fisheries; England and France were at war at the time of this report.

582 Lee's report to the Colonial Secretary in 1838 (*Id.* at pp. 99-103) gives some of the background history of the pearl fisheries of Ceylon. It refers to the origin of the Portuguese establishment in the area in the 17th century, and indicates evidence that the Portuguese "kept for themselves the *pearl fisheries*". (*Id.* at p. 99). It then recites that in 1658 the Dutch took the territories from the Portuguese: "By this success the Dutch Company [The Dutch East India Company] succeeded to the rights, previously possessed by the Portuguese, 'over the Coast, as well as to their authority over the seaports, the Christinas, the *Pearl fisheries* and all thereunto appertaining . . .' " (*Id.* at p. 100). The Dutch held their first pearl fishery in 1667-8, a second in 1669 and a third in 1691, etc. (*Id.*) It thus appears that the only disputes over rights to share in the pearl fisheries were those between the European conquerors and certain native rules and religious orders which claimed traditional rights to some form of tribute.

In *Ceylon Marine Biological Reports,* Part V—March 1911 (Maine et al. Exhibit No. 342), conducted by the

Ceylon Company of Pearl Fishers Limited, apparently for the British Government of Ceylon, it is said that "the Ceylon pearl banks cover an area of over 700 square miles . . ." (*Id.* at p. 191). ". . . In Ceylon the oyster thrives best
583 in the open sea, in about 6 fathoms." (*Id.*) "[T]he Ceylon banks lie scattered about on a shallow water plateau, bound on the east by the mainland and on the west by the overfalls (100-1,200 fathoms) . . . The Distance between a point midway between Tuticorin [on the Madras coast of the mainland] and Cape Comorin and the pearl banks is approximately 100 miles." (*Id.* at p. 192). Another bank is described as "about 11 miles long by 1½ miles broad, situated on the very edge of the overfalls, 18 miles from land. . . ." (*Id.* at p. 201).

Various pearl fisheries are described in Tressler and Lemon, *Marine Products of Commerce* (2d ed. rev. and enlarged, 1951). (Maine et al. Exhibit No. 343). The pearl fisheries of the Persian Gulf, which were then (1951) regulated by the British, are said to have been fished for some 2,000 years. "Only 35 per cent of the genuine pearls of the Persian Gulf come from the waters around Bahrein. Kuwait to the north and the Trucial Oman Coast to the south supply the remainder." (*Id.* at p. 108). The distance from shore is not stated but it is said the divers descend to depths of 60 feet. (*Id.*). The Ceylon fisheries are described as being in the Gulf of Manaar, "a 65 to 150 mile-wide arm of the Indian Ocean, separating the island of Ceylon from the southermost part of India." (*Id.*).
584 These fisheries "are almost an ancient as those of the Persian Gulf; they are alluded to in Singhalese records as early as 550 B.C. and Pliny wrote of them" (*Id.*).

Another scientific account entitled "The Tinnevelly Pearl Fishery" was given by Clements R. Markham to the Society of Arts (15 *Proceedings of the Society,* 256 (1867))

(Maine et al. Exhibit No. 344). Markham describes in some detail ancient records of the pearl fisheries between India and Ceylon, indicating that these pearl fisheries had been worked from time immemorial. He describes the Portuguese, Dutch and English successive controls of this fishery, and he reports that the various government realized very substantial profits. (*Id.* at p. 256). He says: "The pearl oyster banks, which are very numerous, lie off Tuticorin and Trichendoor; and are about six to eight miles from the shore, and from five-and-half to eight-and-half fathoms from the surface." (*Id.* at p. 257).

Markham reports an 1865 communication from a Col. Pelly, who was the political resident in the Persian Gulf, concerning the Bahrein pearl fishery, which states that the Persian Gulf pearl banks "are the property of the Arabs in common, but no foreigner is allowed to fish them. The richest are those of the island of Bahrein, which are
585 found at all depths, from a little below high-water mark to eighteen fathoms." (*Id.* at p. 259). It is reported that these fisheries have been worked "from the most remote times." (*Id.*).

In the discussions which followed Markham's lecture, another participant described the mother-of-pearl fisheries in the Persian Gulf, the Red Sea, the Gulf of Panama and the Gulf of Mexico. These were also said to be of considerable value. (*Id.* at pp. 261-62).

Tressler and Lemon describe other pearl fisheries; those in the Red Sea have been exploited since centuries before the Christian era. (Maine et al. Exhibit No. 343, p. 109). Pearl fisheries off Venezuela date back to 1500 A.D. (*Id.*). The Spanish became aware in 1526 of the richness of the Panama pearl fisheries on the Pacific Coast. "The principal reefs and headquarters of the fishery are at Archipelago de las Perlas, or Pearl Islands, situated from 30 to 60

miles southeast of the Pacific terminus of the Panama Canal." (*Id.*). The pearl fisheries off the Paficic coast of Mexico, which were very rich, were reported to the Spaniards by Cortes. (*Id.*).

Tressler and Lemon also mention the Australian fisheries but I will deal with them later, using other sources.

586 Tressler and Lemon also describe other sub-sea resources, namely coral and sponge. (*Id.* at pp. 141-46, 733, 746-51). Coral, which was used "for personal adornment" at least as early as the third century B.C. was described by Greek writers and was much used by the Romans, who took coral near the present Hyeres and Lipari Islands and off the coast of Trapani in Sicily. (*Id.* at p. 141). Coral is also found in Japanese waters and around Formosa and the Pescadores. (*Id.* at p. 143). In the Mediterranean, important coral banks are located on the Algerian and Tunisian coasts. They extend: "eastward from Cape Ferro (Cap de Fer) toward Cape Bon, and in a southerly direction to the Gulf of Gabes in the region of Sfax. The coral fisheries are carried on at 6 or even 8 miles from shore and at depths between 90 and 900 feet . . . In those regions the fisheries have been carried on for centuries." (*Id.* at pp. 142-43).

Off Sicily the coral banks are said to be at an average depth of 650 feet. (*Id.* at p. 143). In the Red Sea "there is a black coral fishery extending for 50 miles north and south." (*Id.*). There are also Japanese coral fisheries 30 to 100 fathoms under the surface (*Id.* at p. 144), and some in deep water off the coast of Southern California. (*Id.* at p. 143).

Although the right to exploit coral, like other sub-sea
587 riches, was internationally acknowledged as a right which states could acquire and hold, there were international conflicts over coral fishery ownership similar to those through

which the ownership of the Ceylon pearl fisheries passed from native princes to Portugal, to the Netherlands to England. The *Encyclopedia Britannica* describes the disputes as follows:

"From the middle ages downwards the securing of the right to coral fisheries on the African coasts was an object of considerable rivalry among the Mediterranean communities of Europe. Previous to the 16th century they were controlled by the Italian republics. For a short period the Tunisian fisheries were secured by Charles V. to Spain; but the monopoly soon fell into the hands of the French, who held the right till the Revolutionary Government in 1793 threw the trade open. For a short period (about 1806) the British Government controlled the fisheries, and now they are again in the hands of the French authorities. Previous to the French Revolution much of the coral trade centered in Marseilles; but since that period, both the procuring of the raw material and the working of it up into the various forms in which it is used have become peculiarly Italian industries, centering largely in Naples, Rome and Genoa. On the Algerian coast, however, boats not flying the French flag have to
588 pay heavy dues for the right to fish, and in the early years of the 20th century the once flourishing fisheries at La Calle were almost entirely neglected." 7 *Encyclopedia Britannica,* 131 (11th ed. 1911).

The same historical account is given in Italian in Bini and Maldura, *Piccola Bibliioteca di Pesca: La Pesca Della Spunge E Del Corallo* 77 (1938).

With further reference to the modern tendency to support the British claim to the Ceylon pearl fisheries by asserting that the Gulf of Manaar and Palk's Bay are "territorial bays," it must be noted that pearl fisheries, although not as rich as those of Ceylon, are also found

along the west coast of India, south of Bombay and up as far as Karachi (now Pakistan). No such justification is adduced as to these fisheries, but a quite abundant literature seems to make no reference to any international challenge to the exclusive exploitation of those fisheries by the coastal populations. (Kuns and Stevenson, *The Book of the Pearl* 128-136 (1908); Maine et al. Exhibit No. 345, pp. 128-136). I think this is significant even though exact data as to these fisheries' distance from shore are not available to me. The same remark – *i.e.*, the lack of central importance of the existence of a territorial bay – may be made about many of the other seabed fisheries
589 to which I refer. As to the argument based on immemorial usage without objection, most of the scholarly accounts do not suggest the date at which the usage commenced or whether there was acquiescence from the outset before there had been a significant lapse of time. As already suggested, the attitude of the European powers regarding their "inheritance" of rights of native princes was highly ambivalent and reliance on the native practices was invoked when helpful and not otherwise. The most rational explanation is that coastal exploitation of seabed resources was from the outset considered to be reasonable and this practice crystalized into law.

In the Mergui Archipelago, off the southwestern tip of Burma, administered by the British after 1826 as part of India, valuable pearl fisheries are "scattered over an area roughly computed at 11,000 square miles . . . " (*Id.* at p. 133). These were originally fished by the primitive peoples who inhabited the shores. The British divided the area into blocks, which were leased to fishing companies or groups. "Rights to catch trochus, green snail shells, and sea-slugs, were included in the lease." (*Id.* at p. 136). Extensive pearl fisheries in the Red Sea and

Arabian Gulf are conducted under the dominance of Hindu traders. Exact data concerning location and distance from shore are not available to me. We do know
590 that the divers operate in terrible danger from sharks, devil-fish, sawfish and giant clams. (*Id.* at pp. 144, 153-55).

The pearl fisheries off the American coasts were a great source of riches for the Spaniards in the 17th century. In later times they have been controlled by the governments of Colombia, Venezuela, Panama and Mexico. Foreign companies and expeditions were apparently allowed to operate upon payment of a fee to the local government. In 1857, the Mexican Government, for example, divided the Gulf of California into four pearling districts, which were leased to the highest bidders. In 1884 the Mexican Government started granting exclusive concessions in consideration of a royalty and an export duty. (*The Book of the Pearl, supra,* pp. 230 ff., deals with the American pearl fisheries.) (Maine et al. Exhibit No. 344, pp. 230 ff.)

In 1927, the Chairman of the International Fisheries Commission, United States and Mexico, asked the Department of State "as to what would be considered the high seas in the Gulf of California." The Department replied that "the width of the Gulf leaves little doubt that it should be regarded as part of the open sea, with exception, of course, of the inside, marginal belts of territorial water." (1 Hackworth, *Digest of International Law* 708 (1940).)

It seems desirable to present a multiplicity of evidence
591 concerning the unchallenged right of coastal states to exploit the riches of the ocean beds off their shores, including those outside territorial waters, which are therefore under the high seas. I do this in order to dispel the impression which some writings might create that such rights

to the seabed and subsoil depend upon the location in bays, or upon "occupation" or even on immemorial usage. In regard to this concept of immemorial usage as an alleged source of rights under international law I have already noted the European powers seemed to acknowledge that East Asian native rulers had something recognizable as sovereignty which they could transfer. Thus, perhaps the Portuguese, Dutch and English acquired prescriptive rights in Ceylon and India from the native authorities. However, this is not true of other Asian seabed fisheries nor of others in the Americas and elsewhere.

In numerous areas of the Pacific, pearl fisheries including mother-of-pearl, were considered an exclusive proprietary right of the inhabitants of the coast. There is a graphic account of such fisheries off the Sulu Archipelago in the Philippines which were claimed by the Sultan of Sulu. These fisheries were known to the rest of the world 400 years ago. Magellan "reported them to be among the prized possessions of the natives. The pearl-oyster reefs
592 extend from Sibutu Pass to Basilan Strait and roughly cover an area of 15,000 square miles." (Maine et al. Exhibit No. 343, p. 110). After the Spanish-American War, the United States authorities interdicted all pearl fishing within three marine leagues of land except by licensed vessels. Licenses could be issued only to vessels owned by citizens of the United States or natives of the Philippine Islands, although foreign vessels which had fished there in the year immediately preceding could be licensed for five years. (See Maine et al. Exhibit No. 345, pp. 213-17.)

There has been considerable discussion of the pearl fisheries off Australia and New Guinea, but the actual nature of the British claims over the fisheries is not wholly clear. I reached this conclusion in my 1927 book *Territorial Waters, supra,* and I find that later and more detailed

accounts have not cleared away all the uncertainties. The pearl fishery off the coast of Australia originated about 1861 with pioneering activities of an American sailor; it does not seem, like the fisheries of Ceylon and the Persian Gulf, to have been an ancient native monopoly; rather, Australian blacks seem to have been pressed into service and trained as divers. Other divers were brought over from the Malay peninsula and Indonesia. Licensing
593 began at different periods in different areas, the first being in 1886 in Western Australia. (*Id.* at pp. 201-07). Japanese fishermen were numerous after 1891. Estimates of the extent of the Australian fishing grounds vary but at least one source says they extended in irregular patches over a distance of 3,000 miles. (*Id.* at p. 199). D.P. O'Connell in his *International Law in Australia* 279 ff. (1965) refers to regular operations off the northwest coast of Australia "as early as 1851." But he says that the licensing system instituted in 1886 was not enforced against foreign vessels operating outside territorial waters – this following the advice of the Law Officers. This restriction may have had a constitutional rather than an international law basis since, O'Connell writes, Malay and Indonesian divers had engaged in this fishery "from time immemorial" and without formal protest. The Japanese fished since at least 1935, similarly without protest. Nor is it clear from what O'Connell writes that later proclamations of rights to the continental shelf were based on ancient claims. Hackworth discussed the western Australian pearl fishery as follows:

"In a despatch of August 23, 1923 the American Consul General in London informed the Department of State as follows:

594 '. . . I continued my investigation of this matter and I now find that not only is a very extensive maritime

jurisdiction claimed along the coast of Ceylon and Madras but this is also the case in other parts of the world where pearl fishing is undertaken. I have ascertained particularly that along the coast of Western Australia jurisdiction is claimed and exercised at great distances from the coast, apparently, as much as fifty miles. It appears to be the fact, moreover, in relation to Western Australia that non-Australian pearl fishers objected to this extensive jurisdiction whereupon a long controversy ensued and in the result the Colonial Office in London upheld the position of the government of Western Australia.

'While definite information is not at present available respecting every British possession, I believe it to be the case that, throughout the world, wherever there are valuable pearl fisheries, the government concerned claims jurisdiction over the marine areas where such fisheries can be carried on not only to the distance out to sea where actual operations are undertaken but to wide reaches of the open sea beyond, the object being to deal effectively with poachers and to prevent them from gaining access to the pearl beds themselves.' (Consul General Skinner to Secretary Hughes, no. 15676, Aug. 23, 1923, MS. Department of State, file 811.114/1884).

595 "On September 17, 1923 the Consul General reported that further research of the subject revealed that the official boundaries of the State of Queensland 'now extend to the coast of Papua, a distance of over 100 miles from the Australian coast.' There was enclosed with the despatch the following memorandum prepared by Consul Reed, under date of September 17, 1923, entitled 'The Three-Mile Limit and British Australasia':

'. . . In 1879 an Act called "The Queensland Coast Islands Act" was passed which provided for the annexation by Queensland of certain islands in the straits lying between

the Continent of Australia and the Island of New Guinea. The official description of the territory thus annexed to Queensland is as follows:

"Certain Islands in Torres Straits and lying between the Continent of Australia and Island of New Guinea that is to say all Islands included within a line drawn from Sandy Cape northward to the south-eastern limit of Great Barrier Reefs thence following the line of the Great Barrier Reefs to their north-eastern extremity near the latitude of nine and a half degrees south thence in a north-westerly direction embracing East Anchor and Bramble Cays then from Bramble Cays in a line west by south (south seventy-nine degrees west) true embracing Warrior Reef Saibai and Tuan Islands thence diverging in a north-westerly direction so as to embrace the group known as
596 the Talbot Islands thence to and embracing the Deliverance Islands and onwards in a west by south direction (true) to the meridian of one hundred and thirty-eight degrees of east longitude."

'From the attached map of Queensland, which has been obtained from the Agent General for Queensland in London, it will be perceived that the official boundary of Queensland extends much more than three miles out to sea and at a point north of Torres Straits touches the mainland of Papua. Apparently, the islands annexed in 1879 lie just off the coast of Papua, which it itself a territory of the Commonwealth of Australia. The distance between the coast of Queensland and that part of the Island of New Guinea called Papua, is over 100 miles.

'The Commonwealth of Australia is at the present time administering the former German portion of New Guinea known as Kaiser Wilhelm's Land, as well as the former German Islands lying south of the equator, under a mandate from the League of Nations. A reprint from

the Official Year Book of the Commonwealth of Australia for 1922 is attached to this report and is entitled: "The Territories of the Commonwealth," and contains an official map of these mandated districts as well as of the Australian territory of Papua. The boundaries of each territory are defined by sea as well as by land. It appears to be the case that jurisdiction is in many cases claimed
597 to a distance of scores of miles from the coast.' (Consul General Skinner to Secretary Hughes, No. 15773, Sept. 17, 1923, MS. Department of State, file 811.114/1971. With respect to the pearl and chank fisheries of Madras and Ceylon, see Consul General Skinner to Secretary Hughes, No. 15630, Aug. 14, 1923, *ibid.* 811.114/1850." II Hackworth, *Digest of International Law* 677-79 (1941).

One commentator seems clearly to base the limitation to foreign vessels in territorial waters on the question of the competence of colonial legislation. (Goldie, "The Occupation of the Sedentary Fisheries off the Australian Coasts." 1953 *Sydney L.R.* 84, 90). He says also: "Submarine areas, by their nature, should not necessarily be subjected to the same legal regime as the waters of the high seas. These waters are primarily a highway of commerce and for this prupose are most useful when open freely to all. But the utility of submarine areas is of a wholly different character." (*Id.* at p. 85).
Goldie emphasizes "occupation" as one basis for claims to submarine areas. That basis, which was asserted by the British in the Bering Sea Fur Seal Arbitration, was shown to be unsound.

598 On the question of the manner of acquisition of subsoil rights, I think a sounder view is expressed in the International Law Association's Committee Report in 1950 on "Rights to the Sea-Bed and its Subsoil" (Report of the Forty-Fourth Conference, Copenhagen, 1952, p. 87 at p. 90). In the words of the Rapporteur, Jonkheer P.R. Feith:

"The theory that not only the waters of the high seas should be regarded as 'res communis' but that also the sea-bed and its subsoil (I am hence forth speaking solely of the sea-bed and its subsoil outside territorial waters) are 'res communis,' 'res extra commercium,' still satisfies very few people.

"It is certainly very tempting, now that the sea is regarded as a 'res extra commercium,' to postulate that the sea-bed and its subsoil are also 'extra commercium' and 'communis omnium.' But we must not allow ourselves to be blinded by this temptation into maintaining, without further examination, that international law classifies the sea-bed and its subsoil as a 'res communis' and puts them on all fours with the waters of the sea.

"The facts indicate otherwise.

"At all times and in many parts of the world coastal states, have, without incurring any protests, undertaken the development of sea-bed and subsoil resources lying outside
599 territorial waters, whenever this was technically possible.

"As soon as technical progress is so far advanced that, in spite of the depth of the sea, the sea-bed or its subsoil can usefully be developed, no-one in practice is prepared to assert that the mineral or other resources to be obtained from the sea-bed and its subsoil by such development are resources belonging to the community of nations, which no state or individual can or may appropriate. Such sea-bed and subsoil resources have always found an owner, in spite of the view of many writers that the sea-bed and its subsoil are 'res communis.'

"And there can be no doubt that international law has sanctioned such appropriation, even though it is in conflict with the idea of 'res communis.'"

I would add here two comments by delegates to the 1958 Geneva Conference of the Law of the Sea – one by the Argentinian and the other by the British Delegate:

"For centuries past, the activities of States had been carried out on the sea-bed outside the limit of the territorial sea – *e.g.*, in the case of sedentary or permanent fisheries. Another important case was the exploitation of mines that ran out from the coast under the sea. For that reason, the right of States to occupy part of the subsoil had had to be recognized, since there was no rule in positive law prohibiting such action. . . .

600 "For a considerable period, the problem of the continental shelf had escaped the attention of international law, but the reason for that was that technical progress had not revealed the possibilities of exploitation of its natural resources. A similar situation had arisen in regard to the law of the air, but there the principle of sovereignty had achieved full recognition and was established in international law. The Argentine delegation, therefore, considered that the approach to the problem should be reversed; the article should first assert the sovereignty of the coastal State over the continental shelf and then proceed to limit that sovereignty." (Extracts from remarks of the representative of Argentina, Fourth Committee U.N. Conference on the Law of the Sea, Vol. 6, pp. 2, 3.)

"On the other hand, it should be remembered that the International Law Commission had agreed that living organisms permanently attached to the bed of the sea should be covered by the regime of the continental shelf. Moreover, in practice coastal State [*sic*] had *de facto* rights in respect of certain living organisms, such as pearl-oysters, sacred chanks (*turbinella pyrum*) and Waxford oysters, outside its territorial sea. His delegation thought it would be wrong to abolish such rights. It would be better to embody them in the international code which

601 the Conference had been convened to draw up." (Extracts from remarks of the representative of Great Britain, *id.* at p. 61, Para. 39.)

Q. Are there further data available to indicate that seabed fisheries outside of territorial waters were controlled and subjected to regulation by the coastal states? A. Yes, I will briefly refer to some other sources which will so indicate. The items include indications of the distance from shore at which various seabed fisheries (pearl, coral, sponge, etc.) were operated. In many instances, as already noted, the accounts do not specify such distances, but I believe the data are sufficient to establish the fact that such fisheries were carried on outside the three-mile limit. It is clear that some of the fisheries were operated close to shore in shallow water, but indications of the size of the fishing fleets, the length of time boats stayed out and the depth at which some fishing was done, lead me to conclude that at least many of these fisheries were deep-sea fisheries. All the technical and scientific accounts I have examined show that what we usually call "fisheries," that is for swimming fish, seals and whales, etc. are treated quite separately from those of the seabed or continental shelf.

Other items indicate that seabed fisheries were under the control of authority of a coastal State which exacted fees, granted concessions, or regulated seasons or methods
602 of fishing, and the like. Although, as I have said, there are instances of rival claims to such fisheries, the evidence is convincing that international practice recognized the right of coastal states to take jurisdiction over them.

The French Government nurtured the coral industry from the 16th century, mostly in the Gulf of Stora (Algeria). It seems to have been an "exclusive privilege" from at least 1750 until 1791 when the Italians came in. Under an ordinance of 1844, foreign boats paid annual fees of 800 francs; French boats were free. The coral which was found at depths ranging from 200 to 600 feet, was most

abundant off the coasts of Corsica, Sardinia, Provence, Africa, near Trapani and the Straits of Messina. (3 *The Technologist* 372-73, 375, 377 (1863); Maine et al. Exhibit No. 346, pp. 373, 375, 377).

An 1862 account states that the Mediterranean coral fishery "used to be . . ." (no date given) carried on largely by the Trapanese of Sicily who went to Bona (Bône) off the coast of Africa. La Calle (Constantine), in Algeria is another source, "now the principal" one. The number of boats fishing coral off Algeria varied: only 62 in 1832; 245 in 1836; 156 near Bône and Calle in 1853. An account is mentioned of "some years ago" in *the Atheneum*
603 which tells how the fishermen paid a fee for an endorsement by the consul at the port nearest their fishing grounds. (2 *The Technologist* 20, 22 (1862); Maine et al. Exhibit No. 347, p. 22).

Because there are many similarities between the coral and the sponge fisheries the latter may be appropriately dealt with here in somewhat summary fashion.

As of 1948 there were Cuban sponge fisheries which had been active since the 1880's, mainly in the Batabano area between Cuba and the Isle of Pines. Most of the bottom is only 3 to 6 fathoms deep. Cuba regulated by law the size of sponges which might be taken. (U.S. Dept. of Commerce Industrial Series No. 82, "World Trade in Sponges," by A.H. Stuart (1948), pp. 43 ff., Maine et al. Exhibit No. 348.)

The sponge industry in the Bahamas dates from 1841. Sponges are taken at depths of 3 to 24 feet. The season is regulated by the government. (*Id.* at p. 56).

The same source indicates that British Honduras' sponge industry centered at Turneffe Lagoon about 30 miles east of Belize. The government began an effort to cultivate sponges in 1926, from which it withdrew in 1939. It

granted private concessions from 1929 for sponge fishing. A 1945 statute prohibited sponging in the Turneffe area for
604 5 years except under license from the Governor. (*Id.* at pp. 60-62).

Greek sponge beds are scattered over the Aegean Sea, Sea of Candia and Gulf of Salonika. In addition, the Greek fleet fishes the sponge beds from Egypt to Tunisia, often going as far as Tangiers. The Greek government started in the 1940's to enforce safety regulations to protect the health of sponge divers. (*Id.* at p. 66).

Egypt's sponge fishery has been described as "Egyptian only in the sense of its geographic location." (*Id.* at p. 75). Foreign companies fish in the Mediterranean waters under special licenses issued by the Department of Fisheries. Egypt has claimed the right to regulate fishing and sponge fishing in the Bay of El-Arab.

"This bay (in northern Egypt), which is only eighteen miles in depth, is seventy-five miles wide at its opening into the sea. In its reply to Questionnaire No. 2 (1926) of the Committee of Experts for the Progressive Codification of International Law, the Egyptian Government stated that 'the extent of Egyptian territorial waters was fixed at three miles by the Decree-Laws of 21 April 1926 on Fishing and Sponge-fishing, except in the Bay of El-Arab, the whole of which, according to the Decree-Law on Sponge-fishing, is included in the territorial sea.'

605 "Articles 1(b) and 4(a) of the Egyptian Decree of 15 January 1951 provide that the inland waters of Egypt include the waters of all bays along the Egyptian coasts, without specifying any limit.

"The British Government protested, through the diplomatic channel, against this Decree, stating that it was unable to accept it as being in conformity with the rules of international law. In its note of protest, the British Government pointed out that no historic bay "is situated in

Egypt.' " (U.M. Doc. A/CONF. 13/1 p. 17, footnotes omitted).

Libya has a sponge fishery, with some of its best producing beds as much as 20 miles from shore. (*Id.* at p. 77). The fishermen come from Greece, Italy, and other countries. "Prior to World War II, the sponge fishermen were permitted to gather sponges in Libyan waters upon payment of a small fee to the local port authorities. Since the beginning of 1946, the British authorities have required £50 per season for each boat." Other regulations were also enforced. (*Id.*).

An early *Scientific American* article describes injuries to men diving in the "skafander" apparatus and also the exhaustion of sponge banks. It indicates that the use of the skafander was prohibited by authorities of Samoa, Crete and Cyprus and also "the governments of Italy and France,
606 the latter acting on behalf of Tunis." *Scientific American,* August 2, 1902, p. 67; Maine et al. Exhibit No. 349. See also *Piccola Biblioteca di Pesca, supra,* pp. 40 ff.

The article states that the Turkish government collects license fees from boats, depending in amount on the fishing methods used. A closed season was also proposed, but not enacted in law. (*Id.*).

Smith, in his *Great Britain and the Law of Nations, supra,* Vol. II at p. 118, quotes from Sir Cecil Hurst's article and then adduces some official opinions of the Law Officers of the Crown. I quote from p. 119 and following; although I would say that Sir Travers Twiss anticipated by several decades the rule that a bay could be claimed only if the headlands were not more than ten miles apart: "The examples cited by Sir Cecil Hurst of such occupation outside the three-mile limit are the Gulf of Manaar and Palk's Bay, separating India from Ceylon, the sponge beds off the coast of Tunis, beds of pearl oysters off the Mexican coast, and

oyster-beds in St. George's Channel. The last-named are regulated by a British statute, the Sea Fishermen Act of 1868.

"Without recapitulating the arguments used by Sir Cecil Hurst it may be of interest to give some supplementary evidence. We may begin with the following opinion of
607 Robinson, dated 9th February 1826, and addressed to Canning: –

'I am honoured with your Commands signified in Mr. Planta's Letter of the 6th Instant transmitting a Letter from the Colonial Department, enclosing Letters from the Consul General at Algiers respecting the detention of two British Vessels for interfering with the French Coral Fishery on that Coast; And you are pleased to request that I will take the same into consideration and report my opinion thereupon, with reference to my former report on the same subject.

'In obedience to your Commands I have the honor [to report] that the accuracy of any representation that could be made in favor of these Vessels, is so much prejudiced by the false assertions of the Masters respecting their employment, which the Consul General at Algiers admits to be untenable, that it would not be advisable I think to interfere to request any favor from the French Government in their behalf.

'There appear to be exclusive Coral Fisheries enjoyed under Grants from the Bey of Tunis, by French and English Companies on the Coast of Barbary at the distance of Ten or fifteen Miles from the Shore—The title to these exclusive privileges might perhaps be questionable. But the French regulations, so far as they have been described appear not to be unreasonable. They permit Individuals of all Countries to fish, within the Limits
608 on payment of a certain Sum. Interlopers are required to pay double, and may then fish freely, subject to the rules

of the French Fishery. It is probable that the Grant to the English Company is protected by similar regulations, and it would not be advisable to raise any question on the subject.'

"This opinion relates to an incident which had taken place the previous summer. No further action was taken, since the vessels concerned (the *John* and *Harriet* and the *Julia*) had already been released under an arrangement made between the French authorities and the local agent of the English company. By this agreement the company undertook to 'satisfy any demand that may be adjudged due for the trespass by any competent tribunal', and it was further agreed that the final settlement of the affair should be left to the two governments. But in the light of Robinson's opinion the matter was allowed to drop.

"From a letter addressed to Lord Granville by the Consul at Tunis (2nd May 1826) it appears that the company had been granted permission to fish 'along the whole coast, at the same time defining it to extend from the Island of Jerbe Eastward to Cape Roux on the West.' The two cutters previously referred to had been arrested for transgressing these limits. Subsequently the Bey of Tunis was induced to extend the westward limit from
609 Cape Rosse to Cape Roux, and the company appears to have delegated its privileges by granting licenses to other vessels of various nationalities. In July, 1826, one of these vessels was fired upon by a French brig, and the incident elicited the following opinion from Robinson (26th July, 1826):

'I am honoured with your Command signified in Mr. Planta's Letter of the 20th Instant, transmitting a Letter from Mr. Thomas Hamlet, respecting a Sardinian Vessel which was captured by a French Ship, while fishing under a British License; and respecting the proceedings of

Sir Thomas Read relative thereto: – And you are pleased to request . . .

'In obedience to your Commands I have the honor to Report, that it may be questionable how far British Subjects could lawfully, without the sanction of their own Government, become Grantees of Territorial Rights of Foreign Princes, to be exercised in the form of exclusive privileges, on the Sea, against other Nations; or as may happen, against their Fellow Subjects, and their own Government. – The inconvenience of such a practice is manifest, in the consequences detailed in these Papers. The British Subjects, become, in turn, Granters of subordinate Licenses to Individuals of other Nations; and a sort of Tribute is paid to them, for Fishing in the sea. This pretension is exercised under representations, which have led
610 to great loss to the Foreign Individuals, and have become the subject of application to His Majesty's Government, in a form that may eventually involve questions respecting the Territorial limits of Sovereignty of the Bey of Tunis, and the Dey of Algiers . . . .

'Referring to my former Report of the 7th of November last [*missing*], I am humbly of opinion, that it is not a case, in which the Parties are entitled to your special interference for the purpose requested, to issue any directions to the Consul.'

"No other reference to this case can be found, except an opinion (10th January, 1827) relating to the correctness of the conduct of the Consul in connection with the incident. We may now pass over a long interval and quote an opinion of Sir Travers Twiss (18th July, 1871), which is of interest as definitely recognising the principle that the bed of the sea can be acquired by prescriptive occupation.

'I am honoured with your Lordship's commands, signified in Mr. Odo Russell's Letter of the 15th instant, stating that he was directed to transmit to me a correspondence

with Her Majesty's Agent and Consul General at Tunis, relative to the right of the Bey of Tunis to the process of fisheries of Sponge and Polypi beyond the dis-
611 tance of three miles from the Shore. That I should perceive that the question was first raised by a British Firm, as affecting the payment of dues levied by the Bey. Mr. Odo Russell was pleased to request that I would take the matter into my consideration, and furnish Your Lordship with my opinion as to the Instructions which should be addressed to Mr. Wood on the subject.

'In obedience to your Lordship's Commands I have the honour to *Report.*

'That there is no objection on principle to the Bey of Tunis asserting an exclusive right to the *fructus* of the banks off the Coast of Tunis to which Sponges and Polypi attach themselves, although the banks in question are at a greater distance than three miles from the Coast-line, provided the Bey can shew a prescriptive enjoyment of such *fructus.* Vattel 1. I, C:23, S. 287, admits that Nations may acquire a right of property in such *fructus* founded on long continued and exclusive enjoyment, and there are on record many instances of the enjoyment of such right of property. Amongst others Her Majesty's government exercises at present such an exclusive right, as regards the *fructus* of the pearl fisheries off the Coast of Ceylon, having received it as a tradition from the previous Sovereigns of the Island; notwithstanding the principal bank, to which the pearl oyster attaches itself, is at
612 a distance of more than 20 miles from the Coast. The prescriptive use on the other hand of such a right is a question of *fact,* which must be established or may be impugned, like other facts. If it can be shewn indeed, that within the memory of living persons fishermen of various nationalities were accustomed to take sponges

and polypi from the banks in question, freely and without the permission of the Bey of Tunis, I should be of opinion that the claim of prescriptive right on his part failed, that this, as I have observed, resolves itself into a question of *fact.* With regard to the exclusive right of the Bey to the *fructus* of any banks, which are enclosed within a line drawn across the mouths of bays, the headlands of which are not more than ten miles apart, I am of opinion that the Bey is justified in asserting an exclusive right to such *Fructus.*'

* * * * *

"There has been a certain amount of doctrinal controversy as to whether the bed of the high seas is a *res nullius,* and therefore capable of appropriation, or a *res communis* in which no state can acquire exclusive rights. The practice cited above clearly favours the former view, and an additional argument to the same effect may be drawn from the abortive negotiations between Great Britain and
613 France for the construction of a Channel tunnel. This project, which appears to have been first suggested by a French engineer in 1802, became the subject of diplomatic exchanges beginning in 1870, and in 1876 a draft convention was drawn up by an Angle-French commission. The scheme proposed that the tunnel should be constructed by two companies, one from each country, and that the international frontier should be fixed at a point midway,but that no claim should be made to jurisdiction in the surface of the sea-bed or in the water above it. The details of civil and criminal jurisdiction were to be settled by supplementary conventions.

'Clearly this scheme implied that it was within the competence of the two countries concerned to appropriate and annex to their national territories so much of the sub-soil as was needed for the construction of the tunnel. For various reasons the project was never completed,

though some work was begun on each side, but the draft convention may serve to indicate the views of the two governments upon the question of law that was involved." (Footnotes omitted.)

* * * * *

614 Q. Have you found evidence of other undersea activity which has not been challenged on legal grounds in the interrelationships of states? A. Yes. I refer to mining. The exploitation of seams of coal and of minerals, especially tin and cobalt, under the surface of the adjacent seas has been practiced for centuries. Much of the historical material has been described by Professor Horwitz in his testimony, and is evidenced by Maine et al. Exhibits Nos. 165-169, 190, 195 and 196. The history of such mining shows that its seaward reach has been limited only by the extent of the resources (*e.g.*, the vein) or the technological resources of the miner. Both of these are limitations of exploitability which have nothing to do with any limitation imposed by international law, by the rights of other states, or by requirements of occupation or prescription. In line with this tradition the International Law Commission, in proposing artilces of a Convention on the continental shelf, was at pains to state:

"Lastly the Commission points out that it does not intend limiting the exploitation of the subsoil of the high seas by means of tunnels, cuttings or wells dug from *terra firma*. Such exploitation of the subsoil of the high seas by a coastal State is not subject to any legal limitation
615 by reference to the depth of the superjacent waters." (International Law Commission Report, 8th Session (1956), p. 42). It must be remembered that the Commission was here discussing "submarine areas adjacent to the coast but *outside the area of the territorial sea*" and was searching

for a suitable criterion by which to measure the outward reach of that area. It had no doubt that the area of the seabed in question could under international law be lawfully exploited by the littoral state, but it recognized that customary international law had not fixed a definite limit at which the right to exploit the surface would cease. Although opinions differed as to the extent in miles or leagues of territorial waters under international law, there was agreement that territorial waters do legally come to an end at some point and that beyond that end point the high seas begin. On the other hand, in regard to the sub-surface area of the continental shelf, it was not possible to say that an ending point had been established in customary international law since all such activity – regarding pearls, chanks, corals, sponges and mining – had remained unchallenged out as far as the relevant technology permitted exploitation.

At the risk of repeating what is included by Professor
616 Horwitz in his testimony, I shall include a few references to English mines under the sea.

A technical, geological and historical study of British coal fields has made the following points:

"Coal Under the Sea. – To what distance from the shore coal will be available, is a question which cannot be directly answered, as every seam presents the problem under a different aspect. Questions regarding depth, thickness, regularity and absence of faults, as well as the nature of associated strata, are here presented in relation to the coal-seams themselves: and depth of sea-bottom in relation to the sea. In every case a considerable breadth of coal where it approaches the outcrop must necessarily be left as a barrier; and it is unquestionable, that faults traversing the strata under the sea, at a considerable depth and pressure of water, and especially if there are beds or

porous sandstone overlying the coal-seams, would give facilities for the influx of sea-water into the mines so as to prevent, or impede, the working of the coal. Sir Lindsay Wood has taken 3 miles under the seas as the limit to which the coal-seams will be workable in his estimate of the quantities available for future work.

"With reference to this special coal-field, the late Sir George Elliot considered that, in that portion of the dis-
617 trict south of the Tyne, a minimum distance of 3-1/2 miles may be included as available; and that it is possible that a much wider extent will ultimately be worked by means of shafts sunk below the sea itself at a distance from the shore; on the other hand, the late Mr. Forster assumed a distance of only 2 miles in breadth along the coast for that part of the coalfield north of the Tyne. This difference of opinion, on the part of gentlemen of such experience in mining undertakings, is a sufficient proof that the question is at present involved in much uncertainty." (Edward Hull, *The Coal Fields of Great Britain, Their History, Structure and Resources* (Fifth ed. rev., London 1905), pp. 206-207).

Coal mines extend out beyond the limits of territorial waters: "As a matter of fact some coal-mine galleries have already passed the limit of the territorial sea, for instance off the coast of England near Blyth in Northumberland, where they extend to 5678.4 metres from the low-water line, and near Easington in Durham to roughly 5750 metres, that is respectively 122 and 194 metres beyond the outer limit of the territorial sea." (M. W. Mouton, "The Continental Shelf," Hague Academy of International Law, 1954 *Recueil des Cours,* 347-353).

An 1856 account states that:

"At the Howgill pits, west of Whitehaven, the mining

618 has been carried more than 1000 *yards under the sea,* and about *600 feet below its bottom.*

". . . At one colliery, near Newcastle, the passages are more than twenty miles in extent, with the average area of seventy feet." (Leifchild, *Our Coal and Our Coal-Pits* 132-3 (New Impression 1968 from 2nd ed. 1856); Maine et al. Exhibit No. 350).)

I know of nothing in the record or in the literature on international maritime law which would suggest that it would have been contrary to international law if these "twenty miles" had all extended off-shore out under the sea.

According to another authority describing "The Coal Measures of West Cumberland":

"The undersea coal-bearing area is from St. Bees to Maryport and seawards for an unknown distance. The coal workings extend at Whitehaven from the coast for about 5 miles. The further seward extension is unknown, but the Coal Measures do not extend as far as the Isle of Man. It is probable that the exploitation of undersea coal will be limited by economic factors set by haulage costs and ventilation rather than by geological causes." (Trueman, *The Coalfields of Great Britain* 318 (1954); Maine et al. Exhibit No. 351).

By 1927, the Whitehaven mine in Cumberland already
619 extended four miles into the seabed. (Gray, "Mining Coal Under the Sea in Nova Scotia with notes on comparable undersea coal-mining operations elsewhere," in *Proceedings, Second Triennial Empire Mining and Metallurgical Congress* (1928), at p. 93; Maine et al. Exhibit No. 366, p. 93). At the same time an undersea coal field in Kent, not yet then developed, was estimated to have a workable subsea extension of four miles out from the shore. (*Id.* p. 102).

Other references to the English mines appear in Commander Sayre A. Swarztrauber's *The Three-Mile Limit of Territorial Seas: A Brief History* (unpublished thesis, American University, Washington, D.C. 1970), pp. 183 *et seq.*

Coal mines under the sea were being worked off the English coast as early as the 17th century. The mines were improved under Sir James Lowther and his young engineer Carlisle Spedding who developed new methods for such mines. "'Sir James's riches,' says Sir John Clerk, in a letter dated 1739, 'in part swim over his head, for ships pass daily above the very ground where his colliers work.'" Galloway, *A History of Coal Mining in Great Britain* 98-99 (reprint ed. 1969 of 1882 ed.) (Maine et al. Exhibit No. 352).

Tin and copper mining was an ancient industry in Britain. One mine off Cornwall was worked at a depth of
620 177 fathoms, at least by the early years of the 19th century. Others were worked from shafts "about fifty fathoms out from the beach." Barton, *A History of Tin Mining and Smelting in Cornwall* 42 (1967) (Maine et al. Exhibit No. 353). Professor Horwitz has already fully described how in the mid-19th century it was determined that, while the mining rights in Cornwall above the low-water mark belonged to the Duke of Cornwall, the rights below low-water mark and under the open sea belonged to the crown.

Subsea coal mines were also in operation by 1927 off the coasts of Australia (both New South Wales and Queensland), Chile, Japan and Spain (Maine et al. Exhibit No. 366, pp. 103-112). While at that date none of these mines extended out beyond the three-mile limit, I am entirely confident that if technology and economics had made such extensions possible they would have been carried out without the slightest doubt being raised that the

adjacent coastal state had the exclusive right to regulate and profit from them.

Very extensive undersea coal mining has been carried on off both the eastern and western coasts of Canada. This activity is described in considerable detail in Gray's work already cited (Maine et al. Exhibit No. 366.) The Nova Scotia mines first began to extend under the sea in
621 1867 (*id.*, p. 9), and by 1927 had reached distances up to a maximum of 2-1/3 miles from shore (*id.*, p. 5). As early as 1877, a report of the Inspector of Mines of Nova Scotia forecast that undersea mining would eventually extend considerable distances from shore and proposed legislative and regulatory measures to deal with it (*id.*, pp. 6-7). In 1927 Gray foresaw continued extensions of the mines farther out from shore, mentioning the area from 3 to 5 miles offshore as containing reserves (*id.*, p. 68). Gray explained that "the right to grant, by leases, access to undersea coal seams, is derived from possession of the foreshore" (*id.*, p. 72), and described in detail the system of leasing practiced by the provincial government of Nova Scotia as well as governmental regulation of mining practice (*id.*, pp. 82-87). It appears that the provincial government had granted leases much farther out from shore than the then existing distance of exploitation, and considerably beyond territorial waters, since Gray in describing the area of one lease remarked that "the nearest point . . . lay four miles from shore" (*id.*, p. 84). It seems to have occurred to no one that this leasing practice could present any problem of international law.

Gray also describes submarine coal mining along the eastern side of Vancouver Island, in British Columbia
622 (*id.*, pp. 88-91).

Q. To a very large extent, the examples of the exploitation of the resources of the seabed which you have described

date from a period preceding the independence of the United States and therefore reveal the practices of the British and other governments. Can you say whether the United States Government, prior to the Truman Proclamation of 1945, accepted or advocated or claimed that under international law it had the right to exploit riches of the sea outside its territorial waters?

A. Yes, the United States vigorously asserted such rights in its controversy with Great Britain over the control of the fur seal fisheries in the Bering Sea.

By a treaty of 1892 the United States agreed with Great Britain to submit to an international arbitral tribunal a dispute concerning the right of the United States to control the fur seal fishery in the Bering Sea. I wish to read a rather full extract from the case and argument of the United States because it demonstrates that nearly 80 years ago, and more than half a century before the Truman Proclamation of 1945, the United States Government was itself asserting the rights which I believe the thirteen states had upon the conclusion of the Treaty of Peace of 1783, when their position as separate sovereign states was inter-
623 nationally placed beyond dispute.

It will be noted that counsel for the United States, James C. Carter, rejected what he stated was the British thesis, namely that rights to exploitation of a marine resource outside territorial waters depended upon "occupation" of the bottom of the sea. "How can you occupy the bottom of the sea?" asked Mr. Carter. (Oral Argument of James C. Carter, Esq., on Behalf of the United States Before the Tribunal of Arbitration Convened at Paris Under the Provisions of the Treaty Between the United States of America and Great Britain, Concluded Feb. 29, 1892, P. 324 (Paris, 1893).) This is precisely the position taken by the International Law Commission and incorporated in the Geneva Convention of 1958 on

the Continental Shelf, as already quoted. In words which Mr. Carter himself might well have used, the ILC said in its comment on Article 2 of its draft. "The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine area in question would be practically impossible . . ." And the ILC would agree with Mr. Carter that the rights asserted in the pearl, coral and oyster fisheries are justified because "It is where there is a natural advantage, within a certain proximity to the coast of a particular na-
624 tion, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular constant supply of a certain product of the seas, for the uses of mankind . . ." (United States Oral Argument, *supra*, p. 126). The position which the United States thus took in 1893 refutes the notion that the rights which are mentioned in the Truman Proclamation of 1945 originated at that date; they had old roots in international law.

As will be noted also in the portions of the United States Oral Argument I shall quote, the British argument in this same arbitration conceded:

"That international law recognizes the right of a State to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the State." (United States Oral Argument, *supra,* p. 323.)

The United States, in its argument supporting its claim to the exclusive exploitation of the seal herd in the Bering Sea, rested its case largely on the old doctrine of *ferae naturae* and a resulting right of property in the seal herd; the Tribunal did not accept this argument. Nor did the
625 Tribunal accept the contentions of the United States concerning the rights exercised in the Bering Sea by Russia

and alleged British acquiescence therein. The United States lost the case. This does not alter the fact that, on the legal points at issue in the present case, the United States strongly – and correctly, in my opinion – supported contentions on which the defendant states in this case rely and which, as I maintain, were established in international law in the 18th century. The gist of the matter is that the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state – which was not disputed – and unsuccessfully attempted to reason from that fact to a sovereign right over *surface* fisheries.

The following are excerpts from Mr. Carter's argument (United States Oral Argument, *supra,* pp. 322-330):

"Mr. Carter . . . Now the pearl fisheries of Ceylon are another instance, as also the coralbeds in certain parts of the world which are protected by the laws of the nations that are situated contiguous to them, and in some instances for the benefit of the citizens of those nations only. In the American Case we have referred to a great number of instances where laws have been passed to establish and preserve, govern and regulate, fisheries and
626 other pursuits carried on on the high seas. Now the general answer to that which Great Britain makes is, that these laws, whether the laws of sovereign states, or of their colonial dependencies, are designed to operate only on their own citizens, and are not aimed at the citizens of other nations, and that they do not, therefore, furnish any support to the assertion that they may be operative against the citizens of other nations. It is said that they are only designed to regulate the conduct of citizens of the nations by whom they are made. I am not going to go through the particular instances in which these regulations have been adopted, for it would occupy altogether too much time. In general, I suppose that though these

regulations were drawn in terms limited to the citizens of the nations by whom they are passed, yet in reality they are designed to be operative upon citizens of all nations; otherwise they would serve only to facilitate a fuller enjoyment of the benefits of the industry by the citizens of other nations, without the competition and rivalry of the nation by whom they are passed; which I do not suppose is their intent. But there are several instances of rules and laws respecting the practice of these industries on the high seas which are admitted by the counsel for Great Britain to be operative upon the citizens of other
627 nations. Turning to the Argument on the part of Great Britain, page 59, we find this:

'It is next submitted –

'That international law recognizes the right of a State to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the State.

'This affords a legitimate explanation of the cases foreign extra-territorial fishery laws cited by the United States, quite apart from any question whether they apply to foreigners or not.

'But it affords no justification for, nor are they analogous to, the Alaskan Seal Statute, as is contended by the United States.

'The territory of the nation extends to low water mark; but certain portions of the sea may be added to the dominion. For example, the sea which lies *inter fauces terrae,* and, in certain exceptional cases, parts of the sea not lying *inter fauces terrae.*

'The claim applies strictly to the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and, in the same way, mines within the territory may be worked out under the sea below low-water mark.

628 'Isolated portions of the high sea cannot be taken by a nation unless the bed on which they rest can be physically occupied in a manner analogous to the occupation of land.

'Those principles, though they explain legitimately all the examples of foreign laws dwelt on by the United States, show also that no right to, or on, so vast an area of the high sea as Behring Sea can be acquired. Nor has any such claim ever been made.'

"Now, we have it admitted here that it is competent to particular nations to assert a right of property in oyster-beds, pearl-fishery beds, and coral-reef beds, and to assert a right of property, although they are out on the high seas beyond the territorial three-mile limit, and to assert that right against the citizens of other nations. They are obliged to make that admission, for it is impossible to examine the various statutes which have been passed by independent states upon these particular subjects, without recognizing the fact that they are designed to apply to the citizens of all nations, and are actually enforced against the citizens of all nations. What is the assertion there? Why, that the state has, by the operation of its rules and regulations, created a national industry in respect to those fisheries, oysters, pearls, and coral, which it is justified in protecting against invasion by the citizens of other nations, al-
629 though these fisheries are situate on the high seas.

"The President. That does not seem to have been the contention. It was founded rather upon the right of occupation.

"Mr. Carter. Well, I am going to discuss the ground upon which they put it, but they assert that there is a right to protect against the invasion of other nations products outside the three-mile limit. I know they seek to base that upon the right of property. I contend that a nation has a right to establish an industry of that sort and protect it against the invasion of other nations. They undertake to

place a limitation upon it, and to suggest reasons upon which the right is founded. I am going to inquire into the validity of these reasons. They say it is a *property* right to the *bottom,* and that it exists wherever the bottom may be *occupied,* and does not exist where the bottom cannot be occupied. Well, that amounts to this, then, that wherever a nation *can occupy the bottom,* although outside the territorial limits, it may rightfully occupy it and exclude other nations from it. How can you occupy the bottom of the sea? Well, you can occupy it only by taking such possession as is possible. You can buoy it where you can reach the bottom, and establish a force and exclude the citizens of other nations from it; and that is all the occupation of the bottom that you can effect. The assertion,
630 then, on the part of my learned friends is, that wherever you can take such possession of the *bottom,* you can exclude other nations from it. Now that goes much further than the Argument of the United States, no part of which goes to support a general right to occupy the sea outside the three-mile limit. We do not assert any such right, nor do we suppose that any such right exists; but that is their assertion; and if it be true, you can take possession of the bottom of the sea anywhere; and if there is any particular piece of coast off Great Britain twenty miles away where the bottom can be easily reached and which is a particularly favorable place for carrying on a cod fishery or a herring fishery, you can take possession of it and exclude the rest of mankind from it. If this bottom theory, upon which they put themselves, has any validity or foundation, you can do that. If the right to establish the industry rest upon an ability to occupy the bottom, then you can establish one wherever you can reach bottom; and if you can establish it in one place, you can establish it in another. I do not suppose it is possible to defend any right like that over the high seas. I do not suppose it is possible to defend

any such right as that over the fisheries of the seas. There must be some other principle that may be called into play.

631 "These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other.

"We find in practice that the industries are confined to such instances, and in those instances we find rules and regulations passed for the purpose of securing the products of the seas, and designed to make them more useful. Those are the cases in which it can be done, and in those cases it is perfectly justifiable. It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed. That is reasonable. That stands upon the principles which I have been asserting. That is a solid foundation; but it does not rest upon any notion of a right of occupying the bottom. It rests upon the fact that here is a natural advantage, a peculiar locality offering particular advantages,
632 which, if improved, will lead to the prosecution of a useful and profitable industry, useful to the nation, and useful to the world.

"Under those circumstances, if one nation is permitted to cultivate undisturbed that natural advantage, free from

the invasion of others, that industry can be profitably carried on, but if all come in, it is broken up. In such cases, therefore, the nation which enjoys this advantage says to other nations, rightfully: 'Here is an advantage which Providence has placed within our reach, rather than in yours. We can turn it to account; you cannot. We can use it so that it may produce its natural advantages. In order to do that, it requires regulation. . . .'

"Senator Morgan. Mr. Carter, in point of fact, are these Ceylon pearl fisheries and the coral fisheries of which you spoke held subject to the right of free navigation to commerce.

"Mr. Carter. So I understand. I do not understand that commerce can be prohibited over them. Oh no; surely no. There is no occasion to prohibit commerce. It is only the regulation of the industry that is insisted upon.

"So I have to say that upon conceded principles there is a right in a nation to protect an industry for which it has natural advantages, and which it can create, preserve, and improve by means of rules and regulations
633 which it alone has the power to adopt and to enforce. It is conceded that this may be done in the cases to which I refer of the oyster beds, the pearl beds, and the coral beds, no matter how far they are out from land, wherever they are.

"If they are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made in the printed argument of the other side is, that it depends upon an ability *to occupy the bottom.* That does not explain it. That furnishes no ground of reason whatever. If it were

true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and such right to occupy the bottom certainly does not exist. Nor *can* you occupy the bottom of the sea. It is not susceptible of occupation, unless the law should choose to declare that it should be deemed to be the subject of exclusive occupation; and as I have already, I think, sufficiently shown, the law will not do that merely to gratify the whim or the ambition of any particular individual, or any particular nation, but only for the accomplishment of
634 some great social good.

"That right of creating a national industry based upon peculiar natural advantages, and based sometimes upon the mere circumstance that it has been created by rules and regulations, is one that is fully established, in reference to many of several different products of the sea.

"In the protecting of industries of that sort, does the nation extend its jurisdiction over those places? Does it make them a part of its territory? Certainly not. It has no right to do that. It is not consistent with the law of nations that it should do that. There is no occasion for it to do that. There is no need of it. All that it is necessary for it to do is to enforce such regulations on those places as are effective and sufficient to protect the right from invasion by the citizens of other nations. . . .

"To make it entirely analogous, if these seals were in some mannner attached to the bottom, if they were in the habit of congregating at some particular place on the bottom of the sea, then, according to the doctrine which seems to be made the foundation of the right by our friends on the other side, the United States would have a right to go out and take possession of that bottom,

incorporate it into its own territory, and treat it as a part
635 of its own nationality.

"I am sure we assert no such right as that. We do not ask to go to any such length as that. All we ask is the right to carry on the industry on our own admitted soil, and to protect it from being broken up by repressing acts upon the high seas which are in themselves essential wrongs.

"Let me defend these particular instances of the coral beds, the pearl beds, and the oyster beds upon the same principles upon which I have defended the assertion of property interest, not only in the seals, but in the seal industry upon the Pribilof Islands. In all these cases, there is a peculiar natural advantage connected with those places and belonging to the nations which lie in nearest proximity to the places where they are situated. In the next place, they are exhaustible. There is not enough for all; and therefore there arises an occasion when you may assert the principles which govern the laws of property. In the next place, if left open to the unregulated invasion of the citizens of all nations, they would be used up and destroyed. The only condition upon which they can be preserved and made beneficial to mankind is that they be allowed to be worked and operated by the particular power which has the best facilities for that purpose. In the next place, they can be preserved only by putting them under a system of regulation, which shall be operative upon the citizens of
636 that as well as of other nations. It is necessary that the citizens of the particular power, whose citizens go out there and improve and occupy these places, should be also made subject to these regulations. In other words, the general condition is presented that mankind may have the benefit of these advantages if they are disposed of in this way, and not otherwise; and, consequently, they ought to

be disposed of in this way. The bottom of the sea in these places is not made the property of the particular powers who assert the right to the industries. It is not their property at all. It is not within their sovereign jurisdiction at all, any more than any other part of the high seas, but it is a theatre where their defensive regulations may be put in operation, and where the rights of their citizens may be defended.

"Let me support these views by a reference to the opinions of the best writers. I read from Puffendorf on the Law of Nature and Nations. The extract is found on page 134 of my argument:

'As for fishing, though it had much more abundant subject in the sea than in lakes or rivers, yet "tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect; especially since "tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.'

637

"And then Vattel, upon the same subject, says:

'The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc.; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coasts belong may appropriate to themselves and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves

of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery ot [*sic*] a profitable nature, and of which they may become masters, shall they not be permitted to ap-
638 priate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantage which their commerce may thence derive, in case there is a sufficient abundance of fish to furnish the neighboring nations?

'(Sect. 2) A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right.'

"Now, upon the very firm basis of reason and authority we place the right of the United States to protect themselves in the enjoyment of the industry which they have established upon these islands. . . .

"I now pass to the consequences of the establishment of those rights, so far as they involve the question, what acts the United States may do for the purpose of protecting themselves in the enjoyment of the rights thus acquired and established.

"I must assume, in the first place, that if she has the right to the exclusive enjoyment of this industry of taking seals, in consequence of her natural advantages and of the exhaustible character of the product, she has the authority in some manner to enforce that right. Otherwise we should be talking to no purpose. What is a right which
639 there is no means of enforcing? It would be mere words.

It amounts to nothing at all. There is nothing substantial about it. Such things are not the subject of discussion. When it is said that a man or a nation has certain rights of property, it means that they have some rights which can be enforced in some manner. *How* shall they enforce them? That is the question. What acts may the United States do? Can they extend their sovereignty over the seas to an illimitable extent wherever it may be necessary to protect the right? No; they cannot. We make no assertion of that sort. We could not substantiate it, if we did. The sovereign juriscondiction of a nation, is bounded by her territory, with an addition which carries to a certain qualified extent, her sovereignty over a distance on the seas commonly taken as three miles. Beyond that the sovereign jurisdiction of the nation cannot be extended. Beyond that her laws, as laws, have no force or operation. Beyond that, her powers as a legislative power have no effect. The emanations of her legislative power do not extend as exercises of legislative power beyond her territorial jurisdiction. All that we take to be admitted."

The written Argument of the United States also relied on recognized exclusive rights in sedentary fisheries adjacent to Ceylon, Australia, France, Italy, Panama and
640 Mexico (Maine et al. Exhibit No. 367).

On an earlier occasion, in 1832, the United States had engaged in a long diplomatic argument with what was then known as the Government of Buenos Ayres (Argentina). The question at issue was the right of American citizens and ships to fish around the Falkland Islands and around the southern tip of South America. The general nature of the argument is indicated by the following passage from a note from the American charge de affaires to the Buenos Ayres Minister on the 20th of June 1832:

"It is of equal notoriety that from the period of the acknowledgement of their Independence by Great Britain,

they have been in the unmolested enjoyment of the Whale and Seal Fishery in and about these Islands: that these Fisheries, with the full knowledge of Spain, have been prosecuted by them to an extent far exceeding the Fisheries of any and all other Nations. If long and uninterrupted use and possession can impart any right to Fisheries of the above description – the title of The United States is unimpeachable. And Vattel, Book I., chap. 23, S. 287, although he admits the right of Nations owning the Coasts to appropriate to themselves certain Fisheries on their Coasts – expressly excludes them under certain circumstances.

641 'But if (says this Writer) so far from taking possession of it, the Nation has once acknowledged the common right of other Nations to come and fish there, it can no longer exclude them from it. It has left that Fishery in its primitive freedom, at least with respect to those who have been accustomed to take advantage of it. The English not having originally taken exclusive possession of the Herring Fishery on their Coasts, it has become common to them with other Nations.' The acknowledgement spoken of, may be express or implied: a long continued use without interruption, is a virtual acknowledgement of the right to use; and in the instance cited (the Herring Fishery on the English Coast) there has been no formal acknowledgement, on the part of England, that other Nations have a right to use that Fishery; from the acquiescence of England, the acknowledgement is inferred." (The exchange of communications is printed in 20 *British and Foreign State Papers 1832-1833,* 311-441 (1836). The above extract is from pp. 352-353.)

This statement has, I think, an important bearing on the question which I have already discussed at great length, whether actual occupation or use was formerly considered

necessary to create exclusive rights in the continental shelf. (As I have shown, it quite plainly is not necessary today.)
642 I do not think occupation or use was ever necessary, but as the United States' note to Argentina points out, an established custom of free use by others, acquiesced in by the coastal state, might well preclude a later assertion of exclusive rights by it as to the particular resource in question.

To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies). If the Massachusetts authorities had consciously permitted free exploitation of that resource by persons of all nations, and that license had ripened by passage of time into established custom, Massachusetts might well have been limited, as a matter of international law, in later asserting exclusive rights – just as the United States argued respecting Argentina. But I regard it as virtually inconceivable that as a matter of fact, in 1720, 1770 or 1785, Massachusetts *would* have consciously permitted internationally free exploitation on these hypothetical facts. From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have
643 asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. (Of course it might have bargained away part or all of its exclusive right by treaty, in return for other benefits.) I do not believe there would have been any significant international protest against that assertion.

And I believe that assertion would have been fully in accordance with the international law and practice of the time. I think other sovereigns would have been bound to respect it, and I think they would have respected it. And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries.

So, I believe it is error to say that in the 18th century, or prior to the Truman Proclamation, the right of exclusive exploitation did not exist, or did not exist in the absence of occupation. Of course no one would go to the trouble of making a physical "occupation" (to the very limited extent such an occupation is possible, even today) of the seabed before a resource was discovered, just in the hope that something might turn up. But what has always obtained, in my view, is the exclusive right of the adjacent coastal state to *make* an "occupation" (in the limited
644 sense to which I have referred) and to use and enjoy the resources when the occasion should arise.

Q. Were the 13 American colonies treated internationally as separate sovereign and independent states prior to the date when the Constitution of the United States entered into force? A. Your question must be answered in the affirmative. This fact is clear from the Preliminary Articles of Peace between His Britannic Majesty and the United States of November 30, 1782. Article I of that agreement reads as follows:

"His Britannic Majesty acknowledges that said United States, Viz. New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free Sovereign and independent States; That he treats with them as such; And for himself, his Heirs and Successors,

relinquishes all Claims to the Government, Propriety, and territorial Rights of the same, and every part thereof; and that all Disputes which might arise in future, on the Subject of the Boundaries of the said United States, may be prevented, It is hereby agreed and declared that the following are, and shall be their Boundaries Viz. . . . " (All the references given to these early treaties here are taken
645 from 2 *Treaties and other International Acts of the United States of America* (Hunter Miller ed. 1931). The article just quoted is at pp. 96-97.)

The same provision is found in Article 1 of the Definitive Treaty of Peace of September 3, 1783:

"His Britannic Majesty acknowledges the sd. United States, viz. New-Hampshire, Massachusetts Bay, Rhode-Island & Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina & Georgia, to be free sovereign & Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all Claims to the Government Propriety & Territorial Rights of the same and every Part thereof."(*Id.* p. 152).

The same recognition is found in the Treaty of Amity and Commerce between the United States and France of February 6, 1778. The preamble of this treaty begins as follows:

"Treaty of Amity and Commerce.

"The most Christian King, and the thirteen United States of North America, to wit, New-Hampshire, Massachusetts Bay, Rhode-island, Connecticut, New York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South Carolina & Georgia, willing to fix in an equitable and permanent manner the Rules which ought
646 to be followed relative to the Correspondence & Commerce which the two Parties desire to establish between

their respective Countries, States, and Subjects, his most Christian Majesty and the said United States have judged that the said End could not be better obtained than by taking. . . ."

"Traité d'Amitié et de Commerce

"Le Roi Très chretien et les treize Etats-unis de l'Amèrique septentrionale, savoir, Newhampshire la Baye de Massachusett, Rhode-Island, Connecticut, New York, New Jersey, Pennsylvanie, Les Comtés de Newcastle de Kent et de Sussex sur la Delaware, Maryland, Virginie, Caroline septentrionale, Caroline Méridionale et Georgia voulant établir d'une maniere équitable et permanente les règles qui devront être suivies relativement à la Correspondance et au Commerce que les deux parties désirent d'établir entre leurs Pais, Etats et Sujets respectifis, Sa Majesté Trés chretienne et les dits Etas unis ont jugé no pouvoir mieu atteindre à ce but. . . ." (*Id.* p. 3.)

Furthermore, in Article 1 we find the texts both in English and French use both the terms "United States of America" (les Etats unis de l'Amérique) and "the said States" (des dits Etats). While the French text in some subsequent Articles uses the designation "Etats-unis", Article 32 again refers to "the thirteen United States"
647 (des treize Etats-unis). (*Id.* p. 27.)

The Treaty of Alliance with France of February 6, 1778 begins its preamble as follows:

"Treaty of Alliance

"The most Christian King and the United States of North America, to wit, Newhampshire, Massachusetts Bay, Rhodeisland, Connecticut, Newyork, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, having this Day concluded a Treaty of amity and Commerce, for the reciprocal advantage of their Subjects and Citizens have thought it necessary to

take into consideration the means of strongthening those engagements and of rondring them useful to the safety and tranquility of the two parties. . . ."

"Traité d'Alliance éventuelle et deffensive

"Le Roi Très Chrétien et les Etats-unis de l'Amerique Septentrionale, savoir New-Hampshire, la Baye de Massachusset, Rhode-Island, Connecticut, New-york, New-Jersey, Pennsylvanie, Delaware, Maryland, Virginie, Caroline Septentrionale, Caroline Meridionale et Georgie; ayant conclu ce jourd 'huy un Traité d'Amitié, de bonne intelligence et de commerce, pour l'avantage réciproque de leurs Sujets et Citoyens, ils ont cru devoir prendre en considération les moyens de resserrer leurs liaisons, et de les rendre utiles
648 à la Sureté et à la Sureté et à la tranquilité des deux Parties. . . ." (*Id.* p. 35.)

These treaties with France – the first ever made by the United States – were ratified by Congress on May 4, 1778. However, there was a most interesting additional ratification by Virginia, which is described by James Brown Scott, who was selected by Secretary of State Elihu Root to be the chief legal officer of the Department of State:

"On June 2, 1779, the House of Delegates of Virginia

Resolved, nemine contradicente, that it is the opinion of this committee that the treaties of alliance and commerce entered into between His Most Christian Majesty of France on the one part, and the Congress of the United States of *America* on behalf of the said states on the other part, ought to be ratified and confirmed, so far as is in the power of this commonwealth, and the same are accordingly hereby ratified, confirmed and declared binding on this commonwealth.

Resolved, that the Governour be desired to notify to the Minister of His Most Christian Majesty, resident at

Philadelphia, the above ratification under the seal of the commonwealth.

"On June 3rd, the resolution of the House of Delegates was laid before the Senate of Virginia, where it was
649 agreed to on the following day.

"On the 8th of June, the Governor of the State transmitted the act of ratification with a covering letter to M. Conrad-Alexandre Gerard, French Minister in Philadelphia, who, in turn, transmitted them to the Comte de Vergennes, then Minister for Foreign Affairs of France. In the course of his letter, M. Gerard, who had the year before negotiated the two treaties on behalf of his country, said:

"On the 20th of this month the Virginia delegates in a body delivered to me in behalf of their State a package containing a letter from the governor of that Commonwealth and an authentic copy of the Act passed by a unanimous vote of the two legislative branches for the ratification of the treaties concluded between the United States and the King and declaring them binding on the Commonwealth.

"These documents are to-day in the Ministry of Foreign Affairs at Quai d'Orsay, where they were recently examined at my request. They were found to be intact, still bearing the seal of the Commonwealth of Virginia. It is not without interest to observe that these papers bear the signature of Thomas Jefferson, at that time Governor of Virginia, and who three years previously had drafted the Declaration of Independence, to be made effective by the treaty of alliance with France, of which he transmitted
650 the instrument of ratification in behalf of his State. It is to be presumed that he knew the meaning of the Declaration and that he thought his actions to be in accordance with its terms.

"We may perhaps say of Jefferson's letter, with its precious enclosures in Quai d'Orsay, what Macaulay in his *Lays* says of the 'molten image' of Horatius in the Eternal City:

> And there it stands unto this day
> To witness if I lie.

"Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign, and independent, and that they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act." Scott, *Sovereign States and Suits* 55-57 (1925) (Footnotes omitted. See also *Id.* at pp. 35-40, 46-47, 54, 63.)

I have made no study of whether any of the other states ratified the French treaties, or whether any other state ratified any of the subsequent treaties down to 1789, all of which were concluded after the articles of Confederation entered into force. I doubt whether they did, since Article IX gave "the United States in Congress assembled" the sole and exclusive right to make treaties, requiring the vote of nine states in Congress. (As to the French treaties,
651 adopted before the Articles of Confederation came into force, Miller observes that "the urgency of the occasion overrode any technical necessity of a ratification voted by thirteen states." 2 *Treaties and Other International Acts of the United States, supra,* p. 30.) That the delegation of powers over foreign relations, including treaty making, does not impair the sovereignty of the delegating state for international-law purposes is confirmed by the holding of the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States),* [1952] I.C.J.

176. France established a protectorate over Morocco in 1912. The Court held that under this protectorate "Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name of Morocco, and, in principle, all of the international relations of Morocco." *Id.* at 188.

And again the Court said:

"It is not disputed by the French Government that Morocco, even under the protectorate, has retained its personality as a State in international law." *Id.*, p. 185.

652 In the Contract of July 16, 1782 between the King of France and the United States regarding the repayment of money advanced by the King to the United States, one finds that the document is entitled "Contract between the King and the Thirteen United States of North America" (Contrat entre le Roi et les Treize Etats-Unis de l'Amérique Septentrionale). (2 *Treaties and Other International Acts of the United States, supra,* p. 48).

Similar is the Treaty of Amity and Commerce of October 8, 1782 between the United States and the Netherlands, the preamble of which begins as follows:

"A Treaty of Amity and Commerce between Their High Mightinesses the States-General of the United Netherlands, and the United States of America, to wit New-Hampshire, Massachusetts, Rhode Island, and Providence Plantations, Connecticutt, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

"Their High Mightinesses the States General of the United Netherlands, and the United States of America, to wit New-Hampshire, Massachusetts, Rhode Island, and Providence Plantations, Connecticutt, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina,

653 South-Carolina and Georgia. . . ." (*Id.* p. 59.)

"Tractaat van Vriendschap en Commercie tusschen Haar Hoog Mogende, de Staten Generaal der Vereenigde Nederlanden, en de Vereenigde Staten van America, te weeten New-Hampshire, Massachusetts, Rhode Island, en Providence Plantations, Connecticutt, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia Noord Carolina, Zuyd-Carolina en Georgia.

"Haar Hoog Mogende de Staten Generaall der Vereenigde Nederlanden, en de Vereenigde Staten van America, te weeten New-Hampshire, Massachusetts, Rhode Island en Providence Plantations, Connecticutt, New-York, New-Jersey, Pensylvanien, Delaware, Maryland, Virginien, Noord-Carolina, Zuyd-Carolina en Georgien . . . ."

Likewise, the Treaty of Amity and Commerce of April 3, 1783 with Sweden begins with the following language: "A Treaty of Amity and Commerce Concluded between His Majesty the King of Sweden and the United States of North America.

"The King of Sweden, of the Goths and Vandals, etc., etc., etc., and the thirteen United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the counties of New Castle, Kent, and Sussex on Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia . . . ." (*Id.* p. 123.)

654 "Traité d'Amitié et de Commerce Conclu entre Sa Majesté le Roi de Suede et les États Unis de L'Amerique Septentrionale.

"Le Roi de Suede des Goths et des Vandales &c. &c. &c. et les Treize Etats Unis de l'Amerique Septentrionale, scavoir New-Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New-York, New-Jersey, Pensylvanie, les Comtes de New-Castle, de Kent et de Sussex sur la Delaware, Maryland, Virginie, Caroline Septentrionale, Caroline Meridionale et Georgie

. . . ."

In Article 23 of that Treaty the separate quality of the several states is indicated by the language which refers to "the United States of America, or any of them" (les Etats Unis de l'Amérique on quelques uns d'entre Eux"). (*Id.* p. 142.)

Hunter Miller's notes to this Swedish treaty include the following paragraph:

"Certain formal amendments to the opening words of the treaty were proposed (in English) by Congress after ratification (Journals, XXIV, 477); instructions were given to Franklin accordingly by letter of August 15, 1783 (Diplomatic Correspondence, 1783-1789, I, 34-35); but it seems that as formal amendments, those proposals were not pressed. However, on the exchange of ratifications Franklin informed Baron Stael von Holstein, the Ambassador of Sweden at Paris, according to
655 the letter of the latter of February 6, 1784, mentioned below, 'that the United States in their titles will henceforth exclude *North* and call themselves only the United States of America, and that the State which has been known as New Castle, Kent, and Sussex on the Delaware from now on will be called only Delaware' (translation from the Swedish)." (*Id.* p. 149)

In the light of these facts it must be concluded that on the conclusion of the Treaty of Peace with Great Britain in 1783 each one of the thirteen "colonies" had the status of separate states in the international sense, equal to all the other members of the international community of states in the rights and privileges which, in those days, sovereign states enjoyed under international law.

This conclusion is not impaired by the fact that in some of these treaties, in addition to the specification

of the separate States of the "United States," there are references to the "two parties" or "both parties."

It having been acknowledged in the preambles that the foreign Government was contracting with thirteen states, it is as if, in familiar modern contractual language where a multiple or collective group contracts, the treaty had said "hereinafter referred to as the party of the second part."

I have examined the testimony of Professor Joseph H.
656 Smith and I find that the conclusions he reaches, on the basis of the sources of evidence which he analyzes, confirm the conclusion which I have just stated. On the problem of separate individual statehood, he reinforces at his p. 848 (tr.) from a constitutional point of view, what I have stated from an international point of view.

On the question of terminology respecting offshore rights, which I discuss at p. 498 (tr.) and following in my testimony, largely from the evidence of treaty texts, much of Professor Smith's data support the opinion I state. For example, see his pp. 684 (tr.) and following and his summary at pp. 791-792 (tr.). His comments on oyster beds and salt pans (pp. 795, 799-801 (tr.)) are additional evidence of the right to exploit resources of the seabed.

And I agree with the conclusions he states on pp. 828 (tr.), 832-833, 835-836 (tr.), and elsewhere to the effect that Great Britain, in the period in question, claimed sovereignty over the marginal sea and rights to exploit the seabed even outside the three mile limit, off the North American coast as well as in English waters.

* * * * *

659 DIRECT EXAMINATION OF JOSEPH H. SMITH

BY MR. CLAGETT:

Q. Would you please state your name, background and professional qualifications and experience?

A. My name is Joseph H. Smith. I am George Welwood Murray Professor of Legal History at Columbia Law School. I was appointed Professor of Law at Columbia in 1961 while I was engaged in the practice of law in New York City. The occasion for my appointment was the retirement of Professor Julius Goebel, Jr., who had been responsible for the legal history offerings at Columbia since 1928. I was made George Welwood Murray Professor, the seat held by Professor Goebel for many years, in 1967. I have primary responsibility for the offerings in Anglo-American legal history at the Law School.

660 I teach two courses in the legal history field: *Development of Legal Institutions,* primarily concerned with English legal history until the settlement of the American colonies, and *Early American Law,* which covers the American colonial period and the early Federal period until about 1800. I also offer a seminar entitled *American Legal History* which centers about legal developments in the United States from about 1800 to the Civil War.

Since 1961 I have also been director of the Foundation for Research in Legal History at Columbia Law School, succeeding Julius Goebel in that position. Research conducted under the auspices of the Foundation has resulted in the publication since 1937 of six books in English, American and Anglo-American legal history.

I received a B.A. degree at Yale in 1935 and an LL.B. at Columbia in 1938. Following graduation from Law School, I became a Research Assistant with the Foundation for Research in Legal History and continued in that capacity until early 1942. During this time I engaged in extensive research in various governmental archives, courthouses, libraries and historical societies located in

England, the Channel Islands, the West Indies and the Atlantic seaboard states of the United States. This research was conducted for the purpose of writing a book
661 on appeals the Privy Council from the American colonies which was published after World War II. In 1938-39 I also attended seminars at the Institute for Historical Research of the University of London.

I served in the armed forces of the United States from early 1942 to late 1945.

I was admitted to the New York bar in 1940 but did not practice until early 1946, when I became an associate with the law firm of Rathbone, Perry, Kelley and Drye in New York City. I was an associate and then partner in the successor firm of Kelley, Drye, Newhall and Maginnes, resigning from the firm in 1961 after my appointment to the Columbia Law School faculty. While in practice I continued my interest in legal history by helping to see *Appeals to the Privy Council* through the press, by writing book reviews and by working on the second and third of the publications listed below.

Apart from casebooks or teaching materials, I have been author or editor of the following publications:

Appeals to the Privy Council From the American Plantations (Columbia Univ. Press, 1950; reprinted Octagon Books, 1965).

Colonial Justice in Western Massachusetts (1639-1702): The Pynchon Court Record published under the auspices of The William Nelson Cromwell Foundation by Harvard University Press (1961).

662 *Court Records of Prince Georges County, Maryland 1696-1699* (ed. with Philip A. Crowl, 1964): American Legal Records - Vol . 9, published by the American Historical Association in

collaboration with the Hall of Records Commission of the State of Maryland.

"Administrative Control of the Courts of the American Plantations," in 61 Columbia Law Review 1210 (1961); reprinted in *Essays in the History of Early American Law* (ed. D.H. Flaherty), published for Institute of Early American History and Culture of Williamsburg, Va., by University of North Carolina Press, (1969) at p. 281.

"The Foundations of Law in Maryland: 1634-1715," in *Law and Authority in Colonial America* (Barre Publishers, 1965), at p. 92; reprinted by Dover Publications, Inc., 1970, at p. 92.

"The Provincial Court and the Laws of Maryland," in *Essays in Legal History in Honor of Felix Frankfurter* (ed. M.D. Forkosch, 1966) at p. 387.

"New Light on the Doctrine of Judicial Precedent in Early America: 1607-1776," in *Legal Thought in the United States of America Under Contemporary Pressures* (ed. J.N. Hazard and W.J. Wagner, 1970) at p. 9.

Book reviews, largely in the legal history field, in American Historical Review, Columbia Law Review, University of Detroit Law Journal, New York Law Forum, New York Law Journal, Political Science Quarterly, Villanova Law Review. Some of these involved substantial collateral research.

Sir William Blackstone item for new edition of *Encyclopedia Americana.*

I have also edited the following casebooks or teaching materials:

663 *Cases and Materials on the Development of Legal Institutions* (West Publishing Co., 1965). Three earlier editions in mimeographed form (1902-1964) were issued for the exclusive use of Columbia Law School students.

Supplement to Cases and Materials on the Development of Legal Institutions (1969), multilithed materials (335 pp.) privately printed for the exclusive use of Columbia Law School students.

Cases and Materials on Early American Law and Legal Institutions (1969), multilithed materials (953 pp.) privately printed for the exclusive use of Columbia Law School students.

Since 1963 I have also done a substantial amount of research, principally at the Public Record Office in London, England, with a view to writing a book on the appellate jurisdiction of the High Court of Admiralty over the vice-admiralty courts of the American plantations. This would be a companion piece to *Appeals to the Privy Council from the American Plantations.* Some of the research will probably result in a separate article on the role of the Lords Commissioners for Hearing Prize Appeals, a body distinct from the High Court of Admiralty.

At present I am also working on an article, which should be published next year and which represents a substantial
664 amount of research in the United States and England, dealing with judicial tenure in England, the American colonies, and the period of early statehood with particular emphasis upon the American colonial period and the problem of administrative control from England of judicial commissions and salaries and its political consequences.

An article which I authored jointly with Professor Leo Hershkowitz of Queens College, New York, entitled *"Courts of Equity in the Province of New York: The Cosby Controversy, 1732-1736,* will appear shortly in the American Journal of Legal History.

I have also done some research in the last two years looking forward to a comprehensive article on statutory reception of the laws of England, or portions thereof, by the American colonies.

As Special Assistant to the Attorney General of the United States in 1965, I directed and supervised the research for and preparation of an Historical Appendix (364 pp.) to the brief for the United States in *Harris v. United States* in the Supreme Court of the United States, involving the right to jury trial in criminal contempt cases.

For the years 1967-1969 I served as Chairman of the Committee on the Littleton-Griswold Fund of the American
665 Historical Association, having been a member of the Committee for a number of years before 1967. This Committee is responsible for publication of the American Legal Records Series. As Chairman I was particularly concerned with organizing a project to do extensive research in individual rights in the American colonial courts in the period 1720-1760, and with attempts to secure publication of some 17th century Virginia County Court records (Accomack-Northampton) and of some records of the Connecticut Court of Assistants (1665-1711). While no longer on the Committee, I have recently served as consultant to the Chairman on three proposed publications of court records or other legal material.

Since 1965 I have been a member of the Advisory Committee to the Project in Legal History of the American Bar Foundation. Each year members of the Committee read, evaluate and make recommendations with respect to applications for Annual or Summer Fellowships in Legal History.

Last year I was appointed a member of the Editorial Advisory Board for a new series of books entitled "Studies in Legal History" to be published by the Harvard University Press in association with the American Society for Legal History. Members are called upon to act as readers and to make recommendations with respect to manuscripts submitted for publication in the series.

666 I was a member of the Round Table Council for Legal History of the Association of American Law Schools, 1963-1968.

Since 1963 I have been the "law member" of the Columbia University Seminar on Eighteenth-Century European Culture. In 1969 I delivered an unpublished paper on "Blackstone as a Figure of the Enlightenment" and distributed a selective bibliography on Sir William Blackstone.

As a member of the Columbia University Seminar on Legal and Political Thought, I delivered, in 1964, an published paper on the "Reception of the Laws of England in Colonial America." In March 1971 I delivered to the same seminar an unpublished paper on "The Doctrine of Judicial Precedent in Early America, 1607-1800," an extension of the article published in *Legal Thought in the United States of America Under Contemporary Pressures,* listed above. That article had been prepared for the VIII Congress of the International Academy of Comparative Law at Pescara, Italy.

I am a member of the Selden Society and The American Society for Legal History. At the request of the Nominating Committee, I have agreed to serve as Treasurer of the latter organization for the next year.

Since my appointment at Columbia I have been consulted in connection with various Ph.D. theses and publica-
667 tion of articles and books covering such subjects as the Provincial Court of Maryland, early English claims to North America, the work of the Committee on Prize Appeals of the Continental Congress, the early development of the assize of nuisance, the County Courts of Virginia in the early 19th century, the right of privacy in colonial New England, estates in land in colonial New York, the administration of decedents' estates in colonial New York, the County Courts of Maryland in the early 18th century, the law practice of John Jay, the reception of the laws of England in Australia (a problem having some relation to the American colonial experience), the history of the Bar Association of the City

of New York, aspects of English law in the novels of Henry Fielding, the sale of literary copyrights in 18th century England, legal developments in New York State in the early 19th century and the role of the crown law officers in the administration of the American colonies.

While in my teaching of legal history I am concerned with medieval England and 19th century American developments, my primary academic interest is in Anglo-American legal history in the 17th and 18th centuries with emphasis upon control by English judicial bodies and administrators of American colonial laws and legal institutions. An important aspect of this interest is the problem of the reception
668 of the laws of England by the various American colonies.

Q. In your opinion, are there particular difficulties in ascertaining the status and laws of the various American colonies in the 17th and 18th centuries, and the relations between the colonies and the crown and other authorities in England, which would make it useful for the Court to hear the testimony of an expert?

A. Yes, I believe there are particular difficulties in the areas to which you advert. In dealing with the laws, the constitutions and the administration of the American colonies, one is essentially dealing with several bodies of law. On the English side one has to have familiarity with the body of English decisional law which determined what might be called the constitutional status of the dominions of the crown outside the realm. Today a vast body of law has developed with respect to the relations of the English crown to its colonies or former colonies. At the time of the settlement of most of the American colonies, this body of law was in a nascent stage.

The royal prerogative played a large role in English colonization. Its content and scope are formed in English decisions, in acts of Parliament and in administrative custom

669 and practice. Instruments such as royal charters or letters patent, proclamations, orders in council, gubernatorial commissions and instructions all play a role. The opinions and advice of the crown law officers (the Attorney General, the Solicitor General and, to a lesser extent, the King's Advocate) were important elements in colonial administration. The actions of bodies such as the Privy Council, the Board of Trade, the Board of Customs, the Lords Commissioners of the Admiralty, etc., were significant in the governing of the colonies.

The first problem is one of sources – apart from the English reprints and the abridgments, where does one locate charters, commissions, orders in council, reports of the Board of Trade, etc.? Beyond the difficulty of dealing with manuscript sources, one must be able to interpret or construe words in the sense used several centuries ago and to evaluate actions in the light of the realities of law and administration in the 17th and 18th centuries.

English decisional law, acts of Parliament and the administrative acts of English agencies, if not always accessible for American scholars, are relatively centralized and to some extent available in printed sources. From the colonial side the picture is more fragmented, although much of the material sent to England by colonial governors and
670 administrators is located at the Public Record Office in Chancery Lane, London.

Most of the North American colonies have printed substantial portions of the material for their colonial periods such as laws or acts of the Assembly, legislative journals, conciliar records and court records. However, in most colonies much remains in manuscript form. Those remaining in manuscript are frequently widely scattered and poorly indexed. Research may lead to national or state archives, public libraries, historical societies, court houses, university libraries and private collections.

In areas where evidence is scanty or ambiguous, the expert is called upon to exercise a judgment based upon experience stretching over wide reaches of American colonial law and legal institutions.

Q. Would it also be useful, in your opinion, to have the Court hear the testimony of an expert on the legal situation during the period of the formation of the Union?

A. Yes, I believe it would be. There is a certain degree of continuity between the colonial period, the period of Confederation and the early Federal period. In dealing with the Western lands claims, for instance, one is thrown back to the colonial charters from the crown. In many aspects of law and legal systems there was no sharp break
671 with the past at the time of the Declaration of Independence. Much of the background of the Federal Constitution is best understood from the viewpoint of the various constitutional issues raised during the colonial period. While the documentary sources and the literature concerning the formation of the union are relatively limited in comparison with the multiplicity of the colonial period, an expert witness can still perform a useful function.

* * * * *

BY MR. CLAGETT:

Q. Please summarize briefly your understanding of the English law in effect at the outset of English colonization in America with respect to the legal status of the seabed and subsoil of the continental shelf.

A. An understanding of the ownership of the seabed and subsoil under the seas adjoining the American colonies requires reference to the state of the common law in England in the 17th and 18th centuries. As Professor Horwitz stated in his testimony, "under English law and practice of the 17th and 18th centuries, ownership of the seabed under
672 the high seas off English coasts was vested in the crown." (Tr. 120.) English law, or more precisely, the English

common law, clearly recognized crown proprietary rights in the seabed off the English coasts, although the precise distance this ownership extended from the coast was a matter of some uncertainty.

While this common law principle, basically a description of one aspect of the royal prerogative, is first widely articulated in the 17th century, it clearly derives from a much older English legal tradition recognizing the King's sovereignty over the English seas. We find this widespread articulation in the 17th century as a result of controversies over fishing rights, the boundaries of coastal lands and the jurisdiction of the admiralty – the Lord High Admiral and the High Court of Admiralty. The 17th century was a time of tremendous increase in the amount of printed material devoted to legal disputes and controversies and to the law in general. With the age of Sir Edward Coke the printing press became a valuable adjunct to a wider expression of views with respect to various aspects of English law. Actually, as Professor Horwitz points out, the principle that the crown by virtue of its prerogative owned the seabed and subsoil of the seas was given currency during the reign
673 of Elizabeth by Thomas Digges, by the High Court of Admiralty and by William Welwood in his *An Abridgement of all Sea Lawes.* (Tr. 120, 123-127.)

These expressions of the extent of the royal prerogative were made in treatises and elsewhere in the context of the seabed under the high seas off the English (and Irish) coasts. However, the age of Elizabeth was also the age of exploration, and it is clear from a perusal of the available exploration and settlement charters that the royal prerogative in the sense of dominion of the surrounding or adjoining seas was fully expressed in these charters and transferred to dominions of the crown outside the realm in the Western Hemisphere.

Q. Please describe the evidence on which you base that conclusion.

A. From the outset, English exploration and discovery in the Western world rested upon the concept that an English subject taking possession of an uninhabited country or one inhabited only by infidels, basically the *terra nullius* of Roman law, took possession in the name of the King and to his use. Much of the exploration and discovery was done under letters patent or licenses from the crown; in some cases the licensees were not even English subjects. The early patents for exploration and discovery left undefined the exact legal consequences of declaring that the King was
674 sovereign of an island or other area previously regarded as *terra nullius.*

The first letters patent granted to John Cabot and his sons by Henry VII, dated March 5, 1495, empowered the patentees "to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians," with license to set up the royal banners and ensigns in any town, city, castle, island or mainland whatsoever, newly found by them. (Maine et al. Exhibit No. 239, p. 204). They were also granted the right to "conquer, occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered that they may be able to conquer, occupy and possess, as our vassals, and governors, lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands so discovered." (*Id.* at pp. 204-205).

The crown was to receive one-fifth of "all the fruits, profits, emoluments, commodities, gains and revenues" accruing from voyages under the letters patent. No other subjects, without license from the patentees, were to visit

any such mainlands, islands, towns, cities, castles or other places whatsoever discovered by the patentees. (*Id.* at p.
675 205).

It was on the basis of a voyage made by Cabot under these letters patent that England later laid claim to much of the Atlantic seaboard. (*CSP, Col. 1661-68,* Nos. 510, 622) (Maine et al. Exhibit No. 240, pp. 147, 177-78).

A few years later, on March 19, 1501, the King granted letters patent to Richard Warde, Thomas Asshehurst, John Thomas, João Fernandes, Francisco Fernandes, and João Gonsalves. The first three patentees were Bristol merchants; the last three were from the Azores and subjects of the King of Portugal. The patent granted full and unrestricted authority and power "to find, recover, discover and search out whatsoever islands, countries, regions or provinces of heathens and infidels, in whatever part of the world they may lie, which before this time were and at present are unknown to all Christians, and to set up our banners and ensigns in any town, city, castle, island or mainland by them thus newly found, and to enter and seize these same towns, and as our vassals and governors, lieutenants and deputies to occupy, possess and subdue these, the property, title, dignity and suzerainty of the same being always reserved to us." (Maine et al. Exhibit No. 241, p. 237).

It was then provided that the King's other subjects might visit and inhabit the newly found lands and islands, upon
676 license from the patentees, who were granted full power and authority to rule and govern all persons removing to such lands and islands. This authority included the power to make, set up, ordain and appoint laws, ordinances, statutes and proclamations for the good and peaceful rule and government of such persons. (*Id.* at p. 238). There was no limitation, as was customary in later colonial charters, that the laws, etc., not be repugnant or contrary to the

laws of England. However, by implication, in a later provision granting the Portuguese patentees the rights of English subjects (*id.* at pp. 243-244) it would appear that any laws, etc., made were not to deprive English subjects of their rights. The patentees were to hold the lands, islands and places of the King by fidelity alone, without any compensation or anything else being rendered or made "always excepting the dignity, dominion, regality, jurisdiction and suzerainty of the same, wholly reserved to us [the King and his heirs]." (*Id.* at p. 243).

The patentees were also given the office of Admiral at sea in any of the newly discovered places, countries and provinces and as "our Admiral" given full power and authority to do, exercise and carry out "all and singular the things which pertain to the office of Admiral, according to the law and naval custom obtaining in this our realm of England." (*Id.* at p. 242).

677 Another patent was granted on December 9, 1502 by Henry VII to Hugh Elyot, Thomas Asshehurst, João Gonsalves and Francisco Fernandes giving "full and free authority, faculty and power . . . to find, recover, discover and search out any islands, countries, regions or provinces whatsoever of heathens and infidels in whatsoever part of the world placed, and to set up our banners and ensigns in any city, town, castle, island or mainland by them thus newly found, and to enter and seize the said cities, towns, castles, islands and mainlands for us and in our name, and as our vassals and governors, lieutenants and deputies to occupy, possess, and subdue these, the property, title, dignity and suzerainty of the same being always reserved to us." (Maine et al. Exhibit No. 242, pp. 250-251). Other provisions in the letters patent were substantially the same as those contained in the earlier patent to Richard Warde and others, with no necessity of repeating the provision, although there

was no necessity of making the Portuguese patentees English subjects for most purposes.

These several early patents for exploration and discovery do not contain specific or implied grants of the adjoining seas or even of harbors and rivers. This is explicable on several grounds. Since the three patents were not "grants"
678 – because of the reservation of all sovereignty and property in the crown – but mere commissions of agency, there was no occasion to specify all the property rights which the crown could or would claim in the areas to be explored. Secondly, international rivalries in respect to colonization had not intensified. The settlements contemplated were largely in the nature of trading ventures. However, despite the lack of explicit contemporary judicial expression the patents make it clear that the King as sovereign had as great, if not greater, rights in the conquered infidel cities, countries and places as within the realm.

The 1578 letters patent granted by Queen Elizabeth to Sir Humfrey Gilbert authorized the patentee in general terms to discover "remote, heathen and barbarous lands, countreys and territories not actually possessed of any Christian prince or people" and to occupy and hold such lands, countries and territories "with all commodities, jurisdictions, and royalties *both by sea and land*" (Maine et al. Exhibit No. 193, p. 17, emphasis added. See also Exhibit No. 139, p. 49).

Full understanding of these letters patent and others requires some explanation of terms which are no longer current or now have different meanings.

679 The meaning of the word "commodities" appears in the following passage from *London v. Southwell Collegiate Church* (Chapter), Hob. 303, at p. 304 (1618): "[T]he advowson did not pass by . . . the said words. The words are four: commodities, emoluments, profits and advantages, to the prebend belonging; all which four words are

of one sense and nature, implying things gainful." A much later case, *The Frederick VIII,* [1917] P. 43, 44-46 defines as follows: "The word 'commodity' is one of extensive meaning, denoting anything that is useful, convenient, or serviceable."

The word "jurisdictions" has not changed in its meaning.

The word "royalties" (*regalia* or *regalitates* in Latin) as used above, meant the rights of the King or Queen, *jura regis* or *jura regalia,* otherwise collectively called The King's or Queen's prerogative. The term "royalties" is synonymous with "regalities" or "regalia"; all these terms refer to the complex collection of rights which constituted the royal prerogative, which, as we have seen, included *inter alia* the crown's rights in the sea and seabed. See Blount, *Law-Dictionary,* (3d ed. 1717); 2 Cunningham, *A New and Complete Law Dictionary,* (1765); see also 5 Jacob, *Law Dictionary* 551 (Phil. ed. 1811). A well-recognized and major
680 portion of the King's royalties or regalities was the regality *in dominio,* which comprised those portions of the royal prerogative relating to overlordship and ownership of and powers over land, including, for example, proprietorship of mines and rights to royal forests. See *e.g.* Lapsley, *The County Palatine of Durham, A Study in Constitutional History* 54-67 (1900) (Maine et al. Exhibit No. 331). The regality *in dominio* include royal rights in the sea, such as the right of wreck (*id.* at 62-63) and the right to royal fish, whales and sturgeons either cast ashore or taken in the marginal sea (*id.* at 58). I believe it is clear that the regality or royalty *in dominio* included all crown rights in the marginal sea and seabed, and that when the term "royalties" was used in colonial charters it was intended and understood to include those rights.

The 1578 Gilbert patent also provided that the patentee hold and occupy "all the soyle of all such lands, countries & territories so to be discovered or possessed as aforesaid, and of all Cities, Castles, Townes and Villages, and places in the same, with the rites [rights], royalties and jurisdictions, as well marine as other, within the sayd lands or countreys of [or] the seas thereunto adjoyning to be had or used with ful power to dispose thereof, & of every
681 part thereof in fee simple or otherwise, according to the order of the Laws of England, as nere as the same conveniently may be, at his, and their will & pleasure, to any person then being, or that shall remaine within the allegiance of us, our heires and successours." (Maine et al. Exhibit No. 193, p. 18 and No. 139, pp. 49-50).

In my opinion, the above-recited clauses from the letters patent were designed to grant, and did grant, to the patentee maritime or admiralty jurisdiction and also the soil of the adjoining seas. The Queen in effect obviously assumed that when Sir Humfrey discovered and took possession of any "remote, heathen and barbarous lands, countreys and territories" (*Id.* at p. 17 and No. 139 at p. 49) the royal rights or prerogative with respect to such land areas and the adjoining seas were identical to those possessed by the Queen within the realm.

The patent also granted the right to repulse and keep out "as well by Sea as by land and by all other wayes whatsoever" any other persons who without the special license of Sir Humfrey attempted to inhabit "within the space of two hundredth leagues, neere to the place or places within such countreys as aforesayd . . . where the said Sir Humfrey, his heires or assignes, or any of them, or his or their, or any of their associates or companies, shall within sixe yeeres next ensuing, make their dwellings
682 and abidings." (*Id.* at p. 19 and No. 139 at p. 50).

The patent further granted "full and meere power and authoritie to correct punish, pardon, governe and rule by their, and every or any of their good discretions and policies, as well in causes capitall or criminall, as civill, both marine and other, all such our subjects and others as shall from time to time adventure themselves in the sayd journeys or voyages habitative or possessive, or that shall at any time hereafter inhabite any such lands, countreys or territories as aforesayd, or that shall abide within two hundred leagues of any sayd place or places, where the sayd sir Humfrey or his heires, or assignes, or any of them, or any of his, or their associats or companies, shall inhabite within sixe yeers next ensuing the date hereof. . . ." (*Id.* at pp. 20-21 and No. 139 at p. 51).

In early 1584 Queen Elizabeth granted letters patent to Adrian Gilbert and others for search and discovery of the Northwest Passage to China. (Maine et al. Exhibit No. 192). The charter, *inter alia,* granted "full power and absolute authoritie to trade and make their resiance [residence] in any of the sayde Isles, Countreys, Regions, Provinces, Territories, Seas, Rivers, Portes, Bayes, and Havens, and all manner of other places whatsoever with all commodities, profites, and emoluments in the sayde places or any of
683 them, growing and arising, with all manner of priviledges, prerogatives, jurisdictions and royalties both by sea and land whatsoever, yeelding and paying therefore unto us, our heires and successors, the tenth part of all such golde and silver oare, pearles, jewels, and precious stones, or the value thereof, as the sayd Adrian Gylbert and his sayd associates, their heirs and assignes, servants, factors, or workemen, and every or any of them shall finde. . . ." (*Id.* at p. 377).

The patent also gave Adrian Gilbert and his associates the right to exclude others from trading with or inhabiting,

without special license, any "Iles, Countreys, Regions, Provinces, Territories, Seas, Rivers, Ports, Bayes, or Havens, or any other of the premisses by the sayd Adrian Gylbert or his associats, their heires and their said assignes or any of them, to be found by them, discovered and traffiqued unto . . . ", and made such invasions unlawful. (*Id.*).

While the language of the patent is somewhat variant from that of the earlier 1578 charter, in my opinion the language employed granted the crown's rights to the soil under seas adjoining any place of trade or habitation established under the charter terms. How far out the rights extended was left as indefinite as under the statements
684 of the principle with respect to the realm itself.

About six or seven weeks after the grant to Adrian Gilbert and others Queen Elizabeth granted letters patent to Sir Walter Raleigh "to discouer [discover], search, finde out, and view such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People . . . and the same to haue, holde, occupie and enjoy to him, his heires and assignes for ever, with all prerogatives, commodities, jurisdictions, royalties, priuileges, franchises, and preheminences, thereto or thereabouts both by sea and land, whatsoeuer we by our letters patents may graunt, and as we or any of our noble progenitors haue heretofore graunted to any person or persons, bodies politique or corporate. . . ." (Maine et al. Exhibit No. 140, p. 53).

The above quoted language is fuller than that of the 1578 grant to Sir Humphrey Gilbert, and may represent the efforts of careful counsel for a royal favorite. As a practical matter it is doubtful that any greater rights were granted than in the earlier letters patent. The words "prerogatives", "jurisdictions", "privileges" and "franchises" need no definition. "Commodities" and "royalties" have

been defined above. The word "preheminences" does not appear in any law dictionary examined but it frequently
685 appears in company with prerogatives and privileges and seemingly refers to the "pre-eminence" of the King or crown.

In words virtually identical with those of the 1578 Gilbert patent Raleigh was granted "all the soile of all such lands, territories, and Countries, so to be discouered [discovered] and possessed as aforesaid and all such Cities, castles, townes, villages, and places in the same, with the right, royalties, franchises and jurisdictions, as well marine as other within the saide landes, or Countreis, or the seas thereunto adjoyining, to be had, or used, with full power to dispose thereof, and of euery part in fee-simple or otherwise, according to the order of the lawes of England, as neere as the same conueniently may bee . . ." (*Id.* at p. 54).

Also granted, as in the 1578 Gilbert patent, was the power to keep others at a 200 leagues distance and a power to govern all within the same distance from any settlement under the charters. (*Id.* at p. 55).

Q. Was there any contemporaneous judicial definition of the rights of the crown and the status of English law in English colonies? A. The first judicial articulation of the constitutional position of the King in relation to
686 what came to be called dominions of the crown outside the realm came in 1608 in *Calvin's Case* or *The Case of the Post-nati,* 7 Coke Rep. 2a (Exchequer Chamber) (Maine et al. Exhibit No. 243). Earlier arguments on the same set of facts are reported in Moore (K.B.) 790. (Maine et al. Exhibit No. 244). An action in King's Bench and a companion suit in the High Court of Chancery were both adjourned to the Court of Exchequer. This famous case did not directly involve the plantations. An assize of novel disseisin had been brought in King's

Bench, the defendants pleaded in law the alienage of the plaintiff and plaintiff demurred thereto. The question then, as a matter of law, was whether Robert Calvin the plaintiff, being born in Scotland after the crown of England descended to James I, was an alien born and consequently disabled to bring any real or personal action for any lands within the realm of England. The full report of the case in Coke's Reports is very long and the focal problem was *ligeance.* The most important passage is at pages 17b and 18a of Coke's Report. (Maine et al. Exhibit No. 243, pp. 397-399). The manner of acquiring dominion entered into the discussion and the question was treated in terms of the English law of real property. All the realm was in tenure and consequently any additions of property could be acquired only by conquest. The
687 decision then went on to differentiate between the conquest of the kingdom of a Christian king and the conquest of the kingdom of an infidel. If a king came to a Christian kingdom by conquest, seeing that he had power of life and death, he might at his pleasure alter and change the laws of that kingdom. However, until he made such an alteration, the ancient laws of the conquered kingdom remained in effect. But if a Christian king conquered the kingdom of an infidel and brought them under his subjection, *ipso facto* the laws of the infidel were abrogated, for they were not only against Christianity but also against the law of God and of nature. In that case, until certain laws were established the Christian king by himself and by such judges as he should appoint, should judge the infidels and their causes according to natural equity.

The significance of this passage is that it gave the king virtually *carte blanche* in establishing the government and laws of a "conquered country." In later years objections

were raised that the rule laid down primarily contemplated the government of the "conquered" not the "conquerors" and that most of the American colonies, as a factual matter, could not properly be regarded as "conquered" in that settlement or occupation was not accompanied by any armed "conquest" of the native Indian tribes.

688 It was not until many years after *Calvin's Case* that the English central courts enunciated the corollary principle that in the case of the settlement of an uninhabited country, newly discovered by English settlers, the settlers carried the laws of England with them. I shall discuss these later cases subsequently in my testimony. At this point I would like to point out that the argument or speech of Lord Bacon, as counsel for Calvin in the Exchequer Chamber, does enunciate the view that an English subject carries the laws of England with him as his birthright. (Maine et al. Exhibit No. 245).

Calvin's Case was probably the most important English case dealing with the constitutional status of the colonies, which were usually called plantations or dominions of the crown outside the realm in the 17th or 18th centuries. The opinions and arguments in *Calvin's Case* were published in pamphlet form, as were some of the related Parliamentary proceedings involving a projected union with Scotland.

As we shall see, as late as 1774 Lord Mansfield reiterated in large part the precepts laid down in *Calvin's Case* in a decision which dealt with the prerogative of the crown in Grenada, a Windward island conquered from the French. *Campbell v. Hall,* 1 Cowper 204 (K.B.) (Maine et al. Exhibit No. 246) and Lofft 655 (Maine et al. Exhibit No. 247). This decision, in turn,

689 in conjunction with the status of conquered Quebec, was

the subject of a three-volume commentary and critique by Baron Maseres. (*The Canadian Freeholder: In Three Dialogues Between an Englishman and a Frenchman, Settled in Canada* (1779).)

There was little advance in English judicial circles beyond the learning displayed in *Calvin's Case* until the 1690's although the problem of the extent to which the laws of England did or should extend to the plantations, particularly the West Indian islands, was fairly frequently before the Lords of Trade and Plantations or some other comparable body. (See for example, *CSP, Col., 1677-1680,* Nos. 1323, 1346, 1347, 1405.) (Maine et al. Exhibit No. 248, pp 497-8, 520-1, 554). However, two cases of the 1670's, *Craw v. Ramsey,* Vaughan 274 (C.P. 1670) (Maine et al. Exhibit No. 249), and *Concerning Process out of the Courts at Westminister into Wales of Late Times and How Anciently,* Vaughan 395 (Maine et al. Exhibit No. 250), underscore that the "English plantations" were dominions belonging to the crown of England and not to the King of England and recognize a concept of settled countries or plantations as opposed to the sole category of "conquered countries", as in *Calvin's Case.* (Maine et al. Exhibit Nos. 243 and 244).

* * * * *

694 BY MR. CLAGETT:

Q. Please turn now to the royal charters of the colonies which eventually became the states defendants in this action. What provisions do they contain, if any, regarding seabed rights and how do you construe those provisions? A. The first charter of Virginia, granted in 1606, provided for a "first colony" to be planted on the North American Atlantic coast between 34 and 41 degrees north latitude and a "second colony" to be

planted on the same coast between 38 and 45 degrees north latitude. The grant of the "first" or southern colony was phrased as follows:

"And that they shall have all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said first Seat of their Plantation and Habitation by the Space of fifty Miles of *English* Statute
695 Measure, all along the said Coast of *Virginia* and *America,* towards the *West* and *Southwest,* as the Coast lyeth, with all the Islands within one hundred miles directly over against the same Sea Coast; And also all the Lands, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Waters, Marshes, Fishings, Commodities, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for the space of fifty like *English* Miles, all alongst the said Coasts of *Virginia* and *America,* towards the *East* and *Northeast*, or towards the *North,* as the Coast lyeth, together with all the Islands within one hundred Miles, directly over against the said Sea Coast: And also all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land by the Space of one hundred like *English* Miles; . . . ." (Maine et al. Exhibit No. 41, p. 3784).

The grant of the "second" or northern colony was similarly worded. (*Id.* at p. 3785).

In addition, the councils of the two colonies were given the rights to "dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies, as of the said main
696 Lands on the Backside of the same Colonies . . . ." (*Id.* at p. 3786).

A comparison of this 1606 charter with the earlier letters patent to Gilbert and Raleigh and the two later Virginia patents may leave some doubt whether this charter was intended to vest in the patentees rights to the soil of the adjacent seas. However, the noted American historian, Charles McLean Andrews, has stated that the territorial boundaries set forth in the 1606 charter for the first colony "formed a section of land, which according to the wording of the patent was to extend fifty miles north along the seacoast above the first settlement and fifty miles south, one hundred miles into the interior and one hundred miles out to sea." 1 *Colonial Period of American History* 84. (Maine et al. Exhibit No. 251, p. 84).

The second Virginia charter of 1609, an "Enlargement and Explanation" of the 1606 "Grant, Privileges and Liberties" to the "first colony," granted,

"all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from
697 the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest; And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid; Together with all the Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries, Woods, Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences within the said Territories, and the Precincts thereof, whatsoever, and

thereto, and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which We, by our Letters Patents, may or can grant, in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." (Maine et al. Exhibit No. 42, pp. 3795-96).

Also granted was the right "to dig and to search for all manner of Mines of Gold, silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and [any] part of the mainland not
698 formerly granted to any other." (*Id.* at p. 3798).

The letters patent further provided
"that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." (*Id.* at p. 3801).

I conclude that the letters patent were intended to, and did, grant the seabed and subsoil of the adjoining sea to a distance of one hundred miles from the shore. This conclusion is supported by

(1) The comprehensive language employed in the grant – "Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences."

(2) The geographic specificity of the rights granted – "within the said Territories, and the Precincts thereof, whatsoever, and thereto, and thereabouts *both by Sea*

and Land, being, or in any sort belonging or appertaining" (Emphasis added) (the word "Precincts" in this context meaning "environs").

(3) The "as large and ample Manner" language, construed in the light of the Gilbert and Raleigh patents.

(4) The favorable construction or interpretation clause.

699 The inclusion in the charter of "all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid" may have been influenced by the fourteenth century work of Bartolus, *Tractatus de Insula.* As stated by Professor Julius Goebel, Jr., in his book, *The Struggle for the Falkland Islands* (1927), at pp. 74-75:

"One having jurisdiction over the territory adjacent to the sea, says Bartolus, has jurisdiction over the sea for one hundred miles notwithstanding the fact that the sea is common to all, and it follows from this that jurisdiction over the islands within such waters is properly vested in the nearest state. For two days' journey, says Bartolus, is what the law regards as sufficiently near on land, and one hundred miles at sea is less than two day's journey."

Some of the early writers were fascinated by the problem of new islands arising from the sea. Unless the patentees had a right to the soil of the adjoining seas, such new arisen island, regarded as *nullius,* might be lawfully occupied by a foreign power, such as Spain, or might be granted by the crown to other patentees. It made sense from both the standpoint of the patentees and of the crown, particularly under the uncertain conditions of early colonization efforts, for the crown to grant and the Virginia Company to hold rights to the

700 soil of the adjoining seas to a distance of over one

hundred miles from the shore.

It is inconceivable to me that the King would accept at this time or later the view or concept that the rights of the crown in the colonies or plantations abruptly terminated at the low water mark. Who was to say the King nay? Assuming that the crown had rights to the soil of the sea comparable to those enjoyed with respect to the realm, it is inconceivable that charter after charter could be granted without including a grant of these rights to the various patentees or a demand therefor. That extended research reveals no negotiation or bargaining directed toward the acquisition of such rights leads me to conclude that they were included in one form of diplomatic language or another virtually as a matter of course, in every grant scrutinized.

Certainly I have found no evidence of any thin line drawn by the negotiators for the crown between (1) land under water in rivers, ports, harbors, bays and arms of the sea and (2) land under the adjoining seas. If such a fine distinction was being consciously drawn it would have surfaced somewhere in the years of colonization extending from the reign of Elizabeth to the American Revolution. And as I understand the position of the United States in
701 this proceeding, it concedes that grants were made by the crown of the soil beneath the waters of rivers, ports, harbors, bays and arms of the sea.

The third Virginia charter, granted in 1612, after making reference to the terms of the second or 1609 charter set forth the following recital:

"Now forasmuch as we are given to understand that in those Seas adjoining to the said Coasts of Virginia, and without the Compass of those two hundred Miles by Us so granted unto the said Treasurer and Company as aforesaid, and yet not far distant from the said Colony in

Virginia, there are or may be divers Islands lying desolate and uninhabited, some of which are already made known and discovered by the Industry, Travel and Expences of the said Company, and others also are supposed to be and remain as yet unknown and undiscovered, all and every of which it may import the said Colony both in Safety and Policy of Trade to populate and plant; in Regard whereof, as well for the preventing of Peril, as for the better Commodity of the said Colony, they have been humble suitors unto Us, that We would be pleased to grant unto them an Enlargement of our said former Letters-Patents, as well for a more ample Extent of their Limits and Territories into the Seas adjoining to and upon the Coast of Virginia, as
702 also for some other Matters and Articles concerning the better government of the said Company and Colony, in which Point our said former Letters Patents do not extend so far as Time and Experience hath found to be needful and convenient . . ." (Maine et al. Exhibit No. 43, p. 3803).

The document then granted and confirmed to the grantee (The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony in Virginia): "all and singular those Islands whatsoever situate and being in any Part of the Ocean Seas bordering upon the Coast of our said first Colony in Virginia, and being within three Hundred Leagues of any of the Parts heretofore granted to the said Treasurer and Company in our said former Letters-Patents as aforesaid, and being within or between the one-and-fortieth and thirtieth Degree of Northerly Latitude: together with all and singular Soils, Lands, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines and Minerals, as well Royal Mines of Gold and Silver, as other Mines and Minerals, Pearls, precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences, both within

the said Tract of Land upon the Main, and also within the said Islands and Seas adjoining whatsoever and thereunto or thereabouts, both by Sea and Land being or situate: And which, by our Letters-Patents, we may or can grant,
703 and in as ample Manner as We or any our noble Progenitors have heretofore granted to any Person or Persons, or to any Company, Body Politick or corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffick, of, in, or into any foreign Parts whatsoever, and in as large and ample Manner as if the same were herein particularly named, mentioned, and expressed. Provided always, that the said Islands or any Premises herein mentioned, or by these Presents intended or meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate, nor be within the Bounds, Limits, or Territories of the Northern Colony heretofore by Us granted to be planted by divers of our loving Subjects in the North Parts of Virginia." (*Id.* at p. 3804).

As in the case of the 1609 charter, the 1612 letters patent contained a provision

"that in all Questions and Doubts, that shall arise, upon any Difficulty of Construction or Interpretation of any Thing, contained in these, or any other our former Letters-patent, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." (*Id.* at p. 3810).

704 The primary purpose of the third charter was to extend the "first colony's" eastern or seaward boundaries to include the Bermudas, lying almost six hundred miles off Cape Henry. The settlement of Virginia had not been commercially successful and the Bermudas offered an additional area for exploitation by the Virginia Company. However, the Bermuda Islands shortly passed into other hands. In

November, 1612 the Virginia Company sold its title and rights in Bermuda to a new group, which remained dependent upon the Virginia Company's charter. In November 1614 the Bermuda group surrendered these acquired rights to the crown. The King then issued a royal charter dated June 29, 1615, to the "Governor and Company of the City of London for the Plantation of the Somer Islands." Provisions in the Bermuda charter made it clear that the Virginia Company had surrendered only the Bermudas or Somer Islands out of the total territory granted to it in 1612. Craven, "An Introduction to the History of Bermuda", 17 *William and Mary Quarterly,* Second Series 176, 195 (1937). (Maine et al. Exhibit No. 252, p. 195).

Leaving aside the inclusion and exclusion of the Bermudas, the third charter to the Virginia Company confirms and strengthens the view that the soil under the seas off
705 the Virginia coast to a distance of one hundred miles was vested in the grantee, the Virginia Company. The third charter was not intended to, and did not, grant the seas and subsoil stretching from the Virginia mainland to the Bermudas. The clauses granting *jura regalia* were limited to the mainland area and the Bermuda islands area and the seas adjoining each area. The point of reference in the later colonial period was always the limits of the 1609 charter.

Despite the loss of its charter by the Virginia Company in 1624 and the loss of territory by subsequent royal grants, such as those for Maryland and Carolina, in my opinion the eastern bounds of Virginia at the time of the American Revolution were still as settled by the 1609 charter. Professor Flaherty, who I understand will be appearing as a witness for Virginia, has a detailed account of the Virginia boundary situation and I do not wish to duplicate his testimony. I certainly agree with his conclusions as to

the eastern boundary of the province in the period 1624 to 1776.

The "second colony" under the Virginia charter of 1606 commenced colonization of the New England coast and then, in order to avoid all confusions, questions and dif
706 ferences with the "first colony," sought new letters patent from the crown. (Maine et al. Exhibit No. 1). This petition resulted in a grant to the Council of New England, to be called New England, bounded as follows:
"that all that Circuit, Continent, Precincts, and Limitts in America, lying and being in Breadth from Fourty Degrees of Northerly Latitude, from the Equnoctiall Line, to Fourty-eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Maine Land, from Sea to Sea, with *all the Seas,* Rivers, Islands, Creekes, Inletts, Ports, and Havens, within the Degrees, Precincts, and Limitts of the said Latitude and Longitude, shall be the Limitts, and Bounds, and Precincts of the second Collony . . . ." (Maine et al. Exhibit No. 11, p. 1829). (Emphasis added).

The significant language in the grant reads as follows:
"all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territoryes, viz, the aforesaid Part of America, lying and being in Breadth from fourty Degrees of Northerly Latitutde from the Equinoctiall Line, to fourty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Maine Land from Sea to Sea, together also, with the Fishings, Mines, and Mineralls, as well Royall
707 Mines of Gold and Silver, as other Mine and Mineralls, precious Stones, Quarries, and all, and singular other Comodities, Jurisdictions, Royalties, Priveliges, Franchises, and Preheminences, both within the same Tract of Land upon the Maine, and *also within the said Islands and Seas*

adjoining: Provided always, that the said Islands, or any of the Premises herein before mentioned, and by these Presents intended and meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate, nor be within the Bounds, Limitts, or Territoryes, of that Southern Collony heretofore by us granted to be planted by diverse of our loving Subjects in the South Parts, to have and to hold, possess and enjoy, all, and singular, the aforesaid Continent, Lands, Territoryes, Islands, Hereditaments, and Precincts, *Sea Waters,* Fishings, with all, and all Manner their Commodities, Royalties, Liberties, Preheminences, and Profitts, that shall arise from thence, with all and singular, their Appertenances, and every Part and Parcell thereof, and of them. . . ." (*Id.* at p. 1834). (Emphasis added).

As in the 1609 and 1612 Virginia patents, the charter contained the following clause:

"And further our will and pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty of Instruction or Interpretation of any Thing contained
708 in these our Letters-pattents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and theire Successors, and every Member thereof." (*Id.* at p. 1840):

Under the terms of this grant the Council of New England undoubtedly was granted the right to the soil of the adjacent seas; the charter provisions I have read specifically refer to "Seas adjoining" and "Sea Waters." Whether this right extended to a distance of one hundred miles from the coast, as in the original grant to the "second colony," may find an affirmative answer in the favorable construction or interpretation clause. Another solution, of course, would be to regard as applicable the same flexible limits as operated in the realm itself. Certainly nothing in

the petition for a charter for New England would warrant any reduction in the extent of the hitherto granted subsoil of the sea. (Maine et al. Exhibit No. 1).

That the royal grant to the Plymouth Company or Council of New England was construed contemporaneously as including "the seas and islands lying within one hundred miles of any part of the coasts of the country" granted appears from the August 10, 1622 grant of the province of Maine by the Plymouth Company to Sir Ferdinando Gorges and Captain John Mason. (Maine et al. Exhibit
709 No. 2).

This indenture described the royal patent to the Plymouth Company as granting

"all that part or porcon of that country now commonly called New-England wch is situate, lying and being between the latitude of forty and forty-eight degrees northerly latitude, *together with the seas and islands lying within one hundred miles of any part of the said coasts of the country aforesaid*: and also all the lands, soyle, grounds, havens, ports, rivers, mines, as well royal mines of gold and silver, as other mines, minerals, pearls and pretious stones, woods, quaries, marshes, waters, fishings, hunting, hawking, fowling, commodities and hereditaments whatsoever, together with all prerogatives, jurisdictions, royaltys, privileges, franchises and preliminaries within any of the said territories and precincts thereof whatsoever." (*Id.* at p. 1622). (Emphasis added).

The indenture then went on to grant to Gorges and Mason "all that pat [part] of the main land in New-England lying upon the sea-coast betwixt ye rivers of Merrimack and Sagadahock, and to the furthest heads of the said rivers, and soe forwards up into the land westward until threescore miles be finished from ye first entrance of the aforesaid rivers, and halfway over; that is to say, to the midst

of the said two rivers wch bounds and limitts the lands
710 aforesaid together wth all the islands and isletts within five leagues distance of ye premises and abutting upon ye same or any part or parcell thereof.

As also all the lands, soyle, grounds, harbors, ports, rivers, mines, mineralls, pearls, pretious stones, woods, quarries, marshes, waters, fishings, hunting, hawking, fowling, and other commodities and hereditaments whatsoever; with all and singular their appurtenances, together with all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, preheminences, marine power, *in and upon ye said seas and rivers;* as also all escheats and casualties thereof, as flotson, jetson, lagon, with anchorage, and other such duties, immunities, sects, isletts and appurtenances whatsoever, with all the estate, right title, interest, and claim and demands whatsoever wch ye said President and councill and their successors, of right ought to have or claim in or to the said porcons of lands, rivers, and other ye said premises, as is aforesaid by reason or force of his highness' said Letters Patents, in as free, large, ample and beneficial manner, to all intents, constructions and purposes whatsoever, as in and by the said Letters Patents ye same are among other things granted to the said President and councill aforesaid, ... " (*Id.*
711 at pp. 1622-23. Emphasis added).

Again the charter defines the grant as "all the islands and isletts within five leagues distance of ye premises and abutting upon ye same or any part or parcell thereof." There is no mention of adjoining seas within this five league limit. Yet the charter goes on to grant "all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, preheminences, marine power, in and upon ye said seas and rivers" and in effect whatever rights the Council of New England had in the premises. My conclusion

is that the patentee obtained a right to the soil of the adjoining seas up to the distance of five leagues, as well as to islands within such bounds.

Incidentally, it might be pointed out that the 1620 royal grant to the Council of New England and the 1622 grant by the Council to Gorges and Mason, taken together, confirm the meaning attributed above to the 1609 Virginia patent.

In 1639 Sir Ferdinando Gorges applied for and received a royal charter which was in substance a confirmation of the 1622 grant from the Plymouth Company. The letters patent incorporated a province or county, to be called the
712 Province or County of Maine, and defined its limits to include

"the Northe halfe of the Isles of Shoales togeather with the Isles of Capawock and Nawtican neere Cape Cod as alsoe all the Islands and Iletts lyeinge within five leagues of the Mayne all alonge the aforesaide Coasts betweene the aforesaid River of Pascataway and Segadahocke with all the Creekes Havens and Harbors thereunto belonginge. . . . " (Maine et al. Exhibit No. 3, p. 1626).

The charter went on to provide that the grant was made with

"all and singuler the Soyle and Grounds thereof as well drye as covered with waters and all Waters Portes Havens and Creekes of the Sea and Inletts of the said Province of Mayne and Premisses as to them or any of them belonginge or adjacent as alsoe all Woodes Trees Lakes and Rivers within the said Provynce of Mayne and Premisses or Lymitts of the same togeather with the Fisheing of whatsoever kinde as well Pearle as Fishe as Whales Sturgeons or any other either in the Sea or Rivers and alsoe All Royaltyes of Hawkeing Hunting Fowleing Warren and Chases within the said Province of Mayne and Premisses aforesaid Deere

of all sorts and all other Beasts and Fowles of Warren
713 and Chase and all other Beasts there and alsoe All Mynes and Care of Goulde Silver Precious Stones Tynne Leade Copper Sulphure Brimstone or any other Mettal or Mynerall matter whatsoever within the said Province and Premisses or any of them opened or hidden and all Quarries there And all Gould Pearle Silver Precious Stones and Ambergreece whiche shallbee founde within the said Province and Premisses or any of them and the Lymitts and Coasts of the same or any of them or any parte of them or any of them and all and singular other Proffitts Benefitts and Commodityes groweing comeing accrueing or happening or to be had perceived or taken within the said Province and Premisses Lymitts and Coasts of the same or any of them. . . .

. . . with all and singular and as large and ample Rights Jurisdiccons Priviledges Prerogatives Royalties Liberties Immunityes Franchises Preheminences and Hereditaments *as well by Sea as by Lande* within the said Province and Premisses and the Precincts and Coasts of the same or any of them and *within the Seas belonging or adjacent to them* or any of them as the Bishopp of Durham within the Bishopricke or Countie Palatine of Duresme in our Kingdome of England now hath useth or enjoyeth or of right hee ought to have use or enjoye within the said Countie Palatine as if the same were herein particulerly menconed and expressed . . . " (*Id.* at pp. 1626-27). (Em-
714 phasis added).

In addition, Gorges, his heirs and assigns, were granted "All Treasure Trove Goodes and Chattells of Felons and Felons themselves Waifes Estrayes Pyrats Goodes Deodands Fynes and Amerciaments of all the Inhabitants and others happening groweinge or ariseing in the said Province and other the Premisses or any part thereof or in any Voyage

or Passage to or from the same aswell for Offences committed against our selfe our heires and successors or thinges concerninge our selfe our heires or successors or our proffitt as against others or thinges concerninge others or the proffitts of others and all and all manner of Wrecks of Shipps or Merchandize and all that which to wrecks belongeth by what means soever happening within or upon the Havens Coasts Creeks or Shoares of the Premisses or any parte thereof And Wee Doe for us our heires and successors create ordeyne and constitute the said Fardinando Gorges his heires and assignes the true and absolue [absolute] Lords and Proprietors of all and every the aforesaid Province of Mayne and Premises aforesaid and all and every the Lymitts and Coasts thereof Saveing always the faith and allegiance and the Supreame Dominion due to us our heires and successors. . . . " (*Id.* at pp. 1627-28).

715 Full power and authority was given

"to erect Courtes of Justice aswell ecclesiasticall as civill and temporall whatsoever and to appoynt and constitute from tyme to tyme Judges Justices Magistrates and Officers as well of the said Courte and Courtes of Justice as otherwise aswell by Sea as by Lande for the hearing and determining of all manner of Causes whatsoever within and concerning the said Province and Premisses or any of them or the Inhabitants or Residents there and Passengers to or from the same aswell by Lande as by Sea. . . . " (*Id.* at pp. 1628-29).

Full and absolute power and authority was granted to erect and appoint within the said province and premises "such and soe many Portes Havens Creekes and other Places for the ladeing and unladeing of Shippes Barques and other Vessells, and in such and soe many places and to appoynt such Rights Jurisdiccons Priviledges and Libertyes unto the said Portes Havens and Creekes belonging as to

him or them shall seeme meete." (*Id.* at pp. 1631-32). Tolls were authorized for loading or unloading merchandise at any such ports, havens and creeks. (*Id.* at p. 1632).

A saving clause provided as follows:

"Saveing allwayes to all our Subjects of Our Kingdome of England Libertie of Fisheing as well in the sea as in the
716 Creekes of the said Province and Premisses aforesaid and the Priviledge of Salteing and dryeing of theire Fishe and Dryeing of theire netts a Shoare of the said Province and any of the Premisses or in any of the said Portes, Creekes withstanding which said Liberties and Priviledges our pleasure is that the said subjects of us our heires and successors shall enjoye without any noteable damage or injuries to bee done to the said Sir Fardinando Gorges his heires and assignes or the Inhabitants of the said Province or any of the Premisses or in any of the said Portes, Creeks or Shoares aforesaid but chiefly in the Woodes there groweing. . . . " (*Id.*)

As to admiralty rights the patent provided as follows:

"And Wee Doe further for us our heires and successors give and graunte unto the said Sir Fardinando Gorges his heires and assignes for ever all Admirall Rights Benefitts Jurisdiccons and likewise all Priviledges and Commodities to the said Admirall Jurisdiccon in any wise belonging or apperteyning in and uppon the Seas Rivers and Coasts of or belonging to the said Province and Premisses or every or any of them or to the same adjoyneing within twentie leagues of the said Province and Premises of any of them and in and upon all other Rivers and Creekes thereof And likewise power to heare and determine all manner of Pleas for and concerning the same Saveing allwayes to us our
717 heires and successors and to the Lord High Admirall of England for the tyme being of us our heires and successors all and all manner of Jurisdiccon Rights Powers

Benefitts and authorities whatsoever incident or belonging to the said office of Admirall which itt shalbee lawful from tyme to tyme to us our heires or successors or the Lord High Admirall of England for the tyme being to have use and exercise within the said Province and Premisses and the Seas and Rivers thereof or within twentie leagues of the same as aforesaid when wee shall thinke fitt. . . . " (*Id.* at p. 1633).

Finally, as to construction of the letters patent the following was set forth in the document:

"And further Wee Will and by these Presents for us our heires and successors Doe graunte to the said Sir Fardinando Gorges his heires and assignes that these our Letters Patents or the enrollment of them shalbee in all things and to all intents and purposes firme good effectuall and sufficient in the lawe against us our heires and successors aswell in all Courts as elsewhere within our Kingdome of England or in any other our Kingdomes and Domynions as in the said Province and Premisses aforesaid or in any of them and shallbee construed reputed and taken aswell according to the true meaning and intent as to the wordes of the same most benignely favorably and beneficially to
718 and for the said Sir Fardinando Gorges his heires and assignes (noe interpretacon being made of any worde or sentence Whereby Gods worde true Christian Religion now taught professed and maynteyned the fundamentall Laws of this Realme or Alleagiance to us our heirs or successors may suffer prejudice or diminucon) any omission misinformacon want of certaine expression of the contents lymitts and boundes or the certeyne scituacon of the said Province and Premisses aforesaid hereby meant or intended to be graunted or in what latitude or degree the same are or any defect in these Presents or any Lawe Statute or other cause or matter to the contrary notwithstanding. . . . " (*Id.* at pp. 1636-37).

The charter concluded with a guarded reservation of the rights of prior settlers:

"Nevertheless our intent and meaneing is that out of the Premisses hereby graunted or menconed to bee graunted there shalbee always saved and reserved to all and every such person and persons as have or hath any lawefull graunte or graunts of Landes or Plantacons lawfully setled in the division and Premisses aforesaid the free houlding and enjoyeing of his and theire right with the Liberties thereunto apperteyning hee or they relinquishing and layeing downe his and theire Jura Regalia (if hee or they have any) to the said Sir Fardinando Gorges his heires and as-
719 signes whome wee have hereby made Proprietor of the Province or Devision and Premisses aforesaid and payeing some small acknowledgement to the said Sir Fardinando Gorges his heires and assignes for that hee or they are now to houlde theire Landes anew of the said Sir Fardinando Gorges his heires and assignes. . . ." (*Id.* at p. 1637).

This extremely expansive donation of rights, etc. to Sir Ferdinando Gorges leaves no doubt that the grant included the soil under the seas to a distance at least five leagues from the Maine coast. This is particularly true, of course, when the patent is read as a confirmation of the earlier 1622 charter from the Council of New England, which I have just discussed. I will come back to Maine later in my testimony.

In 1628 the Plymouth Company, holding New England under its 1620 charter from the King, granted to Sir Henry Rosewell and others:

"all that Parte of Newe England in America aforesaid, which lyes and extendes betweene a greate River there commonlie called Monomack alias Merriemack, and a certen other River there, called Charles River, being in the

Bottome of a certayne Bay there, commonlie called Massachusetts, alias Mattachusetts, alias Massatusetts Bay [within defined limits] . . . from the Atlantick and Westerne and
720 Ocean on the East Parte, to the South Sea on the West Parte; and all Landes and Groundes, Place and Places, Soyles, Woodes and Wood Groundes, Havens, Portes, Rivers, Waters, Fishings, and Hereditaments whatsoever, lyeing within the said Boundes and Lymitts, and everie Parte and Parcell thereof; and also, *all Islandes lyeing in America aforesaid, in the saide Seas or either of them on the Westerne or Eastern Coastes or Partes of the said Tractes of Lande,* by the said Indenture mencoed to be given, graunted, bargained, sould, enfeoffed, aliened, and confirmed, or any of them; and also, all Mynes and Myneralls, as well Royall Mynes of Gould and Silver, as other Mynes and Myneralls, whatsoeuer, in the saide Lands and Premisses, or any Parte thereof; and all Jurisdiccons, Rights, Royalties, Liberties, Freedomes, Ymmunities, Priviledges, Franchises, Preheminences, and Comodities whatsoever, which they, the said Councell established at Plymouth, in the County of Devon, for the planting, ruling, ordering, and governing of Newe England in America, then had, or might vse, exercise, or enjoy, in or within the saide Landes and Premisses by the saide Indenture mencoed to be given, graunted, bargained, sould, enfeoffed, and confirmed, or in or within any Parte or Parcell thereof . . . " (Maine et al. Exhibit No. 24, pp. 1847-48). (Emphasis added).

721 I should note that, to the best of my knowledge, no copy of the Rosewell patent has ever been located. The language I have just read comes from a recital in the royal patent to which I shall now turn.

In the following year, 1629, Sir Henry Rosewell and others, incorporated under the name of the Governor and Company of the Massachusetts Bay in New England, received

a confirmatory grant from Charles I in the following words:

"all the saide Parte of Newe England in America, lyeing and extending betweene the Boundes and Lymytts in the said receted Indenture expressed, and all Landes and Groundes, Place and Places, Soyles, Woods and Wood Groundes, Havens, Portes, Rivers, Waters, Mynes, Mineralls, Jurisdiccons, Rightes, Royalties, Liberties, Freedomes, Immunities, Priviledges, Franchises, Preheminences, Hereditaments, and Comodities whatsoever, to them the saide Sir Henry Rosewell, Sir John Younge, Thomas Southcott, John Humfrey, John Endecott, and Simon Whetcombe, theire Heires and Assignes, and to their Associatts, by the saide recited Indenture, given, graunted, bargayned, solde, enfeoffed, aliened, and confirmed, or mencoed, or intended thereby to be given, graunted, bargayned, sold, enfeoffed, aliened, and confirmed: . . . . " (Maine et al. Exhibit No. 24, pp. 1848-49).

722 The charter in a further paragraph granted the same territory, this time specifically described, and

"all Landes and Groundes, Place and Places, Soyles, Woodes, and Wood Groundes, Havens, Portes, Rivers, Waters and Hereditaments whatsoever, lyeing within the said Boundes and Lymytts, and every Parte and Parcell thereof; and *also all Islandes in America aforesaide, in the saide Seas, or either of them, on the Westerne or Easterne Coastes, or Partes of the said Tracts of Landes hereby mencoed to be given and graunted, or any of them;* and all Mynes and Mynerals as well Royal mynes of Gold and Silver and other mynes and mynerals, whatsoever, in the said Landes and Premisses or any parte thereof, and free Libertie of fishing in or within any the Rivers or Waters within the Boundes and Lymytts aforesaid, and the Seas thereunto adjoining; . . . " (*Id.* at p. 1850). (Emphasis added).

These patentees were
"To have and hould, possesse and enjoye the saide partes of New England in America, which lye, extend, and are abutted as aforesaide, and every parte and parcell thereof; and all the Islandes, Rivers, Portes, Havens, Waters, Fishings, Fishes, Mynes, Myneralls, Jurisdiccons, Franchises, Royalties, Liberties, Priviledges, Comodities, and Premisses
723 whatsoever, with the Appurtenances, ... " (*Id.*)

Later in the letters patent it was provided
"That theis Presents shall not in any manner envre, or be taken to abridge, barr, or hinder any of our loving subjects whatsoever, to vse and esercise the Trade of Fishing vpon that Coast of New England in America, by theis Presents mencoed to be graunted. But that they, and every, or any of them, shall have full and free Power and Liberty to continue and vse their said Trade of Fishing vpon the said Coast, *in any the Seas therevnto adioyning* or any Armes of the Seas or Saltwater Rivers where they have byn wont to fishe, and to build and sett vp vpon the Landes by theis Presents graunted, such Wharfes, Stages, and Workehouses as shalbe necessarie for the salting, drying, keeping, and packing vp of their Fish, to be taken or gotten vpon the Coast; and to cutt down, and take such Trees and other Materialls there groweing, or being or shalbe needefull for that Purpose, and for all other necessarie Easements, Helpes, and Advantage concerning their said Trade of Fishing there, in such Manner and Forme as they have byn heretofore at any tyme accustomed to doe, without making any wilfull Waste or Spoyle, any Thing in theis Presents conteyned to the contrarie notwithstanding." (*Id.* at p. 1859). (Emphasis added).

724 Lastly, the letters patent ordained that
"theis our Letters patents shalbe firme, good, effectuall, and availeable in all Things, and to all Intents and

Construccons of Lawe, according to our true Meaning herein before declared, and shalbe construed, reputed, and adiudged in all Cases most favourablie on the Behalf, and for the Benefitt and Behoofe on the saide Governor and Company and their Successors; . . . . " (*Id.*)

A close comparison of the 1620 patent to the Plymouth Company, the 1628 patent to Henry Rosewell and others and the 1629 patent to the Massachusetts Bay Company reveals that a grant of the "adjoining seas" contained in the first grant is lacking in the second (or at least in the recital thereof) and third grants above. However, I do not believe that the omission is significant or meant to deny any right of the soil of the sea to the several patentees.

I believe that this right was included in two granting clauses of the 1629 patent. First, in the clause which granted and confirmed all jurisdictions, rights, royalties, liberties, freedoms, immunities, privileges, preeminences, hereditaments and commodities whatsoever granted or intended to be granted by the Plymouth Company in its 1628 charter. (Maine et al. Exhibit No. 24, p. 1848).
725 Secondly, in the clause granting jurisdictions, franchises, royalties, liberties, privileges, commodities, and premises whatsoever without reference to the Rosewell patent. (*Id.*)

In view of the extensive rights to the seabed held by the Plymouth Company by royal patent and the policy of the Company in usually including similar, if more limited, rights in its charters, I find it difficult to believe that there was not some grant of the soil under the adjoining seas intended under the Rosewell patent. Secondly, in view of the policy of the crown as expressed in earlier and later letters patent, I find it hard to believe that the Massachusetts Bay Company would be discriminated against by the King or that the negotiators for the Company

would accept such discriminatory treatment. Thirdly, the extended treatment of the reservation of the right to fish in the adjoining seas to non-Massachusetts subjects indicates, in my judgment, that a proper construction of the 1629 charter would include a grant of the soil of the adjoining seas, in accordance with the rule prevailing with respect to the realm.

This 1629 charter to the Massachusetts Bay Company was avoided by *scire facias* proceedings in the Court of Chancery in England in 1684. Seven years later, after the
726 Glorious Revolution of 1688, a second charter was granted for Massachusetts Bay. It is discussed later in my testimony.

To come back to Maine, I should point out that Ferdinando Gorges, grandson of Sir Ferdinando Gorges, by an indenture of March 13, 1677/8, granted, bargained and sold the County Palatine of Maine to John Usher. The relation of boundaries and *jura regalia* is somewhat compressed but there is no doubt that the grandson intended to convey rights to the soil beneath the adjoining seas to a distance of five leagues from the mainland, that is, to the extent granted by the crown in 1639. (Maine et al. Exhibits Nos. 5 and 46). Two days later Usher conveyed his rights in the County Palatine to the Governor and Company of Massachusetts Bay in New England, the indenture containing substantially the same description of the grant of lands, soils and *jura regalia.* (Maine et al. Exhibit No. 6). Whether or not the grant by Usher to the Massachusetts Bay Company survived the *scire facias* proceeding is of little consequence. For, as we shall see, under the second Massachusetts Bay charter, that of 1691, Maine was incorproated into the province of Massachusetts Bay and accordingly governed by the provisions of that charter with respect to the rights to the soil of the adjoining aeas.

727 The 1632 royal patent to Caecilius Calvert, Lord Baltimore, for the Province of Maryland, after describing the territory covered by the grant, went on to provide for a grant and confirmation of

"all Islands and Inlets within the Limits aforesaid, all and singular *the Islands and Islets, from the Eastern Shore of the aforesaid Region, towards the East, which had been, or shall be formed in the Sea, situate within Ten marine Leagues from the said shore;* with all and singular the Ports, Harbours, Bays, Rivers and Straits belonging to the Region or Islands aforesaid, and all the Soil, Plains, Woods, Marshes, Lakes, Rivers, Bays, and Straits, situate, or being within the Metes, Bounds and Limits aforesaid, with the Fishings of every kind of Fish, as well of Whales, Sturgeons, and other royal Fish, as of other Fish, *in the Sea,* Bays, Straits, or Rivers *within the Premises,* and the fish there taken; And moreover all Veins, Mines and Quarries as well opened as hidden, already found, or that shall be found within the Region, Islands, or Limits aforesaid, of Gold, Silver, Gems, and precious Stones, and any other whatsoever, whether they be of Stones, or Metals, or of any other Thing, or Matter whatsoever; . . . . " (Maine

728 et al. Exhibit No. 141, p. 1678). (Emphasis added).

Broad judicial powers were conferred, including maritime or admiralty jurisdiction, as follows:

"to constitute and ordain Judges, Justices, Magistrates and Officers of what kind, for what Cause, and with what Power soever, within that Land, and *the Sea of those Parts,* and in such form as to the said now Baron of Baltimore, or his Heirs, shall seem most fitting: And also to Remit, Release, Pardon, and Abolish, all Crimes and Offences whatsoever against such Laws, whether before, or after Judgment passed: and to do all and singular other Things belonging to the Completion of Justice and

to Courts, Praetorian Judicatories, and Tribunals, Judicial Forms and Modes of Proceeding, although express Mention thereof in these Presents be not made: and, by Judges by them delegated, to award Process, hold Pleas, and determine in those Courts, Praetorian Judicatories, and Tribunals, in all Actions, Suits, Causes, and Matters whatsoever, as well Criminal as Personal, Real and Mixed, and Praetorian . . . . " (*Id.* at p. 1680). (Emphasis added).

The charter further granted power to erect and constitute "within the Province of Maryland, and the Islands and Islets aforesaid, such, and so many Sea-Ports, Harbors, Creeks, and other Places of Unlading and Discharge of
729 Goods and Merchandizes out of Ships, Boats, and other Vessels, and of Lading in the same, and in so many, and such Places, and with such Rights, Jurisdiction, Liberties, and Privileges, unto such Parts respecting, as to him or them shall seem most expedient . . . ."

"Saving always to Us, our Heirs and Successors, and to all the Subjects of our Kingdoms of England and Ireland of Us, our Heirs and Successors, the Liberty of Fishing for Sea-Fish, as well in the *Sea*, Bays, Straits, and navigable Rivers, as in the Harbors, Bays, and Creeks *of the Province aforesaid;* and the Privilege of Salting and Drying Fish on the Shores of the same Province; and, for that Cause, to cut down and take Hedging-Wood and Twigs there growing, and to build Huts and Cabins, necessary in this Behalf, in the same Manner, as heretofore they reasonably might, or have used to do. Which Liberties and Privileges, the said Subjects of Us, our Heirs and Successors, shall enjoy, without notable Damage or Injury in any wise to be done to the aforesaid now Baron of Baltimore, his Heirs or Assigns, or to the Residents and Inhabitants of the same Province in the Ports, Creeks, and Shores aforesaid, and especially in the Woods and Trees there growing." (*Id.* at pp. 1683-84). (Emphasis added).

730 Finally it was provided that:

"And if, peradventure, hereafter it may happen, that any Doubts or Questions should arise concerning the true Sense and Meaning of any Word, Clause, or Sentence, contained in this our present Charter, We will charge and command, That Interpretation to be applied always, and in all Things, and in all Courts and Judicatories whatsoever, to obtain which shall be judged to be the more beneficial, profitable and favorable to the aforesaid now Baron of Baltimore, his Heirs and Assigns. . . . " (*Id.* at p. 1686).

Under this charter, in my opinion, Lord Baltimore, as patentee, became vested with the right to the soil of the sea for a distance of at least ten marine leagues seaward from the Eastern shore.

The charter clearly contemplates that parts of the sea were within the bounds of the province. It is also perhaps unique in including "islands to be formed," as well as those already in existence at the time of the grant, within a certain distance from the eastern sea shore. I have remarked earlier upon the relationship of ownership of the bottom of the sea to such islands rising from the sea.

From 1691 to 1715 the Maryland charter was suspended to the extent that it granted governmental rights to Lord
731 Baltimore. However, there is no indication that the several royal governors appointed for the Province assumed for the crown the rights to the Atlantic seabed granted in the charters. (*CSP, Col., 1689-1692,* Nos. 1026, 1028, 1297) (Maine et al. Exhibit No. 253, pp. 310, 380). Even if they did, the fourth Lord Baltimore was restored in 1715 to all proprietary and governmental rights under the charter.

A 1663 royal charter of Charles II incorporated "The Governor and Company of the English Colony of Rhode-Island and Providence Plantations in New-England, in America" and granted to that body

"all that parte of our dominiones in New-England, in America, conteyneing the Nahantick and Nanhyganset Bay, and Countryes and partes adjacent, [within defined limits] . . . ."

"and, in particular, the lands, belonging to the townes of Providence, Pawtuxet, Warwicke, Misquammacok, alias Pawcatuck, and the rest vpon the maine land in the tract aforesayd, together with Rhode-Island, Blocke-Island, and all the rest of the islands and banks in the Narragansett Bay, and bordering vpon the coast of the tract aforesayd (Ffisher's Island only excepted), together with all firme lands, soyles, grounds, havens, ports, rivers, waters, fishings, mines, royall, and all other mynes, mineralls, precious stones, quarries, woods, wood-grounds, rocks, slates, and
732 all and singular other commodities, jurisdictions, royalties, priviledges, franchises, preheminences and hereditaments, whatsoever, within the sayd tract, bounds, landes, and islands, aforesayd, or to them or any of them belonging, or in any wise appertaining: . . . " (Maine et al. Exhibit No. 150, pp. 3220-21).

The letters patent also ordained and appointed "that these presents shall not, in any manner, hinder any of oure lovinge subjects, whatsoever, ffrom vseing and exercising the trade of fishing vpon the coast of New England, in America; butt that they, and every or any of them, shall have ffull and ffree power and liberty to continue and vse the trade of ffishing vpon the sayd coast, in any *of the seas thereunto adjoyninge,* or any armes of the seas, or salt water, rivers and creeks, where they have been accustomed to ffish; and to build and to sett upon the waste land, belonginge to the sayd Collony and Plantations, such wharfes, stages and worke-houses as shall be necessary for the salting, drying and keepeing of theire fish, to be taken or gotten upon the coast. And ffurther,

for the encouragement of the inhabitants of our sayd Collony of Providence Plantations to sett vpon the businesse of takeing whales, itt shall bee lawefull ffor them, or any of them, having struck whale, dubertus, or other greate ffish, itt or them, to pursue unto any parte of that
733 coaste, and into any bay, river, cove, creeke or shoare, belonging thereto, and itt or them, vpon sayd coast, or in the sayd bay, river, cove, creek or shoare, belonging thereto, to kill and order for the best advantage, without molestation, they makeing noe wilfull waste or spoyle, any thinge in these presents conteyned, or any other matter or thing, to the contrary notwithstanding. And further alsoe, wee are gratiously pleased, and doe hereby declare, that if any of the inhabitants of oure sayd Collony doe sett upon the plantinge of vineyards (the soyle and clymate both seemeing naturally to concurr to the production of wynes), or bee industrious in the discovery of *ffishing banks, in or about the sayd Collony,* wee will, ffrom tyme to tyme, give and allow all due and fitting encouragement therein, as to others in cases of lyke nature." (*Id.* at p. 3219.) (Emphasis added).

Finally, the instrument provided that the letters patent should be construed, reputed and adjudged in all cases most favorably on the behalf, and for the benefit and behoof, of the Governor and Company and their successors. (*Id.* at pp. 3221-22).

It is my opinion that by virtue of this charter with its grant of royalties the patentee had a right to the soil beneath the seas adjoining to the same extent as did the
734 crown in England.

My conclusion rests in large part upon the sweeping clause in the charter granting "all and singular other commodities, jurisdictions, royalties, privileges, franchises, preheminences and hereditaments, whatsoever, within the

sayd tract, bounds, landes, and islands, aforesayd, or to these or any of them belonging, or in any wise appertaining." If this language did not encompass the King's right to the soil of the adjoining seas, it is hard to visualize what words could have been effective. If these did not accomplish the grant, what words in the lexicon of the Stuart prerogative would have done the job? Secondly, the long and elaborate treatment of fishing rights by inference, in my opinion, confirms that the charter was intended to and did grant the right to the soil of the adjoining seas to the extent, at least, of the crown's right with respect to the realm.

Charles II on March 12, 1664, made a grant to his brother James, Duke of York, of lands and territories described as follows:

"all that part of the maine land of New England beginning at a certainplace called or knowne by the name of St. Croix next adjoyning to New Scotland in America and from thence extending along the sea coast unto a certain place
735 called Petuaquine or Pemaquid and so up the River thereof to the furthest head of ye same as it tendeth northwards and extending from thence to the River Kinebequi and so upwards by the shortest course to the River Canada northward and also all that Island or Islands commonly called by the severall name or names of Matowacks or Lond [Long] Island scituate lying and being towards the west of Cape Codd and ye narrow Higansetts abutting upon the maine land between the two Rivers there called or knowne by the several names of Conecticutt and Hudsons River together also with the said river called Hudsons River and all the land from the west side of Conecticutt to ye east side of Delaware Bay and also all those severall Islands called or knowne by the names of Martin's Vinyard and Nantukes otherwise Nantuckett together with all

ye lands islands soyles rivers harbours mines minerals quarryes woods marshes waters lakes ffishings hawkings hunting and ffowling and all other royalltyes proffitts commodityes and hereditaments to the said severall islands lands and premisses belonging and appertaining with theire and every of theire appurtenances and all our estate right title interest benefitt advantage claime and demand of in or to the said lands and premises or any part or parcell thereof . . . . " (Maine et al. Exhibit No. 67, pp. 1637-
736 38).

Also granted was absolute power and authority "to correct punish pardon governe and rule all such the subjects of us our heires and successors who may from time to time adventure themselves into any of the parts or places aforesaid or that shall or doe at any time hereafter inhabite within the same according to such lawes orders ordinances direccons and instruments as by our said dearest brother or his assignes shall be established and in defect thereof in cases of necessity according to the good direccons of his deputyes commissioners officers or assignes respectively as well in all causes and matters capitall and criminall as civill both marine and others soe alwayes as the said statutes ordinances and proceedings be not contrary to but as neare as conveniently may be agreeable to the lawes statutes and government of this our realme of England and saving and reserving to us our heires and successors ye receiving hearing and determining of the appeal and appeales of all or any person. . . . " (*Id.* at p. 1638).

This grant comprised the territories which became the colonies or provinces of New York and New Jersey. Actually, of course, this charter was granted at a time when New Amsterdam was still held by the Dutch. The capitulation did not take place until August, 1664. (For

737 the 'intrusions' of the Dutch upon English territory see *CSP, Col., 1661-1668,* Nos. 510, 622.) (Maine et al. Exhibit No. 240, pp. 147, 177-8).

Later, in 1673, New York or New Amsterdam was recaptured by the Dutch and then ceded to the English by treaty. This led to the second charter to the Duke of York dated June 29, 1674 (Maine et al. Exhibit No. 68), which contained provisions virtually identical with those set forth above. (For the reasons behind the second charter see Robert Ludlow Fowler, "Organization of the Supreme Court of Judicature of the Province of New York," 19 *Albany L.J.* 66, 68-69 (1879) (Maine et al. Exhibit No. 254).)

Under the provisions of both of these charters the Duke of York, in my opinion, had rights to the seabed identical with those possessed by the crown in England with respect to the realm. While the charter language, "all other royalltyes proffitts commodityes and heraditaments" (Maine et al. Exhibit No. 67, p. 1638) is somewhat attenuated in comparison with the usual language in letters patent, there is a further grant, not usually included, of "all our [the King's] right title interest and benefitt advantage claime and demand of in or to the said lands and premises or any part or parcel thereof." (*Id.*) In general, historians
738 have regarded the New York patents as constituting very liberal grants; after all, it would scarcely be expected that rights granted to others somewhat routinely would be denied the King's brother.

The Duke of York's 1674 commission to Edmund Andros to be governor of New York recited the grant from the King, including specific reference to the grant of all royalties, profits, commodities and hereditaments, and authorized Andros to perform and execute all powers granted under the letters patent. (Maine et al. Exhibit No. 255).

The same format was followed in the 1682 commission to Thomas Dongan to be governor of New York. (Maine et al. Exhibit No. 256).

When James, Duke of York, became James II of England in 1685 the 1674 charter (Maine et al. Exhibit No. 68), to the extent that it covered New York, was merged in the crown. As a consequence New York became a royal province. Where did this leave the province with respect to ownership of the soil of the adjacent seas? Are we dealing with the situation of a conquered infidel country or a conquered Christian country? The first charter, that of 1664 (Maine et al. Exhibit No. 67), apparently was based on the theory that Charles II was disposing of a "conquered infidel kingdom." It could scarcely be said to deal with a "conquered Christian kingdom" when it was granted
739 prior to the capitulation of New Amsterdam. (The English apparently chose to ignore the presence of the Dutch and considered themselves to have captured New York directly from the Indians.) In the case of the second charter, since there had been a re-conquest of New Amsterdam, it could be said that there had been a conquest of a Christian kingdom and then Dutch law would prevail – unless altered by the King. (For the "conquered people" view see *CSP, Col., 1689-1692,* No. 289.) (Maine et al. Exhibit No. 253, p. 103.) However, whatever the Dutch law on the subject of the soil of the adjacent seas, the second charter in its grant to the Duke of York of various royalties, profits, commodities and hereditaments in effect suspended it. In terms of *Calvin's Case* the King by the second charter to the Duke of York altered and changed the Dutch law with respect to the seabed, if it was consistent with English law. The merger of the charter into the crown in 1685 did not serve to revive Dutch law; the same English rule was applicable as under

the two royal charters to the Duke of York.

After New York became a royal colony, the short-form commission previously utilized by the Duke of York was replaced by the standard form of commission used for governors in the royal provinces. Among the
740 powers granted was "full power and authority" with the advice and consent of the Council to grant to the inhabitants such lands, tenements and hereditaments as it was in the governor's power to dispose. (Maine et al. Exhibits Nos. 257-264.)

James, Duke of York, on June 24, 1664, a few months after receiving the March 1664 royal grant from his brother, Charles II, noted above, entered into an indenture with John Lord Berkeley and Sir George Carteret by which he granted, bargained, sold, released and confirmed

"all that tract of land adjacent to New England, [within defined limits later known as New Jersey] . . . and also all rivers, mines, mineralls, woods, fishings, hawking, hunting, and fowling, and all other royalties, profits, commodities, and hereditaments whatever, to the said lands and premises belonging or in any wise appertaining: with their and every of their appurtenances, in as full and ample manner as the same is granted to the said Duke of York by the before-recited letters patents; and all the estate, title, interest, benefit advantage, claim and demand of the said James Duke of York, of in or to the said [blank] and premises or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof." (Maine et al. Exhibit No. 69, p. 2534).

THE SPECIAL MASTER: I have a question at this
741 point. Does this charter include what is now all of New

Jersey, or only east Jersey?

THE WITNESS: I believe this included –

THE SPECIAL MASTER: All of West Jersey?

THE WITNESS: I believe this first one includes both.

THE SPECIAL MASTER: Both east and west?

THE WITNESS: Yes.

THE SPECIAL MASTER: All right.

THE WITNESS: Ten years later, after James had received a second confirming royal grant, following the recapture of New Amsterdam by the Dutch, he entered into a further indenture dated July 29, 1674, with Sir George Carteret, his heirs and assigns for the territory lying north of a line connecting Barnegat Bay on the ocean with Pennsauken Creek on the Delaware, with language similar to that just quoted. (Maine et al. Exhibit No. 72, p. 2547).

THE SPECIAL MASTER: That would be East Jersey?

THE WITNESS: That would be East Jersey, Your Honor.

John, Lord Berkeley had in the meantime, on March 18, 1673/4, sold his joint but as yet undivided interest in New Jersey to John Fenwick, in trust for Edward By-
742 llynge. The indenture of bargain and sale granted, bargained, sold and conveyed to John Fenwick

"all that the moiety or half part of him the said John Berkeley of and in the said tract of land and premises so to be or then called by the names of New Caesarea or New Jersey: And also all that his moety or half part of all rivers, rivelets, mines, minerals, quarries, woods, fishings, hawkings, huntings, fowlings, and all other royalties, profits, forts, franchises, liberties, governments, powers, priviledges, commodities, hereditaments and immunities whatsoever, to the said land and premises belonging; with their and every of their appurtenances, in as full, ample and

beneficial manner to all intents and purposes as the same was granted to the said John Lord Berkeley and the said Sir George Carteret, their heirs and assigns, by him his said Royal Highness the said James Duke of York." (Maine et al. Exhibit No. 74, p. 2554).

In February 1674/5 by several instruments Fenwick and Byllynge conveyed their moiety of the premises granted to Berkeley and Carteret to William Penn, Gawn Lowry and Nicholas Lucas, so that Penn and his associates became tenants in common with Carteret. (*Id.* at pp. 2554-55). On July 1, 1676 Carteret, Penn, Lowry, Lucas and Byllynge entered into a quintipartite deed for the partition of the
743 lands granted to Berkeley and Carteret with Carteret taking premises to be known as East New Jersey and Penn and his associates taking premises to be known as West New Jersey. Penn and his associates bargained, sold and conveyed all their interests east of the partition line to Carteret with all and every the isles, islands, rivers, mines, minerals, woods, fishing, hawkings, huntings, and fowlings and all other royalties, governments, powers, forts, franchises, harbors, profits, commodities and hereditaments whatsoever belonging or appertaining to the said eastern part. A similar conveyance was made by Carteret to Penn and his associates with respect to the western part of the lands. (Maine et al. Exhibit No. 74). On August 6, 1680 the Duke of York by indenture in effect confirmed the grant of the soil and government of West New Jersey to Penn and others. The indenture contained the following description

"all that part, share and portion, and all those parts, shares and portions of all that entire tract of land and all those entire premises so granted by his said Royal Highness unto the said John Lord Berkley, and Sir George Carteret, and their heirs as aforesaid, as in, by, and upon the said partition aforesaid, was and were vested in the said William Penn, Gawen Lawry, and Nicholas Lucas, and their heirs,

744 and then agreed to be called by the name of West New Jersey, together with all islands, bays, rivers, waters, forts, mines, quarries, royalties, franchises, and appurtenances whatsoever, to the same belonging, or in any wise appertaining. And all the estate, right, title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity, of him the said James Duke of York, of into, and out of the same, or any part or parcel of the same; as also the free use of all bays, rivers and waters, leading unto or lying between the said premises, or any of them in the said parts of America, for navigation, free trade, fishing or otherwise . . . ." (Maine et al. Exhibit No. 265, p. 2564).

It further provided that

"for the better enabling the said Edward Byllynge, his heirs and assigns, to improve and plant the said premises with people, and to exercise all necessary government there, whereby the said premises may be the better improved and made more useful to him, his heirs and assigns, and to the King's Majesty, his said Royal Highness hath likewise given, granted, assigned and transferred, and doth by these presents give, grant, assign, and transfer unto the said Edward Byllynge, all and every such the same powers, authorities, jurisdictions, governments, and other matters
745 and things whatsoever, which by the said respective Letters Patents, or either of them, are and were granted, or intended to be granted, to be exercised by his said Royal Highness, his heirs, assigns, deputies, officers, or agents, in upon, or in relation unto the said premises hereby confirmed, or intended to be confirmed, and every of them, in case the same were now in the actual seizen of his said Royal Highness, to be held, enjoyed, exercised and executed by him the said Edward Byllynge, his heirs and assigns, and by his deputies, officers, agents and commissioners, as fully and

amply to all intents, constructions and purposes as his said Royal Highness, or his heirs, might, could or ought to hold, enjoy, use, exercise or execute the same, by force and virtue of the said several and respective and before recited Letters Patents, or either of them, or of any thing in them, or either or any of them conteyned or otherways however." (*Id.* at pp. 2564-65).

THE SPECIAL MASTER: I don't quite understand something in this. You say there was a conveyance or a confirmation by the Duke of York to Penn and his associates. Yet it recites conveyance and assurance to Edward Byllynge who had previously had already conveyed his interest to Penn and associates. In other words, Byllynge conveyed to Penn and his associated in February
746 1674/5, and this is in 1680. That is sort of an assurance to the former grantor was to perpetuate the title which he had already conveyed. I am not sure whether you claim that at this point, but I would like to know if you might.

MR. CLAGETT: Perhaps I can check it out in the recess and have it straightened out.

THE SPECIAL MASTER: It may not be of any importance.

Very well, you may proceed.

THE WITNESS: On December 5, 1678 Sir George Carteret devised East New Jersey to certain trustees to sell for the payment of his debts and legacies; he died shortly thereafter. The trustees in 1681 put the province of East New Jersey up for sale. It was purchased at auction by a group of twelve persons headed by William Penn, the indentures of lease and release being executed on February 1 and 2, 1681/2. The aforesaid indentures granted and conveyed "all the said premises called East New Jersey, together with all isles, islands, rivers, mines, minerals, woods, fishings, hawkings, huntings, fowlings, and all other royalties, privileges,

franchises, forts, harbours, profits, commodities, and hereditaments whatsoever, thereunto belonging." (Maine et al. Exhibit No. 75, p. 2571). All twelve proprietors, with one
747 exception, were Quakers. The purchase of East New Jersey was, in part, an extension of Penn's interest in establishing a haven for persecuted Quakers. In August 1682 the new proprietors agreed that each would take a partner in the venture, thus bringing the number to twenty-four.

On March 14, 1682/3, a new indenture of confirmation was entered into between the Duke of York and the twenty-four East New Jersey proprietors. (Maine et al. Exhibit No. 75). This indenture granted, bargained, sold, released and confirmed to the twenty-four proprietors the province of East New Jersey, as bounded in the partition of 1676, "together with all islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises and appurtenances whatsoever" (*Id.* at p. 2572), as well as "all the estate, right, title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity," (*id.*) of the Duke of York to the same or any part thereof, as also the free use of all bays, rivers and waters for navigation, free trade, fishing or otherwise. (*Id.*) Also granted to improve and plant the province and to exercise the necessary government, were the same powers, authorities, jurisdictions, governments and other matters and things whatsoever which by the royal letters patent were granted to the Duke of York as fully and amply as the Duke might use,
748 exercise or execute the same by force of the several royal patents. (*Id.* at p. 2573).

On November 23, 1683, some questions having arisen as to the propriety of the Duke of York's grants of government, Charles II by royal letter charged and commanded planters and inhabitants of the Province of East New Jersey that "they do submit and yield all due obedience to the laws and government of the said grantees, their

heirs and assigns, as absolute Proprietors and Governors thereof, (who have the sole power and right derived under his Royal Highness from his said Majesty, to settle and dispose of the said Province upon such terms and conditions as to them shall seem good) . . . " (Maine et al. Exhibit No. 77, p. 2583).

However, the efforts of the proprietors of the two Jerseys to govern their respective provinces encountered many obstacles, and by 1688 some proprietors favored surrender to the crown of the rights of government. Under William and Mary opposition to chartered governments in general intensified in English administrative circles. As to the Jerseys the King was advised that the proprietors had no right to, nor could they exercise, any of the governmental powers granted by the Duke of York, that it belonged to the King in the right of the crown of England to constitute governors in the two provinces and to give
749 directions for governing the inhabitants thereof. Finally, on April 15, 1702 the proprietors of the two provinces by deed surrendered to Queen Anne their powers of government, which were described at some length in the document of surrender. There was no surrender of any proprietary rights or any rights to the lands or soil of either province. (Maine et al. Exhibit No. 78).

As part of the surrender transaction the crown agreed that certain instructions would be included in those issued to the royal governor. Among them was an instruction to propose to the General Assembly the passing of an act or acts whereby the right and property of the proprietors to the soil of the province might be confirmed to them according to their respective rights and titles, together with such quit rents as had been reserved or became due to the proprietors from the inhabitants of the province and all such privileges as were expressed in the conveyances made by the Duke of York, excepting only the right of government

which remained in the crown. (Maine et al. Exhibit No. 80, p. 517; No. 82, p. 49; No. 83). No such act was ever passed.

The deed of surrender made no specific references to the relinquishment of *jura regalia* not in the nature of governmental rights. (Maine et al. Exhibit No. 78). This uncertainty later gave rise to a series of cases in the Supreme Court of the United States and in the New Jersey courts dealing with the rights of the proprietors in the soil under tidal rivers and bays. *Martin v. Lessee of Waddell,* 41 U.S. (16 Peters) 367 (1842); *Arnold v. Mundy,* 6 N.J.L. 1 (Sup. Ct. 1821); *Bell v. Gough,* 23 N.J.L. 624 (E. & A. 1852); *Stevens v. Paterson and Newark R. Co.,* 34 N.J.L. 532 (E. & A. 1870); *Schultz v. Wilson,* 44 N.J. Super. 591 (Sup. Ct. App. Div., 1957). A diversity of views appears in the various opinions in these cases: (1) the Duke of York had no right to transfer *jura regalia* and thus the proprietors never had any right to the soil under tidal rivers or bays; (2) the surrender to the crown in 1702 included *jura regalia* such as the soil under tidal rivers and bays; (3) in any event the rights of the proprietors passed to the State at the Revolution; and (4) the proprietary rights survived both the act of surrender and the Revolution. While the cases concerned the beds of tidal rivers and bays, there are scattered dicta indicating no cleavage in judicial treatment of the soil under the adjoining sea as opposed to the soil under tidal rivers and bays.

My own opinion is that the Duke of York did make a valid grant of *jura regalia* to the proprietors of both Jersey provinces. Certainly in the case of East New Jersey, as we have seen, the grant was ratified by the crown, if
751 such an act were necessary to validity, and the proprietors *de facto* did govern and administer East New Jersey and West New Jersey for a number of years. I find it hard to

construe the act of surrender, on its face, as passing *jura regalia.* It seems probable, however, that later in the colonial period the surrender was construed by the crown representative and the General Assembly as including *jura regalia* such as the right to the soil under the sea, arms of the sea and tidal rivers. In any event, on the Revolution I am of the opinion that the right to the soil of the adjoining sea, whether belonging to the crown or proprietors, passed to the State of New Jersey.

* * * * *

After obtaining his charter for Pennsylvania in 1681 William Penn wanted to secure for his province a clear and certain route to the sea. This meant access to Delaware River and Bay and also conflict with the boundaries of Maryland and the pretensions of the Duke of York. He commenced negotiations with the Duke of York, who was in possession of the territory along the western shore of
752 the Delaware as part of the spoils of the 1664 campaign against the Dutch, with the knowledge and consent of his brother, Charles II, but without a royal patent. (*See CSP, Col., 1677-1680,* Nos. 1403, 1409, 1565, 1599) (Maine et al. Exhibit No. 248, pp. 553-4, 555, 623 and 633-4). The Duke of York, prior to this date and through his representatives, had made a substantial number of grants of land to settlers west and south of Delaware River and Bay. See *Original Land Titles in Delaware Commonly Known as the Duke of York Record, 1646 to 1679* (undated, Wilmington, Delaware).

The negotiations in 1682 resulted in four documents, two deeds of feoffment and two leases for 10,000 years. One set of documents granted and leased all land below the southern border of Pennsylvania and within a 12-mile

circle including the town of Newcastle. The other set of documents and leases granted all the land south of the 12-mile circle extending down to Delaware to Cape Henlopen, including the Whorekill (Maine et al. Exhibit No. 266, pp. 587-88.)

The first deed of feoffment, dated August 24, 1682, granted

"all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying
753 and being upon the River Delaware, in America, and all islands in the said River Delaware, and the said river and soil thereof, lying north of the southern-most part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdictions, liberties, and privileges thereunto belonging; and all the estate, right, title, interest, powers, property, claim and demand whatsoever, of his said royal highness, of, in, or to the same, or any part or parcel thereof . . . " (*Id.* at p. 588).

The deed of feoffment also contained the following grant and covenant by the Duke of York:

"And his said royal highness, for himself, his heirs and assigns, doth covenant and grant, to and with the said William Penn, his heirs and assigns, by these presents, that his said royal highness, his heirs and assigns, will at any time or times hereafter, during the space of seven years next ensuing the date hereof, upon the request, and at the costs and charges in the law of the said William Penn, his heirs and assigns, do make and execute, or cause or procure to be made, done, and executed, all and every such further act and acts, conveyances and assurances in the law whatsoever for the further conveying and assuring the said town and circle of twelve miles of land about

754 the same, and islands, and all other the premises, with the appurtenances, unto the said William Penn, his heirs and assigns for ever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, shall be reasonably devised, advised, or required." (*Id.* at p. 589).

The second deed of feoffment, also dated August 24, 1682, granted:

"all that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Whorekills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bays, waters, rivers, isles, and inlets, belonging to or leading to the same, together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, rivers, rivulets, bays and inlets, situate in or belonging unto the limits and bounds aforesaid, together with all sorts of minerals; and all the estate, interest, royalties, franchises, powers, privileges, and immunities whatsoever, of his said royal highness therein, or in or unto any part or parcel thereof; . . . ." (*Id.* at p. 591).

The second deed of feoffment contained a grant and covenant similar to that in the first deed:

755 "And his said royal highness, for himself, his heirs and assigns, doth covenant and grant, to and with the said William Penn, his heirs and assigns, by these presents, that his said royal highness, his heirs and assigns, will at any time or times hereafter, during the space of seven years next ensuing the date hereof, upon the request, and at the costs and charges in the law of the said William Penn, his heirs and assigns, do, make, and execute, or cause or procure to be made, done, and executed all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring the said tract of land, and all and singular other the

premises, with the appurtenances, unto the said William Penn, his heirs and assigns for ever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, shall be reasonaly devised, advised, or required." (*Id.* at p. 592).

The language in the corresponding lease varies somewhat. The Duke of York bargained, sold and let:

"All that tract of land upon Delaware River and Bay beginning twelves miles south from the town of Newcastle otherwise called Delaware, and extending south to the Whore Kills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bayes, waters, rivers, isles and inlets belonging to or leading to the same, together with the soil, fields,
756 woods, underwoods, mountains, hills, fens, lakes, rivers, rivulets, bays and inlets, situate in or belonging unto the limits and bounds aforesaid, together with all sorts of minerals; and all the estate, interest, royalties, franchises, powers, priviledges and immunities whatsoever, of his said royal highness therein, or in or unto any part or parcel thereof." (*Id.* at p. 591).

I should comment that at the time of the several grants to William Penn by the Duke of York the present Cape Henlopen, at the southern extremity of Delaware Bay, was known as Cape Cornelius and that what was then designated "Cape Henlopen" was located some 20 miles south at Fenwick's Island, now the southern boundary of the State of Delaware. Later this was thoroughly canvassed in the famous suit of Penn against Lord Baltimore in the High Court of Chancery in England.

When he arrived in America William Penn promptly took possession of the lands covered by the two deeds of feoffment by ceremonies of livery of seisin, as contemplated in the deeds.

Some months later, on 22 March 1682/3, Charles II granted to the Duke of York

"All that the Towne of Newcastle otherwise called Delaware and fort therein or thereunto belong scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or
757 Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southernmost part of the said Circle of twelve miles about the said Towne and all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen together with all the lands Islands Soyle Rivers Harbors Mines Mineralls Quarries Woods Marshes Waters Lakes fishingg hawkings hunting and fowlings and all other Royalties Proviledges profitts Comodities and Hereditamts to the said Towne fort Tracts of land Islands and premisses or to any or either of them belonging or apperteyning with their and every of their appurtenances Scituate lying and being in America. And all our estate right title interest benefitt advantage Clayme and demand whatsoever of in or to the said Towne fort lands and prmisses or any parte or parcell thereof." (Maine et al. Exhibit No. 102, pp. 1-2).

In view of the covenants by the Duke of York contained in the two deeds of feoffment of August 24, 1682, one might have expected to find a confirmatory grant or deed from the Duke of York to William Penn following the March 22, 1682/3 royal grant. However, for reasons not now apparent, the March 22, 1862/3 charter was not
758 entered in the patent rolls in the usual manner (the document itself seems to have been turned over to William Penn or his representative), and the Duke of York sought

to surrender said charter and secure a further, and presumably more favorable, grant from Charles II. In any event, it seems likely that because of a complaint or petition by Lord Baltimore as to possible conflicts with the Maryland charter, no further grant of Delaware lands to the Duke of York passed the great seal and that the March 22, 1682/3 charter was never surrendered. (*CSP, Col., 1681-1685,* Nos. 1440, 1442.) (Maine et al. Exhibit No. 267, p. 562).

While the various grants from the Duke of York to William Penn and from Charles II to the Duke may have left something to be desired from the standpoint of the art of conveyancing, it is my conclusion that William Penn, as proprietor, was granted and possessed of the same rights to the bottom of the sea off the Three Lower Counties as were possessed by the crown with respect to the realm.

While New Hampshire became a royal province in 1679 there were a number of earlier grants covering New Hampshire lands, among others, from the Council of New England to John Mason.

A March 9, 1621/2 charter from the President and
759 Council of New England to John Mason granted Cape Anne or Mariana (later part of Massachusetts Bay) in the following terms:

"All that part of the Sea Coast of New England being a great headland or Cape & lying in ye Northernmost parts of the Massachusetts Country & to ye Northeastwards of the Great River of the Massachusetts Stretching it Self out into ye Sea Eastwards five Leagues or thereabouts and lying betwixt ye Lat. of 42 & 43 Degr. or thereabouts; & comonly called or knowne by the Names of Cape Frabigzand or Cape Anne with the North South & East Shoares & Coasts thereof the back bounds thereof towards the Maine Land to begin at the head of the Next Great River to the Southwards of the said Cape

wch runns upwards into the Country of the Main Land westward and Supposed to be called Naumkeck or by what other Name or Names the Said River is or may be called & soeforth Eastwards into ye Sea & to ye uttermost part of ye Said headland or Cape & round about the Same to ye Northwards and from thence along the Sea Coast to the Next Great River wch runns up into the Maine Land Westwards & Supposed to be called Merimack or by what other Name or Names the said River is or may be called & lying to the North westwards of the said Cape & to the farthest head of the Said river from wch period to Crossover land to ye head
760 of the other Great River wch lyes Southwards of ye aforesaid Cape where the perambulacon began & halfe way over that is to Say to ye Midst of either of ye Said two Rivers wch bounds or limits the aforesaid lands both on ye North & South thereof togeather wth the Great Isle or Island henceforth to be called Isle Mason lying Neere, or before the Bay Harbor or ye river of Aggawom *togeather alsoe wth all the Seas Isles or Islands adjoining to any part of ye precincts of the Lands aforesaid or lying wth in 3 Miles of any parte of ye same,* as alsoe all ye Lands Soyle Grounds havens Ports Rivers Mines Mineralls pearls & pretious Stones woods Quarreys Marshes Waters Lakes fishings hunting hawking ffowling Com'odityes & hereditamts whatsoever wth all & Sing'ler their appurtenances togeather wth all prerogatives rights royaltyes jurisdictions priviledges francheses p'heminences libertyes Marine power as alsoe ye Escheats and casualtyes thereof, wth all ye State right title interest claime & demand whatsoever wch the Said president & Councill & their Successors of right ought to have or claime in or to the Said porc'ons of land & other ye premises as is aforesaid by reason or force of his Highness Said Letters Patents in

as free large ample & beneficiall Manner to all intents construc'ons & purposes whatsoever as in & by ye Said
761 Letters Patents the Same are amongst other things granted to ye Said president & Councill aforesaid." (Maine et al. Exhibit No. 12, pp. 20-21; Emphasis added). This charter specifically includes "Seas" along with "Isles or Islands" within three miles of any part of the mainland grant.

In my opinion the charter language gave Mason the right to the soil under the sea for a distance of at least three miles from the coastal area granted, including the Isle Mason.

A further indenture between the President and Council of New England and John Mason, dated November 7, 1629, made the following grant:

"All yt part of ye Maine land in New England lying upon ye sea Coaste beginning from ye Middle part of Merrimack River & from thence to proceed Northwards along ye Sea coaste to passcattaway river & soe forwards up within ye sd river & to ye furthest head thereof & from thence Northwestwards untill Threescore miles be finished from ye ffirst entrance of passcattaway river & also from Merrimacke through ye sd River & to ye furthest head thereof & soe forward up into ye land Westwards untill Threescore miles be finished and from thence to cross over land to ye Threescore miles end accounted from passcattaway river together wth all Islands & Isletts within five leagues
762 distance of ye premises & abutting upon ye same or any parte or parcell thereof as also all ye lands soyle grounds havens ports rivers mines Mineralls pearles pretious stones woods quarreys marshes waters fishings hunting hawking fowling & other commodityes & hereditamts wt soever wth all & singular their appurten'ces together wth all prerogatives rights royaltyes Jurisdicc'ons priviledges franchises rights royaltyes Jurisdicc'ons priviledges franchises

libirties preheminences marine power *in & upon ye sd Seas & rivers* as allso all escheats & casualtyes therof as flotson Jetson lagon with anchorage & other such dutyes im'unityes sects isletts & appurten'ces wt soever wch [with] all ye estate right title interest claime & demand wt soever wch ye sd president & Councell & their Successors of Right ought to have or Claime in or to ye sd porc'ons of lands rivers & other ye premises as is aforesd by reason or force of his high'ss sd letters patents in as free large ample & beneficiall man'er to all intents construcc'ons & purposes wtsoever as in & by ye sd Letters pattents ye same are amongst other things granted to ye sd president & Councell aforesd." (Maine et al. Exhibit No. 13, pp. 2434-35; emphasis added).

In my opinion this indenture gave Mason the right to the soil beneath the seas for a distance of at least five leagues from the coastal area granted, including Isle
763 Mason. My conclusion rests upon the language of "together with all Islands and Isletts within five leagues distance of the premises and abutting upon the same or any part of parcel thereof," plus the grant of all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, pre-eminences and marine power in the "said Seas and Rivers." In addition, the grant included whatever rights the Council of New England claimed. It certainly claimed the rights to the sea and its soil to a distance of more than five leagues from the mainland.

A November 3, 1631 indenture between the President and Council of New England and Sir Ferdinando Gorges, Captain John Mason and others granted what was known as the Piscataway area in the following terms:
"All that house and chiefe habitacon situate and being at Pascataway al's Pascataquack al's Pascequacke in New England aforesaid, wherein Capt Walt; Neale and ye

Colony wth him now doth or lately did reside together wth the Gardens and Cornegrounds occupied and planted by the s^{d} Colonie, and the Salt workes allready begun as afores^{d} And also that procon of Land lying wthin the precincts hereafter menc'oned, beginning upon the Seacoast 5 miles to the W^{t}ward of or from the s^{d} chiefe Habitacon or Plantation now possessed by the s^{d} Cap^{t} Walter Neale for y^{e} use of the Adventurers to Licona
764 (being in the latitude of 43 degr' or thereabouts in the Harbour of pascataquack al's Pascataquack al's Pascataway, and so forth from y^{e} s^{d} beginning Eastw^{d} & Northeastw^{d} and so proceeding Northw^{ds} or North Westw^{ds} into y^{e} Harbour and River along the Coasts & Shoares thereof including all the Islands and Isletts lying w^{thin} or neere unto the same upwards into the head land opposite unto the plantacon or Habitacon now or late in the Tenure or Occupation of Edw^{d} Hilton, & from thence, W'w^{ds} & South W'w^{ds} in y^{e}midle of the River and through the middle of y^{e} Bay or lake of Boquacack al's Boscaquack or by what other name or names it hath towards the bottome or Westermost part up y^{e} River called Pascassockes to the falls thereof, and from thence by an Imaginary Line to pass over, and to the Sea, where the pambulacon begann Togeather w^{t}h all y^{e} Lands, Soyle, Ground Wood, Quarries, Mines, ffishing, Hunting Hawking, ffowling, Comodities and Hereditam $^{'s}$ whatsoever, Togeather also wth all p'rogatives, Jurisdicc'ons Royallties, privileidges, ffranchises and preheminences wthin y^{e} precincte of Land conteined wthin y^{e} limits or bounds aforese'd. And also the Isles of Shoales, and y^{e} ffishings thereabouts – And *all the Seas wthin 15 miles of the foresd Sea Coasts,* And also all the Sea Coasts and Land lying on y^{e} East and Northeast side of the Harboure and River of Pascataway afores^{d}

765 and opposite to the bounds above menc'oned beginning 15 miles to y^e^ S: eastwards of y^e^ Mouth or first entrance and beginning of the said Harboure, and so upp to y^e^ falls and into the ponds or Lakes that feed the s^d^ ffals, by the space of 30 miles including the s^d^ ponds or Lakes and the Shoares thereof, and so crossing into the Landward, at a right angle by the space of 3 miles the whole length thereof from y^e^ s^d^ mouth or first entrance from the Sea *and Eastwds into y^e^ Sea, w^ch^ s^d^ 3 Miles shalbe allowed for y^e^ breadth of y^e^ s^d^ land last menc'oned both upon y^e^ land and Sea.* As also all y^e^Land Soyle Ground Woodes, Quarries Mines, fishings Hunting Hawking ffowling Commodities and Hereditam's whatsoever, togeather w^th^ all prerogatives Jurisdicc'ons, Royalties, Privileidges, ffranchises and p'heminences w^th^in the p'cincts of Land lasst menc'oned conteined. (Maine et al. Exhibit No. 16, pp. 41-42; emphasis added).

In my opinion this indenture gave the grantees the right to the soil under the seas for a distance of at least fifteen miles from the coast of the first area bounded and for a distance of at least three miles from the coast of the second area bounded.

The Council of New England by an April 22, 1635, indenture granted two areas to John Mason, one to be
766 known as New Hampshire, the other as Masonia. The indenture, in the nature of a deed of feoffment as to New Hampshire, granted as follows:

"All that part pupart & por'con of y^e^ Maine land of New England aforesaid [within defined limits] . . . & also that the South Half of the Isles of Shoulds together with all other Islands, & Isletts as well imbaid as within 5 Leagues distance from the premisses & abuting upon the same or any part or parcell thereof not otherwise granted to any by Speciaall Name All which part & porc'on of

Lands Islands and premises are from henceforth to be called by the Name of New Hampshire." (Maine et al. Exhibit No. 19, pp. 2443-44).

The second area granted, to be known as Masonia, consisted of 10,000 acres "Lying on [the] South east part of the river of Sagadahock in New England aforesaid at the mouth or entrance thereof." (*Id.* at p. 2444).

The indenture then went on to provide

"And moreover the Said Councill for y^{e} considerac'ons aforesaid have given granted bargained Sold enfeoffed & confirmed & by these p'sents doe give grant bargaine Sell enfeoffe & confirme unto y^{e} said Captaine John Mason his heires & assignes together wth the said bargained p'mises all y^{e} firme Lands Soyles Grounds havens
767 Ports Rivers waters ffishings Mines and Mineralls as well Royall Mines of Gold & Silver as other Mines & Mineralls pretious Stones quaryes & all & Singular other Com'odityes Jurisdictions Royaltyes priviledges ffranchises & preheminences both wthin the Said Tracts of Lands upon the Maine and alsoe *with y^{e} Islands & Seas adjoyning."* (*Id.;* emphasis added.)

In my opinion this indenture vested in John Mason the right to the soil beneath the seas for a distance of at least five leagues from the coast of the area designated as New Hampshire. In the case of Masonia, the extent of "seas adjoining" would presumably be measured as in the case of the seas adjoining the realm. Another indenture, in the nature of a bargain and sale, of the same date between the same parties is to the same effect. (Maine et al. Exhibit No. 18, pp. 2441-42).

Another indenture (a 3000 year lease), entered into a few days before the April 22, 1635, indenture above, between the Council of New England and John Wollaston, Mason's brother-in-law, in trust for Mason, contained

the same language with respect to the same land areas. (Maine et al. Exhibit No. 17, pp. 2437-38). These several indentures marked a division of lands and confirmation of others shortly before the Council of New England surrendered its charter to the King.

In May 1675 the crown law officers reported to the
768 Committee of Plantations that Robert Mason, the son and heir of John Mason, through the several grants from the Council of New England had good and legal title to lands called New Hampshire. (*CSP, Col., 1675-1676,* No. 563) (Maine et al. Exhibit No. 263, p. 233). Although Mason's rights to New Hampshire as against the pretensions of Massachusetts Bay were upheld, Robert Mason offered to surrender his right to government in 1678; and in July 1679, the King having determined to take all the towns and province of New Hampshire into his own care, the Lords of Trade and Plantations proposed a form of government. The Council, governing with the President, were to administer justice, civil and criminal, according to the laws of England, as far as circumstances permitted. (*CSP, Col., 1677-1680,* Nos. 342, 343, 356, 587, 1045, 1058) (Maine et al. Exhibit No. 248, pp. 118-120, 127-28, 211-12, 386, 390-91). Several years earlier, in 1674, William Dyer, in a petition to the king urging the purchase of New Hampshire and Maine, pointed out that "if the king purchased Maine and New Hampshire, he would have absolute dominion over those seas [the adjoining seas previously described] and might settle a duty on all fisheries there, and might reduce those of Massachusetts to a ready sub-
769 jection." (*CSP, Col., 1669-1674,* No. 1279) (Maine et al. Exhibit No. 269, pp. 579-82).

New Hampshire was established as a royal province in 1680 by means of a commission constituting a President and Council for the Province, John Cutt being named as

President. (Maine et al. Exhibit No. 25). The commission commenced by reciting that the Massachusetts Bay colony, without any legal right or authority, had taken upon themselves to exercise a government and jurisdiction over the inhabitants in the towns of Portsmouth, Hampton, Dover, Exeter, and all other towns and lands in the Province of New Hampshire lying and extending from three miles northward of the Merrimack River, or any part thereof, to the Province of Maine. The commission thereupon inhibited and restrained the jurisdiction. After reciting that "[the] government of [that] part of the said Province of New-Hampshire, so limited and bounded as aforesaid hath not yet bin granted unto any person or persons whatsoever but [the] same still remains & is under Our immediate care & protection" (*id.* at p. 2446), the commission erected, constituted and appointed a President and Council to order, rule and govern the Province and the planters and inhabitants thereof. (*Id.*)

Although no mention is made in the Commission of the adjacent seas in the description of the Province, under orthodox theory the crown would still have whatever right to the seabed was inherent in the assumption by the crown of sovereignty over what at this time was probably still regarded as a "conquered" country. The exact extent of this right, as noted earlier, was not defined in English law, but its existence was clear. By establishing New Hampshire as a royal province the crown retained the right to the soil of the adjoining seas rather than granting this right to a patentee by means of a royal charter, as in the cases we have been considering. The royal governor, as representative of the crown on the spot, would, of course, be authorized to exploit this right. The Cutt Commission, of course, contained no reference

770

to boundaries. At first reliance must have been placed upon grants from the Council of New England which I have just reviewed. However, although these grants may have been important in asserting so-called Masonian claims against settlers in private litigation, by the 1700's the King and Council and others took the view, particularly in the boundary disputes with Massachusetts Bay, that New Hampshire never had a charter, *i.e.*, a royal charter (*CSP, Col., 1733,* No. 116 and *Id., 1737,* No. 288) (Maine et al. Exhibit Nos. 334 and 335). This is not entirely accurate in view of the 1620 grant to the
771 Plymouth Company which encompassed what was later to become New Hampshire. However, the position of the crown seems to have been that it was entitled to the government of New Hampshire from the time of the surrender of the Council of New England's charter. In any event there can be no doubt that at independence New Hampshire succeeded to seabed and subsoil rights as measured by the common law of England.

In the 1697 commission to the Earl of Bellomont as Governor of New Hampshire we find, for the first time, a grant of "full power & Authority by and with the Advice of our Said Councill to agree with the Inhabitants of our Province and Territories aforesaid for Such Lands Tenements and hereditaments as now are or hereafter shall be in our power to dispose of and them to grant to any person or persons for such Tearmes and under Such Moderate Quitt rents Services and acknowledgm'nts to be thereupon reserved unto us as you by and with the Advice aforesaid shall thinke fitt . . . ." (Maine et al. Exhibit No. 31, p. 619). The same provision was contained in all subsequent gubernatorial commissions until the Revolution.

After the 1629 royal charter to the Massachusetts

Bay Company had been vacated in a *scire facias* proceeding in the High Court of Chancery in England, the col-
772 ony was made part of the Dominion of New England and governed by Sir Edmund Andros under several commissions granted to that royal official. As part of the American counterpart or aftermath of the Glorious Revolution in England, Andros was ousted from his position in April, 1689 by the colonists, confined and then sent back to England. From the date of the ousting of Andros to the grant of a new charter on October 7, 1691, the constitutional status of Massachusetts Bay under what amounted to a provisional government is vague and confused. In some respects, at least, the colonists acted as if the 1629 charter was still in effect.

However, after intensive lobbying in England a new charter was granted by William and Mary. This charter erected, united and incorporated into one "reall" [royal] province, to be known as the "Province of the Massachusetts Bay in New England," the colony of Massachusetts Bay, the colony of New Plymouth, the province of Maine, the territory called Acadia or Nova Scotia and all the tract of land lying between Nova Scotia and Maine (now known as New Brunswick). (Maine et al. Exhibit No. 44, p. 1876). This charter of October 7, 1691, plus an explanatory royal charter of 1725, constituted the frame of government for Massachusetts Bay until the American Revolution.

773 The charter started out with lengthy recitals of the 1620 grant to the Council of New England, the 1628 deed from the Council of New England to Sir Henry Rosewell and others, the 1629 royal letters patent to the Governor and Company of the Massachusetts Bay in New England and the 1684 *scire facias* proceedings by the crown in the High Court of Chancery vacating

and cancelling the aforesaid letters patent of 1629. The letters patent then set forth the following recitals of the events leading to the granting of the charter and the reasons for the crown's action:

"severall persons employed as Agents in behalfe of Our said Collony of the Massachusetts Bay in New England have made their humble application vnto Vs that Wee would be graciously pleased by Our Royall Charter to Incorporate Our Subjects in Our said Collony and to grant and confirme vnto them such powers priviledges and Franchises as [in] Our Royall Wisdome should be thought most conduceing to Our Interest and Service and to the Welfare and happy State of Our Subjects in New England and Wee being graciously pleased to gratifie Our said Subjects And alsoe to the end Our good Subjects within Our Collony of New Plymouth in New England aforesaid may be brought vnder such a forme of Government as may put them in a better Condicon of defense and considering aswell the granting vnto them as vnto Our Subjects in the said Collony of
774 the Massachusetts Bay Our Royall Charter with reasonable Powers and Priviledges will much tend not only to the safety but to the Flourishing estate of Our Subjects in the said parts of New England and alsoe to the advanceing of the ends for which the said Plantancons were at first encouraged of Our especiall Grace certaine knowledge and meer Mocon have willed and ordeyned and Wee doe by these presents for Vs Our Heires and Successors Will and Ordeyne that the Territories and Collnyes comonly called or known by the Names of the Collony of the Massachusetts Bay and Collony of New Plymouth and Province of Main the Territorie called Accadia or Nova Scotia and all that Tract of Land lying betweene the said Territories of Nova Scotia

and the said Province of Main be Erected Vnited and Incorporated." (*Id.* at pp. 1875-76).

The letters patent went on to define the province or territory in the following manner:

"all that parte of New England in America lying and extending from the greate River comonly called Monemack als Merrimack on the Northpart and from three Miles Northward of the said River to the Atlantick or Western Sea or Ocean on the South part. And all the Lands and Hereditaments whatsoever lying within the limits aforesaid and extending as farr as the Outermost Points or Promontories of Land called Cape Cod and
775 Cape Mallabar North and South and in Latitude Breadth and in Length and Longitude of and within all the Breadth and Compass aforesaid throughout the Main Land there from the said Atlantick or Western Sea and Ocean on the East parte towards the South Sea or Westward as far as Our Collonyes of Rhode Island Connecticut and the Narragansett Countrey all alsoe all that part or porcon of Main Land beginning at the Entrance of Pescata way Harbour and soe to pass vpp the same into the River of Newickewannock and through the same into the furthest head thereof and from thence Northwestward till One Hundred and Twenty Miles be finished and from Piscata way Harbour mouth aforesaid North-Eastward along the Sea Coast to Sagadehock and from the Period of One Hundred and Twenty Miles aforesaid to crosse over Land to the One Hundred and Twenty Miles before reckoned vp into the Land from Piscataway Harbour through Newickawannock River and alsoe the North halfe of the Isles and Shoales together with the Isles of Cappawock and Nantuckett near Cape Cod aforesaid and also [all] Lands and Hereditaments lying and being in the Countrey and Territory commonly called Accadia or Nova Scotia. And

all those Lands and Hereditaments lying and extending betweene the said Countrey or Territory of Nova Scotia and the said River of Sagadahock or any part thereof
776 And all Lands Grounds Places Soiles Woods and Wood grounds Havens Ports Rivers Waters and other Hereditaments and premisses whatsoever lying within the said bounds and limitts aforesaid and every part and parcell thereof and alsoe all Islands and Isletts lying within tenn Leagues directly opposite to the Main Land within the said bounds and all Mines and Mineralls aswell Royall Mines of Gold and Silver as other Mines and Mineralls whatsoever in the said Lands and premisses or any parte thereof." (*Id.* at pp. 1876-77).

This charter is atypical in that it does not contain the usual language granting "lands, soils, grounds, woods, havens, ports, rivers, waters," etc. Nor does it contain the usual phraseology with respect to jurisdictions, rights, royalties, liberties, freedoms, immunities, privileges, franchises, pre-eminences, hereditaments, etc. However, there is nothing in the charter which can be construed as depriving the inhabitants of the province, the grantees under the letters patent, of the right to the soil under the sea below the low-water mark to the extent provided in earlier grants. The crown did specifically limit some rights existing or claimed to exist under former grants. Admiralty jurisdiction was specifically vested in the crown, probably as the result of the charges by Edward Ran-
777 dolph of widespread evasion of the Acts of Trade in the Massachusetts Bay colony. An appeal to the King in Council from the provincial courts in judicial matters was provided for and regulated. A procedure for the disallowance or confirmation of acts of the General Assembly was inserted in the charter. The fishing rights of subjects, other than the inhabitants of Massachusetts Bay, were reserved, as in the 1629 charter.

As far as rights to the soil were concerned the tenor of the charter was to enlarge or at least preserve such rights. First, added to the bounds of the 1629 patent were the Plymouth colony, the province of Maine, the territory of Nova Scotia and the lands lying between Maine and Nova Scotia. Secondly, the inclusion of all islands and islets lying within ten leagues directly opposite to the mainland not only clarified the limits of the 1629 grant but also enlarged the former boundaries of Maine from five to ten leagues.

In addition, the charter contained a saving clause that "Provided neverthelesse and Wee doe for Vs Our Heires and Successors Grant and ordeyne that all and every such Lands, Tenements and Hereditaments and all other estates which any person or persons or Bodyes-Politique or Corporate Townes Villages Colldges or Schoolss doe hold and enjoy or ought to hold and enjoy within the bounds a-
778 foresaid by or vnder any Grant or estate duely made or granted by any Generall Court formerly held or by vertue of the Letters Patents herein before recited or by any other lawfull Right or Title whatsoever shall be by such person and persons Bodyes Politique and Corporate Townes Villages Colldges or Schoolss their respective Heires Successors and Assignes for ever hereafter held and enjoyed according to the purport and Intent of such respective Grant vnder and Subject neverthelesse to the Rents and Services thereby reserved or made payable any matter or thing whatsoever to the contrary notwithstanding." (*Id.* at p. 1877).

The tenor of this provision was to preserve the *status quo* under the 1629 letters patent insofar as Land grants are concerned.

That there was no appropriation to the crown of any

rights to land or soil appears from the following charter provision:

"Provided alsoe that it shall and may be Lawfull for the said Governor and Generral Assembly to make or passe any Grant of Lands lying within the Bounds of the Colonys formerly called the Collonys of the Massachusetts Bay and New Plymouth and province of Main in such manner as heretofore they might have done by vertue of any former Charter or Letters Patents which grants of lands
779 within the Bounds aforesaid Wee doe hereby Will and ordaine to be and continue for ever of full force and effect without our further Approbation or Consent." (*Id.* at p. 1883).

Taking into consideration all the above factors, I am of the opinion that under the 1691 charter to Massachusetts Bay the right to the soil under the sea for a distance of at least ten leagues off the coast was vested in the inhabitants of the province. Certainly nothing in the "legislative history" of the charter indicates any intent to deprive the province of any rights to the seabed below the low water mark (*CSP, Col., 1689-1692,* Nos. 1276, 1277, 1440, 1572, 1573, 1574, 1606, 1650, 1665, 1669, 1670, 1724, 1731, 1738, 1744, 1745, 1753, 1758, 1759 and 1760). (Maine et al. Exhibit No. 253, pp. 375, 423, 470-71, 479, 509, 511-13, 527-31, 533, 535, 542-43).

In *CSP, Col., 1700,* No. 641 iii, there is a reference by the Governor, Council and Assembly of Massachusetts Bay to "the undoubted right and privilege of your Majesty's subjects to fish in the seas on the whole Eastern coast, conformable to your Majesty's right of Sovereignty over the seas." (Maine et al. Exhibit No. 270, p. 419).

* * * * *

780 Q. Professor Smith, would you care to answer the question that the Special Master put to you this morning

about some of the New Jersey documents? A. This regards the Edward Byllynge situation that you asked me about this morning, Your Honor.

THE SPECIAL MASTER: Yes.

THE WITNESS: I checked out the two documents involved here, which is 74, and the second document, 265, Exhibit 265. I think I probably could have improved my prose in the first place by mentioning there was a claimed equitable interest, although there was a conveyance of a legal title. Apparently Byllynge retained or claimed he retained an equitable interest in the particular land. Now, that is played down in document No. 74, and there it is only called the claimed equitable interest. But when we come to the second document, the 265, which is later, then apparently something must have happened in the meantime. Now he is recognized as the real party in interest I think by this particular document. So, I don't know, I can find out, but I don't know why Byllynge's status, it seems changed between the two. That's the
781 reason why the different approach between the two documents. I don't know why that was so. I don't have the full explanation.

THE SPECIAL MASTER: Obviously Byllynge was claiming some interest at this point.

THE WITNESS: That's right, Your Honor.

THE SPECIAL MASTER: And the crown was giving him a confirmation of some kind.

THE WITNESS: I gather the crown believed him rather than the other people involved.

THE SPECIAL MASTER: All right.

BY MR. CLAGETT:

Q. Are there further 17th and 18th century charters, other than those directly affecting the nine common-counsel states, which you believe pertinent? A. Yes. For

their cumulative effect and for what they show as to the exercise of the royal prerogative I would like to refer to several other royal charters of the 17th and 18th centuries, namely, the Heath patent for the Bahamas and Carolina, the later Carolina patent, the Connecticut and Georgia patents, and the Newfoundland and Nova Scotia patents.

The October 30, 1629 letters patent to Sir Robert Heath, granted by Charles I, described the region to be
782 granted as

"[Y]et hitherto untild, neither inhabited by ours [or] the subjects of any other Christian king, Prince or state But some parts of it inhabited by certain Barbarous men who have not any knowledge of the Divine Dietye." (Maine et al. Exhibit No. 271, p. 69).

The letters patent gave, granted and confirmed "all" that River or Rivelett of St Matthew on the South side & all that River or Rivelett of the great passe on the North side, & all the lands Tenements & Hereditaments lying, beeing & extending within or between the sayd Rivers by that draught or Tract to the Ocean upon the east side & soe to the west & soe fare as the Continent extends itselfe with all & every their appurtenances & alsoe all those our Islands of beayus Bahama & all other Isles & Islands lying southerly there or neare upon the foresayd continent all which lye inclusively within the degrees of 31 & 36 of Northerne latitude;
And all & singular the ports & stations of shippes & the Creeks of the sea belonging to the Rivers, Islands & lands aforesaid; with the *fishings of all sorts of fish, whales, sturgeons & of other Royaltyes in the sea* or in the rivers moreover all veines, mines or pits either upon or conceald of Gold, Silver Jewells & precious stones & all other things
783 whatsoever, whither of stones or metalls or any other thing or matter found or to be found in the Region Territory Isles or limitts aforesaid. And furthermore the

patronages and advowsons of all churches which shall happen to be built hereafter in the said Region Territory & Isles and limitts by the increase of the religion & worship of Christ Together with all & singular these & these soe amply, Rights Jurisdictions, priviledges prerogatives Royaltyes libertyes immunityes with Royall rights & franchises whatsoever *as well by sea as by land,* within that Region Territory Isles & limitts aforesaid To have exercise use & enjoy in like manner as any Bishop of Durham within the Bpricke or County palatine of Durham in our kingdome of England ever heretofore had held used or enjoyed or of right ought or could have hold use or enjoy." (*Id.* at p. 70. Emphasis added).

In my opinion this patent granted, for the several geographic areas named, rights to the seabed and subsoil of the adjoining seas of the same nature as that possessed by the King with respect to the realm. I rely primarily upon the reference to "fishings of all sorts of fish . . . & of other Royalties in the sea" and the reference to royalties, etc. "as well by sea as by land."

The Connecticut charter of April 23, 1662, granted by Charles II, commenced with a recital that the colony
784 consisted in part of purchased and in part of conquered lands. (Maine et al. Exhibit No. 272, p. 529). It gave, granted and confirmed to the Governor and Company and their successor:

"all that Part of Our Dominions in New-England in America, bounded on the East by Narraganset-River, commonly called Narraganset-Bay, where the said River falleth into the Sea; and on the North by the Line of the Massachusetts-Plantation; and on the South by the Sea; and in Longitude as the Line of the Massachusetts-Colony, running from East to West, That is to say, From the said Narraganset-Bay on the East, to the South Sea on the

West Part, with the Islands thereunto adjoining, together with all firm Lands, Soils, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines, Minerals, precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, Preheminences, and Hereditaments whatsoever, within the said Tract, Bounds, Lands, and Islands aforesaid, or to them or any of them belonging." (*Id.* at pp. 535-536).

Also contained in the charter was a caveat that "these Presents shall not in any Manner hinder any of Our loving Subjects whatsoever to use and exercise the Trade of Fishing upon the Coast of New-England, in America, but they and every or any of them shall have
785 full and free Power and Liberty, to continue, and use the said Trade of Fishing upon the said Coast, in any of the Seas thereunto adjoining, or any Arms of the Seas, or Salt Water Rivers where they have been accustomed to fish, and to build and set up on the waste Land belonging to the said Colony of Connecticut, such Wharves, Stages, and Work-Houses as shall be necessary for the salting, drying, and keeping of their Fish to be taken, or gotten upon that Coast, any Thing in these Presents contained to the contrary notwithstanding." (*Id.* at p. 535).

In my opinion these letters patent granted the Governor and Company of Connecticut rights to the seabed and subsoil of the adjoining sea of the same nature as that possessed by the King with respect to the realm. I regard these rights as royalties belonging to the grant of the mainland and the islands thereunto adjoining.

The letters patent of March 24, 1662/3, for Carolina, described as "parts of America not yet cultivated or planted, and only inhabited by some barbarous people, who have no knowledge of Almighty God," (Maine et al.

Exhibit No. 273, p. 2743) granted the patentees, the Earl of Clarendon and others,

"all that territory or tract of ground, scituate, lying and being within our dominions of America, extending from
786 the north end of the island called Lucke island, which lieth in the southern Virginia seas, and within six and thirty degrees of the northern latitude, and to the west as far as the south seas, and so southerly as far as the river St. Matthias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the south seas aforesaid; together with all and singular ports, harbours, bays, rivers, isles and islets belonging to the country aforesaid; and also all the soil, lands, fields, woods, mountains, fields, lakes, rivers, bays and islets scituate or being within the bounds or limits aforesaid, with the fishing of all sorts of fish, whales, sturgeons, and all other royal fishes *in the sea, bays, islets and rivers within the premises,* and the fish therein taken; and moreover all veins, mines, quarries, as well discovered as not discovered, of gold, silver, gems, precious stones, and all other whatsoever, be it of stones, metals, or any other thing whatsoever, found or to be found within the countries, isles and limits aforesaid . . . . together with all and singular the like, and as ample rights, jurisdictions, priviledges, prerogatives, royalties, liberties, immunities and franchises of what kind soever, within the countries, isles, islets and limits aforesaid." (*Id.* at p. 2744. Emphasis added.)

787 These letters patent, in my opinion, granted rights to the seabed and subsoil of the sea adjoining the mainland and islands of the same nature as that possessed by the crown with respect to the realm. The grant of royalties relates to the sea within the premises or limits of the charter.

The June 9, 1732 charter to a company organized by James Oglethorpe for the colonization of a province to be called Georgia, then waste and desolate lands, granted to "The Trustees for establishing the colony of Georgia in America" "all those lands, countrys and territories, situate, lying and being in that part of South Carolina, in America, which lies from the most northern part of a stream or river there, commonly called the Savannah, all along the sea coast to the southward, unto the most southern stream of a certain other great water or river called the Alatamaha, and westerly from the heads of the said rivers respectively, in direct lines to the south seas; and all that share, circuit and precinct of land, within the said boundaries, *with the islands on the sea, lying opposite to the eastern coast of the said lands, within twenty leagues of the same,* which are not inhabited already, or settled by any authority derived from the crown of Great-Britain; together with all the soils, grounds, havens, ports gulfs and bays, mines, as well royal mines of gold
788 and silver, as other minerals, precious stones, quarries, woods, rivers, waters, fishings, *as well royal fishings of whale and sturgeon as other fishings, pearls, commodities, jurisdictions, royalties, franchises, privileges and preeminences within the said frontiers and precincts thereof and thereunto in any sort belonging or appertaining,* and which we by our letters patent may or can grant, and in as ample manner and sort as we may or any of our royal progenitors have hitherto granted to any company, body politic or corporate, or to any adventurer or adventurers, undertaker or undertakers, of any discoveries, plantations or traffic, of, in, or unto any foreign parts whatsoever; and in as large and ample manner, as if the same were herein particularly mentioned and expressed . . . ." (Maine et al. Exhibit No. 274, p. 771. Emphasis

added).

By this charter, in my opinion, the patentees were vested with the rights to the soil of the adjoining seas to a distance of at least twenty leagues from the granted coastal area. This charter is significant as demonstrating that the 18th century did not witness a diminution of the royal prerogative with respect to new settlements.

It is interesting that when the Lords Proprietors of the Bahamas, holding under letters patent granted by Charles
789 II, surrendered their civil and military powers of government in the islands, they saved and excepted "all and singular the ports harbours bays and rivers to the abovemenconed Island and Isletts belonging and appertaining with the fishing of all sorts of fish whales sturgeon and all other royall fishes in the seas bays islands and rivers within the abovemenconed premisses and the royall fish and others therein taken together with the royaltye of the sea upon the coast within the limitts aforesaid . . ." (*CSP, Col., 1717-1718,* No. 176) (Maine et al. Exhibit No. 275, pp. 85-87).

Professor Horwitz, in his testimony, referred briefly to the Charter of 1611 from James I to the Newfoundland Company which, after defining the portion of Newfoundland conveyed, continued: "together with the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid." (Maine et al. Exhibit No. 179, p. 53). The grant then continued with the familiar language:

"And also all the lands soil grounds havens ports rivers mines, as well royal mines of gold and silver as other mines, minerals pearls and precious stones woods quarries marshes waters fishings huntings hawkings fowlings commodities and hereditaments whatsoever, together with all prerogatives jurisdictions royalties privileges franchises

and preeminences within any the said territories and the
790 precincts thereof whatsoever and thereto or thereabouts *both by sea and land being or in any sort belonging or appertaining* and which We by our Letters Patents may or can grant, and in as ample manner and sort as We or any of our noble Progenitors have heretofore granted to any company body politic or corporate or to any adventurer or adventurers undertaker or undertakers of any discovery plantation or traffic of in or unto any foreign parts whatsoever, and in as large and ample manner as if the same were herein particularly mentioned and expressed: . . . ." (*Id.* Emphasis added).

This charter, indeed, opened with a "whereas" clause indicating that rights in the sea were the essential purpose of the grant:

"*Know ye whereas* divers our loving and well-disposed subjects are desirous to make plantation to inhabit and establish a colony or colonies in the southern and eastern parts of the country and isle or islands commonly called Newfound Land, unto the coast and harbours whereof the subjects of this our Realm of England have for the space of fifty years and upwards yearly used to resort in no small numbers to fish, intending by such plantation and inhabiting both to secure and make safe the said trade of fishing to our subjects for ever, and also to make
791 some commendable benefit for the use of mankind by the lands and profits thereof which hitherto from the beginning (as it seemeth manifest) hath remained unprofitable, and for better performance of such their purpose and intentions have humbly besought our regal authority and assistance . . . ." (*Id.* at p. 51).

The charter also provided for reserved fishing rights in the area conveyed on the basis of established custom. (*Id.* at p. 53).

Plainly there can be no doubt that this charter conveyed both the sea and the seabed adjacent to Newfoundland at least out to 10 leagues.

A patent of Nova Scotia granted on July 27, 1662 to Sir Thomas Temple similarly conveyed an area extending by express definition 30 leagues into the sea. (*CSP, Col., 1661-1668,* No. 340) (Maine et al. Exhibit No. 240, pp. 101-02).

Q. What conclusions do you draw from this survey of the charters? A. When the various colonial charters are read cumulatively they indicate that the crown claimed and granted to, or made effective for, the American dominions of the crown the same sort of rights in the adjoining Atlantic as it claimed in the English seas. Since the precise extent of the claim in English waters
792 was undetermined, the opportunity was taken to particularize the limits in certain of the colonial charters, though these limits varied from one charter to another. Given the very limited means of technological exploitation at the time, the charters were extremely far sighted when they did set limits, almost as if they were anticipating modern technological developments. The result of all this is perhaps not too far from the modern continental shelf doctrine that the coastal state has exclusive rights as far out as there are practical possibilities of exploitation, so long as the seabed in question can still be regarded as adjacent to the coast. Seen in this light, the specific limits, where they are stated, might not be regarded as fixed and final, but rather as indications of how far out the practical interests of the coastal dominion were considered to extend at the time of grant.

Be that as it may, in the light of the charter provisions I have surveyed it is clear beyond dispute that in 17th and 18th century English law, sovereignty or

dominion over a territory with a sea coast was regarded as carrying with it rights over the adjacent sea, seabed and subsoil, and that the crown quite consciously conveyed such rights in the various colonial charters.

Q. Do you know of any evidence, besides that which
793 you have already discussed, which indicates that the American colonists or colonial governments believed that their charters conferred jurisdiction or rights over the marginal sea and seabed or that they actually exercised such jurisdiction and rights? A. I have not made a systematic study of this area and cannot deal with it with any degree of comprehensiveness. Much if not most of the relevant material would be scattered in libraries and archives throughout the states in question, and I have not examined it. I expect that there would be some evidence of the type you suggest, but on the whole I believe that it would be rather limited in extent, for at least two reasons. First, because of the technological impediments to exploitation of seabed and subsoil resources in the marginal sea during the period we are discussing, the occasions on which practical possibilities of exploitation would arise would be few and far between. That is not at all inconsistent with a quite general awareness that the exclusive right of exploitation was vested in the adjacent sovereign, which would exercise it on the rather infrequent occasions when the possibility arose. Second, it must be remembered that during the colonial period the great preponderance of ambitions and expec-
794 tations for economic expolitation were directed westwards, toward the vast body of land beyond the narrow strip of coastal settlement, whose resources, once discovered, could be exploited far more readily and profitably than those of the seabed and subsoil. For that reason one would expect to find fewer instances of actual

exploitation, and of the exercise of regulatory power by the coastal governments, on this side of the Atlantic during the period we are discussing than in Europe. But as I say, I have not studied the subject systematically so I really cannot say how much material there may be.

Professor Flaherty, who I understand will be appearing as a witness for Virginia, has studied this sort of material as it relates to Virginia. The evidence he has found confirms me in my belief that there was a general recognition and awareness during the colonial period that the coastal state had exclusive rights of exploitation and regulation in the marginal sea and would exercise them whenever the occasion arose.

Beyond that answer, I will mention only a few isolated examples that have come to my attention.

In 1715 the New York government adopted an act to entitle Garret de Graeuw and his Assigns to the Fishery of Porpoises during the Term of Seven years. (Maine et
795 al. Exhibit No. 276, p. 839). The act gave de Graeuw the exclusive right to fish for porpoises "in the seas, Harbours, Rivers and other Waters within this Colony."

In 1715, 1730 and twice in 1737 the New York government adopted statutes regulating the raking of oysters. (Maine et al. Exhibits Nos. 277, 278, 279 and 280). The first three of these acts are not limited in their scope to the boundaries of any counties, or to harbors, rivers, bays, etc., and certainly deal with oyster beds below low water mark in the sea. The last-mentioned statute deals specifically with oyster beds "lying at & near Richmond County, within this Colony." This implies a distinction similar if not identical to that in English law: the "body of a county" ended at low water mark but the sovereign's jurisdiction and prerogative extended much farther into the sea.

In 1692 Governor Copley of Maryland appointed Edward Greene of Somerset County (the only county of the colony with an Atlantic coastline) as officer to salvage all "drifts wastes and wrecks," including whales, "as shall be driven or cast on shoar or be found floating within the limits and bounds aforesaid" (Maine et al. Exhibit No. 374). The reason for the appointment was stated to be incursions of Pennsylvanians and other for-
796 eigners "upon and within the limits and bounds of this Province at the Seaboard Side" to take drift whales. (*Id.*)

In 1712 the Maryland legislature enacted a statute prohibiting the striking or shooting of fish "within the Precincts of this Province." (Maine et al. Exhibit No. 325). It was provided that the statute should not extend to the striking of fish "upon the Sea-side," *id.* at 199, thus limiting the effect of the statute to the Chesapeake Bay and its tributaries, which is obviously where the legislature considered that the striking of fish was leading to the depletion of resources. The express exclusion of the sea fisheries from the effect of the statute implies that without such an exclusion they would have been considered covered by the statute as being "within the Precincts of this Province."

A New Jersey statute of 1718 restricted to certain times of the year the raking of oysters from the "Oyster-beds within this Province." (Maine et al. Exhibit No. 326).

In 1693 the Pennsylvania government adopted a statute (Maine et al. Exhibit No. 281) providing for the payment, by all foreigners, of a royalty of ten percent of oil and bone for the killing of any whale within Delaware Bay.
797 A Pennsylvania law of 1698 (Maine et al. Exhibit No. 282, pp. 268, 273) levied fees for permits to carry tobacco

"to & fro within this River of [*sic;* should be *or*] bay of Delaware."

In 1682 William Penn chartered the Free Society of Traders, granting to them a manor of 20,000 acres (Maine et al. Exhibit No. 283). Included in the grant was "free fishing of whales, sturgeon, and all royal and other fishes in the main sea and bays of the said province, and in the inlets, waters, and rivers within or adjoining to" the manor. (Id. at p. 549).

In 1700 William Penn found himself embroiled in a controversy with the authorities in England, who were attempting to deny him the admiralty jurisdiction to which he believed himself entitled. The subject of admiralty jurisdiction is enormously complicated, and I have not dealt with it in this testimony. However, it is interesting that Penn based his assertion of admiralty jurisdiction on his belief, which he seems to have assumed would be unquestioned, that he owned the marginal sea. In a letter of December 10, 1700, to the Lords of the Admiralty (Maine et al. Exhibit No. 284), Penn wrote: "nothing can appear more unreasonable or absurd to me than that this country being granted me by the King's Letters Patent, both soil and government, with the royalties of both land and water . . . my power should be disputed of appointing an officer, that most mayors or ports in England, if I mistake not, have the privilege of . . ." (*Id.* at p. 349). In another letter of the same year (Maine et al. Exhibit No. 285), Penn protested, "to have 300 miles of water and yet no power to serve a Writt on it, is to grant a country without a way to it . . . . 'Tis a great Affront & Injustice that my Waters should be under another Vice Admiralty; to talk of a Country and no waters, property or palatine & no vice admiralty, nor to be Lord of ye Waters, has a contradiction in it . . . ." (*Id.* at pp. 140-41. (Contractions expanded).

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As I have said, these examples are merely a few fragments of a general awareness which I believe existed.

Q. Do you know of any other evidence indicating colonial ownership of the marginal sea or seabed? A. In April, 1700 during negotiations for settlement of the French and English boundaries in North America in the region of Nova Scotia the French ambassador made the following proposal:

"As to fishing, since all commerce between the two nations in the colonies is forbidden, and since, under pretence of fishing, there would not fail to be contra-
799 band traffic, it is thought that in accordance with the custom already established in those parts, fishing should be forbidden out of sight, fixing the distance at eight leagues, and that for the same reasons the islands included in that space should belong to the nation to whose coast they are nearest." (*CSP, Col., 1700,* No. 368) (Maine et al. Exhibit No. 270, pp. 213-14).

Several items collected from the *Calendar of State Papers, Colonial,* with respect to royal colonies in the 17th century, show clear recognition of the crown's rights to the seabed below the low water mark.

In the West Indies the seabed under shallow coastal waters was converted into salt ponds or salt pans and the salt collected therein was of economic significance. Although these ponds were beyond the low water mark the crown obviously asserted ownership.

In 1662 one Henry Janson complained to the king that there had of late been encroachments made upon the sea about the coast of Barbados contrary to the limits of the first plantation. He also prayed and received a warrant for a grant under the Great Seal of all the waste grounds in and about the island of Barbados not legally granted earlier or prescribed for by the limits

800 and bounds of the first plantation. The grant issued but was obstructed by some of the planters in the island. Janson later (1663) surrendered the granted waste lands to save the king from importunities of the planters but sought compensation for his losses. (*CSP, Col., 1661-1668,* Nos. 275, 276, 431, 509, 511) (Maine et al. Exhibit No. 240, pp. 85, 127, 147).

In 1670 Sir Thomas Modyford, Governor of Jamica, wrote that 5000 acres of waste land by the sea side, mostly covered with salt water, had been granted to Captain John Noy and that there was "a very hopeful work begun for salt." Thomas Tothill, the Receiver General, reported that three salt ponds, containing upwards of 4000 acres, under the management of Noy had yielded 10,000 bushels, Noy asserting he could have made as many tons if a market had been available. (*CSP, Col., 1669-1674,* Nos. 270, 271) (Maine et al. Exhibit No. 269, pp. 98-105).

It should be noted that an earlier proclamation of Oliver, Lord Protector, dated October 10, 1655, gave encouragement to such as should transport themselves to Jamaica. These persons, among other things, were to hold and enjoy all fishings "within their [land grant] bounds." (*CSP, Col, 1675-1676,* No. 229) (Maine et al. Exhibit No. 268, pp. 97-8). This is a clear indication that the bounds
801 of the island were certainly not the low water mark.

Passing references to salt ponds in St. Christopher's in the Leeward Islands appear in the *Calendar of State Papers, Colonial.* For a time in the 17th century this island was held in part by the French. In 1679 Governor Stapleton complained that the French had seized a vessel which "rode at the great Salt Ponds upon St. Christopher's, which is as much His Majesty's property as any part of the Island." (*CSP, Col., 1677-1680,* No. 1137) (Maine et al. Exhibit

No. 248, p. 424). In 1691 Governor Christopher Codrington in a long report advised that the salt ponds should be reserved to the King. (*Id., 1689-1692,* No. 1,756B) (Maine et al. Exhibit No. 253, pp. 540-41).

In New York in 1687 Governor Dongan was accused of giving certain waste ground to the Mayor and Corporation of New York to the detriment of the inhabitants. The waste land in question was a dock reclaimed from the sea by the inhabitants themselves. (*CSP, Col., 1687,* Nos. 334 (p. 334), 1250) (Maine et al. Exhibit No. 286, pp. 334, 367).

Another significant incident is to be found in Jamaica, where in 1676 the bounds of the parish of St. Dorothy were changed to include a portion of the high seas on which an interloper on the Royal African Company's slave
802 trade monopoly had been seized. In the prosecution in the local Court of Admiralty objection was made based upon Stat. 15 Richard II, c. 3, that the seizure was *infra corpus comitatus* (within the body of a county). The Governor and Assembly were severely criticized by the Lords of Trade and Plantations for passage of the act and a royal instruction issued directed against further encroachments on the rights of the Admiralty. However, there is no suggestion whatsoever denying the rights of the crown to the seabed of the high seas. (*See CSP, Col., 1675-1676,* Nos. 972, 976, 987, 989 (Maine et al. Exhibit No. 268, pp. 418-19, 425, 429-31); *id., 1677-1680,* No. 1571 (Maine et al. Exhibit No. 248, pp. 1624-5); *id., 1681-1685,* Nos. 227, 367 (Maine et al. Exhibit No. 267, pp. 113-14, 183-84); *id., 1693-1696,* No. 1930 (p. 528) (Maine et al. Exhibit No. 287, p. 528); Labaree, 1 *Royal Instructions to British Colonial Governors, 1670-1776,* No. 659 (Maine et al. Exhibit No. 288).

Q. You have already touched on the earliest stage of

the evolution of legal doctrine regarding the status of English law, and particularly the royal prerogative in the American dominions of the crown. In the later colonial period, did that doctrine develop further so as to confirm crown and proprietary rights to the seabed and sub-
803 soil of the continental shelf? A. Yes. I have been considering thus far the royal right to the soil under the adjoining seas in the context of express and specific grants of prerogative rights by various provisions in colonial charters. But the prerogative rights of the crown were part and parcel of a larger body of law – the common law of England. We must ask whether as an element of this law, the common law of England, did the prerogative principle with which we are concerned become established in the American colonies prior to the Revolution?

In a sense, the answer to the question becomes of importance only if there is no applicable charter, commission, proclamation, etc., which establishes the right to the soil under the adjoining seas either in a general way (as in the case of the realm) or for a specific distance measured in leagues or miles.

In the first place, can the various charters, in and of themselves, be construed as in effect extending the laws of England, including the common law, to the various plantations for which charters were granted?

None of the colonial charters provided explicitly and in so many words that all the laws of England were to be in effect in any colony, plantation or province. The
804 charter granted to William Penn in 1681 for Pennsylvania is exceptional in that it did provide that designated portions of the laws of England were to be in force in the province until changed by local laws. (Maine et al. Exhibit 95). Under the learning of *Calvin's Case* (Maine

et al. Exhibits Nos. 243-244), if, in the case of a conquered Christian kingdom, the King put into effect the laws of England for the government of that country, no succeeding King could alter them without an act of Parliament. While the colonies generally were considered as conquered infidel kingdoms rather than conquered Christian kingdoms, the same principle might be applicable and the King would be inhibited in the exercise of his prerogative. This may have deterred the crown in dealing directly with the problem.

However, despite the absence of specific language in the charters the colonists from time to time seized upon various provisions of the several charters to support contentions that these letters patent extended the laws of England, particularly the common law, to the plantations or to a particular plantation.

The charters in making grants of legislative powers and ordinance-making powers restricted the exercise of such powers to the making of acts or ordinances which were
805 not contrary or repugnant to the laws of England. The exact language varied somewhat from charter to charter. It was argued by some colonists that this limitation indicated an assumption or understanding that the laws of England were in effect in the colonies to which charters were granted.

The charters invariably provided that the lands granted be held as of the manor of East Greenwich or Windsor or some other royal manor in England. The exact meaning and effect of this provision was a matter of some dispute. (See Viola Francis Barnes, "Land Tenure in English Colonial Charters of the Seventeenth Century" in *Essays in Colonial History Presented to Charles McLean Andrews by His Students* (1931) pp. 4-40; E. P. Cheney, "The Manor of East Greenwich in the County

of Kent," 11 *American Historical Review* 29 (1905); C. T. Carr, "Our Manor of East Greenwich," 29 *Law Quarterly Review* 349 (1913); 1 C. M. Andrews, *The Colonial Period of American History,* 86-87 (1934); J. Hurstfield "The Greenwich Tenures of the Reign of Edward VI," 65 *Law Quarterly Review* 72 (1949). Among other things, it was contended by some that this clause indicated an intention by the crown to have the laws of England extend to the granted territories.

806 Some charters specifically provided that the Statute of *Quia Emptores* (1292) should not be applicable in the case of land grants by the patentee. In other words, if Lord Baltimore, holding the province of Maryland under royal letters patent, granted the manor of St. Gabriel to Richard Roe in fee simple, said Roe would not then hold directly of the King as he would if the Statute of *Quia Emptores* were considered applicable. Some colonists raised the point that if the laws of England did not extend to the colonies, why was it necessary to exclude or interdict the operation of *Quia Emptores.*

* * * * *

835-836 BY MR. CLAGETT:

Q. What do you conclude from this review? A. I conclude that by the eve of the American Revolution there was general recognition that the common law of England was in force in the North American colonies. While certain points of law, involving particularly individual liberties, were at times in dispute between the crown and the colonies, no such dispute existed concerning crown rights in the seabed. Those rights, therefore, existed as fully on this side of the Atlantic as they did in English waters. With respect to royal colonies those rights remained vested in the crown itself and were delegated to the royal governments. In the case of charter

colonies, corporate or proprietary, seabed rights had been conveyed in whole or in part to such governments. I believe, in conclusion, that the accepted status of English law in this country on the eve of the Revolution confirms and strengthens the specific evidence from the charters
837 that seabed rights were recognized here in the colonial period.

Q. How did American independence affect the situation? A. Once independence was achieved or contemplated the whole problem of the reception of the laws of England entered into a new phase. The question now was how much of the colonial law should be received as the law of the individual states, for no state contemplated that with independence all their corpus of law vanished or should vanish leaving a *tabula rasa.* The instruments of transition, for the most part, were so-called "reception provisions" in either state constitutions or statute.

There was some variance but in general the common law of England was one of the elements received.

* * * * *

845 I have not made a systematic search to ascertain whether every state adopted such a statute or constitutional provision. Such statutes and provisions obviously simply confirmed what would have been the effect of independence in any event, that is, the succession by the new sovereign to the regality *in dominio,* including rights to the seabed of the marginal sea.

American independence was of course confirmed by the Peace of Paris of 1783, 8 Stat. 80. By Article I Great Britain acknowledged the United States, which are enumerated, as "free, sovereign and independent States." Article II provides that the boundaries of the United States are to include "all islands within twenty leagues of any

part of the shores of the United States." While there is no language, such as we have found in most of the colonial charters, referring to such regalities within these limits as waters, seas, mines, fishings, etc., it is my opinion that in the light of the long history of such charter provisions
846 it was well understood at the time that language granting islands within a certain distance of the coast also granted the intervening sea and seabed, out to at least that distance. Thus it is my opinion that the Peace of Paris included an acknowledgment by Britain that all crown rights in the marginal sea off the North Atlantic coast, at least out to 20 leagues, had passed to the states, and to the states individually.

In my opinion it is perfectly clear that the language quoted *must* have been intended to have this meaning. There is no doubt that at this period the crown claimed sovereignty over the marginal sea and seabed, and if the language quoted did not convey that sovereignty then from the British point of view the marginal sea and seabed immediately off the coast of the United States would have continued to belong to the crown of England. I think we can be confident that this absurd result was not intended.

This conclusion is graphically confirmed by a map (Maine et al. Exhibit No. 327) which was owned and closely studied by King George III. This is a copy of a map illustrating "The British Colonies of North America" published by John Mitchell in 1755. King George's copy of the map includes inserted lines which do not appear on the original. These lines extend into the sea. One of
847 them is variously labeled "Boundary of Nova Scotia by the Treaty of Utrecht," and "line expressing the exclusive Right of the Fishery Reserved to Great Britain by the Treaty of Utrecht, extending 30 leagues from the land."

The other line in the sea, extending all the way along the coast of the present United States north of Florida, is labeled "Boundary as described by Mr. Oswald." Richard Oswald was the principal negotiator for Britain of the Peace of Paris of 1783. The line was obviously intended to demarcate a boundary in the sea 20 leagues from the coast of the United States. It plainly represents a contemporaneous British interpretation that the language of the Peace of Paris quoted above was intended and understood to confirm to the United States – individually, not collectively – not only islands at least within 20 leagues of the coast but also the sea and seabed within that distance.

Moreover, an American copy of the same map, used by John Jay at the peace negotiations, shows a very similar boundary in the sea (Maine et al. Exhibit No. 339). Thus the parties were agreed on the construction to be given the treaty language.

For a complete description of the various copies of Mitchell's map and their significance for the Peace of Paris, see 3 Miller, *Treaties and other International Acts*
848 *of the United States of America,* 319-56, especially pp. 328-49. (Maine et al. Exhibit No. 355).

Q. The Federal Government argues that, even if the colonies owned the continental shelf during the colonial period, that ownership somehow passed to the federal government in the process of the formation of the Union. Do you have an opinion as to what the historical evidence indicates concerning the contemporary intent and understanding on this point? A. Yes. I think that on the basis of the historical evidence, so far as the intent and understanding of the framers is concerned, the argument you refer to is entirely without foundation. Indeed, there is overwhelming evidence that throughout the period of

the formation of the Union, up to and including the drafting and ratification of the Constitution of 1787, the states intended to preserve to themselves individually all ownership and territorial rights except those which were expressly transferred to the federal Government. No one, I believe, would contend that there was ever any express transfer of the rights of the states to the seabed of the continental shelf. It follows that, so far as the intent of the framers is concerned, there was no transfer at all, since the historical evidence conclusively negatives the idea of a transfer by implication.

849 Q. Please discuss the historical evidence which has led you to these conclusions. A. To begin with the Declaration of Independence, it of course declared "That these United Colonies are, and of Right ought to be Free and Independent States." Not one state, but states. I do not believe it has ever been, or can be, seriously questioned that the signers believed they were creating thirteen independent and sovereign states, and that each of those states succeeded individually to all sovereign, territorial and ownership rights which had previously been vested either in the British Crown or in the colonial government. The Supreme Court so held in a number of very early decisions.

Some delegates in Congress had argued that the colonies should confederate first and declare independence only afterwards. *The Constitution of the United States of America (Annotated),* Senate Document No. 39, 88th Cong., 1st Sess. (1964) at 26. But this proposal was rejected. The Articles of Confederation were not adopted by the Congress until November 17, 1777, and came into effect only in 1781.

Q. What evidence, if any, is there bearing on the question whether the Articles of Confederation were intended to accomplish any transfer of any territorial or ownership

850 rights, such as rights to the seabed of the continental shelf, from the states to the confederation government? A. There is considerable evidence, and all of it is inconsistent with the notion of such a transfer.

First, the provisions of the Articles themselves. Article II provides that "each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Article IV characterized the confederation as a firm league of friendship among these sovereign and independent states.

Article IX set up, in great detail, an elaborate procedure for the arbitration of disputes between two or more states concerning "boundary, jurisdiction or any other cause whatever," and contained the express proviso "that no state shall be deprived of territory for the benefit of the United States." It is hard to imagine any language which could more conclusively or expressly negative any notion of an implied transfer of territorial rights.

It is well known that one of the principal political issues, if not the principal issue, during the confederation period was whether, and on what terms, the states possessing territories west of the Appalachians by virtue of their
851 colonial charters would give up those territories. The whole history of the western lands question demonstrates a recognition that the states preserved all their territorial and ownership rights until and unless express cessions were made. This was a matter of paramount importance. Indeed, the reason the Articles of Confederation did not become effective until 1781 was that Maryland refused to ratify them until it was satisfied that the western lands of the larger states would be ceded.

New York ceded its western lands in 1781 (Maine et al. Exhibit No. 328, 3-5). Virginia in 1783 (*id.* at pp.

6-9), Massachusetts in 1785 (*id.* at pp. 10-12), Connecticut in 1786 (*id.* at pp. 22-24), and South Carolina in 1787 (Maine et al. Exhibit No. 370). The legal nature of these cessions, some of which contain conditions, was that of compacts between the ceding states and the other states, which explicitly accepted them through their delegates in Congress.

Virginia's cession, which covered the entire Northwest Territory, was conditioned among other things on the undertaking that the territory ceded should be formed into new states to be admitted into the federal Union (Maine et al. Exhibit No. 328, pp. 6-9). The Northwest Ordinance of 1787 recognized that certain provisions there-
852 of would require the consent of Virginia because they were not wholly consistent with the conditions in Virginia's act of cession. (Ordinance of 1787, Article V. See footnote to 1 Stat. 51, 53).

The Articles of Confederation contained no express provision permitting the acquisition or government of territory by the confederation, and for that reason the policy adopted is sometimes said to have been illegal. The problem was resolved by the doctrine that the conferdation government could acquire territory and govern it temporarily, until new states could be organized. This idea was put forward by Maryland as early as 1779. 14 *Journals of the Continental Congress, 1774-1789,* pp. 619-22 (Ford ed.) As I have mentioned, the Virginia act of cession, by far the most important, contained the obligation to create new states as an express condition. The Northwest Ordinance fully implemented that condition. Historians are nearly unanimous that from the beginning the purpose of the territorial system was the admission of new states into the Union. See, *e.g.,* Carter, "Colonalism in the Continental United States," *S. Atlantic Quarterly* 26 (1948); Burnett, *The Continental Congress* 222 (1941); 1 Willoughby,

The Constitutional Law of the United States 332 (1910); Langdell, "The Status of Our New Territories," 12 *Harv. L. Rev.* 365, 371 (1899).

853 Thus the development under the Articles of Confederation shows two things. First, the states were recognized as retaining all their territorial and ownership rights except insofar as they expressly ceded them, conditionally or unconditionally. Second, while no express provision in the Articles permitted the acquisition and government of territory by the confederation, the doctrine that the confdederation might acquire and govern territory *temporarily* pending its erection into new states won acceptance.

The converse of these propositions is, first, that no state could lose territorial or ownership rights by implication, without an express cession, and second, that there was no concept of *permanent* ownership by the confederation of territory or ownership for any purpose other than erection into states. The concept of a permanent federal domain outside state boundaries, whether on land or in the seabed of the continental shelf, was wholly foreign to the thinking of the confederation leaders.

On the latter point, one need not go so far as to say – though such a statement would probably be correct – that the framers intended that the confederation (and later the federal) government would be without the constitutional power to acquire and hold territory for any
854 purpose other than the erection of new states. The point is that it was generally – if not universally – considered during the period of the formation of the Union, and long afterwards, that that was the only purpose for which the United States should and would acquire territory. This militates heavily against the notion that any one intended or understood that during this same period the United States, implicitly, covertly, and without a word of discussion

or comment, was acquiring from the states exclusive rights to a vast subsea domain which it would hold forever.

Q. What, if any, changes in the situation you have described were brought about by the adoption and ratification of the Constitution of 1787? A. In my opinion none, although of course the constitution worked profound changes in many other respects.

In view of the long and critical debate over cessions during the confederation period, and the full awareness by all participants of cession and territorial questions, it is inconceivable that any of the framers believed that territorial or ownership rights were being ceded implicitly and without discussion.

At one point during the Constitutional Convention Rufus King of Massachusetts suggested that, if the debts of the states were to be assumed, then in return all un-
855 allocated lands of the states should be given up to the federal government. 2 Farrand, *Records of the Constitutional Convention* 328 (1911). But, signficiantly, this proposal received almost no support among the delegates and was never even seriously considered.

Article IV, Section 3 of the Constitution provides, of course, that new states may be admitted to the Union by Congress, but that no new state shall be formed within the jurisdiction of any other state or states without the consent of those states. It is interesting to note that Roger Sherman of Connecticut opposed this provision as unnecessary; to him it was self-evident that "the Union cannot dismember a State without its consent." *Id.* at 455. However, the representatives of Maryland vigorously urged that the provision be deleted for the opposite reason, namely that Congress *should* have the right to dismember the larger states without their consent. *Id.* at 461-62. There was a full debate on this question and the provision was

retained by a vote of 8 to 3. *Id.* at *462.* Again Maryland attempted to delete the provision, *Id.* at 463-64; and again the proposal was rejected by the same vote. *Id.* at 464.

Immediately after the adoption of the first clause of Article IV, Section 3 as it still remains, Charles Carroll of Maryland moved to add that nothing in the Constitution should be construed to affect the claim of the
856 United States to vacant lands (*i.e.*, lands not within any state boundary) ceded to them by the Treaty of Peace. *Id.* at 465. James Madison thought such a provision unnecessary but harmless, but proposed that "to make it neutral and fair, it ought to go farther & declare that the claims of particular States also should not be affected." *Id.* The debate resulted in the adoption of what became the second clause of Article IV, Section 3 of the Constitution:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State."

Also of paramount importance in ascertaining the intent of the framers is the provision of Article I, Section 8 of the Constitution, giving Congress legislative powers over a federal district for the seat of government and over all places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings. The section expressly provides that the federal district and the other places mentioned may be acquired only with the consent of the legislatures of the states in ques-
857 tion. The clause as first proposed, while providing that federal district could be acquired only by the cession of

particular states, did not require the consent of the state legislatures for the purchase of places for forts, etc., over which federal legislative authority was to be exercised. This omission was promptly pointed out by Gerry of Massachusetts, who contended that "this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government." Farrand, *supra,* at p. 510. The matter was immediately resolved by the addition of the words "by the Consent of the Legislature of the State," after which the clause was adopted unanimously.

In my opinion the constitutional provisions I have mentioned, and the debates leading to their adoption, are inconsistent with any notion that the framers intended that the adoption of the Constitution involved the implicit transfer by the states to the federal government of any territorial or ownership rights whatever, whether in the seabed of the continental shelf or elsewhere. Where such rights were to be transferred, express language was drafted to provide therefor and to require the consent of the states that would be affected. Article IV, Section 3 expressly protected the states
858 against dismemberment and provided that nothing in the entire Constitution should be so construed as to prejudice any territorial or property claim of any state. It is difficult to imagine how the intent could be more clear.

I might add that, soon after ratification of the Constitution, there were a number of express state cessions affecting properties in offshore waters. The ninth statute to be enacted by the First Congress, on August 1, 1789, assumed federal responsibility for maintenance and repairs "of all lighthouses, beacons, buoys and public piers

. . . at the entrance of, or within any bay, inlet, harbor, or port of the United States," but provided that this responsibility should continue for one year only unless meanwhile these aids to navigation were ceded to the United States by the states owning them. Act of August 7, 1789, Ch. 9, 1 Stat. 53; *History of the Formation of the Union Under the Constitution* 451 (Bloom ed. 1941). The various state legislatures promptly enacted such acts of cession. *Id.* The Virginia act of cession, adopted November 13, 1789, specifically provided that the conveyance did not include any fishing rights. All this, again, is inconsistent with the notion of implied transfers.

Q. Was there any change after the adoption of the Constitution in the doctrine or assumption that (aside
859 from the federal district and forts, etc.) the federal government could hold territory only temporarily, for the erection of states, and not as a permanent federal domain? A. In my opinion this doctrine or assumption remained vital after the adoption of the Constitution. This is the consensus of historians, such as Carter, Willoughby and Langdell, whom I have mentioned previously. In the *Dred Scott* decision, whatever the defects of other aspects of that decision may have been, Chief Justice Taney expressed the long-standing and virtually unanimous constitutional understanding when he wrote that territory "is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rely on the same discretion." *Scott v.*

Sandford, 60 U.S. (19 How.) 393, 447 (1856). The post-Civil War Supreme Court similarly considered that "this discretion in Congress [to govern territories] is limited by the obvious purposes for which it was conferred, and
860 that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union . . . ." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

Two of the states, North Carolina and Georgia, had not ceded their western lands at the time the Constitution went into effect. North Carolina's act of cession was adopted on December 22, 1789 (Maine et al. Exhibit No. 329, pp. 3-8); Georgia's act of cession was not adopted until April 24, 1802 (Maine et al. Exhibit No. 330, pp. 142-146). Both of these post-Constitution acts of cession contained, as had Virginia's earlier cession, a condition providing that the territories ceded should be formed into states. The United States accepted both these acts of cession. Further, the First Congress re-enacted the Northwest Ordinance with only minor changes (Act of August 7, 1789, Ch. 8, 1 Stat. 50), thus honoring the commitment to Virginia and confirming the policy that territories would remain such only temporarily until they could be erected into states.

For about a century after the adoption of the Constitution the policy that territories were temporary only
861 was faithfully followed. The territories acquired by the Louisiana Purchase, the purchase of Florida from Spain, the annexation of Texas and the Mexican War were all erected into new states either immediately or as soon thereafter as their conditions of settlement and population made statehood practically possible. It was only in the late 19th century, with the acquisition of territories outside the continental United States, that the possibility of permanent national territories began to be

discussed. That this represented a major new constitutional development is shown by the great debate at that time over whether "the Constitution follows the flag." See, *e.g.*, 3 *Selected Essays on Constitutional Law*, Ch. 5 (1938).

I might add that Article II of the Georgia act of cession of 1802 (Maine et al. Exhibit No. 330, p. 45) also contained an express cession by the United States of any claim, right or title they might have "to the Jurisdiction or Soil of any Lands lying within the United States, and out of the proper Boundaries of any other State" within the state of Georgia as it remained after the cession. The United States accepted this provision, which is wholly inconsistent with the notion that any territorial or ownership rights had passed by implication on the adoption of the Constitution.

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878 DIRECT EXAMINATION OF DAVID H. FLAHERTY

BY MR. BALILES:

Q. Will you please state your name and describe your background and experience? A. My name is David H. Flaherty. I am an Assistant Professor of History at the University of Virginia. I am currently on leave from the University of Virginia for the academic year 1971-72 as a Fellow in Law and History at the Harvard Law School, a Charles Warren Research Fellow in American History at Harvard University, and a Fellow of the American Coun-
879 cil of Learned Societies. I am devoting the current year to study and research in connection with my interests in American Legal History.

I graduated with an Honors B.A. from McGill University in 1962. From 1962 to 1965 I was in residence at Columbia University as a graduate student in early American

history. I studied under two of the leading experts in early American legal history, Professor Richard B. Morris of the History Department and Professor Joseph H. Smith of the Columbia Law School. I also worked as a research assistant to Professor Alan F. Westin of the Department of Public Law and Government at Columbia on a project sponsored by the Special Committee on Science and Law of the Association of the Bar of New York City to study the impact of modern technology on personal privacy. I received a Ph.D. in history from Columbia in 1967 for a thesis on the origins of the right of privacy in early America. This will be published in 1971 as *Privacy in Colonial New England* by the University Press of Virginia.

From 1965 to 1968 I was an instructor in history at Princeton University, where I first taught a course in the history of early American law. In 1968 I was appointed as an assistant professor at the University of Virginia to teach American legal history and to establish and direct a Joint Program in American and English Legal History
880 between the Law School and the History Department. This program, the first of its type to be created in the United States, is now in existence. I teach a full year lecture course on the history of American law to an enrollment of graduate students, law students, and undergraduates. I direct theses in legal history by graduate history and law students at both the Masters and doctoral levels.

I am a member of the American Society for Legal History, am on the editorial board of the *American Journal of Legal History,* and am a member of the Program Committee for the 1972 annual meeting of the American Society for Legal History.

In addition to the book on *Privacy in Colonial New*

England previously mentioned, I have recently published an extensive essay titled "Law and the Enforcement of Morals in Early America." The essay appeared in an annual volume published by the Charles Warren Center, Harvard University, titled *Perspectives in American History,* as well as in a volume titled *Law in American History,* to be published by Little Brown.

In 1969 I edited a volume titled *Essays in the History of Early American Law,* which contains essays by the leading experts on the subject. My contribution to the volume was titled "*An Introduction to Early American Legal History.*" I also prepared in 1969 an edition of the first
881 laws drawn up for the colony of Virginia between 1609 and 1612. These appeared as: *For the Colony in Virginia Britannia. Lawes Divine, Morall and Martiall,* comp. William Strachey. My introduction is titled, "The First Laws of English America." I have also published several essays in the *American Journal of Legal History.* I have delivered a number of papers to conventions, including the American Historical Association and the recent Conference on American Legal History at the Harvard Law School.

For the academic year 1970-71 I was a Visiting Lecturer at the Judge Advocate General's School of the United States Army in Charlottesville, Virginia and taught a course in American Legal History to members of the Advanced Class.

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Q. Professor Flaherty, the Commonwealth of Virginia is one of the defendant states in the matter now before this court. Would you please state briefly your under-
882 standing of the basic issues involved? A. The Commonwealth of Virginia is a defendant in *United States v.*

Maine, et al.[1] The United States claims it is entitled, to the exclusion of Virginia and the other states along the Atlantic coast, "To exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast, extending seaward to the outer edge of the continental shelf, for the purposes of exploring the sea and exploiting its natural resources . . . ."[2]

Virginia disputes the claim of the United States, and, by way of affirmative defense, asserts a claim over the seabed one hundred miles from its coastline in the Atlantic Ocean: ". . . Virginia alleges that as successor in title to the Virginia Company grantees of King James I of England, by letters patent dated May 23, 1609, Virginia is now, and ever since its admission to the Union has been, entitled to exercise dominion and control over the exploitation and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line to the limit of one hundred miles to the exclusion of any other political entity whatsoever, including the plaintiff (subject, however, to the limits of the National Seaward Jurisdiction established by the plaintiff). . . ."[3]

Q. Do you have an opinion whether the royal charters issued to the Virginia Company authorized the assertion of authority and jurisdiction over the marginal sea, the seabed, and the resources thereof, by the colony

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[1] No. 35 Orig., Oct. Term 1969.

[2] Complaint para. VI.

[3] Answer of Virginia.

of Virginia and if so, would you state your opinion and the reasons for it? A. Since the royal charters to the Virginia Company established the historic claims of the colony and State of Virginia to ownership over the marginal sea and the seabed within one hundred miles of the Virginia coast, the boundary provisions of these early charters require considerable attention in my testimony. King James I of England granted a charter for the colony of Virginia to the Virginia Company by letters patent dated April 10, 1606. The charter responded to their request to settle the territory "scituate lying and being all along the sea Coastes betweene fower and Thirtie degrees of northerly latitude from the equinoctiall lyne and Fyve and Fortie degrees of the same latytude and in the
884 mayne lande betweene the same Fower and Thirtie and Fyve and Fourtie degrees and the Ilandes thereunto adjacente or within one hundred myles of the Coaste thereof. . . ."[4] The charter directed that the petitioners from the Virginia Company "shall and may begynne theire saide firste plantacion and seate of theire firste abode and habitacion at anie place

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[4] The Jamestown Voyages Under the First Charter, 1606-1609 24 (P. L. Barbour ed. 1969). (Hereinafter cited as Jamestown Voy.) The most recent and most accurate printing of the First Charter is in *Id.* 24-34.

Quotations from primary sources in the text of this memorandum retain original spelling and punctuation, except that "i" and "j" and "u" and "v" have been silently transposed to correspond to modern usage.

All dates cited in the memorandum before 1752 are Old Style, except that in the dating of years before 1752, January 1 has been taken as the beginning of a new year instead of March 25. March 12, 1722/23 thus becomes March 12, 1723.

upon the said Coaste of Virginia or America where they shall thincke fytt and conveniente betweene the saide fower and thirtie and one and Fortie degrees of the saide latitude And that they shall have all the landes woodes soyle Grounde-
es havens portes Ryvers Mynes Myneralls Marshes waters Fyshinges Commodities and hereditamentes whatsoever from the said first seate of theire plantacion and haby-
tacion by the space of Fyftie miles of Englishe statute
885 measure all alongest the saide Coaste of Virginia and Amer-
ica towardes the Weste and southeweste as the Coaste lyeth with all the Islandes within one hundred myles directlie over against the same sea Coaste And alsoe all the landes soyle Groundes havens portes Ryvers Mynes Myneralls woodes Marrishes waters Fyshinges Commodities and here-
ditamentes whatsoever from the saide place of theire firste plantacion and habitacion for the space of Fiftie like Eng-
lishe miles all alongest the saide Coast of Virginia and America towardes the Easte and Northeast as Coaste lyeth together with all the Islandes within one hundred Miles directlie over againste the same sea Coaste . . . ."[5] Char-
les M. Andrews, one of the leading authorities on early American history, has commented that the territorial boundaries set forth in the Virginia charter of 1606 "form-
ed a section of land, which according to the wording of
886 the patent was to extend . . . one hundred miles out to sea."[6] The charter then included a specific grant of min-
eral rights in any part of the territorial property of the

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[5] *Id.* 25-26; also 1 W.W. Hening, The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619 (1819-1823) 59 (hereinafter cited as Hen. Stat.) The latitudes noted herein only include the area granted to the Virginia Company.

[6] 1 C. M. Andrews, *The Colonial Period of American History* 84 1934-1938). (Hereinafter cited as Andrews, *Col. Per.*)

colony: "And moreover wee doe graunte and agree for us our heires and successors that the saide severall Counsells of and for the saide severall Colonies shall and lawfully may by vertue hereof from tyme to tyme without interupcion of us our heires or successors give and take order to digg myne and searche for all manner of Mynes of Goulde Silver and Copper aswell within anie parte of theire saide severall Colonies as of the saide Mayne landes on the backeside of the same Colonies . . . ."[7] The Crown reserved to itself a specific portion of the discovered minerals. It also empowered the colony to defend itself "aswell by sea as by lande," and to control those trading with the colony.[8]

On November 20, 1606 the English Crown issued a set of instructions for the government of the colony of Virginia. These established a Council in London "for ye good Government of ye people to be planted in those part(s) and for the good ordering and disposing of all causes happening within ye same . . . ." This Council had responsibility "for all matters, which shall heppen in Virginia or any the Territories of America between 34 and 45 deg: from ye aequinoctial line northward, and the Islands to
887 the several Colloniies limitted, and assigned . . . ."[9] A royal Ordinance and Constitution of March 9, 1608 enlarging the Council basically repeated this earlier grant of jurisdiction, including "the Islandes to the severall Collonies limitted and Assigned . . . ."[10]

For purposes of reorganization and the revitalization of its settlement efforts, the Virginia Company secured a second

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[7] 1 Jamestown Voy. 28.

[8] Id. 29, 30.

[9] Id. 35.

[10] *Id.* 74.

charter from the crown by letters patent dated May 23, 1609. It defined the jurisdiction of the colony over the marginal sea, the seabed, and the resources thereof in even more precise terms than the first charter. The Company received: "All those lands, countries, and territories, situate, lying, and being, in that part of America called Virginia, from the point of land, called Cape or Point Comfort, all along the sea coast, to the northward two hundred miles, and from the said point of Cape Comfort, all along the sea coast to the southward two hundred miles . . . . and also all the islands, lying within one hundred miles, along the coast of both seas of the precinct aforesaid; together with all the soils, grounds, havens, and ports, mines, as well royal mines of gold and silver, as other minerals, pearls and precious stones, quarries, woods, rivers, waters, fishings, commodities, jurisdictions, royalties, privi-
888 leges, franchises and preheminences, within the said territories, and the precincts thereof, whatsoever, and thereto and thereabouts, both *by sea* and land, being or in any sort belonging or appertaining . . . ."[11] This specific provision of the charter grant neatly made clear the inclusion within the confines of Virginia of the marginal sea and the seabed. The Council of the Virginia Company in London was also granted powers of government "not only within the precincts of the said Colony, but also upon the seas in going and coming, to and from the said Colony,

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[11] 1 Hen. Stat. 88 (emphasis added). The location of Point Comfort, which is at the mouth of the James River in Chesapeake Bay, on the seacoast was typical of contemporary georgraphic uncertainty on such matters; but the reference may have been to what came to be called Cape Henry.

. . . ."[12] The 1609 Charter further reaffirmed the Company's privilege of mining in Virginia: "to dig and to search for all manner of mines of gold, silver, copper, iron, lead, tin, and all sorts of minerals, as well within the precinct aforesaid, as within any part of the main land, not formerly granted to any other; . . ."[13] As thus defined in the charter, the precincts of Virginia included both the main land and the marginal sea, with
889 territory as yet unknown and ungranted on the mainland the only area capable of future expansion.

This Charter of 1609 also included a rule of construction that may be employed to resolve any ambiguities as to whether the marginal sea and the seabed to a distance of one hundred miles from the coast were within the boundaries of the Virginia Colony: "Our will and pleasure is, that in all questions and doubts, that shall arise, upon any difficulty of construction or interpretation of any thing, contained either in this, or in our said former letters patents, the same shall be taken and interpreted, in most ample and beneficial manner for the said treasurer and company, and their successors, and every member thereof."[14]

The Virginia Company secured a third charter from the Crown dated March 12, 1612. Its primary purpose was the extension of Virginia's seaward boundaries to include the Bermudas, which lie just under six hundred miles off Cape Henry. Since the settlement of Virginia had not yet been commercially successful, the Bermudas presented an attractive additional area for exploitation by the Company. The Crown was given to understand:

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12 1 Hen. Stat. 92.

13 1 Hen. Stat. 93.

14 1 Hen. Stat. 97.

"that in those seas, adjoining to the said coast of Vir-
890 ginia, . . . and yet not far distant from the said colony in Virginia, there are, or may be, divers islands, lying desolate and uninhabited, some of which are already made known and discovered, by the industry, travel and expences of the said company and others also are supposed to be and remain, as yet, unknown and undiscovered, all and every of which it may import the said colony, both in safety and policy of trade, to populate and plant, in regard whereof, as well for the preventing of peril, as for the better commodity and prosperity of the said colony, they have been humble suitors unto us, that we would be pleased to grant unto them an enlargement of our said former letters patents, *as well for a more ample extent of their limits and territories into the seas adjoining to and upon the coast of* Virginia, . . ."[15]

The last clause makes perfectly clear that the Crown understood the boundaries and jurisdiction of Virginia already extended into the marginal sea and the seabed.

The third charter proceeded to extend the boundaries of Virginia to include "all and singular those Islands whatsoever, situate and being in any part of the ocean seas bordering upon the coast of our said first colony in Virginia, and being within three hundred leagues of any the
891 parts heretofore granted to the said treasurer and company, in our said former letters patents, ..."[16] The grant further included "all and singular soils, lands, grounds, havens, ports, rivers, waters, fishings, mines, and minerals, as well royal mines of gold and silver, as other mines and minerals, pearls, precious stones, quarries, and all

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15 1 Hen. Stat. 99-100 (emphasis added).

16 1 Hen. Stat. 100.

and singular other commodities, jurisdictions, royalties, privileges, franchises and preheminences, both within the said tract of land upon the main, and also within the said Islands *and seas* adjoining, whatsoever, and thereunto or thereabouts, both by sea and land, being or situate; . . . ."[17] In Quo Warranto proceedings before the Court of King's Bench from November 4, 1623 to May 24, 1624, the Virginia company in its brief summarized why it had obtained the 1612 charter and the meaning of its provisions. The section of the 1612 charter just quoted was restated by the Company in language that further made clear Virginia's jurisdiction over the marginal sea and seabed. The grant included "all and singular the soil, ground, land, harbors, rivers, waters, fisheries, mines and minerals, pearls, precious stones, quarries, and all and singular commodities, jurisdictions, regalities, privileges, franchises, and pre-eminences both being and situated in the aforesaid tract of land upon the mainland, and in any of the afore-
892 said islands *and seas* adjacent whatsoever, and near to the same and around them both *by sea* and by land, ..."[18]

Although the innumerable islands of the Bermudas had been the main inspiration for the extension of seaward boundaries in the 1612 charter of the Virginia Company, these specific islands soon passed into other hands. In November, 1612 this Company sold its title and rights in Bermuda to a new group, who remained dependent upon the Virginia company's charter. In November, 1614 the Bermuda group surrendered these acquired rights to the Crown. In turn the King issued a royal charter dated June 29, 1615 to the "Governour and Company of the

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[17] 1 Hen. Stat. 100 (emphasis added).

[18] 4 Records of the Virginia Company of London (S.M. Kingsbury ed. 1906-1935) 376 (emphasis added). (Hereinafter cited as Rec. Va. Co.)

City of London for the Plantation of the Somer Islands."[19]
893 The Bermuda charter made clear that the Virginia company had only sold and given up the Bermudas or Somer Islands out of the total grant of territory it had received in 1612.

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896 An examination of the successive charters of the Virginia Company from 1606 to 1612 makes plain that the marginal sea and the seabed within one hundred miles of the sea coast were included in the territory granted to the Company by the Crown. One might have assumed that the grant of offshore jurisdiction over islands implied jurisdiction over the marginal sea surrounding the islands, but in the charters Virginia's authority over the marginal sea and the seabed was made specific. Virginia's chain of title to boundaries extending one hundred miles into the marginal sea dates back to these original charter grants from the Crown.

These charters were the first letters patent issued by
897 the Crown to colonizing or commercial ventures that had to attempt to define territorial boundaries in the New World being settled and explored. Although the fifty year old Muscovy Company and the infant East India Company served as prototypes for the organization of the Virginia Company, they could not fill this role with

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[19] Craven, An Introduction to the History of Bermuda, 17 William and Mary Quarterly, Second Series 195 (1937). The Bermudas were also known as the Somers Islands. The Bermuda Charter of 1615 is printed in 1 J. H. Lefroy, *Memorials of the Discovery and Early Settlement of the Bermudas and Somers Islands, 1515-1685* 84-98 (1877). It outlined the basic sequence of events described in this paragraph, dating from the 1612 charter of the Virginia Company. The latter's part in the affair is related in *Id.*, 84-85.

respect to the definition of boundaries. The earlier companies had been founded for trade and not settlement purposes. Thus the question of territorial limits for settlement attracted the careful attention of those drafting the first Virginia charter. The inclusion of the marginal sea within the boundaries of Virginia must be viewed as the result of conscious effort. The Virginia charters were drawn up by royal officials closely associated with the Crown in response to the petitions of some of the leading citizens of the realm. The historian Andrews has pointed out that before the first charter of the Virginia Company passed the royal seals "the text was undoubtedly scrutinized by Attorney General Coke and Solicitor General Dodderidge and had the great seal affixed by Lord Chancellor Ellesmere, the three men who, with Popham, were the greatest lawyers of the day."[20] Such individuals knew what they were doing in terms of the jurisdiction and expansive boundaries granted to the Vir-
898 ginia Company. The process of obtaining a royal charter in the seventeenth century was not a haphazard business, but an established procedure with a great deal of careful scrutiny built into the system.[21] Nor was the Company's acquisition of seaward jurisdiction a secret from contemporaries. The Spanish Ambassador to London wrote to Philip III on January 24, 1607 about the plans for the settlement of Virginia, including the information that the English Crown had given "them permission to occupy any

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[20] 1 Andrews, *Col. Per. 85.*

[21] See the careful process described in 3 H.L. Osgood, The *American Colonies in the Seventeenth Century* 19 (1904-1907).

island within a hundred leagues from shore. . . ."[22] Emanuel van Meteren, consul to the Antwerp merchants in London, and a principal foreign observer there, printed a summary of the 1606 charter in 1608, which included the information that the Virginia Company's territories included the islands within one hundred miles of the seacoast.[23] Captain John Smith's map of Virginia in 1612 showed the extensive ocean off the Virginia seacoast under the title of "The Virginian Sea." Smith made this comment about Virginia's eastern boundary: "The bounds thereof on the East side are the great Ocean."[24] Smith was familiar with the boundary provisions of the Virginia
899 charters. His lack of precision concerning the exact location of Virginia's boundary in the ocean was typical of many such incidental descriptions in the seventeenth and eighteenth centuries. No one disputed Virginia's territorial claims to the east in contrast to the boundary disputes that persisted in all other directions during the colonial era. Commentators rarely made the effort necessary for precision concerning Virginia's one hundred mile jurisdiction into the marginal sea.

Research has uncovered additional explicit recognitions that the Virginia charter grants did include parts of the Atlantic ocean and its appurtenances. The Privy Council ended several years of debate between the Virginia and New England Companies over freedom of the seas with respect to fishing rights by an order regarding freedom of fishing dated June 18, 1621, declaring that "the said

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22 1 Jamestown Voy. 70

23 *Id.* 271.

24 *Id.* 334. The 1612 map is opposite 374.

Colonies should fish att Sea within the Limitts and bounds of each other reciprocally . . . ."[25] This made clear that each colony did have an expanse of ocean within its boundaries. Again, in 1626 the King of England directed Attorney General Heath to prepare letters patent for a group of subjects to establish a colony on the Amazon River in America, to include such provisions "as have bene heretofore
900 graunted to any others uppon the like undertakings . . . ." The grant of territorial boundaries was to extend "from east to west throughout the continent from sea to sea, and all islands and terrytaries within twenty myles adjacent."[26] This was obviously designed in imitation of the Virginia charters, except that the latter had provided for one hundred miles into the marginal sea. In 1688 James II informed the governor of Virginia of the appointment of Sir Robert Holmes as royal coordinator of a drive against pirates. The king had granted Holmes for a three year period all the goods belonging to or having been seized by pirates "upon the Land in any part or parts of America, or any the Islands or Sea limits or Territorys thereof."[27] In an episode involving Virginia in 1719 there was another explicit recognition of the concept of ownership of the marginal sea based on charter grants. A pirate seized a
901 ship east of Bermuda, and brought it to North Carolina where he burnt it on shore. A Virginia vessel captured

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[25] 3 Rec. Va. Co. 459-460

[26] 1 A. W. McDonald, Transcript Chiefly Concerning the Boundary Line Between Maryland and Virginia 283-284 (hereinafter cited as McDonald Transcr.) These transcripts were made from the original documents in the Public Records Office, London for the State of Virginia around 1860. Five manuscript volumes of these transcripts now exist in the Virginia State Library, Richmond.

[27] 7 McDonald Transcr. 282

the pirate there and seized the accompanying goods. Controversy ensued between Virginia and North Carolina over the rights to these pirate goods. As Governor Spotswood of Virginia explained the situation in a letter to the Lords of Trade on May 26, 1719, the government of North Carolina claimed the captured goods, because these were seized "within *the Seas of the Soil* of the Lords Proprietors...."[28] In an important opinion written in 1823 Chief Justice John Marshall of the United States Supreme Court discussed the scope of the early Crown charters, especially those to Virginia; "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and *the waters.*"[29]

902 The explanations for why Virginia received ownership and jurisdiction over the islands off the seacoast and the marginal sea and seabed in its charters need not be sophisticated. Knowledge about the geography of the area that became the colony of Virginia was not extensive in 1606. The instructions of the London Council in the fall of 1606 to those about to settle the colony made clear that they did not really know very much as yet about Chesapeake Bay. The first settlers were instructed to find a safe port in the entrance of a navigable river on the seacoast of Virginia, but a little inland. It was also thought possible that the first habitation might have to be an island off the coast of Virginia that was fortified and protected by nature.[30] The

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[28] 2 The Official Letters of Alexander Spotswood, Lieutenant Governor of the Colony of Virginia, 1710-1722, 324 (emphasis added) (R. A. Brock ed. 1933). (Hereinafter cited as Spotswood)

[29] Johnson and Graham's Lessee v. William M'Intosh, 21 U.S. 580 (8 Wheat. 580) (emphasis added).

[30] 1 Jamestown Voy. 49-50

discovery of numerous islands in the marginal sea in the first explorations of Virginia after 1606 only reinforced the importance of including islands discovered and undiscovered in the charter grants. Captain John Smith reported in 1608 that in the ocean off the Eastern Shore there were "many Isles both great and small, some woody, some plain, most of them low and not inhabited."[31] Eventually at least twenty islands were discovered off the Eastern Shore
903 of Virginia north of Cape Charles. The Eastern Shore comprised more than three-quarters of the Virginia seacoast. In the seventeenth century these islands off the Eastern Shore were coveted and rapidly patented by residents of Virginia concerned with raising cattle and horses.[32] The sea-fenced, grass-covered islands served as excellent ranges for livestock.

The prospect of important offshore islands being discovered loomed large in the minds of the leaders of the Virginia Company. It reinforced their desire for offshore jurisdiction not only over islands, but over the seas that might contain some of the fabled riches of the New World. The first maps of Virginia in the seventeenth century by modern standards much exaggerated the size of the islands off the Eastern Shore.[33] This only encouraged and symbolized the commercial ambition of the investors in the Company. They wanted their charters to provide carefully for every possible right in the event that something might prove commercially exploitable. The grants of jurisdiction over the marginal sea and the seabed, which became typical of many other colonial charters, also furnished protection for
904 the future interests of the Company in admiralty cases and

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31 Quoted in S. M. Ames, *Studies of the Virginia Eastern Shore in the Seventeenth Century* 3 (1940).

32 See *Id.* 32-35.

33 See Verner, The First Maps of Virginia, 1590-1673, 58 Virginia Magazine of History and Biography 3-15 (1950).

droits and assured it of some control over fishing and fishermen.[34]

Q. Do you have an opinion whether the annulment of the Virginia Company's charter in 1624 had any implications for Virginia's territorial boundaries in the marginal sea and if so, would you please state your reasons for it?

A. In July, 1623 the Privy Council decided to seek an annulment of the charter of the Virginia Company that would bring the colony directly under royal control. It drafted a plan of reorganization designed to prevent the seeming mismanagement of the affairs of the colony that was occurring under Company rule. The Privy Council submitted this plan to the Virginia Company on October 8 in the hope of securing a voluntary surrender of the charter. The Company refused to comply on October 20. The court of King's Bench issued a writ of Quo Warranto against the Company on November 4, 1623. By its decision of May 24, 1624 on the quo warranto proceeding confirming the action of the Privy Council, the charter of the Virginia Company was annulled. Since Virginia's jurisdiction over the marginal sea, the seabed, and the resources thereof had depended upon the charter grants, the actual
905 implications of the annulment of the charter in 1624 must be examined.

THE SPECIAL MASTER: I wonder whether you don't mean by its decision, referring to the court's decision, because you hadn't mentioned the decision before.

THE WITNESS: I am not sure I understand – oh, by this decision.

THE SPECIAL MASTER: You hadn't mentioned any decision prior to that point. But you mentioned the

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[34] See Helen J. Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century 33-34 (1931).

proceedings begun in the court by quo warranto. I think you are going into a subsequent decision of the court in the quo warranto decision.

THE WITNESS: Do you want –

THE SPECIAL MASTER: I think you mean by the decision of the court of May 24th.

THE WITNESS: Yes, Your Honor.

THE SPECIAL MASTER: All right, proceed.

THE WITNESS: The distinguished historian and lawyer Philip A. Bruce has well expressed the prevailing interpretation by historians of what happened in 1624 in terms of the issues that concern your question: "The substance of the change was that the Crown and not a corporation was
906 to exercise the direct controlling power."[35] Another leading authority, Herbert L. Osgood, wrote that "the province thenceforth stood in immediate, instead of mediate, relation to the Crown. The territory within its bounds, so far as it had not already been granted to private parties, became again a part of the royal domain."[36] The changes in 1624 primarily represented an alteration in the form or method of government in Virginia. This occurrence did not affect the boundaries or jurisdiction of the colony over its territory.

A variety of statements by the Crown and its agents in these years made the nature of the changes in 1624 perfectly clear. When the Virginia Company was debating the request of the Privy Council in October, 1623 that it surrender its charter in return for a new one, the Company received reassurances "that in the same [new] Charter his Majestie purposeth to make the like graunte as well of lande

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35 2 P. A. Bruce, *Institutional History of Virginia in the 17th Century* 259 (1910).

36 3 Osgood, *Amer. Col. 17th Century* 72; see also *Id.* 52, 58.

as of fraunchises and other benefits and thinge as were graunted in the former Charter with Declaration that for the setlinge and establishinge of private intereste of all men
907 this newe Companie shall confirme or newly graunt unto them the like interest as they enjoy by graunt order or allowance of the former Companie: . . . ."[37] On October 20, 1623, the Privy Council further held a meeting to squelch rumors concerning the implications of the impending demise of the Virginia Company:

"Whereas their Lordships were this day informed that there is a great discouragement amongst many adventurers of the Plantation in Virginia by reason of the intended reforminge and chaunge of the Government, whereupon they are fearefull to prosecute their adventures, so as it may occasion some stopp of those Shipps which are nowe ready fraughted and bound for that Country; . . . . for the better satisfyinge of those, who either through error or mistakinge or through the untrue suggestions of others have conceaved any such feare or discouragement, their Lordships do thinke fitt hereby to declare againe that there is no other intention theen meerely and onely the reforminge and chaunge of the present Government, whereof his Majestie hath seen so many bad effecte as wilbe to the endangeringe of the whole plantation, if it continue as it is; . . . ."[38]

On May 13, 1625 the newly crowned Charles I issued a royal proclamation concerning Virginia wherein he affirmed that his only aim in having the charter judicially repealed
908 and adjudged void was "to reduce that government into such a right course as might best agree with that form which was held in the rest of his royal monarchy; . . . ." The

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[37] 2 Rec. Va. Co. 469.

[38] 2 Rec. Va. Co. 476.

proclamation that Virginia was now a royal colony, included a confirmation of its charter boundaries: "We hold these territories of Virginia and the Summer Islands, as also that of New England . . . and within the limits and bounds whereof our late dear father, by his letters patents, under his great seal of England, remaining of record, hath given leave and liberty to his subjects to plant and inhabit, to be a part of our royal empire, ..."[39] The Crown had no intention of altering the previously established boundaries of the colony when it replaced the Virginia Company with royal rule.

The meaning of the 1624 action by the Crown with respect to the charter of the Virginia Company has been considered in litigation before the United States Supreme Court In the celebrated case of *Johnson v. McIntosh* in 1823, a series of facts were set forth. The first cited the Virginia charter of 1609 and its grant of jurisdiction over islands within one hundred miles of the seacoast, as well as rights in the soil and ground in the various territories. The fourth
909 fact was as follows:

"4th. That in the year 1624, this corporation was dissolved by due course of law, and all its powers, together with its rights of soil and jurisdiction, under the letters patent in question, were revested in the crown of England; whereupon the colony became a royal government, with the same territorial limits and extent which had been established by the letters patent, and so continued until it became a free and independent state; except so far as its limits and extent were altered and curtailed by the treaty of February 10th, 1763, between Great Britain and France, and by the

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[39] M. Jensen ed. *American Colonial Documents to 1776* (English History Documents, IX) 235-236 (1955) (hereinafter cited as Jensen, *Amer. Col. Doc.)*

letters patent granted by the King of England for establishing the colonies of Carolina, Maryland, and Pennsylvania."[40]

In the course of his opinion Chief Justice Marshall took specific notice of the Virginia 1609 charter: "This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the Company, by the
910 judgment of the Court of King's Bench on a writ of *Quo Warranto;* but the whole effect allowed to this judgment was to revest in the crown the powers of government, and the title to the land within its limits."[41]

The significance of the 1624 action of the Crown against the Virginia Company with respect to the territorial claims of the colony and state became a subject of debate in the United States Congress in the early 1840's. While the ultimate concern was the legitimacy of continuing land claims by Virginia veterans of the Revolution, the issue was joined on the question of whether or not Virginia had been entitled in the first place to the Western lands that the state claimed during the Revolutionary era. A report to the House of Representatives in 1842 revived an old and discredited argument by an examination of the charters to Virginia.[42] According to this line of reasoning, Virginia could not claim its ancient boundaries after 1624 because its charter had been revoked. Congressman Edmund W. Hubard of Virginia responded to this attack by preparing a new report for the Committee on Public Lands that was

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[40] Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat. 544) 545-546.

Justice Joseph Story quoted an extensive segment of this opinion in the first chapter of his first volume 1 *Commentaries on the Constitution of the United States* 8-20 (1833).

[41] Id. 21 U. S. (8 Wheat. 578) 578.

[42] H. R. Rep. No. 1063, 27th Cong., 2d Sess. 49-63 (1842).

911 presented to the House on May 2, 1844.[43] Hubard sought to explain how the colonists "considered a charter as the sure foundation of all their rights, and as the palladium of their liberties; and why, until 1776, they always referred to their charters (although revoked by the grantor) as an ever-enduring guaranty to them and their posterity of their rights to life, liberty, and property; . . . ." Despite some impassioned rhetoric concerning the solemn and perpetual nature of a charter issued by a king to his free subjects, the report of the committee also addressed itself to some more specific considerations:

"A very large portion of that space included within the circuit of not less than twelve of our present counties, is still claimed and held under patents granted by the London Company during the legal existence of that corporation, and any lawyer will tell this author [of the 1842 report] that titles so derived were as valid and sacred after the charters were annulled, as they had been before; and that they continue as valid at this day, as any titles derived under grants of the Crown before the Revolution, although such grants may be under the great seal of England, as the manner is, au-

912 thenticated *per ipsum regem.*"

The Hubbard Report then addressed itself to the issue of what had actually occurred in 1624:

"It is apprehended, that if the details of that controversy, and the judgment pronounced in it, were examined, it would be found that the judgment only took away the monopoly, and the power of government over the colony,

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[43] H.R. Rep. No. 457, 28th Cong., 1st Sess. (1844). The House agreed to print two thousand extra copies of the Hubard Report. (Hereinafter cited as Hubard Report, 1844). The Bill accompanying the Report, H.R. No. 352 was given a first and second reading onMay 2 and then sent to the Committee of the whole House on the State of the Union.

(Quotations below from *Id.* 18-19, 20-21, 23, 24.

which were vested in the company by the charter, wihout affecting at all the territorial limits, or other rights of the colony itself; that the only change was from the proprietary government of a trading company to a royal government, over the same dominion and colony. It is sufficient to state that it was so understood at the time, and ever afterwards."

The Report concluded that with respect to the effect of the actions in 1624 on the territorial limits of Virginia, "the same title to the lands within its limits, which the charter had vested in the company, was revested in the Crown. The charter, so far from being annihilated, was recognized. The vacant lands in the colony were thenceforth crown lands in the king's dominion of Virginia, and the extent of that dominion was only to be ascertained by the territorial limits described in the charter."

913 The colonists in Virginia generally approved of the demise of the Virginia Company, although in the first years after 1625 they made some efforts toward securing a new royal charter to confirm the privileges they had previously held. On March 2, 1624 the Virginia Assembly wrote to England that they were "given to understand that his Majestie hath signified his gratious pleasure for the universal good of this plantation . . . to institute another forme of Government, whereby this worke may be upheld and better prosper in time to come, and to that end hath required surrender of the present Pattents, declaring nevertheless his Majesties Royall resolution of assuring unto the perticular members of the Company such lands and priviledges in the said Countrie, as according to the proportion of each mans adventure and proper interests do now belong unto them; . . . ."[44] The Assembly thanked the Crown for its

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[44] 1 McDonald Transcr. 86-87; see also 1 Andrews, *Col. Per.* 176 note.

care and submitted to the royal will. A month after the final overthrow of the Company, the Crown ordered the Privy Council to establish a committee to oversee the governance of Virginia. The directive made clear that "His Majesty resolved to renew a Charter with the former Priviledges and with Amendment of such imperfections as concern ye Government of ye Plantation and Colony."[45] The
914 death of James I on March 27, 1625 ended any plans for the renewal of a charter for Virginia and temporarily pushed the whole issue of this colony to the background. On May 13, 1625 Charles I did declare his firm intention not to revive the Virginia Company.[46] In the next few years thereafter, the Crown recurrently confirmed the colonists in their lands and privileges, such as in the instructions of September, 1628 to Governor John Garvey, but a new charter did not appear.[47]

The Commissioners appointed by the Privy Council to oversee the governance of Virginia after 1625 seem to have attempted to secure a new charter for the colony of Virginia in 1631. This effort was interesting, not because it succeeded, but because it indicated a continuing understanding that the colony still enjoyed its boundaries as established by the charters and deserved to have these formally renewed. On March 2, 1631 the Commissioners wrote to the Attorney General that the Virginia adventurers (probably a reference to the remnants of the Virginia Company in London rather than to actual colonists) had responded favorably to the king's willingness,

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45 1 McDonald Transcr. 366-367 (June 24, 1624).

46 See 1 Andrews, *Col. Per.* 191-192, 194.

47 2 McDonald Transcr. 49 (Sept. 12, 1628); see also 2 Bruce, *Institutional History* 260, 262.

915 "In profering unto them a new charter of restitution of a Company, with confirmation of all their ancient Territories, Landes, llandes, Rights and Priviledges whatsoever; point of Government only with some few other reservations excepted. It is (on their behalf) ordered: that Mr. Attorney Generall bee desired to pass no Grant or Patent unto any Person or Corporation, but with proviso or exception of all territories etc formerly granted to the late Company of Virginia, by all or any the severall grants of his now Majesties' late royal father King James."[48]

On May 24, 1631 the King appointed a commission under the direction of the Earl of Dorset to investigate the Virginia situation. Their report later in 1631 recommended a reincorporation of the Virginia Company retaining only the power of government in the hands of the Crown: "And further that this Company may have granted unto them by this Charter the ancient territories, land, and islands of and belonging to Virginia in as ample manner as the same were bounded and graunted unto the late Company, by all or any the several graunts or letters patents whatsoever of your Majesties late Royall Father King James of blessed memory."[49] On November 25, 1631, Dorset wrote on
916 behalf of the king to a person who was familiar with the former proceedings of the colony of Virginia and who possessed drafts of its former charters, asking that he assist in the preparation of a new patent for the colony.[50] Yet despite these high powered efforts, a new charter did not appear. There exists a long memorandum of anonymous

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48 2 McDonald Transcr. 65-66.

49 The recommendation to the Crown was probably made in November, 1631. 2 McDonald Transcr. 90-91.

50 2 McDonald Transcr. 95.

considerations against giving Virginia a new charter that makes a very strong case in favor of royal rule.[51] The author intimated that the desire for a new charter was inspired by the old adherents of the Virginia Company who had infiltrated the group of commissioners appointed to run the colony.

Virginia over the years has vigorously asserted its view that the actions of 1624 did not affect the territorial limits and other rights of the colony and state, particularly in the course of its boundary controversies with Maryland.[52] Maryland has argued that the 1624 action abrogated all claims, territorial and governmental, of Virginia. It has based its claims in these disputes on its own interesting charter of June 20, 1632, which included:

917 ". . . All islands and islets within the limits aforesaid, all and singular the islands, and islets, from the eastern shore of the aforesaid region, towards the east, which had been, or shall be formed in the sea, situate within ten marine leagues from the said shore; with all and singular the ports, harbours, bays, rivers, and straits belonging to the region or islands aforesaid, and all the soil, plains, woods, mountains, marshes, lakes, rivers, bays, and straits, situate, or being within the metes, bounds, and limits aforesaid, with the fishings of every kind of fish, . . . in the sea, bays, straits, or rivers within the premises, and the fish there taken; and moreover all veins mines, and quarries, as well opened as hidden already found, or that shall be found within the region, islands, or limits aforesaid, of gold, silver,

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51 2 McDonald Transcr. 97-102 (1631?); see also 1 Andrews, *Col. Per.* 201-202.

52 See L.N. Whealton, *The Maryland and Virginia Boundary Controversy (1668-1894)* 8-9 (1904).

gems and precious stones, and any other whatsoever. . . ."[53] The Maryland charter obviously represented a serious challenge to the integrity of Virginia's territorial borders as es-
918 tablished by the original charters. The colony lodged a vigorous protest with the royal authorities against this dismemberment of their colony, arguing that the grant to Lord Baltimore was an infringement upon their charter and an intrusion into their territory.[54]

The Crown referred the matter to the court of Star Chamber in June, 1633, and the court handed down its decision on July 3: their Lordships "did think fit to leave the Lord Baltimore to his Patent, and the other partys to the course of law according to their desire."[55] This was not a legal ruling against the validity of Virginia's claim, but rather a simple refusal to intervene on the basis of the Virginia petition. Charles M. Andrews has suggested that the legal advisor to the Privy Council agreed that the Maryland
918 charter infringed on Virginia's rights, but that the Privy Council "could do no more than accept a situation which had arisen too late to be remedied . . . . It finally decided

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53 Jensen, *Amer. Col. Doc.*, 85-86. The extensive grant of jurisdiction to Maryland in this charter over the marginal sea, the seabed, and the resources thereof, is useful confirmation of the interpretation earlier in this testimony of the meaning of the several Virginia charters.

54 See the anonymous "Considerations upon the Patent to Lord Baltimore" that cites the Virginia charters and is generally hostile to the Lord Baltimore grant in 2 McDonald Transcr. 127-131. The date assigned to this document in the transcripts, June 20, 1632, seems impossible; a later date in 1632 is more likely.

55 2 McDonald Transcr. 136; also Report and Accompanying Documents of the Virginia Commissioners Appointed to Ascertain the Boundary Line between Maryland and Virginia, appendix 94-95 (1873).

to leave Baltimore in full possession of his patent and advised the remonstrants to follow any course of law they desired."[56] The Hubard Report to the House of Representatives in 1844 argued that although the Star Chamber refused to assist Virginia, "here was an act of Virginia, certainly, if there was not also an act of the Crown, recognizing the existence of the charter under which Virginia claimed."[57] The colonists obviously believed that the royal charters to the Virginia Company still established their territorial boundaries and were prepared to defend these against competing claims and grants.

The immediate royal response to the first Virginia-Maryland boundary controversy was of considerable interest. The Privy Council wrote to the Governor and Council in Virginia on July 22, 1634, informing them "that 'tis not intended that interests which men have settled when you were a Corporation should be impeached, that for the present they may enjoy their Estates and Trades with the same Freedome and Privilege as they did before the recalling of
920 their Patents, . . ." [58] Andrews noted that this letter did "not say that Virginia had a right to all the land named in the charter of 1612, an assertion that no English authority could possibly have made at this time, when the crown was disposing as it pleased of lands north of the Potomac."[59] In fact the Hubard Report in 1844 rightfully pointed out that "the precedent of the charter of Maryland, in effect, established the right of the Crown to dismember from Virginia any part of her territory, at its discretion, without

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56 1 Andrews, *Col. Per.* 284-285.

57 *Hubard Report, 1844,* 25.

58 1 McDonald Transcr. 367-368.

59 2 Andrews, *Col. Per.* 305 note.

her consent; but it in no wise affected the right of Virginia to such territory within her ancient limits, as had not been dismembered from her."[60] A twentieth century authority on the history of Virginia concluded that "the revocation of the charter in 1624 did not change the boundaries, but after that time the King was able to change them at pleasure."[61] The subsequent charters to Lord Baltimore, William Penn, and the Carolina proprietors obviously represented such alterations in the northern, west-
921 ern, and southern boundaries of Virginia at the pleasure of the Crown. But otherwise, and especially in terms of the eastern boundary of the colony in the Atlantic ocean, the boundaries of Virginia remained the same down to the outbreak of the American Revolution.

The lack of a formal charter unquestionably remained a cause of some insecurity to the colonists. As the leading authority on early seventeenth century Virginia, W.P. Craven, has stated, "the colonists had no charter, visible evidence of rights conceded and bulwark for their defense in the courts. Instead, public authority, . . . rested on custom and usage sanctioned merely by the more mutable forms of royal consent."[62] But confirmations of colonial rights, privileges, and territories in Virginia multiplied rapidly in the 1630's and 1640's.[63] The concern of the colonists was of course much less with such matters as

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60 *Hubard Report, 1844* 25; see also 3 Osgood, *Amer. Col. 17th Century* 92.

61 T.P. Abernethey, *Western Lands and the American Revolution* 362 (1937).

62 W.F. Craven, *The Southern Colonies in the Seventeenth Century* 226 (1949).

63 *Id.* see 153, 174-175, 176.

boundaries to the east and maritime jurisdiction than to their right to enjoy a substantial degree of self-government through an elected local Assembly; they took these other matters almost for granted. By April, 1642, the Grand Assembly of Virginia felt confident enough to enact a strongly worded statute opposing the restoration of the Virginia Company and expressing their satisfaction with
922 the status quo.[64] On July 5, 1642 the Crown acknowledged their desire for immediate royal rule and assured the colonists that no changes in the currently successful form of government were anticipated.[65] Virginia's self-confidence received another reinforcement during the Interregnum, after the realities of the situation finally forced royalist Virginia to surrender to Parliament on March 12, 1652. The Articles of Agreement between Virginia and the Commonwealth guaranteed "that Virginia shall have and enjoy the antient bounds and lymitts granted by the charters of the former Kings, And that we shall seek a new charter from the parliament to that purpose against any that have intrencht upon the rights thereof."[66]

Q. In your opinion, what was the significance, if any, of the Arlington-Culpeper grant of the 1670's as it related to the Virginia Colony's assertion of territorial boundaries in the marginal sea?

923 A. On February 25, 1673 Charles II granted the whole of his royal colony of Virginia "as far as soil and regalties were concerned," to the Earl of Arlington and Thomas

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64 1 Hen. Stat. 230-236.

65 1 McDonald Transcr. 389.

66 1 Hen. Stat. 364. Virginia did not receive a new charter from Parliament, and, of course, this agreement had no validity after the restoration of the Stuart monarchs in 1660.

Lord Culpeper for a thirty-one year period.[67] This grant primarily conveyed the power to receive quit-rents and to control the granting of land. The Crown did not ostensibly intend to remove the powers of the Virginians to govern themselves. Charles M. Andrews has concluded that there was "no intention in the mind of the king of removing the territory from under the control of the colony's government, . . . but the extensive powers named in the patent promised to make trouble."[68]

The details of the Arlington-Culpeper grant are initially valuable in conveying a sense of the territorial extent Virginia was then thought to encompass, and to illustrate that jurisdiction over the marginal sea, seabed, and its resources was not an unusual concomitant of a royal grant. The eastern jurisdiction of the Arlington-Culpeper grant was to include: . . . all that entire tract territory region and dominion of land *and water* commonly called Virginia together with the territory of Accomack, and all that part of the bay of Chespeake, that lyeth betweene the same, or any part thereof and all other the rights members jurisdic-
924 tions and appurtenencies thereof, situate lying and being in America adjoining to the colony and dominion of Maryland towards the north, to the great ocean, towards the east, ... as also all those other tracts regions dominions and territories of land *and water,* situate lying and being beyond the uttermost adjacient limitts of Carolina aforesaid . . . as also all islands whatsoever with all or any the limits and precincts aforesaid or within ten leagues of any the coastes of any of the said territories, together with the soyle of all and singular the premises, and all woods . . .

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[67] 2 Andrews, *Col. Per.* 234-235.

[68] *Id.* 235.

waters rivers . . . pooles, ffishings, havens, ports harbours, bays, creeks, *wrecks of sea, flatson jetson and lagon,* with all sorts of fish whatsoever as well whales, sturgeons and all other royal ffishes as *all others whatsoever in the said seas,* bayes, lakes, rivers and waters . . . and all royal mines and other *mines* whatsoever, which now are or at any time or times hereafter shall be had found or taken *within the limitts precints or places aforesaid,* together with the royalty of the said seas and bays afore granted. . . .[69]

The Crown would not have allocated any territory to Arlington and Culpeper that was not within the established boundaries of the royal colony of Virginia. Thus this grant evidenced royal recognition that the marginal sea (in this
925 instance restricted to a distance of thirty to thirty-five miles offshore) and the seabed were within the traditional domain of the colony of Virginia.

In September 1674 the Grand Assembly of Virginia prepared an address to Charles II expressing its fears about the new lord patentees, asking the Crown to revoke the recent grant and requesting a confirmation of their "liberties priviledges, immunities, rights and properties," by a new royal charter to Virginia.[70] The Virginia agents sent to England for this purpose presented certain propositions to the Crown in June, 1675. The agents referred to the episode whereby the charters of the Virginia Company were recovered in 1624: "Yet did the said king forthwith promise and declare, that a charter should be renewed with the former privileges to the planters, at whose instance and for

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69 2 Hen. Stat. 570-571 (emphasis added).

70 2 Hen. Stat. 311-314; see Lovejoy, Virginia's Charter and Bacon's Rebellion, 1675-1676, *Anglo-American Political Relations,* 1675-1775 37-39 (Olson and Brown ed. 1970.)

whose sake the former charter was called in." Virginia basically sought "a confirmation, by charter, of the authority of the grand assembly consisting of governor, council and burgesses."[71] The rights at issue in this entire episode
926 were primarily political and governmental.[72] The Lords of the Commission for Foreign Plantations referred the whole matter to the Attorney-General and solicitor-general. The latter's favorable report to the king in council in October 1675 was adopted by the royal authorities in November.[73] Twice thereafter the Crown ordered the letters patent to be passed under the great seal as a new charter. In April, 1676 the Virginia agents had to petition for the second directive, making mention of the previous order to prepare a bill for the great seal: "That when they came to pass the same there was a stop put to it, but for what cause they knew not, That they had long since sent a Copy of the Order in Council into Virginia for passing the said bill . . . ."[74] But on May 31, 1676 the Crown issued a fur-
927 ther order-in-council that the "Lord High Chancellor of England do forbear putting the Great Seal of the Patent concerning Virginia notwithstanding the late order of the

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71 2 Hen. Stat. 526.

72 The eight provisions that the Virginia colonists wanted in a new charter are reprinted from the manuscript source in Sister Joan de Lourdes Leonard, Operation Checkmate: The Birth and Death of a Virginia Blueprint for Progress, 1660-1676, 24 *William and Mary Quarterly,* Third Series 70note (1967). The petition was received and read June 23, 1675.

73 See 5 McDonald Transcr. 8-11, 12-16 for the report of the legal advisors on October 12, 1675, and the royal approval for the preparation of new letters patent on November 19. See also 2 Hen. Stat. 527, 531.

74 5 McDonald Transcr. 26-27 (April 19, 1676).

18th of April last past."[75] Bacon's Rebellion had so recently erupted in Virginia that it could not have been directly responsible for the order of May 31, but the eventual arrival of the news of the disturbances in the next few months definitely ended the movement for a new charter.[76]

Thus the charter of 1676 never did pass the great seal and did not become official. The draft charter was of course primarily a political and constitutional document that said nothing about such matters as boundaries and seaward jurisdiction.[77] The fact that no one found it necessary in 1676 to include a restatement of the boundaries of Virginia in the proposed charter suggests that both the colonists and the Crown believed that the early charters still established the boundaries of the colony, except to the extent that these limits had been adjusted by subsequent royal grants to other colonies. Osgood has also said of the
928 Virginia agents that "though their effort to procure a charter failed, they helped to save the territorial integrity of Virginia, and it was never again imperilled."[78] This did not mean that the Virginia colonists could rest secure in their existing boundaries after 1676. Vigilance against territorial encroachments was the order of the day in a colonial era of expansive settlement and competing charter grants. A petition from the Virginia Council to the Crown in May, 1683 furnished an early and typical illustration of

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[75] 5 McDonald Transcr. 28.

[76] For a discussion of the reasons for the failure of the movement for a new charter, see Lovejoy, *supra* note 70, 40-42.

[77] See the Virginia Charter of 1676, 56 *Virginia Magazine of Hist. and Biog.* 263-266 (1948).

[78] 3 Osgood, *Amer. Col. in 17th Century,* 253.

the colony's continuing concern for its territorial integrity: "That noe incroachment may bee on the bounds and limits of this His Majesty's Colony of Virginia, which we have too great reason to apprehend the Government of Carolina designes by pretence having extended their bounds beyond the limits of their first Grant. . . . Neither are our Northern Bounds less encroached on by the Lord Baltimore by an unfair Line run from the pretended point of Land called Watkin's Point East to the Sea, by which (as is supposed) there is at least fifteen miles north lost from Virginia. Its therefore proposed that His Majesty may bee humbly supplicated to command and direct the bounds of both Provinces to bee justly ascertained, by which means our vicinity
929 will within its due bounds bee entirely kept and for ever ban any pretences of future encroachments." [79]

Perhaps the Virginia colonists took some comfort in the obvious impossibility of encroaching upon their eastern boundary in the marginal sea.

The Virginia colonists were more fortunate in the ultimate disposition of the Arlington-Culpeper grant than they had been in their search for a new charter. In 1681 Arlington conveyed all his rights and interests derived from this patent to Culpeper, who by this time was in Virginia, having added the governorship to his financial interests. In 1683 Culpeper left for England without royal permission and was relieved of his office. Culpeper then sold all his rights in Virginia, except for the Northern Neck, back to the Crown in May, 1684.[80] The end of this episode left Virginia's territories and jurisdiction intact.

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[79] 6 McDonald Transcr. 219-220.

[80] 2 Hen. Stat. 521-522.

Q. What additional evidence exists of the prevailing views in the colonial era concerning the boundaries and jurisdiction of Virginia, especially to the eastward?
A. The period between the Glorious Revolution in America and the eventful years of the Revolutionary era were quiescent ones with respect to the eastern boundary and
930 jurisdiction of the colony of Virginia. There were no major constitutional crises and no new grants to royal favorites that threatened the integrity of the colony's territory to the eastward. These years furnish an opportunity to describe briefly some aspects of prevailing colonial views concerning Virginia's boundaries and jurisdiction, issues that will be developed in greater detal later in my testimony.

The first significant native historian of Virginia, Robert Beverley, published his *History and Present State of Virginia* in London in 1705. His collective comments on Virginia's boundaries made plain that he included the marginal sea within the domain of Virginia. Beverly followed prevailing practice by describing Virginia's borders as described in the first charters. "The least Extent of Bounds in any of the Grants made to Virginia, since it was settled, and which we find upon Records there, included 'the Islands on both Seas, within an Hundred Miles of the Main.'" The early Virginia charters also included "all the lands within an Hundred Miles directly over-against the same Sea-Coast, and also back into the Main-Land One Hundred Miles from the Sea-Coast. . . ."

Beverley placed the eastern boundary in the Atlantic ocean: Virginia was bounded "on the East by the main Ocean, called the Virginia Seas . . . ." His references to the ocean
931 coast of Virginia evidenced the appreciation and recognition by Virginians' of the value of their seacoast: "The Coast is a bold and even Coast, with regular Soundings, and is open all the year round: . . . . A bolder and safer

Coast is not known in the Universe; to which Conveniences, there's the Addition of good Anchorage all along upon it, without the Capes."[81]

A second major Virginia historian of the colonial era, the Reverend William Stith, published his *History of the First Discovery and Settlement of Virginia* in 1747 in Williamsburg. Its main value for our present concerns was the evidence it included that the Virginians were well aware of their earliest charters. An appendix to the volume reprinted the three charters to the Virginia Company, copies of which Stith had found among public papers in the colony. "I thought the Publication of these Charters the more proper, as I conceive, that they have never been legally revoked, and as they contain things of very great Consequence and Concern."[82] Stith's history of the Company period demonstrated an awareness in the mid-eighteenth century of the seaward jurisdiction conferred in the early charters. Stith noted, for example, that the Virginia
932 Company's purpose in securing the 1612 charter was to include the Bermudas, because "by their former Letters-patent, they were only entitled to the Islands within an hundred miles of their coast. . . ."[83]

Some references to the continued validity of the early Virginia charters in the 1710's suggested a state of English and colonial knowledge of the early history of Virginia, whereby both sides operated on the assumption that these

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81 See R. Beverley, *The History and Present State of Virginia* 117, 118, 27, 118 (Wright ed. 1947).

82 W. Stith, *The History of the First Discovery and Settlement of Virginia* appendix III-IV (Williamsburg, 1747). According to 1 Andrews, *Col. Per.* 82 note, the charters had never before been printed.

83 Stith, *Id.* 126-127.

charters still set forth basic guidelines on a great many matters. A letter of July 20, 1713 from the Lords of Trade to Governor Spotswood recognized the continued existence of the charter, but argued that royal instructions to a Virginia governor were of equal validity: "Comment on the unreasonableness of the Assembly in rejecting a law made out of the 84th Article of his Instructions, which latter it is but just he should strictly adhere to and which are and ought to be deemed by them as valid as their charter."[84] In another episode William Byrd II referred to
933 the Virginia charter as part of an argument with the Lords of Trade in 1718. Byrd had been trained at the Inns of Court and was a prominent member of the Virginia Council at the time. The dispute involved the power of the governor to appoint judges for Courts of Oyer and Terminer. Byrd wrote from London to the Lords of Trade on February 24, 1718: "Having been convinced by the Attorney General's opinion that His Majesty's Governor of Virginia hath power by the Royal Instruction to appoint Courts of Oyer and Terminer in that Colony notwithstanding the Laws and the Charter which seemed to confine Criminal Causes to the General Court," he proceeded to argue against the practice on other grounds.[85] The draft charter of 1676, which never became official, did not include treatment of such specific matters, so Byrd had to be referring to one of the Virginia Company's charters.

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[84] 8 Sainsbury Abstracts 421. William Noel Sainsbury made these abstracts for the Virginia State Library from original documents in the Public Record Office, London, around 1873. There are currently twenty manuscript volumes of these abstracts in the Virginia State Library, Richmond. (Hereinafter cited as Sainsbury Abstracts).

[85] 3 Sainsbury Abstracts 686.

By the early eighteenth century these charters seemed to have acquired almost the status of constitutional documents that served as sources of first resort on any kind of issue.

The correspondence of the royal governors of Virginia that is now readily available included some references to the boundaries of Virginia. The Lords of Trade asked Governor Spotswood on August 7, 1718 for information about the boundaries of the colony and any current en-
934 croachments on them by foreign princes.[86] It is suggestive that the Board itself, which even requested the best available map of the Virginia boundaries, was not more fully informed and aware of Virginia's existing boundaries. Spotswood replied on May 20, 1720, with a brief reference to a copy of the 1609 charter: "I find here a Charter granted by King James ye 1st, dated ye 23d of May, in the 7th year of his Reign, whereby there is given to the Company of Adventurers for ye Colony of Virginia, all that Tract of Land from Cape Comfort, two hundred Miles Northward along the Sea Coast, and extending from Sea to Sea. . . ."[87] The subsequent discussion in the letter paid no further attention to the eastern boundary, since this was not an area of encroachment. Yet by reading the whole of the charter Spotswood was no doubt reminded of the extent of Virginia's jurisdiction into the marginal sea and its appurtenances as described in the 1609 charter.

A report of Governor Dinwiddie to the Lords of Trade in January, 1755 was also illustrative of contemporary knowledge concerning Virginia's borders:
"The Boundaries of the Dom'n of Virg'a, as they were first established'd by the Charter of King James the 1st,

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86 3 Sainsbury Abstracts 795.

87 2 Spotswood 336.

935 Anno. 1606, were from Cape Comfort, now called Cape Henry, 200 Miles North along the Sea Coast, and the same Distance South from the same Cape, and West to the So. Sea, together with all Islands in both Seas, lying within 100 Miles of the Main Land; in w'ch Tract is comprehended great Part of y't w'ch is now called No. Carolina, all the Province of M'yl'd, and part of Pennsylvania. But the Boundaries of Virg'a, as it is now circumscribed, are to the East and So. East, the Main Atlantick Ocean . . . . and on the No., a Line from the Sea, thro' y't Isthmus called the E. Shore . . . . And then Virg'a resumes its ancient Breadth, and has no other Limits to the West y'n y't its first Royal Charter assigned it. . . . ."[88] Several implications of this statement to the imperial authorities are worth noting. Although Dinwiddie was understandably vague about the current extent of Virginia's jurisdiction into the main ocean, he did not establish the eastern boundary as starting at the seacoast or seashore. Secondly, the governor still considered the original charters, less subsequent specific royal grants to other colonies, to be of binding force in establishing Virginia's claim to ter-
936 ritory. Thirdly, the governor did not note any real losses of territory or jurisdiction toward the east, which in part accounts for his slight attention to this issue. Virginia had no claimants competing for territory on the east. Much more precision was necessary in references to the northern and southern boundaries of Virginia because of the rival charter grants and competitive claims of Maryland and the Carolinas.

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[88] 1 The Official Records of Robert Dinwiddie, Lieutenant-Governor of the Colony of Virginia. 1751-1758 380-381 (1933) (hereinafter cited as Dinwiddie).

On January 30, 1763 Governor Fauquier of Virginia faced a similar task of responding to the queries of the Commissioners for Trade and Plantation Affairs: "Query 2d. What are the Boundaries? Have those Boundaries been settled and ascertain'd, and by what Authority?" Fauquier's interesting response began with the fairly unspecific comment that "Virginia is bounded on the East by the great Atlantic Ocean . . . ."[89] After referring to the Potomac river as the northern boundary with Maryland, Fauquier added that this Boundary is fixed by the Royal Charters . . . . ,"; it was apparent from his response to the entire question that Fauquier had used the early Virginia and indeed Maryland charters as the starting points for framing a response , only taking into account later ad-
937 justments by royal authority. Obviously no such adjustment had occurred in terms of the Eastern boundary of Virginia, leaving the colony with a claim to territory stretching one hundred miles out into the Atlantic.

The statements by Governors Dinwiddie and Fauquier evidenced a general situation in which Virginians were not much concerned about their eastern boundary and did not have to be. As early as 1663 the Grand Assembly passed "an act concerning the bounds of this colony on the Eastern shore."[90] It only concerned the northern limit of Virginia's jurisdiction on the Eastern Shore. The colony had no doubt whatsoever about the extent of its seaward boundary, nor were these eastern boundaries involved in any contemporary dispute. In the seventeenth century Virginia had to defend its northern and southern boundaries, while

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89 Colonial Office 5/1330, ff. 261-284. Public Record Office, London. I am indebted to Mr. George Reese of the University of Virginia for a transcript of this document.

90 2 Hen. Stat. 183-184.

in the eighteenth century the western boundary and the extension of the northern and southern boundaries into the western territory were subjects of continuing concern and controversy. The much different situation with respect to actual knowledge of the western boundary of Virginia was well illustrated by the statement of Governor Dinwiddie to the Lords of Trade in 1755 that "the Western Boundary as yet is not well known, nor can it be ex-
938 pected to be fully known for some Ages."[91] Even on the eastern seacoast and marginal sea, efforts to secure accurate maps of the Virginia coast, including soundings and depths near the shore, never really succeeded in the colonial era.[92] The many maps then in existence seem remarkably imprecise by modern standards concerning the geography of the entire Virginia region and were largely unconcerned with hydrography. None of the original maps of colonial Virginia examined for the purposes of my testimony indicated where the eastern boundary of Virginia was specifically located in the seventeenth and eighteenth centuries, other than by a general inclusion of the marginal sea on the face of the maps. In fact, the main value of contemporary maps may well be to suggest the inevitability with which Virginians expected the marginal sea to be included within their territorial limits. At a later

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91 1 Dinwiddie 381.

92 See R.P. Stearns, *Science in the British Colonies of America* 698 (1970); 4 Executive Journals of the Council of Colonial Virginia, 1680-1775 253 (H.R. McIlwaine and W. L. Hall ed. 1925-1945); (hereinafter cited as Exec. J. Council); A.P. Middleton, *Tobacco Coast: A Maritime History of Chesapeak Bay in the Colonial Era* 72-77 (1953). In 1726 Governor Drysdale emphasized the prohibitive cost of preparing a complete map of the colony. Drysdale to Lords of Trade, June 29, 1726, 9 Sainsbury Abstracts 204-205.

period in American history, one is accustomed to thinking of Virginia on a north-south rather than an east-west axis. But as one colonial map, Virginia Exhibit No. 1, suggests,[93]
939 the colonists and English authorities and traders conceived of the territory of Virginia as one approached it from the Atlantic. One arrived in Virginia when one began to enter the Virginian Sea. Inclusion of a specified area of the marginal sea within the boundaries of the colony seemed an obvious and inevitable precondition for the colony's continued existence.

Colonial Virginians turned more and more to a study of their original charters as innumerable matters of controversy arose in the decade preceding the outbreak of the Revolution. In terms of the territorial boundaries of the colony, Virginians recognized that the early charters to the Virginia Company constituted the basis of their territorial claims and boundaries. The charters revealed that the seaward boundary of Virginia, prior to and at the time the colony became a member of the Union, and as established by the charters, extended one hundred miles into the Atlantic Ocean. Col. Richard Bland's *An Inquiry into the Rights of the British Colonies* in 1766 well illus-
940 trated the degree of contemporary knowledge of the history of the Virginia charters. Bland was a lawyer and antiquarian. Thomas Jefferson and other leading Virginians considered Bland the most learned authority in the colony on its constitutional history.[94] Bland's *Inquiry* included

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[93] This section of a map of Virginia, Maryland, Pennsylvania, and East and West New Jersey was published under the imprint of John Thornton and Will Fisher in London sometime in the period 1689-1704. The insert is a photostat of a copy in the Virginia State Library, Richmond.

[94] 1 J.P. Boyd, ed. The Papers of Thomas Jefferson 165note (1950-) (Hereinafter cited as Jeff. Papers).

an accurate survey of the history of the Virginia charters, of the significance of the annulment in 1624, of subsequent royal renewals of colonial rights and privileges, of the colony's opposition to a new Virginia Company charter in 1644, and the agreement of Virginia with the Parliamentary commissioners in the early 1650's.[95] The leading Virginians were well aware of the fundamental importance of the charters to Virginia.[96]

941 George Mason, another prominent Virginian, carried out the most extensive analysis of the meaning and significance of the Virginia charters on the eve of the American Revolution. Mason's personal papers contain extensive annotated extracts from the Virginia charters that he made in 1773 in connection with his interests in Western lands. Although not a practicing lawyer, Mason had received some education in the law from his uncle, John Mercer. Robert Rutland, the editor of the recently published *Papers of George Mason,* states that Mason, because of his familiarity with the various Virginia charters, was a "recognized expert."[97] In 1782 Mason wrote to Edmund Randolph, then the Attorney General of Virginia, and made a reference to the need to consult the original charters of 1606 and 1609:

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[95] Col. R. Bland, *An Inquiry into the Rights of the British Colonies* 16-20 (Williamsburg, 1766).

[96] On April 30, 1775 Thomas Jefferson encouraged E. Hazard of New York, who was preparing a collection of documents concerning the history of the American colonies: "I will direct office copies of our charters, resolutions of assembly etc. and of our treaty with the commonwealth of England to be immediately made out, and will forward them by the best means I can." 1 Jeff. Papers 164.

[97] 1 R. Rutland ed. The Papers of George Mason 731note (1970). (Hereinafter cited as Mason Papers).

"The Charters I presume may all be found in the House of Delegates's Office: I had them all in my possession (made up in one bundle) when I was formerly appointed to settle some Matters of Jurisdiction in Chesapeake Bay and Potomack River . . . . I returned the Charters into the House of Delegates."[98]

In his extracts from the Virginia charters Mason paid particular attention to the issue of territorial limits and boun-
942 daries. In each of the charters he noted the clause granting the Company the islands within one hundred miles of the coast.[99] From the 1612 charter he included the following key phrase concerning the extent of Virginia's grant: "Together with all and singular the Soils, Lands, . . . Waters, Fishings, Mines and Minerals etc. . . both within the said Tract of Land upon the Main, and also within the said Islands and Seas adjoining . . . ."[100] Mason next examined the issue of whether these rights of the Company were transferred to the royal colony itself by the actions of 1624. Mason realized this was a critical issue. Early in his extracts he made the following reference to the clause last cited above: "See Sect. 4th of the 3d Charter of James 1st. by which harbors, fisheries, etc. etc. etc. are granted to the Company which being of a public nature must plainly inure to the people of the Colony, after the dissolution of the Company if this dissolution had been legal. Sed Quere."[101] The Latin legal phrase indicated that Mason was not totally sure of his point and wanted to investigate the issue further. A few pages later in his memorandum, Mason actually cited section four of the

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98 2 Mason Papers 754-755 (Oct. 19, 1782).

99 1 Mason Papers 164, 166, 169-170.

100 1 Mason Papers 170.

101 1 Mason Papers 163.

1612 charter and added this illuminating and less unsure
943 annotation: "This Clause, Sect. IV, of this Charter, respecting the ports, rivers, waters, and fishings, and a Clause of the same nature in Sect. VI. of the Second Charter (not particularly recited in these Extracts) being of a publick Nature in which the people and Inhabitants were interested as well as the company, it is presumed could not be destroyed or avoided by the Dissolution of the Virginia Company."[102]

Mason then articulated the following interpretation of the impact of the 1624 dissolution of the Virginia Company upon the boundaries of the Virginia colony: "The Bounds of the Colony. . . remained unaltered until King Charles the First in the year 1632, by Charter to Cecilius Calvert Lord Baron of Baltimore, established the Proprietary and Province of Maryland. That Country being then uninhabited, the Importance of it little known or attended to, and the scene of Confusion introduced by the Civil War in England prevented the people of Virginia making any opposition."[103] Mason's interpretation was accurate, but he was obviously unaware of the extent to which the colonists had protested the grant to Lord Baltimore in defense of their territorial integrity. Mason's further view
944 was that only royal grants to Baltimore, Penn, and the Carolina proprietors had altered the boundaries of Virginia as originally established by the charters. After describing these later charter grants, Mason concluded: "And by these Means have the ancient and original Boundaries been contracted; and the Colony and Dominion of Virginia reduced to its present Limits."[104] The only direction in

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102 1 Mason Papers 170 note.

103 1 Mason Papers 176.

104 1 Mason Papers 176.

which Virginia had not suffered some formal curtailment of her boundaries was to the eastward into the marginal sea.

Mason returned to this issue of the impact of the dissolution of the Virginia Company on the charters when discussing the 1676 charter of Virginia. Mason obviously believed that Virginia did acquire a new royal charter in that year and he copied the body of this charter into his memorandum.[105] Mason used the 1676 charter to make a further argument in favor of the limited impact of the 1624 decision: "This seems to acknowledge and confirm the Company's right to the Charter to be in the Colony after the dissolution of the former."[106] He was concerned to show that the early charters continued to establish the territorial limits of Virginia after 1624. Mason noted that
945 the 1676 charter omitted a discussion of boundaries: "The Country of Virginia is only mentioned at large and in general terms in this Charter, and not described or ascertained by any particular Limits or Boundaries." He then proceeded to interpret the significance of this omission: "For (not to mention the liberal and beneficial Manner of Construction which we have a right to) the plain, natural, and obvious meaning of the Charter is, to grant and confirm certain Rights, privileges and Immunities to all his Majesty's Subjects, who then did or ever should inhabit that Tract of Country in America, usually called Virginia, according to the Description and Boundaries of the original Charters, not before otherwise appropriated or disposed of by his Majesty's ancestors. In this situation hath it remained from

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105 1 Mason Papers 177-178, see also 166.

106 1 Mason Papers 163.

the time of this last Charter; and in this Manner hath Virginia been constantly laid down ever since, in all the English maps, as well those published by publick Authority as others, to wit, Bounded . . . on the East by the Atlantic Ocean. . ."[107]

Virginians entered the Revolutionary era firmly convinced that the early charters still established the basic territorial limits of the colony.

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946 Q. What were the implications, in your opinion for Virginia's claim to territorial boundaries in the marginal sea and Virginia's assertion of ownership over the seabed and the resources thereof, of the Colony's emergence as a sovereign and independent state in 1776?

A. In the spring of 1776 the citizens and legislators of Virginia held a series of assemblies and conventions that resulted in the colony of Virginia becoming an independent and sovereign state. In early May the General Assembly dissolved its relationship with Great Britain. The preamble to an act concerning courts and judges summarized what had occurred: "Whereas it hath been found indispensably necessary to establish government in this colony, independent of the crown of Great Britain, or any authority derived therefrom . . ."[108] The convention of May, 1776 declared that "no government separate from or independent of, the government of Virginia, ought to be erected or established within the limits thereof."[109] On May 15, 1776 the Virginia Convention issued this momentous directive to its delegates to the Continental Congress:

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107 1 Mason Papers 179-180.

108 9 Hen. Stat. 126.

109 9 Hen. Stat. 111.

947 "Resolved unanimously, That the delegates appointed to represent this Colony in General Congress, be instructed to propose to that respectable body, to declare the United Colonies free and independent States, absolved from all allegiance to, or dependence upon the crown or parliament of Great Britain; and that they give the assent of this Colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming foreign alliances, and a confederation of the colonies, at such time, and in the manner, as to them shall seem best: Provided, that the power of forming government for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures."[110]

These Virginia resolutions for independence were presented to the Continental Congress on June 7, 1776, and led directly to the formal Declaration of Independence. In July, 1776 the latter document declared the former colonies to be independent states and severed all connections between them and the mother country. The Declaration ended with the significant provision that the "Free and Independent States" had "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do."[111]

948 In June, 1776 the convention of the State of Virginia drew up a constitution. The indictment of George III in the preamble to the new constitution included "plundering our seas, ravaging our coasts. . . ."[112] Article 21 of the Constitution turned to a matter that was now of considerable importance, the territorial limits of the new state:

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110 1 Hen. Stat. 8.

111 1 Hen. Stat. 35.

112 1 Hen. Stat. 50.

The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, ... The western and northern extent of Virginia shall, in all other respects, stand as fixed by the charter of King James the first, in the year one thousand six hundred and nine, and by the public treaty of peace between the Courts of Great Britain and France, in the year one thousand seven hundred and sixty-three; unless, by act of Legislature, one or more territories shall hereafter be laid off, and governments established westward of the Alleghany mountains.[113]

949 Virginia thus acknowledged and accepted the changes actually made by the Crown in its territorial boundaries after 1624. But the constitutional convention only found it necessary to describe Virginia's territorial boundaries specifically in those directions, north, south, and west, where changes had occurred since the granting of the early charters. Otherwise the authority of Virginia to the eastward over the marginal sea and the seabed stood as established in the early charters. The 1609 charter had included jurisdiction over the sea, islands, and the seabed within one hundred miles of the coast, and the State of Virginia now asserted this claim on the basis of the 1609 charter.[114] The state also

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[113] 1 Hen. Stat. 56. Thomas Jefferson drafted this provision. See 1 Jeff. Papers 385 note 19.

[114] In 1773 George Mason, the authority on Virginia's charter, noted that "the principal Design' of the 1612 charter, 'seems to be to grant to the said Company the Islands of Bermudas...." He was

(continued)

asserted the primacy of the charters in another connection; the Convention resolved on June 24 "That no purchases of Lands within the chartered limits of Virginia shall be made, under any pretence whatever, from any
950 Indian Tribe or Nation, without the approbation of the Virginia Legislature."[115]

Virginia asserted its ownership of the marginal sea, the seabed, and the resources thereof, in 1776 on the basis of its independence and sovereignty as a state. As Justice Story later wrote, "none of the colonies before the Revolution were, in the most large and general sense, independent, or sovereign communities. They were all originally settled under, and subjected to the British Crown. Their powers and authorities were derived from, and limited by their respective charters . . . ."[116] Virginia became an independent and sovereign state in May, 1776, and acquired the technical legal authority of sovereignty, especially in such matters as the ownership of land and the extent of territorial boundaries.[117] Although Virginia asserted its an-
951 cient territorial limits in 1776 on the basis of the charters,

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114 (continued) aware that the Virginia Company subsequently sold the Bermudas to others. This awareness that the main purpose of the 1612 charter was later negated may explain why the state in 1776 claimed its ancient territorial limits on the basis of the 1609 charter, rather than the 1612 charter. The 1609 charter has remained the basis of Virginia's territorial claim until the present day. 1 Mason Papers 171-172note.

115 Journal of the Virginia Convention of 1776 in 6 P. Force, *American Archives,* Fourth Series, 1588 (1846).

116 1 Story, *Commentaries on the Constitution* 196.

117 See Claude H. Van Tyne, Sovereignty in the American Revolution, 12 *American Historical Review* 529-545 (1906-1907); and A.C. McLaughlin, *A Constitutional History of the United States* 131-136, also 99, 106, 127 (1935).

there were grounds for asserting its territorial limits on the simple basis of the sovereignty the state had taken over from the Crown. The Hubard Report to Congress in 1844 made this point, but also suggested the important relationship of the charters to Virginia's sovereignty:

"This sovereign neither claims nor ever has claimed, anything whatever *under* these charters. She refers to them, constantly, as she would do to any history, geographical treatise, or authentic map, as the best evidence the nature of the case permits, to prove what are the metes, bounds, and extent of the territory which she does claim. She refers to them, as she does to the grants made to others . . . as proofs of what were and are the limits of that region in America called Virginia. . . ." [118]

The Virginia Commissioners in the Maryland-Virginia boundary dispute of the early 1870's hypothesized that even if Virginia had not had a royal charter in force in 1776, "the colony became a sovereign State in June, 1776, and thereby became sovereign over her ancient limits, and the right of eminent domain is independent of all colonial charters or Royal patents, and is as supreme as royalty itself."[119]

952 The United States Supreme Court in 1823 accepted the following description of occurrence in Virginia in 1776 as one of the stated facts in a major case:

"17th. That on the 6th of May, 1776, the colony of Virginia threw off its dependence on the crown and government of Great Britain, and declared itself an independent state and government, with the limits prescribed and established by the letters patent of May 23d, 1609, as curtailed and restricted by the letters patent establishing the

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[118] *Hubard Report, 1844,* 25.

[119] *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line* 243 (Annapolis, 1874).

colonies of Pennsylvania, Maryland, and Carolina, and by the treaty of February 10th, 1763, between Great Britain and France; which limits, so curtailed and restricted, the state of Virginia, by its constitution and form of government, declared should be and remain the limits of the state, and should bound its western and north-western extent. . . ." [120]

The Supreme Court has continued to recognize the sovereignty of Virginia in 1776 and that the royal charters constituted the basis of the new state's claim to its territorial
953 limits.[121] The Supreme Court has also rejected an argument that has sometimes been used to dispute Virginia's title to its territorial claims. Chief Justice Jay wrote in 1793 that during the Revolutionary era, "it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states, within whose limits they were situated, but to the *whole people.* On whatever principle this opinion rested, it did not give way to the other and *thirteen sovereignties* were considered as emerging from the principles of the revolution, combined by local convenience and considerations."[122] Chief Justice Taney concluded in 1842 that "when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject

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120 Johnson and Graham's Lessee v. William M'Intosh, 21 US. (8 Wheat. 558) 558.

121 See Field, J., Virginia v. Tennessee, 148 U.S. 504, 508 (1892).

122 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470, quoted in 1 Story, *Commentaries on the Constitution* 205.

only to the rights surrendered by the Constitution to the general government."[123]

954 Q. Do you have an opinion whether the Treaty of Paris of 1783 affected Virginia's territorial boundaries to the eastward in the marginal sea and if so, would you state your reasons for your opinion?

A. After seven years as an independent state claiming territorial boundaries to the eastward as derived from the charters to the Virginia Company, Virginia may have suffered its first decrease in seward jurisdiction by virtue of the Treaty of Paris between Great Britain and the United States of America, dated September 3, 1783. In article one the English Crown recognized Virginia and its sister states as "free sovereign and Independent States." The Crown then entered into a general agreement with these states concerning territorial boundaries. On the east the territory of the states comprehended "all Islands within twenty Leagues of any Part of the Shores of the United States . . . ."[124] The American people retained fishing rights in the sea. Virginia received a copy of this definitive peace treaty on February 3, 1784.[125]

955 In reality this peace treaty with England did not affect the validity of Virginia's claim to ownership of the sea, seabed, and the resources thereof to the distance of one

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123 Martin et al v. The Lessee of Waddell, 41 U.S. 1013; see also Story, J. in Town of Pawlet v. Clark, 13 U.S. (9 Cranch 292, 335, 299).

124 The Treaty is printed in Richard B. Morris, *The Peacemakers. The Great Powers and American Independence* 462-463 (1965).

125 3 *Journals of the Council of the State of Virginia, 1776-1781* 326 (H.R. McIllwain and W.L. Hall eds. 1931-), (hereinafter cited as J. Council State).

hundred miles from its coast. The peace negotiations did not even touch explicitly on this particular issue, except to the extent that the eastern seaboard states had their jurisdiction over offshore islands to the distance of twenty leagues recognized. The eastern boundaries of the American states were never really a matter of controversy or contention during the peace negotiations as a whole, except for the peripheral issue of fishing rights on the high seas. When the issue arose, there were even indications that the peace commissioners from the United States argued territorial boundaries based on the charters to the individual colonies. When there was controversy over the north-east boundary's inclusion or exclusion of the St. John's River versus the St. Croix River, John Adams's colleagues "thought it would be too hazardous to contend for a river which was not named in the charter of Massachusetts, against a river that was named in it."[126] The Treaty of Paris did have the positive effect of formalizing the existence and powers of the states. Chief Justice Marshall focused on the meaning of the treaty in an 1823 opinion:

956 "By the treaty which concluded the war of our Revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States', whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the Declaration of Independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled."[127]

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[126] Adams is quoted in Morris, *Peacemakers* 363.

[127] Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat. 584) 584.

In accordance with this last comment by the Chief Justice, Virginia has continued to assert an eastern boundary that extended one hundred miles into the marginal sea.

Q. Do you have an opinion whether the Articles of Confederation infringed upon Virginia's ownership of the marginal sea and the seabed and if so, please state the reasons for your opinion?

A. The Articles of Confederation, as adopted by the Continental Congress in 1777, finally went into force in March, 1781, and formalized the confederation of the United States. Gordon Wood, the leading student of the
957 constitutional history of this period, has recently written that "the Confederation was intended to be, and remained, a Confederation of sovereign states."[128] Article II provided that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled."[129] The delegated powers were not insignificant with respect to the concerns of this testimony with the exercise of jurisdiction. Article IX granted the Continental Congress the power to make peace and war, to enter into treaties and alliances, "of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas . . . ." The Congress became the last court of appeal

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128 G.S. Wood, *The Creation of the American Republic, 1776-1787* 357 (1969); see also McLaughlin, *Constit. Hist.* 119-120.

129 1 Hen. Stat. 37.

958 in all disputes between the states concerning boundaries and jurisdictions. The Congress acquired authority to operate a navy.[130]

Yet this grant of powers to Congress did not formally infringe upon Virginia's ownership of the marginal sea and the seabed. Wood has emphasized that "whatever the limitations the Confederation may have placed in fact on the individual sovereignty of the states, few believed that their union in any theoretical sense contravened that sovereignty." The individual states remained independent, with their territorial integrity intact. As Wood further noted, "commercial regulation and taxing power, indeed all final governmental, lawmaking power remained with the states."[131]

Q. Did the negotiations between Virginia and the Continental Congress over the cession of the North-West Territory have any implications for Virginia's boundary claims to the eastward and if so, would you please discuss those implications?

A. The sovereign state of Virginia strikingly exercised its independence in its relations with the Continental Congress in the course of negotiations over the cession of lands on the north-west side of the Ohio River to the United
959 States. This episode further demonstrated that Virginia took its territorial boundaries as stated in the early charters very seriously. Within the limits of prevailing knowledge, Virginia had always claimed extensive territory to the west of the settled regions of the colony. The General Assembly passed an act in 1752, for example, to encourage persons to settle on the waters of the Mississippi, which Virginia included within its boundaries.[132]

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130 1 Hen. Stat. 41-43.

131 Wood, *Creation Amer. Republic* 354-355.

132 6 Hen. Stat. 258; renewed in 1753, *Id.* 355-356.

Virginia's claim that it was entitled to the territory northwest of the Ohio River on the basis of the 1609 charter did not go unchallenged in the Continental Congress. The various land speculators and land companies that were vitally interested in this vast expanse of land turned to the Continental Congress to attempt to deny Virginia's claims.[133] Thus Virginia had to prove title to the territory on the
960 basis of its charters before the territory could be conveyed to Congress for the creation of a national domain. None of the theories advanced by the land speculators to justify their competing claims to the northwest territory met with much acceptance inside or outside of the Continental Congress, but they did cause the Virginians to endure several years of anxiety on the matter. The initial argument was that the Continental Congress was a sovereign body that had succeeded to the powers and prerogatives of the British Crown, and thus could exercise control over lands west of the Appalachians as the British had done since 1763. A corollary was that there were lands lying outside the bounds of any particular state and that Congress had succeeded to the sovereignty over them. A further refinement was that the common efforts of the associated states in defense of their liberties had earned them a common right to the Western lands.[134] A letter from Richard Henry Lee at the Continental Congress in August, 1777 alerted

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133 This entire issue is well-treated in the following works: Jensen, The Creation of a National Domain, 1781-1784, 26 *Mississippi Valley Historical Review* 323-342 (1939), (hereinafter cited as Jensen, *MVHR*); J.P. Boyd, The Virginia Cession of Territory Northwest of the Ohio, 6 Jeff. Papers 571-580; Boyd, Virginia's Claim to Western Territory, 6 Jeff. Papers 647-668.

134 These arguments are identified and dismissed by Jensen, 26 *MVHR* 324, 329, 338.

Thomas Jefferson and his fellow Virginians about the general trend of the arguments being used against Virginia's territorial claims; "The Confederation goes on but slowly, occasioned by the immensity of business created by the
961 war. But I find our right to our Charter bounds, as stated by our Act of Government will be strongly contested. The Charter of 1609 it is said has been vacated, and that no transfer of that Charter right can be shown from the Company to the people of Virginia. That therefore the ungranted lands were the property of the Crown, and being taken from it by common exertions, must become common Stock. Will you be so kind as to favor me with your reasons and authorities in support of our right?"[135] For the moment there was no response from Virginia on this particular issue, although in a dispute with Pennsylvania in 1779 over a boundary line between the two states, Virginia did refer to its boundaries "as described in its charter of May 23rd, 1609 . . ."[136]

The General Assembly of Virginia first aroused itself against the activities and claims of the land companies in the fall of 1779 and in the process of a remonstrance to the Continental Congress made another important statement of Virginia's territorial claims. The state had passed an act "to prevent present settlements on the north west side of the Ohio river. . . ." In light of this enactment:
962 "The General Assembly of Virginia cannot avoid expressing their surprise and concern, upon the information that Congress had received and countenanced petitions from certain persons stiling themselves the Vandalia and Indiana company's, asserting claims to lands in defiance of the civil

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135 2 Jeff. Papers 31.

136 10 Hen. Stat. 527. Madison was one of the two boundary commissioners from Virginia in this dispute.

authority, jurisdiction and laws of this commonwealth, and offering to erect a separate government within the territory thereof. Should congress assume a jurisdiction, and arrogate to themselves a right of adjudication, not only unwarranted by, but expressly contrary to the fundamental principles of the confederation; superseding or controuling the internal policy, civil regulations, and municipal laws of this or any other state, it would be a violation of public faith, introduce a most dangerous precedent which might hereafter be urged to deprive of territory or subvert the sovereignty and government of any one or more of the United States, and establish in congress a power which in process of time must degenerate into an intolerable despotism."

The General Assembly then stated its views of the territorial claims of the states versus the Congress:

"Congress have lately described and ascertained the boundaries of these United States, as an ultimatum in their terms of peace. The United States hold no territory but in right of some one individual state in the Union: the
963 territory of each state from time immemorial, hath been fixed and determined by their respective charters, there being no other rule or criterion to judge by; should these in any instance (when there is no disputed territory between particular states) be abridged without the consent of the states affected by it, general confusion must ensue; each state would be subjected in its turn to the encroachments of the others, and a field opened for future wars and bloodshed; nor can any arguments be fairly urged to prove that any particular tract of country, within the limits claimed by congress on behalf of the United States, is not part of the chartered territory of some one of them, but must militate with equal force against the right of the United States in general; and tend to prove such tract of

country (if north west of the Ohio river) part of the British province of Canada."

On behalf of the Commonwealth of Virginia, the General Assembly protested "against any jurisdiction or right of adjudication in congress, upon the petitions of the Vandalia or Indiana company's, or on any other matter or thing subversive of the internal policy, civil government, or sovereignty of this or any other of the United American states, or unwarranted by the articles of the confederation."[137] Commenting on the Virginia Remonstrance, a
964 leading authority on this whole issue concluded: "It is hard to see how any valid legal arguments could have been brought against the Virginia contention, but many feeble theories have been concocted for that purpose."[138]

On January 2, 1781 the Virginia General Assembly set forth several conditions to govern its future cession of the territory northwest of the Ohio River to the Continental Congress. One provision related generally to the remaining territory of the state of Virginia: "That all the remaining territory of Virginia included between the Atlantic ocean and . . . shall be guaranteed to the Commonwealth of Virginia by the said United States."[139] On such a controversial issue Virginia did not intend to miss any opportunities to have its territorial boundaries recognized and even guaranteed. On November 3, 1781 a committee of the Continental Congress presented a report on the Virginia cession that was hostile to Virginia's western land claims. The Congress did not act upon the report and postponed

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137 10 Hen. Stat. 557-559 (Dec. 14, 1779). George Mason was the author of this Remonstrance, 2 Mason Papers 595-598.

138 Abernethey, *Western Lands* 226.

139 10 Hen. Stat. 566.

965 consideration of it sine die in May, 1782.[140] But the appearance of this slanted report finally stimulated the Virginians to a spirited defense of their claims.

In January, 1782 James Madison wrote to Jefferson from Philadelphia to enlighten him concerning the machinations in Congress. Virginia needed documents to prove its title. George Mason and Edmund Pendleton had furnished assistance, but Madison now wanted the results of Jefferson's research. He solicited a thorough survey of the whole subject, "beginning with the original charter, pursuing it thro' the subsequent charters and other public acts of the crown . . . ."[141] Attorney General Edmund Randolph of Virginia seems to have been the focal point for the compilation of evidence supporting the Virginia title. In a letter to Randolph in August, 1782 Madison encouraged him to seek enlightenment from Jefferson. He particularly referred to a document that Jefferson had shown him concerning the agreement between Virginia and the Commissioners of Parliament in 1651, "which shews clearly the ideas entertained by Virga, with respect to her territorial limits subsequent to the resumption of the Char-
965 ter."[142] Mason wrote Randolph in October of the same year:

"I have not bye me Copys of the Virginia Charters in 1606 and 1609, or I should have made some Remark on them, endeavouring to shew that Payne's construction of them is capricious and absurd, as several of his other Strictures are; . . . that the Description and Boundaries are

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140 Jensen, 26 MVHR 330, 332.

141 Jan. 15, 1782. 6 Jeff. Papers 147-149.

142 5 W.T. Hutchinson and W.M.E. Rachal eds. The Papers of James Madison 50 (1962) (Hereinafter cited as Madison Papers).

intelligible, and admit a natural and easy Construction; the Charter of 1609 confirming and enlarging, not destroying that of 1606; that tho' the Virginia Company was dissolved, and the Government resumed by the Crown, the Charter, so far as the Setlers and their Posterity are interested or affected, remains valid; . . . ."[143] Abernethey has pointed out a dangerous pitfall that confronted the land companies and smaller states such as Maryland which
967 challenged Virginia's claim to the western territory. If Virginia's "charter boundaries were denied, the other States would have a hard time showing how their boundaries were established."[144] The lawyer William Samuel Johnson, who argued the case for Connecticut before the Court of Commissioners on the Connecticut-Pennsylvania territorial dispute in December 1781, clearly pointed out the absolute centrality of the royal charters: "All titles in America take their Origin from the Crown in the way of Charters and other Grants . . . . Charters or Grants are the foundation of all American property and charters or Grants once fairly made should operate eternally."[145] Johnson argued that "at the approaching peace with G. Britain our charters will be the best foundation to stand upon in discussing the subject of the back territory . . . . Our charters or Grants from the King of England made the only *firm basis* of American claim to those back lands."[146]

Sometime in the fall of 1781 Arthur Lee wrote a memorandum entitled "A concise view of the title of Virginia to

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143 2 Mason Papers 754-755 (Oct. 19, 1782); see also an enclosure titled "Some Remarks on the Title of Virginia to the Lands on the Western-Waters" in a letter from Mason to S. Purviance, May 20, 1782, in 2 Mason Papers 727-728.

144 Abernethey, Western Lands 366.

145 6 Jeff. Papers 495-496 reprints Johnson's argument.

146 6 Jeff. Papers 497.

the Western Lands in refutation of the Pamphlet called
968 Public good."[147] Lee's arguments were particularly interesting because they were those of a Virginia lawyer trained in England. From 1770 to 1774 Lee had attended the Middle Temple in London and was called to the Bar in London in April, 1775. He remained in Europe in the service of the Revolutionary cause until 1780, when he returned to service in the Virginia Assembly and from 1782 to 1785 as a Virginia delegate to the Continental Congress. Lee initially referred to the 1606 charter as establishing Virginia's claim to the western territory: "This Charter was confirmed and enlarged in 1609 under which we now claim." Lee then proceeded to analyze the significance of Virginia's becoming a royal colony in 1624: "Those who wish to rob Virginia of her territory really for the benefit of certain Companies of Land-mongers, that *pretendedly* for *public good,* make great use of this change, as if it anulled the Charter, and thereby took from the original Settlers and from us their Descendants the rights derived from the Charter. But in this there is neither truth nor justice. The Charter was
969 under the great Seal. The Inhabitants had done nothing to forfeit it, and the transaction between the Proprietary Company and the Crown for a change of the exercise of Sovereignty from the Company to the King, would not effect their rights which were distinct from those of the Company."

Jefferson was inevitably involved in this entire controversy. In a memorandum "Notes Concerning Boundaries"

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147 The manuscript is in the Lee Family Papers at Alderman Library, University of Virginia. The attributed date of October 28, 1781 seems reasonably accurate. Thomas Paine in 1780 had published *Public Good, being an Examination into the Claim of Virginia to the vacant Western territory. . .*

prepared ca. 1782-1784 Jefferson wrote: "Charters from the crown, whether to *proprietors* or *people,* are fundamental rights, vesting in all, and not alterable but by consent of all parties."[148] Jefferson also prepared a more extensive "Outline and Preamble of Argument on Virginia's Claim" in 1782.[149] It was really an outline for a legal brief establishing the extent of Virginia's territorial boundaries as derived from the original charters. The outline began as follows:

"A brief history of the several charters.
Their extent.
. . . .
Resumption by the crown
Whether there was such resumption
970 it's effect only to change the form of government
not lessen extent of country . . . .
Encroachments of the crown by granting Maryld.
Pennsylva. Carolina
The opposition of Virginia
Stipulation with the Commissioners for limits.
Subsequent assurances of the crown not to encroach again.
. . . .
Ratification by Virga; at the forming new constitution
. . . .
Acknowledgement that our charter was in force by ministerial writers in beginning of late dispute."

The previous pages of my testimony make it possible to understand the logic and sequence of Jefferson's argument without much difficulty.

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148 6 Jeff. Papers 487.

149 See 6 Jeff. Papers 663-668.

The report of a committee of Congress that finally led to the cession of northwest lands by Virginia appeared in June, 1783. The Congress agreed to the terms on September 13, 1783. Although generally recognizing Virginia's territorial claims in their entirety, the committee did not believe that they could agree to the provision requiring a United States guarantee of Virginia's remaining territory, as a precondition for the cession. Congress was only seeking cessions of land; it had not had an opportunity to dis-
971 cuss the right of Virginia to the territory it was not ceding. Most importantly, "your committee conceive this condition of a guarantee, to be either unnecessary or unreasonable, inasmuch as, if the land above-mentioned, is really the property of the state of Virginia, it is sufficiently secured by the confederation, and if it is not the property of that state, there is no reason or consideration for such guarantee."[150] Congressional acceptance of this report put to rout the various theoretical challenges to Virginia's territorial boundaries. Jensen noted that "Congress was at last passing from the control of the landless states whose motives were a compound of jealousy and private interest."[151] The efforts of leading Virginians had succeeded in establishing their case. The implicit guarantee and recognition of these claims by the Continental Congress suited the legal minds of the Virginia General Assembly. In October, 1783 it passed an act to authorize the cession of the northwest territory to the United States. Virginia in formal fashion ceded the jurisdiction it had "to the territory or tract of country within the limits of the Virginia charter . . . ."[152]

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150 11 Hen. Stat. 569-570.

151 Jensen, 26 MVHR 338. Only Maryland and New Jersey opposed acceptance of the Virginia cession at this point.

152 11 Hen. Stat. 327.

972 Congress accepted this second Virginia cession in March, 1784.[153] By requiring such a formal cession of territory, the United States basically recognized the validity of Virginia's remaining territorial and jurisdictional claims under its 1609 charter.[154] Virginia's eastward boundary extending one hundred miles into the marginal sea remained untouched.

Q. In your opinion, what effect did the adoption of the Federal constitution have upon Virginia's claim to ownership of the marginal sea and the seabed within one hundred miles of the eastern coast and its inclusion within the territorial boundaries of the state?

A. In the period of state constitution-making and under the Articles of Confederation the separate and independent states did not think in terms of a national government or a single republic.[155] Yet the decision at the Constitutional Convention in 1787, as later ratified by the individual states, was to subordinate the sovereignty of the states to the larger national interests embodied in a central government. The federal Constitution included specific and well-known grants of jurisdiction by the states to the United
972 States. Yet none of these directly affected Virginia's claims to ownership and jurisdiction over the marginal sea, the seabed, and the resources thereof.

Article 1, Section 8 of the Constitution granted the federal government authority over duties, imposts, defense, foreign commerce, piracies and felonies on the high seas, and a navy. But this did not limit Virginia's claims to ownership of the marginal sea and seabed under its charter grants.

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153 See the "Deed of Cession as Executed" in 6 Jeff. Papers 577-580.

154 See *The Hubard Report, 1844* 21 for such an argument.

155 See Wood, *Creation Amer. Repub.* 128-130, 356.

The limits on the powers of individual states as stated in Article 1, Section 10, included restrictions on the granting of letters of marque and reprisal, entering into treaties and alliances, imposition of duties, and the maintenance of troops or ships of war in peace time. But most of these limitations dated from the Articles of Confederation and did not really alter the authority of Virginia over the marginal sea and seabed in terms of ownership. Virginia's maritime jurisdiction was limited in some areas in comparison to the authority exercised by the independent state, such as the provision in Article 3, Section 2, granting the federal government judicial power over all cases of "admiralty and maritime jurisdiction." Article 4, Section 3, empowered the central government to regulate the territory or other property of the United States, but "nothing in this constitution shall be so construed, as to prejudice any claims of the United States, or of any particular state." Finally the 10th amendment to the Constitution further guaranteed the territorial and jurisdictional claims to the eastward that Virginia made on the basis of its original charters: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Federalist No. 45 confirmed this interpretation, reassuring the states that: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the state."

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In a debate in the Virginia ratifying Convention of 1788, Madison tried to assuage the fears of those concerned about the grant to the federal government of exclusive power of legislation in any area that became the seat of the United States government: "Let me remark. . . that there must
975 be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession."[156] By the specific and limited grants to the federal government embodied in the Constitution and by the ratification of it, Virginia did nothing to lessen its claim to ownership of the marginal sea and the seabed within one hundred miles of the eastern coast and its inclusion within the territorial boundaries of the state.[157]

Q. Do you have an opinion whether the colony and the Commonwealth of Virginia exercised authority and jurisdiction over the marginal sea, the seabed, and the resources thereof in the seventeenth and eighteenth centuries and if so, would you state your reasons for your opinion?

976 A. A response to this query initially requires a survey of the general exercise of authority and jurisdiction in the colony and state. Between 1624 and 1776 Virginia was a royal colony owing ultimate allegiance to the Crown of England. Following a period of salutary neglect of the American colonies in the first half of the seventeenth century, the Crown evolved a system of imperial supervision

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156 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 433 (J. Elliot ed. 1901).

157 See Judge A.T. Embrey, *"Waters of the State," or Property in Virginia in the Banks, Shores and Beds of the Bay of Chesapeake, the Sea, the Rivers and Creeks of the State and Control of the Waters Thereof* 162 (1931); also W.U. Solberg, ed. *The Federal Convention and the Formation of the Union of the American States* 366-374 (1958).

to regulate its holdings. After 1675 the Lords of Trade and Plantations, a standing committee of the Privy Council, exercised direct supervision over the colony of Virginia. After 1696 the Board of Trade and Plantations, a body separate from the Privy Council, replaced the Lords of Trade. The Board of Trade reported to a committee of the Privy Council and ultimately to the king in council. Such other English royal officials as the lords of the Treasury, the lords of the Admiralty, and the attorney-general also shared in the administration of the colonies.

Royal supervision of Virginia featured a system of dispersed responsibility in England that made prompt and effective administration of the colony from England impossible. Delays and negligence on the part of the imperial authorities were common. The Board of Trade was particularly inefficient between 1714 and 1748.[158] In accordance with the principles of mercantilism England had only
977 a limited concern with the colony of Virginia in any event. So long as the colony made a substantial contribution to the economic welfare of the mother country, many details and certain aspects of colonial governance escaped the attention of the imperial authorities. The English were concerned to conserve the royal revenues in the colony, enforce the Navigation Acts, and encourage successful trade. The Crown was primarily responsive to the needs of the English merchants trading in Virginia. Only flagrant infringements of the royal prerogative attracted the attention of the imperial authorities.

As a royal province Virginia was directly responsible to the Crown and not to parliament. Especially in the seventeenth century, the Crown insisted that the colonies were

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158 In general see P.S. Flippin, *Royal Government in Virginia* 36-39, 42-43-49, 69, 71 (1919). (Hereinafter cited as Flippin, *Royal Govt.)*

its preserve. It guaranteed the rights of the colonists by royal charters. Parliamentary attempts to impinge on the royal prerogative in a variety of areas involving the colony were not successful.[159] Although some statutes enacted by Parliament were specifically extended to include the colonies, Virginia was primarily subordinate to the Crown during the colonial era.

978 The series of instructions given to newly appointed royal governors embodied essential royal policy for Virginia. The governor became the main agent of the royal prerogative in the colony. Yet his instructions rarely encompassed much more than the central econmic concerns of the mother country and their successful implementation. The sets of instructions issued to Virginia governors from 1682 to 1771 showed "that during this period the policy of the British government in regard to the colony was practically uniform."[160] Especially in the eighteenth century, some of the royal governors were not even particularly enthusiastic supporters of the crown. The official royal governor of Virginia never set foot in the colony from 1704-1737, and the royally appointed lieutenant-governors fell under the sway of the Assembly. Governor Gooch was not obsessed with upholding the royal prerogative from 1727 to 1749; he allowed the Burgesses to accumulate power. So long as the interests of the Crown, as represented by the British merchants, were protected, the imperial authorities were increasingly willing to leave the House of Burgesses to its own devices. Wilcomb Washburn, a leading historian of colonial Virginia, has described the resulting relationship between the Crown and Virginia

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159 See N. Varga, The English Parliament's Authority over Virginia before the Restoration, 62 *Va. Mag. Hist. Biog.* 281-288 (1954).

160 Flippin, *Royal Govt.* 69.

by the late seventeenth century: "The Virginians' relation-
979 ship to the crown was increasingly informal rather than emotional, and their true interests self-centered."[161]

The royal governor was the single most powerful and important individual in Virginia. He was the direct representative of the royal prerogative. He recommended names for the Council that served him in an advisory capacity. The governor summoned the Assembly and could prorogue it at will. He had initial power to review and disallow statutory enactments of the legislature and discretionary power in matters not provided for by his instructions. The instructions to the governors and their Councils in the first decades of royal rule empowered them "to direct and govern, correct and punish our Subjects now Inhabiting or being, or which shall hereafter inhabit or be in Virginia, or in the Isles, Havens, Creeks, Ports or Territories thereof. . . ."[162]

980 Thus on a day to day basis the governor was intimately concerned with the exercise of the jurisdiction that Virginia held under its charters. Distance from England and the mercantile orientation of English imperial policy permitted the governor considerable power over the ordinary conduct of affairs. The historian Flippin has made the important point that "so long as a governor could keep the colony quiet and prosperous, and trade with England was successful, thus increasing the royal revenues and furnishing the British merchants a lucrative return for their

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161 W.E. Washburn, Law and Authority in Colonial Virginia, *Law and Authority in Colonial America* 126 (G.A. Billias ed. 1965).

162 See the instructions to Sir Francis Wyatt in 1639, to Sir William Berkeley in 1650, and to Sir George Yeardley in 1626, 1 McDonald Transcr. 371, 392, 401. See generally L. Labaree ed. *Royal Instructions to British Colonial Governors, 1670-1776* 13, 50, 82-84, 134-135 (1935).

investment, nothing was said about the royal instructions, the royal prerogative, or the popular spirit of the colonists."[163]

The Governor's Council was closely associated with him in the day to day exercise of jurisdiction. The Council was the upper house of the legislature as well as the General or highest court in Virginia. The General Court enjoyed an exceedingly broad jurisdiction to deal with almost any legal matter that arose in the colony.[164] The councillors "were the most influential men in the colony,
981 since they filled the most important offices and held, on account of their family relationship and wealth, the highest social position."[165] Their power steadily increased vis-a-vis the governor in the colonial era, and their support became essential to his success in office. They could and did unite with the House of Burgesses against a recalcitrant governor. An action of the Council in April 1754, illustrated their conception of their own importance by the mid-eighteenth century. The Crown had forwarded some instructions concerning legal appeals to England. The Council responded by appointing a committee to inform his majesty "how incompatible the Obedience to such an Instruction would prove with the laws and Constitution of this Colony."[166]

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163 Flippin, *Royal Govt,* 149.

164 See, for example, 3 Hen. Stat. 289 (1705). The destruction of the original records of the General Court of Virginia during the Civil War created a major gap in the historical and legal records of the colonial era. It is most likely that the General Court at one time or another touched on issues directly relevant to the concerns and argument of this memorandum; yet almost no record of the decisions of the General Court now exist.

165 Flippin, *Royal Govt.* 166-167.

166 5 Exec. J. Council 465.

The House of Burgesses enjoyed an even greater accession to the exercise of power than the Council in colonial Virginia. The first meeting of the Grand Assembly of Virginia in 1619 initiated a substantial degree of self-government by this legislative body. The Assembly continued to meet on a fairly regular basis for the remainder of the colonial era. The Crown approved its existence and gave it basic powers to formulate policy for the governance of Virginia. Although the Assembly did not meet every year,
982 it did keep a close watch on the Governor's activities. Prior to 1680 the governor, Council, and Burgesses met together under the rubric of the Grand Assembly.

As early as the mid-seventeenth century the Burgesses had a sense of their own importance and power in the governance of the colony. In a conflict with the governor and Council in 1658, the Burgesses declared themselves as representatives of the people to have the supreme power in Virginia, subject only to "the supreme power in England."[167] In November, 1682, the General Assembly passed an act imposing penalties on any persons "that shall publish or declare that the acts of assembly of Virginia are not of fforce."[168] In April, 1752 the General Assembly addressed a representation to the Crown against the disallowance of certain laws enacted during the 1748 revision of Virginia laws. They requested royal reconsideration of the disallowed statutes, and among other arguments made reference to "the antient constitution and usage of this colony. . . ."[169] The power of the purse exercised by the legislature was a major reason why its quest for power was so successful in the colonial era.

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167 1 Hen. Stat. 502, also 530.

168 2 Hen. Stat. 501-502.

169 5 Hen. Stat. 435.

983 The movement for independence only increased the powers of the Virginia legislature. The new state constitution greatly reduced the powers of the governor and intensified legislative domination of government. Wood has argued that "to the Americans in 1776 their legislatures represented more than the supreme lawmaking authority in their new states. They were as well the heirs to most of the prerogative powers taken away from the governors by the Revolution."[170]

One finds little hesitation among colonial governors, Councils, and Legislatures in Virginia to exercise jurisdiction over almost any problem or issue that came to their attention and required action. Such assertion of authority with respect to the marginal sea, its resources, and the seabed, will be assessed in the remainder of this testimony. These agencies of government will appear as very much problem and need oriented. They had little hesitation in acting upon almost any issue they encountered. The issues they treated with the greatest delicacy and circumspection involved the fundamental concerns of mercantile policy, but this had little to do with the interests of this testimony. The colonists enjoyed a substantial degree of self-government with respect to the exercise of authority and jurisdiction over the marginal seas, the seabed, and the natural resources of the colony.

The Virginia legislature acted with dispatch upon all issues which arose with respect to the Eastern Shore of Virginia and the seacoast in general. This illustrated the governmental response to particular problems and its general awareness of the special concerns of Virginia's coastal region. Land patents were readily issued for the numerous islands off the seacoast in the early years of settlement.[171]

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170 Wood, *Creation Amer. Repub.* 136-143, 154, 162-163.

171 See Ames, *Studies of the Virginia Eastern Shore* 32-35.

In 1780 the Assembly ordered that certain unappropriate lands on the eastern seashore that had been reserved for the public's common good, especially "the accustomed privilege of fishing," should remain as common land.[172] In 1785 the Assembly passed "an act to dispose of the waste and unappropriated lands in the commonwealth of Virginia, on the eastern waters."[173] When a person complained to the Assembly in 1679 that others were fishing on his property and hauling their nets on his shore, the legislators declared that every man's right to the land patented by him extended to low water mark, making the
985 foregoing activity subject to an action of trespass.[174] The legislature frequently declared that owners of high lands adjoining swamps, marshes or sunken grounds were to have one year's notice before another person could take up this land.[175]

The General Court of Virginia exercised direct jurisdiction over the seabed in a case around 1735 involving a lot reclaimed from the sea in the town of Hampton. The Court declared that land claimed or gained from the sea belonged to the owner of the adjoining property, if the water had previously ebbed and flowed over it.[176] In 1771 the Virginia Council rejected a petition for a grant of land on Cape Henry, because the seashore and lands were useful to the local inhabitants "for carrying on a Fishery" and for erecting a lighthouse. "The whole of

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172 10 Hen. Stat. 226-227; renewed in 1792, 1 S. Shepherd, ed. The Statutes at Large of Virginia 65 (1835-1836).

173 12 Hen. Stat. 100-101.

174 2 Hen. Stat. 456.

175 2 Hen. Stat. 300 (1672); 3 Hen. Stat. 528 (1710); 5 Hen. Stat. 421-422 (1748).

176 Curle v. Sweeney, *Virginia Colonial Decisions. The Reports by Sir John Randolph and by Edward Barradall of the Decisions*

[continued]

the said Lands, as well the desert, as the Sea and Bay Shores, be reserved for his Majesty's use . . . ."[177] In
986 1704 the Council exercised direct jurisdiction over an episode occurring on Assoteague Island off the coast of Accomack county.[178]

But in many ways the marginal sea, its resources, and the seabed did not loom large on the Virginia horizon in terms of areas that required the exercise of jurisdiction. No one lived on the sea; governing bodies found themselves more often preoccupied with problems in the inhabited parts of Virginia. The marginal sea was generally not within the boundaries of any individual county, so it was removed from the regular attention of powerful local authorities. Chesapeake Bay and Virginia's great rivers generated many more problems that required attention than did the marginal sea. And despite the maritime flavor of colonial life, even in Virginia, the Eastern Shore and the marginal sea were far removed from the habitations of the vast majority of Virginians. As late as 1700 a resident of the Eastern Shore who had agreed to serve on the Council reminded his colleagues of his geographical isolation: "Liveing at so great a Distance on the Eastern Shore, beyund the Great Bay of Cheasapeak where the Passage is very often Troublesome and hazardous the same may sometimes Casually hinder my
987 attendance . . . ."[179] On the sea coast the threat of bad

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176 (Continued) *of the General Court of Virginia, 1728-1741* B119 (1909).

177 6 Exec. J. Council 406-407.

178 2 Exec. J. Council 400, 434.

179 2 Exec. J. Council 91.

987 winds, storms, and tides encouraged ships to hurry within the Virginia Capes as fast as possible and not linger in the marginal sea. Yet despite all of these qualifications, the governing bodies in colonial Virginia still exercised a substantial jurisdiction over the marginal sea, the seabed, and the resources thereof.

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988 Q. What forms of maritime jurisdiction did the colony and State of Virginia exercise over the marginal sea? A. Twentieth century Americans need to be reminded of the maritime flavor of life in pre-industrial times, even in a colony and state like Virginia, which had such an intense commercial preoccupation with tobacco and the land required to grow it. Colonial Virginians did choose to exploit Virginia's landed resources much more than those derived from the sea and its seabed. Yet the author of the standard study of the Chesapeake world in the colonial era has pointed out that "colonial dependence upon shipping for marketing staple commodities abroad, for importation of necessary goods from overseas, for securing the latest news and fashions from the mother country, for travel, and for protection from the enemy, lent a maritime flavor to life in Virginia and Maryland and made the inhabitants more acutely aware than their descendants today of the importance of the sea and of navigation."[180] The most common contact of the Virginia colonists with water was not the seacoast or the ocean, but the major rivers and creeks and the vast expanse of Chesapeake Bay. Jurisdic-
989 tion over these bodies does not pertain directly to the concerns of my testimony.

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180 Middleton, *Tobacco Coast* 25.

One entered Chesapeake Bay from the Atlantic ocean through the Virginia Capes, Cape Charles on the north, and Cape Henry to the south, with a distance of about twelve miles between them. From Cape Henry to Old Point Comfort at the mouth of the James River, the distance was 17.5 miles, while from Cape Henry to the first settlement at Jamestown the distance was 57 miles.[181] The Virginia seacoast, which was open all year long, featured navigable rivers, harbors and anchorages.

Despite some continuing debates with common law courts over the extent of their jurisdiction in the seventeenth century, English Admiralty courts enjoyed a flourishing supervision over the seas, public rivers and streams, and the shores of the sea. They controlled wrecks, whales, flotsam, privateers, pirates, and some issues pertaining to fisheries.[182] But for most of the seventeenth century separate Admiralty courts were not established in the American colonies. The colonies were left to cope with the traditional issues pertaining to admiralty jurisdiction
990 through the existing common law courts. In Virginia the county courts and the General Court tried admiralty cases, including some matters occurring on the high seas, and prizes and wrecks.[183] Even during the period of Company rule, the colony of Virginia enjoyed a direct grant of admiralty jurisdiction. Sir Samuel Argall was both governor and admiral of Virginia. His duties as admiral included protection of the colony from attack by sea, the seizure

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181 Figures cited are from Middleton, *Tobacco Coast* 31 and 1 Jamestown Voy. 465.

182 See Crump, *Colonial Admiralty Jurisdiction* Chapter 1.

183 General information on admiralty jurisdiction as exercised in colonial Virginia can be found in Crump, *Id.* chapter two; Bruce 1 *Institutional History* 697-705; Flippin, *Royal Govt.* 324-333.

of interloping trading vessels, and supervision of ships coming into the harbors of Virginia.[184] The 1609 charter of the Virginia Company granted the following papers to the governors and officers appointed for Virginia by the Company: "They shall and may, from time to time forever hereafter, within the said precincts, of Virginia, or *in the way by sea thither and from thence,* have full and absolute power and authority, to correct, punish, pardon, govern and rule, all such the subjects of us, our heirs and successors, as shall, from time to time, adventure themselves in any voyage thither, or that shall, at any
991 time hereafter, inhabit in the precincts and territories of the said colony, as aforesaid, according to such orders, ordinance, constitutions, directions, and instructions, as by our said council, as aforesaid, shall be established; and in defect thereof, in case of necessity, according to the good discretions of the said governor and officers, respectively, as well in cases capital and criminal as civil, both marine and other; . . . ."[185]

The governor and Council that ran Virginia on a day to day basis in the seventeenth century possessed a considerable maritime jurisdiction, whether in their capacities as an executive, legislative, or judicial body. The royal instructions to Lord Culpeper as governor of Virginia, in December, 1679 and again in January, 1682, directed him "to exercise all the powers belonging to the place and Office of Vice-admiral of and in all the seas and Coasts about your Government. . . ."[186] The Grand Assembly of Virginia placed specific jurisdiction over maritime causes

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184 Crump, *Colonial Admiralty Jurisdiction* 59-60.

185 1 Hen. Stat. 96 (emphasis added).

186 5 McDonald Transcr. 291 and 6 *Id.* 19. Governor Effingham received the same instruction in Sept. 1683, 6 *Id.* 233.

in the hands of the General Court and the county courts. An act of the Assembly in March, 1658, empowering county courts to hear maritime causes, illustrated the ex-
992 tent to which matters normally handled by the Admiralty courts in England became the concerns of local common law jurisdictions in seventeenth century Virginia. "The countie courts shall heare maritime causes, and the sherriffes shall have power to arrest on board shipps by warrant from the Governour or any one of the councill, or under the hand of any two commissioners, whereof one to be of the quorum, untile it be otherwise settled."[187] In June, 1680 the Assembly confirmed this power of sheriffs in response to a query. Their authority was "equall and alike with their authority and power on land in their counties in like cases, and this to continue in force untill there be courts of admiralty settled."[188]

In March, 1660 the Grand Assembly took the surprising step of passing "an act for establishing a Court of Admiralty."[189] Its enactment demonstrated the willingness of governing bodies in colonial Virginia to act upon almost any problem that seemed to require attention:
"Whereas by daily experience wee find the inconveniences that happen to the inhabitants of and traders into this country for want of a court of admiralty. Bee it enacted and ordained by this present Assembly, that the Governour
993 and Council shall have full power and authority of a court of admiralty to cognoss, determine and administer justice in all things pertaining to seafairing, that shall appertaine, happen or fall out (within the jurisdiction of this collonie) either between mariner and merchant, or mariner and

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187 1 Hen. Stat. 466-467.

188 2 Hen. Stat. 489.

189 1 Hen. Stat. 537-538.

master . . . and all other business whatsoever among sea-affairs done on the water, any where within the limits and the jurisdictions of Virginia or the lawes and cognizance thereof, with the cognition of writts, the causes and actions of reprisalls, of letters of marque to take stipulations, cognitions and insinuations, And to do all other things without which the jurisdictions of the admiralty cannot stand or bear out, ... "

The admiralty court was further instructed to proceed against pirates and illegal traders. Whatever the good intentions of the Assembly, this act remained a dead letter. Perhaps the best reason for the inaction appeared in an answer by Governor Berkeley to a query from the Lords Commissioners of Foreign Plantations in 1670: "What courts of judicature are within your government relating to the admiralty? Answer. In twenty eight yeares there has never been one prize brought into the country; so that
994 there is no need for a particular court for that concern."[190]

Although the General Court and the county courts continued to carry the burden of exercising admiralty jurisdiction, more and more problems seemed to surface in the last years of the seventeenth century. This led to a movement for the creation of separate Admiralty courts in all of the American colonies. In May, 1691, in response to a royal instruction for the appointment of a court of Exchequer, the Council responded that a court of Admiralty was also an absolute necessity in Virginia. The Council further requested "that Rules and Methods for the proceedings in the said Courts may be given, there never having been either of these Courts in this Country, . . . "[191] The whole issue of admiralty jurisdiction was becoming

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190 2 Hen. Stat. 512.

191 1 Exec. J. Council 177, also 526.

more prominent. The newly arrived governor, Sir Edmund Andres, read his royal commission to the Council in September, 1692, "Constituteing and Appointing him Vice Admirall of the Rivers within this Government *and the Seas Adjacent*. . . ."[192] In October, 1696 the Council sought the opinion of the Attorney-General of Virginia as to which court should handle the issue of the legitimacy of claims to two prize ships. It was his opinion that the
995 governor may "appoint such persons as you shall think fitt for tryal and determination of Such maritime affairs...." But the Council followed his alternative recommendation of placing the cases before existing courts of record in the colony.[193] In June, 1696 the Council followed the opposite course in the case of a French prize captured by a royal ship during a voyage to Virginia. "It is the opinion and advice of the Councill that there being no Court of Admiralty erected in this Government his Excellency may and ought to give Commissions under the Seal of the Colony appointing a Judge register Marshall and other officers necessary for tryal of the said prize." The governor appointed one member of the Council as an Admiralty judge to conduct a special court of Admiralty.[194] It was perhaps most significant in terms of the exercise of maritime jurisdiction that the colony handled the entire matter on its own.

In 1697 the Crown through a directive sent to Virginia from the High Court of Admiralty established a separate Admiralty court for Virginia. This action followed the restatement of the acts of trade in 1696 and made clear

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192 1 Exec. J. Council 270 (emphasis added).

193 1 Exec. J. Council 355, 358.

194 1 Exec. J. Council 367-369.

that the new admiralty courts had a primary responsibility to enforce royal trading policy. The colonial courts also
996 exercised jurisdiction during the remainder of the colonial era over such matters as privateering, piracy, prizes, wrecks, and whales. The Admiralty court set up by the Virginia Council early in 1698 for Virginia and North Carolina was a part of Virginia's judicial system. Appeals were possible to the High Court of Admiralty in England.[195] The latter appointed the governor of Virginia as a Vice-Admiral, who in turn appointed the judges for the local Admiralty court.[196]

The new Admiralty courts were more closely linked to the imperial authorities than the courts that had handled maritime matters in the seventeenth century. In theory the new courts were also self-supporting on the basis of the fees they earned from cases heard. A letter received by the Council from the king in August, 1704, directed them to "be obedient to such orders and Instructions as they shal from time to time receive from the Lord high Admiral and to require all Persons in this Plantation whom it may concern to be aiding and assisting in the recovery
997 of her Majesty's dues and the dues of the Lord high Admiral in cases of Prizes. . . ."[197] The Council sent a copy of these instructions to the Collectors of Customs and the Naval officers of the several districts into which Virginia was divided. The suppression of illegal trade remained

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195 See generally Crump, *Colonial Admiralty Jurisdiction,* chapter 9; 1 Exec. J. Council 379; 2 *Id.* 25-26.

196 See 2 Exec. J. Council 251, 259, 264; 1 *Id.* 399; 2 *Id.* 64, 126, 309, 430; 3 *Id.* 248; 2 Spotswood 351-354; Labaree ed. *Royal Instructions* 442.

197 2 Exec. J. Council 376.

one of the primary expectations of the imperial authorities with respect to the Admiralty court in colonial Virginia.[198]

This Admiralty court exercised a broader and more expansive authority than the Admiralty court in England.[199] In 1730, 1743 and 1750 Governor Gooch described this jurisdiction as follows in response to the queries of the Board of Trade on the present State of Virginia:

"For breaches of the Acts of Trade, and for determining Controversys concerning Salvage, mariner's wages, and other Maritime Affairs, there is a Court of Admiralty held before a judge constituted by Commission under the Seal of the High Court of Admiralty of Great Brittain; and to this Court belong an Advocate, a Register and Marshal appointed by the Governour who, by a Commission is also
998 Vice Admiral of all the *Seas, Coasts,* Rivers and Creeks *within his Government.* This Court is not held at any certain time, but is called as Occasion or Business require. . . ."[200]

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198 See Labaree ed. *Royal Instructions* 383.

199 The issue is discussed by L.K. Wroth, The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction, 6 *AJLH* 250-251, 366 (1962).

200 July 23, 1730 in Colonial Office 5/1322, ff. 68-74, Public Record Office, London; Aug. 22, 1743 in C.O. 5/1326, ff. 12-19; 1750 in C.O. 5/1327, ff. 78-83. I am indebted to Dr. Edward M. Riley, Director of Research at Colonial Williamsburg, for furnishing transcripts of these documents. Governor Dinwiddie's description in 1755 was similar to those made by Governor Gooch. 1 Dinwiddie 384.

The Virginia Admiralty court supervised an expansive territory. Hartwell, Chilton, and Blair in their report on Virginia written in 1697 ascribed the admiralty functions of the governor of Virginia to his position "as Vice-Admiral of the Virginia Seas."[201] Such a description at the very least included the marginal sea off the coast of Virginia. In April, 1699 the General Assembly stipulated as part of
999 an act against pirates and privateers "that all treasons, felloñyes, piracyes, robberies, murders or other capitall offences that shall be commited upon the high seas or in any river, . . . where the admirall hath jurisdiction, shall be enquired, tryed, heard, determined, judged and execution awarded and done within this his majestyes collony and dominion in such forme as if such offence had been comited in and upon the land of this his majestyes collony and dominion." [202] The indictment of a pirate in Virginia in 1719 was for an act "on the high seas, near Cape Charles in this Colony, within the Jurisdiction of the Admiralty and of this Court . . . ."[203] In 1719 the Vice-Admiralty court of Virginia also condemned and sold the goods captured from a pirates' ship in North Carolina. Virginia proceeded to do this despite North Carolina's objection that the ship should have been condemned in that colony as a wreck. Virginia forwarded the value of the condemnation to England to await the royal decision.[204]

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201 H. Hartwell, J. Blair, and E. Chilton, *The Present State of Virginia, and the College* 22 (H. D. Farish ed. 1940). The three authors were prominent royal officials in Virginia.

202 3 Hen. Stat. 178.

203 1 *Calendar of Virginia State Papers and Other Manuscripts, 1652-1781* 196 (W. P. Palmer et al. eds. 1875-1893).

204 2 Spotswood 316-319.

The colonists lived in an age of imprecision and lack of geographic knowledge with respect to martime matters.
1000 This encouraged Virginia to exercise an expansive maritime jurisdiction with impunity. An episode in 1715, for example, suggested that the Admiralty in England was not capable of careful or sharp distinctions with respect to the maritime jurisdiction of Virginia. Governor Spotswood discovered that the Admiralty had ordered a royal ship to Maryland and then to Boston. He sent the following information to the Secretary of the Admiralty: "I apprehend you are under some mistake as to the Scituation of that province; for tho' it appears by the Map that part of Maryland is bounded on ye Sea, yet the Seat of the Government, and the greatest part of the Province lyes far up the Bay of Chesapeake, whereas the Land on the Sea Coast is little inhabited, and no port or harbor on that side . . ."[205] He generously suggested that in future they send their missives to Maryland via the Virginia government.

On the eve of the American Revolution the Admiralty court in Virginia functioned much as it had during the eighteenth century. It was not popular by this time because of its role in the enforcement of the acts of trade. The Crown recognized its problems with illegal trade by an order-in-council dated July 6, 1768 establishing four Vice-Admiralty courts in the colonies to hear appeals from
1001 provincial admiralty courts or to have original jurisdiction in the enforcement of the acts of trade.[206] Virginia was placed in the Philadelphia Vice-Admiralty district.

At the Virginia Convention in December, 1775, the colonists decided to enforce the continental association

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205 2 Spotswood 107.

206 Jensen, *Amer. Col. Doc.* 707-708.

against importation. The Convention appointed three men as Admiralty judges to hear breaches of this non-importation agreement. In May, 1776 the Convention gave the Admiralty judges jurisdiction over all captures of enemy vessels. The new Virginia constitution of June, 1776 provided for regular judges of Admiralty matters.[207]

The Virginia General Assembly passed a statute creating a state court of Admiralty in October, 1776:

"The said court shall have cognizance of all causes heretofore of admiralty jurisdiction in this country, and shall be governed in their proceedings and decisions by the regu-
1002 lations of the continental congress, acts of general assembly, English statutes prior to the fourth year of the reign of King James the first, and the laws of Oleron, the Rhodian and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty, save only in the instances hereafter provided for. If in any case the regulations of the American congress shall differ from those established by act of the general assembly of this commonwealth, if such case relates to a capture from any publick enemy with whom the United States of America are or may be at war, the said regulations of the congress shall be observed. In all other cases, the supremacy of the laws of this commonwealth within the same shall prevail."[208]

The Assembly passed a further statute concerning the Admiralty court in May, 1779. The above passage was rewritten as follows:

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207 The details are from 9 Hen. Stat. 103-105; 1 *Official Letters of the Governors of the State of Virginia* 21 note (H. R. McIlwaine, ed. 1926-1929); 9 Hen. Stat. 117. The Virginia Council of State received resignations from three Admiralty judges and appointed others in their places in August, 1776. 1 J. Council State 103.

208 9 Hen. Stat. 203.

"The court of admiralty . . . shall have jurisdiction in all maritime causes, . . . and shall be governed in their proceedings and decisions by the regulations of the congress of the United States of America, by the acts of the general assembly, by the laws of Oleron, and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws
1003 of nature and nations. If the regulations of congress happen to differ from those of general assembly, the latter are declared to be supreme in cases wherein citizens only are litigants, and the former in all other cases: . . .[209]

The Virginia Court of Appeals exercised admiralty jurisdiction on an appellate basis after 1776.

The Virginia Admiralty Court functioned in an independent fashion during the Revolutionary years. In May, 1781 the Assembly authorized Congress to levy a duty of five per cent on all prizes and prize goods condemned by the Virginia Admiralty court, but then suspended the act in November until other states passed similar laws.[210] In March, 1782 the Virginia Council of State responded to a letter from the governor of North Carolina by issuing a directive to the Virginia Admiralty Court, so that nothing can "interrupt that harmony which ought to subsist between the United States of America."[211] In October, 1788 the Virginia Assembly established district courts: "Those cases in which the court of admiralty hath jurisdiction by law, and which are not taken away by the constitution of the United
1004 States, are hereby transferred to the district courts, to be

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209 10 Hen. Stat. 98.

210 10 Hen. Stat. 409, 451

211 3 J. Council State 56. This directive concerned the handling of a specific case.

proceeded on as the law requires in the said court of admiralty."[212] In December, 1788 the Assembly recognized that the new federal Constitution granted admiralty and maritime jurisdiction to the United States and discontinued the Virginia court of Admiralty as of March, 1789.[213]

Pirates represented a serious threat to the safety of Virginians from about 1660 to 1730. In the course of defending against these predators, colonial authorities engaged in a particularly important form of maritime jurisdiction and regulation. As early as 1621 the Virginia Company instructed the governor of Virginia "to punish piracies."[214] In the seventeenth century piracy was primarily within the jurisdiction of the General Court. Bruce noted that in some of the earlier cases the pirates were sent to the court of Admiralty in England:

"There is, however, reason to think that this took place only when the acts they were accused of had been committed, not off the coast of Virginia, but in remoter waters. . . . When the act of piracy had been committed in the waters of Virginia, the trial of the persons guilty took place in the Colony."[215] In the eighteenth century pirates were tried either in Admiralty court or in specially appointed courts of Oyer and Terminer for the trial of pirates.[216]

Both the Virginia Council and Assembly found themselves much preoccupied with the issue of pirates in the late seventeenth and early eighteenth century. The governor and Council issued a large number of proclamations warning the

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212 12 Hen. Stat. 736; renewed in Oct. 1792, 13 *Id.* 432.

213 12 Hen. Stat. 769-770

214 1 Hen. Stat. 114

215 1 Bruce, *Institutional History*, 676-677.

216 G. Webb, *The Office and Authority of a Justice of the Peace* 107 (Williamsburg, 1736); Labaree ed. *Royal Instructions* 450-451.

populace of the presence of pirates in general or particular, ordering their seizure, preparing the seacoast against their raids, and warning the inhabitants not to have dealings with them.[217] "Whereas of late there have been severall Ships taken and plundered and some other sunke, burnt or otherwise destroyed by Pyrates lying off and hovering over the Coasts of this Dominion . . . .," read a proclamation issued in 1700. An act of the Assembly in 1699 warned against pirates and privateers and the harm they committed "on the high seas." An act cited earlier directed that crimes committed at sea were to be tried in Virginia as if they
1006 had occurred on land.[218] It is worth noting that the Assembly of the state of Virginia passed an act in 1785 "to prevent losses by pirates, enemies, and others, on the high seas."[219]

A brief note of a few cases involving pirates will furnish some sense of the scope of the jurisdiction exercised by Virginia over the marginal sea, and occasionally beyond. In May, 1700 the Virginia Council took immediate cognizance of the case of a Liverpool merchant ship taken by pirates "about thirty Leagues from the Capes." When the ship master managed to sail his pillaged vessel to the Eastern Shore, the colony granted him assistance in refitting his ship and permitted him to engage in trade despite the loss of his customs records.[220] In the spring of 1700 the colony also made prodigious efforts with the assistance of a royal guardship to capture the pirate ship *La Paix* that

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217 See for example 1 Exec. J. Council 62-63 (1684), 89-90 (1688); 2 *Id.* 66 (1700); 3 *Id.* 89-90 (1706).

218 3 Hen. Stat. 176-177.

219 12 Hen. Stat. 167-168.

220 Jensen, *Amer. Col. Doc.* 262-264; 2 Exec. J. Council 68.

was operating off its seacoast. The ship with its one hundred pirates was finally captured within the Capes.[221] In 1716 Governor Spotswood learned that pirates were preparing to raid Virginia shipping from the Bahamas and sent a
1007 ship to reconnoiter the situation. Spotswood informed the Crown that he took this action because he was the nearest royal governor and also held a commission from the late King William for the appointment of the admiralty officers in those islands.[222] In 1718 Virginia initiated a controversy with North Carolina by seizing a pirate ship in the latter's territory and having it condemned in the Virginia admiralty court.[223] Most of the acts of piracy that concerned Virginia in 1724 occurred within about ten leagues of the Virginia coast.[224]

Virginia engaged in a significant exercise of jurisdiction over the marginal sea when it issued directives to its guardships to convey merchant ships a certain distance off the coast for protection from pirates. In times of war royal instructions insisted that the tobacco ships travel in convoys; protective vessels convoyed them right across the Atlantic in most cases.[225] The Virginia Council normally set a date in the spring for the convoy to sail. Protecting the
1008 tobacco fleet from pirates and privateers usually involved

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221 See the documentary account of the colony's efforts in Jameson, ed. *Privateering and Piracy in the Colonial Period: Illustrative Documents* 259-275 (1923).

222 2 Spotswood 169-171

223 2 Spotswood 273-275.

224 See 4 E. Donnan ed. *Documents Illustrative of the History of the Slave Trade to America* 117-120 (1930-1935).

225 Labaree ed. *Royal Instructions,* 460-461; 1 Exec. J. Council 103 (1689).

the Atlantic ocean within a limited distance of the Virginia coast. The authorities obviously considered the marginal sea within about fifty leagues of the coast to be the prime area requiring protection from pirates. The situation in the spring of 1700 when Virginia captured the one hundred pirates from the *La Paix* and wanted to send them to England was nicely illustrative.[226] The governor put the pirates in groups on separate merchant ships that sailed in a convoy under the temporary protection of a royal ship for a certain distance offshore. The governor himself decided to board the Shoreham and sail "forty or fifty leagues off the Coast" to insure that the merchant ships were safe from pirates. But after the governor's return from this sea journey, the Council reconsidered their former order that the royal warship "every twenty days to go out to Convoy all Ships and Vessells off the Coasts about fifty or sixty Leagues without the Capes where the greatest danger is . . . ." "His Excellency Informing the Councill that when he went out in the Shoreham with the Late fleet they
1009 found the strength and force of the Current to be such that sailing outwards forty or fifty leagues they made it above one hundred thirty six Leagues Inwards bound and if they had not had fair Winds might have been two or three weeks before they had recovered the Capes which great Inconveniency with Divers others being Considered. It is ordered that the said Captain William Passenger Command of his Majesties Ship Shoreham every twenty daies or shorter time if he see convenient Cruseing upon the Coasts or Convoying any Ships outwards bound shall go no farther than the Soundings."

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226 This episode can be followed in 2 Exec. J. Council 84-85, 91-92. Sending the pirates to England was a condition of their surrender. This was unusual; normally such pirates were tried in Virginia.

The Council may not have been aware that vessels approaching Virginia obtained their first soundings of bottom in eighty or ninety fathoms at a distance of forty or fifty leagues off shore. But the first hydorgraphic map of the seacoast was not available until 1735. Its table of soundings in various latitudes off the Virginia Capes were taken between 18½ and 26½ leagues from the coast which was perhaps a better estimate of the distance the Council may have intended by the reference to the soundings.[227] This interpretation is supported by the directive of the Council in June, 1701 that the warship "Convoy this Fleet 20
1010 Leagues without the Capes of Virginia . . . ."[228] The Commercial importance of this activity was suggested by the fact that this particular convoy included 49 ships. In 1709, however, the Council directed a guardship to convey a tobacco fleet "fifty Leagues out to Sea . . . ."[229] Another illustration of a Council directive to guardships occurred in 1761, when the authorities had two royal ships at their disposal to help in the defense of Virginia's seacoast. The Council ordered one to "cruize within four or five leagues North and South, and not above eight or ten leagues to the Eastward of the Capes, so as to make the Entrance into the Bay once every twenty four hours." They ordered the second ship to "cruize from fifteen to thirty Leagues to the Eastward and between the Lattitudes of Cape Hatteras, and Cape Henlopen."[230] Virginia obviously exercised an extensive supervision over the marginal sea in the process of protecting the interests of its citizens and traders.

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227 Middleton, *Tobacco Coast* 27, 74.

228 2 Exec. J. Council 159.

229 3 Exec. J. Council 223.

230 6 Exec. J. Council 194.

The issue of privateering primarily arose during the interminable years of warfare involving England and its European enemies. The Virginia governors had instructions to commission privateers from the colony during wartime and to condemn prizes taken by these privateers in the Vir-
1011 ginia Admiralty court.[231] During the period of the Revolutionary war Virginia continued to issue letters of marque or reprisal to privateers from the state, with the proviso that such state privateers pay attention to the regulations of the Continental Congress on such matters. The latter primarily concerned the need for careful identification by the state of those to whom such powers were granted.[232]

Virginia made efforts to protect its own ships and shipping from foreign privateers during wartime, much as it responded to the threat of pirates. In the early 1670's Governor Berkeley informed the imperial authorities that no privateers had frequented the "coasts and neighbouring seas" of Virginia, "since the late Dutch war."[233] In 1632 Virginia captured, tried, and convicted some privateers.[234] Privateers became a real problem in the early 1700's and
1012 Virginia occasionally was successful in capturing one.[235] In 1758 Virginia remained dependent upon royal guardships to "protect the Coast of Virginia from the Depredations of Privateers."[236] The latter simply represented another issue

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231 See Labaree ed. *Royal Instructions* 446; 3 Exec. J. Council 506 (1719); 6 *Id.* 12 (1756), 214 (1762); 2 Dinwiddie 497 (1756).

232 3 J. Council State 109.

233 2 Hen. Stat. 513

234 1 Exec. J. Council 38-39.

235 See 3 Exec. J. Council 8 (1705), 149 (1707); 1 Spotswood 104 (1711).

236 6 Exec. J. Council 77.

that required Virginia to continue to pay attention to its marginal sea.

The enforcement of the Crown's rights to the goods in a wreck or lost goods of various kinds was an interesting aspect of Virginia's extensive maritime jurisdiction. James II wrote to Lord Howard of Effingham, the governor of Virginia, in October, 1687, concerning some treasure that had recently been brought to the American colonies from a wreck near the coast of Hispaniola. "And one full moyety of all Treasure and Riches taken upon, out of, or from the bottom of the Sea being by the ancient ordinances of the Admiralty due unto us as Lord High Admiral according to the Reports or Certificat of our Judge of our high court of Admiralty and Judge Advocate."[237] James ordered his governor to search out the one half share due the Crown in this instance, "or from any other wreck whatsoever which hath lately been brought or shall bee
1013 brought into the Plantation under your Government . . . ." In February, 1688 the Virginia Council received similar instructions to take care of the Crown's share of any plate, silver, gold, riches, or treasure taken from a wreck.[238] In August, 1692 the Council proclaimed that all anchors, cables, and boats found in the rivers and bays of the colony belonged to the Crown and not to the persons finding them.[239] A proclamation by the governor in May, 1700 asserted the jurisdiction of Virginia on behalf of the Crown over all sorts of things found on the water or the coast: "Whereas Especially at this time severall goods and merchandizes may be found floating upon the water in the

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237 Oct 22, 1687, 7 McDonald Transcr. 277-278.

238 1 Exec. J. Council 89.

239 1 Exec. J. Council 267.

Bay of Chisapeake or upon some other haven River or Creek in this his Majesties Colony and Dominion or may be drove on Shore and there privately taken up and carryed away . . . .

. . . . require all his Majesties Coroners and Sheriffs in their respective Counties and Stations to use their utmost Endeavour to take and secure all Wrecks, Buoys, Cables, Anchors, Boates or other goods and merchandizes which they shall find in or floating upon the water or Drove upon the Shore and all such goods and things as may be ac-
1014 counted for Floatsam Jetsam or Lagan . . . and Give me an account thereof from time to time . . . ."[240] Persons discovering and reporting such material received an allowance for salvaging it. The directive specifically applied to Chesapeake Bay and the rivers, not because the Crown did not claim similar rights in the marginal sea and seacoast, but because the whole question was more pertinent to an island and sheltered body of water. The authorities responded to the wreck of a ship that hindered navigation anywhere in Virginia waters, as they did by erecting a beacon over a wreck in the York river in February, 1708.[241] In 1710 Governor Spotswood sent a boat to Currituck Inlet in North Carolina to salvage cables from the wreck of a royal ship. He then sold the material and paid charges for salvage from the total amount.[242] The Assembly of the state of Virginia passed "an act concerning wrecks" in May, 1782:

"Whereas many vessels have been and may hereafter be stranded on the sea coast, bay or river shores within this commonwealth, and the goods or other property belonging

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240 2 Exec. J. Councl, 84, 86.

241 3 Exec. J. Council 166.

242 1 Spotswood 3, 67-68

1015 to such vessels may be embezzled and stolen, to the great injury of the owners."[243] This act was primarily to protect the property of ship owners when their ships encountered difficulties. It provided for commissioners of wrecks "in each of the counties bordering on the sea or bay shores in this state," who were responsible for assisting endangered, stranded, or wrecked vessels.

Q. Do you have an opinion on whether the trade and commercial jurisdiction of Virginia involved the exercise of authority over the marginal sea and if so, would you state your reasons for it? A. The establishment and enforcement of trade regulations by the colony and state of Virginia was another aspect of jurisdiction that involved the marginal sea. Prior to the development of significant imperial supervision of colonial trade in the last third of the seventeenth century, Virginia acted almost like an independent state in this respect. In 1643 and 1658 the Grand Assembly encouraged and regulated trade with the Dutch.[244] In 1645 the Assembly specifically encouraged its inhabitants
1016 to engage in as much free trade as possible with the residents of England to the benefit of the colony.[245] The Articles of Agreement between Virginia and the Commissioners of the Commonwealth of England in 1652 agreed "that the people of Virginia have free trade as the people of England do enjoy to all places and with all nations. . . ."[246]

With the emergence of an imperial trade policy, the enforcement of royal trade regulations was a major preoccu-

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243 11 Hen. Stat. 51-54; the Council of State appointed the commissioners of wrecks for the four seacoast counties in July. 2 J. Council State 118-119, 430 (1785).

244 1 Hen. Stat. 258, 469, also 540 (1660).

245 1 Hen. Stat. 296.

246 1 Hen. Stat. 364.

pation of the colonial authorities. This affected all aspects of maritime jurisdiction from admiralty courts, to pirates, to the regulation of shipping and coastal defense. The suppression of illegal trade remained a major colonial preoccupation. In 1715 Governor Spotswood, for example, would not allow a French ship that limped into Virginia to sell its cargo and condemned two other ships for trading with the French islands.[247]

The state of Virginia continued to exercise an independent trade jurisdiction after 1776. The state assembly passed an act to protect and encourage the commerce of nations acknowledging the independence of the United States of America.[248] Several acts restricted foreign vessels to
017 certain ports within the commonwealth.[249] In 1785 Virginia agreed not to charge tolls on ships coming through the Virginia Capes and to maintain the waters of Chesapeake Bay as a common highway for Virginia and Maryland residents.[250] In October, 1783 Virginia passed "an act to authorize the congress of the United States to adopt certain regulations respecting the British trade."[251] This nicely illustrated Virginia's independence in such matters during the period of the formation of the Union.

Virginia imposed a series of duties and importation taxes on incoming vessels in the colonial era. For a good part of the seventeenth century any ship entering Virginia from

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247 2 Spotswood 103-105-108.

248 10 Hen. Stat. 202-203.

249 11 Hen. Stat. 402-404 (1784); 12 Hen. Stat. 320-323 (1786), 434-436 (1787).

250 12 Hen. Stat. 50-55.

251 11 Hen. Stat. 313-314.

the ocean had to pay castle duties and port charges.[252] From about 1680 on, the colony raised revenues by set-
1018 ting import duties on liquors and slaves.[253] By royal instruction the colonial authorities appointed naval collectors, who played a significant role in exercising the maritime jurisdiction of the colony and in enforcing import duties. They enforced embargoes, organized convoys, cleared vessels for the sea, collected fees in their districts on the entering and clearing of vessels, and enforced the acts of trade.[254] The state of Virginia created and continued in existence a number of naval officers for each district after 1776. They had an extensive jurisdiction over importation, exportation, embargoes, and general maritime supervision.[255]

Q. Did Virginia enact regulations concerning shipping and related maritime matters that, in your opinion, per-
1019 tained to the exercise of authority and jurisdiction over the marginal sea? A. Many of the trade regulations previously cited illustrated the supervision exercised by the colony of Virginia over matters relating to ships engaged in oceanic pursuits. A few additional illustrations of this matter will suffice. In 1656 the Grand Assembly ordered all

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252 1 Hen. Stat. 176 (1632), 192 (1632), 218 (1633), 229 (1640), 247 (1643) 301 (1645) 533-534 (1660); 2 Hen. Stat. 134 (1662).

253 2 Hen. Stat. 466-469 (1680); 3 Hen. Stat. 23 (1684) 38 (1686), 88-92 (1691), 229-235 (1705), 344-349 (1705); 4 Hen. Stat. 143-150 (1726), 276 (1730), 310 (1732) 393 (1734); 5 Hen. Stat. 26-31 (1738), passim.

254 Labaree, ed. *Royal Instructions* 657; Beverley, *Hist. and Present State of Va.* 241, 247 (1705); Flippin, *Royal Govt.* 253-256.

255 9 Hen. Stat. 184-191 (1776); 10 Hen. Stat. 304-306 (1780); 11 Hen. Stat. 258-264 (1783); 12 Hen. Stat. 304-319 (1786), 438-452 (1787).

ships arriving in Virginia to report to the governor.[256] In 1658 the Assembly ordered all ships coming from England to provide four months provisions for passengers on the ocean voyage to Virginia.[257] In 1700 the Council determined that all masters of vessels driven ashore "by stress of Weather or for supply of Provisions wood or water, were to give Bond to perform the Laws of this Country."[258]

The Virginia Assembly also encouraged the building of ships by Virginians to engage in foreign commerce. In 1662 the Assembly passed a statute offering a cash reward for such construction in Virginia and exempted boats owned by Virginians from certain duties.[259] Some shipbuilding occurred on the Eastern Shore of Virginia, but this activity never really flourished in colonial Virginia.[260] In 1671 Govenor Berkeley made clear that Virginians owned few ocean going vessels.[261] In 1743, however, a royal official reported that Virginians owned about fifty ships engaged in trade with the mother country.[262] Governor Fauquier reported to the Lords of Trade that in 1762 Virginians owned one hundred and two ships engaged in the ocean trade.[263]

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256 1 Hen. Stat. 392.

257 1 Hen. Stat. 435; renewed 2 Hen. Stat. 129 (1662).

258 2 Exec. J. Council 103.

259 2 Hen. Stat. 122, 178; in 1663 the Assembly rewarded the builder of a large vessel. 2 *Id.* 199, also 204.

260 See C. W. Evans, *Some Notes on Shipping and Shipbuilding in Colonial Virginia* 23-24 (1957); Middleton, *Tobacco Coast* 230-243.

261 2 Hen. Stat. 515, 516.

262 Flippin, *Royal Govt.* 51.

263 Colonial Office 5/1330, ff. 261-284, Public Record Office London.

The attempt to build a lighthouse on Cape Henry for oceanic vessels engaged in trade with Virginia was not a success story until the 1790's. The project was originally conceived by the energetic Governor Spotswood in 1720. The Assembly passed an act for this purpose in 1728, which the Crown vetoed primarily because of the opposi-
1021 tion of English merchants.[264] A further act of the assembly in 1752 was similarly unfruitful.[265] Another act in 1772 finally initiated construction of a lighthouse in 1773, which was interrupted by the outbreak of war.[266] In 1777 the state of Virginia erected a makeshift lighthouse at Cape Henry.[267] In 1789 Virginia formally ceded title and jurisdiction over up to two acres of land on Cape Henry to the United States for the erection of a lighthouse, with the proviso that Virginia citizens retained the privileges
1022 "they now enjoy of hauling their seines and fishing on the shores of the said land . . ."[268] This transaction illustrated the care and formality with which states have occasionally transferred the ownership of an area within their territorial

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264 The entire story is well told by A. P. Middleton, The Struggle for the Cape Henry Lighthouse, 1721-1791, 8 *The American Neptune* 26-36 (1948); see also Middleton, *Tobacco Coast* 28. The 1728 statute is printed in W. Winfree, comp. *The Laws of Virginia. Being a Supplement to Hening's The Statutes at Large 1700-1750* (Richmond, 1971), 291-295. The English merchants expressed their opposition to the Lords of Trade in 1722, 9 Sainsbury Abstracts 47, 50. The latter reported their veto of the 1728 Virginia statute in a letter to Governor Gooch in May, 1729. 9 Sainsbury Abstracts 448.

265 6 Hen. Stat. 227-229; 6 Exec. J. Council 146 (1759)

266 8 Hen. Stat. 539-541, 652-653 (1773).

267 1 J. Council State 350.

268 13 Hen. Stat. 3-4; renewed in 1798, 2 Shepherd Statutes 88-89.

boundaries to the federal government. The United States began work on the first federal lighthouse in 1791 and completed the effort in 1792.

The Virginia Assembly engaged in a series of efforts in the seventeenth century to restrict the incoming oceanic trade of the colony to at first one port and then several designated ports.[269] The Crown disallowed the major efforts of the Assembly in 1691 and 1705 actually to create a number of ports.[270] The English authorities and merchants were much more alarmed at the threat of economic diversification in Virginia than they were at the problems of collecting customs and duties and enforcing general trade regulations under the existing system. Such prospects dimmed their theoretical commitment to the idea of established ports.

1023 Thus Virginia did not develop any significant ocean ports in the colonial era, with the exception of Norfolk, which had become the principal seaport of the colony by the mid-eighteenth century. Almost any river in Virginia became a resting place for ships from the sea. There were also some harbors on the seacoast of the Eastern Shore of Virginia. Especially in wartime the Council became concerned that ships search out the most adequate protection available when in these seacoast rivers. In April, 1692 the Council then discovered "by Considering of the Mapps that the Severall like Rivers on the Seabordside of the Eastern Shore by being Navigable are very dangerous both for Enemyes and false Traders . . . ."[271] They asked the Burgesses from the Eastern Shore whether it would be an injury to their

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269 See 1 Hen. Stat. 163, 166, 190, 214, 245, 412-414; 2 Hen. Stat. 135.

270 3 Hen. Stat. 53-69, 108-109, 404-419.

271 1 Exec. J. Council 153-154, 228

fellow residents "if noe Ships or Vessels whatsoever should be permitted to goe into the Little Rivers and harbours on the Seaboardside of the Eastern Shore, they affirmed it would not . . . ." The Council then instituted such a prohibition, "except onely Smiths Island River which is known to be fitt place to Secure Marchants Ships in Legally trading to this Colony at their first arrivall."

Virginia also exercised jurisdiction over the regulation and establishment of ferries. The matter was a common
1024 preoccupation of the legislature.[272] But most of the ferries were on rivers or Chesapeake Bay and had little to do with the seacoast. There is some evidence that regulated ferries existed on the seacoast side of the Eastern Shore in the eighteenth century between the islands and the mainland and over the seacoast rivers.[273]

Professional ship pilots made their appearance in Virginia waters in the early years of settlement. Virginia began to regulate and license this maritime occupation in 1651, in response to "a generall complaint made by master of shipps that wee had neither pilotte nor beacons to direct them in their bringing their shipps upwards . . . ."[274] Most of the work of the pilots initially consisted of picking up ships from the sea in the vicinity of the Virginia Capes and guiding them over Chesapeake Bay to their respective landing places. In 1691 the Council agreed to appoint a pilot for Smiths Island River, which is on the seacoast side of the
1025 Eastern Shore.[275] A major enactment in 1755 establishing

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272 See for example 3 Hen. Stat. 469-476 (1705); Middleton *Tobacco Coast* 62-64; Evans, *Notes on Shipping and Shipbuilding* 37-46.

273 See 2 Exec. J. Council 279 (1702) concerning a ferry to Hog Island; and 6 Hen. Stat. 19 (1748).

274 2 Hen. Stat. 35.

275 1 Exec. J. Council 182.

pilots and regulating their fees stated specifically that pilots were to pick up vessels "coming from sea."[276] Pilots were not necessary on the marginal sea, or at least until the ships began to approach the Capes and sought passage through its dangerous shoals.

The state of Virginia passed similar acts for the regulation of pilots.[277] Enactments by the Assembly concerning pilots in 1801 and 1802 made clear that the rates for pilotage began from or at the sea and provided for the return of the ship to sea by the pilot.[278] This recognition of the activities of pilots in the marginal sea was much more explicit than in previous enactments. The whole issue simply represented another aspect of Virginia's extensive exercise of jurisdiction over the marginal sea.

A number of residents of Virginia went to sea as sailors.
1026 The colony asserted authority over them as well as other mariners that entered its territory. Most of the statutes regulating seamen date from the eighteenth century. The Assembly passed a mjaor act in 1722 "for punishing mutinous and disobedient Seamen; and for the more speedy determination of controversies arising between masters of Ships, and their crews."[279] The act applied to ships employed in "trading within this colony," but the prohibited

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276 6 Hen. Stat. 490-494; this act was frequently renewed: 7 Hen. Stat. 580-585 (1762); 8 Hen. Stat. 197 (1766), 358 (1769), 542 (1772).

277 11 Hen. Stat. 185-189 (1783); 12 Hen. Stat. 299-303 (1786); 13 Hen. Stat. 267-268 (1791); 1 Shepherd Statutes 169-173 (1792), 302 (1794).

278 2 Shepherd Statutes 286 (1801), 309-313 (1802).

279 4 Hen. Stat. 107-110.

acts do not seem to have had to occur within the confines of Virginia. The statute authorized two Justices of the Peace to board a ship and settle an issue. The broad jurisdiction exercised by Virginia in this statute was emphasized by the final proviso in the basic act. It directed that nothing in the statute should be taken "to limit or restrain the power, authority and jurisdiction of the lord high admiral of Great-Britain, the vice admiral of this dominion, or judge of the vice admiralty, for the time being, in any matter or thing, properly belonging to the cognizance of the admiralty court." The Assembly passed a generally similar statute in 1748, with the emphasis less on the punishment of mutinies and more on the general problems involved in regulating the behavior of seamen on ships trading "within this colony."[280] The implication was that
1027 Virginia would exercise a jurisdiction over behavior that had occurred anywhere, once the mariner was within Virginia's territory again or for the first time. The repeated proviso that Virginia did not intend to infringe on admiralty jurisdiction suggested that this issue was a sensitive one that the legislators could not confront too directly.

The state of Virginia passed "an act concerning Seamen" in 1785.[281] The act required the registration of all seamen living in Virgnia with the expectation that some would take advantage of opportunities to join the Navy of Virginia. Young indigent persons were to be bound out to sea as apprentices. Their complaints of ill treatment were to be heard by the county court nearest to the port from which an apprentice served. Justices of the Peace

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280 6 Hen. Stat. 24-28 (1748); amended in 8 Hen. Stat. 523-524 (1772).

281 12 Hen. Stat. 131-137.

had jurisdiction over charges against mutinous and refractory seamen. The state of Virginia intended to exercise jurisdiction over conduct that occurred on Virginia ships located anywhere.

Another aspect of Virginia's maritime jurisdiction involved the imposition of a period of quarantine on ships and passengers arriving in Virginia from foreign ports afflicted with the plague. The Assembly passed such an act in 1722.[282] In the late 1760's the Crown disallowed a
1028 supplementary statute designed to impose quarantine on English ships importing convicts or servants infected with various other diseases.[283] The Assembly renewed the act in 1772.[284] The act of the state of Virginia in 1783 to require "vessels coming from foreign parts to perform quarantine" left the decision to the discretion of the governor and Council, who could judge the necessity of such a quarantine in specific cases.[285]

Ships engaged in the tobacco trade frequently brought a load of stones and bricks to Virginia as ballast, which they then sought to discharge before taking on their primary cargo. The Virginia Assembly passed its first "act to prevent the casting of ballast into Rivers and Creekes" in 1691.[286] The prohibition extended to ports, havens, and harbors, which included a few places on the eastern seacoast of Virginia. Ballast was to be deposited on shore, not in a spot that could hinder navigation. The renewal of this ballast provision in 1705 added an additional prohibition that was in a direct sense an early act for environmental

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282 4 Hen. Stat. 99-103.

283 8 Hen. Stat. 260-261 (1766); 6 Exec. J. Council 304 (1768).

284 8 Hen. Stat. 537-538.

285 11 Hen. Stat. 329-331.

286 3 Hen. Stat. 46-47.

protection. The problem was simple: "The commanders or masters of the ships or vessels which have imported negros into this colony and dominion, have caused such negros as died on board, to be cast into the rivers and creeks where such ships or vessels did then ride, to the great annoiance of the inhabitants adjacent."[287] In future any Negro, "or other person whatsoever," that died under such circumstances was to be buried on shore. The colony and state of Virginia continued to pass statutes, including these basic provisions concerning ballast and dead bodies, at least into the 1790's.[288]

In 1679 Virginia initiated another lengthy series of statutes to clear rivers, creeks, and navigable bodies of water in general of such obstacles to navigation as logs and trees.[289] County courts handled primary jurisdiction over this problem. In addition to the general acts for this purpose, the Assembly of the colony and state passed a significant number of statutes after 1745 for the clearing of specific rivers.[290]

The general significance of this particular material concerning ballast and the clearing of rivers and the like was its illustration of the willingness of the Virginia authorities, particularly the Assembly, to take the necessary steps to

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287 3 Hen. Stat. 353-354.

288 Webb, *Justice of the Peace* 278 (1736); 6 Hen. Stat. 94-101 (1748); 7 Hen. Stat. 392-394 (1761); 12 Hen. Stat. 180-181 (1785); I Shepherd Statutes 145-147 (1792).

289 See 2 Hen. Stat. 455 (1679), 484-485 (1680); 3 Hen. Stat. 394-395 (1705); 4 Hen. Stat. 110-112 (1722); Webb, *Justice of the Peace* 278 (1736); 6 Hen. Stat. 69-71 (1748).

290 See for example 5 Hen. Stat. 375-377 (1745); 6 Hen. Stat. 291-293, 394-395; 8 Hen. Stat. 148-150, 564-581; 11 Hen. Stat. 450-462 (1784), 510-525 (1784).

cope with such problems. These had only a peripheral relevance to the issue of the exercise of jurisdiction over the marginal sea or the seabed. Yet in the unlikely event that the marginal sea and seabed had begun to be plagued by similar problems, it is apparent that the Virginia legislature would have taken the steps necessary to cope with the situation.

Another minor aspect of the Assembly's willingness to supervise and regulate maritime matters concerned the problem of mills and dams on navigable rivers and streams. These became a significant obstacle not only to river traffic, but more especially to fish. Beginning in 1759 the Assembly enacted a series of specific statutes requiring the owners of mills and mill-dams on particular rivers to make openings or slopes in their dams for the passage of fish.[291]
1031 The state of Virginia continued to pass such statutes, now on the general level.[292] An interesting statute passed by the state assembly in 1808 sought to prevent the obstruction of the passage of fish up and down the James River during the summer and fall seasons.[293]

Q. In your opinion, did provisions for the maritime defense of the colony and state of Virginia require the exercise of authority and jurisdiction over the marginal sea?

A. Provisions for the maritime defense of the colony and state of Virginia required the exercise of authority and jurisdiction over the marginal sea. This primarily involved

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291 7 Hen. Stat. 321-322 (1759), 409-410 (1761); 8 Hen. Stat. 581-583 (1772).

292 12 Hen. Stat. 187-190 (1785); 1 Shepherd Statutes 138-139 (1792).

293 3 Shepherd Statutes 409.

arranging for royal or local ships to cruise the marginal sea and for lookouts to be posted on the seacoast to watch for the enemy. Virginia had no land based defenses, such as forts, that could be really effective against ships on the seacoast. The forts that were periodically built for the protection of the rivers did not prove to be very useful.[294] Virginia's main reliance, especially in time of war,
1032 was upon guardships. In general Virginia depended on the royal ships provided by the imperial authorities for purposes of defense of the Virginia seacoast. This also included protection of its shipping in wartime or during periods of attack from pirates and privateers. The governor of Virginia controlled the royal ships of war sent over for Virginia's use in his capacity as the vice-admiral.[295] Convincing the royal authorities of the necessity of such a guardship became a preoccupation of the governor and his Council in the late seventeenth and early eighteenth centuries. In 1680 the Council considered "now absolute necessary it is for the peace and safty of this his Majesties Country so full of great Rivers Bayes and waters that the Dominion of the Sea Should be preserved. . . ."[296] They requested an armed vessel of substantial size to be constantly on station in Virginia. Such requests had to be renewed periodically as defense problems loomed larger.[297]

On the numerous occasions when Virginia had a large warship available, the colony employed it for a variety of duties on the marginal sea. In 1690-91 the ship did remain

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294 See in general 2 Bruce, *Institutional History*, Chapter 13.

295 Flippin, *Royal Govt.* 97-98.

296 1 Exec. J. Council 7.

297 See 1 Exec. J. Council 41 (1683), 143-144 (1691); 2 Spotswood 350 (1721).

within the Bay to cruise back and forth examining vessels and preventing any from leaving before the convoys officially sailed.[298] Sometimes the Council directed the ship to sail about or between the Capes.[299] Governor Spotswood used royal guardships to convoy trading vessels off the coast and on occasion to a place as far away as Barbados.[300] Sometimes the guardships became involved in the suppression of illegal trade in and out of Virginia.[301]

Virginia was largely dependent on royal guardships to fight pirates and to convoy its ships off the coast, primarily because large sized ships were necessary for coastal duty; small ones were of no value except in shoal waters and around the islands just off the coast. Virginia simply did not have an armed vessel of its own that could begin to match some of the large ships of the pirates and privateers. Throughout the colonial period, however, Virginia did hire at its own expense small ships to work as effectively as possible in coastal defense, to chase enemies into
1034 shallower water off the coast, or to assist the larger guardships with specific problems. The colony hired its own boats in the 1660's and 1670's before it really began to secure royal guardships.[302] The royal instruction to Lord Howard of Effingham as governor of Virginia in the early 1680's granted him full power "for the resisting and withstanding of all Enemys, Pyrats and Rebells both at Land and Sea. . . ," including authorization in dealing with the enemy, "If the occasion shall require to pursue and prosecute

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298 1 Exec. J. Council 127, 166, 197.

299 1 Exec. J. Council 41 (1683); 1 Spotswood 3 (1710).

300 1 Spotswood 67-68; 2 Spotswood 249-250.

301 1 Exec. J. Council 321, 330, 354; 1 Spotswood 9-12, 14-15.

302 See 2 Bruce, Institutional History, 178-189.

in or out of the limits of Our said Colonie and Plantations of any of them."[303] In 1683 the Crown after long deliberations among its various agencies agreed to station a ketch on the coast of Virginia as the governor had long requested for the control of trade and defense.[304] The records of the Council that begin in 1680 noted numerous occasions on which Virginia continued to hire a sloop of its own for use in the marginal sea.[305]

1035 Costs and lack of success frequently meant that such a ship remained in the colony's employ for a short period of time. In 1741 the inhabitants of Norfolk and Hampton petitioned for relief "against the Spanish Privateers, now Committing Depredations near the Capes." The Council then hired two sloops for a three month period "for the Purpose of Cruising in a Warlike manner on the Coast."[306] On a number of occasions the Council agreed to hire its own boat while the royal ship was being repaired or careened.[307] Such matters became a heavy charge to the colonial treasury; occasionally the Assembly refused to allocate funds for such defense purposes or refused to pay for expenses incurred.[308] An abstract of a letter from the Lords of Trade to Governor Spotswood in 1713 made clear

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303 Instructions of Jan. 1682 and Sept. 1683 in 6 McDonald Transcr. 18, 232.

304 See the extensive correspondence on this subject in 6 McDonald Transcr. 273-280.

305 1 Exec. J. Council 497 (1683); 3 *Id.* 170 (1708), 211, 219 (1709).

306 5 Exec. J. Council 54, 57-59.

307 5 Exec. J. Council 49 (1744); 6 *Id.* 230 (1762).

308 See for example 1 Spotswood 120, 151; 2 *Id.* 9-10

their lack of sympathy with the Assembly's position: "Think the Assembly very much in the wrong in rejecting the claims for the fitting out of a Spy Boat and he should represent to them the reasonableness of their discharging such debts as are contracted solely for their service and security."[309]

Another common measure employed for maritime defense involved the posting of lookouts in each of the sea-
1036 coast counties of Virginia. The Council began to order the assignment of such lookouts in 1691 and continued the practice as needed for a number of years.[310] From 1699 to 1704 there was a lookout on Smith's Island or Mock Island off the coast of Northampton County. After 1705 lookouts became a regular part of the defenses of the country during times of danger.[311]

The independent state of Virginia took on a major burden of maritime defense in 1776. The Assembly played the major role in the creation of a Navy for Virginia. In May, 1776, the Assembly passed "an Ordinance for establishing a board of Commissioners, to superintend and direct the naval affairs of this colony."[312] This Board was to supervise the building of naval vessels, furnish them, and direct all matters relating to the Navy. In October, 1776 the Assembly ordered the naval commissioners to
1037 build two frigates and four larged armed gallies "fit for

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309 8 Sainsbury Abstracts 410 also 420.

310 1 Exec. J. Council 143-144, 228 (1692); 2 *Id.* 5-6, 69, 110, 130, 174-175, 320-321, 353, 425.

311 3 Hen Stat. 364 (1705); 4 Hen. Stat. 197-204 (1727), 395 (1734); Webb, *Justice of the Peace* 225 (1736); 6 Hen. Stat. 115-116 (1748).

312 9 Hen. Stat. 149-151. See the 10 ms. volumes of "Naval Records of Virginia, 1776-1783" in the Virginia State Library.

river or sea service.[313] In May, 1777 the Assembly reestablished the system of lookouts to sea stationed in the eastern seaboard counties.[314] In May, 1779 the Assembly discontinued the Navy board and replaced it by a new board of war and trade.[315] "An act to regulate the Navy of this Commonwealth" followed in October, 1779.[316] One naval vessel was to serve at sea as a prison ship, while another was to be established as a lookout boat. In 1780 the presence of the British in and around Virginia territory resulted in acts for the defense of the eastern frontier of Virginia: "Whereas it is indispensably necessary that there should be a marine force for the protection of the sea coast of this state. . . ."[317]

The Council of State and the Committee of Safety primarily implemented the directives of the Assembly in the matter of defense of the marginal sea and seacoast of Virginia. By the fall of 1783 the Council noted that Congress permitted Virginia to retain two armed vessels for
1038 the protection of its trade. The state still had two such public boats in the summer of 1787.[318]

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Q. Have you formed an opinion as to the attitude of the Virginia colonists and authorities toward the exploitation of the colony and state's natural resources, including

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313 9 Hen. Stat. 196.

314 9 Hen. Stat. 294.

315 10 Hen. Stat. 123.

316 10 Hen. Stat. 217.

317 10 Hen. Stat. 296-299, also 379-386 and 458 (1781).

318 3 J. Council State 300; 4 *Id.* 135.

the sea, the seabed, and the resources thereof and if so, would you state your opinion and the reasons for it?

A. The goal of the first settlers of colonial Virginia was the total exploitation of the natural resources of the New World. Initially the newcomers were concerned about natural resources, including fish, minerals, and precious metals, wherever they could be found within the limits of their charter. All the first published comments on the new found land expounded on its great marine resources, especially fish, oysters, sea crabs, and seafish. The first voyages of discovery after the settlement of Jamestown noted the natural abundance surrounding the explorers. The Spanish model spurred on the first adventurers in Virginia to search for mines, especially for such precious metals as gold.[319] The English people needed to be sup-
1039 plied with such basic resources as coal, copper, iron, salt, and naval stores. A visitor to the fledgling colony reported to the Spanish government in January, 1610, that the English were seeking to exploit the many iron, copper, and other mines in Virginia.[320]

The Virginia Company strongly encouraged the development of natural resources that could be sent back to the mother country in a profitable commercial arrangement. In May, 1609 the Company advised their local representatives to search for royal mines, to make pitch, tar, ashes, and iron, and to fish for cod, sturgeon and the like.[321] In July, 1621 the Company encouraged the governor of Virginia to explore the seacoast of the colony, to search after

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319 See generally 1 Bruce, *Institutional History* 9-21.

320 1 Jamestown Voy. 152-153.

321 *The Three Charters of the Virginia Company of London With Seven Related Documents* 66-67 (S. Bemiss, ed. 1957).

minerals, to make salt, iron, pitch, and tar, and to find good fishing between James River and Cape Cod "or any wher within our limmittes. . . ."[322] As early as 1630 the Virginia Assembly passed an act "for the better furtherance and advancement of staple commodities," including potash, saltpetre, iron, salt, and vines.[323]

1040 The first adventurers to Jamestown did not need much encouragement to make the exploitation of natural resources a major preoccupation. The potential much impressed them. One wrote in the spring of 1607 that "in the large soundes neere the sea are multitudes of fish, bankes of oysters, and many great crabbs. . . . And within sight of land into the sea we expect at tyme of yeare to have a good fishing for codd. . . ."[324] Captain John Smith wrote in 1612 concerning "the commodities in Virginia or that may be had by industrie."[325] According to Smith, "the Bays and rivers have much marchandable fish and places fit for salt coats, building of ships, making of iron, etc." Although gold was by no means the only mineral resource the settlers were seeking, the search for gold in the first years did assume major proportions on occasion. In 1608 the struggling settlers devoted much time to loading a ship with a golden dirt that turned out to be iron pyrites. In 1612 Smith described the problem he had then faced: "But the worst mischefe was, our gilded refiners with their golden promises, made all men their slaves in

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322 *Id.* 124.

323 1 Hen. Stat. 151.

324 1 Jamestown Voy. 99.

325 2 Jamestown Voy. 353.

hope of recompence, there was no talke, no hope, no worke,
1041 but dig gold, wash gold, refine gold, load gold. . . ."[326]

The initial enthusiasm of the Company period for the exploitation of Virginia's natural resources continued in some measure into the early era of royal rule. During the first half century after 1624 the Crown continued to encourage such activity. Royal commissions and instructions to governors recognized that "by the discovery of industrious and well experienced men, the limits and bounds of the said Plantation may be augmented and the Trade and Commerce . . . much advanced. . . ." Governors were empowered to grant commissions "unto any of our subjects there addressing themselves for the discovery of the same Country and ports, Bounds and Limits and Extents thereof."[327] Governor Harvey was himself an enthusiastic participant in this effort. Soon after his arrival in Virginia in 1630, he could write that he had already been to look at the site of an iron works and that it looked promising; "I have also hope to discover a Salt Peter mine in the Bay." In the fall he planned to travel inland for eight to
1042 ten days to see for himself "whether there be anie such silver mine as is, and hath bin commonlie reported or not. . . ."[328] In 1632 Governor Harvey reported to the Privy Council that Virginia gave promise of producing potash and saltpetre, but that "skilfull" persons from England would be needed to start an ironworks.[329] In

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326 2 Jamestown Voy. 393-394; see also Beverley, *Hist. and Present State of Va.* 30-31.

327 Commission to Sir Francis Wyatt, Jan. 11, 1639, 1 McDonald Transcr. 371-372; see also instructions to Gov. Yeardley in 1626 and Gov. Berkeley in 1650, 1 *Id. 402, 392.*

328 2 McDonald Transcr. 40.

329 2 McDonald Transcr. 111.

1662 the Crown announced through its instruction to Governor Berkeley that it intended to erect an iron works in Virginia that would be larger than anyone could privately undertake. The king sought the advice of the governor and Council in Virginia, but nothing seems to have come of the venture.[330]

Although the seventeenth century did witness continuing efforts to discover and exploit the natural resources of Virginia, the successful beginnings of the tobacco trade discouraged considerable involvement in such activity. Virginians had found the road to wealth in a crop that they had not anticipated. Tobacco remained the great Virginia mania for the remainder of the colonial era. All other activity was subordinated to the tobacco trade, leading to recurrent appeals from those in authority for broadening
1043 the basis of the economy. Deploring the excessive focus on the growth of tobacco became a commonplace theme.[331] Yet at the same time imperial policy by the late seventeenth century tended to discourage Virginia from extensive efforts to exploit her natural resources and diversify the economy.[332] The Board of Trade saw the colony more as a market for English exports than as a source of varied and useful imports.

Q. What efforts were made, if any, to develop the mining and mineral resources of the colony and the state of Virginia?

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330 1 McDonald Transcr. 418.

331 Captain J. Smith, *The True Travels, Adventures and Observations* 43 (1630); 1 Spotswood 73-74 (1711).

332 These points are well-developed in Sister J. de Lourdes Leonard, Operation Checkmate: the Birth and Death of a Virginia Blueprint for Progress 1660-1676, 24 *William and Mary Quarterly*, 3rd Ser., 44-74 (1967).

A. The colonial authorities in Virginia encouraged and controlled to at least some extent the development of the mineral resources of the colony. There were recurrent reminders of how much more could be done in this area. Hartwell, Chilton, and Blair asserted in 1697 that "the Manufacturer of Iron and Other Minerals, with which that Country, to all Advantages, is well stored," was one of
1044 the potential improvements to be made in Virginia.[333] A major restatement of the land law in statutory form by the Assembly in 1749, included a specific provision encouraging patentees of land to work in digging any stone quarry, coal, or other mine, upon his tract. . . ."[334] On occasion the Council exercised some supervision over the exploitation of natural resources. In 1690 they summoned one Colonel Hill to appear before them and answer for his contempt, because he had raised fifty men "to go in search for Gold mines without License. . . ."[335] In 1702 a French refugee blacksmith living above the falls on the James River petitioned the Council "that he may have leave to use the coal mines lately discovered there for his forge. . . ." The Council permitted him "to take what Coales he shall want out of the said Coalmine. . . ."[336]

The English Crown exercised an important influence and control over the exploitation of Virginia's natural resources, especially those derived from mining. Unless otherwise provided for, the Crown exercised absolute ownership of the product of mining in Virginia. The colonists were fortun-
1045 ate that the first charters granted extensive mining rights in Virginia to the Company, that were later taken over by

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333 Hartwell, Chilton and Blair, *Present State of Va.* 5.

334 5 Hen. Stat. 425.

335 1 Exec. J. Council 522.

336 2 Exec. J. Council 244.

the colonists themselves. The 1606 charter authorized mining for gold, silver and copper, with the Crown retaining a claim to only one-fifth of the gold and silver and one-fifteenth of the copper.[337] The 1609 charter extended to the colonists the right to search for iron, lead, tin, and all other minerals, as well as gold, silver and copper, retaining now to the Crown only one-fifth of the gold and silver.[338] The 1612 charter simply repeated or confirmed these 1609 provisions concerning mining.[339] This issue arose again in the royal instructions to Governor Culpeper in 1679, which authorized him "to make leases under Our Great Seal . . . for any Number of Years, not exceeding one and twenty years of any Mine or Mines as well Royal Mines, as others to us belonging, reserving to Us our Heirs and Successors one tenth part of all such Ores as shall arise and be gotten of such Mines during such term as such Mine shall be devised."[340] Imperial authorities anxious
1046 to increase royal revenues obviously thought there were some possibilities in the New World.

Since there was little mining activity in the seventeenth century, the issue of the percentage due the Crown from mining remained something of an academic issue, until the governorship of Spotswood in the 1710's. He and his Council became much exercised in the process of trying to secure clarification from England on this issue.[341] The

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337 1 Hen. Stat. 61-62.

338 1 Hen. Stat. 88-89, 93. Gold and silver were isolated as "royal mines."

339 1 Hen. Stat. 100-101, 109-110.

340 5 McDonald Transcr. 292.

341 See 3 Exec. J. Council 267; 1 Spotswood 160-162, 168; 2 *Id.* 70-71.

initial response received by Spotswood illustrated the extent to which the mother country could discourage manufacturing and exploitation of natural resources in Virginia. In 1711 the Lords of Trade refused to sanction iron mines in Virginia: "are still of the same mind and cannot think it for her Maj. service or the advantage of this Kingdom that such a Manufacture should be promoted in the Plantations."[342] In 1713 the Lords of Trade reported to one of the Queen's principal advisors that Governor Spotswood had hopes of discovering silver and gold in the Virginia mountains, but that persons were unwilling to search for mines, "until her Majesty pleasure be declared what share her Majesty shall think fit to reserve in case such mines
1047 be found."[343] Either the colonists did not have knowledge of the specific charter provisions on such matters, or they were unwilling to rely on such ancient provisions for so mutable a matter. Spotswood enlisted powerful support in November, 1713, when the titular governor of Virginia, the Earl of Orkney, wrote to the Queen on his behalf and seeking clarification of this important issue.[344] The Queen referred the matter to the Lord Treasurer. Then in May, 1714 the Lords of Trade agreed to the substance of the Earl of Orkney's memorial concerning mines and minerals in Virginia, "with the reservation of one fifth part thereof, as is reserved in the Charter granted to the inhabitants of Mass. Bay."[345] This applied to all mining

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342 Lords of Trade to Gov. Spotswood, Nov. 22, 1711, 8 Sainsbury Abstracts 330.

343 Lords of Trade to Dartmouth, Feb. 27, 1713, 8 Sainsbury Abstracts 404.

344 Nov. 30, 1713, 8 Sainsbury Abstracts 433.

345 Lords of Trade to Lord High Treasurer, May 12, 1714, 8 Sainsbury Abstracts 459.

that took place in Virginia. Such clarification permitted the Virginia colonists greater freedom in future efforts to exploit the natural resources of the colony.

By 1781 Jefferson could enumerate gold, lead, copper, iron, pit coal, marble, and limestone as minerals that could be found in Virginia and that had attracted some
1048 mining operations.[346] One could readily add pitch, tar, potash, and saltpetre as products of basic natural resources in Virginia. In the case of each of these minerals or by-products there is evidence from the colonial and early national period that some efforts of varying success had been made to develop the resource.[347]

1049 A variety of reasons help to explain the inadequate development of the colonial mining industry in Virginia. Rev. William Stith, the mid-eighteenth century historian of Virginia, stated the matter simply when he said: "Virginia is not a Country of Mines." The emphasis in Virginia was upon producing the basic staples of life.[348] Nor

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346 T. Jefferson, *Notes on the State of Virginia, 1781* 26-29 (W. Peden ed. 1955).

347 See the following: (copper) I.N. Hume, *Here Lies Virginia* 128 (1963); (coal) Beverley, *Hist. and Present State of Va.* 125; K. Bruce, *Virginia Iron Manufacture in the Slave Era* 87-88 (1931); (lead) 1 J. Council State 65 (1776); 3 *Id.* 83, 179 (1782); A. Hecht, Lead Production in Virginia during the 17th and 18th centuries, 25 *West Virginia History* 173-183 (1964); (potash) Beverley, *Hist. and Present State of Va.* 72; J.P. Hudson, *A Pictorial Booklet on Early Jamestown Commodities and Industries* 11 (1957); (saltpetre) 2 Hen. Stat. 514 (1671); 5 Hen. Stat. 362-363 (1745); (pitch and tar) S. Snow, Naval Stores in Colonial Virginia, 72 *Va. Mag. Hist. and Biog.* 75-93 (1964); 4 Hen. Stat. 96 (1722); 2 Exec. J. Council 412 (1704); 3 *Id.* 193-194 (1708).

348 W. Stith, *The Hist. of the First Discovery and Settlement of Virginia* 81 (1747).

was this totally a matter of choice or preference on the part of the Virginians. Full-scale exploitation of natural resources was neither economically nor technologically feasible in early America. Governor Berkeley tried to explain the intense focus on tobacco cultivation by 1663 as follows: "There was never yet any publick incouragement to assist the Planters in those more chargeable undertakings, as Iron-Mines and Shipping." He also referred to "the want of a public Stock to enable us to procure able men for the finding all sorts of Mines, making Iron of those Mines that are found, ..."[349]

The lack of technological and scientific knowledge concerning mining methods should not be forgotten. As early as 1612 Captain John Smith wrote about Virginia: "Concerning the entrailes of the earth little can be saide for
1050 certainty. There wanted good Refiners. . . ."[350] The Virginia iron industry only began to flourish after 1710, when Governor Spotswood supported the immigration of some German miners.[351] A naturalist reported in the 1730's that in Virginia "they have found definite mines of antinomy, iron, lead, and copper, which however up to date have not yet been worked, much less correctly investigated from lack of people who understand such things."[352] Governor

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349 Sir W. Berkeley, *A Discourse and View of Virginia* 6-7, also 5 (London, 1663; reprinted 1914).

350 2 Jamestown Voy. 350.

351 2 Spotswood 66, 95.

352 W. Byrd II (?), *Natural History of Virginia, or the Newly Discovered Eden* 18 (R.C. Beatty and W.J. Mulloy eds. 1940). The author of this work is now thought to have been John Lawson rather than William Byrd. See P.G. Adams, The Real Author of Wm. Byrd's Natural History of Virginia, 28 *Amer. Literature* 211-220 (1966).

Dinwiddie lamented the absence of persons with appropriate technical training and money in 1755.[353]

A variety of other problems stifled the colonial mining industry. Little demand existed for such a resource as coal, when wood was readily available for heating and cooking purposes. It was economically unfeasible to transport some available ores to places where they could be
1051 readily used.[354] The Reverend Hugh Jones wrote in 1724 that "there is coal enough in the country, but good firewood being so plentiful that it encumbers the land, they have no necessity for the trouble and expense of digging up the bowels of the earth, and conveying them afterwards to their several habitations.[355] Mining entrepreneurs even had to contend with the danger of Indians. The massacre of 1623 ended the first effort to operate an ironworks in the colony.[356]

The colonial iron industry merits attention as the most successful colonial effort to utilize the mineral resources of Virginia. Despite fledgling efforts at the beginning of an ironworks that ended with the Indian massacre of 1623, the Virginia colonial iron industry had its real beginnings with the energetic Governor Spotswood after 1710. Thereafter iron mining became an important part of the Virginia

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353 1 Dinwiddie 387.

354 See Beverley, *Hist. and Present State of Va.* 290; also 1 Hen. Stat. 135-136 (1628).

355 G. Jones, *The Present State of Virginia, 1724* 92 (R.L. Morton ed. 1956).

356 See Beverley, *Hist. and Present State of Va.* 126; also 1 Hen. Stat. 135-136 (1628).

1052 economy.[357] Primarily because of the costs involved, the Virginia Assembly did not respond to Spotswood's initiative in these first years, leading him to complain to England that "the Country hath so little inclination to make use of the advantages which nature has put into their hands. . . ."[358] The colony and state of Virginia finally began to pass acts for encouraging adventurers in ironworks in 1727 and thereafter.[359] The legislators became eager to encourage the exploitation of natural resources, once the technical feasibility and commercial viability of the project had been demonstrated to at least some extent. Tobacco and landowning were such certain ways to commercial success in comparison to most alternative enterprises, that it required a substantial effort to divert capital and initiative from this tried and true path.

1053 Given the technical and financial problems facing the colonial mining industry, it is perhaps surprising to discover how much activity occurred in this area. Governor Gooch prepared the following survey of mining in Virginia for the Lords of Trade in 1730:

"Mines of Iron Oar are found in many Places of the Country, and five Furnaces for melting of it are already sett up. Three Copper Mines are already discovered; two in the Northern Neck, and one in the County of Spotsilvania; the Oar is very encouraging; on one they are at Work, and will very soon begin with the other two. There

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357 See in general Bruce, *Virginia Iron Manufacture* 3-79; Lester J. Cappen, *Iron Works at Tuball* (1945); B. Hindle *Technology in Early America* 44, 46 (1966); Hume *Here Lies Va.* 206-207.

358 1 Spotswood 41, also 20-21.

359 4 Hen. Stat. 228 (1727), 296 (1730); 6 *Id.* 137 (1748); 9 *Id.* 303 (1777); Webb, *Justice of the Peace* 228 (1736).

are also many Signs of Lead, Tin and Antimony in the place near the great Mountains, but for want of Men skilled in these Searches, and money'd persons to try Experiments, it is probable these and other richer Metals may for many Years remain undiscovered."[360]

Gooch's response in 1743 was more pessimistic: "Mines of Iron Oar are found in many Places of this Colony and five Furnaces for Melting thereof have been set up, but meeting with little Encouragements, they decline and a very considerable one is this year broke up. Attempts have been made to work upon some Copper Mines but not being attended with Sucess have been dropt." [361] By
1054 1750 there were only two furnaces for smelting iron ore in existence. Gooch could also mention a recently discovered copper mine by 1750.[362] Progress in the colonial mining industry was obviously not inevitable, despite major investments of time and money. In 1755 Governor Dinwiddie reported to the Lords of Trade that there were "large quantities of Iron Oar in many Places, and some Furnaces for manufacturing it, fit to send to Great Britain. . . ."[363] Governor Fauquier's report in 1763 perhaps in its mixture of positive and negative aspects represents a fitting conclusion to this brief survey of the vagaries of colonial mining in Virginia:

"There are Coals found in various parts of the Colony especialy near the Falls of James River which Pits have been lately open'd and work'd and Coal exported to the

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360 C.O. 5/1322, ff. 68-74, query 9, Public Record Office, London.

361 C.O. 5/1326, ff. 12-19, query 9, PRO.

362 C.O. 5/1327, ff. 78-83, query 9, PRO.

363 1 Dinwiddie 386.

northern Colonies. The Country is also full of Iron, Stone, of which Iron is made in many parts of it. There have been Mines both of Copper and Lead discover'd but neither of them work'd, excepting one Mine very rich in Lead lying on a branch of new River in the road to the upper Cherokee Nation. The proprietors of this are now beginning to work it, of which number I was one my
1055 self but quitted it on a Doubt whether Lead would bear the Expence of so long a Land Carriage as is necessary to bring it to Market. The Mine is certainly rich in Lead and was thought to contain a considerable Quantity of Silver, but by the Experiments yet made it does not contain a sufficient Quantity to answer the Expence of extracting it."[364]

It was at least apparent in Fauquier's description that the Crown had ceased to hinder and discourage the exploitation of Virginia's natural resources and was permitting the entrepreneurial instincts of colonial Virginians to emerge.

Q. In your opinion, what efforts were made by the colony and state of Virginia to exploit natural resources drawn from the marginal sea and the seabed?

A. The supply of salt for the colony and state of Virginia was a perennial concern of the authorities. The domestic production of salt was an important illustration of the exploitation of a natural resource drawn from the sea. Along the seacoast of Virginia two methods were used in the production of salt. Solar salt was made by the evaporation of sea water by the heat of the sun in salterns along the shores of oceans and seas, while the alternative was to boil salt water in regions where fuel

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364 C.O. 5/1330, ff. 261-284, query 8.

1056 was cheap.[365] In either case the salt water was run directly from the sea into salterns by means of canals.

The Virginia Company began the manufacture of salt on Smith's Island off the seacoast. In 1610 Captain Samuel Argall reported on his explorations of the islands off the seacoast: "Salt might easily be made there, if there were any ponds digged, for that I found salt kernel where the water had overflowed in certain places."[366] Saltmaking began on Smith's Island in the 1610's. Initially the workers boiled seawater, but by the 1620's they were experimenting with evaporation by the sun. There is some evidence that by 1633 the Eastern Shore had exported some salt to Massachusetts.[367] The settlement at Dale's Gift in the 1610's also dedicated itself to saltmaking and catching fish on the Eastern Shore.[368] The Virginia Company directly encouraged both of these efforts.[369] In 1628 the Council in Virginia ordered a person to the Eastern Shore to "seeke out fit places for to experiment the making of
1057 salte by the sonn. . . ."[370]

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365 H. B. and G. M. Weiss, *The Revolutionary Saltworks of the New Jersey Coast: With Notes on the Early Methods of Making Salt in New England, New York, Delaware and Virginia* passim (1959).

366 Quoted in J. Wharton, *The Bounty of the Chesapeake: Fishing in Colonial Virginia* 12 (1957).

367 Ames, *Studies of the Va. Eastern Shore* 111-114.

368 J. Rolfe, *A True Relation of the State of Virginia lefte by Sir Thomas Dale Knight in May last 1616* 39 (1951 edition).

369 Wharton, *Bounty of the Chesapeake* 20.

370 *Minutes of the Council and General Court of Colonial Virginia* 174 (H.R. McIllwaine ed. 1924).

Virginia authorities again became actively involved in the encouragement of a saltworks in the 1650's and 1660's particularly in support of the efforts by a leading resident of the Eastern Shore, Colonel Edmund Scarbrugh. The Assembly helped defray his expenses, rewarded him for the first significant quantity of salt he produced, granted him a monopoly for the Eastern Shore, and forbade the importation of salt into that region.[371] But Scarbrugh could not produce enough salt for everyone, and his monoply had to be ended.[372] He had encountered the perpetual problem of producing enough salt for everyone and of adequate quality.

Only the outbreak of the Revolutionary War moved the Virginia legislature to try again to stimulate the production of salt domestically. In the meantime, Virginia, like most other American colonies, dependended on a supply of
1058 salt from Salt Tortuga, one of the Leeward Islands. The lack of a domestic salt supply seriously hindered the salting of fish in Virginia. The General Assembly of the state of Virginia made a determined effort in the spring and summer of 1776 to encourage the making of salt. This effort continued for the remainder of the Revolutionary period with some success.[373]

Almost every commentator on colonial Virginia noted the plentifulness of fish in the surrounding waters and seas. The first adventurers to Jamestown were astonished

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371 2 Hen. Stat. 12 (1660), 38 (1661), 122 (1662); also Beverley, *Hist. and Present State of Va.* 67; Wharton, *Bounty of the Chesapeake* 21-22.

372 2 Hen. Stat. 186 (1663), 236-237 (1666); also Wharton, *Bounty of the Chesapeake* 22.

373 See 9 Hen. Stat. 122-126; 9 Hen. Stat. 310-312; 1 J. Council 18, 125, 154, 269-270.

by the numbers of fish they saw. The Virginia Company tried to stimulate the fishing industry from the beginning, encouraging mariners to discover the best places for fishing in the nearby ocean. In 1610 Captain Samuel Argall fished off the Virginia coast for the benefit of the colony. The early charters granted the colonists substantial fishing rights in the Atlantic ocean.[374] Eighteen century commentators also boasted of Virginia's great natural resource of
1059 fish and shellfish.[375]

Although a large number of Virginians caught fish on a daily basis, commercial fisheries did not really develop in Virginia until at least the mid-eighteenth century. The fishing industry faced a number of serious problems: fishing in Chesapeake Bay was erratic; the colony lacked ice and had little salt; sun-drying was difficult in the region; transportation, packing and handling facilities were inadequate; there were few towns to provide a ready market.[376] Until at least 1700 Virginia imported some salted fish from New England.[377] Again fishing took a back seat to the tobacco trade. The colonial legislature hardly involved itself with the issue of fishing. In June, 1680 the Assembly did pass "an act restraining strikeing and killing fish at unseasonable times."[378] But in general the colonial government

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374 See generally Wharton, *Bounty of the Chesapeake* 3, 10-12, 14.

375 Hartwell, Chilton and Blair, *Present State of Va.* 7; Beverley, *Hist. and Present State of Va.* 146; Byrd (?), *Natural History of Va.* 73-79.

376 See Wharton, *Bounty of the Chesapeake* 3. 40-41.

377 See Capt. J. Smith, *The True Travels* 44 (1630); 3 Exec. J. Council 193-194 (1708); Wharton, *Bounty of the Chesapeake* 14.

378 2 Hen. Stat. 487-488; repealed in 1686, 3 *Id.* 30.

1060 did nothing to foster commercial fisheries.[379] In fact, it was not until enactments of 1795 and 1805 by the legislature that there was much evidence of the existence of commercial fisheries in the state.[380]

Colonial commentators also admired the vast quantities of oysters and other shellfish available in Virginia.[381] Oysters were gathered in the lower parts of the Bay and at the Virginia Capes where the water was saltiest. Oystering was a regular occupation by the mid-eighteenth century, and there were some suggestions that an oyster trade existed, although the problems of preserving oysters by pickling them were severe.[382] In addition to eating this seabed resource, the colonists used oyster shells extensively for iron smelting, for making roads and garden paths, and in making mortar for bricks. Burned oyster shells produced
1061 the lime employed in making mortar and hence in building.[383] The colonial legislature did not have much concern with oysters and shellfish. It was not until the early nineteenth century that the state legislature passed acts "to prevent the destruction of oysters within this commonwealth"

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379 J.C. Pearson, The Fish and Fisheries of Colonial Virginia, 23 *William and Mary Quarterly,* 2nd Ser., 7 (1943).

380 1 Shepherd Statutes 371-373; 3 *Id.* 173.

381 See Wharton, *Bounty of the Chesapeake* 8, 37; G. Percy, *Observations Gathered out of "A Discourse of the Plantation of the Southern Colony in Virginia by the English,* 1606," 9-10 (D.B. Quinn ed. 1967); Byrd (?), *Natural Hist. of Va.* 82-86.

382 See Middleton, *Tobacco Coast* 56-58.

383 See W. Dailey, Lime Preparation at Jamestown in the Seventeenth Century, 18 *William and Mary Quarterly,* 2nd Ser. 1-12 (1938); Hume, *Here Lies Va.* 66; Wharton, *Bounty of the Chesapeake* 59-60.

and the like. The practice of burning oysters for the lime without eating the oysters first was particularly condemned.[384]

Whaling was a colonial industry that especially involved the exploitation of the resources of the marginal sea. Whales were occasionally found and seen off the coast of Virginia.[385] In 1693 the Council gave several persons a commission to catch whales and removed the duty from them: "It is the Coucills Opinion that the Ketching of Whales in the Bay, and on this Coast, is for their Majesties Service
1062 and Advantage of this Countrey. . . ."[386] In 1699 the governor responded to the address of the Burgesses and Council by issuing a proclamation forbidding the striking or killing of whales in Chesapeake Bay, because this resulted in the killing of fish and the pollution of the rivers by smells.[387] In 1710 the Governor and Council approved the petition of two Virginia partners that they be allowed to engage in whaling "upon the coast of this her Majestys Colony and in the bay of Chesapeak. . . ."[388] In 1751 and 1752 several gentlemen of Virginia fitted out the sloop Experiment for the purpose of engaging in the whale fishery on the seacoast of Virginia. The vessel caught a number of whales in the next year or two, much to the satisfaction of the Virginia Gazette, which reported each

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384 See 3 Shepherd Statutes 47-48; Whealton, *Md. and Va. Boundary Controversy* 45 (1904).

385 Byrd (?), *Natural Hist. of Va.* 73; Middleton, *Tobacco Coast* 206-207.

386 1 Exec. J. Council 275.

387 1 Exec. J. Council 449; 2 *Id.* 21, 28.

388 3 Exec. J. Council 244.

success, and tried to encourage this undertaking off the coast of Virginia.[389] Some whaling took place on a regular basis by 1791 because 1263 gallons of whale oil appeared in a list of goods exported for that year.[390] A comment by the Reverend Hugh Jones in 1724 perhaps best summed
1063 up the ambivalent position that Virginia found itself in with respect to the exploitation of the resources of the marginal sea: "As for carrying on the fishing trade in Virginia, though there be plenty of fish there, yet I believe other countries where fisheries are established, and that have little else to mind and depend upon, would outdo it in this respect; only more whales might be taken upon the Eastern Shore, and bring good gain to such people as would make it their business." Jones was a perceptive and prophetic individual.[391]

Q. Do you have a concluding opinion concerning the question of ownership of and jurisdiction over the marginal sea, the seabed and the resources thereof, for a distance extending outward into the continental shelf for one hundred miles from low-water mark on the Virginia coast and if so, would you please state the reasons for it?

A. In my opinion, Virginia's claim to ownership of, and jurisdiction over, the marginal sea, the seabed, the subsoil, and the resources thereof, for a distance extending outward into the continental shelf for one hundred miles from low-water mark on the Virginia coast can be clearly established and demonstrated. The royal charter of 1609 to the Virginia Company established the territorial
1064 limits of the colony of Virginia to the eastward upon which

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389 Virginia Gazette, May 9, 1751; June 13, 1751; April 24, 1752.

390 Wharton, *Bounty of the Chesapeake* 43.

391 H. Jones, *Present State of Va.* 142.

this claim to ownership of the marginal sea and its resources was initially based. This 1609 charter further conveyed to Virginia power over, and rights within, the region of "the Virginian Sea", including the specific grant of mineral and fishing rights. The conveyance to Virginia of the marginal sea was in recognition of the resources available for potential exploitation. Despite royal grants in the colonial era that affected the territorial extent of Virginia to the north and south, the English Crown made no further alterations in the eastward boundary of Virginia after it became a royal colony. In the colonial era Virginia thus enjoyed both *dominium,* that is ownership and proprietary rights, as well as *imperium,* that is powers of regulation and control, over the marginal sea and its resources. This sea was central to basic economic and defense considerations of the colony of Virginia in the colonial era, and Virginia specifically exercised extensive jurisdiction over this maritime region in the seventeenth and eighteenth centuries.

At the time of the formation of the Union (1776-1789) ownership of the continental shelf in the marginal sea passed from the colony of Virginia to the successor state. The state of Viginia also inherited from the English Crown any
1065 degree of ownership over this region that it had shared with the mother country, while the colony was a separate part of the British colonial empire. At the time of the Revolution Virginia's chain of title to boundaries extending one hundred miles into the marginal sea dated back to the original Virginia charter grants from the Crown. By reference to the charter of 1609 in its Constitution of 1776, the now sovereign state of Virginia asserted its historic claims to its historic boundaries, except as these had been adjusted by later royal grants.

The various boundary controversies among Virginia, North Carolina, Maryland, and Pennsylvania well illustrated the concern that the colonists had with territorial issues.

Virginia was very careful to defend its historical boundaries to the fullest extent possible in every direction. The effort made by prominent Virginians to establish the validity of the 1609 charter and its boundary stipulations in the course of the controversy over Virginia's cessation of the territory northwest of the Ohio river at the time of the formation of the Union made clear the basic importance attached to the issues of formal boundary lines and legitimate land titles.

From the time of the formation of the Union and the
1066 assertion of its territorial limits to the eastward as derived from the 1609 charter, Virginia has never granted away or transferred in any formal manner its ownership over the marginal sea and the seabed to any other state, individual, or the federal government. In particular the Commonwealth of Virginia has never passed on to the United States Government the ownership of the continental shelf that it acquired from the colony of Virginia and from England at the time of the formation of the Union.

Thus the seaward boundary of Virginia has continued to extend one hundred miles into the marginal sea during the period of existence of the colony and state of Virginia, and certainly prior to and at the time that the Commonwealth became a member of the Union. During and before this latter era Virginia had traditionally exercised sovereignty and dominion over the marginal sea, the seabed, the subsoil, and the resources thereof. Virginia similarly held title to the seabed and subsoil in the marginal sea. The submerged lands that the continental shelf encompassed within one hundred miles of the Virginia coast were within the state's historic boundaries. Virginia at the time of the formation of the Union enjoyed the right to explore and exploit the natural resources of the continental shelf that lay within her historic boundaries.

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CROSS-EXAMINATION OF PHILIP C. JESSUP

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BY MR. RASHKOW:

1147 Q. It is your opinion then that in the 18th century the mere assertion of a right to a broad area of sea without any further action was sufficient to gain sovereignty over those areas?

A. No, I would say assertion plus acquiescence.

Q. Assertion plus acquiescence. No further action was required?

A. No.

Q. During your discussion about ports and harbors on 477 through 479, whatever that was, 497 to 499, you added that it is reasonable to assume that these waters included more than territorial waters *stricto sensu*. What do you mean by the expression territorial waters *stricto sensu*?

* * * * *

1148 A. I mean by that the area of waters which were, as I have explained, considered to be part of the territory of the states. And more than the three mile limit in terms of what I am talking about here as evidence by the treaties which I then begin to quote following page 500.

Q. On page 506 you speak of the curtailment of previous claims to sovereignty over the sea, in the context that the doctrine of the territorial sea crystalized in the 18th and 19th centuries. Could you tell me more specifically when that doctrine crystallized?

A. In terms of precisely, I think this could never be done. I always rely there on that very remarkable dictum that Justice Cardozo wrote in New Jersey against Delaware, in which he says, "International law . . . has at times like the common law a twilight existence till it receives the
1149 imprimatur of a court which attests to its jural quality." I think one always has to bear in mind – he was talking, of course, about the development of the law of the thalweg that there is a boundary line in rivers. But this applies equally to the maritime boundaries out to sea in trying to fix the specific time.

Q. You say the development represented a curtailment of state jurisdiction. Is there any evidence that this curtailment applied only to rights in the sea and not to rights in the seabed also?

A. Would you say that again?

Q. You state that the development of the territorial sea doctrine represented a curtailment of state jurisdiction. Is there any evidence in state practice during this period which you are discussing that this curtailment applied only to the sea and did not apply equally well to the seabed?

A. I think this appears from my subsequent discussion of the practice in regard to the development of pearl fisheries, coral fisheries, sponge fisheries, and other fisheries of the seabed which continued to be operated in the limits which I have described and which are not marked by curtailment during this period. In other words, there was no interference with the traditional claims to the exploitation of the seabed as there was a curtailment
1150 of the previous claims to exercise rights over the surface waters.

Q. Then the evidence upon which you base the conclusion that claims in the seabed were not curtailed at

the same time that claims to the sea were curtailed is this evidence relating to the sedentary fisheries?

A. Right.

Q. Did any of the nations who curtailed these claims distinguish between the sea and the seabed in the curtailment, in their relations with other nations?

A. They didn't use this expression, England didn't write to France and say, "I curtail your right in the waters." But in terms of the practice the states which were exercising control over seabed fisheries continued to exercise that control without significant opposition at the same time that they were asserting a denial of the right to extend your control over the surface waters.

Q. On page 506 of your testimony you testified that the curtailment of claims to sovereignty over the seas occurred because of insistence by powerful maritime states, including Great Britain and the United States. When did Great Britain begin to advocate a three mile territorial sea?

1151 A. It varies to some extent, and as I said before, it depends very frequently on the nature of the claim which is being asserted. Of course, you do have in the Territorial Waters Jurisdiction Act of 1878 the assertion that the rights of the Crown to the three mile limit extend and have always extended. They didn't attempt to say what year they had in mind as the most distant year in which this applied. But in terms of a good deal of the international practice this certainly was developing in English practice in the 18th century, and probably the early part of the 18th century.

Q. When did the United States as a nation begin to advocate the three mile territorial sea?

A. This is after independence?

Q. Yes.

A. You go back I suppose again to the Jeffersonian letters to Genet and Hammond. The letter to Hammond of course, is more complete than the letter to Genet, and some think it was because Jefferson was very much irritated by Genet who was always pestering him with the assertion of French claims and a desire to establish closer relations between France and the United States. And in his letter to Hammond, Jefferson says in the meantime he wishes to fix provisionally on some distance. He goes on to talk about the human sight estimated at 20 miles or, as I men-
1152 tioned before, the cannon ball usually stated at one sea league. Some supported three sea leagues, and so on. And he says for the present we are going to take the three mile limit for purposes of neutrality. But you do have some other discussions which are not definitely based upon the three mile limit. For instance, in my book on *The Law of Territorial Waters* you have a report of a Congressional Committee in 1782 about fishing rights off the Newfoundland banks, which was a rather special case. And there they talk about a three league limit. In the case which I also cite, the opinion of Attorney General Randolph in 1793, you have a consideration of a fight between the British ship and the French frigate, and he says that the United States is justified in attaching to our coast an extension of the sea beyond the reach of a cannon shot. But, as I point out, he was there talking about Delaware Bay as a territorial bay. So that you go on into the Jeffersonian statements in 1793. And then you get variations as you go into the later statements in 1806, 1807, in the instruction to the commissioners to negotiate treaties with the British.

Q. Is it fair to say then that in your opinion the three mile rule had been established as American policy in the early part of the 19th century?

1153 A. Yes. I think this is particularly indicated by the instructions of 1806, 1807, Madison to Monroe and Pinckney where, after stating as sort of a consideration it would be nice if we could go out so far, he said, "If you can't get that," he said, "don't take anything less than one sea league." In other words, this I think was the minimum which the United States was prepared to accept. But there were still tentative feelers to see whether they could get away with a broader limit. But if I may just put in this point, as a result of Washington's neutrality policy, which was a novelty in international law, in my opinion, on insisting on neutral duties as well as neutral rights, the tendency there was to restrict the extent of territorial waters because the United States was firmly taking the position that they had duties in the territorial waters as a neutral to prevent the capture of ships by belligerents. Therefore, for that purpose there was a desire to limit the area of responsibility, whereas when you come to a question of fisheries, particularly up off Newfoundland, the tendency was to say how far out can we move this so that we have a right to fish freely.

Q. Since the United States established its territorial sea at three miles early in the 19th century, has the United States changed its position as to the breadth of
1154 the territorial sea?

A. Yes, within the last few months the United States has indicated it would be ready to accept the 12 mile limit as a part of a deal to establish a series of zones which would include the zone of territorial waters and what is called, or I think it was a few months ago, a trusteeship zone, and then the international zone. You also have a beginning of a yielding on that in the final compromise of the United States-Canada proposals at the Geneva Conference in 1960 when they were trying to get

a reconciliation. But apparently, at least the negotiating position of the United States now, is that they would accept the 12 mile zone. But as to the existing law they were very firm at the Geneva Conference of '58 that the three mile limit was established in international law. And, as I recall, this was firmly stated in a number of the anti-smuggling treaties concluded early in the prohibition era. In the British treaty, we said it is the firm intention of the contracting parties to maintain the principle of three miles as the limit of territorial waters.

Q. Is it then your position that the United States has maintained since the early 18th century, in its relations with other countries, that its territorial sea was, and today
1155 is, officially three miles?

A. Yes.

MR. CLAGETT: You said the early 18th century?

MR. RASHKOW: Excuse me, early 19th century.

THE WITNESS: Yes.

BY MR. RASHKOW:

Q. In many places in your testimony you refer to the exploitation of sedentary fisheries beyond territorial waters. Is the right to exploit these resources, which you have testified to, the same right as described by you in quoting from Mr. Carter in the Bering Sea arbitration at page 624 and 625?

A. Yes. Carter refers back at 625 to the most famous case, the Ceylon fisheries, and he indicates the British had conceded that international law recognizes the right of the state to acquire certain portions of the waters of the sea and the soil under the sea, and to include them within the territory of the state. This includes the question of the territorial sea as well as the seabed. Then he goes on to develop the question of the seabed and knocking out the argument about occupation by insisting on the right to, as he says on page 627, "The claim applies strictly to

the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and,
1156 in the same way, mines."

Q. How far out was this right as described by you and described by Mr. Carter applicable, to what distance into the sea?

MR. CLAGETT: When?

BY MR. RASHKOW:

Q. During the 18th and 19th centuries.

A. I have pointed out in various of my discussions of these exploitations of the seabed that it is not always possible from the available evidence to say exactly how far out the seabed fisheries were exploited. But in my discussion of the claims of Ceylon, I have noted the distances in many respects where the claims went out quite far beyond the three mile limit, and I have noted various statements that they did not limit their claims to the area of territorial waters. For instance, on page 576, I quote Mr. Ormsby-Gore in the parliamentary debate as saying the farthest point was 25 miles from the coast of Ceylon. Now, it is true that in regard to the fisheries at Palk's Bay the claim was justified on the ground that this could be considered an historic territorial bay. This, I think, is not true in regard to the Gulf of Manaar. And this conclusion, I think, is borne out by the
1157 various discussions. At times there were claims that the Gulf of Manaar was also a territorial bay, but at page 16 of my *Law of Territorial Waters,* I quote Russell, J., as saying the Gulf of Manaar is a part of the high seas from its size, configuration, and geographical position. He did not believe the Crown had or was under any circumstances asserting any special right with respect to the Gulf. So that you have in the area of the Gulf, as distinguished from Palk's Bay, claims which go out maybe

20, 25, 30 miles. And some of the descriptions of the area are in terms of square miles which makes it a little difficult to determine just how far out to sea they went. But I have said in my testimony that it seems to me from the general descriptions one can assume reasonably from the description of the type of fishery, the type of ship, the depth of the water, etc., that many of these went out beyond the three mile limit. And on page 583, for instance, I quote statements that the pearl beds go out 18 miles from land. I think it is impossible to set a particular mileage limit around the world, and I think the conclusion which I have stated in my testimony, and which I have maintained, is that it doesn't matter whether you went out 10 miles beyond the three mile limit, or 20 miles, or 30 miles, if you were exploiting one of the
1158 sedentary fisheries, and other states did not object.

Q. On page 623 of your testimony you quote from Mr. Carter, and you say that the ILC would agree with Mr. Carter with respect to the justification for the right of sedentary fisheries. That quote is: "It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular constant supply of a certain product of the seas, for the uses of mankind . . . " Is this a fair statement of what is, in your opinion, the principle of international law which governs seabed resources?

A. That is Carter's explanation of the basis of the claim –

Q. Quite right.

A. – from 623, 624? I think it is a resonable analysis of why the rights were carried on. But I think one has to read that particular statement of Carter's in the general context of his argument in the whole Bering Sea case because he was trying to lead up from the established notion that you had a right to exploit the seabed near your coast to his idea of the conservation of the seal herd and the right of the United States to exclusive rights
1159 there. So, I think his argument moves on into a bit of pleading for the main element of the case. But I think, as I say here, that the ILC would probably agree with Carter that this is a justification for the development of the rule.

Q. On page 643 of the transcript you testified that what has always obtained in your view is the exclusive right of the adjacent coastal state to make an occupation in a certain limited sense, and to use and enjoy the resources when the occasion arises. What do you mean by an occupation in a certain limited sense?

A. I put it in quotation marks because I have explained rather fully in previous parts of my testimony I do not accept the doctrine which has been advocated by various writers that the seabed can be occupied and that occupation of the seabed is essential to the establishment of a claim. And, in particular, I quoted rather at length from Lauterpacht's articles in which he disposes, I think quite effectively, of the claim about occupation. I also pointed to the views of the International Law Commission and to the views of the International Court of Justice, all of which I think indicate that occupation is not necessary. And I have said in that passage on 643, "Of course no one would go to the trouble of making a physical 'occu-
1160 pation' (to the very limited extent such an occupation is possible, even today) of the seabed before a resource was

discovered." What I have in mind is – perhaps I could give you two illustrations. I have pointed to the discussion at the Geneva Conference of the Indian Government's insistence on including articles which dealt with the peculiar kind of fishery off the Indian Coast where they put permanent stakes into the bed of the sea and maintained these for the purpose of netting, and so on, year after year after year. And the conference was agreeable to recognizing that that was a good basis for a claim. That is a kind of physical occupation. I think you can say also that if you have mounted a drilling apparatus and have your platform and all and are operating there, that you can talk about a physical occupation, although as I have explained I do not think that this is at all a prerequisite to the assertion of a claim. But, as I say as I go on, I think at the end of that page, "the exclusive right of the adjacent coastal state to make an 'occupation' (in the limited sense to which I have referred) and to use and enjoy the resources when the occasion should arise." That is the general sense in which I am using it there.

1161 Q. To whom do the resources belong if the coastal state never makes the limited occupation, never takes any action?

A. I think it is very clear from the decision of the International Court in the North Sea case that this is an inherent right and you may begin to exploit whenever you have the desire or the facilities.

Q. So, as an inherent right it is not necessary to take any action or to make any claim with respect to those resources?

A. The court is very clear on that, I think. I quoted specifically – if I can find it here – the court says, this is at page 526 of my testimony, "In short, there is here an inherent right. In order to exercise it, no special legal

process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised."

Q. The court is speaking in the context of the continental shelf convention, although it may apply to previous law.

A. Yes.

1162 Q. In your opinion, could this inherent exclusive right of a coastal state to the resources of the seabed exist customarily in international law during the 17th century?

A. Yes.

Q. The 18th century?

A. Yes.

Q. And the 19th century?

A. Yes.

Q. Did this right, inherent exclusive right, exist for the entire bed of the sea?

A. Well, I suppose you mean there does it go out into the middle of the ocean, into the deep seabed. Here I think you would have to say no. You cannot say how far out it did go, as I have explained a few minutes ago in answer to your question. But it was based on the idea that these were resources proximate to the coastal state. And it was the proximity of those resources, somewhat in line with Carter's argument which we just discussed, which entitled the state to exploit these, and you had your inherent right. But it is also clear from the opinion of the court in the North Sea case that they recognized that there was a terminal point to the continental shelf and this did not go out into the middle of the ocean,

1163 the deep sea.

Q. Is it your opinion then that the inherent exclusive rights of the coastal state to the resources of the seabed and subsoil beyond the territorial waters were found by the International Law Commission to be justified on this principle of proximity?

A. In part, yes.

Q. When you say in part, yes, what would the other considerations be upon which they justified it?

A. I think in terms of the general usage, which they analyzed, and the evidence which was presented to them in all of the studies which were made for the ILC of the tradition or practice of the exploitation of the seabed. I think the International Law Commission, in dealing with sea laws particularly, but in the other cases, other subjects as well, was very much influenced by practice and not necessarily so much by the rationale, if I may call it that, for example, of Carter's argument.

Q. Under international law could a nation renounce those seabed rights?

A. It can renounce them in the sense of making a treaty with another state by which we say we hereby give you the rights to exploit this area, or it can make a cession of an area as it can of land territory.

1164 Q. Is there any other way in which it could renounce those rights, such as by acquiescence of activities in relation to those?

A. Yes, I have suggested in my testimony – I can't give you the page at the moment – that if there were a long acquiescence in the exercise of those rights by an offshore state, by another state, that this might establish in the offshore state, or the foreign state, a sort of prescriptive right which you could say would constitute a renunciation by the permissive state.

Q. What about a declaration, could it renounce its

rights by declaration in the nature of the Truman Proclamation?

A. You mean saying we repudiate the Truman Proclamation, we say we have no such rights?

Q. Quite right.

A. Well, then, other states would be entitled to rely on that to come in and exploit. And if the state didn't change its mind and chase them out you would have one of these cases of acquiescence.

Q. If a nation did renounce those rights by whatever means it takes to renounce rights, to whom would those
1165 rights, the resources of the seabed, belong?

A. These are renunciations not in favor of any particular state but a complete renunciation?

Q. Yes.

A. I think you would get back to the argument which I discussed a little bit as to the distinction between a *res nullius* and a *res communis*. I don't think one could say that the case of – your hypothetical case of renunciation, that these resources would revert to the state of *res communis* because this was not the condition anyhow. And you might well say that this became a *res nullius* and might be subject to acquisition by any state.

Q. Assuming that the colonies had rights in the seabed out to 50 or 100 miles in 1776 under international law, assuming also that the United States renounced these rights at the end of the 18th century, and did not assert rights to the seabed again until the Truman Proclamation in 1945, assuming those two facts, is it your opinion that the rights to the seabed acquired by the United States under international law as a result of that assertion belong to the Federal Government or to the states under international law?

A. Excuse me, did you characterize those as facts?

Q. Yes.

1166 A. You started by saying assumptions, and then you said assuming those facts.

Q. Assuming those were found to be the facts.

A. Well, I got misled there because I thought you were saying that these were facts. Would you please repeat that?

Q. Assuming that the colonies had rights in the seabed out to 50 or 100 miles in 1776, and assuming also that the United States renounced those rights at the end of the 18th century, and did not assert rights over those resources until the Truman Proclamation in 1945, assuming those two facts, or assuming they are found to be facts, given those assumptions, is it your opinion that those rights to the seabed would belong to the United States or to the states?

A. I think you are asking me a question somewhat out of the range of my expertise for which I am qualified to testify. And you stated a hypothetical situation which I don't accept, of course, because there was no such renunciation. If you are thinking, as I suppose you are, of the doctrine expressed in the Canadian case that rights which were acquired after the confederation, they must be rights acquired by that entity which is recognized in international law as a sovereign state entitled to rights under international law which was part of their

1167 thesis, I think, in the British Columbia case, then you are putting a situation in which you lead to a conclusion that the entity in international law is the one which acquires the rights. But, as I say, this is a kind of hypothesis which I have never considered because it seems to me to be entirely contrary to facts in terms of any renunciation which might have been made as is specified in your assumptions. On the other hand, in regard to the

Federal system in the United States, I think that I would not be justified in going into the ranges of constitutional law for which I have not been qualified. I would ask counsel whether I am correct that he did not qualify me as an expert in constitutional law.

MR. CLAGETT: That is correct, sir. I am sure I could have if I had wanted to.

THE SPECIAL MASTER: I would like to ask a point on that question, if I might. The first assumption; namely, that the states as colonies had acquired certain rights in the seabed which is being claimed here by the states –

THE WITNESS: Yes.

THE SPECIAL MASTER: – assuming, but you say you don't think it was the fact, but assuming that it was so, that the Federal Government by a suitable instrument renounced rights in the seabed beyond the three mile limit,
1168 would that renunciation be recognized in international law by other states as binding on the states which were the holders of those rights?

THE WITNESS: I would think, Judge Maris, that there you would get into the question as to whether the Federal Government could renounce something which did not appertain to the Federal Government which was the property of somebody else.

THE SPECIAL MASTER: From the international law standpoint the Federal Government is the entity with which other nations deal, representing whatever complex of powers there exist here in this country.

THE WITNESS: Yes, I think that is correct. Foreign governments faced with a declaration by the United States Government that, if I may alter the case a little bit to make it a little clearer in my own mind, suppose the United States Government in the 20th century said we no longer claim three miles as the limit of territorial

waters, we claim only two miles. Other states, in spite of cases like Manchester against Massachusetts, which recogized the three mile limit for the states, other states would deal with the Federal Government and say we stand on your position. And as indicated in many situations the
1169 Federal Government has asserted that the individual states do not have a right of contact with foreign governments in terms of international negotiations unless under the provisions of the Constitution they conclude a compact with the consent of the Congress.

THE SPECIAL MASTER: I suppose that the ultimate case would be a formal treaty or convention, to which the United States as a sovereign adhered, expressly giving up any right beyond a certain point, which the states were at that time claiming to have.

THE WITNESS: Your Honor, there has been published in the last few years two studies, and I am sorry, I can't identify them, and I merely refer to the fact that they do exist, in which a young scholar has pointed to situations in which state governments have dealt with foreign governments. I read them rather hastily and did not find them very conclusive. But there is perhaps some evidence that state governments have dealt with foreign governments without the opposition of the Federal Government. But I am quite sure that in the face of a stand by the Federal Government on its rights to conduct foreign relations of the United States, at the present time the foreign governments would insist that they had no need to pay any
1170 attention to what the state government asserted.

THE SPECIAL MASTER: Of course, there would be the question as to whether the state would then have some claim against the Federal Government.

THE WITNESS: Yes, sir.

BY MR. RASHKOW:

Q. On page 518 of the transcript you testified that, "No distinction in the legal principle applicable can be made between exploitation of pearl fisheries and drilling for oil." I take it that it is your opinion that both of these resources are subject to an inherent exclusive right of the coastal state as a result of the natural advantage which the coastal state has for their use and enjoyment?

A. And as a result of the reasoning of the International Court in the North Sea cases concerning the prolongation of the coast and the inherent right to its exploitation.

Q. Does this principle apply to fishing the waters in the coastal state?

A. No, a distinction has always been made, and I think I have pointed this out, between the right to deal with so called swimming fish and the right to deal with the seabed. This was brought out very clearly, I think, in the Geneva Conference.

1171 THE SPECIAL MASTER: Suppose we take a break for a few minutes now.

(Short recess.)

BY MR. RASHKOW:

Q. Prior to breaking for the recess, I asked you a question concerning rights to the fishery resources in the adjacent seas, and you said that these inherent exclusive rights did not extend to the fishery resources. Is it not true that some nations recently, within the last 20 years, have asserted an inherent exclusive right to the fishery resources of the seabed on the same basis as what you allege the rights of the sedentary resources is justified?

A. To a certain extent this is the basis of the justifications of Peruvian claims and the claims of some of the other states on the west coast of South America which have been generally rejected not only by the United States but by most other states. And the Peruvian case is

the clearest one because they claim that there was a relationship between the swimming fish off the coast of Peru and the entire livelihood of the Peruvian nation because one of their principal economic resources is the guano. Guano depends on the presence of the birds. The presence of the birds depends on the presence of the fish. And, therefore, if people are allowed to come in and catch
1172 all their fish, this is destructive of the very life of the country. This goes further, really, than the claim to the seabed where such a vital connection was not generally alleged. But it is perhaps an example where there is a claim to swimming fish, as I called them, on the basis of the peculiar rights of the adjacent shore states. But these also have to be noted or are an attempt, in my opinion, by the states on the west coast of South America to find, rather desperately reaching out for some justification to a claim of rights off shore because they don't have a continental shelf and since their coast drops off sharply into the sea. And it is only when the Argentine came in to join the west coast states that the Argentine was able to tie this in with a very extensive continental shelf. Now you've got Peking backing up the claim of the South American states. Whether that's on the basis of some particular interpretation of international law I am not informed.

Q. On page 569 of the transcript you testified that Hurst's language in his article "Whose Is the Bed of the Sea?" may be read to imply that he regarded the seabed as terra nullius except for isolated instances where actual occupation had been established. You added that you disagree with such implication. Does the language used by
1173 Hurst in the article imply, in your opinion, that Hurst himself viewed the seabed as terra nullius?

A. I don't know that I can be more explicit than I have here.

Q. I was confused as to whether the implication you were talking about was what concerned Hurst's beliefs, or whether it concerned the implication of the theory of seabed resources.

A. I was suggesting this is a situation in which actual language used can be interpreted in one of two ways. One possible interpretation is the terra nullius interpretation. But that is not the inevitable interpretation of what he said.

Q. Well, what did Hurst himself believe in your opinion?

A. Well, I don't know, I can only judge him by his language in that article. There I think it's ambivalent, it could be interpreted either way. And I am merely noting this is a possible interpretation. But if this was his position, then I would have to disagree.

Q. Is your position that the exploitation of sedentary fisheries and coal mines under the sea prior to the development of the continental shelf doctrine was permitted
1174 under international law as an incident of the inherent, exclusive rights of these states, rather than occupation or usage, consistent with the opinion of other publicists who have written in the field?

A. Yes.

MR. CLAGETT: I didn't understand that question. I don't know if the witness did. I wonder if it could be repeated.

MR. RASHKOW: Did you understand the question?

THE WITNESS: Well, I think I know what you were driving at, yes.

MR. RASHKOW: Would you still have an objection?

MR. CLAGETT: I would if only for my benefit. I found it difficult.

BY MR. RASHKOW:

Q. Is it your position that the exploitation of seden-

tary fisheries and coal mines under the sea prior to the development of the continental shelf doctrine was permitted under international law as an incident of the inherent, exclusive rights of these states, rather than occupation or usage. Is that position consistent with the opinion of other publicists who have written in this field?

A. I had better, to avoid any ambiguity, not try to say
1175 yes or no, but to give you an answer in a little more detail. My position is consistent with the first part of your question, that this developed as part of the inherent right. And very definitely, as I have tried to point out on a number of occasions, it did not depend on occupation. I have also pointed out in various places in my testimony that this is not the unanimous judgment of all international lawyers. Some of them have taken the position that it does depend on occupation. And I said earlier this morning that I relied very heavily on the reasoning in the Lauterpacht article, on the conclusions of the International Law Commission, and on the statements in the judgment of the International Court in the North Sea case. But, to summarize, definitely I reject the occupation of the sea.

Q. You referred to the Lauterpacht article, the International Law Commission –

A. I should add the Bering Sea arguments of the United States.

Q. – and Mr. Carter and the Bering Sea arbitration.

A. Or we can say the United States position.

Q. Are you familiar with any other publicists in the field whose opinion with respect to this right to the resources of the seabed is consistent with yours?

1176 A. In addition to those I have mentioned?

Q. Correct.

A. I am sorry, I can't recall the names of all of the members of the International Law Commission who joined

in asserting their view that it didn't depend on occupation. I could give you the names of the judges of the International Court that joined in the majority opinion. These represent pretty much top flight international lawyers, present company excepted, in passing on this issue.

Q. Now I, of course, am not referring to the doctrine itself.

A. As far as treatises are concerned, I think on this point as on most points, if you scan the literature of both periodical and published volumes you can total up a number of writers on each side. And it is not, in my opinion, significant to computerize them and say there are 40 one way and 60 the other, or 30, whatever it might be.

Q. Prior to the development of the continental shelf doctrine, as the doctrine under that name, was there any decision by the Permanent Court of International Justice or the International Court of Justice, or any other international arbitral tribunal which recognized as a principle of international law the principle that the coastal state had inherent exclusive right to the resources of the seabed and
1177 subsoil of the seas adjacent to its coast beyond the territorial seas?

A. You want international tribunals?

Q. Yes.

A. No, I don't remember that issue being posed in such a way. I have explained that I don't agree with the dicta in the Abu Dhabi case, which was an international arbitration and which held to the contrary. I explained I don't agree with that and I have given comments of others who have pointed out this was a dictum not necessary to the holding.

Q. Did the United States in the Truman Proclamation base the claim it made under that proclamation on such a principle of customary international law?

A. Yes, I think so. That is on the principle of inherent right, yes. I think that actually the Truman Proclamation was not designed to say here, we have a great innovation, we are going to create new international law. I think it was based on what they considered to be their basic rights. And this was one reason why they were so careful to exclude the possibility of its seeming to imply sovereignty over the waters over the continental shelf. They were very clear that it did not include this. And this in itself is an indication that they were thinking
1178 of the international law which preserved the freedom of the high seas outside the territorial waters, but asserting at the same time that the rights of sovereignty appertained to the United States for the seabed.

Q. To your knowledge, did the Truman Proclamation make any reference to any customary rule of international law which would justify the assertion made therein?

A. I haven't the exact language in mind. I know the person who, I think, was principally responsible for drafting it, Professor William Bishop in Michigan. But I don't recall the specific language in the proclamation.

Q. Prior to the Truman Proclamation in 1945, did the United States ever assert rights to the resources of the seabed and subsoil beyond the territorial sea?

A. There were, of course, and I think I mentioned some of these, some instances of exploitation of sponge off the Gulf coast, the Gulf states, they weren't specific assertions, perhaps, of the United States Government. I referred to the position of the United States in regard to some other claims. And I think there was one statement, I can't put my finger on it at this moment, in regards to the Mexican claims recognizing their right to regulate the fisheries. The situation in regard to the Federal Govern-
1179 ment before 1945, I think amounts to this, that in terms

of exploitability, which throughout I stressed is the prime consideration, there was not occasion to assert claims to the exploitation of the oil and other resources outside of the territorial waters. And when this became a reality the right was asserted and it was maintained in the Truman doctrine.

Q. So, in your opinion, if the occasion had arisen they would have claimed such rights prior to 1945?

A. Right. And I suppose one might say that the very argument we have been talking about, the argument of the United States in the Bering Sea arbitration, was an assertion of the right to exploit the resources of the sea-bed although we didn't happen to be engaged in sponge and coral fishing to a great extent on the national scale.

Q. To your knowledge, was there any attempt by the United States with respect to these sponge and coral fisheries to exclude foreign fishermen from participating in the fisheries beyond the territorial seas?

A. I am not aware of it.

Q. Aside from what you have testified to in connection with Carter's argument in the Bering Sea arbitration prior to the Truman proclamation, did the United States in the conduct of its foreign relations ever recognize this prin-
1180 ciple of inherent exclusive rights of the coastal states to the resources of the seabed beyond the territorial sea?

A. I think yes, but I would point out that in the places where these claims were most firmly established in the pearl fisheries, in the Mediterranean fisheries, in the Australian fisheries, the United States was not concerned. The principal case which I can cite you, where the United States took a definite stand supporting this, the case which I mentioned in my testimony in regard to the Philippines when the United States was in occupation, in which they adopted legislation or by decree insisted on

reserving the right to the exploitation of the subsoil pearl fisheries outside territorial waters off the Philippine Islands. This was the first decade of this century, or in the 1890's, after the Spanish-American War.

Q. What was the breadth of the territorial sea claimed by Spain prior to the Spanish-American War?

A. Generally six miles.

Q. On page 135 of your prepared testimony, 625 of the transcript, I believe, you say that the United States in the Bering Sea arbitration "successfully attempted to reason" from the doctrine of inherent exclusive right of the coastal states to seabed resources "to a sovereign
1181 right over surface fisheries."

MR. CLAGETT: You mean unsuccessfully, don't you?

MR. RASHKOW: Does he say unsuccessfully?

MR. CLAGETT: Yes.

THE WITNESS: What page is this?

MR. CLAGETT: 625.

THE WITNESS: "The United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state – which was not disputed – and unsuccessfully attempted to reason from that fact to a sovereign right over surface fisheries."

BY MR. RASHKOW:

Q. Did the Arbitral Tribunal accept the underlying argument of Mr. Carter that the coastal states had a right to the sedentary fisheries off its coast on the basis of inherent exclusive right?

A. No, the Tribunal didn't have to rule on that. And if it had pronounced on it I would say it was dictum because the main issue was the right to the protection of the seal herd, and as I pointed out the United States argument based on the old ferae naturae doctrine was rejected by the Tribunal, and the United States lost its

case on that basis. And also on the basis that the Tribunal
1182 did not accept the arguments of the United States about the prior claims of Russia in the Bering Sea.

Q. To your knowledge, were any seabed resources, other than sedentary fisheries, discovered off the coasts of any of the colonies in North America during the colonial period?

A. I would have to check to see whether any of the mining operations off the Canadian coast began at that period. Some of the mining operations in England, of course, were earlier, and I mention the mining off both the east and west coasts, but I don't recall the date on which they began. I am sure I must have it in the testimony somewhere.

Q. Did the Crown or the colonies during the colonial period ever assert against other nations a claim to any resources of the seabed and subsoil of the seas adjacent to its colonies in North America?

A. Yes, I think that in Professor Smith's testimony, or Professor Horwitz' testimony, and I mentioned some of this, there are references to the oyster fisheries, the salt beds, and I suggested that these are also claims to the right to exploit the subsoil or seabed resources. I think perhaps that all inclusive language in some of the charters also includes the seabed resources along with all the other
1183 things they mentioned.

Q. You were, then, referring to Professor Smith's testimony relating to excercises over sedentary fisheries or seabed resources of the colonies of the United States?

A. Yes.

Q. Is it your opinion that assertion of rights to salt pans constitutes assertion of rights to the seabed resources?

A. It is of the same general nature, yes.

Q. At page 643 of the transcript you testified that

you do not think the legal situation whcih existed in your opinion in the 17th and 18th centuries was significantly different to any more recent times, including the 19th and 20th centuries. Was the legal situation you were referring to that other nations would have acquiesced and respected assertions by a coastal state to exclusive rights to exploit newly discovered seabed resources?

A. I am sorry, I got confused on that. Would you repeat that?

Q. At page 643 of the transcript you testified that you do not think the legal situation which existed in the 17th and 18th centuries was significantly different at more
1184 recent times, including the 19th and 20th centuries. Was the legal situation you are referring to the situation which would permit other nations to exploit seabed resources as a result of inherent exclusive rights?

A. Excuse me, at one point I think there is no reference to the 17th century. On page 642 I am talking entirely of the 18th century. And the reference on page 643, I think it is to the 18th century, rather than to the 17th century. I don't see any reference at that point to the 17th century. But I think, if I understand the drift of your question, I do assert that the situation existing in the 19th and 20th centuries is the same situation which would have existed in the 18th century if the cases arising at the present time would have arisen in those times.

Q. Are you familiar with the French-Brazilian lobster war in the early 1960's?

A. Generally.

Q. And was that a case in which France objected to assertion of ownership in the lobsters by Brazil?

A. Of course, it's not a seabed sedentary fishery in terms of the discussion if it is near the surface because lobsters are swimming fish. They are not attached to the bottom like an oyster. The French did object to the

1185 exclusion of French fishing vessels from the Brazilian lobster fishery. Actually, the word war was a journalistic description. The matter was finally adjusted by negotiation and agreement. But it was an objection to a Brazilian claim to regulate a swimming fish, fisheries of the sea.

Q. What was the Brazilian contention?

A. That I don't recall specifically, except that they have now also extended their claims to regulate shrimp fisheries, and the United States has recently made an agreement with them whereby we have agreed to limit the number of shrimp boats which will engage in the fishery. This is a compromise adjustment that has been made.

Q. Are you familiar with the agreement the United States entered into with Japan and the Soviet Union relating to the king crab fisheries off the coast of Alaska?

A. Yes.

Q. Was there a dispute between those states as to the rights of those resources?

A. Yes. They tied up partly with the other fisheries off the Alaskan coast, particularly the salmon fisheries. But the United States did agree to allow the Japanese, and I am not quite sure about the extent of the concession to the Russians, to participate in the king crab fishery there, and the Japanese have carried it on. This is against
1186 the background of long disputes between the Japanese and the United States on the nature of their participation in fisheries off the Alaskan coast and off the northwest coast.

Q. Was the United States position during those negotiations that the king crab represented a sedentary fishery within the definition of the continental shelf resources of the continental shelf convention?

A. My impression is that it did not.

Q. Did these earlier disputes to which you refer be-

tween Japan and the United States relate to crab fisheries or did they relate to swimming fisheries?

A. Largely to the swimming fisheries. I discussed that difficulty in an editorial comment in the *American Journal of International Law* in 1939 in connection with various bills which were then introduced in the Congress, most of which tended to assert a wide claim of the whole area, over the waters as well as the submerged land adjacent to the coast of Alaska. This, incidentally, was an indication of a concern with submerged lands or seabeds, and actually in the Copeland bill they use the term, the continental shelf, which is some seven years before the Truman doctrine, using the term continental shelf. But because that
1187 legislation, or those bills, rather – it didn't become legislation – those bills were couched in terms of the kind of broad claim to the Bering Sea which we had so firmly rejected when the Russians had asserted it. They were not supported by the Executive and did not become law. But they arose out of the difficulties of the Alaskan and northwest coast fishermen with the Japanese and, as I pointed out this almost did come to actual hostilities when some of the masters of the American fishermen asked their owners to send them rifles to drive off the Japanese.

Q. In your testimony you testified that you were a member of the International Court of Justice between 1967 and 1972.

A. Oh, no. I am sorry, '61 to '71.

Q. Excuse me, '61 to '71. How does a case come before the International Court of Justice?

A. It comes in various ways. It may be by a compromise agreed upon by the parties at the time; it may be by the individual initiative of the states invoking some prior treaty which contains a clause providing for the compulsory jurisdiction of the court, or it may be through

the request of an authorized organ of the United Nations or one of its agencies requesting an advisory opinion.

1188 Q. Once a case is before the International Court of Justice is the court free to deal with any and all issues related to the case?

A. Yes.

Q. You mentioned that you were a member of the International Court of Justice at the time of the North Sea continental shelf case and joined in a judgment in that case. Did you write the majority opinion for the court?

A. I am sorry, this is a matter of the privilege of the court and one is never allowed to disclose who writes the opinions of the court. I must ask Your Honor to be excused.

THE SPECIAL MASTER: We will certainly respect that.

BY MR. RASHKOW:

Q. Did you write a separate opinion in that case?

A. Yes.

Q. Did your separate opinion in that case deal with the inherent exclusive right of the coastal states?

A. No, I was interested in bringing out some factual considerations which seemed to me had not been sufficiently explored in the majority opinion. It was strictly a supplemental opinion. But I express no disagreement with

1189 the conclusions of the court majority.

Q. On page 534 of the transcript you say that you cannot read the judgment of the International Court of Justice in the North Sea continental shelf case as intimating that over a long historical period the continental shelf or adjacent seabed and subsoil was res nullius. You add that, "All the evidence refutes such a concept." What evidence are you referring to?

A. I am referring there to all of the material which I think mostly I recalled this morning, in which I reject the occupation theory, including the conclusions of the International Law Commission. And the argument of the United States in the Bering Sea case, and the other bits of evidence which I have already mentioned in connection with the doctrine of occupation. You will notice that I am speaking here in the passage you read about this being res nullius open to occupation by any state, and what I have maintained in all of my arguments about the sedentary fisheries of the seabed is in support of the general conclusion of the International Court that there is an inherent right which appertains to the coastal state and it is not open to every other state in the world to come in and exploit those fisheries.

1190 Q. Am I correct in saying that it is your opinion that the doctrine of the continental shelf as a doctrine under that name is today received customary in international law?

A. Yes.

Q. Am I correct in saying in your opinion the doctrine of the continental shelf as a doctrine under that name was received customary in international law in 1958?

A. Yes.

Q. Would this be true in 1945?

A. No, the terminology would not have been fully developed. Although as I have just indicated the term was used earlier as, for instance, in that bill of 1938.

Q. Is it your opinion that the International Law Commission, during its discussion on the matter in the 1950's, felt the doctrine of the continental shelf was received customary international law?

A. Yes. They had some difficulty with it, but I think as a result of their investigations and of the testimony they took of the witness, rather, the views that were expressed by the various experts, they concluded that it was.

Q. Are you familiar with the definition of continental shelf given in the continental shelf convention of 1958?

A. I couldn't recite it word for word, but I am fam-
1191 iliar with it in general.

Q. Are you familiar with that part of it which refers to the exploitability of the continental shelf?

A. Yes, it is an indication that it is for exploration or exploitation. I think those are the two terms used. There was a tendency in Geneva to protect the right of scientific exploration even in the continental shelf, but reserving the right of exploitability to the coastal states.

Q. Do nations have a right in the seabed and subsoil, under the continental shelf convention, beyond the area of the seas that are exploitable?

A. Well, it's either the 200 meter depth or the exploitability levels, and you may have one or the other. And at the time they thought they were adopting a measure in terms of meters which would exceed the limits of exploitability. And that, of course, has been radically passed. But I think there is at the present time an outer limit beyond the limits of exploitability which are under the convention available to the coastal states. That is the reason I think that you've got the present discussion in the Seabed Committee on the exploitability of resources in the deep seabed, outside the continental shelf and outside the continental slope.

Q. The definition says to 200 meters or beyond where
1192 exploitable, is that correct?

A. Yes.

Q. Has the President proposed limiting the continental shelf doctrine to a 200 meter limit in his negotiations with the Deep Sea Committee?

A. Pardon?

Q. Has the United States proposed limiting the continental shelf doctrine to the 200 meter limit and establishing a trusteeship zone beyond that area?

A. In general, I examined the proposals of the United States at the Geneva Conference just about a year ago, but in about the last month or two months the Seabed Committee has been meeting at the United Nations in New York, and I have not seen the documentation on those meetings. And whether the United States has varied its proposals during those last few months, I am not aware. But, as I stated earlier this morning, in general the proposal of the United States was to agree on a 12 mile limit for the territorial waters and then to agree on the intermediate trustee zone and the deep sea area which would be under international supervision.

Q. If the United States, in negotiations in the conduct of its foreign relations, were to renounce any rights beyond the 200 meters, in your opinion would they be giving up rights they had in areas beyond 200 meters where ex-
1193 ploitable?

A. Yes. In other words, I think they now have rights to the area which is within the exploitability limit or the 200 meter zone.

Q. Under the Continental Shelf Convention there is a limit to the area which these rights applied, either the 200 meter or the area which is exploitable. Beyond those points to whom do the resources of the seabed belong?

A. Under the convention, I think the intention is that outside of that you are in the realm of the high seas where no one state has any particular privileges or rights.

Q. Could a nation, could any nation claim those seabed rights if they were able to exploit them?

A. If they are within the limits of exploitability. But the point which has come in connection with this, and it was somewhat argued but not in great detail in the North Sea cases, was whether the whole idea of proximity, which the court felt was tied up with the notion of the continental shelf, meant that there was some limit to the continental shelf. In other words, that this notion of the exploitability of the seabed could not be interpreted to mean that you could go way out into the middle of the ocean to any depth just because you could, perhaps through developing technology, and be able to recapture the man-
1194 ganese nodules from the seabed.

Q. Is it your opinion that the continental shelf doctrine limited the rights which the coastal states already had under customary international law to the resources of the seabed and subsoil?

A. Are you talking about the convention or the doctrine?

Q. I am talking about the convention.

A. Convention?

Q. Yes.

A. No, I don't think it did because it was inherent in the nature of the case all the way through from the earliest claims to the exploitability of the pearl fisheries that exploitability was inherent in the nature of it. If they had limited it to a definite meter limit, then it would have been a limitation.

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1209 REDIRECT EXAMINATION OF PHILIP C. JESSUP

BY MR. CLAGETT:

Q. Judge Jessup, at one point rather early in the cross examination Mr. Rashkow asked you a question about how far out the territorial limits of England extended in the 17th and 18th centuries. And you replied three miles. Did you understand that Mr. Rashkow was asking that question about both the 17th and 18th centuries when you replied three miles?

A. Well, as I indicated in response to another question, I think, while I said I couldn't give an exact birthdate to the three mile limit, I indicated it was consolidated and settled in the 18th century rather than in the 17th century.

1210 Q. So, in the answer to the question I mentioned –

A. I had more in mind the 18th century.

Q. There was some reference in your cross examination to the opinion in the Canadian case offshore mineral rights of British Columbia. I am referring, of course, only as to cross examination into the international law aspect of that decision. There is a sentence in that opinion which reads, "It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia." If that sentence is intended to mean that international law holds as between the Federal Government and the Provinces of Canada it is the Federal Government that holds title to the subsea resources, would you agree with that statement?

A. That would, of course, be quite impossible. This would not be a question in which international law could possibly intrude.

Q. To your knowledge, has any state ever renounced its continental shelf resources?

A. I have no knowledge of such a renunciation.

Q. I take it you don't believe the United States has ever done so?

A. I think not.

1211 Q. There was some talk during cross examination as to whether the Truman Proclamation was made in accordance with an existing right under customary international law or not. If, in 1945 there had not been an existing right under customary law in favor of the adjacent state to claim the exclusive right to exploit continental shelf resources, would the Truman Proclamation have been an internationally wrongful act?

A. It certainly would not have established an international right. I will put it this way: that the general acquiescence in the Truman Proclamation immediately after it was issued, the fact that it was immediately so widely imitated, the fact that it was preceded by the British-Venezuelan arrangement, and the whole rationale of the Truman Proclamation and the accompanying statements along about the same period of the United States Government indicated that it was based upon an understanding of what the international law rights were. And if no such rights had existed, then I think it would have been comparable to some of the outmoded claims to the high seas, and might have been put in the same category as I would put the 200 mile claim of the South American states which asserts a sovereignty over the seas as well as over the seabeds. And in that sense it would have been an

1212 internationally wrongful act. And I think the more extensive claims would have been internationally wrongful or we can say an internationally invalid act.

Q. There was also some reference in the cross examination to the doctrine of inherent rights as stated in the majority opinion in the North Sea case. Is there anything in any of the opinions in the Australian case, which is one

of the Government's exhibits in this case, which bears on the interpretation of the majority opinion in that respect?

A. Yes. There is difficulty in remembering the names of all of the Australian judges, but the one that begins with a B, and who rather led off at great length – Barwick. He has a considerable passage on page 279 in which he quotes from the opinion of the International Court and says this may prove a sounder basis for the claim to the bed of the sea than the attempts made, in the cases to which I later refer, which relate to the ownership of the beds, the consideration which would support a claim for jurisdiction over the territorial waters.

Q. And as to the question whether Judge Barwick interpreted the majority opinion as you do, as saying that the inherent right had always vested, is there any language that bears on that?

1213 A. Well, that is the part that he quotes, and which I understood him to accept as being a sound diagnosis of the law in question. He quotes that part from the judgment of the International Court. Of course, there is here an inherent right, in order to exercise it no special legal process has to be gone through, nor have any special legal acts to be performed, and so forth, as we have quoted before. And then he goes on in the sentence I have quoted before, "This may prove a sounder basis for the claim." Then he goes on later, "Thus accepting for present purposes the decision of the International Court, internationally the continental shelf naturally appertains to a nation as an international person." Of course, this is dicta, but it is an indication that in his opinion, plus the interpretation which I have also given to the International Court judgment, is a sound one.

MR. CLAGETT: That is all I have, Your Honor.

MR. RASHKOW: I have two questions, Your Honor.

THE SPECIAL MASTER: Just a minute. Do any of the other states have any questions of this witness?

MR. LATIMER: We have no questions.

THE SPECIAL MASTER: All right. Go ahead, Mr. Rashkow.

1214 RECROSS EXAMINATION

BY MR. RASHKOW:

Q. In your discussion on redirect you discussed whether if the United States proclamation, the Truman Proclamation, was unlawful, you said it would have no validity in international law. Is it not true that an act when made is unlawful in attaining validity in international law through acquiescence?

A. Yes, I think the actual words I used were you could say it was an unlawful act or you could say that it was invalid. Now, it is true that in international practice an originally unlawful act or invalid act may acquire validity through acquiescence of other states.

Q. This discussion relating to Barwick's opinion in the Australian case concerning continental shelf rights, is it your opinion that Barwick believed that inherent exclusive rights to the seabed had always existed and existed prior to the continental shelf doctrine?

A. It seems so from that passage.

Q. Would you rest your opinion completely on that passage, or are you familiar with the total opinion?

A. Oh, I have examined the total opinion with some difficulty, and I think it contains various inconsistencies,
1215 and I disagree entirely with his interpretation of Regina against Keyn, as I have explained in my own testimony. And, of course, this was entirely unnecessary to the decision of the case which was before him.

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CLARIFYING EXAMINATION OF
RICHARD B. MORRIS

BY MR. CLAGETT:

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1855 Q. Absent the Treaty of Utrecht it would be your testimony that the Crown would have no rights whatever below the low water mark?

A. That's right.

Q. In the absence of a treaty then it had no rights whatever below low water mark?

A. That's right.

1856 Q. In either the sea, the surface of the sea, or the seabed?

A. Save for whatever rights would be territorial, in territorial waters. I would exclude territorial waters.

Q. Oh –

A. That's right.

Q. What do you mean by territorial waters?

A. Well, in the 18th century, as the previous testimony has shown, territorial waters might be gunshot, might be three miles offshore.

Q. So, you are saying that there were rights in the sea below low water mark in the 18th century?

A. In territorial waters.

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CROSS-EXAMINATION OF W. KEITH KAVENAGH

BY MR. CLAGETT:

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2085 Q. Does the grant to Arlington and Culpepper include "all other royal fishes as all others whatsoever in the said seas?" Does it include "together with the royalty of the said seas and bays aforegranted?"

A. I am sorry, are you reading from the grant itself?

Q. Yes. Do those two phrases occur in the grant?

2086 A. I don't have the grant in front of me, but if you have read from the grant I will trust your reading of it.

Q. I am showing you the language, "and all other royal fishes as all others whatsoever in the said seas, bays, lakes, rivers and waters," and I now show you the language "together with the royalty of the said seas and bays aforegranted."

A. Yes.

Q. Do you see that language?

A. Yes.

Q. Now, you testified previously that in your prepared testimony you have sought to quote all language from the charters which you thought might be helpful to the court in resolving this case. You didn't feel that language might be helpful or relevant?

A. Evidently at the time, no.

Q. Do you now? Do you think that's something the court might want to look at in deciding this case?

A. It is very possible, yes.

Q. When the charter says "together with the royalty of the said seas," do you know what it means by "the said seas"? What seas have been referred to before? Would you like to see the charter again?

A. I assume that it means the Atlantic Ocean, those
2087 being the only seas there.

Q. Has the Atlantic Ocean been referred to previously in the charter?

A. I have not read the charter recently. I don't know if they use specifically that language.

Q. I would request you to read it and tell me what you think the antecedent of "the said seas" is.

A. Do you want me to read the entire charter?

Q. That's up to you. I am asking you what you think the antecedent of the term "the said seas" is.

A. They use the phrase the great ocean. Isn't that what you are referring to?

Q. I am asking you what you think the antecedent of the term "the said seas" is.

A. There are two seas mentioned. The great ocean of the east and the great ocean of the west. There are two, this is why he would then say seas, plural. Would you like me to read you the phrases?

Q. I only asked you, for the fourth time, what you thought the antecedent of "the said seas" was. Your testimony is that the antecedent is the great ocean and –

A. The great sea to the west.

Q. The great sea to the west?

2088 A. Yes.

Q. So, when the charter later refers to the said seas, those two are what you think it has in mind?

A. Yes.

Q. Now, the charter says "the said seas and bays aforegranted." Did the charter previously grant the great ocean and the great sea to the west?

A. Not as I recall.

Q. Then what do you think the reference means?

A. They were granting royalties in those seas.

Q. The passage that I just read said "together with the royalty of the said seas and bays aforegranted." That is, in this passage they are granting the royalties. Where are they granting royalties? They are granting royalties "in the seas and bays aforegranted." That's what it says, isn't it?

A. Yes.

Q. All right. What are the seas aforegranted?

A. That would be the Atlantic Ocean and the Pacific Ocean.

Q. Is there previously in the charter a grant of the Atlantic Ocean?

A. Not that I can recall offhand.

Q. Would you like to check your recollection?

2089 A. Yes. I am sorry, up to that point I don't see where he granted the sea.

Q. Then what do you think that language means?

A. A strict reading of the statement "royalties of said seas and bays aforegranted" implies very strongly that somewhere in this the Crown granted the seas and the bays, but I see no where where he did.

Q. How do you solve this conundrum, do you have any suggestions, solutions?

THE SPECIAL MASTER: I suppose that's one I have to solve, not this witness.

MR. CLAGETT: I thought the witness might be able to assist you.

THE WITNESS: I can try.

THE SPECIAL MASTER: I am looking to you to assist me, Mr. Clagett.

BY MR. CLAGETT:

Q. Is it at all possible, Dr. Kavenagh, in the absence of any other suggestion from you as to what the antecedent might be, that the antecedent was intended to go back to the language "as also all islands whatsoever within all or any of the limits and precincts aforesaid, or within 10 leagues of any of the coasts of any of the said territories together with the
2090 soil of all and singular the premises and all waters within those premises"? Could that possibly have been what the reference back was to?

A. No, because I had been construing the term waters as inland waters and not high seas.

Q. So, if you insist on that construction that leaves you utterly without an explanation as to what "the seas and bays aforegranted" might mean in that charter, doesn't it?

A. The only other way that that could be read is that royalties before granted in the said seas and bays reverse the phrase. However, obviously it's not reversed in the charter and I couldn't offer that.

* * * * *

2095 Q. . . . . What do you think the Maryland charter means by the term "the sea within the premises"? I am quoting from line 1 of page 1496.

A. For the premises you would have to literally read the charter up to the habendum clause because, as I under-

stand it, that is the premises. The premises in the charter being that portion of the document which names the grantor, the grantee, the reason for the grant, and in general terms that which is to be granted. That is the premises.

Q. Do you think the term "sea within the premises" included the sea within 10 miles of the coast?

A. I would have to read the charter to make sure. I don't repeat the premises here, so I don't have them readily at hand to answer that.

Q. Excuse me, I said 10 miles. I meant 10 leagues. At page 1495 you quote the language about 10 leagues, at line 17, and you go right on in your quote, there is no ellipsis, until you get to line 2 of 1496 and the words "within the premises" are in the same sentence. My question is whether, when you find the words "sea within
2096 the premises," you would interpret that as reading back to the 10 marine league boundary earlier in the same sentence?

A. No. The seas within the premises, that portion which you are discussing, refers to fishing, and it mentions the fish. That has to do strictly with that, the fish, the royal fish, and so forth, in the seas, bays, straits, rivers, and so forth. Within the premises, I would have to again look at the first one. Is this in the habendum section, or is this in the major section, in the first part of the document?

Q. I will be glad to show you the whole text of the charter, if you want. Since both terms are in the same sentence I thought that might be adequate.

A. Now, what is the question?

Q. My question is whether the term "sea within the premises" includes the sea within 10 marine leagues from the shore.

A. My answer is no because the initial statement of boundaries only mentions to the sea plus the islands.

Q. Then what do you think "sea within the premises" means?

A. Again, you have the same kind of composition you pointed out in the other, you have to assume that
2097 they were referring to the sea between the islands and the mainland.

Q. Is that the way you construe it?

A. There is no other sea in the area that I know of.

Q. So, it is your testimony that "sea within the premises" does mean sea within 10 leagues of the mainland?

A. I still balk at the word premises because it is still my position you could not grant the sea. I cannot explain why you suddenly include sea in the premises because from what I construe the premises the original main grant and the reasons therefor, sea was not mentioned. And he is in addition referring to royal fishes and things of that nature, which means he may not be granting the sea but that which is in the sea.

Q. What about "sea . . . of the province," which is used at lines 21 and 22 of page 1496, does that include, does that include in your interpretation the sea out to 10 leagues?

MR. RASHKOW: There is no reference to sea in the province in that sentence.

MR. CLAGETT: It's line 21, "sea"; line 22, "of the province."

THE WITNESS: It divides it into two areas. Seas, bays, straits, and navigable rivers; and also harbors, bays,
2098 and creeks of the province, if you wish to read it strictly.

BY MR. CLAGETT:

Q. You don't think "sea . . . of the province" refers

back to the sea, bays, straits and rivers?

A. Not in a very strict reading of that sentence, no, if you are reading it strictly, as others have been read.

Q. You did not read it in that strict way, did you, on page 1497 when in the sentence beginning on line 10 you interpret this clause as dealing with the sea within 10 leagues of the coast? You weren't being quite so strict there, were you?

A. I am sorry, I don't follow you.

Q. On page 1497, in the sentence beginning at line 10, you interpret the clause we have just been looking at, which deals with liberty of fishing, as concerning itself with the sea within 10 leagues of the coast. Therefore, are you not on page 1497 construing the phrase "sea . . . of the province" to mean all those seas within 10 leagues of the coast?

A. I see what you are getting at, but I was referring to fishery rights and not the sea itself.

Q. In the sentence beginning on page 1497, line 10, you are interpreting, are you not, the prohibition in the charter on Lord Baltimore from excluding subjects from
2099 fishing? That's the clause you are interpreting in that sentence, aren't you?

A. Yes.

Q. Now, you quote that clause, do you not, the language of it, beginning at line 18 on page 1496?

A. True.

Q. So, on page 1497, you are interpreting the clause which you quote in the paragraph immediately preceding, is that not correct?

A. Yes.

Q. That is correct. Now, in your interpretation paragraph you say that Lord Baltimore was prohibited from excluding subjects of the Crown of England from

fishing in the sea within 10 leagues of the coast. What language in the paragraph of the charter do you interpret as dealing with the sea within 10 leagues of the coast?

A. You are referring back to 495, that section going up to 1496, yes. But –

Q. I am referring to the paragraph you quote from the charter on page 1496, line 18, through page 1497, line 9, and I am asking you what language is it in that paragraph which, in the immediately following paragraph, you interpret as prohibiting Lord Baltimore from excluding subjects of the Crown of England from fishing in the sea
2100 within 10 leagues of the coast?

A. Lines 18 through 21 at least, "Saving always to us, our heirs and successors, and to all the subjects of our kingdoms of England and Ireland, of us, our heirs and successors, the liberty of fishing for sea fish, as well in the sea, bays, straights, and navigable rivers, as in harbors, bays, and creeks of the province."

Q. So, what language are you interpreting as incorporating the 10 league concept? Isn't it the language "the sea . . . of the province," isn't that what you are interpreting as incorporating the 10 league concept? If not, what language are you interpreting as incorporating the 10 league concept?

A. It would be that.

* * * * *

2146 Q. How about a submerged bank five miles offshore where there were shellfish and pearls?

A. It would have to be an extremely shallow bank.

Q. Yes, it would. There are such banks, are there not?

A. Covered with less than five feet? I don't know frankly. My geographical knowledge doesn't extend that far.

Q. Suppose there was such a bank with pearls or shellfish in it five miles off the coast of any of the American colonies in the 17th century, do you think that the King or the palatine grantee would have asserted exclusive jurisdiction over it?

A. My reaction would be yes, having been given the jurisdiction. Yes.

* * * * *

2161 Q. My question was whether there were not regulations for the Pemaquid settlement which involved the prohibition of vessels not belonging to this government from making herring voyages at certain areas?

A. Where is that?

Q. Right here (indicating).

A. Yes, it says that.

Q. Was there also a regulation providing that all vessels coming to fish in the Pemaquid area must first go into the harbor at Pemaquid to report to the government, and that they could then proceed to fish only as license or permit might be granted?

2162 A. The article says, "All vessels out of any government if they come to trade or fish, shall first enter at Pemaquid or the places appointed; and that they shall not go into any other harbor except by stress of weather, but first to clear and give an account of their design and not to break bulk before they have so cleared, and then proceed to trade or fish as license or permit may be granted, on penalty." That is what you are referring to?

Q. Yes. Doesn't that say that fishing vessels wishing to fish in Pemaquid waters can't do so without getting a license or permit first?

A. Yes, he is exercising the jurisdiction.

Q. Did the regulations also provide that no fishing boats whatsoever shall throw overboard any garbage that tends to do damage to the fishery banks?

A. It does.

Q. By no fishing boats whatsoever, do you think those regulations meant only English or only colonial fishing boats, or do you think they meant all fishing boats whatsoever?

A. The language is such that it means any boat in the area.

Q. Do you know where the fishing banks referred to
2163 in that regulation are?

A. Quite frankly, no.

Q. Do you think they were internal waters?

A. By the nature of the coastline there were a number of harbors, bays and river mouths; it could possibly be inland as well as at sea. I frankly don't know which they are referring to.

* * * * *

2255 Q. I am going to ask you a somewhat complicated hypothetical question, not very complicated, but a little. If you were shown evidence which convinced you that in English law in the 17th century it was well recognized that a coastal sovereign had rights of sovereignty and
2256 ownership, by virtue of his coastal sovereignty, in the sea, seabed and subsoil adjacent to the coast, and that these rights were customarily referred to in legal documents as royalties, as jurisdiction, as preheminences, and similar words, would you then be led to give any different construction to any of the charter language which you have interpreted in your testimony?

A. I would be dishonorable to the historical profession if I didn't so do.

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CROSS-EXAMINATION OF RICHARD B. MORRIS

BY MR. CLAGETT:

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2345 Q. Let's assume for the moment – I know you don't believe it – but let's assume a hypothetical that you think is contrary to fact, that the English common law in the 17th century gave the sovereign of the coast rights of ownership or paramountcy in the surrounding waters and the bed and subsoil thereof. If that were the common law of England in the 17th century, can you think of any motive which the colonists might have had to change it, or to deviate from it?

A. The only motive they might have to change it or deviate from it was their very strong opposition to the navigation laws which involved English control of the sea and seaports; and there was violent opposition between 1644 and 1681. This could be a motive.

Q. That would be a motive, I take it you mean against recognizing Crown control of the sea?

2346 A. That's right.

Q. It wouldn't be a motive against recognizing their own control of the sea, would it?

A. No.

Q. And it wouldn't have anything at all to do with the seabed, would it?

A. No.

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CROSS-EXAMINATION OF LOUIS HENKIN

BY MR. CLAGETT:

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2624 Q. At page 1905 you say that there is nothing in the colonial charters and grants to suggest that Great Britain was asserting territorial rights in the waters of North American waters.

* * * * *

Q. And you say there is every reason why such rights were not claimed. And you go on to talk about a growing recognition that new sovereign rights could not be had in seas beyond the reach of coastal cannon. Can you cite me one authority in England in the 17th century which talks about a cannon shot rule? We are talking about 17th century charters.

2625 A. No – are we talking about 17th century charters, is this the period?

Q. Certainly.

A. Well, no, I can't. I don't know anybody, as I say, before Grotius who suggests that. And I don't know any British authorities that state this. I can only say these charters, it seems to me, are sort of internal documents and grants rather than assertions in international law, and I don't know whether anybody challenged them or had any basis for challenging them.

Q. That is not what you are saying here at all, Professor Henkin. It is not a fair paraphrase of what you are saying here that given the legal climate in 17th century England you don't see how the charters and grants can be

construed as attempting to convey territorial rights in the sea?

A. Well, I guess I may have been mistaken just as to the dates of those charters, Mr. Clagett. I would have to see what dates – what dates were those charters? I don't remember.

Q. Virginia of 1607, 1609; Maryland, 1633; New England, 1620.

A. 1607 is within a few years of Elizabeth's statement to the Danes which I just quoted. If Elizabeth
2626 was saying to the Danes that she doesn't recognize these sovereign rights in coastal waters there I would be surprised that she was claiming them off the coast of North America.

Q. Was Elizabeth on the throne in 1607?

A. She went off in 1603.

Q. Isn't it a rather well known fact taht her successor took a radically different view of territorial rights in the sea than Elizabeth did?

A. Yes, although I am not sure he took – there is evidence of that by 1607. The bigger claims were made by Charles, which were substantially later in the 17th century.

Q. Are you familiar with James' fishing proclamation of 1609?

A. I have seen references to it here.

Q. Are you aware that at least a first draft of Selden's *Mare Clausum* was written and known to the King by 1615?

A. That's my impression.

Q. It is not the fact then that the period of issuance of these colonial charters coincided precisely with the period in which the English sovereigns were most intensely aware of sovereignty over the sea and making the most
2627 expansive claims to that sovereignty?

A. Well, it is obvious, so there is some coincidence of the two events, yes.

Q. That being the case, can you think of any conceivable reason why they would not have wished to make claims off the North American coast similar to the claims they were making around England?

A. If they were made around that period then I would withdraw that: I don't have the expertise on the history of the period, but I was assuming that these claims were dated at a later period when Great Britain had already abandoned these claims.

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2640 Q. . . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?

A. I don't know of any such examples.

* * * * *

2642 Q. What do you think in fact would have happened in, say, 1765 if French boats had anchored four miles off the American coast and started dredging for oysters there?

A. There might have been a controversy. Whether France would necessarily have conceded it, I have no idea. It depends a little on the power situation. But there was nobody asserting in 1765, that I know of, that the coastal state automatically had that right.

Q. That wasn't my question.

A. I understand.

Q. I asked you a question about what would have happened, and you said something might have happened.

Do you think there would have been a controversy?

A. I would have to see who had stronger naval power in the area at the time.

Q. Who did?

A. Well, presumably Great Britain did, but I suspect it is an irrelevant question.

Q. I thought you said it was relevant to our question.

A. Well, it is irrelevant to our legal question. It is relevant to what would have happened, a controversy.

Q. Suppose we just talk about the question I asked for a moment, and I think the court will decide what is
2643 relevant and what isn't.

A. All right.

Q. So, since in your view Great Britain had the greater naval power you are pretty confident that in 1765 if a French boat had started dredging for oysters there it would have been driven off, would it not?

A. That is likely.

Q. At page 1908 of your testimony I got a certain implication that you are saying that international law resolves the question of Federal versus state ownership in this case, that somehow the international law of today requires that the Federal Government and not the States have the exclusive right to exploit continental shelf resources. Is that you position, or am I misreading?

A. No, I don't think it takes any position between the United States and the states. They can do as they like. They can give it all away if they want to.

Q. The Supreme Court clearly so held in the second Louisiana case, did it not?

A. Yes.

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2645 Q. Is the ownership of property within one's boundaries a matter of external or internal sovereignty?

A. Within one's boundaries?

Q. Yes.

A. I guess that's internal.

Q. But not the ownership of property outside one's boundaries?

A. Well, it depends where. If I claimed to own property in France, I would probably be subject to French law and not international law necessarily.

Q. Well, suppose the State of Virginia had owned a manor in England in 1776, or 1783; is it your view that by the Peace of Paris or the Constitution or something
2646 the United States succeeded to fee simple title to that manor?

A. Not necessarily; if Virginia owned this in the same capacity which an individual owns property, I guess I could own a house in England and no one succeeds to it.

Q. I am stating you the facts. The facts are that the deed books of the County of Middlesex show that the manor of West Twichingham has been deeded in title fee simple absolute to the Commonwealth of Virginia. Then the Peace of Paris intervenes and the Constitution intervenes; is fee simple title now in the Commonwealth of Virginia, or in the United States?

A. No, I would think it would remain in the Commonwealth of Virginia.

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CROSS-EXAMINATION OF SAMUEL E. THORNE

BY MR. CLAGETT:

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2689 Q. I found a statement in Pitman Potter that Bracton says the four seas are part of the realm, and that the King had the right to charge tolls for fishing.

A. Yes, I think that's so.

Q. Is that so?

A. I think so. Where was that, Mr. Clagett?

Q. I found the statement at page 45 of Potter. I have not been able to locate the passage in your edition,
2690 although I can't say I have exhausted it.

A. Whether he said it or not, I don't know. But I think that that is true, that they did collect tolls.

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Q. What was the document, *De Prerogativa Regis*?

A. Well, it is another difficult question, an unsolved one. It appears among the statutes, but it really isn't a statute. It looks like a document drawn up sometime in the reign of Henry, III, maybe early Edward, I. It is a list of the King's prerogatives as understood at that time. It is very hard to date it precisely because some of them are earlier, some later.

Q. Is it correct that among the prerogatives of the
2691 Crown listed in that document is royal fish "taken in the sea or elsewhere within the realm?"

A. I should know – I edited that book, as you know, but I don't recall the precise words.

Q. The Latin words, as I read them in the Statutes of the Realm, are *wallenas et sturgeones captos in mari vel alibi infra regnum.*

A. Right.

Q. That is translated "taken in the sea or elsewhere within the realm"?

A. Yes.

* * * * *

Q. That implies, does it not, that the author of that document believed that the seas were themselves within the realm, since he says within "the sea or elsewhere within the realm"?

A. Yes, I never thought of that, but it sounds right.

Q. Do you agree with Fenn's statement at page 122 that before the full doctrine of ownership of the sea and seabed became explicit in the early 17th century the law "at least permitted the monarch to grant exclusive
2692 rights of use over a thing in which he had no ownership"?

A. This is 122?

Q. Yes.

A. I think kings did do that, I think they granted rights of use over things. It largely depended on whether they could get away with it or not.

Q. I would assume that Fenn is talking there perhaps, among other things, of grants by the King of exclusive rights to fisheries in the sea?

A. I think so.

Q. You agree that there were such grants and the King did take that approach?

A. I think so. Yes, if he could he did.

Q. As a matter of English law in the 17th century, what acts were required to extend English sovereignty or

English dominion over new areas? Did it take an Act of Parliament, or a statute, or was it done by the Crown solely?

A. In newly discovered things, you mean? Newly discovered land, say?

Q. Yes, perhaps.

A. I think not very much was required. I think simply a statement was required. You couldn't do very much more than that if you landed on a strange shore. A claim
2693 made in the name of the King.

Q. No statute or court decision would be necessary for that area to become part of the English dominion?

A. Make a claim for it.

Q. As a matter of English law?

A. I think –

Q. Which a court would later recognize if the issue arose?

A. I don't know the answer to that, but I think that was all that was required. That is my general impression. Sir Francis Drake did nothing more than that.

Q. So that the executive, the Crown, could assert and take possession of areas as a part of the English sovereignty, and later if the issue arose the common law of course would recognize, yes, if the King did that that area became a part of the English dominion?

A. I know of nothing that supports it, but it seems reasonable, yes. If they wanted it and they could hold it.

Q. You know of nothing that supports it?

A. No, except I know such claims were made in newly discovered territories.

* * * * *

2697 Q. Was there any other decision of the common law courts in the 17th century, to your knowledge, which

passed on whether the Crown owned fisheries in the sea or not?

A. Not to my knowledge, no.

Q. How about opinions of law officers of the Crown?

A. I don't know.

Q. You don't know of any?

A. No.

Q. Didn't both James I and Charles I seek and receive opinions from the law officers of the Crown prior to the fishing proclamations?

A. Oh, yes. The law officers of the Crown of James and Charles were apt to do what James and Charles thought were proper.

Q. In other words, under the Stuart constitution the monarch had a good deal to say about what the law was, didn't he?

A. If his attorneys didn't believe it they were out of jobs.

2698 Q. Is it the case that before issuing his proclamation in 1635 as to exclusive fisheries Charles solicited the opinion not only of the law officers of the Crown but also of the admiralty judges, and they gave their opinions that by the law of England the Crown had an exclusive right to the fisheries off the English coasts?

A. Did they? I don't know. But if you say they did I believe that. And so did Selden, of course, who wrote his book the same year.

Q. Would such an opinion by the admiralty judges have any legal status; would someone be justified in relying on it as a source of law?

A. Absolutely.

Q. How about a decision of the Lords of Admiralty, are they any different from the admiralty judges?

A. I believe they were, yes.

Q. Would a decision by the Lords of Admiralty couched in legal terms have any authority as a legal matter?

A. Admiralty as I remember them, were not judges, but – weren't they officers of the admiralty? I mean, admirals themselves? That is quite apart from that, I am sure their opinions would be authenticated. It could be that the Lords of the Admiralty sat in cases here. It
2699 could be. I don't know.

Q. What about acts taken by the King in Council; did they have any legal force in the 17th century?

A. Oh, sure.

Q. So, if the King in Council had determined that the Crown owned the fishery in the British seas and asserted the right to exclude foreigners, that would have been an act having legal force?

A. I think so, yes.

Q. Do you know whether the King in Council in fact took such action in the 17th century?

A. No. The King in Council were very strongly in favor of this, so I wouldn't be surprised if they took action many times. They were intent on proving an exclusive right to fish in the sea, a British right. But if you can establish it by four or five people sitting around the table then they did it.

Q. It takes five down at the Supreme Court building in Washington, doesn't it?

A. (No audible answer.)

Q. Do you know of any acts of Parliament in the 17th century which referred to his Majesty's ancient and undoubted sovereignty and dominion in the seas?

2700 A. No, but I wouldn't be surprised if there was such.

Q. Would such a declaration have authority for what the law of 17th century England was?

A. It would be their opinion, of course. But the

preamble of the statutes it would be, yes.

Q. How about an Act of Cromwell's Council of State; that performed, did it not, the functions of King in Council and Parliament, both, did it not?

A. Right.

Q. So, would I be correct in assuming that that was the highest law giving power in England de facto while it sat?

A. It would certainly be authoritative.

Q. Do you know whether the Council of State had anything to say about whether England owned its seas and the fisheries therein?

A. I don't, but I am sure they must have said something about it.

Q. You would assume that they asserted that right of ownership?

A. Yes.

Q. And that assertion, in your view, would have legal
2701 force?

A. Yes, it would be an assertion.

Q. It would have the force of law, would it?

A. For binding others outside of England, no. But binding Englishmen.

Q. No, as a matter of English law.

A. Binding Englishmen. Was it concerned with foreigners fishing in English waters?

Q. Oh, yes.

A. Would it bind them? That is the question, of course.

Q. That is the question I am asking. As a matter of English law would it bind them?

A. It would try to. It would, if you could bind them, if it could be done. If you sent the sheriff out there and stopped them.

Q. Attempts were made to do that quite frequently, were they not?

A. If you send the fleet out you could stop them from fishing there. But sitting around the table and saying you couldn't do it wouldn't be very effective.

Q. It would be enough to create English law, would it not, if the right people sat around and did it? Whether the English law were then enforced would be another
2702 matter, would it not?

A. Yes.

Q. So, it is your position that the law of England in the 17th century was that the Crown had the ownership or the exclusive right to the fisheries in the English seas?

A. Yes, they thought that – as they themselves determined it. Yes.

Q. Did Selden's book have, or was it given, any sort of official status?

A. Yes, it was deposited by the King in the Exchequer.

Q. Is that the only place?

A. That is the only place I know it was deposited.

Q. Wasn't it also deposited in the Privy Council and in the Admiralty?

A. No. I don't know.

Q. You don't know?

A. No, I don't. I do know it was deposited in the Court of the Exchequer.

Q. Do you know of any decisions of common law courts in which Selden was cited as a legal authority?

A. Sure, the Oldsworth case is one.

Q. Any others?

2703 A. I don't know of any others, but since it became the leading book on the subject I am sure it must have been.

Q. Would you agree with Fulton's description of it as the "approved embodiment of British public policy"?

A. Yes, I think so.

* * * * *

2708 Q. Professor Thorne, if at any time during the 17th century a French or Dutch ship had come one mile or four miles off the English coast and started dredging for oysters, do you have the slightest doubt that the Crown would have asserted the right to exclude them?

2709 A. That is the same question you asked this morning. I will attempt to answer, but you asked that question. They wouldn't have found any, it is too far down – they wouldn't have found any oysters at all – let me have that again, once more. A mile off shore?

Q. Yes, one mile or four miles.

A. That they would have been stopped by the British?

Q. Yes.

A. No, I think that would have happened.

Q. You think the British would have stopped them?

A. Yes.

Q. The Crown would have asserted the legal right to exclude them and would have attempted at least to do so?

A. A mixture of legal and actual right, but yes, I think so.

THE SPECIAL MASTER: I suppose the Crown might not have stopped to examine the authority before acting.

THE WITNESS: I believe that would be so.

BY MR. CLAGETT:

Q. I suppose the Crown had already examined the authority to its own satisfaction anyway in the inquiries it made before the fishing proclamations. Wouldn't the Crown have regarded, didn't it in fact regard, sedentary

fisheries as just as much a subject of this exclusive right
2710 as surface fisheries as against foreigners?

A. By that do you mean fishing grounds ordinarily occupied by Englishmen?

Q. Or any other fishing ground in the English seas as the Crown construed them?

A. Yes, I think so.

Q. Do you have any doubt that if a case putting at issue the Crown's right to exclude foreigners from such sedentary fisheries had come before a common law court in the 17th century the common law court would have upheld the Crown right?

A. I think they would have.

Q. You think they would have upheld it?

A. Yes.

Q. Even though you say Hale had some doubt as to whether the seabed belonged to the King while it was still under water, do you have any doubt that Hale would have upheld the Crown right to exclude foreigners from oysters and fisheries?

A. Hale was very strong for the Crown. He was one of the chief advocates of the Crown view that they owned the seabed in this later time, in this later period. And I
2711 think he was obliged to share this with the architect of this, with Selden, his great friend. I think he would tend to back up the Crown right substantially – but sometimes he couldn't make it stick – but I think he tried to do it. What would have been his view in this case? Like the rest of the states – I think he in fact is your only real proponent, or the strongest proponent, the English law has for the ownership of the seabed. And if you assume that that is so, which I think is so, then he would have backed it up. If there had been such a case.

Q. You are not really saying Hale was the only proponent, are you?

A. No, not the only one, but one of the strongest. Maybe the strongest.

Q. Dr. Kavenagh, during his testimony, said that he had an impression that in the 17th century under English law the sea was not susceptible of ownership. And, when he was asked on what authority he based that impression, he listed Lord Hale, among others.

A. I think there is a passage in there – I quote it, too, I believe – in which he said that the sea is fluid and it can't be possessed because it is shifting all the time, it is not like a piece of ground which you can measure and know where it is. But whether that was his
2712 final view, or just one of his views, I am not prepared to say. He does say that because it is fluid it can't be possessed.

Q. Yes, but he makes it quite clear, doesn't he, even though he might not own the water in terms of fee simple title to water which can move, that certainly the Crown did have an exclusive right over what was in the water and what was on the seabed?

A. That was his claim, that's right. I think the reason for the seabed claim was because the other proved untenable. I mean, the claim to owning water proved untenable, and the only way you could make that stick was to say well, you own what is below it, too, and therefore everything above it.

Q. Suppose it hadn't been fishes that French ships tried to extract a mile or four miles off the English coast but a mineral of some sort, say they found a gold mine down there, tried to take that, do you have any doubt that the Crown would have attempted to exclude them and would have claimed that gold as its exclusive right?

A. No, I think they would have attempted to, sure.

Q. Do you have any doubt that if that issue had come before an English common law court the court would have

2713 upheld the Crown's claim?

A. No, I think they would have. It depends on how much of a good lawyer the other side had, of course. Does that trouble you?

Q. I wouldn't say it troubles me, no. I find it hard to conceive that, no matter how good the lawyer for the defense was, the Crown would not have prevailed in that case.

A. Do you think they would have found for the British side?

Q. Yes, I think so. Don't you?

A. I think so.

* * * * *

2727 Q. Given the state of English law, say, between the accession of James in 1603 and the Oldsworth case in 1637, is it likely prima facie that a colonial charter issued at that time would have attempted to convey exclusive fishing rights off the coast of the land areas being conveyed?

A. If they considered themselves to have it, yes, I think so.

Q. If who considered?

A. If the Crown considered themselves to have it.

Q. Do you think the Crown did consider itself to have it?

A. Exclusive in North America?

Q. Yes.

A. I don't know.

Q. You don't know?

A. They considered themselves to have it in the British seas.

Q. Can you think of any reason why the Crown, given its frame of mind in that era, would not have asserted its exclusive fishing rights off the North American coast?

A. No, I think they would have tried to do it if they could, yes.

2728 Q. So that it is logical to assume that they would have tried to convey exclusive fishing rights by charter?

A. Right, that's true.

* * * * *

2733 Q. . . . Do you know of any document authority in the 17th century which refers to either ownership of the sea, or ownership of the seabed, or the right to exclude or license foreign fishermen as a royalty?

2734 A. Well, I don't know of one, but it could easily be.

Q. You don't know of any?

A. No.

Q. Would it surprise you if quite a number of them existed?

A. No.

Q. It would be the natural way to refer to such a right, would it not?

A. Royal rights?

Q. Yes, part of the regalia, one of the royalties, that would be the normal way an English lawyer would think of such rights in the 17th century, as royalties, would it not?

A. These rights we have been talking about?

Q. Yes, the rights I just mentioned.

A. I guess so.

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CROSS-EXAMINATION OF KINVIN L. WROTH

BY MR. CLAGETT:

* * * * *

2746 Q. Could royalties in the sea be granted to a subject in the 17th century?

A. Rights such as wreck, royal rish and the like?

Q. Yes.

A. Yes.

Q. Do you know of any authority or commentator in the 17th and 18th centuries who described the right to exclude or license foreign fishermen in the English
2747 seas as a royalty or regality?

A. Did you say any commentators –

Q. Any authority, any organ of government, or any commentators.

A. I can't recall at the moment any such source specifically describing the right to exclude as a royalty. If you mean to differentiate the right to exclude from the right to fishery itself –

Q. A right to a fishery itself implies the right to exclude others.

A. You do not mean to differentiate?

Q. No, I don't.

A. Then the proclamation of James I of 1609, which is in my testimony at pages 2517 and 2518, is an example of that.

Q. Do you know of any others?

A. Dr. Dee's work, although available only in paraphrase, also appears to take that position. It is cited by me on page 2517.

Q. Any others?

A. I don't recall others specifically, but I believe there are others cited in Fenn's work.

2748 Q. Yes. Didn't Fenn in fact say that the *jus piscandi* was always regarded as part of the regalia?

A. He did describe it as considered by some at least as part of the regalia. My recollection of his discussion.

Q. Didn't the common law courts describe the right to a fishery as a regality in the case of the Fishery of the Banne?

A. I don't recall that specifically.

Q. Are you aware that Henry Stubbe referred to the exclusive right to a pearl and coral fishery, or pearl and coral fisheries, as a royalty?

A. No, I don't recall that.

Q. That Lord Shaftesbury referred to exclusive fishing rights as a royalty?

A. No.

Q. That John Boroughs did the same?

A. I don't recall that reference.

Q. That Dudley Carleton so stated in 1617?

A. No.

Q. If, as Professor Thorne has testified, at least one theory of why the King owned the fisheries in the sea was that it was by his prerogative, then the normal and natural way for an English lawyer to describe the owner-

2749 ship of a fishery, or exclusive right to a fishery, or a right to exclude or license others in a fishery in the 17th century, would be to call it a royalty, would it not?

A. I don't know that I can agree that that would necessarily be the normal way. But I have asserted myself in the pages of the testimony to which we are referring that the right to fishery was considered an assertion of the prerogative.

Q. Weren't royalties defined as those things which the King had by his prerogative?

A. Yes.

Q. Therefore, wouldn't it be the normal way to refer to it?

A. Well, I think there are other theories, as my testimony suggests, other theories of the nature of the Crown's right in the right to fishery. Theories of prescription, for example, which I also advert to.

Q. You wouldn't find it at all surprising or extraordinary to find lawyers referring to fishing rights as a royalty in the 17th century?

A. As I have indicated, I have no difficulty with that, no sir.

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