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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

BEFORE THE SPECIAL MASTER

# FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

# OPPOSITION OF THE COMMON COUNSEL STATES TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE PLAINTIFF

# BRIEF FOR THE COMMON COUNSEL STATES

Volume I

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE COMMON COUNSEL STATES

1. English law and practice prior to the seventeenth century recognized the sovereignty and ownership by the crown of the English seas and the seabed and subsoil thereof. Brief for the Common Counsel States (hereinafter "Br.") 7-50.

2. The English seas were within the realm of England. Br. 8-18.

3. The crown's rights in the English seas included control of the fisheries. Br. 18-25.

4. The English maritime jurisdiction was territorial in the English seas, and included both legislative power and criminal jurisdiction over foreigners. Br. 25-32.

5. The crown's ownership of the seabed of the English seas was recognized from very early times. Br. 32-35.

6. In the reign of Elizabeth I the law of maritime sovereignty and dominion was extended and elaborated in several important respects. Br. 35-48.

7. Exclusion of foreigners from coastal fisheries was firmly established in Scottish law and practice. Br. 48-50.

8. Seventeenth-century English law and practice fully recognized the crown's sovereignty and dominion in the English seas, seabed and subsoil. Br. 50-137.

9. The crown possessed territorial sovereignty over the English seas. Br. 53-80.

10. The crown possessed the legal right to exclude or to license foreign fishermen in the English seas and the right to create monopolies of newly discovered fisheries; and all fisheries in English waters were subject to regulation. Br. 80-101.

11. The admiralty jurisdiction was territorial in the English seas, was an attribute of sovereignty, and included jurisdiction over foreigners. Br. 102-107.

12. The crown owned the seabed and subsoil of the English seas and the resources thereof. Br. 107-30.

13. The flag salute was insisted upon as an attribute of English sovereignty in the English seas. Br. 130-33.

14. Other aspects of maritime sovereignty dealt with navigation and neutrality. Br. 133-37.

15. British law and practice in the eighteenth century did not change substantially with respect to maritime sovereignty and dominion. Br. 137-55.

16. The British seas continued to be regarded as subject to British sovereignty and a part of British territory. Br. 140-43.

17. The claim to exclusive fisheries in the British seas was not abandoned, and indeed was extended to new British possessions. Br. 144-47.

18. The admiralty jurisdiction in the British seas remained unchanged. Br. 147-48.

19. Crown ownership of the seabed and subsoil and of the resources thereof continued to be fully recognized in law. Br. 148-51.

20. The flag salute continued as a recognition of sovereignty in the British seas. Br. 151-52.

21. Other attributes of sovereignty and jurisdiction involved neutrality and smuggling. Br. 152-55.

22. The American colonial charters created territorial seas and conveyed maritime sovereignty and dominion. Br. 156-231.

23. Given the legal and political climate in which the colonial charters were issued, it would have been incredible if the colonies they created had stopped at low-water mark. Br. 156-88.

24. The issuance of the colonial charters and important acts of maritime sovereignty in British waters were closely correlated in time. Br. 157-62.

25. The persons involved in acts of maritime sovereignty in British waters were largely the same persons as those responsible for the chartering and establishment of the American colonies. Br. 163-80.

26. The English discoveries and symbolic acts of taking possession were sufficient in law to establish maritime sovereignty. Br. 180-81.

27. The common law of England, including the law of maritime sovereignty and dominion, became law in this country. Br. 182-84.

28. The exploitation of fisheries and other marine resources was of paramount importance as an objective of American colonization. Br. 184-88.

29. Britain claimed maritime sovereignty in North American waters. Br. 188-96.

30. The colonial charters, construed in light of contemporary legal usage, conveyed extensive rights both of sovereignty and of property in the marginal seas. Br. 197-224.

31. The record is sufficient to establish a uniform territorial sea 100 miles in width off the coasts of the Common Counsel States. Br. 224-31.

32. Rights of sovereignty and dominion were exercised over the American territorial sea during the colonial period. Br. 232-86.

33. The fisheries were subjected to extensive regulation and licensing, and foreigners were excluded. Br. 233-61.

34. The colonies asserted and exercised control and jurisdiction over the seabed and its resources whenever the occasion arose. Br. 261-68.

35. The territorial jurisdiction of admiralty existed in the American seas just as in the English seas. Br. 269-71.

36. Other aspects of sovereignty, ownership and jurisdiction confirm that the American seas were regarded as subject to the same law as the English seas. Br. 272-75.

37. Several maps made in the colonial period provide additional evidence for the American territorial seas. Br. 275-78.

38. There was no curtailment of colonial rights in the marginal sea between 1752 and 1776, and if there had been such a curtailment it would never have been recognized in American law. Br. 279-86.

39. The English law of maritime sovereignty and dominion was not inconsistent with international law in the period 1606-1783, and no British or American court could or would have so held. Br. 287-313.

40. No British or American court would have questioned its government's territorial claims on the basis of alleged contrary doctrines of customary international law. Br. 287-89.

41. Plaintiff's contentions regarding international law cannot be sustained. Br. 289-313.

42. Broad claims to territorial seas were fully sanctioned by state practice. Br. 293-99.

43. The views of publicists recognized the right to territorial seas with virtual unanimity, and no consensus had developed restricting such seas to any limit less than 100 miles. Br. 300-10.

44. No narrow-limit rule was applied to seabed claims. Br. 310-13.

45. At the American Revolution the States individually succeeded to the maritime territorial sovereignty and dominion both of their predecessor colonial governments and of the British crown. Br. 314-76.

46. The States were individually sovereign in the revolutionary and Confederation periods. Br. 317-51.

47. The States, whether "externally sovereign" or not, succeeded individually to the territorial boundaries and property rights both of the crown and of the colonial and proprietary governments, including rights in the marginal sea and seabed. Br. 352-67.

48. The Peace of Paris of 1783 and the negotiations preceding it demonstrate American awareness of maritime rights, and show no American disagreement with territorial seas 100 miles or 30 leagues in width. Br. 368-72.

49. The Peace of Paris established for at least some purposes, including exclusive fisheries, a twenty-league maritime boundary off the coasts of the defendant States. Br. 372-76.

50. The exclusive right of the States to explore and to exploit the resources of the continental shelf were not transferred to the United States by the Constitution. Br. 377-414.

51. The Constitution expressly preserves State territorial boundaries and property rights. Br. 377-79.

52. Several other provisions of the Constitution and the debates at the Federal Convention indicate the intention not to change or to affect State boundaries or the ownership of property. Br. 379-81.

53. The great weight of Supreme Court authority has recognized State sovereignty in the period 1776-1789, and State succession to all territorial and property rights of the Crown and the colonial governments was uniformly upheld until the California case. Br. 382-414.

54. The exclusive rights of the States to the continental shelf have not been abandoned or extinguished since 1787. Br. 415-77.

55. It was well understood throughout our history down to 1947 that under the Constitution the States retained their rights in tide waters, including the marginal sea, and in the bed and subsoil thereof, and Congress has repudiated the California Court's decision to the contrary. Br. 415-28.

56. The United States did not abandon or relinquish the rights of the States by adopting the three-mile limit. Br. 428-53.

57. No renunciation can be inferred from mere silence. Br. 431-34.

58. The United States' adherence to the three-mile limit has not been consistent or unqualified. Br. 435-46.

59. The three-mile limit was not applied by the United States to the seabed and subsoil. Br. 446-53.

60. The States' continental-shelf rights were not extinguished by any obligatory rule of international law in the period 1783-1945. Br. 453-77.

61. Even if plaintiff were otherwise correct, the international law against which the States' claims should be judged is present law, not past law. Br. 453-55.

62. The three-mile limit never became an obligatory rule of international law. Br. 455-61.

63. No obligatory rule of international law prior to 1945 barred the States' seabed and subsoil claims. Br. 462-77.

64. The federal foreign-affairs and defense powers do not require federal ownership of the exclusive right to exploit the resources of the continental shelf, but merely the same paramountcy which the Federal Government enjoys on land. Br. 477-94.

65. The California Court's view that exclusive federal proprietary rights in the continental shelf are required by the foreign-affairs and defense powers was always unsound and has been repudiated by the State Department, by Congress, and by subsequent decisions of the Court. Br. 477-89.

66. The record demonstrates that no foreign-affairs or defense difficulties would result from recognition of State property rights in the seabed and subsoil of the continental shelf. Br. 489-94.

67. The Submerged Lands Act and the Outer Continental Shelf Act are unconstitutional if they purport to deprive the Atlantic States of territory or property. Br. 495-501.

68. The defendant States should prevail even if exclusive rights to part or all of the continental shelf are deemed to have sprung into existence de novo in 1945. Br. 502-15.

69. The Atlantic States are entitled to the shelf as residual sovereigns and owners of property of their land territories, to which continental-shelf rights are an "inherent" appurtenance. Br. 502-08.

70. At the very least, the Atlantic States are entitled to prove historic boundaries out to three leagues under federal legislation. Br. 509-15.

71. The crown's ownership of the seabed and subsoil of British waters has continued unchanged and has been applied to the continental shelf. Br. 518-26.

72. Vis-a-vis foreign nations, British adherence to the three-mile limit has not been consistent and has not been generally applied to the seabed and subsoil. Br. 526-32.

73. The Canadian and Australian cases turned on the allocation of powers in late 19th-century British constitutional law between the imperial crown and unchartered imperial provinces, and thus have no relevance to the issues in the present litigation. Br. 532-41.

74. The Common Counsel States are entitled to judgment. Br. 1-541.

# OPPOSITION OF THE COMMON COUNSEL STATES TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE PLAINTIFF

The Common Counsel States oppose each and every one of the Findings of Fact and Conclusions of Law proposed by the plaintiff. The grounds for such opposition are set forth in the brief ("Br.") of the Common Counsel States. Below we refer to the pages of the brief which deal with each of plaintiff's proposed Findings and Conclusions.

## Plaintiff's Proposed Findings of Fact

1. See Br. 50-155, especially pp. 61, 78-80, 89-90, 100-01, 103-04, 131-33, 137-39, 144-45, 151-52.

2. See Br. 117-18, 264-68.

3. See Br. 206-10, 219-21, 232-78.

4. See Br. 261-62.

5. See Br. 255-57, especially p. 256, footnote.

6. See Br. 233-61, especially p. 233; see also p. 369, footnote.

7. See Br. 279-86, especially pp. 282-83.

8. See Br. 360-76.

9. See Br. 360-66.

10. See Br. 368-76, 428-31, 435-39.

11. See Br. 428-53.

12. See Br. 428-53.

Plaintiff's Proposed Conclusions of Law

1. See Br. 1-541.

2. See Br. 1-7, 423-28, 477-94, 518-41.

3. See Br. 495-501.

4. See Br. 5-7.

5. See Br. 1-541.

6. See Br. 1-4, 7-155.

7. See Br. 1-4, 7-50.

   (a) See Br. 11-13, 18-25, 37-39, 42-48.

   (b) See Br. 13-14, 36.

   (c) See Br. 15-18, 25-32.

   (d) See Br. 25-32.

   (e) See Br. 25-32.

   (f) See Br. 32-35, 39-45.

8. See Br. 1-4, 50-155.

   (a) See Br. 102-07, 130-33, 147-48, 151-52.

   (b) See Br. 102-07, 130-33, 147-48, 151-52.

   (c) See Br. 102-07, 130-33, 147-48, 151-52.

   (d) See Br. 102-07, 130-33, 147-48, 151-52.

   (e) See Br. 53-80, 140-43, 147-48, 151-52.

   (f) See Br. 107-30, 148-51.

9. See Br. 53-80, especially pp. 63-64, 66, 72-75; see also pp. 93-94, 96-100, 188-92.

10. See Br. 1-4, 156-278.

11. See Br. 1-4, 156-231.

    (a) See Br. 156-231.

    (b) See Br. 201-04, 206-09.

12. See Br. 1-4, 232-78.

    (a) See Br. 233-61.

    (b) See Br. 233-62.

    (c) See Br. 11-13, 58, 272-73.

    (d) See Br. 11-13, 58, 252-62, 272-73.

    (e) See Br. 269-71.

    (f) See Br. 269-71.

13. See Br. 279-515.

14. See Br. 279-86.

15. See Br. 314-428, 477-94, 502-08.

    (a) See Br. 314-51, 409-14.

    (b) See Br. 352-67, 415-28, 477-94, 502-08.

    (c) See Br. 314-428, 477-94, 502-08.

    (d) See Br. 360-76.

    (e) See Br. 360-66.

16. See Br. 377-494.

    (a) See Br. 377-414.

    (b) See Br. 415-53.

    (c) See Br. 453-77.

17. See Br. 287-313.

18. See Br. 287-313, 453-77.

19. See Br. 1-541.

# BRIEF FOR THE COMMON COUNSEL STATES

## INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf. The issue was so stated in the Complaint of the United States which initiated the litigation (paras. II and III). The Complaint sought to establish that exclusive right on behalf of the United States and to defeat any conflicting "right, title or interest" claimed by the States (paras. IV, VI). The answers of the States varied in language, but generally claimed "some interest" in the area in question, denied plaintiff's claimed exclusive right, and asserted exclusive rights to explore and to exploit on behalf of themselves. See, e.g., Answer of the State of Maine, paras. IV, VI, Affirmative Defense.

It is important to be clear about the issue, because plaintiff's witnesses and plaintiff's brief have repeatedly asserted that various arguments and evidence adduced by the Common Counsel States, while admittedly demonstrating some State interest in the seas and the seabed and subsoil of the continental shelf, are not sufficient to establish that the States or their predecessor sovereigns possess or ever possessed "full territorial sovereignty" or "general rights of property" (by which ownership in fee simple absolute is apparently meant) in the

sea, the bed of the sea or the subsoil. E.g., Plaintiff's Brief (hereinafter Pl. Br.) 30, 32, 35-37, 41, 48, 52-57, 66, 82, 93.

These contentions are difficult to understand in view of the undisputed fact (Tr. 2611) that the United States does not, even today, take the position that it possesses full territorial sovereignty or fee simple title to the seabed and subsoil of the continental shelf, let alone in the superjacent waters, either against the defendant States or against foreign nations; and plaintiff took no such position in its Complaint herein. Rather, the right asserted by the Truman Proclamation of 1945, and confirmed by the Continental Shelf Convention of 1958, is a more limited right: precisely the exclusive right to explore and to exploit which is at issue in this proceeding.*/ It is curious that the United States should take the position that to prevail in this litigation the States need to establish full territorial sovereignty or fee-simple ownership, in view of the fact that the United States itself has never claimed and does not now claim such things.

Historically, the right at issue in this litigation has been variously defined and established. Obviously, the States must prevail here if they can demonstrate that prior to 1776 they or their predecessor sovereigns had the precise right at issue here -- the exclusive right to explore and to exploit -- and that they have not lost it since that time. Plainly full territorial sovereignty or fee-simple ownership would embrace that right; therefore if we find that at a certain time the defendant States or their

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*/ "The rule . . . gives to a state jurisdiction in the continental shelf off its coast only for the purpose of exploring and exploiting its natural resources." Restatement (2d), Foreign Relations Law of the United States § 23 (1965).

predecessors did lawfully claim and exercise such sovereignty or ownership, the right at issue here is established as a part thereof. But the United States can hardly prevail by showing that at a particular historical moment the continental-shelf rights claimed by the States or their predecessors fell short of full territorial sovereignty or fee-simple ownership. Rather, the United States must demonstrate that the States and their predecessors did not and do not possess the right at issue here: the exclusive right to explore and to exploit. Thus, evidence that at a particular time the continental shelf or the superjacent waters were regarded as within the boundaries or territories of the States or their predecessors, or belonged to them in property, is sufficient but not necessary to sustain the States' position as of that time. If some aspect of territorial sovereignty or fee-simple ownership was then lacking which today adheres to those terms, that avails the United States nothing unless the United States can show that what was lacking was the right at issue here. We have emphasized this point because of what appears to be a misunderstanding by the United States of the fundamental issue in this proceeding.

It is unnecessary to determine whether the right here at issue is to be described as a right of sovereignty (imperium) or a right of ownership or property (dominium). Whatever it be called, the issue is whether the States and their predecessors have lawfully possessed it and now lawfully possess it. In general, the Common Counsel States subscribe to the analysis by Dean Pound (Pound, "Rights Involved in United States v. Texas," U.S. Exhibit 17, Appendix), who views the right as essentially

one of property. The question of sovereignty becomes relevant, first, because of the doctrine that the sovereign owns all unallocated or ungranted property within its territorial boundaries. Thus if the States can show that in the critical periods here at issue their boundaries extended to the continental shelf or that the shelf was within their territories, they must prevail as a matter of course, unless they had granted or ceded the resulting right of property to the plaintiff. If they cannot show that, but can show that at the critical periods they were sovereign over the land areas and coasts adjacent to the Atlantic continental shelf, and that that land sovereignty entailed rights over the shelf which included the right at issue here, then also they prevail.

Very briefly, the position of the Common Counsel States is that the record establishes that under the law and practice of England prior to and during the 17th and 18th centuries the seabed comprising the continental shelf of England and of English possessions was subject to an exclusive right of exploitation in favor of the English crown. In that period no generally recognized principle of international law prohibited or denied that exclusive right to the English crown. During the period 1492 to 1776, England acquired by right of discovery and the performance of symbolic acts of sovereignty the territories now comprising the defendant States and the adjacent continental shelf. During that period the crown granted its right of exploitation over part or all of that continental shelf to colonial proprietorships and governments. At American independence those rights passed individually to the successor independent States. If any portion of

the Atlantic continental shelf was not granted to the colonial proprietorships and governments by the crown prior to 1776, then such portions were retained by the crown until they passed to the adjacent coastal States individually at independence.

Nothing has occurred since 1776 which has divested the defendant States of the right of exploitation of the continental shelf which they had thus acquired. The States preserved their respective rights when they entered into the Articles of Confederation and into the Constitution of the United States. Nor have those rights been divested by any acts of abandonment or renunciation on the part either of the United States or of the States from 1776 down to the present, or by operation of international law. Thus they still exist in their full force and vigor.

Finally, even if it should be held, contrary to our submission, that the exclusive right here at issue did not exist on behalf of any one prior to 1945, but came into existence as a wholly new right between 1945 and 1958, then it is the position of the Common Counsel States that it came into existence as a right of the States rather than of the Federal Government, because of the allocation of powers and property incorporated in our Constitution, and particularly because of the status of the defendant States as residual sovereigns of their land territory and as owners of the unallocated or ungranted public lands within their territories or appurtenant thereto.

We dispute plaintiff's argument (Pl. Br. 25-29) that the defendant States bear "a heavy burden" in this proceeding. Plaintiff relies for

that contention on (1) the California line of cases, (2) the legislation of 1953, (3) the States' alleged "acquiescence," and (4) purported "property rights" which "will not be lightly overturned." Pl. Br. 25.

(1) Both the result and the reasoning of the California line of cases have, as we shall show (pp. 423-28, 483-89, infra), been repudiated both by Congress and by subsequent decisions of the Supreme Court. These decisions were based on mistakes of fact; they had the benefit of no evidentiary record, and they treated the issues here involved only in the most cursory and superficial manner. The Court plainly indicated its willingness to view the issues with a fresh and open mind by granting the States' motion herein for proceedings before a Special Master.

(2) Congress in 1953 had the benefit of neither an adjudication nor an evidentiary record concerning the title of the defendant States. Congress repeatedly made clear its underlying intent to affirm the historic title of any State having such a title (pp. 423-28, infra). If Congress inadvertently acted in a fashion inconsistent with vested territorial and property rights of the defendant States, such action is plainly unconstitutional (pp. 495-501, infra).

(3) The defendant States have never in any fashion "acquiesced" in any surrender of their title. Even if they had, no more weight should be given to that than was given by the California Court to the uniform failure by the United States to claim the marginal sea and the bed thereof, and its uniform acquiescence in State ownership, from the

beginning of the nation to the year 1937. United States v. California, 332 U.S. 19, 39-40 (1947); see pp. 415-28, infra.

(4) Plaintiff has not asserted that it has, by lease or otherwise, created any private property rights in any of the submerged lands in dispute here; and we know of none. Hence there are no "property rights" to be "overturned" other than plaintiff's own asserted title, which is purely theoretical, abstract and undeveloped, and is the very title at issue in this proceeding. No reason has been or can be suggested why that should create any heavy burden for the States. In California and subsequent cases, to the contrary, the Court was willing, without finding that the United States had sustained any "heavy burden," to extinguish a great body of State and private property rights on the development of which large amounts of money had been spent. 332 U.S. at 40.

Nothing plaintiff has brought forward absolves it of the normal burden of proof which rests upon a party instituting litigation.

## I.

## ENGLISH LAW AND PRACTICE PRIOR TO THE SEVENTEENTH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE SEABED AND SUBSOIL THEREOF.

Professor Horwitz briefly summarized (Tr. 120-27) the great body of law and practice, down to the accession of James I in 1603, affirming the sovereignty and dominion of the English crown over the four seas surrounding the British isles. The tradition is an ancient one; 17th-century writers customarily traced it back to the reigns of the early Saxon

kings (e.g., Exhibit 695,*/ pp. 25, 34) or even earlier. E.g., Selden, Mare Clausum 118-259. The ancient English doctrine, including both sovereignty and property of the seas, has recently been reviewed and restated by D.P. O'Connell, Chichele Professor of Public International Law at Oxford University, in "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303-24 (1971).

A. The English Seas Were Within the Realm of England.

In view of England's geographical position, it is not surprising that from earliest times we find constant and intense preoccupation with control and regulation of the sea and its resources. Potter briefly summarizes the evidence as follows:

> "Culminating in the British claims to sea dominion, this long and extensive body of state practice found here its most vigorous expression. A document of Alfred extended the King's power to the middle of the surrounding seas, and Edgar styled himself 'king . . . of the ocean lying round about Britain.' After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea. Edward I (1272-1307) instructed his naval officers to maintain firmly 'the sovereignty which his ancestors the kings of England were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws

*/ For brevity, Maine et al. Exhibits are cited herein simply as "Exhibit ___." Exhibits of other parties are preceded by the name of the party offering them. All quotations are modernized and made consistent as to spelling, punctuation and capitalization, but not otherwise. The transcript of the hearings is cited as "Tr.". Footnotes are usually omitted from quotations. "State" is capitalized when it means a State of the United States, but not otherwise.

by them made to govern all manner of nations passing through the said sea.' Henry IV (1399-1413) granted leave to a certain Spaniard to sail 'freely from the port of London through our dominions to the town of Rochelle,' and Elizabeth (1588-1603) was besought by the king of Sweden to grant permission to one Wormaeus to sail to Spain 'through the sea-dominions of the Queen,' as the king wrote.

* * *

"Much more evidence of the same type might be exhibited here. Admirals' commissions were based on the proposition that the British kings were 'lords of the English sea on every side.' Parliamentary records contain similar allusion to the 'sovereigns of the sea,' 'lords of the sea,' and so on . . . .

"It will be observed that there are two elements present here. There is a great body of state practice, and there is some considerable comment upon it by observers." Exhibit 469, pp. 38-41.

Another impartial modern summary is found in Colombos, The International Law of the Sea 48 (6th rev'd ed.):

"§56. English claims to the sovereignty of the sea. --The first recorded claim of the English kings to sea power goes back to the tenth century when Edgar the Peaceful styled himself 'sovereign of the Britannic Ocean.' Edward III after the Battle of Sluys exacted a salute from all foreign vessels as being due to him as 'King of the Seas.' This claim however, 'to the guardianship or Admiralty of the sea' had already been advanced by his father, as appears from an official letter written in 1322 to Edward II by the King of France, who complained of the depredations committed upon French ships by English mariners 'who call themselves the custodians of the sea on your behalf.' In 1372, a Petition to Parliament contained the statement that

> 'then and in times past' all countries held and called the King of England 'King of the Sea.' A similar title, 'lord of the English sea on every side,' appears in a Patent of 1337, and in the Parliament Roll of 1420. As a price of their acquiescence in this ackowledgement of sovereignty, the Hanseatic merchants looked to the Kings of England to keep a passage for their ships free from the depredations of pirates. The right to 'the Sovereignty of the Seas' was thus coupled with the duty of the preservation of law and order therein."

See also Exhibit 723, p. xxxiv.

It has frequently been pointed out that the English claims became even more explicit, consistent and systematically enforced after Edward III's great naval victory of Sluys in 1340. Exhibit 715, pp. 165-66; Exhibit 469, p. 46; Selden, Mare Clausum 375 ff.; Tr. 122; Exhibit 186, p. 4.

While plaintiff herein has argued that these mediaeval English assertions of sovereignty over the sea were for "protective" purposes only, and that any notion of "territorial" sovereignty came much later, there are very explicit mediaeval authorities which demonstrate that the English seas were regarded as part of the realm, within the territorial sovereignty and dominion*/ of the crown. Selden demonstrated that as

*/ Today dominion means ownership in property. In the mediaeval period the term generally meant political lordship (the closest concept then existing to the modern sovereignty) with property rights as a concomitant thereof. We shall use the word in the modern sense, except of course when quoting.

early as the reign of Henry I banishments were made out of England and "out of the sea belonging to the king of England." Mare Clausum, p. 391; Exhibit 695, p. 149. As Professor Thorne conceded (Tr. 2689), Bracton declared that the four seas around England were parts of the realm. Exhibit 469, p. 45. Gould likewise concludes, "the narrow seas were thus considered to be within the realm of England." The Law of Waters 19 (3d ed. 1900).

The famous document Prerogativa Regis, included in the law books as a statute of Edward II, in defining the right to royal fish provided that the king shall have them when "taken in the sea or elsewhere within the realm" (Exhibit 194, p. 40; Exhibit 729, p. 227), thus clearly and directly expressing the conviction that the seas themselves were within the realm. Callis pointed this out in the 17th century, Exhibit 680, p. 40, and Professor Thorne agreed that this was the necessary meaning. Tr. 2691. Britton, along with Bracton*/ the most authoritative of the

*/ Bracton said nothing as to whether he regarded the right to royal fish as territorial or not. As to wreck, he regarded the royal right as applying to a wreck found on shore, or close to shore, or far out at sea providing it could be proved that the wreck would have floated to shore in England, but not otherwise. Thorne (ed.), 2 Bracton on the Laws and Customs of England 339 (1968). This gropes for, but has not yet reached, a fully territorial concept of the crown's maritime rights. It was Britton's more advanced formulation, not Bracton's more primitive one, which survived.

English mediaeval civilians, likewise regarded the crown's right to royal fish as territorial, applying to fish caught in the English seas but not elsewhere. He wrote that "sturgeons taken within our dominions shall belong to us" (the crown), and likewise "whales caught within our jurisdiction." Nichols (ed.), Britton 57 (1901). (Britton's obvious use of "dominions" and "jurisdiction" as coextensive is significant.) The royal prerogatives of flotsam, jetsam and lagan were likewise territorial in the English seas only; outside their bounds such items belonged to the first finder. Exhibit 194, p. 41. The statute 17 Edw. 2, c.11, provided that "the king shall have wreck of the sea throughout the realm."

Hale, in De Jure Maris, stated the "royal fish" doctrine as follows:

> "Touching royal fish, therefore called so, because of common right such fish, if taken within the seas parcel of the dominion and crown of England or in any creeks or arms thereof, they belong to the crown; but if taken in the wide sea, or out of the precinct of the seas belonging to the crown of England, they belong to the taker . . . . But salmon or lamprey are not royal fish. By the common right of the king's prerogative these belong to the king, if taken within his seas or the arms thereof. Anciently the entire sturgeon belonged not to the king, but only the head and the tail of the whale, according to Bracton, cited by Stamford upon this chapter of the prerogative. According to the custom used in the admiralty, these great fish, if taken in the salt water within the king's seas, they were divided, and a moiety was allowed to the taker, the other moiety to the admiral in right of the king." Exhibit 194, pp. 42-43.

Modern writers likewise agree that the ownership of royal fish was territorial, operating only within the English seas where the crown

possessed rights of sovereignty and property. Chitty, A Treatise on the Law of the Prerogatives of the Crown 144 (1820); Jerwood, Dissertation on the Rights to the Sea Shores 85-86 (1850); Gould, op. cit. at 20 n. 2.

Robert Belknap, an eminent judge in the reign of Richard II, declared that "the sea is subject to the king, as a part of his English kingdom or of the patrimony of the crown." Selden, op. cit. at 385. Selden also demonstrated that in common mediaeval usage the terms "within the four seas" and "within the realm" were used synonymously and interchangeably, as were the terms "without the four seas" and "without the realm." Selden, op. cit. at 387-89. Many other 17th-century writers made the same point.

A somewhat mysterious and not always reliable legal treatise entitled The Mirror of Justices, apparently written by Andrew Horn, Chamberlain of London, about 1290, declared that the prerogatives of the crown included "sovereign jurisdiction, sovereign seigniory over all the land as far as the mid-stream of the sea around the land." Whittaker (ed.), The Mirror of Justices 8 (1895).

The requirement that within the English seas foreign ships strike their flags to English ships, so important in the 17th and 18th centuries, can be traced back to an ordinance of King John as early as 1201. Exhibit 693, pp. 39-40; Fulton, The Sovereignty of the Sea 6-7 (1911). */

*/ In the course of this brief we quote frequently from Fulton's The Sovereignty of the Sea (1911) and Moore's A History of the Foreshore (3d ed. 1888). Substantial portions of these works have been included in the record as Exhibits 693 and 728, respectively. References to those portions will be cited by the exhibit numbers. References to portions of these works not included in the exhibits are cited as "Fulton, op. cit."

/cont'd

Modern writers have recognized that the flag salute was required by the English crown as a recognition of territorial sovereignty, jurisdiction and dominion over the English seas; see, e.g., 1 Halleck, International Law 134 (4th ed. 1908). The doctrine that an island rising in the sea belonged to the crown, while contrary to the views of Roman lawyers, was established in English law as early as the reign of Edward I (Exhibit 728, p. 53); thus Diggs' reassertion of the same principle in Elizabeth I's reign (Tr. 325) was no new doctrine.

Collectively, all the rights of the crown in the English seas, rights both of government and of property, were regarded as among the jura regalia, regalia or royalties of the crown. This point of terminology is important because of the conveyance of "royalties" in the American colonial charters. Since plaintiff's witnesses have conceded that these terms were the standard English legal usage for whatever rights the crown possessed in the English seas, Tr. 2733-34, 2747-49, extended citations are unnecessary. Gould, citing authorities ranging from Bracton down to the 19th century, describes the conventional usage: "the rights of the Crown in tide waters are classed among the regalia or prerogative rights . . . ." Op. cit. at 34.

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and "Moore, op. cit." These works are long out of print and are not easy to find in libraries or elsewhere. Counsel for the Common Counsel States has in his possession complete xerox copies of both works. If it would assist the Special Master, we would be happy to make xerox copies of our copies for his use.

We also quote or cite certain other published works which are not part of the record but of which judicial notice may be taken. We have copies of most of these works or the relevant portions thereof, and of course should be happy to make copies available to the Special Master if it would serve his convenience or if copies are not readily available to him.

The term tide waters, frequently encountered in the literature, may require some definition. As used in English and American legal writings, it normally and properly means all those waters in which a perceptible tide ebbs and flows, including the seas, bays and other coastal waters, the foreshore, and tidal rivers up to the fall line. The legal distinction invariably made as to underwater land is between the land under tide waters, as thus defined (which belonged to the sovereign out to whatever was regarded as the limit of sovereign dominion at the time) and the land under non-tidal lakes, rivers, creeks, etc., which belonged to the adjacent proprietor. English law, as we shall see, has never made any distinction with respect to rights of property between what under current international-law usage would be termed internal waters (bays, rivers, etc.) on the one hand and the territorial or marginal sea on the other. Accord, O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 367 (1971). In this country the distinction has generally been defined as between navigable and non-navigable waters, which if applied to England would produce virtually the same result; in England, unlike this country, there are almost no waters which are navigable but non-tidal.

Professor Wroth contended (Tr. 2507) that a statute of 1389, 13 Richard 2, c.5, 2 Statutes of the Realm 62 (1816), was inconsistent with the proposition that the English seas were regarded as part of the realm. The statute provided that the admiral should "not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea."

On cross-examination, Tr. 2750-51, it was pointed out to Professor Wroth that the words "but only" could well have been used in the sense of "except," in which case the statutory language would be clear support for the proposition that the English seas were regarded as within the realm. Professor Wroth's attention was also called to the fact that an eminent admiralty authority had so construed the statute, Exhibit 667, pp. 369-70; but the professor maintained his previous position.

Since cross-examination we have found a Latin text of the formula in question, and it makes it wholly clear that in the English version "but only" was used in the sense of "unless" or "except." The Latin version is "quod admiralli et eorum deputati se de aliqua re infra regnum Anglie facta nisi solomodo de re super mare facta, . . . ." Coram Rege Roll, No. 569 (Trinity 1403), m.68, 7 Sayles (ed.), Select Cases in the Court of King's Bench (88 Publications of the Selden Society) 136 (1971). (Emphasis added.) The Latin word nisi means unless or except, and means but only in its meaning which is synonymous with those words. The use of solomodo further confirms the meaning; nisi solomodo means except only with respect to. If Professor Wroth's interpretation were correct, the formula would not have read nisi solomodo but rather sed solum. Thus, the formula was framed in such a way as to leave no doubt that the English seas were within the realm. The English translation in Sayles' edition agrees: "admirals and their deputies are in no way to intermeddle with

anything done within the realm of England save only what is done upon the sea." Ibid.*/ (Emphasis added.)

The same document describes the Earl of Huntingdon as "the late admiral . . . in the western and southern regions of the realm of England." Id. at 137. Since everyone concedes that the admiral had jurisdiction only in the sea, this title is yet further confirmation that the seas of England were regarded without question as being "regions of the realm."

Professor Wroth made the astonishing statement that his interpretation of the 1389 statute was supported by "several generations of English lawyers." Tr. 2751. When asked what "lawyers" he had in mind,

*/ Professor O'Connell believes, quite incorrectly in our submission for the reasons stated, that the 1389 statute used the word realm as excluding the English seas. But he correctly points out that if used in that sense realm included only the bodies of counties, which were far from coextensive with the territory and property of the crown, which as he observes included Wales, the Channel Islands, and the English seas, none of which were within the body of any county. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 372-73 (1971). O'Connell's view is that realm has been used in two senses: one meaning only the bodies of counties, the other including all the territories and property of the crown, including the English seas. O'Connell has no doubt that the crown had full rights of territory and property in the English seas.

The only authority in the record who used realm as meaning only the bodies of counties appears to be Sir Henry Finch, writing in 1613. Finch's text (pp. 75-76, infra) makes it clear that the realm, as he used the term, was far more limited than those areas over which the crown had sovereignty and dominion.

Two years after the 1389 statute, Parliament again acted on the subject of the admiralty jurisdiction. 15 Richard 2, c. 3, 2 Statutes of the Realm 78-79 (1816). The new act declared that the admiral had no jurisdiction over "things rising within the bodies of counties, as well by land as by water." The term realm was not used.

he named only one, Lord Coke. Tr. 2752. In point of fact Coke held explicitly that the English seas were within the realm; see pp. 70-71, infra. All Professor Wroth could say about his other alleged supporters is that they were "those lawyers who interpreted the statute . . . of Richard II as imposing limitations upon the admiralty's jurisdiction." Tr. 2751-52. In fact a typical representative of that class, Sir John Bramston, in a speech in Parliament in 1663 advocating further limitations on the admiralty, construed the 1389 statute precisely as we have done:

> "From the body of the Act you may likewise observe: 1. The Act proceeds negatively. The Admiral shall not meddle with things done within the realm . . . . Then it goes on affirmatively and says but only with things done upon the high sea, else they had been excluded from the sea, because the sea is parcel of the realm." 2 Yale (ed.), Nottingham's Chancery Cases (79 Publications of the Selden Society) 942-43 (1961).

B. The Crown's Rights in the English Seas Included Control of the Fisheries.

It is hardly surprising that the doctrine of crown sovereignty and dominion over the sea was applied to fish, the chief resource of the sea; it would be astonishing if it had not been so applied. There is no dispute that royal fish found within the English seas were the property of the crown (e.g., Exhibit 690, pp. 72-73), or that the right to royal fish, as to wreck, flotsam, jetsam and lagan, in particular parts of the English seas or shore could be and were granted to subjects from the earliest times. Exhibit 194, pp. 17-18, 37-44; Exhibit 728, pp. 20, 40-41, 51-52, 70, 96, 139-40, 233, 710-14, 754-58.

But the royal right to grant exclusive fisheries in portions of the English seas was far from limited to royal fish. "Grants and confirmations of fisheries in the sea by King John are very numerous." Exhibit 728, pp. 20-21. In Henry III's reign "there are very numerous entries on the records relating to fisheries and weirs in the sea all around the coasts of the kingdom." Id. at 41. Records of the reign of Edward I show that "sea fisheries and ports and the soil of the foreshore were parcel of many manors around the coast." Id. at 110.

Many cases prior to the 17th century "show that oyster grounds, which are below low-water mark, passed by grant." Moore, op. cit. at 418, n.1;*/ Tr. 123. Professor Thorne conceded that exclusive rights to fisheries in the sea could be and were granted by the crown prior to the 17th century. Tr. 2691-92. See also Exhibit 157, p. 40.

The evidence as to the mediaeval English law and practice on this point is summarized at Exhibit 729, pp. xlii-xliii:

> "In whatever way the right to create several [i.e., exclusive] fisheries in tidal waters arose, it is clear that in early times before the reign of Henry II the power was extensively exercised, and several fisheries which are now in existence almost completely cover the whole of the tidal estuaries and many parts of the coasts of the kingdom. Textwriters deriving their knowledge only from decided and reported cases have considered that these fisheries so granted were exceptional and few in number. This is a fallacy, for it can be shown by records that they existed in almost every piece of tidal water round the coasts which was naturally available for the profitable exercise of an exclusive fishery. Numerous several fisheries in tidal waters were in existence before

*/ See footnote, p. 13 , supra.

> the date of Domesday, and in non-tidal waters the fisheries appear to have been all appropriated to the lords of the manors."

Moore lists (Exhibit 728, pp. 908-15) many ancient exclusive fisheries all around the coasts of England, both in the estuaries and "upon the open sea-coast [where] it is clear that they have existed from the earliest time." Id. at 909.

One of the recognized causes of action of the mediaeval common law, for which forms are given in the law books, was an action for trespass upon an exclusive fishery. Shanks (ed.), Novae Narrationes (80 Publications of the Selden Society) 76 (1963). Other forms existed for actions to assert a common right of fishery, that is, "to fish in another's water." Id. at lxxxiv-v, 22, 77, 192-93, 337. The royal writ of mort d'ancestor, providing for inquisitions post mortem to establish the seisin of decedents in real property and the right of heirship thereto, could and did issue with respect to a fishery as well as to land. Royal writs could and did also issue to protect an exclusive fishery from encroachments by others. Van Caenegem, Royal Writs in England from the Conquest to Glanvill (77 Publications of the Selden Society) 177, 188, 190, 243, 248, 316 (1959).

The state of the English common law and practice on this point -- that one of the ancient royalties or royal rights of the crown was the right to grant or to lease exclusive fisheries in portions of the English seas -- is not open to question. The doctrinal basis for this right is more complicated, because of the persistence to a degree, in the writings of those English lawyers who were trained in the Roman or civil law, of certain

vestiges of the ancient Roman-law doctrine that the sea and its resources were free to all. To the extent that such vestiges are found in the works of Bracton, Britton and Fleta, they were clearly out of tune with the actual state of English law and practice, and they form one of the principal bases on which these writers have been criticized for following academic Roman-law notions rather than the English law as it existed. See, e.g., Exhibit 157; Jerwood, Dissertation on the Rights to the Sea Shores 89, 92 (1850).

Even the theoretical Roman-law writers, however, made crucial concessions to the actual state of English law and practice. Fenn has pointed out that the feudal lawyers conventionally numbered the ius piscandi as among the regalia (royalties) of the crown. Exhibit 690, pp. 70, 76, 136-39. An exclusive right to a sea fishery was a property right, and could be acquired by grant from the sovereign. Id. at 73-80.

There is a long-standing textual controversy as to whether Bracton said that all animals and fish, which by natural law were res nullius, now belong to the sovereign, or whether the better text indicates that only some animals and fish (all of which were previously res nullius) had been appropriated to the sovereign by man-made law. Tr. 2685-88. Either version of the text shows that even Bracton recognized that the law in fact had moved in the direction of eroding the old Roman law on the subject. Bracton wrote of "the four seas of England" as places in which English jurisdiction existed, Gould, The Law of Waters 7 (3d ed. 1900), and regarded that jurisdiction as including the king's right to levy tolls on fishermen for the use of the sea. Tr. 2689; Exhibit 469, p. 45. Fenn has

shown that the Roman-law doctrine of freedom of the seas was everywhere on the defensive in the mediaeval and post-mediaeval period and by the end of that period had decisively given way to the doctrine of territorial sovereignty and dominion in adjacent seas. Exhibit 690, passim. Moore believes it clear that Bracton, in saying that fisheries were common, meant only that they were common except where the crown had placed them under exclusive ownership. Exhibit 729, p. xxxix.

By the late middle ages, even those continental Roman lawyers who denied a right of property in the sea asserted the right of the sovereign to lay servitudes on it, to tax its use, to create exclusive sea fisheries, and to impose the national laws and statutes on activities therein. Exhibit 690, pp. 77, 79, 105-08, 115, 117, 135 ff., 145. In these conditions, a denial that the sea and seabed could themselves be owned was plainly an academic vestige of a superseded legal attitude; and legal theory moved inexorably towards the conclusion that full ownership was possible. Exhibit 690, p. 148. In this instance as in many others, legal theory lagged behind practice; and the evidence of record demonstrates that there was no time during the middle ages at which the common law had any question about the right of the sovereign to grant exclusive fisheries or to license or to tax fishing, whether by English subjects or by foreigners, in the English seas.

Regulation of the English sea fisheries dates back at least to Magna Carta, which included a provision against the erecting of new weirs.

That provision was enforced. Exhibit 728, p. 50.*/ Frequent inquisitions were made to discover wrongs or encroachments (purprestures) upon the king's prerogative rights in the sea as well as on the land. Id. at 69. Persons were summoned and prosecuted for wrongfully claiming wreck or royal fish "in the waters of the lord king." Id. at 139. A statute of 1571, in order to protect fishing nets at sea, prohibited ships from anchoring "on the main sea" in the areas of fisheries during the fishing season. Exhibit 729, p. 178.

Selden shows that during the reign of Richard II a tax was imposed by act of Parliament on every ship, whether English or foreign, passing through the English seas or fishing therein. Selden, Mare Clausum 297-302; the statute itself is set forth in Exhibit 710, pp. 156-57. Evidence to the same effect is found in many other reigns. Id. at 355-62. A statute of Edward IV prohibited all foreigners from fishing in the Irish Sea without license. Id. at 436-39; see also 1 Halleck, International Law 134 n.2 (4th Ed. 1908). That tolls for sea fishing were imposed and collected by the English crown was conceded by Professor Thorne. Tr. Tr. 2689-90.

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*/ A reading of the actual text of the Magna Carta provision in question indicates that it did not apply to weirs in the sea, but only in rivers. However, either Magna Carta or subsequent statutes appear to have been construed as applying to the sea. Exhibit 728, pp. 741-42. In any event, there is no doubt that weirs in the sea were in fact proceeded against as encroachments upon the king's rights, and that the law prohibited such encroachments.

What the English kings claimed in their own seas, they accorded to other sovereigns in theirs. By treaties of 1490 and 1523, England acknowledged the sovereignty of Denmark in its northern waters, and agreed to take licenses for fishing there. Fulton, op. cit. at 112.

Fulton points out, op. cit. at 75, that the English kings by treaty and otherwise on many occasions permitted fishing by foreigners without charge in the English seas. See also Exhibits 558, 559, 560, 561, 563, 564. Such permission, of course, is in no way inconsistent with the assertion by the crown of sovereign rights which included the prohibition of fishing if and when the crown so chose. Obviously there could be many reasons for the crown to permit fishing -- e.g., reciprocal benefits received from foreign sovereigns; the general interest of good will and friendly relations -- especially when, as was true throughout these early times, the volume of fishing was never such as to interfere with the ability of English fishermen to take as much as they wanted. With respect both to fishing and to navigation by foreigners, the 17th-century writers were fully aware that the English kings had not infrequently permitted these without charge, but quite reasonably pointed out that sovereignty includes the right to permit as well as the right to forbid. See, e.g., Exhibit 710, pp. 129, 146-58.

The situation in the reign of Mary I (1553-1558) is described by Elder, The Royal Fishery Companies of the Seventeenth Century 4-5 (1912), as follows:

> "That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary 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. 1/
>
> "1/ Cal. S. P. Dom. Car. II, vol. 339."

While Fulton doubts these assertions, op. cit. at 140-41, there is substantial evidence for them, and it is beyond question that they were regarded as authoritative legal precedents by the writers of the 17th century. Exhibits 565, 595, 596 (p. 6).

C. The English Maritime Jurisdiction Was Territorial in the English Seas, and Included Both Legislative Power and Criminal Jurisdiction over Foreigners.

Plaintiff's position apparently is that, both before and after 1603, English admiralty jurisdiction was in no sense territorial, but extended over English subjects, and no others except pirates, anywhere at sea. If we understood plaintiff correctly, it contends that the admiralty jurisdiction was, and was understood to be, precisely of the same nature and extent in the Mediterranean, in the South Pacific, and two miles from the cliffs of Dover. The Common Counsel States submit that, to the

contrary, the evidence of record demonstrates that the admiralty jurisdiction was regarded as an attribute of sovereignty or lordship over the English seas and extended to foreigners as well as to English subjects in those seas. We think the record on this point is quite conclusive; we shall simply summarize the principal evidence briefly.

One of the most important records is the document De Superioritate Maris, dating from about 1305, in which the attorneys for England and several other nations asserted the "sovereign lordship of the Kings of England" over the "sea of England," and used that sovereign lordship as the foundation for the jurisdiction of the English admiralty to the exclusion of the rival jurisdiction of a French admiral. See Exhibits 176, 177; Mare Clausum, pp. 403-28; Tr. 2761 ff.; Fulton, op. cit. at 741-49. While plaintiff has attempted to belittle the document as merely a "draft complaint," there is no serious dispute that at the very least it represented the official position of the English government at the time, and therefore is an authoritative statement of that government's view of the nature and basis of its admiralty jurisdiction.

There cannot be the slightest question that 17th and 18th century admiralty writers regarded De Superioritate Maris as authoritative and that it played a major part in shaping their view of English maritime sovereignty and of the admiralty jurisdiction. E.g., Tr. 121-22; Exhibit 693, p. 43; Selden, Mare Clausum 403-28. Modern writers have likewise regarded the document as authoritative. See, e.g., Hall, Treatise on International Law § 40 (7th ed. 1917), republished in Crocker

(U.S. Dept. of State), The Extent of the Marginal Sea 66 (1919); Halleck, International Law 134 (4th ed. 1908); La Pradelle, 5 Revue Générale de Droit International Public 264 (1898), translated in Crocker, op. cit. at 187 n.5. Even Fulton*/ concedes that the document was submitted "on behalf of England." Exhibit 693, p. 45. Justice Story quoted it extensively as evidence for "the immemorial right of the King of England to the sovereignty of the British seas, and the right to make laws to regulate navigation, and to keep the peace, in those seas." De Lovio v. Boit, 7 Fed. Cas. 418, 420 n.5 (D. Mass. 1815).

Marsden regarded the origin of the admiralty jurisdiction as "intimately connected with the claim made by Edward III and his progenitors to be sovereigns of the sea." Exhibit 200, p. xv; Tr. 120-21. The various statutory definitions of the admiralty jurisdiction read in terms which leave no doubt that the jurisdiction was conceived as territorial. E.g., Exhibit 667, pp. 362, 369-70; see also pp. 15-18, supra. And these statutes make no distinction between English subjects and foreigners as subjects of the admiralty jurisdiction within the English seas.

Fenn declared that for purposes of the admiralty jurisdiction in feudal law "the sea . . . is a district of the kingdom." Exhibit 690, p. 76. Baldus and the other continental feudal lawyers who were heavily relied on in England plainly regarded the admiralty jurisdiction as territorial. Id.

*/ For the "revisionist" nature of Fulton's views, see Tr. 334-36. Fulton wrote in the period when devotion to the "freedom of the seas" was at its height, especially in England; and he approached the traditional law and practice in more of a polemical than a historical spirit, even though his work contains much of great value.

at 107-08. In the 16th century, Thomas Craig wrote that crimes committed within the territorial waters of the king are tried in the waters of that king, as being within his jurisdiction. Id. at 172.

Envoys of England and Flanders declared in a formal convention of 1320 that the King of England was lord of the sea and that certain robberies had occurred "on the sea of England" and thus were "committed upon his sea within his power." Exhibit 723, p. xxii; Fulton, op. cit. at 54-56. The location of these robberies is believed to have been about 120 miles south of the southwestern tip of England. Ibid.

An ordinance of Edward III, probably dating from 1339, specified that the admiralty jurisdiction was to extend to all ships of any nation traveling through the English seas. Exhibit 715, pp. 165-66.

The commissions of the English admirals expressly founded their jurisdiction upon the proposition that the English kings were "lords of the English sea on every side." Exhibit 469, p. 40. The usual form of commission in Selden's time, which he said had endured for "very many years past," appointed the admiral "governor general over all our fleets and seas of our said kingdom of England and Ireland," and gave him jurisdiction over those fleets and seas. Mare Clausum, pp. 305-06. Particular admirals were given command and jurisdiction over particular portions of the English seas. Id. at 396. One form gave the admiral "custody" of the sea. Exhibit 562.

Of what did this territorial jurisdiction in the English seas consist? Certainly it included, as plaintiff's witnesses have emphasized, the

power and duty of protection and the prevention of piracy. However, the notion that jurisdiction over piracy is non-territorial, because a pirate may be seized and punished anywhere by anyone, is a crude anachronism when applied to this mediaeval period. No distinction appears from the mediaeval records between piracy and other crimes so far as the admiralty jurisdiction is concerned. While in the earlier middle ages there is some evidence that rulers regarded the suppression of piracy as a cooperative venture, certainly by the 15th and 16th centuries piracy, like other crimes, in the adjacent waters of a state was tried in the courts and by the law of that state and no other. Exhibit 690, p. 130.

Further, the English maritime jurisdiction was far more extensive than plaintiff concedes. It included, as Justice Story held, "the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas." De Lovio v. Boit, 7 Fed. Cas. 418, 419 (D. Mass. 1815). There can be no question that it included the right of the English kings to make and to enforce substantive law, both civil and criminal, applicable to the English seas as within the dominions of the crown. While the alleged origin of the famous laws of Oleron in a promulgation by Richard I, Exhibit 715, p. 168, has been questioned, there is no doubt that the laws of Oleron, while "founded upon well-recognized customs of the sea," were regarded as deriving their authority in the English seas from their adoption by the English crown. Ibid.; Jerwood, A Dissertation on the Rights to the Sea Shores 15 (1850). "But it was not

alone from this source [the laws of Oleron] that the maritime law in England was derived . . .; as time passed there also grew up in England a body of precedents preserved in the ancient volume The Black Book of the Admiralty. This old register contains the admiralty laws, decisions, ordinances, proceedings and acts of the King, the Admiral and the courts of admiralty of England from the earliest time." Exhibit 715, p. 168. Edward I instructed his naval officers to maintain "the sovereignty which his ancestors, the Kings of England, were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea." Exhibit 469, p. 39. The document De Superioritate Maris expressly affirmed the crown's right of "making and establishing laws and statutes," as well as "all other things which may appertain to the exercise of sovereign dominion" over the English seas. Exhibit 176, p. 56. The jurisdiction included the right of visit and search of all vessels passing through those seas. Exhibit 469, p. 47.

The record of an admiralty inquisition held in 1376, Exhibit 667, pp. 367-69, illustrates the comprehensive range of criminal offenses with which the jurisdiction was concerned. So far from being limited to piracy, the list extends to murder, manslaughter, petty felony, aiding the enemy, exporting goods without license, false weights and measures, unauthorized claim of wreck or other royalties of the seas, disobedience of maritime regulations and many others. Of particular interest are items demonstrating that at this early date sea fisheries, including sedentary fisheries, were regulated under English law:

"9. Of such as take salmons at unreasonable times.

"10. Of such as spoil the breed of oysters, or drag for oysters and mussels at unreasonable times.

"11. Of such as fish with unlawful nets.

"12. Of taking royal fishes, viz., whales, sturgeons, porpoises, etc. and detaining one half from the King." Id. at 368. See also Exhibit 679, p. 243.

There is no hint or suggestion that the crimes listed were to be ignored if committed in the English seas by foreigners. Indeed it is apparent that the purpose of much of the admiralty criminal jurisdiction, including regulation of fisheries, would have been wholly defeated had foreigners been exempt therefrom.

Failure to observe the flag salute in the English seas was, from the time of King John (Fulton, op. cit. at 6-7), punished as a criminal offense and by criminal remedies. And no one disputes that the flag salute was required of foreign ships, and that it was "a token of the superiority of the British sovereign over the adjacent seas." De Lovio v. Boit, 7 Fed. Cas. 418, 419 (D. Mass. 1815) (Story, J.). Here, then, is an undeniable area of application of English criminal law and jurisdiction to foreigners in the English seas.

Professor Horwitz has summarized (Tr. 157-63) a considerable body of additional evidence that the admiralty jurisdiction was territorial and extended to foreigners. Such is the necessary implication of the statute of 1536, which provided that offences committed at sea shall be

tried "as if any such offences had been committed or done in or upon the land" (Tr. 157-58), since obviously crimes committed by foreigners on land in England were subject to the jurisdiction of the English courts. Much earlier, a commission of 1361 expressly provided for the trial of crimes committed at sea "by certain of our subjects and others," that is, foreigners. Exhibit 198, p. 88. While the early records of actual cases and trials in admiralty are sparse, Professor Horwitz found one clear case and another highly probable case of trials of foreigners in admiralty for offences other than piracy committed on the English seas. Tr. 161-62. As we shall see later, the record contains conclusive and incontrovertible records of such trials and convictions of foreigners in the 17th century (pp. 103-04 , infra). There is no doubt that the flag salute was at all times enforced against foreigners.

D. The Crown's Ownership of the Seabed of the English Seas Was Recognized from Very Early Times.

While the doctrine that the king owned the bed of the sea did not achieve its most elaborate articulation until the reign of Elizabeth I, there is ample evidence that from a very early date English law accepted without question the common-sense proposition that the seabed under adjacent waters, and its resources, were proper subjects of ownership and belonged to the crown unless lawfully acquired by a subject.

As early as 1286 a dispute arose regarding the right to take stone from the bottom of the sea opposite Portland, and the case was litigated

like any other question of title to real property. Exhibit 728, pp. 95-96. Neither party is seen claiming that the seabed is res nullius or that the right to take stone belonged to the first comer. The action was in trespass and the issue was whether title was in the lord of the manor fronting on the seacoast in question or in the earl as feudal lord.

At about the same time, the Toppesham case established prescriptive ownership by the earls of Devon of an exclusive fishery and of the soil under the port of Exeter. Jerwood, Dissertation on the Rights to the Sea Shores 49-50 (1850). It can hardly be doubted that other cases of this type would be discovered if the mediaeval records were thoroughly examined for that purpose. Gould, one of the leading modern authorities on the law of waters, declares that "the ancient municipal law of England" is that "the Crown had a property in the adjacent seas both as against foreign nations and its own subjects." Gould, The Law of Waters 6 (3d ed. 1900).

In the reign of Edward III it was declared "that not only the dominion of the sea, but the very soil, belongeth unto the king." Jerwood, op. cit. at 91. A substantial number of cases during the reigns of Edward I, Edward II and Edward III (1276-1377) involved exclusive fisheries in the sea or other tidal waters, carried on by subjects under grant from the crown, which involved the placing of weirs on the seabed. Some of these cases were those of the Abbot of Tichfield, the Abbot of Furneys, the Earl of Devon, the Abbot of Benet Hulm, the Earl of Lancaster and the

Manor of Burnham. Since the weirs involved the right to the soil, Hale regarded these cases as holding that title to the soil had passed along with the grant of the fisheries. Exhibit 194, pp. 18-22. In the 19th century Hall disputed that interpretation, Exhibit 728, pp. 727-31. Moore's position is that "Mr. Hall's averment that the cases quoted by Hale do not assume an ownership of the soil is wholly wrong." Id. at 730, n. (k). Large parts of both of Moore's works are devoted to discussions of when grants of exclusive fisheries should be construed as passing the soil of the seabed and when they should not. Exhibits 728, 729, passim; see especially Moore, op. cit. at 658-59.

On this technical point, Hale and Moore appear to have the better of the argument as against Hall. For our purposes, of course, it does not matter; the significant fact is that all three disputants agree without question that the soil of the sea and other tidal waters is susceptible of ownership and was so regarded as early as the 13th and 14th centuries by the English common law, and that title thereto was in the king unless a subject had acquired it by grant or prescription.

Gould does not consider that the doctrine of crown property in the sea was any sudden or new development:

> "Prior to the decision in Regina v. Keyn, the open seas around the coasts of Great Britain were considered to be the property of the Crown, and it was commonly said that the sea is not only under the king's dominion, but that it is his proper inheritance. According to Selden and the writers of his time, the king is lord of the great waste, both land and water.

> Lord Hale says that the king is owner of this waste, and that the narrow sea adjoining the coast of England is 'part of his dominions, whether it lie within the body of any county or not.' In ancient times, it was declared that the sea is within the legiance of the king, as of his crown of England; and in the Rolls of Parliament, in the reign of Henry V., it appears that the Commons prayed that whereas the king and his progenitors have always been lords of the sea, and now it happens that the king is lord of the coasts of both sides of the sea, that therefore the king will lay an imposition upon strangers passing over the sea. Coke, Bacon, Blackstone, Chitty, and Woolrych, writing at different periods, reassert the same doctrine; and Callis considers that, by the common law, the king has, in the English seas, possession and rights of property as well as of jurisdiction." Gould, op. cit. at 18-19.

E. In the Reign of Elizabeth I the Law of Maritime Sovereignty and Dominion Was Extended and Elaborated in Several Important Respects.

Plaintiff has made much of Elizabeth I's two well-known assertions of freedom of the seas, made in opposition to claims by Spain and Denmark to prohibit navigation and to license fishing in large portions of the seas. Elizabeth's statements are not altogether inconsistent with the English legal tradition of crown sovereignty and dominion over the English seas, since the right of free navigation through territorial waters (today called the right of innocent passage) has usually been recognized as a qualification on maritime sovereignty. Moreover, it has been observed that Elizabeth's position on these occasions was inconsistent with her claims and actions at other times, as well as being quite out of tune with

the international and English law and practice of the day. Colombos, The International Law of the Sea 50-51 (6th revd ed.); Hall, A Treatise on International Law § 40 (7th ed. 1917), reprinted in Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 67 (1919).

"Queen Elizabeth, in 1600, stamped a portcullis on those dollars destined for the East Indian trade, to signify the right of closing navigation in her seas." Halleck, International Law 134 n.2 (4th ed. 1908), reprinted in Crocker, op. cit. at 84; see also Exhibit 726, pp. 125-26. "Queen Elizabeth seized upon some Hanseatic vessels lying at anchor off Lisbon for having passed through the sea north of Scotland without her permission." 1 Phillimore, Commentaries upon International Law clxxi (3d ed. 1879), reprinted in Crocker, op. cit. at 366; see also Exhibit 726, p. 127. Elizabeth's admirals issued licenses to Dutch ships to pass through the English Channel. 1 Marsden, Law and Custom of the Sea 332 (1915).

Elizabeth insisted on the flag salute in her seas, as her sister had done, and enforced it even against ships carrying foreign sovereigns through English waters. Colombos, op. cit. at 52. In 1576 the queen ordered ships to sea to clear pirates from the narrow seas, declaring that in those seas "she and her predecessors have been accounted to have always held supreme sovereignty." Exhibit 457, p. 210. In 1598, in allying herself with the Dutch against Spain and Portugal, Elizabeth envisioned not securing the freedom of the seas to all, but "that England and the Netherlands would together hold the empire of the seas."

Davenport, European Treaties Bearing on the History of the United States and Its Dependencies to 1648, p. 240 (1917); Swarztrauber, The Three-Mile Limit of Territorial Seas 16 (1972).

It was during Elizabeth's reign that Dutch fishing first became obtrusive in English coastal waters, and Elizabeth was subjected to considerable pressure from her subjects to exclude the Dutch. The fact that she refrained from doing so was clearly due, not to any fixed views on her part about the freedom of the seas (as we have seen, those were views which she reserved for occasions when their expression was in England's interest), but to the fact that the Dutch and English were allies in a desperate war against Spain; quite obviously, to raise the fisheries issue would have been counterproductive so far as the essential cooperation between the allies was concerned. Exhibit 693, pp. 135-38; Beaujon, The History of Dutch Sea Fisheries 464 (1883).

Major doctrinal developments occurred under Elizabeth's aegis in the further refinement of the law of maritime sovereignty and dominion. Albert Gentili, an Italian who lived in England and wrote in defense of both English and Spanish maritime claims, appears to have been the first to apply the term territorium to the adjacent seas, and his usage is said to have been the origin of the modern term territorial sea or waters. Swarztrauber, The Three-Mile Limit of Territorial Seas 17, 24 (1972). Gentili, as counsel for Spain in the English prize courts, argued that the

belt of territorial waters of 100 miles in breadth*/ was within the "dominions" of England within which, under the Anglo-Spanish treaty of 1604, England owed the duty of protection to Spanish ships. While the prize courts refused to extend the duty of protection beyond the "king's chambers" (pp. 135-36, infra), the English government early in James' reign embraced the 100-mile limit as the criterion for territorial waters and exclusive fishing in the absence of historic vested rights to a greater limit. See p. 63, infra; Exhibit 693, pp. 358-61; Fulton, op. cit. at 122.

Dr. John Dee, writing in 1577, asserted royal ownership of sea fisheries and urged that foreigners be taxed for fishing in English waters. Tr. 333-34; Fulton, op. cit. at 99-104. Dr. Dee relied on no special English right or occupation, but on the doctrine that every coastal sovereign had sovereignty and ownership over its adjacent seas up to the midline between its coasts and those of the opposite state. Dee modified this doctrine in the case of the English Channel, which he asserted belonged in its entirety to the English crown on the ground of the queen's claim to the French throne, and the oceans around Scotland, on the ground that Scotland was in English law regarded as no full sovereign but merely an English tributary state. Fulton, op. cit. at 101-04. He was also intensely

*/ In Gentili's time, and for more than a century thereafter, the 100-mile limit was favored by most of those international lawyers who believed there was any limit to the territorial sea which nations might lawfully claim. See pp. 300-10, infra.

concerned with American exploration and was a backer of colonial enterprises. On commission from the queen, to whom he was well known, he wrote in justification of the English title to North America at the time of the Gilbert patent (p. 44 , infra). He himself owned part-interests in the Gilbert ventures. Rowse, The Elizabethans and America 17-21, 41, 182-83 (1959).

The most important of the Elizabethan common-law writers was Thomas Diggs. While as we have seen (pp. 32-35, supra), the seabed and the resources thereof had been recognized as a subject of ownership as early as the 13th century, it was apparently Diggs, in 1568 or 1569, who first elaborated a systematic theory of that ownership by the crown. Tr. 123-25; Exhibit 203; Exhibit 690, pp. 171-72; Exhibit 728, pp. 180-84. Diggs originated new law in asserting crown prima facie ownership of the foreshore; he took crown ownership of the sea and seabed as established and noncontroversial. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 307 (1971).

While Diggs' theory of the foreshore has been criticized, notably by Moore (Exhibit 728, passim), that criticism has nothing to do with the issues in the present proceeding. The dispute between Moore and Diggs went to the question whether, as Moore contended, the foreshore had been so extensively granted out by the crown, either expressly or by implication, to the owners of the adjacent upland that they should be presumed to have it unless specific proof showed the contrary -- or whether, as Diggs had maintained, the presumption was in favor of the crown unless an

express grant could be shown. Moore never questioned that both the foreshore and the seabed are proper subjects of ownership, nor did he question that title thereto ultimately derived from the crown. Similarly, none of the cases, either in Elizabeth's reign or later, in which the crown's claim to the foreshore or derelict lands was defeated stands for the proposition that the seabed cannot be owned or that the crown was not the original owner. In every such case, the crown lost because the court found a grant, a presumed grant or prescription.

As Professor Thorne recognizes (Tr. 2446-47), Elizabeth and her government warmly embraced Diggs' theory. Inquisitions to recover submerged and derelict lands were promptly undertaken. Exhibits 213, 643; Tr. 144. The Dulinge case combined Diggs' theory on the foreshore with the ancient legal tradition that the crown is "owner and proprietor" of the English seas and with the equally ancient tradition (see p. 23 , supra) of crown surveillance against illegal weirs, which dated at least back to Magna Carta. Tr. 125-27; Exhibit 201.

In Sir John Constable's Case of 1575, which involved a dispute between the crown and the owner of the adjacent manor as to the right of wreck on the foreshore, Plowden argued that, while the boundaries of England included the entire English Channel and one-half of the seas on every other side, the crown did not own the sea and seabed. Moore, op. cit. at 224-32. Professor Horwitz' assertion (Tr. 311) that Plowden is the only English authority who has ever denied crown ownership of the seabed

has not been disputed by plaintiff herein. While Plowden's client won the case, the court's decision was based not on Plowden's theories but on the holding that the foreshore in question and the right of wreck thereon had been granted by the crown to Constable's predecessor in title. Moore, op. cit. at 233; see Tr. 2714-15. Moreover, Plowden based his assertion that the crown did not own the seabed on the observation that the bed "is of no value" (Pl. Br. 51), implying that if the state of technology had given it value he would have been of a quite different opinion.

During Elizabeth's reign, in 1571, Parliament enacted a statute asserting regulatory jurisdiction over fishing practices in the main sea off the coasts of Norfolk and Suffolk. Because of interference with fishing nets, the statute prohibited any ships from anchoring in fishing areas of the sea during the fishing season. Exhibit 729, p. 178.

Another legal development during the reign of Elizabeth is of critical importance in understanding the legal climate in which the American colonial charters were issued. This was the law of monopolies. As new portions of the world were rapidly opened up to English navigation, trade, fishing and other exploitation, it became customary for the crown to vest these new commercial opportunities in particular persons or companies by charters or patents of monopoly. The late 16th-century and early 17th-century colonial charters were instruments of this type; but they were not the only ones, or the earliest.

The prototype was the charter of 1555 to the Muscovy or Russia Company, which, as confirmed by act of Parliament in 1566, prohibited all Englishmen other than the company from trading to any country lying north, northwest, or northeast of London where English trade had not been commonly carried on prior to 1553. Exhibit 777, p. 41. Such monopolies proliferated throughout the reign of Elizabeth and in the succeeding reigns. They had a double purpose: first, the encouragement of trade and economic exploitation; second, the production of revenue for the crown.

One of the economic opportunities discovered and developed by the Muscovy Company was the whale fishery in the seas covered by its charter. As a matter of English law, there is no doubt that the company had a monopoly of that fishery, to the exclusion of all others. Exhibit 776, p. 127.

Towards the end of Elizabeth's reign, the crown's right to create such monopolies was called into question, both in Parliament and in the courts. Elizabeth vehemently maintained that the right was an attribute of her prerogative, which might not be challenged. Exhibit 776, p. 106. About 1600 Sir Edward Coke, then Attorney General, rendered a careful legal opinion on the subject. He held that monopolies were legitimate when justified for the advancement of trade, for the exploitation of new inventions or for new trading voyages, but not otherwise. Ibid. While questions continued to arise from time to time in Parliament as to whether

particular monopolies were sound policy, Coke's opinion established a legal test which endured: that a monopoly was valid if it covered some new discovery, venture or economic opportunity, but not if it attempted to exclude Englishmen from particular economic activities in places in which they had previously engaged in them.*/ See also 1 Scott, The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720 118-25 (1912). As we shall see (pp. 234-38, infra) this standard was invoked by both sides during the New England fishing-monopoly controversy of the 1620's, where the issue really boiled down to the question of fact of whether English fishermen had customarily frequented the New England fishing grounds prior to the New England charters of 1606 and 1620 which created the monopoly.

As a matter of English law, then, the situation was quite clear on the eve of American colonization. The application of the established doctrine to the issues in the instant proceeding is obvious. There can be no doubt that, if during Elizabeth's reign some newly exploitable mineral

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*/ The theory implied limitations on the crown's right to grant exclusive fisheries. Eventually the doctrine grew up, though long disputed, that an exclusive fishery in English waters must antedate Magna Carta to be valid. Interestingly, that doctrine was not applied in this country, on the ground that a limitation on a personal sovereign (the king) did not bind the people acting through their legislature. In this country it was therefore generally held that the legislatures had the power to grant exclusive fisheries or sedentary fisheries in tide waters, and many such grants were made. See Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689, 698 (1932), and authorities there cited.

resource had been discovered in the seas or seabed adjacent to England, the crown would have asserted and exercised the right to license such exploitation or to create a monopoly to exploit it.

The letters patent granted by Elizabeth to the Gilberts and Raleigh, which are the precursors of the American colonial charters of the next century, were typical grants of monopolies in this legal context. As Professors Horwitz and Smith have testified, these patents vested their recipients with royal or palatine rights both in the lands to be discovered and settled and in the seas adjacent thereto. Tr. 226-29, 673-85. Sir Humphrey Gilbert's patent of 1578 conveyed "all commodities, jurisdictions and royalties both by sea and land," and "the rights, royalties and jurisdictions, as well marine as other, within the said lands or countries or the seas thereunto adjoining . . . according to the order of the laws of England." Exhibit 139; Tr. 678, 680-81. The issuance of the patent was preceded by a legal opinion on the queen's title by Dr. John Dee, whose views on maritime sovereignty have already been described (p. 38, supra); Dee was instrumental in procuring the patent, and had an interest therein. The Private Diary of Dr. John Dee 4, 8, 18-19 (Halliwell ed.).

Raleigh's patent of 1584, which was confirmed by act of Parliament, contained similar language. Exhibit 140; Tr. 684-85; Rowse, The Elizabethans and America 48 (1959). Adrian Gilbert's patent, also of 1584, included all profits, jurisdictions and royalties both by sea and land, and the right to exclude others from both the territories and the seas

to be settled by Gilbert; the rent to be paid to the queen included the tenth part of, among other things, pearls, demonstrating that the possibility of exploitation of the resources of the seabed was well understood and avidly anticipated. Tr. 682-83. One of the first activities of the Raleigh colonists in what is now North Carolina was to search for pearl fisheries, and they were elated when they believed they had discovered signs of them. Stebbing, Sir Walter Raleigh 46 (1891).

It is beyond serious question that these patents were intended to convey monopolies both by sea and by land; that is, to authorize the patentees to exercise the exclusive right of exploitation of the resources of the seas and the seabed as well as those of the land. There seems no reason to doubt, given the state both of legal doctrine and of governmental practice at the time, that the patents were also intended to convey title to the seabed.

It is not difficult to reconcile such creations of monopolies with Elizabeth's occasional assertion, some years later, of the freedom of European waters for fishing. Even if it be supposed that Elizabeth was serious, and not merely expedient, in those assertions, it must be remembered that the English law of monopoly drew a sharp distinction between an attempt to monopolize a previously known and exploited resource, which was regarded as impermissible, and the monopoly of a newly discovered territory, opportunity or resource, which was valid. Elizabeth and her lawyers regarded an exclusive charter for a newly discovered

territory, or a newly discovered fishery, or a newly discovered sedentary fishery or mineral resource of the seabed, in exactly the same terms as they regarded, and as we still regard, a patent vesting in the inventor an exclusive right to the exploitation of a new invention. Thus it is possible that Elizabeth might have regarded an attempt to monopolize established fisheries in European waters as illegal, without in any way implying that exclusive rights could not be created for the exploitation of the resources of the sea and seabed in the new world. As we shall see, in the next century the English crown and government adopted the position that English sovereignty and dominion in its territorial seas overrode any right of foreigners to fish there, which was regarded to have been a mere revocable liberty or license when it had been allowed by the English crown. The two theories had somewhat different implications for crown rights in English waters; but the crown right to exclusivity in the waters and resources of the seas adjacent to newly discovered lands was common ground between them.

Indeed, it can be demonstrated that the intention to monopolize the North American fisheries, to the exclusion of foreigners, preceded and in principal part caused the earliest colonial ventures in Elizabeth's reign. In 1578, the same year Sir Humphrey Gilbert received his patent, Anthony Parkhurst, a merchant of Bristol, wrote a "Report of the True State and Commodities of Newfoundland." Parkhurst argued in favor of an English settlement at Newfoundland in order that the English might "be

lords of the whole fishing." Rowse, op. cit. at 162. "The same year Sir Humphrey Gilbert advocated the scuppering of the Spaniards and their extrusion from the fishery there." Ibid. According to the 18th-century American lawyer William Bollan, Gilbert taxed all ships, English and foreign, fishing on the Newfoundland coasts. Exhibit 673, pp. 9, 11. "Apparently the English held the right to exclude the vessels of all other nations from the fishing grounds." Exhibit 720, p. 27; Exhibit 742, pp. 214-15.

Even before Gilbert's settlement in 1583, English assertion of power over the fisheries had begun:

> "Sir Thomas Hampshire was sent out by Queen Elizabeth with five ships in 1582 with a commission to subject the fishery to proper regulation. It is known . . . that Sir Thomas did in fact lay down the bases of the fishing rules which were subsequently observed, and that before his voyage England was recognized by the fishermen of various countries, including France, who then frequented the island, as having a right of some sort, probably founded on discovery, to exercise jurisdiction among the adventurers from Europe. By 1580 it had become the practice, by common accord of the fishermen of all nations, that the captains of the English fishing vessels should act as judges and arbitrators, notwithstanding that at this time their numbers were relatively few. Shortly after that date English superiority was planted on a surer footing. In 1583 Sir Humphrey Gilbert, acting under a due commission, formally took possession of the island on behalf of his sovereign, in the presence of various persons, subjects of other nations, who happened to be there in pursuit of the fishery, and from whom he exacted tribute in acknowledgment of the queen's right. The fact that possession

> was taken was recorded by setting up a pillar of wood, upon which the Arms of England were carved." Lobster Fisheries on the Coasts of Newfoundland: Case of Her Majesty's Government (1892), quoted in Parry (ed.), 2b British Digest of International Law 420 (1967).

Although Gilbert's attempted settlement at Newfoundland in 1583 was unsuccessful, two years later Sir Bernard Drake "was sent to round up the Spanish fishing fleet in Newfoundland. This was a very profitable enterprise and six hundred fishermen were brought back to be taken care of. Henceforth no Spanish fishing fleet went to Newfoundland, and 'out of the whole number of fishing vessels England had more than double the fleet of her rivals and all quietly submitted to her control.'" Rowse, op. cit. at 164; Exhibit 720, p. 27. So much for Queen Elizabeth's dedication to the freedom of the seas and of the fisheries.

Throughout the 17th and 18th centuries, England based its claim to Newfoundland and its fisheries on the Cabot discovery and on Gilbert's ceremonial taking of possession. Exhibit 742, p. 214.

## F. Exclusion of Foreigners from Coastal Fisheries Was Firmly Established in Scottish Law and Practice.

While Scottish law as such never became law in this country, it is relevant to the issues in this proceeding as showing the legal climate in which James VI and I was educated and operated for most of his life, and which he brought with him on his accession to the English throne in 1603.

As early as the reign of David I (1124-1153), both Scots and foreigners were prohibited from exploiting the important sea fishery at the mouth

of the Firth of Forth without obtaining licenses and paying tithes. Fulton, op. cit. at 59-60. As to the Scottish seas generally, "restrictive measures were in force from an early period." Id. at 75. The Scots fiercely resisted any intrusion of foreigners into what they called their "reserved waters," and sea battles were fought to vindicate that right in the 15th and 16th centuries. Id. at 77-79. The Scots "reserved waters" were generally defined as extending to a "land-kenning" of the coast, that is, the distance from which the land could be seen from the tops of masts. This distance was usually defined as either 14 or 28 miles, although the Scottish lawyer Welwood wrote that the Scots had asserted the right to exclusive fisheries for 80 miles from the coast and the Dutch had acquiesced therein. Id. at 77, 84. Sometimes two "land-kennings" were claimed, Exhibit 777, p. 363, which probably explains the claim to 28 miles. No treaty entered into by Scotland ever sanctioned any foreign right to fish in Scottish waters. Acts of Parliament regulated the sea fisheries and excluded foreigners. Fulton, op. cit. at 82-83; Exhibit 756, pp. 290-93; Exhibit 464, pp. 34-36. The crown rights included the "assize-herring", an ancient tax levied on the herring fishery. Id. at 82; Exhibit 693 at 152-53. An act of Parliament in 1424 fixed the tax as four shillings for each last (an old unit of weight) of herring caught by Scots and six shillings for each last caught by foreigners. Fulton, op. cit. at 171, n.1.

According to Professor Elder, Dutch fishermen first came into Scottish waters in 1594, pursuant to a Scottish license which kept them at a distance of 28 miles from the shore. Tr. 140; see also Exhibit 596.

Given this tradition, it is hardly surprising that the eminent Scottish lawyer Sir Thomas Craig, in a work published in the year of Elizabeth's death, affirmed that a sovereign is the proprietor of the fisheries in his adjacent seas and may permit or prohibit foreign fishing there according to custom. Exhibit 690 at 172-73; Exhibit 693 at 357. See also Exhibit 447. Likewise, William Welwood's Sea Laws of Scotland, published in 1590, affirmed the crown's exclusive right to enjoy sea fisheries and to grant them out to subjects. Exhibit 690, pp. 174-75.*/

II.

SEVENTEENTH-CENTURY ENGLISH LAW AND PRACTICE FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS, SEABED AND SUBSOIL.

During the reign of James I (1603-25), English law became even more fixed and definite as to the rights of sovereignty and property of the crown in the adjoining seas, and had several very important practical applications. The English seas were regarded as part of the realm, just as much as the land, and therefore subject to the legislative, executive and judicial power of the state. The crown possessed and exercised the right to exclude or to license foreign fishermen and the right of admiralty

*/ But see Fulton, op. cit. at 352. We have not been able to obtain a copy of Welwood's 1590 work and thus cannot establish whether Fenn's assertion that the paragraph he quotes is from the 1590 version is correct or not.

jurisdiction, both civil and criminal, including criminal jurisdiction over foreigners for crimes committed in the English seas.

The English seas were regarded on historical grounds as extending all the way across both the North Sea and the English Channel, and for considerable distances into the Atlantic. Except where special circumstances operated (as in the English Channel, all of which was claimed on the basis of the English kings' claim to the French throne), the usual doctrine was that English sovereignty extended either for 100 miles or midway to the opposite coasts. Within the English seas, the right to the fisheries was exclusive, the admiralty jurisdiction was territorial, and the flag salute was required for foreign ships. As to the seabed and subsoil, the law of England was that the crown owned them and the resources thereof. These legal doctrines were subjected to further definition and elaboration throughout the 17th century.

The overwhelming body of evidence supporting these conclusions is summarized by Professor Horwitz at Tr. 128-231. The facts are largely conceded by plaintiff's witnesses. Most of the evidence speaks quite well for itself, in spite of plaintiff's attempt to introduce subtleties and distinctions which never occurred to those who were making and interpreting the law in the 17th century. In this section we shall simply refer to the most important evidence broken down into appropriate categories. First we shall collect the evidence showing that as a general proposition, under English law throughout the 17th century, the crown was sovereign in the

English seas and those seas were part of the realm of England. We shall then set forth the evidence in the four most important areas in which that sovereignty was exercised and implemented: the crown's exclusive right to the fisheries in the English seas, to exclude or to license foreign fishermen, and to regulate fisheries; the territorial admiralty jurisdiction in the English seas, including jurisdiction over foreigners; crown ownership of the seabed and of the resources thereof; and, finally, the requirement of the flag salute as a recognition of maritime sovereignty.

A. The Crown Possessed Territorial Sovereignty over the English Seas.

Plaintiff's witnesses cannot and do not deny that England claimed and exercised sovereignty over the English seas in the 17th century. One of the plaintiff's witnesses, Professor Wroth, has attempted to explain that away by contending that the term sovereignty was regarded as entailing only some sort of "protective" jurisdiction over the seas, amounting perhaps to no more than a special English duty to prevent piracy in the seas adjacent to England. To the contrary, the evidence shows that English law in the 17th century had a fully developed doctrine of territorial waters entailing sovereignty in the complete modern sense over what were regarded as the English seas.

1. Court Cases

In the Case of the Royal Fishery of the Banne, in 1610, the Privy Council, the highest judicial body in England, declared that "the sea is of the legiance of the king as of his crown of England." Exhibit 157, p. 38; Tr. 216.

In Rex v. Oldsworth, a decision of the Exchequer in 1637, it was declared that "as the king is supreme upon the land, so he is upon the sea" -- a clear expression of the view that the crown's sovereignty in the English seas was of the same nature as its sovereignty over the land territory of England. Tr. 142.

Also in 1637, all the judges of England joined in the decision of the great Ship Money Case (Rex v. Hampden). At issue was whether

the king had authority, without the consent of Parliament, to levy an impost on his subjects to build ships for the defense of the English seas. One of the principal contentions of the crown was that the English seas were within the realm, and that subjects were obligated to contribute freely for the defense of the realm, in contradistinction to expeditions and ventures outside the realm, where no such obligation existed. By a vote of 7 to 5, the court held in favor of the crown. 3 Howell, State Trials 825-1254 (1816).

The ship money writs, whose lawfulness was at issue, declared that the kings of England had always been "masters of the aforesaid sea" and "lords of the sea aforesaid." Id. at 830, 848, 1191. Before issuing the writs, the king had obtained an advisory opinion, affirming their lawfulness, from the Chief Baron of the Exchequer and the Chief Justices of the Courts of Kings Bench and Common Pleas. In the subsequent prosecution of Hampden for refusing to pay, the Solicitor General, Sir Edward Littleton, based his argument in principal part on the duty of subjects to fight (or to contribute money for fighting) within the realm, as opposed to conquest or conservation of foreign countries or territories beyond the sea." Id. at 924. "The kingdom of England consists of land and sea"; "the king is as much lord of the sea as land"; "if the king could command for land, he may for sea, for both are one kingdom"; "the sea and the land make but one kingdom"; the king is "lord of the narrow seas." Id. at 928, 932, 937, 947. Sir John Banks, the Attorney General, likewise arguing for the crown, was to the same effect:

"This dominion is not only upon the land, but it is upon the sea. And so the king he hath not only a dominion at sea, but he is 'dominus maris Anglicani,' he is both owner of the sea and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the barons in the Exchequer, in the case of Sutton Marsh, Mich. 13 Car. That the soil of the land, so far as the sea floweth is the king's, and the king is seized thereof, jure corona. Mirror 8, Bract. fol. 8, temps Edw. 1, Avowry, 46 Ed. 3, Com. 3, b. That not only the dominion of the sea, but the very soil belongeth unto the king.

"In the next place he hath, besides his supremum dominium, a sovereign jurisdiction, and that extends both by sea and land.

"First, for creation of all his great officers and judges; creation of the Admiralty, time out of mind. 20 Hen. 7, fol. 8, 12 Hen. 7, fol. 17, power to make justices could not be granted; and all these powers resumed in the statute, as inherent in the crown. 12 Hen. 7, fol. 17, there it is said by Fineux, that at the beginning all administration of justice was in one hand, that is, in the crown. And surely this jurisdiction did not begin in the time of Ric. 1, when those laws were renewed by him at his return from the Holy Land; but there were admirals in England, and the admiral law by sea long before. 27 Ed. 1, a famous record in the Tower, that the commissioners for the emperor, Spain and France, did appear before the king's commissioners, and did acknowledge the sovereignty of the king of England upon the sea did belong unto him time out of mind. And for further proof of this, it likewise appeareth in that learned book of Mr. Selden's called Mare Clausum." Id. at 1023.

As stated, the court held for the crown by a vote of 7 to 5.*/ The opinions of the majority fully accepted the

*/ Two of the dissenters, Bramston and Davenport, disagreed with the majority only on the purely technical ground that by the record it did not appear to whom the money assessed was due.

crown's argument. Sir John Finch, Chief Justice of Common Pleas, held as follows:

> "By the fundamental laws and policy of this kingdom, the sole interest and property of the sea, &c. is in the king.
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> * * *
>
> "Sea and land make but one kingdom, and the king is sponsus regni; Magdalen College Case, sir Joh. Davies' Reports, stat. 24 Hen. 8, 1 Eliz. and 1 Jac. The soil of the sea belongs to the king, who is lord and sole proprietor of them; and good reason why he should, as is well maintained by Mr. Selden, that worthy and learned author of Mare Clausum; and I hope shallbe by his majesty maintained, with the sovereignty of the sea: and without a navy this authority can do but little good.
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> * * *
>
> "[I]t cannot be denied but originally the king had the sovereignty of the whole kingdom both by sea and land, who hath a power of charging the whole kingdom.
>
> * * *
>
> "Then if sea and land be but one entire kingdom, and the king lord of both, the subject is bound as well to the defence of the sea as of the land; and then all are bound to provide ships, men, ammunition, victuals, and necessaries for that defence." Id. at 1225-27.

Judge Crawley's opinion referred, though more briefly, to the dominion of the sea, id. at 1086, as did Baron Weston's, id. at 1067.

Notably, none of the judges in the minority in any way questioned the holding that the English seas were within the realm; their disagreement was entirely on other matters. In fact Chief

Baron Davenport of the Exchequer went out of his way to agree with the majority on that point:

> "[T]he king is lord of the sea; as it was argued at bar, in a cause brought before us the barons of the Exchequer, where we did unanimously agree, and adjudge that the king was, and is in my conscience, rightly the lord of the very propriety and ownership of the seas. The occasion upon which this grew a question was as I conceive, upon the writing of two books: the one called Mare Liberum, that no ownership of the sea should belong to the king; whereas it is the sea of our sovereign, and defence by sea, under Almighty God, that is our protection; and if we should suffer any else to have an interest in it, it would hazard the whole kingdom. But in answer to this book, Mr. Selden hath wrote very learnedly a notable book called Mare Clausum, approved of by his majesty, and enrolled in the Exchequer by command from his majesty, there to remain. But since there is another book written, which I had at my argument, by one Pontanus, directed to the great chancellor of the king of Denmark; and he undertaketh herein to make an answer to every particular chapter in Mr. Selden's book; and truly, as I think in my opinion though weak, Mr. Selden hath a judgment in law against him upon a nihil dicit." Id. at 1210.

Sir John Bramston, Chief Justice of King's Bench, was in accord:

> "Thus much for defence upon the land; now for defence upon the sea. In the statute 18 Ed. 3, cap. 7, that they who serve the king out of the kingdom, serve for wages; but in case of necessity, without the realm, in times past, by no precedents, saith my brother Crooke, can it be proved it was done before. -- I answer, that the sea is within the kingdom; see 2 Ed. 3, cap. 10, protect. 46 Bract' lib. 2, fol. 365, there the sea is made part of the kingdom. Doctor and Student, cap. 51. It is the ancient custom of England, that the king is lord of the narrow seas." Id. at 1246.

Counsel for the defendant likewise had no quarrel with the crown's argument on the question relevant here. Indeed, one

of the defendant's arguments was that the king owned all the profits of the seas, not only royal fish but also "all other profits of the sea, if the king would take them," id. at 1004, and therefore had no need to make exactions of his subjects for the defense of the sea. Again the defendant argued:

> "For though the king be lord of both sea and land, and hath in them both the sole dominion; yet in the sea he hath the whole property, and in a manner all the considerable profit and privilege; the subject hath but the passage of the sea, and the minima to take fish, not considerable in point of benefit." Id. at 1010-11.

Thus we see that in this great case, surely one of the most famous and important in all the history of the English-speaking peoples, both parties and all the judges of England were in accord that the English seas were part of the realm. As is well known, the holding that ship money could be levied without the consent of Parliament was immensely unpopular, was denounced in Parliament, and was one of the major causes of the Civil War. However, in the parliamentary denunciation no trace of criticism can be found of the case with respect to its holding that the seas were within the realm. See id. at 1254, 1305.

An indictment in the High Court of Admiralty in 1674 of foreigners for failing to give the flag salute declared that "the British seas are, and from the time beyond the memory of man have been, within the sovereignty and of the dominion of the kings of England for the time being as a parcel of the kingdom of England." Exhibit 621. Since this indictment was deemed legally sufficient and resulted in a conviction (Exhibit 622), it has undoubted legal authority. Similar

indictments are found in Exhibits 623 and 627. One of those convicted subsequently obtained a royal pardon for the crime of failing to give the flag salute "within Our British Seas." Exhibit 629.

While Professor Wroth has sought to deprecate (Tr. 2501-03) the charges to admiralty juries of the great admiralty judge Sir Leoline Jenkins, the authoritative legal force of those charges can hardly be questioned. In his 1668 charge, Jenkins twice referred to the sovereignty of the crown in the British ocean. Exhibit 762, pp. lxxxvii-viii. In another charge, Jenkins declared that "his majesty hath an undoubted empire and sovereignty in the seas that environ these his kingdoms, which by the ancient statute laws are called the quatuor maria, by foreigners, and by our modern treaties, the British seas." Id. at xc; see also id. at xcvi.

2. Acts of Parliament

As Professor Thorne has conceded (Tr. 2700), during the Commonwealth period the Council of State was the highest law-giving authority in England. In 1650, "whereas the dominion of these seas has time out of mind undoubtedly belonged to this nation," the Council directed the admirals "to preserve the dominion of the sea." Exhibit 224.

In 1652 Parliament adopted a resolution requesting the Council of State "to prepare a declaration to assert the right of this Commonwealth to the sovereignty of the seas, and to the fishery." Exhibit 693, p. 409. The Council's response was to order the translation and republication of Selden's Mare Clausum. Id. at 410.

In 1654 the Council of State granted a licence to a fishing captain of Dieppe "to enter those our seas between the coasts of England and France." Exhibit 586.

On the outbreak of the second Dutch War during the reign of Charles II, Parliament, in the preamble of an act granting money for the equipment of the fleet, declared it to be "for the preservation of his Majesty's ancient and undoubted sovereignty and dominion in the seas." Fulton, op. cit. at 458.

In 1681 the Scottish Parliament, in a statute defining the jurisdiction of the Scottish admirals, specified that it extended to all maritime and seafaring causes "within this realm," indicating Parliament's understanding that the Scottish seas were within the realm of Scotland. Exhibit 172, p. 124.

In 1699 the English Parliament enacted a statute directing the Lord High Admiral to appoint certain ships to cruise on the coasts of England and Ireland to seize smugglers. Masterson, Jurisdiction In Marginal Seas 3 (1929). The act specified no seaward limitations for this jurisdiction, a fact which Masterson explains as follows:

> "It is unnecessary, however, to determine those limits at this early period; for the English Government was then claiming and maintaining sovereignty over the entire four bodies of water known as the 'English Seas,' which would embrace the limits of all ports. Hence, there was nothing novel or unusual in the exercise of jurisdiction over smuggling craft for an indefinite distance, as provided by the Act of 1699." Id. at 3-4.

3. Legal Opinions

James I's fishing proclamation of 1609 was preceded by an exhaustive legal inquiry as to the juridical basis for the crown's assertion of sovereignty over the sea and the right to exclude foreign fishermen. This inquiry culminated in a favorable opinion to the Privy Council from a committee of five persons, of whom at least three (Caesar, Dun and Crompton) were lawyers. Exhibit 693, pp. 138-47.

In 1610 Sir Julius Caesar, a noted admiralty judge and later Master of the Rolls, delivered, in connection with the fishing negotiations with the Dutch, an opinion confirming English sovereignty over "the four great seas" and the right to exclude foreign fishermen therefrom. Exhibit 565; Fulton, op. cit. at 158-59.

In 1617, Caesar delivered another legal opinion, asserting the duty of the Dutch to extradite, for trial and punishment in England, Dutch citizens who had seized Captain Browne in the sea off the English coast while he was selling fishing licenses to Dutch fishermen. Caesar regarded the Dutch crime as having been committed "within the territory" of England. Exhibit 566, p. 2. Before rendering his opinion, Caesar had obtained the opinions of three other eminent lawyers. Exhibit 693, p. 174. On the basis of this opinion, diplomatic representations were made to the Dutch (Exhibit 567), who acquiesced and surrendered the culprits as demanded. Exhibit 693, p. 174.

Charles I, like his father, commissioned extensive legal research prior to issuing, in 1636, his proclamation asserting maritime sovereignty. Exhibit 679, pp. 230, 243-46; Exhibit 693, pp. 211-13, 364-65.

Similarly, the parliamentary government during the interregnum, before confirming the position of the Stuart kings regarding maritime sovereignty, commissioned William Ryley, the Keeper of the Records in the Tower, to provide proofs of the English sovereignty of the sea; Ryley did so. Exhibit 558; Exhibit 693, p. 409.

Charles II, when embroiled with the Dutch over the flag salute, requested the eminent admiralty judge Sir Leoline Jenkins for a legal opinion Jenkins' response was that "the king of England for the time being is lord of those seas, where he hath the right of his flag acknowledged; and that those seas 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 the Manor of Eltham." Exhibit 211, p. 698; Exhibit 693, p. 484.

In 1671 Trinity House, in response to an inquiry from the crown, gave an opinion that the British seas included the entire English Channel and the North Sea all the way to the coast of the low countries, and in the south extended to Cape Finisterre. Uncertainty was expressed as to how far northward the British seas extended. Exhibit 635.

In 1699 Sir Charles Hedges, admiralty judge, gave a report affirming that the British seas included the entire Bay of Biscay, as far as the Spanish coast. Exhibit 199, p. 233 n.1.

4. Other Official Pronouncements and Acts of State

As Professor Thorne has recognized (Tr. 2699), the courts and Parliament were by no means the only law-making bodies in England

in the 17th century; formal acts by the king in Council likewise had the force of law. In matters touching the prerogative, the ordinary law courts were rarely involved, and pronouncements by the king in Council -- which indeed was the highest judicial body in England -- are the best authority.

James I's fishing proclamation of 1609 (Exhibit 221), made in Council and, as we have seen, after elaborate legal research, referred to the "sovereign power" of the English crown in the adjacent seas, declared that crown rights in those seas were a part of the prerogative, and described those rights as "regalities." The proclamation prohibited foreigners from fishing without license "upon any of our coasts and seas of Great Britain, Ireland and the rest of the isles adjacent."

In the years following James' proclamation, innumerable formal pronouncements by official bodies and high officers of the state reaffirmed the English sovereignty in the seas. We shall mention only a few of the most important. The great Earl of Salisbury, Lord Treasurer and prime minister, writing to the English Ambassador at Madrid, declared that by the civil law every state has sovereignty over its adjacent seas at least 100 miles out, and affirmed also the English claim to the entire channel between England and France on the basis of a special historic right. Exhibit 693, pp. 360-61.

Naval instructions of 1632 ordered the recipient "to preserve the king's regality in the narrow seas." Exhibit 679, pp. 398-99. The use of this term -- regality or royalty -- for the collective sovereign rights

of the crown in the English seas was altogether customary and habitual in this century as previously.

Among the long series of official papers preceding Charles I's fishing proclamation, the "Propositions for Fishing" of 1633, by Secretary of State Sir John Coke, asserted the crown's sovereignty and command at sea. Exhibit 184; Exhibit 693, pp. 211-13; Tr. 215.

In 1633 the Lords Commissioners of the Admiralty requested Sir Henry Martin, admiralty judge, and the Attorney General to draft a "reglement" relating to the protection of the king's "ancient right, honours and sovereignty in the narrow seas, and in his chambers and ports." Exhibit 568. The reglement composed by them, and issued as a royal proclamation in 1634, asserted sovereignty over "the four English seas." Exhibit 569; Fulton, op. cit. at 251-52, 759-61. While measures for the enforcement of neutrality were prescribed only within certain limits, careful reservation was made that "his majesty doth justly challenge sovereignty and property in all those his seas far beyond the limits hereafter to be described and might with like justice require from all persons using those his seas a forebearance from injuries and all hostile actions." Exhibit 569, p. 760.

Charles I's Ship Money proclamation, also of 1634, based the levying of ship money on a declaration that English kings had ever been lords of the English seas. Exhibit 469, p. 40.

In 1635, one of the English complaints against France was that the French "challenged a joint sovereignty on the sea with his majesty." Exhibit 678, p. 402.

Charles I's fishing proclamation of 1636 was made "by the advice of our Privy Council," the highest court in England. Like his father's proclamation of 1609, it asserted sovereign rights over "the coasts and seas of Great Britain, Ireland, and the rest of the isles adjacent." Exhibit 222.

In 1639 Secretary Windebank, at the command of the king, gave directions for naval voyages "to preserve his majesty's sovereignty in those narrow seas." Exhibit 610. Innumerable other official documents similar to this one could be cited.

Under the Commonwealth and Protectorate, the English claims to maritime sovereignty were not diminished in the slightest. In 1644 the parliamentary committee for the Admiralty gave instructions to maintain "the kingdom's sovereignty and regality in the seas." Exhibit 693, p. 380. One of Cromwell's first directions was to the naval officers, that they "maintain the sovereignty of the commonwealth in the seas." Tr. 216.

Nor was there any change at the restoration. Charles II's declaration of war on the Dutch in 1672 was based primarily on their refusal to recognize English sovereignty and dominion in the English seas. Exhibit 693, pp. 482, 487-88.

Similarly, William III's declaration of war on France in 1689 gave, as one of the reasons for hostilities, French violations of the flag salute, which was stated to be an attribute of "our sovereignty of the narrow seas, which in all ages has been asserted by our predecessors,

and which we are resolved to maintain, for the honour of our crown and of the English nation." Exhibit 693, p. 518. Another casus belli was declared to be French encroachments on the Newfoundland fisheries in the American seas. Exhibit 741, p. 242; Exhibit 751, p. 4, n.9; see pp. 247-48, infra.

5. Legal Treatises of the Period

William Welwood, writing in 1613 and 1615, asserted English sovereignty in the adjacent seas, and referred with approval to Bartolus' doctrine that the sovereignty of a coastal state extends 100 miles into the sea. Exhibit 209; Exhibit 693, pp. 354-55.

Robert Callis, writing in 1622, is wholly specific that the English seas are within the realm, and that the crown is sovereign there by the common law of England. Exhibits 178, 680; Tr. 128-31, 156. Callis' purpose was to establish that the statute law of England, and specifically the Statute of Sewers, were in force in the English seas. Callis makes very clearly the distinction between the realm and the bodies of counties, which comprise only part of the realm. Exhibit 680, p. 41.

Professor Wroth argues (Tr. 2510), on the basis of Callis' statement that the intent of the statute of 1389 (pp. 15-18, supra) was rather to "limit the Admiral how far he should extend his jurisdiction than in any way set forth the bounds of this Realm," that Callis did not believe that the realm included all areas where the admiralty jurisdiction may be exercised. The argument is quite demonstrably specious. When read in context (Exhibit 680, p. 42), Callis' statement plainly means that the

admiral's jurisdiction was limited on the landward side, not that the realm was more limited on the seaward side than was the admiral's territorial jurisdiction. Of course the admiral's jurisdiction was different from the extent of the realm, since it did not extend to areas within the bodies of counties. This was the whole point of the statute of 1389, which Callis was expounding. On the seaward side, it is plain that Callis regarded the boundaries of the realm and the limits of the admiral's territorial jurisdiction as coextensive, since he relies heavily on the latter to establish the former. Exhibit 680, pp. 39-40.

John Selden, of course, asserted full territorial sovereignty and dominion of England over the four English seas, including the entire English Channel and North Sea up to the opposite coasts, and also including very large expanses of the seas to the north and west of Great Britain.

> "[I]t is not to be conceived that any other kind either of causes or effects of sea dominion are here admitted, than such as have been of the dominion of an island, continent, port, or any other territory whatsoever . . . ." Mare Clausum, preface, p. e3.

Excellent summaries of Selden's views arefound in Exhibit 188 and at Tr. 132-37, and some of the most important passages from Mare Clausum are included in Exhibit 204. Mare Clausum was republished in 1972 by the Arno Press, New York, as part of "The Evolution of Capitalism" series, and today is readily available.

While Mare Clausum was not published until 1635, it was written in 1618 and was read at that time by King James. Fulton, op. cit. at 366; Potter, The Freedom of the Seas 58 (1924); Swarztrauber, op. cit. at 20.

Professor Thorne agrees that it was the "approved embodiment of British public policy." Tr. 2703. The official status given the book is graphically illustrated by the famous entry of March 26, 1636, in the minutes of the Privy Council:

> "So satisfactory and so important was the work considered by the Government that the following entry, dated March 26, 1636, was made in the minutes of the Privy Council: 'His Majesty, this day in council, taking into consideration a book lately published by John Selden, Esq., entitled "Mare Clausum, seu de Dominio Maris," written by the King's command, which he hath done with great industry, learning and judgment, and hath asserted the right of the Crown of England to the dominion of the British seas; the King requires one of the said books to be kept in the Council chest, another in the Court of Exchequer, and a third in the Court of Admiralty, as faithful and strong evidence to the dominion of the British seas.'" Fletcher, "John Selden (Author of Mare Clausum) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 8-9 (1962).

For other comments on the official status of Mare Clausum, see Exhibit 693, pp. 302, 356-65; Swarztrauber, op. cit. at 22; Crocker, op. cit. at 187; Potter, The Freedom of the Seas 61 (1924); Beaujon, The History of Dutch Sea Fisheries 471 (1883); Fulton, op. cit. at 365-67, 369, 374.

The Commonwealth regarded Selden as no less authoritative than King Charles had done. Mare Clausum was translated and republished in 1652 by the direction of the Council of State, which ordered 200 copies for its own use, declaring that the work "'learnedly asserted the rights and interests of the commonwealth in the adjacent seas and would be of good use for these and future times.'" Exhibit 693, p. 410. Charles II confirmed the official status of the work by commissioning a new translation and publication.

In his testimony, Professor Wroth accused Selden of inconsistency by attributing to him certain passages (Exhibit 692) from the 1741 edition of Fortescue's De Laudibus Legum Angliae, in particular the statement that the high sea was "mare liberum, nullius in bonis." Tr. 2489-92. Professor Wroth has now been compelled to admit that he was in error concerning Selden's authorship of this language. U.S. Exhibit 400. However, Professor Wroth continues to maintain that in 1616, at the time Selden wrote his footnotes to Fortescue, Selden held only a "protective" view of admiralty jurisdiction and believed that the English seas were outside the realm.

These contentions are utterly without foundation. Selden's footnote (Exhibit 691) was appended to Fortescue's statement that the admiralty jurisdiction concerned things done upon the sea without the body of any county of the realm. Selden's footnote deals entirely and exclusively with the controversial question of the boundary between admiralty jurisdiction and the jurisdiction of the common law courts on the landward side. There is not a word in the footnote inconsistent with anything in Mare Clausum, written two years later, which dealt with a far broader subject matter. Nor is there a word in the footnote which lends any support to Professor Wroth's assertion that Selden in 1616 believed that the English seas were outside the realm. As in the case of Callis, so with Selden, Professor Wroth's entire argument rests on an attempt to regard as synonymous the phrases "without the realm" and "without the body of any county of the realm." It is impossible to read Callis, Selden, Coke, Hale or any

other authoritative writer of this period without concluding that the distinction between the two terms was entirely clear to them.

Sir John Boroughs, Keeper of the Records, after an exhaustive inquiry, in 1633 wrote the first of the treatises commissioned for Charles I to demonstrate the sovereignty of the crown in the English seas. Exhibit 175; Tr. 131-32. Boroughs asserted full maritime territorial sovereignty, including law-making power, criminal and civil jurisdiction, and ownership of the resources both of the surface of the sea and of the seabed. Like Selden, he observed that a child born upon the king's sea is an English subject, not an alien, by the common law.*/ Exhibit 175, p. 90. In view of all this it is difficult to understand Professor Wroth's contention that "Boroughs' position is consistent with the earlier concept of sovereignty as a kind of protective jurisdiction having at most incidental and specific attributes of property." Tr. 2494. A fair reading of Boroughs can leave no doubt that he believed the king was sovereign in the English seas in the same sense that he was sovereign on land. And certainly there can be no doubt that Boroughs regarded the crown as having the exclusive right to exploit or to license any valuable resources found on the seabed of the English seas.

Sir Edward Coke declared unequivocally in his First Institute, published in 1628, that "if a man be upon the sea of England, he is within

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*/ International law was to the same effect: "as to children born at sea, if they are born in those parts of it that are possessed by their nation, they are born in the country. . . ." Vattel, The Law of Nations 101 (6th American ed. 1844).

the kingdom or realm of England, and within the legiance of the king of England, as of his crown of England." Exhibit 182, p. 260; Tr. 132, 157; Exhibit 693, p. 363. He further clarifies his meaning, if any clarification were needed, by stating that "intra quatuor maria" means "within the realm of England." In his Fourth Institute, written after the discovery of the document De Superioritate Maris, Coke accepted that document as authoritative and as illustrative of the nature and basis of the admiral's jurisdiction "in the seas of England." Exhibit 183, p. 142.

Coke was the principal proponent of the common-law courts in their jurisdictional dispute with the admiralty court regarding the landward demarcation between them, and much of his discussion is devoted to that subject. Coke is crystal clear that the seas are without the body of any county of the realm, but are within the realm itself. There is nothing inconsistent or particularly subtle or difficult in this position. There is not a shred of support in evidence or in reason for Professor Wroth's strained, indeed preposterous, contention that every time Coke or other writers speak of the English seas as without the bodies of counties they are implying that the seas are outside the realm. Tr. 2508-09, 2751-53, 2788-90. Professor Wroth was unable to cite any authority who has ever interpreted Coke as he does. Tr. 2790. His interpretation, it is submitted, is palpably wrong and does violence both to the very words which Coke used and to the entire legal context in which those words were written.*/

*/ Plaintiff claims (Pl. Br. 79) that "Coke apparently meant to include within the realm only those portions of the adjacent seas which were

Selden, Coke and Hale formed a triumvirate who were doubtless the most eminent and influential authorities on English law during the 17th century. Like the other two, Sir Matthew Hale -- Chief Baron of the Exchequer and Lord Chief Justice of England -- was unequivocal as to English sovereignty in the English seas. "The narrow sea," he declared, "adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not." Exhibit 194, p. 10; Tr. 156. Here again we see the familiar and straightforward distinction between the realm, which included the English seas, and the counties of the realm, that is, the land area, ports and bays which comprised the counties. Hale believed that English sovereignty extended to "at least so much... [of the sea] as adjoins nearer to our coast than to any other foreign coast." Moore, op. cit. at 358. In his Pleas of the Crown, vol. 1, p. 154, Hale declared that an attack on a royal ship in the narrow seas is a levying of war against the king within the realm, and therefore treason.

Gerard Malynes, writing in 1622, asserted that all princes possess "a distinct dominion of the seas adjoining to the territories and jurisdiction of their countries"; cited with approval Bartolus' view that

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considered at common law to be within the bodies of the counties," that is, "a roadstead or arm of the sea." This is ludicrous. What Coke said was within the realm was "the sea of England," and the "quatuor maria" -- thoroughly familiar terms at that time which designated the four English seas as traditionally defined.

territorial waters were 100 leagues (sic) in width, and gave historical documentation for England's territorial waters. Exhibit 197, p. 186; Exhibit 722, p. 2; Tr. 131.

Richard Zouche, writing in 1663 on the admiralty jurisdiction, founded the territorial jurisdiction of the admiral on the sovereignty and dominion of England over the English seas. Exhibit 212, pp. 19-20; Tr. 150. Zouche (1590-1661) was a noted lawyer, parliamentarian, regius professor of civil law at Oxford, judge of the High Court of Admiralty, and the most eminent civil-law authority of this time. 21 Dic. Nat. Biog. 1332-35. He was "much respected, even by his enemies." Mathiasen, "Some Problems of Admiralty Jurisdiction in the 17th Century." 2 American Journal of Legal History 215, 218 n.13 (1958).

To the same effect was John Exton, writing in 1664, who was judge of the admiralty court both under the Commonwealth and in the reign of Charles II. 6 Dic. Nat. Biog. 962; Exhibit 187; Tr. 150-51.

Identical views were stated in John Godolphin's work of 1661, which distinguished between sovereignty and dominion over the British seas and the admiralty jurisdiction therein, while arguing that the latter was an important consequence and attribute of the former. Exhibit 191, pp. 30-31; Exhibit 695, p. 24; Tr. 151. Godolphin was a doctor of civil law and judge of the High Court of Admiralty from 1653 to 1659.

To precisely the same effect is Robert Codrington, writing in 1665. Exhibit 181; Tr. 146.

Charles Molloy affirmed the full territorial sovereignty of England in the British seas extending from Cape Finisterre to Van Staten. Molloy regarded the seas as fully within the realm, pointing out, as many others had done, that persons born there are not aliens since they are born within the realm. Exhibit 726, p. 124. Molloy's work was long considered the standard work on the maritime law of England, and went through many editions extending through the 18th century. Fulton, op. cit. at 514; Tr. 146; 13 Dic. Nat. Biog. 577.

Sir Philip Medows, writing in 1689, affirmed the full doctrine of territorial waters, including sovereignty, property, exclusive jurisdiction and exclusive fishing. Exhibit 202; Exhibit 725; Colombos, The International Law of the Sea 63 (6th rev'd ed.). He pointed out, entirely accurately, that in his day everyone agreed that each state was sovereign in its adjacent sea by virtue of sovereignty over the land, but that there was disagreement as to how far that territorial sea extended. Exhibit 202 at 42-43. While affirming England's historic right to the entire seas claimed by it, Medows believed that it would be wise for England to restrict its claims to a more reasonable scope.

Professor Wroth is inaccurate (Tr. 2496) in alleging that Medows urged that England's territorial sea be limited only to the bodies of counties plus the king's chambers and royal ports. To the contrary, Medows advocated English sovereignty not only over those areas but over

a uniform maritime belt surrounding the entire coast. In discussing the possible width of that maritime belt, Medows mentioned four possibilities: the 100 miles asserted by Baldus, the 60 miles of Bodin, the 80 miles previously agreed between Scotland and the Dutch, and the 14 miles suggested in James I's reign in 1604 and 1618. Exhibit 202, pp. 43-45. Medows is quite clear that in his view a 14-mile limit would be entirely reasonable, id. at 45, though he is not necessarily averse to a broader limit. Finally, he suggests that England and the Netherlands should agree on a fixed limit to avoid future controversy. Exhibit 725, pp. 46-47. See also Tr. 2772-76, 2777-80. In view of all this, Professor Wroth's assertion (Tr. 2497) that "Medows makes clear that the concept of sovereignty as property was in the case of England limited to the waters of the King's Chambers or those within the bodies of the counties" is utterly without foundation.

The only English legal writer of the entire 17th century whom we have encountered who denied that the English seas were within the realm was Sir Henry Finch in his Law, or a Discourse Thereof, first published in 1613. Finch's entire discussion of maritime matters reads as follows:

> "And under the name of the realm of England, it is plain that Scotland and Wales, much less Ireland, are not included; neither is the main sea that is to say, beneath the low water mark, parcel of the realm; for there the admiral's jurisdiction (which hath nothing to do of things within the realm) doth

> only meddle, and not the common law: but between the high water mark and the low water mark, where by ordinary and natural course the sea ebbs and flows, the common law and the admiralty have divisum imperium; one upon the water, when it is full sea, the other upon the land, when it is an ebb." Id. at 77-78 (1759 ed.); Tr. 2508.

Finch was concerned solely with the dividing line between the jurisdiction of the common law and that of the admiralty; and plainly the above passage (the terminology of which is based on a misreading of the statute of 1389) cannot be taken as meaning that the crown had no dominions, rights of property or jurisdiction outside the "realm" in the narrow, and unconventional, sense in which Finch used the term.

6. Modern Commentators

Every modern commentator we have encountered who deals with the subject recognizes that as a matter of English law in the 17th-century the crown held sovereignty and dominion over the English seas. We shall mention only a few of these commentators.

Fulton, after demonstrating at great length the 17th-century English position on maritime sovereignty and the official status of Selden's work, observes that that work, "apart from its extreme doctrines as to the sovereignty of England in the seas [that is, the doctrine that English territorial waters extended all the way to the coasts of the countries opposite England], . . . more correctly represented what are now the admitted principles as to the appropriation of the adjacent sea than did

most of the works written on the other side, not excepting even those of Grotius." Fulton, op. cit. at 370.

As Professor Horwitz testified,

> "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 recognised treatises on the law of England, together with Selden's definition of the extent of those seas.' Id. at p. 374." Tr. 137.

Fletcher, pointing out the soundness of Mare Clausum as a work both of the common law and of international law, states that "Selden based his treatise on the positive practice of his day. He stated the law as he found it. . . ." "John Selden (Author of Mare Clausum) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 11 (1962).

Potter holds that "as argument attempting to prove the legal validity of maritime dominion or maritime liberty in the period prior to 1650, Selden's work is incomparably superior to that of Grotius in the opposite capacity." Exhibit 739, p. 64.

Fenn, among others, has pointed out that it was recognized and established in the 17th century that adjacent waters were under the full territorial sovereignty and ownership of coastal states; the controversial question was how far out those territorial waters extended. Exhibit 690,

pp. 133, 148. Again, Fenn recognizes 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 196. Fenn's summary analysis of the 17th-century situation, id. at 219-23, is well worth reading in its entirety. He demonstrates conclusively that the full doctrine of territorial waters, including both political sovereignty and ownership, was well recognized and virtually universally accepted more than a century before the American Revolution.

See also 1 Kent, Commentaries on American Law 26 et seq. (14th ed. 1896), reprinted in Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 179-80 (1919); Masterson, Jurisdiction in Marginal Seas 3-4 (1929); Tr. 2671-72.

James Jerwood's A Dissertation on the Rights to the Sea Shores (1850) restated the 17th-century doctrine of English maritime sovereignty and regarded it as fully in effect in his own day. Other eminent 19th-century English writers, including Chitty (Exhibits 445, 446), Hall (Exhibit 449), Schultes (Exhibit 451) and Woolrych (A Treatise on the Law of Waters 4-6 (1830)), wrote to the same effect.

7. Acquiescence by Other States

Obviously, acquiescence by other states is unnecessary to establish the law of England. Nonetheless, it is not wholly without

significance that in 1637 the Spanish government expressly recognized English sovereignty in the English seas. Exhibit 609. Other foreign acquiescence in specific attributes or corollaries of English maritime sovereignty, such as ownership of the fisheries and the flag salute, will be discussed under those headings.

In the Treaty between England and Sweden, signed at Upsala in 1654, it was provided (Article XIV) that "the present treaty shall derogate nothing from the rights of dominion either claim in their respective seas, straits, etc." 3 Parry, Consolidated Treaty Series 257, 269. Again, the Treaty of Friendship and Commerce between Great Britain and Sweden, signed at Whitehall in 1661, provided (Article XV) that "this present treaty and confederation shall in nothing derogate from any pre-eminence, right or dominion of either confederate within any his own seas, channels, or waters, but that they have and retain the same in as full and ample manner as they have hitherto had, or as of right belongs to them." 6 Parry, op. cit. at 469, 493-94.

The Treaty between Great Britain and Denmark, signed at Whitehall in 1661, gave the subjects of each party the right "to pass through the seas and territories whatsoever of either king respectively (doing no damage or prejudice), not only with merchant ships, but also with men of war" up to the number of six (Article XX). In Article XXII, England recognized the duty of English ships to pay the tolls levied for

passage "through the sound appertaining to the king of Denmark and Norway," 6 Parry, op. cit. at 235, 250-51.

The treaties made by Great Britain with Algiers in 1682 and 1688, and with Tripoli in 1662 and 1675, gave the ships of those Barbary states a limited right of visitation of British merchant ships "not being in any of the seas appertaining to his majesty's dominions." Exhibit 674, pp. 355, 361, 711, 714. Here are four explicit recognitions by other states of British sovereignty in the British seas. The extent of those seas was apparently regarded as so well recognized as to require no definition.

The above treaties with Algiers were still fully in effect in 1800, being confirmed by a treaty of that year. Id. at 373. The treaties with Tripoli were likewise confirmed as being in full force and effect by a treaty of 1812. Exhibit 674, p. 732.

B. The Crown Possessed the Legal Right To Exclude or To License Foreign Fishermen in the English Seas and the Right to Create Monopolies of Newly Discovered Fisheries; and All Fisheries in English Waters Were Subject to Regulation.

The law of England with respect to fishing rights in the English seas throughout the 17th century may be simply and categorically stated. Prima facie, the crown owned the sea fisheries as one of its principal regalia or royalties. That ownership was full and unabated with respect to the royal or great fish. As to lesser fish, English subjects had a common right to take them, except in areas of the sea where that right

had been superseded by a royal grant of an exclusive fishery. Any newly discovered or developed fishery was a proper subject for an exclusive right or monopoly created by the crown.

As to foreigners, they had no right recognized by English law to fish within the seas of England; the crown could allow them, exclude them or license them at its pleasure, and its decisions were enforced by the admirals and in the admiralty courts. Both as to English and as to foreign fishermen (to the extent they were permitted at all), England possessed law-making authority in the English seas; that is, England could and did regulate the times, places and manner of fishing. Such fishing regulations derived in part from the old common law of the sea, traceable ultimately back to the laws of Oleron; in part from acts of Parliament, and in part from acts of the king in Council. This body of English regulatory law of sea fishing was likewise policed by the navy and enforced judicially in the admiralty courts.

1. Court Cases

In the Case of the Royal Fishery of the Banne in 1610, the Privy Council, the highest court of England, held that a salmon fishery in a navigable river belonged to the crown as part of its prerogative. The ratio decidendi was that navigable rivers participate of the nature of the sea, and since the king owns the fisheries in the English seas he owns those in navigable rivers also. Exhibit 157. The crown right to fisheries

the court called a "royalty." Id. at 41. And the court authoritatively reconciled the exclusive royal right to the fisheries with the common practice of permitting free fishing by subjects: while by right the king has the "sole interest" in all fisheries, "the profit of it is not commonly taken and appropriated by the king, if it be not of extraordinary and certain value." Id. at 40. Here, at the very outset of the period of American colonization, is the full-blown doctrine, promulgated by the highest judicial authority in England, of crown ownership of sea fisheries as a "royalty" pertaining to the crown by its prerogative. The court was well aware of the civil-law rule, reflected in Bracton, that fisheries are common, but expressly declared that the common law of England is to the contrary.

In Rex v. Oldsworth, in 1637, Baron Weston's opinion declared, "as to fishing, none will admit that the sea is free for every foreigner to fish there." Moore, op. cit. at 300.

In the Ship Money Case, also in 1637, all were agreed that the crown was not only sovereign but owner in property of the sea, and was entitled to all the profits thereof (pp. 53-58, supra).

One of Judge Jenkins' charges to an admiralty jury in Charles II's reign reviewed the existing regulatory law regarding sea fisheries which the jury was directed to enforce:

> "You are to enquire of all nuisances and abuses upon our salt-waters and navigable rivers, beneath

> those bridges that are next the sea; by erecting of water-mills, weirs, stakes, or kiddles, whereby the free course and passage of boats and vessels is hindered, or the young fry of fish destroyed, and you are to present as many as are within the limits of this commission.
>
> "You are to enquire of all such as use any unlawful arts, engines, nets, or means, to catch fish withal upon the sea, or below the lowest bridges, contrary to the statutes in that behalf provided, and contrary to the ancient ordinances of the admiralty, likewise such as do destroy fish out of proper seasons, or while they are of an unsizeable growth, and particularly such as dredge for oysters, between the 3d of May and the 14th of September, that is, out of the seasons prefixed by the ancient statutes of the admiralty." Exhibit 762, p. xcvi.

Jenkins' charge of 1668 furnishes authoritative judicial recognition both that foreign fishermen could not lawfully fish in the English seas without license from the crown, and also that, if licensed, they were subject to English fishing regulatory law:

> "You are to enquire, whether any fishermen, subjects of the French king, do presume to fish upon this Coast, without special license from his Royal Highness; and if they have license, whether they fish with any other nets than such as are of the English size? The offenders and their boats are to be seized on, in any port where they happen to come." Exhibit 762, p. lxxxviii.

2. Acts of Parliament

An act of the English Parliament of 1605, still in force three centuries later, prohibited the erection of any new weir along the sea-shore or within five miles of the mouth of any haven or creek, or the

willful taking of any spawn, fry or brood of sea-fish in any weir without geographical limitation. Exhibit 693, pp. 608-09; Exhibit 716, p. 394; Exhibit 729, pp. 178-79.

In 1630 the Scottish Parliament, appointing commissioners to treat with the commissioners of England regarding Charles I's projected association or company for fishing, instructed the commissioners "that the seas on the coasts of this kingdom and of the isles thereof and all that is interjected between them and that midline in the seas which is equally distant and dividing from the opposite land, are the Scottish seas properly belonging to the crown of Scotland, and that the English have no right nor liberty to fish therein, nor in any part thereof, but by virtue of the association and not otherwise." Exhibit 693, p. 225.

In 1632 the Scottish Parliament approved a royal charter for a fishing society to control the fishing "within his majesty's seas" and to enjoy the exclusive right to export abroad any sea-fish taken within, or brought within, his majesty's dominions. Id. at 240.

The famous Navigation Act of 1651 has been construed as prohibiting foreign fishing in British waters, Exhibit 775, pp. 154-55; and the English insistence that the Dutch pay arrears of tolls due for fishing on the British coasts was one of the causes of the first Anglo-Dutch War in 1652. Id. at 155-57.

A parliamentary resolution of 1652 called for preparation of a declaration to assert the English right both to the sovereignty of the

seas and to the exclusive fishery therein. Exhibit 693, p. 409. (As shown previously, the Council of State thereupon ordered the translation and republication of Mare Clausum.)

In 1654, the Council of State granted a fishing license to a French fishing boat. Exhibit 586. Exhaustive research would doubtless reveal other licenses thus issued by the Council of State, the highest law-making power in England during the Commonwealth.

In 1660 the House of Commons passed a bill declaring the English right to control fishing in the English seas and adopting a number of regulatory measures, including the prohibition of trawling, whether by subjects or by foreigners, within eight miles of certain parts of the coasts. The bill failed to become law because of the dissolution of Parliament two days after it was sent to the Lords. Exhibit 693, pp. 443-44. Other clauses of the bill prohibited the use of certain types of nets on the coast "or within half seas over," or the use of seines by foreigners within 10 miles of any part of the coast to the hindering of English subjects in their fishing.

An act of the Scottish Parliament, passed in 1661, provided for the erection of fishing societies composed of Scottish subjects and enjoying an absolute monopoly of the export of fish. Id. at 444-45.

An act of the English Parliament in 1662 prohibited the use of certain types of nets between June 1 and November 30 within one

and one-half leagues of the coasts of the counties of Devon and Cornwall. Exhibit 693, p. 609; Exhibit 716, pp. 394-95; Exhibit 729, p. 179.

3. Legal Opinions

As stated previously, James I's proclamation of 1609, excluding unlicensed foreigners from fishing in the English seas, was preceded by an exhaustive legal inquiry culminating in a formal opinion of a committee of the Privy Council. Exhibit 693, pp. 145-48.

The opinion of Sir Julius Caesar, admiralty judge, likewise affirmed the crown's right to exclude or to license foreign fishermen. Exhibit 565.

Similarly, Charles I's exclusive fishing proclamation of 1636 was preceded by an exhaustive legal inquiry and the collection of legal precedents supporting the crown's right. Exhibit 679, pp. 230, 243-46; Exhibit 693, pp. 364-65.

In 1636 Charles I received a formal opinion from the Lords Commissioners of the Admiralty as to both the lawfulness and the expediency of his proposed fishing proclamation. The admiralty lords, after having received and studied an elaborate legal opinion of Sir Henry Martin, admiralty judge, declared their opinion "that the right and royalty of that fishing upon your majesty's coasts doth undoubtedly belong unto your majesty by inheritance, so you may justly prohibit or license all strangers at your royal will and pleasure." The lords made it clear that in their opinion the crown right of exclusive possession

pertained not only to the domains inherited by Charles from his father but also to "any other your dominions," that is, to possessions in the new world acquired during Charles' own reign. Exhibit 693, pp. 288-289, 726-64; Exhibits 223, 604.

Also in the 1630's Thomas Wentworth, Earl of Strafford, who was a famous lawyer and parliamentarian as well as a privy councillor and minister of the crown, rendered a legal opinion vindicating the king's exclusive right to the English sea fisheries, relying both on traditional English practice and on the contemporary practice of Russia, Sweden, Denmark and Spain. Strafford also pointed out that exclusive fisheries in England were owned by the proprietors of the adjacent coastal lands, and that ordinary fishermen bought licenses from those proprietors for fishing in their waters. Exhibit 595.

The Commonwealth also, before embracing the traditional doctrine of English ownership of the sea fisheries, commissioned a legal study and opinion, which came to be known as the Ryley Treatise. Exhibit 693, pp. 409-10; Exhibit 558.

In 1674 the Earl of Shaftesbury, who as Lord Chancellor was the highest legal and judicial officer in England, declared to Parliament the king's "dominion and property of his own seas," including the right to exclude or to license foreign fishermen, which Shaftesbury called "a royalty . . . inherent in the crown of England." Exhibit 693, pp. 506-07.

4. Other Official Pronouncements and Acts of State

In 1604, at the outset of his reign in England (and three years prior to the first American settlement at Jamestown), King James caused to be prepared a treaty of union between England and Scotland, which contained a provision preserving to each nation the fisheries to a distance of 14 miles from the coast.

> "This treaty was drawn up by commissioners appointed by the respective Parliaments, the most active of whom were Secretary Lord Cecil (afterwards Earl of Salisbury) and the illustrious Sir Francis (afterwards Lord) Bacon on the English side, and Lord President Fyvie and Sir Thomas Hamilton (later Earls of Dunfermline and Haddington) on the part of the Scots. It was signed by thirty-nine of the forty-four English and by twenty-eight of the thirty Scottish commissioners; it was approved by the king and adopted by the Scottish Parliament, and it was thus an instrument of high authority with respect to the delimitation of the waters of exclusive fishing. The clause in the treaty dealing with freedom of commerce contained the reservation referred to, which was as follows: 'Excepted and reserved to Scottishmen their trade of fishing within their lochs, firths, and bays within land, and in the seas within fourteen miles of the coasts of the realm of Scotland, where neither Englishmen nor any stranger or foreigners have use of fish, and so reciprocally in the point of fishing on behalf of England.'" Exhibit 693, p. 223.

The treaty never came into force, having been rejected by the English Parliament for reasons wholly unrelated to the reservation of fishing rights. Ibid. The draft treaty is an authoritative statement of what in 1604 was regarded as a reasonable limit of exclusive fisheries as between two nations of subjects of a single crown. It in no way implies, of course,

that James or his governments believed that the right to exclude foreign fishermen, such as the Dutch, was limited to 14 miles.

In 1609 -- two years after Jamestown -- the king in Council issued the famous proclamation asserting the English right to exclude or to license foreign fishermen in the English seas. Exhibit 221; Exhibit 693, pp. 139-55. Professor Thorne was unaware of the 1609 proclamation, but conceded that such an act taken by the king in Council had legal force. Tr. 2699. Professor Thorne was aware that the exclusion of unlicensed foreign fishermen was established English state practice in the 17th century. Tr. 2694.

The 1609 proclamation gave rise to a critical and protracted dispute with the Dutch, which brought forth many further official articulations of the British legal position in diplomatic negotiations and otherwise, as well as actual enforcement of the British claims, to the extent militarily possible, through patrolling the British seas and requiring foreign fishermen to accept licenses, which many of them did. See Exhibit 693, pp. 155-208; Exhibit 186, pp. 4, 12; Exhibits 596, 599, 600, 601, 602, 603; Selden, Mare Clausum, 469, 471. In 1616, for example, the Privy Council of Scotland gave detailed instructions for the collection of the assize herring from foreign fishermen "in his majesty's seas." Fulton, op. cit. at 757-58.

French as well as Dutch fishermen requested and received licenses. Exhibits 600, 603. In 1618 the Dutch asked whether the

British rights could not be liquidated by a lump sum payment, to which the British ambassador answered that this would be inappropriate since the right to exclusive fisheries in the British seas was a "royalty" of the crown. Exhibit 601, p. 4. In 1619 the dispute in its most aggravated form was put to rest when the Dutch government agreed to order Dutch fishermen not to come within sight of land of the British coasts, a distance which under Scots law, as we have seen, was reckoned as 14 miles. Exhibit 693, pp. 193, 604; Fulton, op. cit. at 201; Beaujon, The History of Dutch Sea Fisheries 470 (1883). Since the principal fisheries were located just off the British coast, the Dutch withdrawal beyond the line of sight represented a major triumph for the British position.

In 1618, at the request of the King of Denmark, the king and Privy Council of Scotland issued a proclamation forbidding Scottish fishermen to fish in the waters of the Faeroe Islands and directing them to leave those fisheries to the subjects of the king of Denmark as sovereign of those islands, "conform[ably] to the law of nations." Fulton, op. cit. at 175-76. This episode demonstrates that the British insistence on exclusive fisheries in British waters was no mere power-play but was based on a principled view of a legal right which the crown was willing to accord to other nations in their waters just as the crown insisted on it in British waters.

Early in his reign, Charles I conceived a project of a great fishing corporation, comprising both Scots and English, which would have

a monopoly of fishing in all the British seas. This project led to a fascinating dispute between England and Scotland, deriving from the Scottish government's insistence that the "reserved waters" of Scotland should not be shared with English subjects. Scotland claimed an exclusive right not only out to the 14 or 28 miles which we have so frequently encountered, but to the middle of the seas between Scotland and each opposite shore. England, of course, heartily agreed that foreigners should be excluded from all the British waters, but maintained that the right to charter or to license fisheries in those seas belonged to the crown, not to the Scottish Parliament or burghs. The dispute gave rise to many official declarations and acts on both sides, all of which held in common that the sea fisheries were British property to the exclusion of foreigners. Eventually the crown claim prevailed on most points, though certain limited waters remained reserved to the Scots, and the fishing society was chartered and approved by the Scottish Parliament. Exhibit 679, pp. 237-38, 384; Exhibit 693, pp. 216-40; Exhibit 777, pp. 363-65; Exhibit 779.

In 1636 Charles I, by formal proclamation of king in Council, confirmed and reiterated the crown right to exclude or to license foreign fishermen in the British seas. Exhibit 222. (A draft of the proclamation referred to the crown's right to exclusive fisheries as a "regality." Exhibit 570.) Thereafter, until necessarily diverted by the outbreak of the civil war, the navy systematically patrolled the fishing grounds,

primarily in the North Sea, and required foreign fishermen to accept and to pay for licenses. Exhibit 186, pp. 24-27, 70-73; Exhibits 574, 575, 576, 577, 578, 579, 583, 605, 606, 607, 608, 676; Exhibit 679, pp. 51-52, 303; Exhibit 693, pp. 288-89, 300-03.

The Commonwealth and Protectorate governments insisted, no less than had the Stuart kings, on the ownership of the fisheries in the British seas. In 1653 the Commonwealth proposed that the individual licenses to Dutch fishermen be replaced by regular semi-annual payments by the States General of the Netherlands. Exhibit 598. The Council of State issued licenses to French fishermen in 1652, Exhibit 620, and to Swedish fishermen the following year. Exhibit 693, p. 427.

The restoration brought no change of policy regarding the fisheries in the British seas. Exhibit 693, pp. 441-45. Charles II licensed a royal fishery company as his father had done, being careful to exclude it from areas where the fisheries were "already granted appropriate or belonging to some other particular or private person or persons bodies politic or corporate." Exhibit 179, pp. 196, 200; see also Exhibit 444. Licenses were issued to the Dutch, Exhibits 587, 588, 589; to the fishermen of the Spanish Netherlands, Exhibits 591, 611, 612; and, in James II's reign, to the French. Exhibits 593, 594. Foreign fishermen not possessing licenses were driven off. Exhibit 592; Exhibit 673, pp. 40-41 n. [c].

We must now return to the beginning of the 17th century for a brief discussion of the "Greenland" whale fishery, which was practiced in waters far to the north of Britain, principally around the islands now called Spitzbergen, but also westwards from there as far as the coasts of Greenland itself and of North America. It will be remembered (p. 42, supra) that the exclusive fishery in these waters fell within the charter rights of the Muscovy or Russia Company, chartered by Mary I and confirmed by act of Parliament under Elizabeth I. The English and the Dutch began whale fishing in "Greenland" waters at about the same time and each claimed an exclusive right therein -- the Dutch on the ground that a Dutch admiral had discovered Spitzbergen in 1596, the English on the basis of a claim to sovereignty and possession of the Spitzbergen Islands and on the ground that English ships had first fished for whales in those waters. Exhibit 693, p. 193; Exhibit 775, pp. 43-44; Beaujon, The History of Dutch Sea Fisheries 465-67 (1883); Fletcher, "John Selden (Author of Mare Clausum) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 8 (1962).

The Greenland fisheries dispute occasioned Grotius' visit to England as a commissioner on the part of the States General, and according to Fletcher furnished the occasion for Selden's writing Mare Clausum in 1618. The controversy is of particular interest for the present proceeding in that most or all of the "Greenland" waters would not have been regarded as part of the English seas prior to the

16th century. England's claim to these fisheries on the basis of alleged sovereignty of the nearest land mass, the Spitzbergen Islands, and on the ground of discovery and initiation of the fishery there, is obviously closely analogous to the contemporaneous English assertion of sovereignty and exclusive fishery in the waters adjacent to the English discoveries and colonies in North America. Indeed, as stated, the "Greenland" waters themselves extended to the North American coast. 2 Stock, Proceedings and Debates of the British Parliaments Respecting North America 40 n. 65 (1927).

In 1613 the Muscovy Company applied for and received a charter from James I specifically confirming its monopoly of "this new trade of whale-fishing," to the exclusion of both English and foreigners. Exhibit 777, p. 53. The company, when it could, cleared the whaling grounds of intruders, both English and foreign. Exhibit 775, p. 44. At times the company's income appears to have included fees from foreigners licensed to enter the whaling grounds. Exhibit 777, p. 54. The whaling rights were sold by the company in 1622 to a new enterprise known as the Greenland Adventurers. Id. at 58-59. The monopoly was questioned in Parliament in the 1620's as to its exclusion of other Englishmen, but was maintained nonetheless, and was enforced by the requirement and forfeiture of bonds by non-members of the company entering the Greenland whaling grounds without license. Id. at 70-71; Exhibit 750, pp. 81-83. The monopoly was confirmed by the navy committee of Parliament in 1645,

Exhibit 777, p. 72, and again in 1657 as to the most desirable fishing grounds, though certain less desirable grounds were opened to others. Id. at 73-74; Exhibit 776, p. 250. The monopoly was abolished by act of Parliament in 1672, but was restored by the same authority in the reign of William III. Exhibit 777, pp. 74-75.

The Tobago Company, in the reign of Charles II, had as one of its assets two-thirds of the benefit of a patent "for taking up wrecks out of the sea and fishing for pearl and ambergris." Exhibit 778, p. 416.

Admiralty instructions during the reign of Charles I demonstrate that among the duties of the navy were not only the seizure of foreign fishing boats lacking licenses but also the enforcement of regulatory measures for the better preservation of fish, such as prohibition of trawling. Exhibit 679, pp. 51-52, 303.

Throughout the century, the navy patrolled the English coast to prevent foreigners from taking any oysters or lobsters from the coastal waters. Exhibit 677, pp. 282, 289, 291, 299, 312, 313, 318, 324, 493; Exhibit 678, pp. 127-28; Exhibit 679, p. 479.

5. Legal Treatises of the Period

Most of the important writers of the period have already been discussed in connection with their general statements on sovereignty of the seas, and we need do little more than list here the principal writers who asserted and justified the crown's exclusive right to the fisheries in the British seas.

William Welwood. Exhibit 209; Exhibit 690, pp. 174-75; Exhibit 693, pp. 352-55. Welwood justified his position not on the basis of any particular English or Scottish tradition or prescription, but on the general doctrine that coastal sovereigns have exclusive rights in the fisheries of their adjacent seas. That doctrine, in turn, he justified by what remains today the principal and most persuasive reason for the exercise of control by coastal states over marine and seabed resources: the risk of exhaustion of the resources from promiscuous and unregulated use.

Sir John Boroughs. Exhibit 175. Boroughs, like so many others, referred to the crown's prerogatives in the English seas, including the exclusive right to the fisheries thereof, as "royalties." Id. at 45. Boroughs emphasized the need for jurisdiction in the seas in the sense of legislative authority, and made it clear that in his view the legislative authority in the English seas was no less extensive than on land.

Lord Hale. Hale's work De Jure Maris is probably the most authoritative and most often-cited authority on the English law of fisheries and the seabed of all time. The essence of his doctrine may be briefly quoted:

> "The king's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow.

> "1st. The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown . . . .
>
> "But though the king is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty." Exhibit 194, p. 11.

See also Moore, op. cit. at 347, quoting Hale's draft treatise: the king may impose "restraints of fishing by proclamation upon the sea, . . . but until such inhibition it is free for every subject to fish there." Hale gives various examples of exclusive fisheries created by the crown in portions of the sea. Ibid.

John Selden, also, wrote at length in support of the crown ownership of the fisheries in the English seas, with primary emphasis on the crown's right to exclude or to license foreign fishermen. Selden relied heavily on the historical evidence showing that England had maintained and exercised that right in the past, and based his position largely on a doctrine of prescription, appropriation or occupation. It was necessary for him to do this because of his insistence that the English ownership extended all the way to the coasts of the opposite countries, at least to the south and the east. Obviously no general claim of territorial waters as a necessary concomitant of the land sovereignty of any state could justify giving England the entire English Channel and North Sea and nothing to France or Holland.

In that sense Selden's doctrine, as has often been pointed out, was "extreme"; but it was not extreme in any other sense, and certainly not in its insistence that territorial waters were part of the realm and that the sovereign exercises there all the powers which he has on land. Among the writers of this period, Selden is unusual in the emphasis which he placed on prescription or appropriation. The more common tendency, and that which eventually prevailed, was to regard territorial waters as belonging to any coastal state, by virtue of its land sovereignty. It is natural, therefore, to find that those British writers who did not insist on ownership of the entire English Channel or North Sea, but who rather spoke in terms of ownership to the midpoint of those seas, or to a fixed distance (usually 100 miles), said little of appropriation and spoke much more of the doctrinal and practical reasons for territorial waters as a corollary of sovereignty and ownership of coastal land. Many writers combined the two themes: general considerations are used as the basis for a uniform belt of territorial waters which every sovereign could claim; superimposed on those considerations is the special English title based on tradition, prescription or occupation. Indeed Selden himself took this view; he asserted English sovereign rights in North American waters on the basis of discovery and symbolic acts of sovereignty over the land, and expressly denied that possession or occupation was necessary (pp. 190-92, infra).

Gerard Malynes. Exhibit 197. Malynes affirmed the crown's ownership of the fisheries in the four seas of England, as opposed to those of the "main ocean seas." Exhibit 197, pp. 185-86, 190.

Charles Molloy. Exhibit 726. That influential writer (see p. 74, supra) gave the following concise definition of a prince's rights over fisheries in his adjacent seas:

> "not only the regality of the fishing for pearl, coral, amber, etc. but likewise the advantage of all fish royal, as whales, sturgeon, etc. and not only those, but also the direction and disposal of all other fish, according as they shall seem to deserve the regards of the public." Exhibit 726, p. 119.

Sir Philip Medows. Exhibits 202, 725. Medows relied primarily not on any prescription by England, but on the general doctrine that a coastal sovereign has, by virtue of that sovereignty, rights both of sovereignty in his adjacent seas and property in the fishing thereof. Medows defined the right to the fishery as follows:

> "All foreigners are excluded by virtue of such dominion [of the coastal sovereign]. . . from a right of fishing within those seas, without special license first obtained from the lord of the seignory, and under such conditions and considerations as he shall think fit. The reason is, because this is the patrimonial property of his crown, and the fishery is in a manner all the profit that his great sea territory yields him. The dominion of the sea, without an appropriate fishing, is as if a vineyard should be a property, but the grapes common. Or like an estate or possession of land, vested in one, to the use of another, and such we had many here in England, till a good statute executed the possession to the use, and so conjoined what ought not to have been divided. Nor can it be alleged

> that a promiscuous fishing in the sea is of no damage to the proprietor, for admitting the multitude of fish to be so great, as to suffice all men's use, which is not always true, yet this will abate the price of the market for sale, nor can the fishery be farmed out, if occasion be, at so good advantage." Exhibit 202, pp. 7-9.

Henry Stubbe. Exhibit 693, pp. 496-97. Stubbe (a political rather than a legal writer), writing in 1672 under a commission from the crown, mentioned the regality of fishing for pearl, coral and amber as among the exclusive crown rights of property in the British seas.

6. Modern Commentators

No modern authority whom we have encountered has denied the crown ownership of the English sea fisheries under 17th-century English law and practice. Among the principal writers who have affirmed and documented that ownership are Fulton, Moore, Elder, Chitty, Potter and Fenn, all of whose works have frequently been cited in this proceeding.

In this proceeding, Professor Thorne, one of the witnesses for the United States, agreed 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." Tr. 2702.

7. Acquiescence by Other States

In 1637 the Spanish government conceded both English sovereignty in the English seas and the crown's right to license foreign fishermen therein. Exhibit 609. As we have already seen, nationals of many

countries accepted and paid for English licenses to fish throughout the 17th century. While the Netherlands government contested the English right to exclude or to license Dutch fishermen in principle, in practice that government acquiesced in major part to the English position by agreeing to keep its fishing boats away from the coastal areas where the principal fisheries were located (p. 90, supra).

A number of modern writers believe that in 1636 the Dutch government purchased an exemption from licenses by paying £ 30,000 to the English crown. E.g., La Pradelle, 5 Revue Générale de Droit International Public 264 (1898), reprinted in Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 187 (1919); Colombos, The International Law of the Sea 55 (6th rev'd ed.); Sabine, Report on the Principal Fisheries of the American Seas 224 (S. Doc. No. 22, 32d Cong., 2d Sess. 1853). Though Fulton doubted this, op. cit. at 311, he admitted that the Dutch themselves later acknowledged having paid 20,000 or 30,000 florins. Ibid.

A treaty of 1656 between Sweden and England granted to Swedish subjects the liberty "to fish and catch herrings and other fish in the seas and on the coasts which are in the dominion of this [the English] republic, provided the ships employed in the fishery do not exceed a thousand in number." 4 Parry, Consolidated Treaty Series 127, 149.

A treaty of 1661 between Great Britain and Denmark, signed at Whitehall, gave to the subjects of each country most-favored-nation treatment with respect to fishing in the waters of the other and tributes, tolls and duties levied thereon. 6 Parry, Consolidated Treaty Series 234, 247-48 (Article XIII).

C. The Admiralty Jurisdiction Was Territorial in the English Seas, Was an Attribute of Sovereignty, and Included Jurisdiction over Foreigners.

1. Court Cases

It is beyond rational dispute that in the 17th century the English admiralty jurisdiction was regarded as territorial in the English seas and as an attribute of English sovereignty over those seas. The realm consisted of the bodies of counties and of the territorial sea; the common law courts had jurisdiction over the first, and the admiralty courts, in exactly the same sense, over the second. Parliament had legislative jurisdiction, and the crown executive jurisdiction, over both. The civil and criminal jurisdiction of admiralty in the English seas extended to foreigners in those seas as well as to English subjects, just as the jurisdiction of the common-law courts did on land.

These propositions are fully documented by Sir Leoline Jenkins' charges to admiralty juries which comprise Exhibit 762. The admiralty territorial jurisdiction is squarely based upon, and deemed coextensive with, the "sovereignty of our kings in the British ocean." Id. at lxxxvii. No distinction is made between English subjects and foreigners with respect to those whose activities in the English seas are to be investigated and regulated. Foreigners are singled out for special scrutiny and prosecution with respect to the crimes of fishing in the English seas without license and refusal to give the flag salute. Id. at lxxxviii. At pp. xc-xci a clear distinction is made between the territorial jurisdiction of the admiralty in the four English seas, which is exclusive, and the

non-territorial jurisdiction over piracy anywhere in the world, which is non-exclusive. See also Tr. 151-52. At p. xcv the king's "ancient right of the flag upon his four seas" is again specified as a subject of the admiralty's territorial jurisdiction over foreigners. At p. xcvi jurisdiction is asserted over foreign men of war breaking the king's peace within the four seas, and all these attributes of territorial jurisdiction are identified as "emanations of his majesty's sovereignty in these seas." Finally, mention is made of enforcement of the various statutes and ordinances regulating the fisheries, prohibiting or restricting certain methods of fishing, establishing seasons both for surface fish and for oysters, and prohibiting the taking of young fish. Ibid. See also O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 312 (1971).

In the nature of things the admiralty jurisdiction over foreigners was exercised only infrequently, since the English government would have no practical concern, for example, with crimes committed by foreigners against one another on foreign ships passing through the English seas. However, the available evidence is sufficient conclusively to establish that foreigners were prosecuted and convicted in admiralty, for crimes having nothing to do with piracy, when the occasion arose, and that this was considered in no sense irregular or unusual. Professor Horwitz has gleaned from Jenkins' papers one clear case, and one probable case, of prosecution of foreigners during the 17th century. Tr. 164-66. In addition, research commissioned by the Common Counsel States during this

proceeding has unearthed hitherto unpublished documents demonstrating the indictment, trial and conviction of a number of foreigners for crimes other than piracy committed in the English seas. Exhibits 621 through 629. See also 2 Yale (ed.), Lord Nottingham's Chancery Cases (79 Publications of the Selden Society) 464 (1961).

If Lord Cockburn had known of these documents in the 19th century, he could never have taken the position he did in his opinion in Queen v. Keyn. Professor Wroth cannot make the same excuse, since the documents were made available to him. His insistence on turning a blind eye to the evidence (Tr. 2786-88), and maintaining in spite of everything that he knew of nothing to show that the admiralty jurisdiction was ever exercised over foreigners, was hardly calculated to enhance respect for his testimony in general.*/

2. Acts of Parliament

It does not appear that there were any acts of the English Parliament during the 17th century dealing with the admiralty jurisdiction.

However, in 1681, the Scottish Parliament enacted a jurisdictional statute making it clear that as to maritime causes, whether civil or criminal, the high admiral had jurisdiction over both "natives and strangers" in the seas "within this realm." Exhibit 172, p. 124; Tr. 163.

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*/ Plaintiff continues to maintain a deafening silence concerning these conclusive records. Plaintiff's discussion of the evidence for criminal admiralty jurisdiction over foreigners in the 17th century (Pl. Br. 71-77) simply ignores their existence.

3. Other Official Pronouncements and Acts of State

The forms of admiralty commissions make the territorial nature of the jurisdiction clear. The title "admiral of the narrow seas" was used during Charles I's reign. Exhibit 679, p. 51. The record contains a number of admiralty commissions from later in the century, conveying jurisdiction over "our seas" and specifying particular British possessions, including those in North America, to whose seas the jurisdiction also extended. Exhibits 641, 642.

Evidence in the record confirms that throughout the century the duties of the admiralty included the exclusion of unlicensed foreign fishermen from the British seas, the enforcement of regulatory measures with respect to both surface and sedentary fisheries against subjects and foreigners alike, and the policing of improper conduct by foreign ships, including warships, in English waters. Exhibits 676, 677, 678, 679.

4. Legal Treatises of the Period

Lord Coke plainly believed that the admiralty jurisdiction was territorial, since in the fourth part of his Institutes he set forth the document De Superioritate Maris and accepted it as authoritative. It cannot be denied that that document states a territorial and exclusive view of the English admiralty jurisdiction in the English seas, since the whole question at issue was whether a French admiral had the right to exercise any jurisdiction there. Exhibit 183, p. 142. See also Exhibit 160, p. 155.

Hale plainly regarded the admiralty jurisdiction as territorial: "the narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not"; "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." Exhibit 194, p. 10. See also Exhibit 160, pp. 86-88, 147.

The United States will presumably not deny that Selden viewed the admiralty jurisdiction as territorial, exclusive and extending to foreigners; so we shall refrain from documenting the point unless it should be denied.

John Exton, who was an admiralty judge, regarded the admiralty jurisdiction, civil and criminal, over the British seas as identical to the jurisdiction of land governors over the land. Exhibit 685, p. 10; Tr. 150-51.

Godolphin, also admiralty judge, regarded the admiralty jurisdiction as one of the regalia (Exhibit 695, p. 38), and described its subject matter at considerable length (id. at 43-48). He declared that the jurisdiction was both civil and criminal (id. at 48) and extended to foreigners in the British seas (ibid.), and that England possessed legislative as well as judicial and executive authority over the British seas (id. at 57).

Molloy declared, "as it is incumbent on a prince duly to execute justice in his kingdoms by land, so the sea being his territory, it is requisite and a necessary effect of his dominion, that he cause justice to be administered in case of maritime delinquency." Exhibit 726, p. 120.

Molloy specified that, while piracy committed in seas belonging to no one could be punished by anyone, piracy committed in the English seas could be punished only by the crown of England. Id. at 83.

Medows, likewise, regarded the crown as possessing "the sole marine jurisdiction within those seas", that is, "the seas of England." Exhibit 202, p. 7.

Zouche, admiralty judge, made a clear distinction between the territorial jurisdiction of admiralty in the English seas and the non-territorial jurisdiction over English subjects elsewhere: the jurisdiction "over the seas of England, and Ireland, and the dominions and isles of the same . . . are limited and determined in those seas," while the jurisdiction over English seamen and other persons "hath no bounds, but extends to the Mediterranean, African and Indian seas, or any others far remote." Exhibit 212, pp. 17-18.

Even Professor Wroth admitted at one point during cross-examination, Tr. 2757-58, that the admiralty jurisdiction was regarded as territorial, each sovereign exercising it in his own sea.

## D. The Crown Owned the Seabed and Subsoil of the English Seas and the Resources Thereof.

### 1. Court Cases

In the Case of the Royal Fishery of the Banne in 1610, England's highest court, the Privy Council, took it as established law that the crown owned the English seas and the seabed thereof as property, and reasoned

from that established law that the crown also owned the waters of navigable rivers and the soil thereof.*/ The court declared as follows:

> "The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; 22 Ass. p. 93. 8 Ed. 2. Fitz. Coron. 399, and the sea is not only under the dominion of the king (as is said 6 R. 2. Fitz. Protect. 46. The sea is of the ligeance of the king as of his Crown of England;) but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, Dyer 15 Eliz. 226. b. 22 Ass. p. 93. Also the king shall have the grand fishes of the sea, whales and sturgeons, &c. which are royal fishes, and no subject can have them without the king's special grant, Praer. reg. c. 11. Stamf. 37, 38. Bract. lib. 3. c. 3. 39 Ed. 3. 35. a. and the king shall have wild swans, as royal fowls, on the sea and branches of it; the case of swans, 7 Co. So wreck of the sea is a royal perquisite, 5 Co. 107. Sir Hen. Constable's case. And for this reason before the statute of 18 Ed. 3. no subject could pass over the sea, without the king's special license; but there it is enacted, that the sea shall be open to all merchants. And all port and havens, which are ostia et januae regni, appertain to the king, because he is custos totius regni; and F. N. B. 113 a. the king ought of right to save and defend his realm, as well against the sea, as against his enemies. And that the king hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath in alto mari, is manifest by several authorities and records. Exhibit 157, p. 38.

In the case of Attorney General v. Philpott, decided by the Exchequer bench in 1632, the doctrine of the Banne case was repeated and confirmed.**/ The issue concerned certain houses and wharves erected between high- and low-water marks on the River Thames in London.

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*/ It is striking that Plaintiff's Brief never mentions this case.

**/ Professor Thorne was obviously confused about this case at Tr. 2676-79.

It therefore dealt with the foreshore; and Moore, who opposed the prima facie theory of the foreshore, criticised the decision and pointed out certain differences or doubts among the judges. Moore, op. cit. at 265-66. Neither Moore nor any of the judges, however, expressed any doubt concerning the crown's ownership of the soil of the sea, which was the first premise from which the court's theory of the case proceeded.

The Attorney General's information claimed the Thames as being an arm of the sea and a navigable royal port, and reasoned from the crown's ownership of the river as an arm of the sea to the then-controversial theory that the crown also owned the soil of the foreshore. Exhibit 728, p. 262. The court held unanimously in favor of the crown. Id. at 263. The opinion of Baron Denham followed precisely the reasoning of the Privy Council in the Banne case: "The king has interest in a navigable river as high as the sea flows and re-flows in it, and the reason is, because such river partakes of the nature of the sea, and is called an arm of the sea as high as it flows, and the king has the sole interest in the soil of such rivers." Id. at 264. Davenport, Chief Baron, added that "if an island riseth in the sea, it does not belong to the occupier, but to the king," ibid., showing his agreement with Denham that the crown owned the bed of the English seas and therefore owned the soil of navigable rivers. The decree in the case is set forth in full at Moore, op. cit. at 896-907. It is a clear decree in favor of the crown, and holds that the land in dispute belonged to the king "as parcel of the same port [of London] and his inheritance of the crown of England." Id. at 902. The court's holding

extended to "any navigable river or port," ibid.; and as we have seen, the opinions made it clear that the crown owned the soil of navigable rivers by analogy to its undoubted ownership of the bed of the sea.

The case of Rex v. Oldsworth, decided by the Exchequer Court in 1637, followed the law declared in the Banne and Philpott cases. At issue was the ownership, as between the crown and the owners of a coastal manor, of derelict lands left by the sea adjacent to the manor. The owners claimed these lands by custom and by prescription. Moore, op. cit. at 292 et seq. The Attorney General's argument was straightforward: the crown owns the British seas and the soil thereof, and since the crown owned the land in dispute when it was under the sea, it still owns it after its emergence therefrom. Id. at 295-300. The Attorney General contended that prescription does not run against the crown. Id. at 299-300. While he argued that the crown owned the seabed as a part of the prerogative, he plainly regarded the prerogative as a part of the common law, and dealt with the case as a perfectly conventional dispute over title to real property, to be governed by the common law as opposed, for example, to local custom. Ibid.

The court held unanimously in favor of the crown. Baron Weston's opinion shows that the defendants had relied on Bracton, Britton and Justinian as authorities for the freedom of the seas; but Weston held that those Roman-law authorities were overcome by Selden's doctrine and by the established English law that the sea is not free for fishing to foreigners. Disagreeing with the Attorney General, Weston held that in principle

prescription might lie against the king, but that facts sufficient to show prescription in the case at bar had not been made out. Weston regarded the Philpott case as establishing that the crown owned submerged land in ports (actually the holding, or at least the ratio decidendi, was broader; see pp. 109-10, supra) and reasoned from that holding that the king likewise owns submerged lands outside ports, since he "can increase or diminish the ports at his pleasure." Id. at 300.

Baron Trevor held in a straightforward fashion that submerged lands belong to the king while still under water, and that nothing had been shown sufficient to take the title from him when the lands at issue emerged from the water. Trevor's view is clear that the crown's ownership is part of the common law ("our law," id. at 302); he is equally clear that the king's ownership of submerged land is part of the prerogative. Ibid.

Professor Thorne indicates considerable confusion about the Oldsworth case. He asserts (Tr. 2453-54) that Baron Weston must have believed that the property was ownerless before its emergence from the sea, and gives as his reason that Weston discussed the question of prescription. This is an utter non sequitur; see Tr. 2715-20. As Weston himself pointed out, prescription is a title which overcomes a pre-existing title; Weston's words were: "prescription . . . ought to lie [if it lies at all] against the king, and this plainly shews that, if such prescription was not [made out in fact], the king is to have the property." Moore, op. cit. at 300.

Professor Thorne repeatedly argues (e.g., Tr. 2720) that anyone who regarded derelict lands as belonging to the crown by the prerogative must necessarily believe that the lands were ownerless while still under water. This contention is fully refuted by Baron Trevor's opinion, which declared both that crown ownership was by the prerogative and that "as the land 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." Moore, op. cit. at 303. Professor Thorne is on completely unsound ground in apparently assuming that, merely because things subject to such admiralty droits as flotsam were regarded as ownerless until the king's ownership attached, the same was true of everything which the king owned by his prerogative. An obvious example to the contrary -- and one which is mentioned by Baron Trevor, id. at 302, as analogous to the crown ownership of submerged lands -- is the case of royal mines, which were never "ownerless."

We submit, therefore, that the contention repeatedly made by both Professors Thorne and Wroth, that the "prerogative" theory of crown ownership of derelict lands is inconsistent with crown ownership of the bed of the sea, is wholly unsound and quite foreign to the legal thinking of the 17th century. In any event, even were the professors correct, their argument would avail the United States nothing in this proceeding. It is conceded by all sides that the crown's ownership attached, at the latest, as soon as the land or anything of value therefrom emerged or was taken from the sea; and that is entirely adequate to sustain the position of the Common Counsel States in this proceeding.

In the Ship Money Case (Rex v. Hampden), several of the arguments and opinions mentioned the king's ownership in property of the English seas, and the soil and profits thereof. See pp. 53-58, supra.

In the case of Johnson v. Barrett, decided by the Court of King's Bench in 1646, it was disputed whether the crown owned a dock erected on the foreshore, "but it was clearly agreed that if it were erected beneath the low-water mark, then it belonged to the king." Moore, op. cit. at 310-11; Tr. 217-18.

As Professor Thorne admitted (Tr. 2681-82), in those cases relating to the foreshore or to derelict lands in which the crown was unsuccessful the winning argument against the crown was always based on either prescription, custom or a specific title derived from the crown by grant. (An example is the case involving the Lord Berkeley; see Moore, op. cit. at 306-09.) Professor Thorne conceded that none of these cases involved a denial that the king owned the seabed of the English seas. Tr. 2681-82.

In the case of Whitaker v. Wise, in 1671, the crown's lessee prevailed in a case regarding the ownership of land gained from the sea. Moore, op. cit. at 415-16. The court regarded the Philpott case, pp. 108-10, supra, as authoritative.

In Bulstrode v. Hall, in 1674, a King's Bench case, "it was frequently affirmed, and no one denied, that the soil of all rivers as high as the sea ebbs and flows is in the king and not in the lords of manors etc. without prescription." 82 English Reports 1024 (1908).

In Attorney General v. Farmer, in 1676, the defendant claimed derelict lands on the basis of a royal grant of the adjacent manor and of all grounds "which hereafter should be recovered from the sea." Moore, op. cit. at 417. Both parties agreed that the soil of the sea belonged to the king while it was still covered with water. Exhibit 159; Tr. 143-44. The Court of King's Bench held for the crown on the ground that the words of the grant were too vague. Moore, op. cit. at 417. Professor Thorne contends that in this case the crown argued that the king did not own the land at the time of the grant. Tr. 2459. This is questionable: the crown expressly argued that "the sea is the soil of the king," Exhibit 159. In the alternative the crown argued -- and this is the argument which Professor Thorne seems to be referring to -- that "it is only a possibility, and therefore void; as if the King grants land when it shall escheat, it is a void grant." Exhibit 159. It seems clear enough that this argument referred to the language of the grant -- land "which hereafter should be recovered from the sea" -- as an attempt to create "a freehold to commence in futuro, which the law permits not." Exhibit 159. So construed, the argument is not at all inconsistent with the view that the crown owned the land while it was still under water, and could have conveyed it by a properly worded grant. In any event, if the crown did argue as professor Thorne believes it did, the argument

was plainly wrong: "it is to be observed that the argument that the King had not the land in him to grant was untrue, for he has the soil of the sea by his prerogative, and may grant it to a subject." Moore, op. cit. at 417-18.

No English case which we have encountered either before, during or after the 17th century has ever made any distinction with respect to ownership (or susceptibility to ownership) between the soil under the open sea and the soil under the arms of the sea, bays and tidal rivers. The English doctrine has always been that these waters, and the soil under them, are identical in their legal nature: they all partake of the nature of the sea, which is defined as all waters where the tides rise and ebb. Thus in English law, the sea extends juridically from the outmost bounds of English waters, as they have been defined from time to time, to the point on rivers where any perceptible tide disappears. And as to all these tidal waters, the law of England has at all times been that the ownership of the soil under them is vested in the crown by the common law except where a subject may claim title by grant from or prescription against the crown. No soil under any tidal waters within the realm of England, including its territorial seas, has ever been regarded in English law as ownerless or unsusceptible of ownership.

2. Other Official Pronouncements and Acts of State

The Reglement for Preventing Abuses in and About the Narrow Seas and Coasts, promulgated by Charles I in 1634, asserted the "property" of the crown in the four English seas. Exhibit 569, pp. 759, 760.

Professor Thorne conceded that the crown's exclusive ownership, as against foreigners, in the English seas extended both to the sedentary fisheries thereof and to the mineral resources, and that any English court would have so held if a case had come before it. Tr. 2709-10, 2712-13. This concession is entirely adequate to establish the position of the Common Counsel States in the present proceeding, without regard to the academic distinction Professor Thorne seeks to draw between crown ownership of the seabed while still covered with water and the undoubted crown ownership -- which no one ever questioned -- of anything of value that emerged or was extracted therefrom.

There is no doubt that, throughout the 17th century, the crown claimed title to the soil of lands reclaimed from, or left derelict by, the English seas, and habitually granted or sold such lands to others. Exhibits 215, 216, 217, 218, 219, 220, 230, 231, 234, 644, 645, 647, 648, 649, 650, 651, 652, 653, 654, 655; Tr. 144-45; Moore, op. cit. at 420-26. Exclusive oyster fisheries in the sea were likewise granted (Exhibits 226, 227; Moore, op. cit. at 416-17, 418 n. 1), as were salt pans, probably on the foreshore. Exhibit 777, pp. 468-70.

The deed of Dunkirk by Charles II to France in 1662 included the submerged lands in the Channel off the coast. U.S. Exhibit 4, p. 33.

"In 1669 the Earl of Bath and others petitioned the king for a grant of all lands overflowed by the sea in the counties of Denbigh and Flint, with all mines and minerals which shall be found there...." Moore, op. cit. at 415. (Emphasis added.)

Undersea mining for coal was already well known and of practical importance in Britain by the early 17th century, when Sir George Bruce's mines extended for a mile under the Firth of Forth. The undersea mines at Whitehaven, in Cumberland, owned by the Lowther family, were important by the early 18th century. The Lowthers had grants from the crown to the foreshore of their Whitehaven property, obtained during the reign of Charles II. Exhibits 190, 195, 196; Moore, op. cit. at 415, 418. Plaintiff's argument (Pl. Br. 96-97) that these mining activities took place in the subsoil of "inland waters" is far from the mark, since English law never made any distinction with respect to property rights between such waters and the open sea. Moreover, to regard such major arms of the sea as the Firth of Forth

and Solway Firth as inland waters, as contemporary international law may or may not do, is wholly anachronistic when applied to 17th-century Britain, which knew nothing of such a concept.

Among the known, exploited resources of the English coasts and coastal waters in 1700 were amber, ambergris, copperice, jet, pearls, fine pebbles and flint. Exhibit 460, p. 373.

About 1666 an island rose in the sea at the mouth of the River Humber. Ownership was asserted and exercised by the crown, which leased the property out to others for many years. This "is a clear instance of the unquestioned right of the Crown to islands rising in the sea," which of course was a corollary of the crown's ownership of the seabed while still under water. Moore, op. cit. at 414.

3. Legal Treatises of the Period

Robert Callis, writing in 1622, had no doubt that the king owned in property both the water and the soil of the English seas, and had the exclusive right to the profits therefrom whether real or personal, and that this ownership and right were part of the common law of England. Exhibit 680, p. 39. The king's ownership "must needs be by the common law of England; for no law gives the king any soil, but only the common law of England." Id. at 42. Callis repeatedly affirmed, e.g., id. at 45, 47, that the seabed "was the king's when it was covered with waters."

Professor Thorne argues (Tr. 2458) that Callis did not really believe this, because he regarded it as "very disputable whether grounds before they be relinquished by the sea, may be gained by charter and grant from the crown." Exhibit 680, p. 53; see also Tr. 2721-25. Callis immediately went on to resolve his doubt: "I suppose they may." Whatever the reason for the doubt, it cannot be the one Professor Thorne advances, in view of Callis' repeated affirmation -- with no doubt expressed -- that the king does own the bed of the sea. The probable reason

for the doubt is that Callis questioned whether an ordinary subject could hold title to submerged lands;*/ and it is significant that Callis immediately goes on to affirm that a palatine can hold such ownership. Exhibit 680, p. 54. It also seems likely that Callis' skepticism concerning title in subjects to submerged lands based on "charter and grant" was related to the legal situation of the time, when subjects were habitually relying on fictitious, hypothetical or "presumed" grants in attempts, often successful, to defeat the crown's title. In any event, there is no way to impeach the express authority of Callis for the ownership by the crown of the seabed and the English seas and of the sedentary fisheries and mineral resources thereof.

Sir John Boroughs maintained that the king has rights of ownership in the English seas extending to all things floating on the water or lying on the soil thereof. Exhibit 175, p. 92.

Selden, of course, held that the crown owned the seabed of the English seas, and made specific reference to sedentary fisheries, pearls, coral and mineral resources of the seabed as among the subjects of crown ownership. Tr. 135-36; Exhibit 739, pp. 73, 77; Fulton, op. cit. at 372. He adhered to the conventional terminology in referring to the

*/ That this was what was on Callis' mind is further suggested by Exhibit 194, pp. 31-32, where Hale deals with the question of whether an ordinary subject could possess a proprietary interest in the sea. Hale's opinion is that in general he cannot, because he does not have the type of power necessary to exercise such rights of ownership, but that he may acquire and hold title to a particular limited part of the seabed contiguous to the shore.

crown's ownership of the sea and seabed as among the royalties or regalia. Mare Clausum, p. 176. Selden sounds very modern when he contends that the crown must have such ownership because of the importance of these resources to the national economy and because of their obviously exhaustible character. The arguments in favor of control by the adjacent coastal sovereign of the resources of the continental shelf have not changed substantially in the three and a half centuries since Selden wrote.

Lord Hale's De Jure Maris is beyond question the best-known and most frequently cited work of all time on the English common law of the seashore and seabed. Hale is unequivocal that by the common law the soil of the seabed of the English seas belongs in property to the crown. Exhibit 194, pp. 11, 14, 17, 31. For this doctrine Hale cites many cases and other authorities going far back into English history. Hale plainly regards the crown's prima facie ownership as relatively non-controversial, and devotes most of his attention to the highly controversial questions of whether and how a subject claiming ownership of derelict lands or the foreshore may overcome the crown's prima facie title by grant, prescription or custom. Hale freely concedes the possibility of prescription against the king; and the fact that he endorses both prescription and the crown's title to land while still under water is a further refutation of Professor Thorne's theory that anyone who allowed prescription must have believed that submerged lands were ownerless until they were uncovered by the waters.

Professor Thorne contends (Tr. 2453) that at one time Hale regarded the ownership of the seabed by the crown as doubtful, though he concedes that Hale resolved any such doubts in favor of the crown. Tr. 2453-57. Professor Thorne relies on a passage from a Hale manuscript set forth by Moore; op. cit. at pp. 357-69. The passage relied on by Professor Thorne reads in full as follows:

> "Because as the King hath right of jurisdiction or dominion of so much at least of the sea as adjoins to the British coast nearer than to any foreign coast: which appears by Belknap, 6 R. 2. protection 46; so as soon as any matter of profit happens upon or by reason of the said sea capable of propriety, it doth presently belong to the King unless some other better title doth interpose: such are wrecks, floatsam, etc. Insulae natae in mari, etc.; therefore though the King cannot have propriety in the water, yet when any thing therein emergeth that it is capable of propriety it is the King's as aforesaid: The sea is the King's royal waste de communi jure. But to leave that doubtful question whether the soil of the sea be the King's aqua marina adhuc coopertum." Moore, op. cit. at 362.

The first thing to be said about this passage is that, even if it, as interpreted by Professor Thorne, represented Hale's final view (which clearly it did not), it would avail the United States nothing in this proceeding, since crown ownership of anything emerging or taken from the sea or seabed which is capable of profit is wholly adequate to sustain the Common Counsel States' position.

Secondly, it seems unlikely that Hale was in this passage expressing a doubt which he himself entertained. A great deal of the treatise is devoted to analyzing and refuting the old Roman-law doctrine, of which

Hale was fully aware, that the sea and seabed were insusceptible of ownership. It seems probable that in the passage just set forth Hale was using "doubtful" as meaning "controversial," and that those on the other side of the controversy were the old civil lawyers of prior centuries, not anyone either making, declaring or interpreting law in 17th-century England.

Moreover, as neither Professor Thorne nor indeed Moore seems to appreciate, a reading of the Hale manuscript or manuscripts in question makes it plain that they consist of a number of different drafts on the same subject-matter, all of which were later superseded by De Jure Maris. The manuscripts contain two other versions of the passage on which Professor Thorne relies, and both of those versions without question confirm the crown's ownership of the seabed while it is still under water. These two alternate versions are as follows:

> "Because the sea, at least so much thereof as adjoins nearer to our coast than to any other foreign coast: as it is within the king's jurisdiction, which amongst other evidences thereof appears by the book 6 R. 2, protection 46, where Belknap affirms the sea to be of the legiance of the king as of his crown of England, so likewise it is the king's in propriety as his royal waste, and therefore he hath those bona caduca or vacantia, as flotsam etc., partly in respect of the right of property which he hath in the soil underneath the water; and therefore questionless the islands near adjoining to our coast are parcel of the king's inheritance, as being part of that great royal waste covered with the British Ocean: and no more evident right can there be of ownership or propriety than to be master of common right of such profits as any way the sea adjoining yields." Moore, op. cit. at 358.

* * *

> "As touching the right of the sea shore and jus alluvionis et maritima sinc fluvialia incrementa: I conceive that by the common positive law of this kingdom they belong to the king as a part of his prerogative: my reasons are these as well in propriety as jurisdictions.
>
> "1. The narrow seas, or at least so much thereof as adjoins to the English shore, is within the king's jurisdiction or royalty, 6 R. 2, protect. 46, etc.: and likewise in right of propriety; for although the use of the sea be common, yet the propriety thereof belongs to the king as a royal waste: which is the reason that as well all the bona vacantia upon the seas belong to the king as the right of his admiral jurisdiction, so likewise islands in the sea, which although by civil law fiunt occupantis, yet in our law they are annexed in point of interest to the crown, who is thereof presently in possession, and so prevents any right to be acquired per occupationem.
>
> "2. All rights to any land in this kingdom depends upon mediate or immediate tenure of the king: therefore this jus acquisitum per alluvionem, if it be not otherwise derived out of him by some sufficient title, it is part of his waste and inheritance." Moore, op. cit. at 367-68.

Comparison of these two texts and that quoted by Professor Thorne leaves no doubt that all three are drafts or versions of the same passage. In the manuscripts as published by Moore, one of these appears before, and the other after, the version on which Professor Thorne relies. The order in which these drafts was written is not known, but their language indicates that if Hale ever did have a doubt as to the crown's ownership of the seabed, it could not have endured for very long. It seems much more probable, as suggested above, that the "doubt" referred to was that of the archaic Roman lawyers, not of Hale himself. Finally, all

this is academic since at no time was there ever any version of Hale's position which affords the United States any comfort in the present proceeding.

In the version from which the above quotation from p. 358 of Moore is taken, which affirms crown ownership of the seabed, Hale goes on, as he does in his final product De Jure Maris, immediately to affirm that prescription may lie against the crown, thus once again refuting Professor Thorne's notion that crown ownership and prescription are incompatible. It is also notable that, in the above quotation from pp. 367-68 of Moore, Hale combines the "common positive law," the prerogative, and crown ownership of the seabed, thus refuting Professor Thorne's allegations that the common law and the prerogative were regarded as distinct theories or bases for the crown's ownership, and that reliance on the prerogative necessarily implied that the bed of the sea was "ownerless."

Other points in his manuscripts at which Hale refers to the crown ownership of the seabed are published in Moore, op. cit. at 344, 347 and 357. At p. 321, in discussing ports, Hale declares that they are among the regalia, and establishes that they may be created by the king by proclamation -- thus confirming Baron Weston's argument regarding ports in the Oldsworth case, p. 111 , supra.

Professor Thorne testified (Tr. 2461) that in 1667 Hale "in effect rejected" the doctrine of crown ownership of the seabed while still under

water. On cross-examination, Tr. 2728-31, Professor Thorne was compelled to withdraw that opinion, which is wholly without foundation. The statement by Hale in 1667, as Professor Thorne finally conceded, questioned only the equity and practicality of rigorous crown enforcement of its right to derelict lands which had long been in the possession of the owners of the adjacent coastal properties. It bears repeating one last time that, while there was much controversy concerning the tests of adequacy for a claim of prescription or custom to overcome the crown's prima facie title to derelict lands, no one questioned the law that that title was indeed original and prima facie, and certainly no one questioned the crown's exclusive right to the resources of the sea and the seabed.

Molloy affirmed crown ownership of sedentary and seabed fisheries such as those for pearl, coral and amber, and expressly referred to them as a "regality." Exhibit 726, p. 119.

Chief Justice Rolle, in his Abridgement, declared that "the English sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects." U.S. Exhibit 9, p. 47.

The opinion of Sir Henry Spelman, writing prior to 1643, was to the same effect. Exhibit 207, p. 229; Tr. 149-50.

William Sheppard's Grand Abridgement of the Common and Statute Law of England (1675) held that the king "not only as to protection, but to propriety, is said to be lord" of the four English seas; "the soil,

banks and shores" of "the sea and rivers" belong to the crown in property. Quoted in Jerwood, Dissertation on the Rights to the Sea Shores 43-44 (1850).

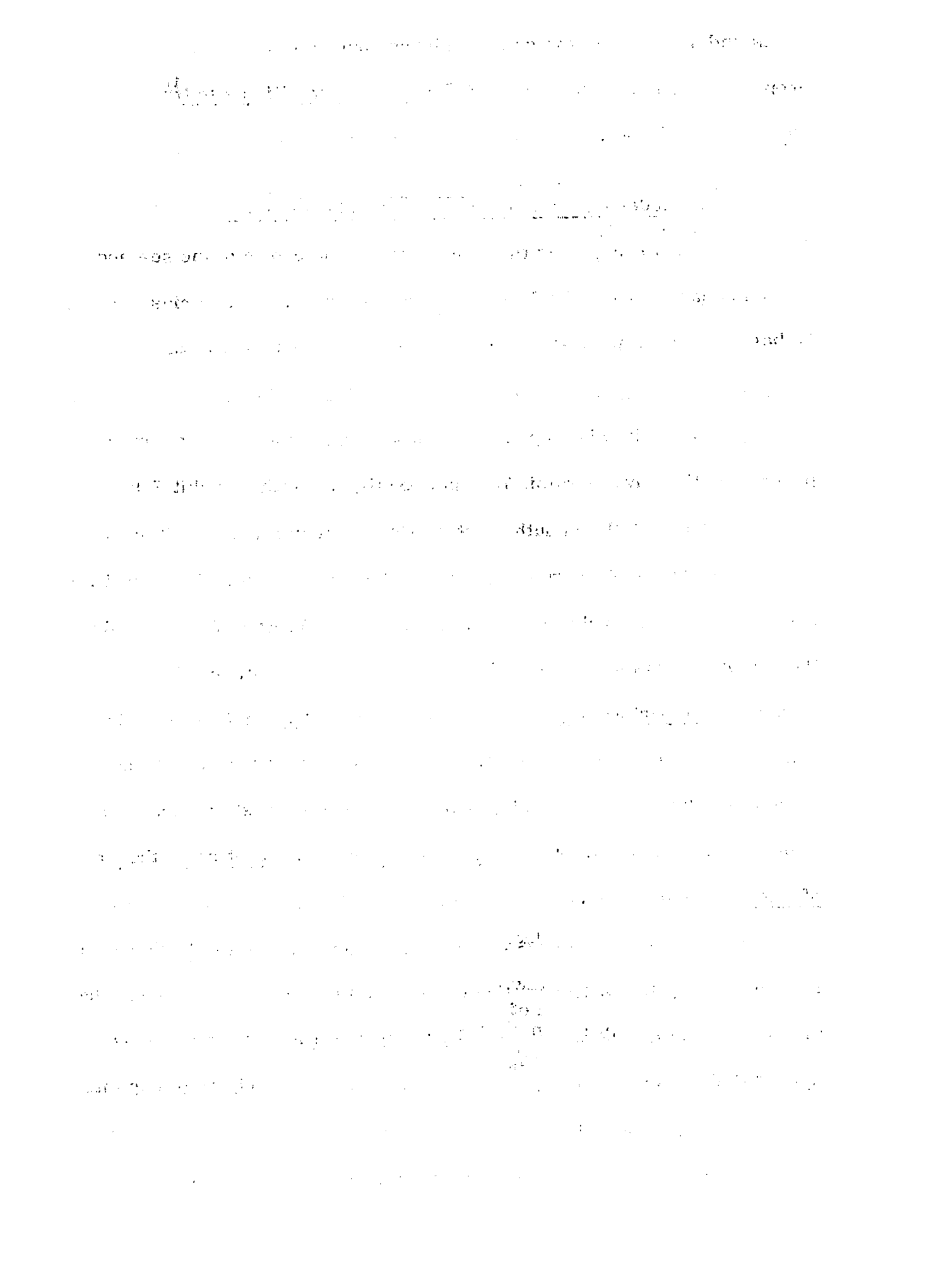
4. Modern Commentators and Judicial Decisions

Fulton recognizes that ownership by the crown of the sea and seabed became part of English law in the 16th and 17th centuries, though he believed that was an innovation dating from Diggs' time. Exhibit 693, pp. 361-62.

Moore likewise agreed that the crown's ownership was and is part of English law. Exhibit 728, pp. xxviii, xxxii-iii; Exhibit 729, p. 14.

Robert Hall, an authoritative 19th-century English writer, set forth the doctrine of crown ownership of the seabed with great explicitness, and regarded it as unchanged to his day. Hall, "An Essay on the Rights of the Crown," Exhibit 449; republished at Exhibit 728, pp. 668-73. Jerwood's Dissertation on the Rights to the Sea Shores (1850) is to the same effect. Jerwood regarded the Banne case as authoritative, and pointed out that it had been cited with approval in at least one 19th-century judicial opinion. Id. at 60-61. Accord, Woolrych, Treatise on the Law of Waters 19-29 (1830).

Fenn did not address himself to the question of title to the seabed in 17th-century English law. Fenn's point is that, even in countries where the old civil-law tradition of ownerlessness ab initio survived, it was agreed that the crown has the power to grant exclusive rights of exploitation



of the resources of the sea and seabed. Exhibit 690, p. 122. Professor Thorne concurred. Tr. 2691-92.

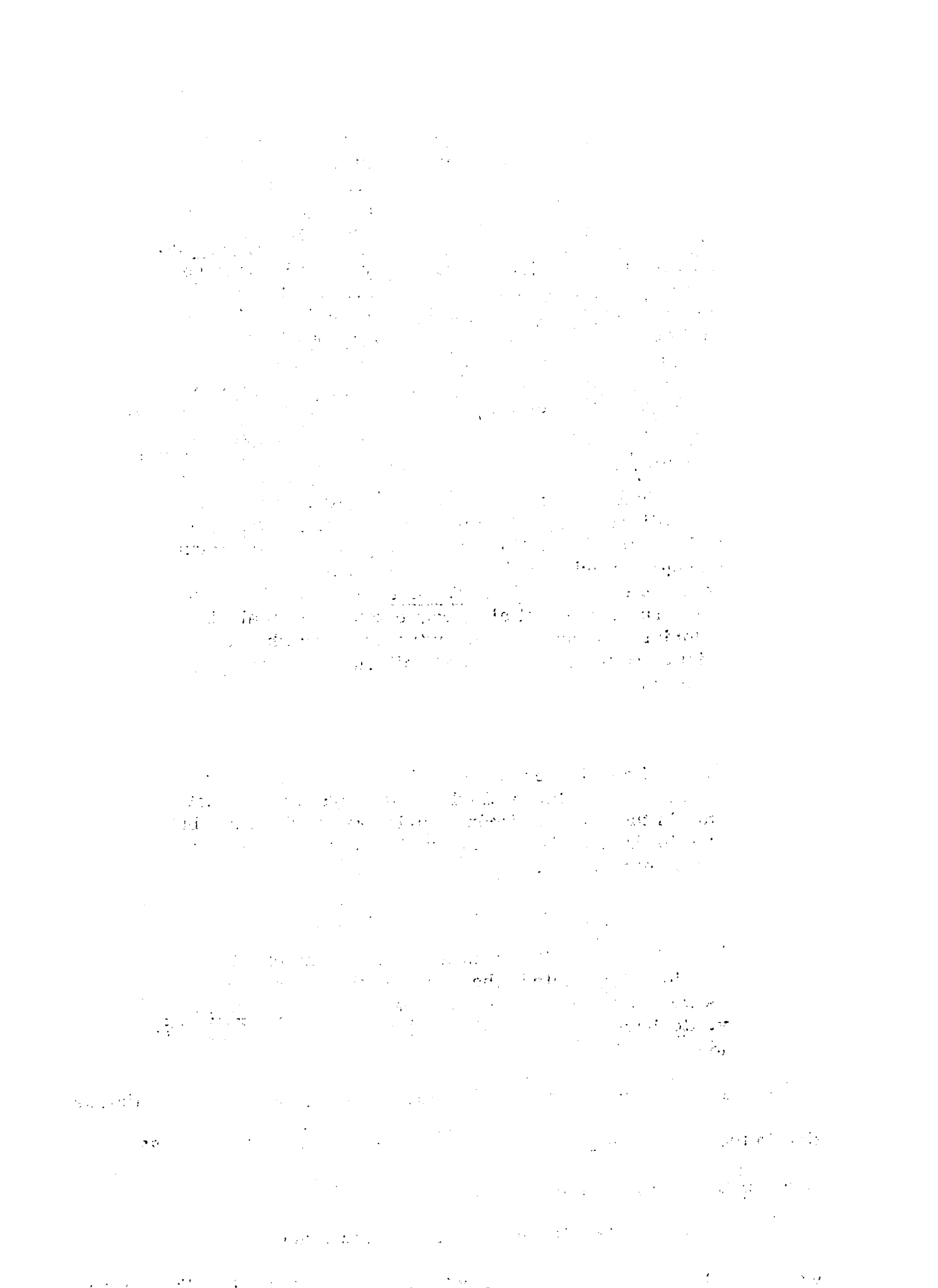
Modern judicial authorities, in this country as well as in England, have affirmed the crown's ownership of the seabed, both anciently and as still in existence; many of them have recognized Hale as the primary authority on the law of England on the ownership of submerged lands and have cited his views on the crown's ownership of the seabed with approval. E.g., Shively v. Bowlby, 152 U.S. 1, 11 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842); Illinois Central R. R. v. Illinois, 146 U.S. 387, 458 (1892); New York v. New York & S.I. Ferry Co., 68 N.Y. 71, 76 (1877); Gough v. Bell, 22 N.J.L. (2 Zab.) 441, 445 (1850); Narragansett Real Estate Co. v. McKenzie, 82 Atl. 804, 810 (R.I. 1912); New York, N. H. & H.R.R. v. Horgan, 56 Atl. 179 (R.I. 1903); Armour & Co. v. Newport, 110 Atl. 645 (R.I. 1920); Simons v. French, 25 Conn. 345, 351 (1856); Furman v. City of New York, 7 N.Y. Sup. Ct. 16, 33 (1851); Dunham v. Lamphere, 3 Gray 268 (Mass. 1855); Rogers v. Jones, 1 Wend. 237 (N.Y. 1828); see English cases cited at Jerwood, Dissertation on the Rights to the Sea Shores 66-67, 70, 95-96, 118-119 (1850), and O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 323 n. 3 (1971). The following is typical:

> "Most of the English colonies had a similar origin in the charter of the sovereign, which granted not only the title to the soil, but the powers of government, and, as incident thereto, the right of the sovereign over

> the sea shores, and those powers denominated regalia. The nature and extent of these grants, both of property and powers, have been held to be regulated by the common law of England, which the English emigrants claimed as their birthright, and brought with them. This introduced and established the common law of England, as regulating the relative rights of the government and people in this country to the sea and sea shores. The effect of this charter was, to grant to the Governor and Company, as a body, the jura regalia or prerogative rights of the crown, to be held for the Colony, as the crown held them for the realm of England; and also the ordinary right of property in the soil, to be held and granted on the liberal tenure of free and common socage, as private rights in real estate are held at common law. Martin v. Waddell, 16 Pet. 367. The same rule, substantially, was established in all the colonial governments, the authorities for which, we think, are too numerous and uniform to require citation.
>
> * * *
>
> "We had considered it settled beyond controversy that, by the common law of England, the right of soil, not only in the sea, the fundus maris, was in the king, but also in the sea shore, the land between high and low water mark . . . .
>
> * * *
>
> "[A]t the time of the granting of the colony charters herein before stated, the king held the sea shores as well as the land under the sea . . . ." Commonwealth v. Roxbury, 75 Mass. (9 Gray) 451, 481-82, 483 (1857) (Shaw, C.J.).

For a succinct summary of Hale's views, regarded as authoritative in the 19th century, see the Hargrave and Butler edition (1823) of Coke on Littleton, Exhibit 448, n.

Joseph K. Angell, the leading American authority on the law of waters in the early 19th century, believed it beyond question that under



English law the crown owned in property the soil of the sea adjoining the English coasts. Among many other authorities, Angell relied on the Case of the Royal Fishery of the River Banne as determinative. Angell, The Right of Property in Tide Waters 18 (1826).

O'Connell writes: "that the Crown possessed the coastal sea as royal waste in the seventeenth century is beyond question. . . ." Op. cit. at 381. Accord, Wait, "Supplementary History of Title of Massachusetts to Submerged Sea Lands," 36 Mass.L.Q. 17, 20-21 (1951).

E. The Flag Salute Was Insisted Upon as an Attribute of English Sovereignty in the English Seas.

1. Court Cases

The record demonstrates that the English courts enforced the duty of the flag salute by foreign ships to English warships in the English seas, and that the flag salute was judicially regarded expressly as an attribute of the sovereignty of the English crown in the English seas as part of the realm. Exhibit 211, p. 708; Exhibits 621 through 629; Exhibit 762, pp. lxxxviii, xcv; Fulton, op. cit. at 512-13; Colombos, op. cit. at 52; 1 Marsden, Law and Custom of the Sea 509-10 (1915).

2. Acts of Parliament

In 1650 the Council of State directed the admiralty to enforce the flag salute as an attribute of the English "dominion of these seas." Exhibit 224.

3. Legal Opinions

At the request of Charles II, Judge Jenkins gave an opinion affirming the duty of the flag salute in the English seas, explaining its basis as an attribute of sovereignty, and setting forth the precedents therefor. Exhibit 211, p. 698; Exhibit 634; Exhibit 693, p. 484 n. 1.

The admiralty experts of Trinity House gave an opinion to the same effect in 1671. Exhibit 635.

4. Other Official Pronouncements and Acts of State

The record shows that throughout the 17th century the English navy enforced the right of flag salute against foreign ships by attack, arrest and seizure wherever necessary. See Exhibit 578; Exhibit 579, pp. 5, 6; Exhibit 679, p. 51; Exhibits 584, 585, 632, 633; Exhibit 693, pp. 511-13, 517. Failure to honor the flag salute was a casus belli against the Dutch in 1671, Exhibit 693, pp. 482, 487, and against the French in 1689, being specifically mentioned in the declaration of war. Exhibit 693, p. 518.

The duty of enforcing the flag salute figured prominently in the naval instructions given by Charles I to his fleet, and equally prominently in those issued by the admiral in 1643 and by the Parliamentary Committee on the Admiralty in 1647, the salute always being explained as an acknowledgment of English sovereignty in the English seas. 1 Marsden, Law and Custom of the Sea 522 (1915); Exhibit 693, pp. 380-81. The instructions were likewise explicit in the reigns of Charles II, Exhibit 458, and

William III, Exhibit 693, pp. 518-20, and continued unchanged throughout the 18th century.

5. Legal Treatises of the Period

Every one of the 17th-century legal writers we have previously mentioned who discussed the flag salute affirmed the right to it as an attribute of the crown's sovereignty in the English seas. These writers included Selden (Mare Clausum, pp. 398-402), Stubbe (Exhibit 693, p. 496), Molloy (Exhibit 726, pp. 102-30), and many others.

6. Modern Commentators

Among the many modern writers who have discussed the flag salute are Fulton, passim; Colombos, op. cit. at 52-55, and 1 Halleck, International Law 134 (4th ed. 1908), reprinted in Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 83 (1919).

7. Acquiescence by Other States

The Dutch acknowledged the duty of the flag salute in the British seas by treaty in 1654, 1662, 1667, 1674 and 1689; although they always managed to avoid explicitly conceding that it was an attribute of English sovereignty in those seas, there was never any question that the English so regarded it. The 1654, 1662 and 1667 treaties required the flag salute "as has been heretofore accustomed," within the extent of the "British seas," which were undefined. 3 Parry, Consolidated Treaty Series 225, 249; 7 Parry, op. cit. at 193, 201; 10 Parry, op. cit. at 231, 242;

Exhibit 717, p. 40. The 1674 treaty described the salute as a British "right" which the Dutch were "justly acknowledging," and specified that the salute was required in any of the seas from Cape Finisterre, in Spain, to "the middle point of land in Norway, called Van Staten." 13 Parry, op. cit. at 123, 134-35; Colombos, op. cit. at 53. The 1689 treaty confirmed that of 1674. 18 Parry, op. cit. at 485, 488.

In 1694 the Danish government disavowed the conduct of a Danish captain who had refused to strike, and promised to punish him. 2 Marsden, Law and Custom of the Sea 165-66 (1916).

F. Other Aspects of Maritime Sovereignty Dealt with Navigation and Neutrality.

All the principal 17th-century English legal writers who dealt with maritime sovereignty discussed whether, and on what conditions, foreign ships had a right of passage through the English seas. Their views need not be discussed at length; Molloy's opinions (Exhibit 727) are typical. While holding unequivocally that the English seas were part of the realm and "as much under the absolute jurisdiction of the prince as the very land itself" (id. at 209), he believed that ordinarily the right of innocent passage should be accorded to foreign ships. He asserted that the right of passage was subject to the right of the crown to suspend it for reasonable cause, to impose reasonable restrictions and regulations, and to charge tolls if they were directly related to expenses incurred by the crown for the protection or advancement of navigation. All this is virtually

identical to the modern international law relating to the right of innocent passage through territorial waters. For our purposes its significance is simply to confirm that a full-blown, and quite sophisticated, doctrine of territorial waters existed in the 17th century, rather than being a later development as the United States contends.

There remains the matter of neutral waters, that is, those portions of the adjacent seas in which a coastal sovereign prohibits other states from making war against one another. In 1604, and again 30 years later, England defined its neutral waters as the areas known as the "king's chambers." These consisted of the maritime areas within very broad baselines drawn from headland to headland; Fulton gives a map of them at p. 123. The "chambers," while far more extensive than what would be considered territorial waters today, nonetheless were not nearly so extensive as the English seas which were regarded as subject to the sovereignty and ownership of England. See, generally, Fulton, op. cit. at 750-54; Oudendijk, Status and Extent of Adjacent Waters 57-58 (1970); Exhibit 569; Tr. 347-51. Fulton recognizes that the king's chambers "had no reference to the claim of James to property in his seas." Op. cit. at 122. The limits were established by a jury of Trinity House, reporting to the High Court of Admiralty, and were described as "the king's chambers, havens or ports." Id. at 754. The formula in the royal proclamation was: "our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports or havens as may be reasonably construed to be

within that title, limit or precinct." Id. at 751-52.

In 1684, Charles II by proclamation similarly defined the areas in which belligerent activities would be prohibited as "our ports, harbors, or other places reputed to be within our more immediate protection, and where our commanders and officers are accountable for the public peace"; again, "so near our coasts, or the entry of our harbours, as may be easily construed to be under our more special care and protection"; again, "within our ports, havens, roads and creeks, as also in every other place or tract at sea that may be reasonably construed to be within any of those denominations, limits or precincts." Exhibit 225. The proclamation drew a clear distinction between "the seas belonging to these our kingdoms" and the more limited areas "under our more special care and protection."

It could be argued that a coastal state's assertion of sovereignty over its adjacent seas entails the obligation of maintaining neutrality wherever sovereignty is claimed. The Spanish government invoked this argument when, in recognizing English sovereignty over the Channel and North Sea, it contended that by that token England had an obligation in those seas to protect Spanish ships from belligerent activities. Exhibit 609.*/ However, since the enforcement of neutrality was plainly more of a burden than of a benefit to a maritime sovereign, England in the 17th century made a sharp distinction between the broad seas over which it

*/ Gentili, as lawyer for Spain, had taken the same position in 1605-08 in prize cases in the English Admiralty Courts. Exhibit 693, pp. 358-61.

claimed sovereignty and proprietorship and the more modest areas, the "king's chambers," within which it undertook to maintain neutrality. In reaffirming the king's chambers for neutrality purposes in 1634, Charles I "expressly declared that his maritime rights were far more extensive and as soon as he had created a powerful fleet his Admiral was instructed to permit no fighting between belligerents in the presence of his ships in any part of the Narrow Seas." Oudendijk, op. cit. at 57-58; Exhibit 569; p. 64 , supra.

However, it became firmly fixed in English doctrine and practice that the maritime areas within which protection against belligerent activities would be afforded was far more limited than the areas in which English sovereignty and proprietorship were claimed and exercised. Hedges' legal opinion of 1699, defining the extent of the English seas, expressly made the point that they were much broader than the king's chambers, which were for neutrality purposes only. Exhibit 199, p. 233 n. 1. Selden had earlier carefully distinguished between the king's chambers and the much broader English seas. Mare Clausum, pp. 363-75.

All this shows how far English law and practice in the 17th century were from the "protective" concept of sovereignty which Professor Wroth contends, without a shadow of foundation, was operative at that time. It is apparent, also, that 17th-century Britain was far from agreeing with Professor Henkin's assertion that "if you are talking about territorial sovereignty, it must include everything, including neutrality." Tr. 2602.

The distinction is also crucial for understanding developments in the late 17th and 18th centuries, when England in a number of treaties embraced the line-of-sight rule for neutrality purposes (at least as to certain of its possessions) without in the slightest degree renouncing its claims to sovereignty, exclusive fishing, ownership of the seabed and the right to the flag salute in far broader maritime areas. The British treaties with Algiers of 1682 and 1686 (see p. 80 , supra) required Algerian ships to refrain from cruising or taking prizes in sight of any British roads, havens, ports, towns or places. Exhibit 674, pp. 356, 362. The 1675 treaty with Tripoli contained a similar condition applicable to Tangier only. Id. at 715. Since these treaties also contained explicit reference to the seas under the sovereignty of the British crown (p. 80 , supra), they demonstrate very clearly the distinction which Britain made in this period between the territorial seas and the more limited areas in which neutrality would be enforced. For later treaties of the same type, see p. 141, infra.

## III.

## BRITISH LAW AND PRACTICE IN THE EIGHTEENTH CENTURY DID NOT CHANGE SUBSTANTIALLY WITH RESPECT TO MARITIME SOVEREIGNTY AND DOMINION.

Plaintiff's position apparently is that at some unspecified time during the 18th century Britain abandoned its established doctrines regarding the British seas, and that the British claim to sovereignty and property in the sea and the bed thereof retreated either to the distance of cannon

shot from the coast, or to three miles, or even all the way to the low-water mark.*/ (No one except Dr. Kavenagh believes that high-water mark is relevant to the discussion.)

To the contrary, the record shows that the British claim to the British seas, as previously defined, persisted fully in law throughout the 18th century, though there were reasons why those claims received less attention and discussion than they had in the previous century. Those reasons were essentially four:

(1) The establishment of British maritime supremacy in fact, in seas even broader than the British seas as traditionally defined, meant that the British legal claims were both less important to establish and less often called in question.

(2) Universal recognition of the right of innocent passage of foreign ships through territorial waters removed what had previously on occasion been a source of contention.

(3) The great decline in the Dutch North Sea fishery, and general observance by the Dutch of their agreement to stay beyond the line of sight in English waters, where their presence had been most obtrusive and where the fisheries were richest, reduced almost to the vanishing point what had been the principal ground of controversy in the 17th century.

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*/ Plaintiff's position finds some support in Fulton, but Professor O'Connell has recently demonstrated that Fulton was wholly wrong on this point. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 316-19 (1971). Even Fulton acknowledges that the cannon-shot rule and the three-mile limit were "unknown to English law" prior to 1800. Fulton, op. cit. at 579-80.

(4) Foreign ships normally and usually acquiesced in the British right to the flag salute in the British seas from Finisterre to Van Staten. While the foreigners may have rationalized this in their own minds as a mere tradition or mark of respect, Britain quite clearly continued to regard it as acquiescence in British territorial sovereignty over those seas.

As we shall see in a later section (pp. 238-55, infra), the most important disputes regarding maritime sovereignty and exclusive fishing in which Britain was involved in the 18th century concerned North American waters, and there the British exclusive claims were fully maintained.

As to the alleged rules of the cannon-shot line and the three-mile limit, no British authority ever applied any such rules to British waters throughout the course of the 18th century, even for the purpose of neutrality, let alone for the purpose of territorial sovereignty, exclusive fisheries or ownership of the seabed.

In the domain of private law or property rights, the 18th century brought no abandonment or hiatus whatever in the doctrine that the crown owned the soil of the seabed beneath the British seas except to the extent that soil had been acquired by British subjects by grant, custom or prescription. That doctrine was as authoritative and unchallenged after the end of the 18th century as it had been before that century began.

A. The British Seas Continued To Be Regarded as Subject to British Sovereignty and a Part of British Territory.

In 1713 Sir Charles Hedges, judge of the admiralty court from 1689 to 1701, Secretary of State and Privy Councillor, 1700-06 (9 Dic. Nat. Biog. 362-63), at the request of the Lords of the Admiralty, rendered a formal opinion concerning the extent of the British seas, which he believed are "without any doubt . . . within her majesty's sea dominions, as queen of Great Britain." Exhibit 199, p. 231. Hedges adhered to the traditional view that British territorial sovereignty included the entire North Sea, English Channel and Bay of Biscay, and the sea to the north of Scotland at least as far as Iceland. He expressed doubt only as to the extent of the British seas on the westward side. There he regarded as minimum limits the 100-mile belt or 60-mile belt generally asserted by civil lawyers as the territorial waters of any coastal sovereign. However, he advanced various theories by which British sovereignty might be considered as extending farther, including the theory that, being possessed of the North American coast as well as of Ireland, Britain might reasonably claim all the waters in between.*/

*/ Hedges' opinion may not be read as expressing any doubt as to whether the British possessions in North America had their own territorial seas. Those possessions were not part of the realm of Great Britain; and Hedges had been asked only for his opinion as to the extent of the seas in which the queen was sovereign "as queen of Great Britain." Thus North American waters came within the purview of his opinion only on the theory that, of the four seas traditionally regarded as British waters, the western sea extended from Ireland all the way to the opposite shore. If there was a belt of international water in between, then the North American seas, though under British sovereignty, would not be part of the "British seas." This may seem a curious technicality to a modern student, but it is plainly

In 1721 Sir Henry Penrice (later judge of the admiralty court, Exhibit 640), at the request of the Lords Commissioners of the Admiralty, rendered an opinion on the question whether the British seas extended to Cape Finisterre, that is, included the entire Bay of Biscay as far as the Spanish coast. Penrice, after examining the precedents, affirmed that the British seas did so extend, and were under the sovereignty of the British crown. Exhibits 458, 637.

A British treaty of 1716 with Tripoli provided for a limited right of visitation of British merchant ships at sea except "in any of the seas appertaining to his majesty's dominions." Exhibit 674, p. 721. In 1751 another treaty with Tripoli contained the same provision. Id. at 726.

If there was any abandonment or diminution of British territorial sovereignty in the four British seas as traditionally defined, during the 18th century, the legal writers of the period -- mostly public officials knowledgeable both as to the state of the law and as to the attitude of the government -- were certainly unaware of it. Alexander Justice's General Treatise of the Dominion and Laws of the Sea (1705) stated the full traditional doctrine of maritime sovereignty with its recognized attributes, including the exclusive right to the fisheries, territorial admiralty jurisdiction over both subjects and foreigners, and legislative power. Exhibit 450;

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the way Hedges thought. If asked, Hedges would obviously have said that if the British seas did not reach across to North America, the British colonies there would have their own territorial seas of 100 or 60 miles at a minimum.

Exhibit 710, pp. 129, 133-58. Writing in 1720, Josiah Burchett, who was Secretary of the Admiralty from 1698 to 1742, relied both on the historic English sovereignty over the four British seas and on the general law that any coastal sovereign has territorial waters of 100 miles from its coasts. Exhibit 675.

In 1735 Thomas Lediard, who was a British diplomat, asserted British sovereignty over the four British seas and gave a quite precise definition of them on the west and north as well as on the other sides, saying they were "generally reckoned" as those seas within a line drawn from Cape Finisterre to 63 degrees of north latitude, and thence eastwards to Van Staten in Norway. Exhibit 718, p. 36. (This demarcation was probably assumed by the many other writers who speak of the British seas as extending from Finisterre to Van Staten. It was reiterated as late as the 19th century. 1 Chitty, The Laws of Commerce 102 (11th ed. 1857).) Lediard goes on to discuss British sovereignty in American waters. He states what was plainly the general view at the time: that while the British seas properly so called did not extend all the way across the Atlantic Ocean, the British possessions in North America had their own territorial seas. Exhibit 718, p. 36.

In 1742 Charles Viner's Abridgement recorded the established law that the British seas are under both the sovereignty and the ownership of the crown. Exhibit 208. Viner traced back to King Alfred's time the doctrine that "the sovereignty of all the land to the middle of the sea about

the land belongs to the king in right of his crown." 6 Viner, Abridgement 505 (2d ed. 1792).

Matthew Bacon's Abridgement, which appeared in 1759, likewise affirmed British territorial sovereignty and dominion in the British seas. Exhibit 171. The digest of Sir John Comyns, Chief Baron of the Exchequer, was to the same effect. Exhibit 185.

In 1746 there appeared an ambitious and interesting work in two volumes entitled The Laws, Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military. Exhibits 716, 717. The work is anonymous, but obviously had official or semi-official status. The author affirms British sovereignty (which he calls dominion) in the four British seas. In prior times, he says, that sovereignty permitted the crown to prohibit navigation through the British seas and to levy tribute thereon. Now those rights have lapsed in the interest of free navigation and commerce. Nonetheless, "the being of our dominion [a modern writer would say: "the substance of our sovereignty"] subsists exactly as before." Exhibit 716, p. 9. This is an excellent statement of territorial sovereignty as limited by the right of innocent passage.

Blackstone, in affirming crown ownership of the seabed in the English seas, is clear that such ownership is a corollary of territorial sovereignty, the king being "lord of the sea." Exhibit 174, p. 262. And: "the main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction." 1 Blackstone, Commentaries 110 (1765).

B. The Claim to Exclusive Fisheries in the British Seas Was Not Abandoned, and Indeed Was Extended to New British Possessions.

Early in the 18th century the Dutch herring fishery in the North Sea suffered a precipitate decline, and ceased to be a substantial interference with the British fisheries or with the British claim to maritime sovereignty. The French, when at war with Holland, destroyed many of the Dutch fishing ships; though Britain was not at war with the Dutch early in the century but indeed was allied with them, the British navy likewise took severe measures against the Dutch fishing boats to enforce the British claim to maritime sovereignty. "Not infrequently their [the Dutch] herring fishery was entirely suspended, it might be for a series of years, owing to the inability of the States-General to protect the fishing vessels from the French or the British cruisers. . . . From these repeated blows the Dutch fisheries never recovered, and the fleets of busses gradually dwindled . . . . Thus the part of the pretention to the sovereignty of the sea which related to the fisheries along the British coasts was solved, the British fisheries, now the greatest in the world, rising on the ruins of the Dutch." Fulton, op. cit. at 534.

Controversy with the Dutch was also generally minimized by their observance of their agreement of 1619 (p. 90, supra) to stay beyond the line of sight from the British shores. At various times during the century the British government, when necessary, made representations to the Dutch, French and Danish governments to insure that their fishermen not come too close to the shore. Exhibit 693, pp. 604-05. There were no

major disputes, however, and as we shall see the really serious controversies regarding foreign fishing in waters under British sovereignty related to North American waters (pp. 238-55, infra).

In 1790 Britain agreed by formal treaty that British subjects should not navigate or fish within ten leagues of any coast in the Pacific Ocean occupied by Spain. Exhibit 674, pp. 663, 666. Here, at the very end of the century, we see Britain, so far from adhering to any cannon-shot or three-mile rule, acquiescing in a Spanish claim to territorial waters of 30 miles for exclusive fishing purposes.

The treatise writers of the century uniformly asserted and recognized the British right to exclusive fisheries in the British seas as traditionally defined. These included Justice, Burchett, Lediard, Viner, Bacon and Comyns. See Exhibit 710, pp. 129, 132; Exhibit 675, p. 28; Exhibit 718, p. 36; Exhibits 208, 171, 185. Comyns, in addition to the passages in Exhibit 185, declared that "the fishery of every navigable river, as high as the sea flows and reflows, belongs to the king by his prerogative . . . but every one [i.e., subjects] may fish in the sea, of common right . . . though it flows upon the soil of another [i.e., the king]. But foreign nations cannot fish in the British seas, without the king's license." 7 Comyns, Digest of the Laws of England 70 (5th ed. 1822).

Thomas Neale's Abstract of the Sea-Laws, as Established in Most Kingdoms of Europe, But More Particularly in England and Scotland (1704), upheld the British claims to exclusive fisheries. He relied on

Bartolus' 100-mile limit, and regarded the seas within that limit as part of the territorium (preface, pp. 8-9).

The author of The Laws, Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military, regarded the British right to exclusive fishing as extending midway to the opposite coasts, but indicated that at that period (the book was published in 1746) the British right was insisted upon in practice only "to a certain distance" from the shore, which at one point the author appears to identify as the line of sight. Exhibit 716, pp. 4, 5, 11, 38.

An act of Parliament of 1714 prohibited "any person" from using certain types of nets "at sea, upon the coast of England." Exhibit 716, pp. 413-14; Exhibit 729, pp. 179-80. An act of 1716 prohibited the killing of young fish or fish out of season. Exhibit 729, pp. 180-81. A statute of 1771, still in force in 1903, provided that persons employed in the British white-herring fisheries "may fish in any part of the British seas." Exhibit 729, p. 230. Finally, an act of 1791 prohibited trespass by unauthorized persons upon "the several [i.e., exclusive] oyster fisheries of this kingdom" and the use of nets or trawls therein. Exhibit 729, p. 181.

In the case of Carter v. Murcot, in 1768, it was held that the fisheries in navigable rivers, as arms of the sea, belong prima facie to the crown, but that a subject can acquire an exclusive fishery therein by royal grant or prescription. The court regarded the decision in the Case of the Royal Fishery of the Banne (pp. 107-08, supra) as authoritative,

and declared "'tis a very good case." Exhibit 455, p. 129; Angell, op. cit., Appendix, at 32-35. The court also relied on Hale.

The crown asserted and exercised jurisdiction over fishing in the waters not only of Britain and America but also of new British possessions elsewhere. After Minorca (Mahon) became a British possession, one Charles Williams petitioned the Board of Trade in 1751 for a license for an exclusive tuna fishery in Minorcan waters. Williams' petition carefully explained that the license he sought would not interfere with established fishing rights, but would be exclusive only as to new and improved methods of fishing devised by him. This was fully in accordance with the law of monopolies in force ever since Elizabeth I's time. The governor of Minorca endorsed the petition. Its ultimate disposition does not appear in the record, but it seems highly probable that it was granted. See Exhibits 796, 807; Exhibit 772, pp. 147, 209, 232-33, 253, 257. Foreigners had previously petitioned for licenses to fish on the coasts of Minorca, but had been refused on the ground that they were not British subjects. Exhibit 807, p. 3.

C. The Admiralty Jurisdiction in the British Seas Remained Unchanged.

Justice and Burchett, the leading admiralty writers of the period, affirmed the full traditional doctrine of the territorial jurisdiction of admiralty in the British seas, including jurisdiction over foreigners. Exhibit 710, pp. 153-58; Exhibit 675, preface, first and second pages.

Similarly, the anonymous work of 1746 listed among the prerogatives of the British maritime sovereignty, along with exclusive fishing, "the regular execution of justice for all crimes committed within" the British seas. Exhibit 716, p. 38. Blackstone is to the same effect. 1 Commentaries 110 (1765).

The admirals' commissions of the 18th century were couched in territorial terms, and conveyed the maritime jurisdiction both of Great Britain and of the British dominions, including those of North America; they spoke of "our fleets and seas," granted powers "by sea, water or land within our kingdoms and places aforesaid," and conferred criminal and civil jurisdiction "within our maritime jurisdiction of our admiralty of England and other places aforesaid." Exhibit 638, pp. 2, 4, 5, 11. The patents of admiralty judges contain similar material. Exhibit 640, pp. 5, 8.

A statute of the reign of George III provided that the jurisdiction of the crown commissioners for admiralty extended to all crimes committed in the seas outside the bodies of counties. Exhibit 160, p. 88.

D. Crown Ownership of the Seabed and Subsoil and of the Resources Thereof Continued To Be Fully Recognized in Law.

The doctrine of crown prima facie ownership of the seabed and foreshore "has been stated in varying language by judge after judge from that time [the time of Hale] to the present day [1888]." Exhibit 728, pp. xxxii-iii. The crown's assertion of ownership of lands recovered from the

sea likewise continued unchanged throughout the 18th century. Exhibit 646, pp. 4-6; Exhibit 656.

The treatise writers who referred to crown ownership of the seas and seabed include Lediard, Exhibit 718, p. 36, and Viner, Exhibit 208. The anonymous but authoritative author of 1746 listed among the crown rights in the British seas "the royalty of granting the liberty of fishing for pearl, coral and amber, and other precious commodities." Exhibit 716, p. 38. Comyns declared that "land, derelict by the sea, belongs to the king by his prerogative; for when the dominion and soil of the British sea belong to him, the derelict land, by consequence, shall be his . . . . So, an island which rises in the sea . . . . So, if a wharf be erected under low water mark, it belong to the king . . . . Or, between high and low water mark." 7 Comyns, Digest of the Laws of England 75 (5th ed. 1822).

Blackstone, who was of course the weightiest British legal writer of the century, affirmed without question the crown ownership of the soil of the sea when covered with water and, by consequence, of lands reclaimed from the sea. Exhibit 174. Blackstone referred to the crown's ownership as a "prerogative," yet again refuting Professor Thorne's theory that the "prerogative" theory means that the seabed is ownerless. Plaintiff's theory that Blackstone's reference to the prerogative meant that he believed the crown did not own the seabed while still covered with water (Pl. Br. 93, 95) is wholly without merit for the reasons stated at pp. 112 and 125, supra.

In Attorney General v. Richards, in 1795, the crown asserted ownership of a portion of the foreshore as against a subject who had erected buildings thereon. The information stated, and the Attorney General argued, that the crown owned the sea and the soil thereof, and therefore owned the foreshore also. The defendant denied none of this, but claimed title on the basis of a grant. The court held that the grant did not include the land in dispute, upheld the title of the crown, and ordered the buildings abated as a nuisance. Angell, The Right of Property in Tide Waters, Appendix, at 9-19 (1826); Moore, op. cit. at 434-35.

The crown's jurisdiction over sedentary fisheries, as well as surface fisheries, was asserted and exercised in the waters of new British possessions. Charles Williams' petition of 1751 (p. 147, supra) sought an exclusive license to exploit the coral resources in Minorcan coastal waters, the exclusive feature being justified by a showing that those resources had not previously been exploited. Exhibit 807. Williams' petition, which was endorsed by the governor of Minorca, was that he should have the exclusive coral fishery for 14 years and that the fishery should thereafter be open to all British subjects but to them only.

Also in 1751, Britain considered acquiring the island of Tabarka from Tunis, and one of the principal arguments in favor of the acquisition was the existence in the coastal waters of the island of a rich

coral fishery. If the island were acquired, Britain "might sell the liberty of fishing for coral to the Genoese or any other persons, until the English should have acquired the art of fishing it for themselves." Exhibit 772, pp. 203-04, 206-07. Exhibit 710, p. 158. See also Exhibit 675, pp. 35-37; Exhibit 718, p. 42; Exhibit 716, p. 2.

E. The Flag Salute Continued as a Recognition of Sovereignty in the British Seas.

Sir Henry Penrice's legal opinion of 1721 affirmed the right of the flag salute as a recognition by foreigners of British sovereignty in the British seas. Exhibits 458, 637. The navy enforced the obligation throughout the British seas; and this on occasion led to sea battles, Fulton, op. cit. at 520-21, though it appears that for the most part foreigners complied without incident. The admiralty instructions continued to require the salute throughout the century. Exhibit 458, pp. 263-64; 2 Marsden, Law and Custom of the Sea 263-64 (1916).

The treatise writers of the period are unequivocal both as to the duty and as to its significance as a recognition of British sovereignty in the British seas. Justice specified that foreigners failing to give the salute "are punishable by the king of England before his admirals, in the same manner as if they had committed a crime within the jurisdiction of his territories by land; which ceremony has been for many ages exacted by the English kings with all imaginable vigor." Exhibit 710, p. 158; see also Exhibit 675, pp. 35-37; Exhibit 716, p. 2; Exhibit 718, p. 42.

The Anglo-Dutch treaty of 1784, ending the Dutch participation in the war of the American Revolution, provided that the flag salute should be honored and practiced as in the past. Fulton, op. cit. at 522.

F. Other Attributes of Sovereignty and Jurisdiction Involved Neutrality and Smuggling.

As we have seen (pp. 134-37, supra), it was already clearly established in the 17th century that the waters within which Britain protected foreign ships from belligerent activities of other states were by no means coextensive with the seas in which Britain claimed sovereignty and dominion. Plaintiff appears to argue that during the 18th century Britain adopted the cannon-shot rule for purposes of neutrality and that this represented a curtailment of its claims to sovereignty and dominion. Plaintiff is wrong on both counts: the neutrality belt bore no relation to Britain's definition of its territorial seas, and the measure used for neutrality purposes in British waters was not the cannon shot, but at a minimum the line of sight. That measure is found in British treaties with Algiers, Tripoli and Tunis of 1716 and 1751. Exhibit 674, pp. 369, 725, 729, 737 and 741. Several of these treaties were limited in their application to Minorca and Gibraltar, and it seems questionable whether any of the treaties were regarded as having any application to the home waters of the United Kingdom, since the Barbary pirates did not venture so far. In one of the treaties the line of sight appears to be regarded as 10 miles from

shore. Id. at 737. As to British home waters, Sir Henry Penrice in 1718 regarded the "king's chambers" as still fully in effect for neutrality purposes. 3 McNair, International Law Opinions 46-47 (1956); 2 Marsden, Law and Custom of the Sea 243-45 (1916).

Professor Henkin (Tr. 2596-98) makes much of the treaty between Britain and Algiers of 1762. That treaty adopted the cannon-shot rule for neutrality purposes in Algerian (not British) waters. Exhibit 674, p. 372. There was a similar treaty with Tunis the same year, id. at 744, though Professor Henkin does not mention it. The Algerian treaty of 1762 forms the sole basis for Professor Henkin's contention that Britain had adopted the cannon-shot rule -- and indeed the three-mile limit -- in the 18th century for purposes of British sovereignty and dominion in the British seas themselves. The contention is patently frivolous.

A series of acts of Parliament spanning the entire 18th century asserted regulatory and criminal jurisdiction, including jurisdiction over foreigners, out to various limits from the British coasts for the purpose of preventing smuggling. These are the well-known "hovering acts." See Masterson, Jurisdiction in Marginal Seas with Special Reference to Smuggling, passim (1929); Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 535, 538, 539, 541 (1919).

A statute of 1718 prohibited the transfer of goods at sea from one ship to another with intent to bring them within the limits of any British port.

> "No limit or distance was specified. It is not necessary to determine the limits of the various ports; for the offense defined was an unlading 'at sea' with the intention to place the goods on board a vessel in the limits of any port, regardless of what those limits were. Nothing was said as to where the goods could have been seized or the masters arrested; but as already indicated, during this period, seizures and arrests were made anywhere on the 'English seas.'" Masterson, op. cit. at 7.

The penalties specified included not only the forfeiture of the goods in question but also fines upon the masters or persons in charge of both the in-taking and the unlading vessels. Ibid.

Acts of 1719, 1736 and 1783 prohibited hovering on the coast within the limits of any port or within two leagues of the shore. Id. at 12, 37. Another act of 1736 prohibited the taking in of foreign goods within four leagues of the coast, and authorized the seizure without geographical limit of ships which had previously come within the limits of any port. Id. at 26-27. Here again, the penalties included fines against individuals as well as the forfeiture of goods. Other statutes of the same general type were enacted in 1751, 1763, 1765, 1779, 1784 and 1794. Id. at 37-42, 58, 65. The 1784 act authorized the seizure, with no geographic limits specified, of ships which had previously come within four leagues of the British coast. Id. at 58. The 1794 statute asserted smuggling jurisdiction over the king's

chambers, extending in places as far as 50 miles from land. Id. at 65. The hovering acts were enforced by the courts against both subjects and foreigners. Id., passim; e.g., p. 42.

Chancellor Kent has an interesting comment as to the doctrinal basis for the hovering acts and its adoption into American law:

> "It was declared in the case of Le Louis, that maritime states claim upon a principle just in itself and temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic purposes, and the right was admitted by the courtesy of nations. The English hovering laws were founded upon that right. The statute (9 Geo. II, c. 35) prohibited foreign goods to be transshipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1799 (c. 128, secs. 25, 26, 27, 99), contained the same prohibition; and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court, in Church v. Hubbart, to be conformable to the laws and usages of nations." Kent, Commentaries on American Law (1896), reprinted in Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 182 (1919).

Herbert A. Smith remarks that the hovering acts "seriously embarrassed the British government in its efforts to obtain a general recognition of the three-mile rule" in the late 19th and early 20th centuries. Exhibit 747, p. 143.

* * *

British law and practice since 1800, which are not part of the law of this country but which cast further light on certain aspects of the pre-1800 law, are treated in an appendix to this Brief.

# IV.

## THE AMERICAN COLONIAL CHARTERS CREATED TERRITORIAL SEAS AND CONVEYED MARITIME SOVEREIGNTY AND DOMINION.

### A. Given the Legal and Political Climate in Which the Colonial Charters Were Issued, It Would Have Been Incredible If the Colonies They Created Had Stopped at Low-Water Mark.

As we have seen, the 17th century, during which all the Common Counsel States were founded and received their charters, was a period of intense British awareness and assertion of maritime sovereignty and its corollaries, including the right to exclude foreigners from fisheries and crown ownership of the seabed and the resources thereof. The official British position, repeatedly stated and acted upon, was that any nation had a right to territorial waters of 100 miles, and that in the four seas surrounding Britain there were particular historic rights sufficient to create a wider British sovereignty, extending at least in the case of the English Channel and the North Sea all the way to the opposite coasts.

It was also a time, as Edmundson put it, of "chartered companies, of trade monopoly, and of commercial protection in its most aggressive form." Exhibit 775, p. 6. The crown habitually granted monopolies of newly discovered areas, trade and resources; and the incorporated company -- the device through which many of the American colonizations were begun -- was a standard mechanism by which such monopolies were created.

In this atmosphere, it would be extraordinary -- indeed inexplicable -- if, as the North American English colonies were chartered and established, we did not find the crown making, and either conveying by charter or retaining for itself, exclusive claims to sovereignty and ownership of the sea and seabed in North American waters. Prima facie, if we knew nothing of the colonial charters but fully understood the English background, we should expect to find such claims and would be astonished if we did not. As to distance, we should expect to find confident assertions of sovereignty and dominion, of the right to exclusive fisheries, and of proprietorship of the sea and seabed extending at least 100 miles from the North American coast. And if charters or other legal documents defining colonial rights contained any ambiguity on these points, we should have no hesitation, in view of the English background, in construing them to create such rights.

### 1. The Issuance of the Colonial Charters and Important Acts of Maritime Sovereignty in British Waters Were Closely Correlated in Time.

The charter of 1606, which vested in monopolistic corporations rights of settlement comprising the entire Atlantic seaboard now occupied by the Common Counsel States, was issued during the period of intensive legal analysis which preceded James I's proclamation asserting sovereignty in the British seas and exclusive fishing therein. The coincidence of dates, both then and throughout the century, is striking. The

British kings and their governments would have all had to be victims of advanced schizophrenia had they not claimed sovereign and property rights in the North American seas, in view of their legal position and practical policies in British home waters at the same time.

To illustrate this point more fully, it may be instructive to set forth in parallel columns the chronology of the principal colonial charters together with some of the important events in the development of British law and practice regarding maritime sovereignty and ownership in British waters. The following chart is far from complete but is, we think, sufficient to make the point.

| Colonial Charters | Events in the Development of British Law and Practice Regarding Maritime Sovereignty and Dominion |
|---|---|
| | 1603 -- James VI of Scotland succeeds as James I of England, bringing with him the Scottish legal tradition of "reserved waters." James is immediately met with intense urging to take action to remedy Dutch encroachments on English fisheries (Exhibit 693, pp. 135-38). |
| | 1603 -- Publication of Sir Thomas Craig's work asserting maritime sovereignty and exclusive fishing rights. |
| | 1604 -- Draft treaty of union between Scotland and England, reserving to each nation its coastal fisheries. James proclaims neutrality within the king's chambers. |
| | 1605 -- The plan for assertion of sovereignty in the four seas and exclusive fishing therein "took more definite form" "within two or three years of the accession of James" (Exhibit 693, p. 138). Parliament regulates sea fisheries by statute. |

1606 -- The Northern (Plymouth) and Southern (London) "Virginia" companies are chartered.

1607 -- First permanent English settlement in America, at Jamestown.

1607 -- The Privy Council considers the proposed proclamation of maritime sovereignty and exclusive fishing, and a committee reports favorably on the legality thereof.

1609 -- Second Virginia charter.

1609 -- Issuance of James I's proclamation of maritime sovereignty and exclusive fishing.

1610 -- Newfoundland charter.

1610 -- Decision by the Privy Council of the Case of the Royal Fishery of the Banne. Sir Julius Caesar's legal opinion asserting maritime sovereignty and exclusive fishing.

About 1610 -- The Earl of Salisbury, prime minister, declares that every state has sovereignty over its adjacent seas for at least 100 miles.

1612 -- Third Virginia charter.

1613 -- Publication of Welwood's An Abridgement of All Sea Laws. Russia Company receives charter confirming its exclusive right to "Greenland" whale fisheries.

1617 -- Sir Julius Caesar's legal opinion that crimes at sea were committed within the territory of England.

1618 -- Selden writes Mare Clausum and the King reads it. England claims the "Greenland" whale fisheries on the ground of first discovery and use, and occupation of the Island of Spitzbergen.

1620 -- Charter of New England.

1621 -- Nova Scotia charter.

1622 -- Grant of Maine by New England Council to Gorges and Mason

1622 -- Callis' lectures on the Statute of Sewers.

1623 -- Calvert's charter for Avalon, in Newfoundland.

1628 -- Publication of Coke's First Institute.

1629 -- Massachusetts Bay charter; Heath patent for Carolina; grant of New Hampshire by New England Council to Mason.

1632 -- Maryland charter.

1632 -- Exchequer Court decides Philpott case.

1633 -- Sir John Coke's "Propositions for Fishing." Publication of Boroughs' The Sovereignty of the British Seas.

1634 -- Charles I's Ship Money proclamation. "Reglement" asserts maritime sovereignty.

1635 -- New Hampshire charter.

1635 -- Mare Clausum is published as a state paper.

1636 -- Charles I's proclamation of maritime sovereignty and exclusive fishing. Admiralty opinion affirming its lawfulness.

1637 -- The courts uphold maritime sovereignty and dominion in the Ship Money case and Rex v. Oldsworth.

1639 -- Maine charter.

1643 -- patent for Providence Plantation.

1644 -- Publication of Coke's Fourth Institute. The Parliamentary Committee on the Admiralty instructs the navy to maintain "sovereignty and regality in the seas."

1650 -- Council of State directs the admirals to preserve the dominion of the sea. Council grants fishing licenses to foreigners.

1652 -- Mare Clausum is translated and republished at the direction of the Council of State.

1652-54 -- First Anglo-Dutch war. By treaty of 1654, Dutch acknowledges flag salute.

1660 -- House of Commons passes bill regulating sea fisheries to the midline between England and coasts opposite England.

1662 -- Nova Scotia charter to Temple.

1662 -- Dutch again acknowledge flag salute by treaty.

1663 -- Rhode Island charter; Carolina charter.

1663 -- Mare Clausum is republished for Charles II in a new translation.

1664 -- Duke of York's patent for New York and New Jersey. The Duke grants New Jersey to Berkeley and Carteret.

1665-67 -- Second Dutch war. Act of Parliament appropriating supplies says it is for the preservation of the king's "sovereignty and dominion of the seas." By treaty of 1667, Dutch again acknowledge the flag salute.

1668 -- Jenkins' charge to an admiralty jury.

1670 -- Hudson's Bay charter.

1671 -- Opinion of Trinity House on the extent of the British seas.

1672-74 -- Third Dutch war. Dutch again acknowledge flag salute.

1673 -- Lease of Virginia to Arlington and Culpeper.

1674, 1676, 1677 -- Foreigners are indicted and convicted for failing to give flag salute in recognition of crown sovereignty over the four British seas.

1681 -- Pennsylvania charter.

1681 -- Scottish statute defining the admiralty jurisdiction "within this realm."

1682 -- The Duke of York's charter for New Castle (Delaware).

1689 -- British declaration of war with France, specifying as a casus belli French incursions on British sovereignty in "our seas," including seas of America. Dutch acknowledge flag salute for the fifth time.

1691 -- Second Massachusetts Bay Charter.

1699 -- Enactment of the first "hovering act." Judge Hedges' legal opinion on the extent of the British seas. Parliament excludes foreigners from Newfoundland fisheries.

2. The Persons Involved in Acts of Maritime Sovereignty in British Waters Were Largely the Same Persons as Those Responsible for the Chartering and Establishment of the American Colonies.

Not only were these events happening during the same period; they involved for the most part the same people. The ruling group in England was small; most of its members knew each other intimately and were related by blood or marriage. In these circumstances it is hardly surprising that the men most actively involved in asserting, adjudicating and exercising British sovereignty and dominion over the British seas in Europe were also the persons most active in promoting, chartering and establishing the British colonies in North America. The following list, which could be greatly expanded both by the addition of more names and of more activities of the persons named, is sufficient to make the point. These men would have been schizophrenic indeed had they taken a wholly different view of maritime sovereignty and dominion in North American waters from the view which they were simultaneously establishing and vindicating at home.

First, of course, we have the sovereigns themselves. All the Common Counsel States were chartered during the reigns of James I, Charles I and Charles II -- each of whom was intensively aware and an ardent advocate of British maritime sovereignty and dominion, as was Cromwell. The establishment of a similar dominion in North American waters as the new colonies were chartered and established is hardly a matter likely to have escaped them.

The next sovereign, James II, had a unique triple status as Lord High Admiral, colonial proprietor and monarch. While Duke of York he served as admiral during the period, encompassing the second and third Dutch wars, in which the British claims to maritime sovereignty and dominion were carried to perhaps their highest pitch both in theory and in practice. His instructions to the navy as Lord High Admiral required enforcement of the flag salute "in acknowledgment of his majesty's sovereignty in those seas," extending to Finisterre. Exhibit 458. James was also one of the patentees of Charles II's royal fishery in 1677. Fulton, op. cit. at 516. And by grant from his brother Charles, he was himself the proprietor and viceroy of New York, New Jersey, Maine and Delaware. Any one reckless enough to assert that those colonies were deemed to end at high- or low-water mark, at least so long as James, admiral, colonial proprietor and king, had anything to do with them, bears a heavy burden.

In the early years the crown's supervision over the colonies was exercised by the Privy Council, consisting of the principal officers of state. In 1634, Charles I appointed as "Lords High Commissioners for the Plantations"the Archbishops of Canterbury and York, the Lord Keeper, the Lord Treasurer and eight other officers of state; under this administration the New Hampshire and Maine charters were granted. Under the Commonwealth colonial affairs were directed by a Board of Commissioners for the Plantations consisting of the principal men of the state, including Cromwell himself.

There follows a discussion of a few only of the men who were principal figures both in the assertion, adjudication and exercise of British maritime sovereignty and dominion at home and in the chartering and establishment of the North American colonies. These will be listed in alphabetical order.

George Monk, Duke of Albemarle (1608-1670). Monk was "general at sea" in the first Dutch war, and commanded the entire British navy in 1653. The principal architect of the restoration of 1660 and one of Charles II's most intimate advisors, he commanded the fleet during the second Dutch war when the Duke of York was absent. 15 Encyclopaedia Britannica 1723-24.*/ Albemarle was one of the patentees and proprietors of the Carolina colony in 1663. His son the second Duke was a patentee of the Hudson's Bay Colony in 1670. 33 British and Foreign State Papers 1365.

Henry Bennet, Earl of Arlington (1618-1685). Bennet was secretary to the Duke of York from 1654 and Charles II's agent at Madrid in 1658-60. Secretary of State from 1662 to 1674, he was throughout that period the principal minister of the crown dealing with foreign affairs. He was heavily involved in the second and third Dutch wars and frequently asserted the English claims to maritime sovereignty and the flag salute. 2 Dic. Nat. Biog. 230-33; Exhibit 693, pp. 469, 483, 497;

*/ All references to the Encyclopaedia Britannica in this section are to the 1959 edition.

Fulton, op. cit. at 490, 502, 506. Arlington was a patentee of the Hudson's Bay Colony in 1670. In 1673 he and Lord Culpeper received a lease of Virginia for 31 years, including "all islands . . . within ten leagues of any of the coast of any of the said territories." Tr. 1489; 33 British and Foreign State Papers 1365.

Thomas Howard, Earl of Arundel (1585-1646). Arundel held many high offices, including that of Lord High Steward, in the reigns of James I and Charles I. He was a friend and patron of John Selden. 2 Encyclopaedia Britannica 493. Arundel was one of the commissioners and councillors for Charles I's exclusive fishing society. Exhibit 693, pp. 227, 239. He was also one of the patentees of the New England charter of 1620, Exhibit 11, and a leading member of the Council for New England. In the division of New England lands in 1632, he received a coastal tract "with all the fishing . . . islands, etc. . . . within 9 miles directly into the sea." U.S. Exhibit 73, p. 64. He and the Duke of Lennox arbitrated the New England fishing dispute in 1619. Exhibit 237; see p. 235, infra.

Francis Bacon, Viscount St. Albans (1561-1626). Bacon was one of the commissioners who drew up the draft treaty of union between England and Scotland in 1604, including the clause preserving exclusive fisheries for each nation in its reserved waters. Exhibit 693, p. 223. Bacon was Solicitor General from 1607, Attorney General from 1613 and Lord Chancellor from 1618. As Attorney General, he was involved in the collection of authorities to justify the English assertion of sovereignty and exclusive fishing in the English seas. Fulton, op. cit. at 163, n. 1.

As one of the principal law officers of the crown, he participated in drafting the colonial charters issued during his time, including the second and third Virginia charters. Scott, The United States of America: a Study in International Organization 71, 72 (1920). He advised the king concerning the establishment and management of the Virginia plantation, Bowen, Francis Bacon 124 (1963), and wrote an "Essay on Plantations." Bacon was himself one of the patentees of the second Virginia charter in 1609 and a member of the Council of the Virginia Company. Exhibit 42. He was also active in procuring the Newfoundland patent of the following year and was one of the patentees named therein. Exhibit 663, p. 304; Exhibit 756, p. 11. He became a member of the governing Council for Newfoundland. Rowse, op. cit. at 202. See also 2 Encyclopaedia Britannica 882-88.

George Calvert, first Lord Baltimore (died 1632). Calvert was one of the principal officers and advisors of the crown for 30 years. In 1605 he became Clerk to the Privy Council, and from 1613 on he was in charge of Italian and Spanish diplomatic correspondence. A member of Parliament, he was Secretary of State from 1619 to 1625. 3 Encyclopaedia Britannica 1. Calvert was one of the patentees of the second Virginia charter of 1609. Exhibit 42. He signed the warrant for the New England charter of 1620. Exhibit 466, p. 31. Also a member of the Council for New England, he received a share of New England lands in the division of 1622. U.S. Exhibit 73, p. 62. As Secretary of State, he was involved in the New England fisheries dispute in Parliament and defended exclusive

fishing rights in American waters. Exhibit 740, pp. 35-36. In 1623 he received a royal charter for Avalon in Newfoundland. The Maryland charter was prepared for him in 1632 and issued to his son and heir just after his death.

George Villiers, Duke of Buckingham (1592-1628). As the royal favorite and intimate counselor of both James I and Charles I, Buckingham was much involved in their assertions of maritime sovereignty. In 1620, at a time when he held the post of Lord High Admiral of England, he was one of the patentees of the New England charter. Exhibit 11. He became president of the Council for New England on Lennox's death in 1624. Preston, Gorges of Plymouth Fort 235 (1953). He received a patent for Guiana, in South America, in 1627 and founded a colony there. Greene, The Foundations of American Nationality 41 (1922).

Sir Julius Caesar (1558-1636). A famous lawyer and public official, Caesar was Chancellor of the Exchequer in 1606-14 and Master of the Rolls from 1614 to his death. His legal opinions (p. 61, supra) were of capital importance in establishing English maritime sovereignty and exclusive fishing rights in the English seas. He had previously been a commissioner of the Admiralty from 1581, and judge of the High Court of Admiralty from 1584 for many years. As Master of the Rolls, Caesar signed the warrant for the New England charter of 1620. Exhibit 466, pp. 31-32; 3 Dic. Nat. Biog. 656-59. He was a member of the Privy Council which decided the Case of the Royal Fishery

of the Banne, which declared the crown's sovereignty and ownership of the sea and seabed of the English seas. 1 Turner, The Privy Council of England 75 (1927).

James Hay, Earl of Carlisle (c. 1580-1636). Carlisle was ambassador to France, Spain, Germany and Venice. He was active in the "reserved waters" negotiations between England and Scotland, and was one of the commissioners of Charles I's exclusive fishery company. In 1627 Carlisle received a charter for the Windward and Leeward Islands, in the Caribbean. 4 Encyclopaedia Britannica 875; 2 Cokayne, Complete Peerage 151 (1889); Exhibit 693, pp. 222 n. 1 and 227 n. 3; Greene, The Foundations of American Nationality 39-40 (1922).

Sir George Carteret (c. 1610-1680). In 1636, Carteret was one of the captains and commanders of the Earl of Northumberland's fleet collecting licenses from the Dutch in the North Sea and driving unlicensed fishermen from English waters. Fulton, op. cit. at 291; Exhibit 607, p. 3. The accounts of the expedition show that Carteret collected £657 in license fees from the Dutch. Ibid. He was comptroller of the English navy in 1639, and Vice Admiral of Jersey in 1644. Appointed Privy Councillor at the restoration, he served as treasurer of the navy from 1661 to 1667. Carteret was one of the eight proprietors named in the Carolina charters of 1663 and 1665. In 1664, he and Lord Berkeley were granted New Jersey by James, Duke of York. 4 Encyclopaedia Britannica 940. He was a promoter of the Hudson's Bay Company and a member of its Court of Adventurers. Exhibit 765, p. 14.

Edward Hyde, Earl of Clarendon (1609-1674). Father-in-law of James II and maternal grandfather of Queen Mary II and Queen Anne, Clarendon was Lord Chancellor and chief minister of Charles II from 1660 through the end of the second Dutch war in 1667. He asserted the sovereignty of the crown over the British seas against the Dutch. 5 Encyclopedia Britannica 757-60. In 1666, Clarendon as Lord Chancellor received the royal warrant to grant a fishing license to 50 ships of the City of Bruges. Exhibit 693, p. 451. Clarendon was one of the patentees of Carolina in 1663.

Sir Edward Coke (1552-1634). As Attorney General from 1594 to 1606, Coke formulated crown doctrine as to the circumstances in which monopolies might lawfully be granted (p. 42 , supra), and as Speaker of the House of Commons he defended that policy in Parliament. Coke was Chief Judge of the Court of Common Pleas, 1606-13, and of King's Bench, 1613-16. 5 Encyclopaedia Britannica 950-51. As a parliamentary leader, he was involved in the New England fisheries dispute in the 1620's. As one of the most eminent of all English legal authorities, he asserted the crown's sovereignty and ownership of the seas (pp. 70-71 , supra). As Attorney General, he supervised and participated in the drafting of the Virginia charter of 1606. Tr. 897; Bowen, The Lion and the Throne 343 (1956); Scott, The United States of America: a Study in International Organization 70 (1920).

Sir John Coke (1563-1644). Coke was a commissioner of the navy, Secretary of State from 1625 to 1639, and one of the councillors of Charles I's exclusive fishing society of 1632. Exhibit 693, p. 239. He wrote "Propositions for Fishing" and many other state papers asserting the crown's sovereignty and ownership of the fisheries in the British seas. Exhibit 693, pp. 212 ff. His works include instructions issued to Captain John Mason for the Scottish fishery, directing among other things that foreigners be excluded. Exhibit 693, p. 219; Exhibit 756, pp. 276-81. Coke was one of the patentees of the second Virginia charter in 1609. Exhibit 42. As Secretary of State, he was involved in defense of the crown in the New England fisheries dispute in Parliament in the 1620's. In 1632 he declared, in the presence of the king, that the crown owned all the fisheries in both the British and the American seas. Exhibit 693, p. 235. See 5 Encyclopaedia Britannica 951.

Sir Dudley Digges (1583-1639). At various times a member of Parliament, Digges was a diplomat; sent as ambassador to Holland in 1620, he was doubtless involved in and fully aware of the continuing Anglo-Dutch dispute regarding the North Sea fisheries. Digges became Master of the Rolls in 1636. 7 Encyclopaedia Britannica 382. He was one of the patentees both of the second Virginia charter of 1609 (Exhibit 42) and of the New England charter of 1620 (Exhibit 11), and was a member of the Council of the Virginia Company. His son Edward Digges was governor of Virginia in 1655-1657. In the 1620's Sir Dudley Digges was

active in Parliament in defending the Muscovy Company's right to its monopoly of whale fishing in "Greenland" waters. 2 Stock, Proceedings and Debates of the British Parliaments Respecting North America 61, 84 (1927).

Sir Dudley Carleton, Viscount Dorchester (1573-1632). As ambassador to Holland from 1616, Carleton bore the brunt of the diplomatic controversy with the Dutch resulting from James I's assertion of sovereignty and dominion of the North Sea. Fulton, op. cit. at 168, 180-85, 190; Exhibit 693, pp. 174, 192-93. Later Privy Councillor and principal Secretary of State in 1628, he collected authorities on the territorial admiralty jurisdiction in the narrow seas. Exhibit 693, pp. 212-13. Carleton was involved in, or at least knowledgeable about, the inception of the Virginia colony in 1607. Exhibit 663, p. 82. In 1622 he received a petition from certain Walloons and French seeking permission to fish in the seas of Virginia. Tr. 2196.

Sir Ferdinando Gorges (c. 1566-1647), "the father of New England colonization." Exhibit 720, p. 34. A soldier and a sailor, Gorges was captain and keeper of the castle of Plymouth from 1596 to 1629, with considerable naval responsibility in the western part of the English Channel. He was, with Popham, chiefly instrumental in procuring the charter of 1606, was a member of the Plymouth Company in 1606 and was involved in the foundation of the Popham colony in Maine. Exhibit 756. One of the most important of the first generation of

entrepreneurs of American colonial settlement, he was principally instrumental in obtaining the New England charter of 1620 and was the guiding spirit of the Council for New England. Later he became the patentee of Maine. 10 Encyclopaedia Britannica 530.

Sir Robert Heath (1575-1649). Heath was Solicitor General, 1621-25; Attorney General, 1625-31; Chief Justice of Common Pleas, 1631-34, and of King's Bench, 1642-45. He was one of the principal defenders of the prerogative in the Parliaments of 1623-25. "As a constitutional lawyer he was distinguished by learning and ability." 9 Dic. Nat. Biog. 348. He was a patentee of the New England charter of 1620 and a member of the Council for New England. Exhibit 11. In 1629 Heath was granted the "Heath patent" for Carolina, extending from sea to sea between the 31st and 36th parallels. He was also a Councillor of the Virginia Company. Greene, The Foundations of American Nationality 41 (1922).

Lodowick Stewart, Duke of Lennox (died 1624). As lessee of the crown, this near relative of James I was in charge of the measures in 1616 and subsequent years to collect the tax called the "assize herring" from Dutch and other foreign fishermen in Scottish waters. Fulton, op. cit. at 168-71, 180. He was a member of the Privy Council which decided the Case of the Royal Fishery of the Banne. 1 Turner, The Privy Council of England 73-74 (1927). He was one of the commissioners to negotiate with the Dutch regarding the fisheries dispute in 1618.

Fulton, op. cit. at 186. Also Admiral of Scotland (Exhibit 466, p. 54), Lennox was one of the patentees of the New England Company charter of 1620, Exhibit 11, and was president of the Council for New England until his death. Preston, Gorges of Plymouth Fort 235 (1953). In the division of New England lands in 1622 he received a coastal tract with "all the fishings . . . and islands . . . within 9 miles directly into the sea." U. S. Exhibit 73, p. 63. He and the Earl of Arundel arbitrated the New England fishing dispute in 1619. Exhibit 237.

Captain John Mason (1586-1635). In 1610 Mason was employed by James I to collect the "assize herring" from Dutch fisherman in Scottish waters, and made a naval expedition to that end. Fulton, op. cit. at 165; Exhibit 693, p. 153 n. He served as governor of Newfoundland from 1615 to 1621, and published the first map of that region. 15 Encylopaedia Britannica 15; Exhibit 663, p. 305. He was one of the guiding spirits of the New England Company, served as vice president of the Council for New England in 1632, and 10 years previously had obtained a grant of land called Mariana from the Council. New Hampshire was chartered to him in 1629. In the early 1630's he was the principal originator of the plan for an exclusive fishing society in Scottish waters, was a councillor and treasurer of the society, and was appointed admiral of its ships. Exhibit 693, pp. 216, 219-20, 241. He was the author of a state paper entitled "A Collection of Diverse Particulars Touching the King's Dominion and Sovereignty in the Fishings, as well in Scotland as

in the British Ocean." Exhibit 693, p. 364. He also wrote "A Brief Discourse of the New-found-land" (1620), emphasizing the fisheries. Bridenbaugh, Vexed and Troubled Englishmen 1590-1642, pp. 227-28 (1968). His last appointment was as vice-admiral for New England, but he died before taking up that position. See generally Exhibit 756; Exhibit 683, pp. 26, 28, 34-35.

Henry Howard, Earl of Northampton (1540-1614). Northampton was Lord Privy Seal from 1608 to 1614. In 1608 the draft of James I's proclamation of maritime sovereignty and exclusive fishing was referred to him and the Earl of Devonshire for their opinions; they recommended its adoption. Exhibit 693, p. 138. Northampton was a member of the Privy Council which decided the Case of the Royal Fishery of the Banne. 1 Turner, The Privy Council of England 73-74 (1927). He was active in procuring the issuance of the Newfoundland patent in 1610. Exhibit 663, p. 304.

William Penn (1644-1718). Penn owed his charter for Pennsylvania primarily to royal favor towards his father, Sir William Penn, admiral during the second Dutch war. The elder Penn had collected a number of documents on the crown's sovereignty and dominion of the sea, and the younger Penn presented those papers to the king. Exhibit 632.

Sir John Popham (c. 1531-1607). Privy Councillor from 1571, Solicitor General 1579-81, Speaker of the House of Commons in 1580,

Attorney General 1581-92, and Chief Judge of the Court of King's Bench from 1592 until his death, Popham was one of the most eminent legal personages of his time. 16 Dic. Nat. Biog. 147-49. At the end of his life Popham was intensely interested and influential in colonial enterprises, and was one of the prime movers in procuring the "Virginia" charter of 1606, of which he is said to have been the principal draftsman. Scott, The United States of America: a Study in International Organization 70 (1920). His nephew George Popham (died 1608), also one of the petitioners for the 1606 charter and one of the patentees named therein, was governor of the abortive Popham-Gorges colony in Maine.

Prince Rupert of the Rhine, Duke of Cumberland (1619-1682). Nephew of King Charles I, Prince Rupert commanded the royal army during the Civil War and the royal fleet in 1648-52, in which capacity he reduced Barbados and other West Indian islands to obedience. He was one of the principal British admirals in the second and third Dutch wars, and First Lord of the Admiralty from 1673 to 1679. The prince was one of the chief originators and backers of the Hudson's Bay expedition in 1668, and one of the incorporators of the Hudson's Bay Company and grantees of its charter in 1670; the company's land territories were called Rupert's Land after him. On the establishment of the Council for Trade and Plantation in 1670, Rupert became one of its first members. 17 Dic. Nat. Biog. 405-17; 33 British and Foreign State Papers 1365.

Robert Cecil, Earl of Salisbury (1563-1612). As chief minister of the crown from 1598 to 1612 and Lord Treasurer for the last four years of his life, Salisbury was at the head of government throughout the period which saw the charter of 1606, the second and third Virginia charters, and James' proclamation of maritime sovereignty in 1609 and the dispute with the Dutch which resulted therefrom. He was intensely active in defending diplomatically James' claim to maritime sovereignty and dominion, Fulton, op. cit. at 150-59, and stated England's official position that every coastal state was entitled to sovereignty out to at least 100 miles from its coasts. Salisbury subscribed to the opinion of the Privy Council Committee in 1607 which endorsed the lawfulness of James' proclamation, Exhibit 693, p. 146, and was of the Council when it decided the Case of the Royal Fishery of the Banne. 1 Turner, The Privy Council of England 73 (1927). Salisbury was himself one of the patentees of the second Virginia charter of 1609. Exhibit 42. A kinsman of Sir Ferdinando Gorges, he took great interest in the initial ventures of colonization. Rowse, The Elizabethans and America 76, 98-100 (1959).

Anthony Ashley Cooper, Earl of Shaftesbury (1621-1683). Shaftesbury was a Privy Councillor and a leading minister in the first part of Charles II's reign, and served as Lord Chancellor in 1672-73. He was much involved in the third Dutch war and in the negotiations with the Dutch in which he repeatedly asserted the crown's sovereignty and property in the British seas. Exhibit 693, pp. 506-07. Shaftesbury was intimately involved

in colonial affairs both before and after the restoration. 20 Encyclopaedia Britannica 426-29. He was one of the patentees of Carolina in 1663, and was the prime mover in the establishment and government of the Carolina colonies. In 1670 he was a patentee of Hudson's Bay. 33 British and Foreign State Papers 1365.

Sir Thomas Smith (c. 1558-1625). Smith was special ambassador to Russia in 1604 and chief executive of the Muscovy Company, which as we have seen had the exclusive whale fishery in the "Greenland" seas. For many years he was governor of the East India Company, and was a commissioner for the settlement of disputes with the Dutch in 1619. Smith was one of those most active in procuring the second Virginia Charter of 1609, and served as treasurer of the Virginia Company from 1609 to 1621. He was also one of the chief commissioners of James I's navy and governor of the Somers Islands (Bermuda) Company. 18 Dic. Nat. Biog. 536-37; Greene, The Foundations of American Nationality 38 (1922).

William Alexander, Earl of Stirling (c. 1567-1640). As Secretary of State for Scotland from 1626 to 1640, Alexander was intimately involved in Charles I's exclusive fishing scheme, in 1630 was one of the commissioners to draft the project, and was a councillor of the fishing company. Exhibit 693, pp. 219-20, 227, 232, 239. Also a leading proponent of American colonization, Alexander received a charter in 1621 for Nova Scotia and New Brunswick, and served as lieutenant governor thereof. 21 Encyclopaedia Britannica 411-12.

Robert Rich, Earl of Warwick (1587-1658). Warwick was vice admiral of Essex from 1619, was appointed admiral of the fleet by Parliament in 1642, and held the office of Lord High Admiral from 1643 to 1645. In 1643 he was ordered to enforce the flag salute in the English seas. Exhibit 693, p. 380. Always interested in colonial ventures, he was one of the patentees of the New England charter of 1620 (Exhibit 11), was chiefly responsible for procuring the Massachusetts Bay charter in 1629, and was president of the Council for New England until 1631. In 1643 he was appointed head of the Board of Commissioners for the Plantations, which the following year granted a patent to the Providence colony in Rhode Island. 23 Encyclopaedia Britannica 377. In 1630 he and the parliamentary leader John Pym had founded a colony on the island of Providence, in the Caribbean. Greene, The Foundations of American Nationality 41 (1922).

Edward Zouche, Baron Zouche of Harringworth (c. 1556-1625). A diplomat, Zouche was ambassador to Scotland in 1593-94, and to Denmark in 1598. President of Wales from 1602 to 1615, he became one of the Commissioners of the Treasury at Salisbury's death in 1612. He was a member of the Privy Council which decided the Case of the Royal Fishery of the Banne. 1 Turner, The Privy Council of England 74 (1927). Zouche was a cousin, intimate friend and patron of Richard Zouche, one of the scholarly authorities for English maritime sovereignty (p. 73, supra). Lord Zouche was heavily involved in colonial enterprises. A patentee of both the second Virginia charter of 1609 and of the New England charter of 1620 (Exhibits

11, 42), he was a member of the Council of the Virginia Company and also one of the first members of the Council for New England. As warden of the Cinque Ports from 1615 to 1624, Zouche had substantial responsibilities for the enforcement of English rights in the narrow seas. 21 Dic. Nat. Biog. 1330-32.

3. The English Discoveries and Symbolic Acts of Taking Possession Were Sufficient in Law To Establish Maritime Sovereignty.

Plaintiff seems to take the position that, admitting that England might have claimed sovereign rights in the seas adjacent to its North American colonies, it would have had to make some sort of occupation or appropriation in fact of those seas for its claim to be effective under the legal concepts of the time. That is plainly unsound. As Keller, Lissitzyn and Mann have demonstrated in their authoritative book Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800:

> "Next, it may be asserted on the basis of the facts that the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient per se to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state." Exhibit 712, pp. 148-49.*/

*/ The quotation is from the conclusion of the work. The authors' conclusions are supported by a careful and exhaustive analysis of the evidence.

Thus, even as to land areas, "effective occupation" was not regarded as necessary in the 16th, 17th and 18th centuries to create a valid and exclusive claim of sovereignty. A fortiori this was true of the adjacent seas. Under the established legal norms of the era, the establishment of sovereignty over a land area was regarded as entailing sovereignty over the adjoining territorial sea. See Tr. 1219. That this was true under English law we have demonstrated at length. It was likewise true under international law; see p. 295, infra. The Supreme Court has recognized that this was established law in the colonial period, and that discovery, without "effective occupation," was adequate to establish English sovereignty. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (Marshall, C.J.); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Massachusetts v. New York, 271 U.S. 65, 85 (1926). Accord, 1 Story, Commentaries on the Constitution §§2-38, pp. 6-18 (5th ed. 1905).

William Bollan, an "able lawyer" in Massachusetts and agent for that colony in London, writing in 1764, founded "the ancient right of the English nation to the American fishery" on Cabot's discovery and Gilbert's symbolic acts, in the same manner as British entitlement to the land mass of North America was invariably justified. Exhibit 669; Exhibit 673, pp. 1-4, 8-10. Keller, Lissitzyn and Mann regard Gilbert's acts of taking sovereignty as typical of the period, op. cit. at 62-65; and control of the fisheries was the principal motive for the Gilbert expedition.

4. The Common Law of England, Including the Law of Maritime Sovereignty and Dominion, Became Law in This Country.

The English colonists considered, in general, that they brought the common law of England with them to their new home.*/ This was indeed explicit from the beginning: the King's Orders and Instructions of 1606 to the King's Council for Virginia provided that the law in the colonies should be "in substance as near to the common law of England, and the equity thereof, as may be," and most of the colonial charters contain similar formulas. As a body of American common law grew up, it remained established doctrine that the common law of England was in force in this country except where inappropriate for some reason to conditions on this side of the Atlantic. "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole

*/ The common law included the prerogative. Exhibit 755. This doctrine was restated by William Bollan in 1766. Exhibit 672, pp. 10-11. The American revolutionary statesmen had no quarrel with the royal prerogative, but rather with the purported legislative power of Parliament. The petition to the king adopted by the first Continental Congress in 1774 declared, "we wish not a diminution of the prerogative." 1 Journals of the Continental Congress 119; McIlwain, The American Revolution: a Constitutional Interpretation 116 (1923). Indeed the revolutionary statesmen relied on the prerogative as the source of the crown's power, by the colonial charters, to establish new governments not subject to parliamentary legislation. Id. at 130-37; Adams, Political Ideas of the American Revolution 97 (1939).

structure of our present jurisprudence stands upon the original foundations of the common law." 1 Story, Commentaries on the Constitution of the United States 140 (1833). See Tr. 802-37, 1278-86, 1721-27, 2032-33, 2341-46. Additional citations are unnecessary for a proposition that cannot be questioned without frivolity.

Plaintiff has not suggested, and cannot suggest, the slightest reason why the English common law bearing on sovereignty and ownership of the sea and seabed in adjacent waters might have been considered inappropriate here. There might, of course, have been a reason for such inappropriateness, particularly as the colonies came to feel more self-reliant and independent, if the crown had sought to retain for itself in American waters all the rights of sovereignty and property which the English law gave it. There could be no such inappropriateness, however, if the crown granted or delegated its rights to the colonial proprietorships and governments on this side of the Atlantic.

Professor Morris conceded as much:

> "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?

"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." Tr. 2345-46.

5. The Exploitation of Fisheries and Other Marine Resources Was of Paramount Importance as an Objective of American Colonization.

We can confidently go much farther and say that, given the objectives of the North American colonization, it was in the highest degree appropriate, and indeed essential, that rights of sovereignty and property be asserted in the American seas. The objectives of colonization were, of course, primarily economic; and in the early stages -- the period of the charters -- they were focused not so much on settlement and production of crops as on the discovery and exploitation of fisheries and mineral resources. Knowledge of the rich North American fisheries was one of the principal incentives to the English colonization. There was great awareness also of sedentary fisheries, and it was hoped that pearls would be

found. The search for gold and other minerals was likewise a paramount objective, and those involved were hardly ignorant that these could be found below as well as above low-water mark.*/ For the paramount importance of fisheries in the North American colonization, see generally Tr. 2055-57, 2283; Exhibit 179, p. 51; Exhibits 663, 664, 719, 720, 740, 741, 742, 748; Exhibit 777, pp. 300-12; U.S. Exhibit 368, p. 27; Rowse, The Elizabethans and America 46, 64, 71, 93, 101, 103-05, 109, 160-80 (1959); Greene, The Foundations of American Nationality 32-33 (1922). In these circumstances, rights of sovereignty and property in the adjacent seas and seabed -- particularly the right to exclude foreigners from such resources as might be found -- were of very considerable importance both to the authors and to the recipients of the colonial charters.

When all these factors are considered together -- the English law and practice of the period with respect to maritime sovereignty and dominion; the fact that the same persons were intimately involved both in the assertion and exercise of such sovereignty and dominion in Europe and in the process of American colonization; the established English law and practice regarding monopoly of newly discovered resources; the firm belief both of England and of the other colonizing powers that valid title could be established by discovery plus symbolic acts of sovereignty; the conspicuous

*/ Selden noted that "it is well known to us that precious stones and pearls are very often found also in the Western Seas," and referred to the exclusive coral and pearl fisheries in Middle Eastern waters. Mare Clausum, p. 142.

importance of maritime and seabed resources as one of the principal objectives of colonization -- we would be utterly astonished to find that England asserted and the charters conveyed no rights of sovereignty and property below low-water mark in the American colonies. It is fair to say that, given the background and the surrounding circumstances, we must approach the colonial charters with a strong presumption that we shall find that they recognized the adjacent seas and seabed as proper subjects for the exercise of sovereignty and ownership.

Professor Thorne conceded as much with respect to exclusive fishing rights:

> "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.
>
> "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." Tr. 2727-28.

Likewise Professor Henkin, once his confusion as to the period in which the colonial charters were granted was cleared up, made the obviously necessary concession:

> "Q Is it 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 intensively aware of sovereignty over the sea and making the most 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.e., his testimony in chief that he would not expect the charters to contain maritime claims]. I don't have the expertise on the history of the period, but I was assuming that these claims [charters?] were dated at a later period when Great Britain had already abandoned these claims." Tr. 2626-27.

Both the legal and political climate in which the charters were issued, and the provisions of the charters themselves, have been aptly summarized as follows:

"The expansion of England was largely due to the efforts of this group which was composed of men drawn from the landed classes, of merchants and of sea-captains who had gained experience in the expeditions of Elizabeth's reign. Either as individuals or as members of a company these men had received charters granting them land and sea within certain limits, the power to organise a government and exercise jurisdiction within these limits, and the right to control the trade and fisheries of the plantation. It was the period of the great struggle between the Stuart kings and the United Provinces over the North Sea fisheries, and everyone was familiar with the attempts of the British government to compel the Dutch to buy licenses to fish for herring in the North Sea; they knew of the expedition under the command of Captain John Mason to collect the white penny from the fishermen of the west coast of Scotland; they were acquainted with the arguments of Selden, who in

> Mare Clausum, argued that the sovereignty of the British king extended from the shores of the British Isles uninterruptedly to the coasts ruled by other sovereigns. Though Selden did not discuss the question of British sovereignty over the North Atlantic [sic; see pp. 190-92, infra], by making grants of these waters the crown tacitly assumed sovereignty there. The colonial patentees then received grants of jurisdiction and territory which had to be turned into a source of profit. In an age when fisheries were a favorite speculation and the North Atlantic was already frequented by ships of several nations, considerable interest was taken in the grants of sole fishing rights and jurisdiction by sea as well as by land." Exhibit 683, p. 25.

B. Britain Claimed Maritime Sovereignty in North American Waters.

In this subsection we shall summarize what the record shows as to the general claims, made by British legal writers and in official documents, regarding maritime sovereignty or the corollaries thereof in North American waters in the 17th and early 18th centuries. More specific claims and examples of the exercise of rights of sovereignty or ownership will be reserved for later sections.

The first writer to deal with England's rights in American waters appears to have been Albert Gentili, regius professor of civil law at Oxford, who died in 1608, the year after the first settlement in Virginia at Jamestown. Gentili maintained that Spain and England, owning as they did both opposite coasts of the Atlantic in their own latitudes, were each sovereign over the seas extending between those opposite coasts. Alternatively, he relied on the established doctrine that every coastal

sovereign had territorial waters of 100 miles. Exhibit 693, pp. 359-60.

As we have seen, the Anglo-Dutch dispute over the "Greenland" whale fishery, beginning in the second decade of the 17th century, involved waters which were at least sometimes deemed to extend as far as the North American coast (pp. 93-95, supra). The dispute unquestionably involved an English claim to maritime sovereignty and exclusive fishing rights, outside the British seas as traditionally defined, based on first discovery and use and on occupation of the nearest land mass. The dispute thus demonstrates the natural and inevitable attitude of the English government and crown towards maritime sovereignty in the adjacent seas of new English colonies.

Sir John Coke, Secretary of State, in 1632 asserted in the presence of the king that the crown owned the fisheries in the American seas. Exhibit 693, p. 235. In his "Propositions for Fishing," written the following year, Coke wrote that the British exclusive fisheries comprised three areas: the coasts of Britain and Ireland themselves, the North Sea, and the waters of the "North and Northwest discoveries," that is, North America. Coke urged that the British must be vigilant to prohibit the French and Dutch from fishing in American waters.

Sir John Boroughs, in his The Sovereignty of the British Seas in 1632, immediately after establishing (p. 22) that in the British seas

the crown enjoyed sovereignty, jurisdiction and exclusivity of fishing, continued as follows:

> ". . . [H]is majesty is now absolute commander of the British Isle, and hath also enlarged his dominion over a great part of the western indies; by means of which extent of empire (crossing in a manner the whole ocean) the trade and persons of all nations (moving from one part of the world to the other) must of necessity, first or last, come within compass of his power and jurisdiction." Ibid.

As we have seen, the immediate occasion for Selden's authorship of Mare Clausum was the "Greenland" fisheries dispute, involving not the traditional British seas but the newly discovered whaling fisheries in northern waters sometimes regarded as extending to the coasts of America. In Mare Clausum Selden wrote as follows regarding British maritime sovereignty in American waters:

> "But there is, moreover, in the more westerly part of this open and main sea, another right belonging to the King of Great Britain, and that of a very large extent upon the Shore of America. Whereas Sir Humphrey Gilbert, Knight, did by authority of Queen Elizabeth transport a colony into the New World, with design to recover certain lands in the east parts of the Northern America, which the right belonged to the English dominion, the queen was by him as her procurator, put into a possession, for ever to be held by her and her heirs, both of the port called by the name of St. John (which is in the Island of Baccalaos [Newfoundland]) and also of the whole sea as well as land on every side, for the space of six hundred miles. Then he received this new kingdom of the queen, as her beneficiary, having a branch and a turf delivered in his hands, according to the usual ceremony of England in transferring the ownership of lands and possessions. Nor truly was it necessary that he should otherwise get the possession,

> from whence this dominion of the queen and her posterity had its original. For (as Paulus says well) there is no necessity that he who intends to take possession of a field, should walk about the whole, but it is sufficient if he enter any part of that field, so long as he doth it with a mind, thought and intent, to possess the field to its utmost extent and bound: Which saying may relate to seas, as well as lands, that were never taken into possession. So that as Siculus Flaccus treating of occupied lands, saith, men did not possess so much land as they were able to till, but they reserved as much as they were in hope they might be able to till, the like also may be said of a sea so taken into possession. Look how much was reserved in hope of using and enjoying; so much also was bounded. But perhaps the first original of the dominion of this sea of America did not proceed from the possession that was acquired by Gilbert. He rather restored and enlarged the right of the crown here: for, that Island called Baccalaos, was added to the English Empire by Sebastian Cabot, in the time of Henry the Seventh. And it is certain that afterwards it grew to be a custom for the officers belonging to the High Admiral of England (in whose charge are all the seas subject to the King of England and Ireland, as King of England and Ireland) to demand tributes of such as fished also in this sea; which was (I suppose) a most evident token of the king's dominion. But it was provided by an Act of Parliament, in the reign of Edward the Sixth, that no tributes of that kind, to the grievance of fishermen, should be paid any longer. How far our English colonies, lately transported into America, have possessed themselves of the sea there, I have as yet made but little enquiry." Mare Clausum, pp. 441-42. (Emphasis added.)

This most interesting passage, among other things, thoroughly explodes plaintiff's contention that Selden's theory of maritime sovereignty was based solely on historic appropriation or possession and hence could have no application to American waters. To the contrary, Selden is in

entire agreement with the general contemporary opinion that discovery plus symbolic acts were sufficient to establish sovereignty and ownership, over both land and sea areas. And while Selden says that he is ignorant how far the American colonists have actually taken possession of their adjacent seas, he plainly regards them as having rights of sovereignty and ownership therein whether they had taken possession or not.

The report of the admiralty commissioners to Charles I in 1636 (Exhibit 693, pp. 288-89, 762-64; Exhibits 604, 223; pp. 86-87, supra) declares the king's ownership of the fisheries not only in the seas "devolved unto you from your royal predecessors" but also in the seas "of any other your dominions," that is, territories acquired by the English crown since Charles' accession in 1625, which were all in North America.

Needham's translation and edition of Selden's Mare Clausum, published in 1652 by the direction of the English government as a state paper, includes in the dedication the following verse addressed by Neptune to the Commonwealth of England:

> "Go on (great State!) and make it known
> Thou never wilt forsake thine own,
> Nor from thy purpose start:
> But that thou wilt thy power dilate,
> Since Narrow Seas are found too straight
> For thy capacious heart.
> So shall thy rule, and mine, have large extent:
> Yet not so large, as just, and permanent."
> Exhibit 693, p. 411 n.1; Tr. 1289-90.

One's amusement at the flowery style of this poetic effort should not divert attention from the fact that it is evidence of recognition and awareness of

an extension of British maritime sovereignty beyond the traditional "narrow seas" because of the establishment of British colonies in North America.

Robert Codrington, in his His Majesty's Propriety, and Dominion on the British Seas Asserted (published in London in 1665), evidences a like awareness:

> "There is also another dominion of the sea belonging to the king of Great Britain, and that of a very large extent upon the shore of America, as on the Virginian sea, and the islands of the Barbados and St. Christophers and many other places . . . ." Id. at 101.

Since this passage is preceded by a lengthy exposition of the standard British claim to maritime sovereignty and its usual attributes, including exclusive fishery and admiralty jurisdiction, in the British seas, there is no doubt that by "dominion" Codrington meant full territorial sovereignty and its corollaries.

The treaty between Great Britain and Spain, signed at Westminister in 1670, included the following provision:

> "XV. The present treaty shall in nothing derogate from any pre-eminence, right, or dominion, of either confederate in the American seas, channels, or waters, but that they have and retain the same in as full and ample manner as may of right belong unto them: but it is always to be understood, that the liberty of navigation ought in no manner to be disturbed, where nothing is committed against the genuine sense and meaning of these articles." Exhibit 736, p. 400.

Similarly, the Treaty of Peace between Great Britain and France, signed at Whitehall in 1686, included the following:

> "It is agreed that each king shall have and retain for himself all dominions, rights and prerogatives in the seas, straits, or other waters of America, with the same amplitude which belongs to each by right and in the same manner in which he now enjoys them." Exhibit 737, p. 91, Article 4.

While these treaty provisions are very general in their terms -- doubtless because the parties would have found it difficult to agree on all the specifics -- they are hardly consistent with, for example, Dr. Kavenagh's notion that sovereignty and ownership were regarded as ending at high-water mark on the Atlantic coast of the British North American colonies. As to the "dominions," "rights," "preeminences" and "prerogatives" referred to, we have seen that English law and practice in the 17th century was more than adequate to provide specific content to those otherwise general terms.

There can be no doubt that the territorial jurisdiction of the Lord High Admiral of England was regarded as extending to the territorial seas of the North American colonies, since the commissions of the admirals and judges expressly referred to those colonies. Exhibits 639, 640; see also Exhibit 675, 3d page of preface.

In 1688 the crown granted to Sir Robert Holmes for a three-year period all goods belonging to or seized by pirates "upon the land in any part or parts of America, or any the islands or sea limits or territories thereof." Tr. 900.

A fisheries tract of 1719, after affirming British sovereignty in the British seas, referred to the British exclusive fisheries of New England and Newfoundland. Exhibit 461, p. 19. Burchett, writing in 1720, claimed for the British crown the seas of "Newfoundland and the adjacent parts of North America," by virtue of Cabot's discovery and Sir Humphrey Gilbert's taking of possession, as well as the northern seas as far as the shore of Greenland on the basis of Sir Hugh Willoughby's "invention" and the discovery and exploitation of the whale fishery by the Muscovy Company. Exhibit 675, p. 35. Lediard, writing in 1735, is of the same view in almost the same words. Exhibit 718, p. 36.

Professor Henkin, more candid on this point than some of plaintiff's other witnesses, recognized that Great Britain claimed exclusive fishing rights in North American waters. Tr. 2628-30.

In 1720 the law officers of the crown issued a most interesting opinion demonstrating their conviction that the seas adjacent to the American colonies were within the boundaries of those colonies. In 1700 Parliament had enacted a statute providing for criminal trials in admiralty cases, pursuant to commission, "in any place at sea, or upon the land, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories." 1 Crosskey, Politics and the Constitution 450 (1953). In 1720 the question arose whether commissions could be issued under the statute for trials in any place at sea throughout the world, or whether there were limitations. The law officers advised the crown that the proper

construction of the statute was that the words "in any place at sea" were modified by the words "in any of his majesty's islands, plantations, colonies, dominions," etc., and that in consequence commissions for trials at sea could not be issued for "any place at large upon the sea" but only for trials in "the sea adjoining" to particular colonies. Id. at 452. This may or may not have been the most reasonable construction of the statute, and Crosskey disagrees with it; its significance for our purposes is that the law officers saw nothing anomalous about the formula "in any place at sea . . . in any of his majesty's . . . colonies." They plainly believed that the colonies had territorial seas and that those seas were within the boundaries or limits of the colonies themselves. The statute, incidentally, provided for jurisdiction over "all piracies, felonies, and robberies committed upon the sea, or in any haven, river, creek, or place where the admirals have power or jurisdiction," with no distinction between crimes committed by subjects and by foreigners. 6 Viner, Abridgment 511 (2d ed. 1792).

C. The Colonial Charters, Construed in the Light of Contemporary Legal Usage, Conveyed Extensive Rights Both of Sovereignty and of Property in the Marginal Seas.

The 17th-century colonial charters are generally similar in language; there is no need in this brief to discuss all of them, which the witnesses in any event have done. We shall analyze the pertinent provisions of two typical charters, and then shall point out certain variations in the language of others.

1. The Second Virginia Charter of 1609

The pertinent portions of the second Virginia charter of 1609 read as follows:

> "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 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 Preeminences within the said Territories, and 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; . . . ." Exhibit 42, pp. 3795-96; Tr. 696-97. (Emphasis added.)

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 formerly granted to any other." Exhibit 42, p. 3798; Tr. 697-98.

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." Exhibit 42, p. 3801; Tr. 698.

Professor Smith has given some of the reasons which compel the conclusion that this language was intended to convey, and as a matter of English law did convey, territorial sovereignty and ownership in property of the seas and seabed out to 100 miles in the Atlantic. Tr. 698-701. His conclusion cannot seriously be questioned.

Among the rights conveyed are jurisdictions, royalties and franchises, all "by sea and land." Jurisdictions, of course, included the admiralty jurisdiction; and we have explained at some length what that consisted of, and on what basis it was considered to rest, in 17th-

century English law (pp. 102-07, supra).*/ The term franchises was in common use as including, among other things, exclusive fisheries, as Blackstone, Hall and Moore have all pointed out. Exhibit 728, p. 709; Exhibit 729, pp. 20, 33. The term royalties (sometimes regalities or regalia) was well understood to include the crown's rights of sovereignty and propriety in the adjacent seas and seabed, and is the normal term a 17th-century conveyancer would have used to grant such rights. Tr. 679-80, 2733-34, 2747-49; pp. 14, 63-64, 80, 82, 86, 87, 90, 91, 96, 99, 100, 121, 124, 125, 126, supra.**/

Why did the authors of the charter not simply write that the boundaries or territory of the colony were to include the seas out to 100 miles? The linguistic or legal usage of any period is based on unarticulated assumptions, which may or may not be wholly obvious to later generations. At the time the charters were written, a territorial sea, usually defined as 100 miles in width, was regarded not as a separate or independent piece

*/ Provisions in other charters confirm that the admiralty jurisdiction was territorial. The Gorges charter of 1639 for Maine is perhaps unique in specifying different distances for admiralty jurisdiction than for other purposes: the seas and islands were conveyed out to five leagues, but the admiralty jurisdiction to 20 leagues. Tr. 712, 716-17. The Maryland charter conferred admiralty jurisdiction in "the sea of those parts," Tr. 728. Dr. Kavenagh admitted that the admiralty jurisdiction conferred by colonial charters was territorial in that it was to be exercised within fixed maritime bounds. Tr. 2050-51.

**/ In 1700 William Penn asserted his conviction that the grant in his patent of "the royalties of both land and water" made him "lord of the waters," with power to serve writs, admiralty jurisdiction and rights of property in the territorial sea. Exhibit 284, p. 349; Exhibit 285, pp. 140-41; Tr. 798.

of territory, to be conveyed separately, but as an accessory or appendent of territorial sovereignty on land.*/ The legal climate today is not significantly different on this point. A study of 20th-century peace treaties, acts of independence and instruments ceding territory would rarely, if ever, reveal explicit mention of a territorial sea or a continental shelf. These are regarded as passing automatically and implicitly along with sovereignty over a land area which has a coastline. The 17th-century attitude was substantially identical; indeed, the 17th-century documents are much more explicit than would be regarded as necessary or normal today.

The text of the 1609 charter suggests that, while the territorial sovereignty of the adjacent sea was regarded as passing automatically, it was considered necessary or at least prudent to mention specifically the attendant rights of property and government in those seas -- the soils, the mines, the pearls, the fisheries, the admiralty jurisdiction, royalties and franchises. It is perhaps unclear from the text whether the adjacent sea was regarded as part of the "territories" or as part of the "precincts thereof" or "thereabouts . . . or in any sort belonging or appertaining." Precincts, Dr. Kavenagh to the contrary, included surrounding or adjacent areas, not merely subdivisions of the territory itself. Tr. 2072.

*/ Similarly, in 1817, in the arbitration concerning title to the islands in Passamaquoddy Bay and the Bay of Fundy, the United States contended that islands within a reasonable distance from a mainland coast are dependent on it and pass, even without an express provision, along with a conveyance of the mainland. "Case of the United States," 6 Moore, International Adjudications 47, 58-60, 71, 107 (1933).

It is essential to understand, finally, that to a 17th-century mind a conveyance of "all the islands lying within 100 miles along the coast" was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. Over and over again, the writers of this period identified sovereignty and ownership of islands with sovereignty and ownership of the sea surrounding such islands and intervening between them and the mainland. Callis, for example, wrote that the islands in the English seas are part of the realm because they are in the English seas, which are themselves part of the realm. Exhibit 680, p. 44. Hale, likewise, considered that islands in the British seas are parts of those seas, which, with the bed thereof, belonged to the crown. Moore, op. cit. at 358. Justice, seeking to prove British sovereignty and ownership of the British seas, argued that England is in possession of all the islands within those seas; to Justice, that is proof of dominion over the seas themselves. Exhibit 710, p. 154. Selden was to the same effect. Mare Clausum, pp. 333-43.

This mode of thinking can be traced back directly to Bartolus (1314-1357), the most famous jurist of the middle ages. Bartolus' view is described by Fenn, Exhibit 690, pp. 98-104. "An island is regarded as part of the mainland, as it were, sticking to it . . . . It goes with the territory nearest to it." Id. at 102. A state automatically has extended power out to sea, entailing property in the islands and jurisdiction in the sea itself. (The rights in the sea were not yet thought of as ownership,

though that development followed inexorably.) Bartolus declares that he who has jurisdiction in territory adjoining the sea has jurisdiction in the sea also. Id. at 103. To what distance? Without answering the question he turns to islands, and says that because there is jurisdiction over the sea there is jurisdiction over the islands also. He then arrives at 100 miles from the coast as the distance to which that jurisdiction over islands extends. This was later interpreted to mean jurisdiction over 100 miles of adjacent sea. Bartolus probably intended this, and "it follows from his reasoning," since "the state's jurisdiction over the islands in the adjacent sea is made to depend upon the jurisdiction of the state over that part of the sea." Id. at 104.

The integral linkage of seas and islands is likewise apparent in De Superioritate Maris, which founded England's sovereignty over the English seas on the fact that "the kings of England, by reason of the said kingdom, . . . have been in peaceable possession of the dominion of the sea of England and of the isles being in the same . . . ." Exhibit 176, p. 56.

Plainly, this background must be understood before the words used in the charters can be fully appreciated. Once the background is understood, we submit, any superficial ambiguity in the charters is resolved. */

*/ In the second Gulf States litigation, the Court held that an early 19th-century boundary formula referring to islands within certain limits did "not appear on its face to establish a boundary line that distance from shore," and said that nothing in the history of Mississippi and Louisiana had been shown to require departure from that conclusion. United States v.

That a grant of islands was regarded as granting the intervening sea as well is further confirmed by language in at least two of the subsequent charters. The Maryland charter of 1632, Exhibit 141, conveys all islands within ten leagues of the shore. It then goes on to convey the fisheries "in the sea . . . within the premises," except that free fishing to English subjects is reserved "in the sea . . . of the province aforesaid." What was the "sea within the premises," "the sea of the province"? Quite apparently, it was the sea within ten leagues of the coast, even though the reference to ten leagues reads in terms of islands rather than of the sea itself. There is no other language in the charter which can possibly be construed as creating a "sea of the province." Dr. Kavenagh, after struggling to resist the obvious, at length admitted that it could only be the language conveying islands within ten leagues which created a sea of the province and a sea within the premises. Tr. 2095-2100.

Similarly, the lease of Virginia to Arlington and Culpeper in 1673 conveys all islands within ten leagues of the coast. The charter goes on to convey "the royalty of the said seas . . . aforegranted." U.S. Exhibit 60. Yet no seas have expressly been referred to or granted as such -- only the islands have been referred to and granted. Yet the assumption that the

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Louisiana. 363 U.S. 1, 81-82 (1960). In his separate opinion Justice Black, who had written for the Court in California, conceded that this "islands" language provided "some color of title" to boundaries in the sea and that Congress had regarded the language as highly significant. Id. at 96-97. In the present proceeding, unlike the Gulf States litigation, we have a record which permits construction of the "islands" language in 17th-century charters in the legal and semantic context of that time.

grant of islands within a certain distance included within it a grant of the seas themselves to that distance was so strong that it determined even grammar: the draftsmen of the charter could and did refer to "the said seas" when only islands had previously been mentioned. Dr. Kavenagh was unable to suggest any other explanation of how the charter could have been constructed as it was. Tr. 2085-90.

Another example of the same type of construction is found in a deed of Nova Scotia in 1630 from the Earl of Stirling to the Baron de la Tour. The deed grants "all the country, coasts and islands" within defined limits, and later in the same sentence "all the fruits, profits and emoluments" "of all the which said lands and seas," though no seas have been explicitly mentioned as such. 1 Moore, International Adjudications 92 (1929).

The third Virginia charter, of 1612, provides that its purpose is to create "a more ample extent of their [the colony's] limits and territories into the seas adjoining to and upon the coast of Virginia . . ." Tr. 890. This is an authoritative interpretation that the second charter did create limits and territories in the seas adjoining, which are now to be made more ample. The third charter also differs slightly in phraseology from the second in granting all soils, jurisdictions, royalties, franchises, etc., both on the mainland "and also within the said islands and seas adjoining" -- language that can leave no doubt that both territorial sovereignty and rights of property in the main sea were conveyed. Tr. 891.

2. The New England Charter of 1620

The boundaries of the New England colony were stated in its charter of 1620 as follows:

> "that all that Circuit, Continent, Precincts, and Limits in America, lying and being in Breadth from Forty Degrees of Northerly Latitude, from the Equinoctial Line, to Forty eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Main Land, from Sea to Sea, with all the Seas, Rivers, Islands, Creeks, Inlets, Ports, and Havens, within the Degrees, Precincts, and Limits of the said Latitude and Longitude, shall be the Limits, and Bounds, and Precincts of the second Colony: . . . ." Exhibit 11, p. 1829; Tr. 706. (Emphasis added.)

The granting language was as follows:

> "all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territories, viz, the aforesaid Part of America, lying and being in Breadth from forty Degrees of Northerly Latitude from the Equinoctial Line, to forty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Main Land from Sea to Sea, together also, with the . . . Fishings, Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, 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, Limits, or Territories, of that Southern Colony 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, Territories, Islands, Hereditaments, and Precincts, Sea Waters, Fishings, with all, and all Manner their Commodities, Royalties, Liberties, Preeminences, and Profits, that shall arise from thence, with all and singular their Appurtenances, and every Part and Parcel thereof, and of them . . . ." Exhibit 11, p. 1834; Tr. 706-07. (Emphasis added.)

The favorable-construction clause also was included:

> "And further our will and Pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty or Instruction or Interpretation of any Thing contained in these our Letters-patents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and their Successors, and every Member thereof." Exhibit 11, p. 1840; Tr. 707-08.

Here, in addition to the same formulas as appeared in the second Virginia charter, we have express statements that "all the seas" specified are within the boundaries of the colony, that "sea waters" are among the properties conveyed, and that the royalties and other benefits include those "within the said islands and seas adjoining." What is missing, however, is the specification of 100 miles or any other distance from the shore.

In its grant to Gorges and Mason in 1622 (Exhibit 2), again in its grant of Mariana to Mason in 1622 (Exhibit 12), and yet again in its grant of New Hampshire to Mason in 1629 (Exhibit 13), the Council for New England authoritatively described the charter to it of 1620 as having

conveyed the land area "together with the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid." This most interesting interpretation obviously sheds decisive light on how we are to interpret both the 1620 charter and the many other charters and patents which speak of the adjacent islands and seas without specifying any particular distance. The Council doubtless based its construction on one or both of two factors, probably on both: first, that 100 miles was generally understood in English law at the time to be the breadth of the territorial sea in the absence of special historic factors; second, that the charter of 1606 had established or recognized a uniform 100-mile territorial sea all up and down the Atlantic coast and that such boundaries were implicitly incorporated into subsequent charters for particular areas. */

The "first division" of its lands made by the Council for New England in 1622 is likewise instructive as to how the Council interpreted its charter and as to the linguistic usage of the time. The Council agreed, for example, that the Duke of Lennox was to have a certain tract of land with boundaries "three leagues into the sea." U.S. Exhibit 73, p. 62.

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*/ Dr. Kavenagh argues that the Council for New England was uncertain, and continually changed its mind, as to what it had been granted. He bases this (1) on the fact that certain other grants by the Council, in describing the 1620 charter, did not mention the 100-mile limit but merely referred back to the text of the charter for its boundaries, and (2) on the fact that the sea boundaries conveyed by the Council to its grantees were less than 100 miles off shore and differed from grant to grant. The argument is frivolous. See Tr. 2113-21, 2151-53.

When later in the same meeting Sir Ferdinando Gorges came to define this grant in conveyancer's language, he described the land area and added "with all the fishings, bays, havens, harbours and islands lying or being within 9 miles directly into the sea." Id. at 63. The Earl of Arundel's division went through a similar process of definition and description. Id. at 62, 63. These minutes confirm that the Council interpreted its charter as giving it boundaries in the sea which could be subdivided among the members. The minutes also show, most interestingly, that boundaries in the sea -- "three leagues into the sea" -- were regarded as accurately conveyed by language specifying fishings and islands within nine miles into the sea, without an express conveyance of the sea itself. This further confirms the position outlined above that a grant of islands within a certain distance was regarded as a grant of the intervening sea.

The patent of Mariana by the Council to Mason in 1622 expressly granted all the seas and islands within three miles of the land area conveyed. Exhibit 12. The Council's grant to Gorges, Mason and others of the Piscataway area in 1631 conveyed "all the seas within 15 miles of the foresaid sea coasts," together with all the soil, mines, fisheries, royalties, franchises, etc. Tr. 764-65.

Other charters used formulas slightly varying from those so far discussed. The Newfoundland charter of 1610 granted "the seas and islands lying within ten leagues of any part of the sea coast of the country aforesaid." Exhibit 179, p. 53; Tr. 789. The grant of Nova Scotia to

Sir William Alexander in 1621 conveyed the "islands or seas lying near or within six leagues from any part of" the mainland on the west, north and east sides, and to the south, "all the seas and islands . . . within forty leagues of the said shores." 1 Moore, Arbitration Digest 20 (1898); 6 Moore, International Adjudications 136 (1933). The boundaries created by the 1662 charter of Nova Scotia extended "30 leagues into the sea." Tr. 791; Exhibit 240, p. 101. The Hudson's Bay charter of 1670 conveyed the right of sole trade in all "seas," etc., "that lie within the entrance of the straits, commonly called Hudson's Straits" with all fishings "in the seas . . . within the premises" and "the royalty of the sea upon the coasts." Exhibit 777, p. 229; Exhibit 765; 33 British and Foreign State Papers 1364, 1370.

The Nova Scotia charter of 1621, with its express grant of territorial seas, was confirmed by a statute of the Scottish Parliament. 6 Moore, International Adjudications 14 (1933). Obviously, Parliament believed that boundaries in American waters extending at least 40 leagues from shore were legally proper. The British in the 18th century regarded the boundaries of Nova Scotia as those established by the Alexander charter. Exhibit 768, pp. 90-91, 97. In 1817 the United States agent in the boundary arbitration with Great Britain construed the Nova Scotia charter of 1621 as follows:

> "By the charter to Alexander he must have been the unqualified proprietor of all rights of fishing in the Gulf of St. Lawrence, in the Bay of Passamaquoddy

> and round his whole shores for six leagues from the coast, and in part for forty leagues, because his sweeping clause of title expressly gives him all the 'bays, shores, islands or seas' within that distance. It is not merely a right of jurisdiction, but of actual property; it is an indefeasible fee simple estate which is granted. It is not the claim of national sovereignty to the marine league which by the law of nations belongs to an independent community, but it purports to grant, and does in fact grant the same title to the sea for six leagues, that it does to any part of the lands upon the continent." "Case of the United States," in 6 Moore, International Adjudications 47, 161 (1933).

Nova Scotia as chartered in 1621 lay within the bounds granted by the New England charter of the preceding year. Gorges and Mason had consented that Nova Scotia be carved out of New England "within the bounds" granted by the New England charter. Gorges, quoted at 6 Moore, International Adjudications 243 (1933); see Exhibit 673, p. 25. Thus the Nova Scotia charter's express conveyance of "seas" is yet further confirmation, if any were needed, that the New England charter conveyed seas.

3. Modern Interpretations of the Charters

Prior to 1947 the Supreme Court uniformly construed the colonial charters entirely consistently with the views set forth above. In Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842), in construing the charter of New York, the Court declared:

> "The object in view appears upon the face of them [the letters patent]. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly

> as circumstances would permit, according to the laws and usage of England; and in which the duke, his heirs and assigns were to stand in the place of the king, and administer government according to the principles of the British constitution . . . . The estate and rights of the king passed to the duke, in the same condition in which they had been held by the crown and upon the same trusts. Whatever was held by the king as a prerogative right, passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters-patent with 'other royalties' and conveyed as such . . . . And in the judgment of the court, the lands under navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him, in the same manner, and for the same purposes, that the navigable waters of England, and the soils under them, are held by the crown."

And in Shively v. Bowlby, 152 U.S. 1, 14, 16 (1894), the Court declared as follows:

> "The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters."
>
> * * *
>
> "By those [colonial] charters . . . 'the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred . . .' '[T]he lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; . . .'"

Many State cases are to the same effect. E.g., Barker v. Bates, 13 Pick. 255 (Mass. 1832); New York, N.H & H.R.R. v. Horgan, 56 Atl. 179 (R.I. 1903); Dunham v. Lamphere, 3 Gray 268 (Mass. 1855) (sea fisheries); Nichols v. Boston, 98 Mass. 39, 42 (1867); Gough v. Bell, 21 N.J.L. 156, 160 (1847); People v. Trinity Church, 22 N.Y. 44, 46-47 (1860); Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689 (1932).

The United States will probably contend that such decisions had reference only to internal waters, i.e., rivers, harbors and perhaps bays. Suffice it to say that there is not a word in any of the opinions which suggests such a distinction, and that no trace of any such distinction can be found in the English common law on which both the charters and the judicial decisions were founded. Many decisions are expressly inconsistent with such a notion; e.g.:

> "[T]he king is held to be owner of the soil under the sea, which royal right, by the common law of England, extends over the shore where the tide ebbs and flows to ordinary high water mark . . . .
>
> ". . . [W]e have no doubt, that by the charters of Charles I and James I, under which the land of the colony of Massachusetts was granted, for the purpose of founding a colonial government of English subjects, all the rights to the sea and sea-shores, with the incidental rights of fishing, were granted to the colonists . . . .

> "[A]ll the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the sea ebbs and flows, did vest in the grantees under those charters. Whatever right or jurisdiction, if any, remained in the crown after those grants, it is clear that it ceased on the establishment of independence, and has remained absolute in the States." Weston v. Sampson, 62 Mass. (8 Cush.) 347, 351-53 (1851)(Shaw, C.J.).

In United States v. California, 332 U.S. 19, 32-33 (1947), the Court, without the benefit of any evidentiary record, dismissed the charters as follows:

> "Neither the English charters granted to this nation's settlers, . . . nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth."

Of course the Court was correct that the charters did not create a three-mile belt: no one had ever heard of such a thing at the time of the charters, and the territorial seas they created were much broader, usually 100 miles either explicitly or implicitly. The third sentence quoted above is, we submit, on the basis of the record made in this case wholly inaccurate.

In the present case, the record contains, besides a great wealth of historical and legal evidence bearing on the background, terminology

and proper construction of the charters, interpretations of them by Professors Smith and Flaherty and by Dr. Kavenagh. We submit that on the basis of credentials, knowledge of the relevant areas of law and history, cogency of reasoning and behavior on cross-examination, the testimony of Professors Smith and Flaherty merits far greater weight than does that of Dr. Kavenagh. The latter is not a lawyer, was not qualified as an expert in either English or American law, and is not even an expert on English history -- the milieu in which the charters originated. His unfamiliarity with English history and law during the pertinent period is striking; see, e.g., Tr. 2075-76, 2131-32. He believes in a clear and sharp distinction between inland waters and the sea, Tr. 2076-78, 2090, although nothing of the sort can be found in English law or practice at the time. His entire testimony was based on the clearly erroneous view that under 17th-century English law the sea and seabed were not susceptible of ownership. Tr. 2072-74, 2097, 2120-21, 2132-37, 2142, 2151, 2153-56, 2174. His testimony generally was not such as to inspire confidence in his conclusions or in the accuracy of his research. See Tr. 1422 (compare this with Tr. 2025-29 and Exhibit 754), Tr. 2037-38, 2041-43, 2081-82, 2086, 2090-91, 2093, 2102-03, 2108-12, 2179, 2186-87, 2193-94, 2205, 2211-20, 2224-34, 2240-41.

Dr. Kavenagh appears to give away plaintiff's entire case at Tr. 2145-46, where he concedes that the maritime "jurisdiction" which all the colonial charters contain was sufficient to entitle the grantees to

the exclusive right to exploit pearls or shellfish five miles off the coast. Elsewhere, Dr. Kavenagh referred to the colonial right to exclude or to license foreign fishermen as "exercising the jurisdiction". Tr. 2162. Such rights, whether called "jurisdiction" or anything else, are plainly enough to sustain the position of the Common Counsel States in the present proceeding.

Finally, Dr. Kavenagh conceded (Tr. 2255-56) that if he was mistaken concerning the state of English law and legal terminology in the 17th century, his testimony would fall. Since he was indeed mistaken, his testimony does fall.

The only way plaintiff has suggested to avoid the conclusive force of the grant of "royalties" in the colonial charters is Professor Wroth's argument that royalties were a part of the prerogative and such rights had to be more specifically mentioned; therefore, the Professor opines, a general reference to "all royalties" or "all royalties by sea and land" conveyed nothing whatsoever. Tr. 2793-94.*/ The argument, of course, flies in the face of the accepted principle of

*/ Pl. Br. 129-30 accuses Professor Smith of inconsistency in not asserting that the third Virginia charter and the Heath patent conveyed the seas all the way to Bermuda and the Bahamas, respectively. Professor Smith pointed out the particular language in the third Virginia charter which led him to that conclusion. Tr. 705. As to the Heath patent, it was not one of Professor Smith's exhibits and Professor Smith naturally said "I haven't seen anything" to lead him to an opinion as to the extent of its maritime grant.

the common law that words in a grant are wherever possible to be construed as effective rather than as a nullity.*/ Obviously, the crown's lawyers were not childish people who used flowery language to no effective purpose. Professor Wroth's argument, of course, also flies in the face of the favorable-construction clauses of the charters.

Gould gives the conclusive answer to plaintiff's argument:

> "Although royal grants to individuals, for private purposes, include only what is expressly granted, and pass nothing by implication, yet, in the case of a grant by the Crown of extensive foreign domains, where the obvious intent of the grant is not merely to vest the Crown's right of property in the grantees, but also to invest them with civil and political powers, and to establish complete though subordinate sovereignties, a different rule has been held applicable in this country. The grant of King James I, in November, 1620, to the council of Plymouth, upon the basis of which most of the others were framed, expressly named, as included in the grant, not only the lands described, but also all havens, ports, rivers, waters, fishings, mines, etc.,

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*/ E.g., 26 C.J.S. §86b(1) (1956); 4 Tiffany, The Law of Real Property §981 (1939); Saulsberry v. Maddox, 125 F.2d 430 (6th Cir. 1942); Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

Plaintiff relies (Pl. Br. 127-28) on an opinion of 1723 that the New Jersey charter did not convey royal mines. The opinion never mentioned the word royalties, and its authors may have overlooked its presence in the charter. The result was doubtless influenced by the fact that the New Jersey proprietors had surrendered their governmental rights, and the opinion could well have reached that result on the ground that the surrender included royalties. The opinion gives no reasoning, and states that the proprietors had not been heard on the subject.

> and all and singular other commodities, jurisdictions, royalties, privileges, franchises, and pre-eminences, both within the tract of land upon the main, and within the islands and seas adjoining; and, although such words as ports, rivers, waters, or fishings, may be insufficient, in the case of a private grant, to convey the soil, yet the other words employed, and especially the word 'royalties,' in connection with the manifest purpose of the grant, were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters, and to invest them with such powers of legislation and administration as were necessary to advance the prosperity of the colonists. Such was the construction adopted by the Supreme Court of the United States, and by the Courts of Massachusetts, New Jersey, and Connecticut. It is doubtless consonant to the law of England. Thus, in Doe v. East India Co., before the Privy Council, it appears to have been conceded that the defendants, as representing the Indian government, had a freehold in the bed and shores of the navigable rivers of India. Upon this principle the colony of Massachusetts passed the ordinance of 1647, by which the seashores and flats of the colony, down to low-water mark, not exceeding one hundred rods from high-water mark, were made the property of the littoral proprietors. In Brookhaven v. Strong, in New York, a grant of an exclusive right to the soil and the oyster fisheries in an arm of the sea, which was made by the colonial government, and was ratified and confirmed by the colonial assembly, was held to be valid." Op. cit. at 70-72.

Likewise, Angell gives the answer, as commonly understood in this country in the early days of the Constitution:

> "The territory, therefore, which was discovered, acquired and possessed by the early settlers of this country, although it was separated from the principal establishment, or mother country, might be considered as a part of the British empire, and subject to the rules and provisions of the British system of

jurisprudence. Hence, not only the jurisdiction of the British sovereign extended over the possessions which were acquired by the colonists from the native occupants by grant or conquest, but also his jus proprietatis, or right of property in all the tide waters included in these possessions existed, at least to the same extent, as in the tide waters of England.

"But inasmuch as the king by virtue of his prerogative was authorized to create political power in this as in all countries newly discovered and possessed by his subjects, the colonies on receiving the royal charters, were invested with a political character, by which they succeeded to all the territorial interests, which had previously belonged to the sovereign power of the parent country. These charters, it is to be observed, were in the nature of grants, and were conferred by the king, on the idea that he was proprietor. But as they respectively created governments, they were not construed as his other grants were; that is as not excluding arms of the sea, &c. but as including them. And thus the governments of the several colonies had ample authority to alter the established law with regard to their tide waters, or to grant an exclusive property therein, at their discretion.

"If any doubt could be entertained on general principles, as to the property of the tide waters of this country being in the king before the charters were granted, it will be removed by referring to the charters. What is particularly alluded to, is the reservation of the right of fishery, which, (as will be shown, in the following chapter,) is contained in several of the charters; the object of which, was to prescribe how far this important and, prima facie public right, might be restrained by any colonial enactment. By a reservation of this kind, it is clear that the king considered himself as the undoubted legal proprietor of the tide waters; for if he had not thus considered, then to qualify his grants by such a reservation was manifestly absurd." Angell, The Right of Property in Tide Waters 36-38 (1826).

Professor Morris' testimony was inconsistent and self-contradictory regarding maritime sovereignty in the American territorial seas in the 18th century. He conceded that there were territorial waters off the North Atlantic coast in that era; he believed the extent of those waters to be unclear, and in spite of the charter provisions asserted that they belonged to the crown, not to the colonies. Tr. 1854. He opined that the coastal sovereign could prohibit navigation in the territorial waters, Tr. 1857, but then said that the sovereign could probably not exclude foreign fishing boats, even from coming as close as 30 yards to the shore. Tr. 1859. (He had his law exactly backwards: because of the recognized right of innocent passage the coastal sovereign could not prohibit navigation, but did have the right to prohibit foreign fishing.) Yet again, Professor Morris said that "The coastal fisheries belong to the proprietor of the coast" (Tr. 1863), but then declared that as to the seabed neither the crown nor the colonial government had any exclusive sovereign or property rights one foot below low-water mark. Tr. 1865-66. Professor Morris' expertise on the law and practice of England and colonial America regarding maritime sovereignty and property was, to put it charitably, shaky in the extreme.

Plaintiff relies (Pl. Br. 122-23, 131-37) on various descriptions of the colonies, in charters, governor's commissions and other documents, as extending "from sea to sea," as "bounded by the Atlantic

Ocean," and the like. Such general statements, made in contexts involving no focus on maritime rights, are hardly persuasive that their authors believed that all territorial and property rights of the colonies stopped at low-water mark. Even today, it would be altogether natural to describe one of the defendant States, or the United States, as bounded on the east by the Atlantic Ocean, unless the purpose of the statement required a specific focus on territorial waters or continental-shelf rights. Such usage is of no probative value for the issues here involved.

Plaintiff also contends (Pl. Br. 131-32) that the absence of boundary disputes among the colonies as to their maritime territories is evidence that no such territories existed. In fact there were disputes among the colonies regarding invasion of one another's maritime rights, see pp. 234-38, infra, though after the initial years these were minimized by the prevalence of "free fishing" clauses. The fact that such disputes did not, so far as is known, take the form of disagreements as to the location of the maritime boundaries is of little if any significance.

Indeed, it is plaintiff's version of colonial law which, if true, would have been far more likely to give rise to a great body of evidence and literature of which in fact there is no trace. Plaintiff's position apparently is that English and colonial law made a rigid distinction between "inland" waters, including bays, harbors, and the like, within which full territorial sovereignty and dominion existed, and the open sea,

where there was neither. The problem of demarcating the boundaries between "inland" waters and the sea is vastly complex, has given rise to endless disputes since that unhistorical distinction was imported into our law, and even today is far from completely resolved. See U.S. Exhibit 9, pp. 17-20; United States v. California, 342 U.S. 891 (1951); United States v. California, 381 U.S. 139 (1965); United States v. California, 382 U.S. 448 (1966); United States v. Louisiana, 382 U.S. 288 (1965); United States v. Louisiana, 389 U.S. 155 (1967); United States v. Louisiana, 394 U.S. 1 (1968); United States v. Louisiana, 394 U.S. 11 (1969); United States v. Louisiana, 394 U.S. 836 (1969); United States v. Louisiana, 404 U.S. 388 (1971); The fact that no such problems arose in the colonial period is evidence that the distinction was unknown at that time.

4. The Free Fishing Clauses

The Newfoundland charter of 1610, which expressly granted "the seas and islands lying within ten leagues of any part of the sea coast of the country," and which contained the usual language conveying soil, pearls, fishings, royalties, etc., nevertheless contained a clause saving and reserving to "all manner of persons of what nation soever and also to all and every our loving subjects which do at this present or hereafter shall trade or voyage to the parts aforesaid for fishing, all . . . liberties . . . concerning their said fishing . . . in as large and ample manner as they have heretofore used and enjoyed the same, . . . anything in these presents to the contrary notwithstanding." Exhibit 179, p. 53; see also Exhibit 777, p. 317. As

Angell points out (p. 218, supra), the fact that the saving clause was considered necessary is yet further proof, if any were needed, that in its absence the general language of the charter would have conferred an exclusive right to the fisheries upon the patentees. It is notable that the saving clause was carefully limited to such fishing as had been practiced prior to the date of the charter; obviously this is a recognition of established or vested fishing rights, in accordance with the recognized English law of the period regarding the circumstances in which monopolies were proper and those in which they were not.

Dr. Kavenagh to the contrary (Tr. 2059-60), none of the charters of what are now the Atlantic coastal states of the United States contained reservations of free fishing both to aliens and to subjects. Only the Newfoundland charter did that, in recognition of the long-established fisheries of other nations in Newfoundland waters. The early charters of the Common Counsel States, down through the New England charter of 1620, contained no free-fishing clauses of any kind; and as we shall see (pp. 234-38, infra), those charters were universally understood and recognized to authorize their recipients to exclude or to license all fishermen, whether British or foreign, within their adjacent seas. As a result of the political uproar which this caused, in several of the charters after 1620 the crown included clauses saving the liberty of fishing to some or all classes of British subjects. Such clauses appear in the Massachusetts Bay

charter of 1629 ("any of our loving subjects," Tr. 723), in the Gorges charter for Maine of 1639 ("all our subjects of our kingdom of England," Tr. 715), in the Maryland charter of 1632 ("all the subjects of our kingdoms of England and Ireland," Tr. 729), and in the Rhode Island charter of 1663 ("any of our loving subjects," Tr. 732). No argument was ever made that such clauses applied to foreigners or that the colonial governments did not have the right to exclude foreigners from the fisheries.

The saving clause in the Maryland charter applied to "fishing for sea fish . . . in the sea . . . of the province." Tr. 729. In 1766 Daniel Dulany, at one time Attorney General of Maryland, gave a legal opinion indicating his view that in the absence of the saving clause the colonial government could have excluded English subjects:

> "When the charter of the Province was framed, it was thought that extensive fisheries might be carried on here, as a matter of great consequence in the national trade and navigation. As [sic., doubtless should be An] extensive legislative authority was conferred by the charter, under which, regulations might have been made, (if not controlled by the saving) less favorable to the English and Irish, than the inhabitants here; but it is not to be supposed that acts of assembly would be wanting, to put the people here upon as good a footing, as any other, and therefore there seems to be very little reason for the notion, that the distinction is unfavorable to the people of Maryland, when it only imports that the liberty is secured to one, against the attempts of the other, and yet leaves to the latter the right of exercising it, in what manner they please, not affecting the liberty of the former, if the provincial legislature should think it for the public benefit. And since an act of

> assembly may confer the same liberty and privilege to the inhabitants of Maryland, that is contained in the saving, may regulate, restrain or control it, as the general interest may require, I apprehend that the saving is rather favorable to the inhabitants here than otherwise, according to the above interpretation. " Quoted in Angell, A Treatise on Tide Waters 56-57 (1826).

Dulany pointed out that the reservation was only to the subjects of the realms of England and Ireland, which did not include citizens of the colonies; it followed that Maryland remained free to exclude other colonials from its sea fisheries. Angell agreed:

> "Admitting this exposition of Mr. Dulany to be correct, which seems too obvious to be disputed, however favorable it may be to the people of Maryland, it must be regarded as unfavorable to the inhabitants of the other States. For as the inhabitants of the other States were not originally included in the saving, and the reservation not extending to them, they were of course debarred the liberty of exercising any piscarial privilege afforded by the waters of Maryland. And it would therefore, be superfluous for the legislature of Maryland, to enact any law to prohibit the citizens of the other States from fishing in its waters. In fact, as the persons to whom the reservation was confined, lost the right thus reserved by the revolution, it became the common right of the inhabitants of Maryland only." Op. cit. at 57.

D. The Record Is Sufficient To Establish a Uniform Territorial Sea 100 Miles in Width off the Coasts of the Common Counsel States.

By the end of the colonial period, the following situation emerged from the various charters so far as specific grants of territorial sea to the predecessors of the Common Counsel States are

concerned. Maine had 20 leagues for admiralty jurisdiction, and five leagues for other purposes, by its grant of 1622 and its charter of 1639. Tr. 708-12, 716-17. New Hampshire, by its grant of 1629 and its charter of 1635, had five leagues. Tr. 761, 766. Massachusetts by its 1629 charter had a territorial sea with no explicitly defined limit (Tr. 722); by its 1691 charter it had ten leagues. Tr. 779. Rhode Island had no explicit limit by its charter of 1663. Tr. 731-34. As to all the New England colonies, the New England charter of 1620, while containing no explicit limit, had been authoritatively construed as conveying a territorial sea of 100 miles. The difference between that 100 miles and the specific boundaries later granted to particular New England colonies may have passed to the individual colonies upon the dissolution of the Council for New England, or that intermediate belt may have returned to the crown.*/

New York had no fixed limit by its 1664 charter. Tr. 734-35. New Jersey had no fixed limit by the New York charter and the Duke of York's patent of the same year to Berkeley and Carteret. Tr. 740.

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*/ The charter of 1620 never lapsed entirely, but is in the direct chain of title of the States whose territories were within its bounds. The United States took the position, in arbitrating the Maine-New Brunswick boundary with Britain in 1817, that "it is . . . only by a regular conveyance, consistent with this grand charter [of 1620], that any valid title can with propriety be derived from or to the English Crown." "The Case of the United States," 6 Moore, International Adjudications 47, 54 (1933).

Delaware had no fixed limit by the charter of 1683 to Penn. Tr. 756-58. Maryland had ten leagues by its charter of 1632. Tr. 727. Virginia retained the 100 miles conveyed by its second charter of 1609. Tr. 696-97.

The status and width of the territorial sea of all the colonies was not in the least affected by the chain of title or particular legal status of the charters as in force or not at any particular time. As Professor Flaherty has demonstrated (and Dr. Kavenagh conceded) in connection with the revocation of the Virginia charter in 1624 (Tr. 904-15, 2079-82), there was no intention to change the boundaries of the Virginia colony because of any change in its degree of autonomy or governmental status. Those boundaries remained the same except where specifically altered.*/ The same conclusion is equally applicable to the other colonies. All of them relied before, during and after the Revolution on their charter boundaries, regardless of whether those charters were in force as governmental instruments or what the precise chain of title had been.

*/ Virginia lost territory, of course, when Maryland was carved out of it. Since Virginia's territorial sea was 100 miles and Maryland's was only ten leagues, the question arose during the hearings as to what became of the 70-mile intermediate belt when Maryland was created. Tr. 1244-48. We submit that the answer is perfectly plain: that belt reverted to the crown. A territorial sea is not an independent territory which can be owned without reference to the adjacent coast. To the contrary, the territorial sea was regarded in the 17th century, and has ever since been regarded, as an appurtenant or corollary of coastal sovereignty. Thus Virginia lost that part of its territorial sea which abutted Maryland when Maryland was erected as a separate colony. Since the crown chose to confer less than all of that territorial sea on Maryland, the remainder reverted to the crown, which held it as ultimate sovereign and feudal overlord of Maryland.

Quite naturally, two questions arise: (1) is the claim of each of the Common Counsel States limited to its charter boundary as summarized above; and (2) what boundary applies in the case of States whose charters specified no boundary explicitly? We believe the proper analysis is as follows. The crown in 1606 asserted and established a 100-mile territorial sea up and down the coast of all the Common Counsel States. Colonies which had no different limit specified in their charters therefore had territorial seas of 100 miles. As to colonies whose charters specified limits of less than 100 miles, the crown retained the waters between those limits and the 100-mile line. As we shall show, what was retained by the crown passed to each State separately at the time of the American Revolution.

We think the evidence is sufficient to show the establishment of a uniform 100-mile territorial sea all up and down the Atlantic coast. There is a wealth of 17th- and early 18th-century English authority for the proposition that 100 miles is the width of the territorial sea in the absence of special history or circumstances (pp. 51, 63, 66, 73, 140, 142, 146, supra). The 100-mile belt was the most frequently and authoritatively asserted standard of the period under international law as well (pp. 306-06, infra). The 100-mile limit was asserted during the period of the earliest colonial charters both by the prime minister of England, speaking officially, and by the leading international-law authority resident in England at the time (pp. 63, supra; pp. 188-89, infra). The

charter of 1606, which asserted English sovereignty over the entire coastline of the Common Counsel States and authorized colonies there, included the 100-mile limit. Perhaps most conclusively, while the New England charter of 1620 specified no fixed limit, the Council for New England had no doubt that that was the limit in force, and in a number of official documents described its charter as having vested in it a territorial sea with that limit. That was a wholly legitimate conclusion on the basis of the existing legal situation and is equally applicable to the other colonies whose charters contained no explicit limits.

The charters which specify a territorial sea of less than 100 miles inwidth in no way imply a shrinking of what the crown believed it owned or had the power to convey. Plainly, the crown on occasion granted less than everything it had or claimed. For example, the lease of Virginia to Arlington and Culpeper in 1673 conveyed ten leagues, while Virginia's territorial sea and ownership of islands was known to extend for 100 miles. Likewise, it cannot be seriously contended that in 1632 the crown believed it owned only the ten leagues it granted Lord Baltimore, or that in 1635 or 1639 the crown believed it owned only the five leagues it granted Maine and New Hampshire. The briefest recollection of the position being taken by the crown in the 1630's with reference to maritime sovereignty in European waters is enough to render such a speculation preposterous. Doubtless whether

a particular patentee received all or less than all of the territorial sea and the islands therein depended on how much he or it was in royal favor.

There are clear precedents, in the grants made by the Council for New England, for simultaneously asserting a territorial sea and islands of 100 miles and granting much less than that. The Council did so in 1622 and 1629 (pp. 206-08, supra); in each case the same document both declared the Council's 100-mile limit and granted a lesser maritime and island belt to the patentees. Indeed, two of these documents, the grant to Gorges and Mason in 1622 and the grant to Mason in 1629, created the very maritime and island belts of five leagues which the crown a few years later adopted in confirming the patentees' title to those territories, i.e., Maine and New Hampshire.

Obviously, both the Council and the crown, vis-a-vis their respective grantees, sometimes wished to convey only a limited portion of their territorial sea and islands while retaining the rest. Probably the desire to allocate fishing rights was responsible for this type of differentiation. For example, when in 1622 the Council for New England granted its members tracts with boundaries "three leagues into the sea," it plainly regarded the grantees as having the exclusive right to the fisheries and islands within those three leagues, while the remainder of the territorial sea out to the Council's own 100-mile boundary was reserved as a resource of the Council, which doubtless

wished to preserve the right to obtain revenue from licensing fishing there.

The legal effect, then, of the charters and other developments during the colonial period was the establishment of a uniform 100-mile territorial sea in the Atlantic along the coasts of all the Common Counsel States. In some cases, the crown granted this entire territorial sea to the colonial proprietor or government; in other cases, the crown granted only a limited part, retaining the remainder for itself until its rights and royalties passed to the States at the time of the American Revolution.

If it should be held that the evidence of record is not conclusive enough to establish a uniform 100-mile territorial sea all along the North American coast, it does not at all follow that the territorial sea was limited in the case of each colony to the width specified in its charter, since it cannot be doubted that the crown frequently granted less than all it possessed and that during the 17th century the crown never took the view that its territorial sea was as constricted as five or ten leagues. Rather, the proper conclusion would be that the territorial sea was regarded as not finally fixed and definite as to its width, but embraced all those areas of sea and seabed which could reasonably be said to be adjacent to the coast or which possessed valuable resources capable of exploitation from the coast.

As we shall see (p. 475, infra) that is precisely the situation today with respect to the continental shelf under contemporary international law. No one doubts that the exclusive rights of coastal nations extend to the point where the depth of the sea reaches 200 meters (a line which, as it happens, is approximately 100 miles offshore along most of the North Atlantic coast); but there is substantial doubt how much farther out than that the exclusive rights of the coastal sovereign extend, and resolution of the doubt hinges largely on the concepts of adjacency and exploitability. It is possible that the crown and the colonists avoided too-frequent or too-definitive articulation of a precise boundary in their marginal seas for similar reasons, wishing to preserve some degree of flexibility -- though as we have said, we think the evidence is sufficient to establish a uniform 100-mile limit. Certainly the conclusion, if it should be reached, that the outer limit of exclusive rights was not fully fixed and definite would not lead to a conclusion that there were no such exclusive rights, but rather to a search for the proper principles to be applied to the definition of those rights at a given time and in given circumstances. Plainly the fact that definition of the outer limit of exclusive rights to the continental shelf is an ongoing process, which even today is not fully completed, could not lead to the conclusion that no such rights exist or existed at a particular time in the past.

V.

## RIGHTS OF SOVEREIGNTY AND DOMINION WERE EXERCISED OVER THE AMERICAN TERRITORIAL SEA DURING THE COLONIAL PERIOD.

The evidence as to the use and exploitation of the sea and seabed in North American waters during the colonial period demonstrates awareness and exercise of exclusive legal rights of sovereignty and property to the extent possible in view of the state of technology at that time. The evidence of colonial regulation of the sea and seabed resources, and the evidence of exclusion of foreigners from valuable fisheries, confirm that any important resource in the North American marginal sea would, as soon as discovered, be regarded as the exclusive possession either of the individual adjacent colony or, if "free fishing" clauses were applicable, of English subjects generally.

The evidence discussed in this section relates in part to the Common Counsel States and in part to the British colonies which are now included in Canada. For reasons of geography and the location of valuable resources in the American seas, certain issues arose more frequently or more sharply in the Canadian areas than to the southward. Precedents from Canada are equally relevant as those from the Common Counsel States themselves. There is no reason to believe that either the crown, the colonists or foreign states regarded the Canadian areas as in any way subject to different legal standards from those applicable to the areas now included in the United States.

No distinction was made between the two groups of colonies until they chose different paths at the time of the American Revolution. Indeed, in 1620-21 the Canadian maritime provinces were part of New England (p. 210, supra), and again after 1691 Nova Scotia was a part of Massachusetts, having been incorporated into it by the Massachusetts charter of that year. Tr. 775.

We are uncertain what plaintiff thinks it has proved by its assertion that during the colonial period fishing "was dependent upon the utilization of shore-based activities" (Pl. Br. 143). That is obviously a half-truth at best, having no application to whaling, to the Newfoundland banks fishery, or to many others. Even as to fisheries where plaintiff's assertion is accurate, the exclusive rights asserted by the crown and the colonies, documented in this section, unquestionably applied to the fishing as well as to ancillary activities on land.

A. The Fisheries Were Subjected to Extensive Regulation and Licensing, and Foreigners Were Excluded.

Alexander Hamilton, writing in 1795, well described the spirit in which the crown and the American colonies had always approched the question of exclusive fisheries and fishing regulation:

> "Some nations, and among them Great Britain, have viewed the exclusive navigation and trade to their colonies, in the light in which they have seen their coasting trade and fisheries, -- as a nursery for that body of seamen whom they have considered not only as necessary to the prosperity and protection of commerce, but as essential to the defense and safety of the state.

* * *

"Is it then surprising, that we see her so anxious to encourage and extend her navigation, as to exclude, as far as practicable, foreigners from any share of her fisheries, her coasting, and her colony trade? Does not candor require us to admit, since her national defense rests upon her navy, which again depends on her seamen, which an extensive navigation can alone supply, that Great Britain, having more to risk, is among the last powers likely to break in upon or materially to relinquish that system of exclusive colony trade, that has so long and uniformly prevailed among the great colonizing powers?

"America has her opinions, perhaps prejudices, on the subject of commerce: she is, and, at least until she shall become a naval power, will continue to be, without colonies. But her laws manifest a similar spirit with those of other nations, in the regulations which they prescribe for the government of her fisheries and her coasting trade. The object of these laws is an exclusion of foreign competition, in order to encourage and increase her own navigation and seamen; from which resources, not only in wars between other nations, but likewise in those in which she may be engaged, important commercial and national advantages may be expected." Exhibit 697, pp. 488, 489-90.

1. The New England Fishing Controversy

Under the 1606 charter, the "northern," or Plymouth, company, while not making any permanent settlement, sent out a number of fishing expeditions under license between 1606 and 1620 to the coasts within its grant. Exhibit 663, p. 320. Certain other fishing expeditions, however, were sent to the same regions both by the "southern," or London (later Virginia), company, from its colony at Jamestown, and by the

powerful fishing interests of southwestern England. The Plymouth Company took the view that such expeditions not licensed by it violated its exclusive rights. In 1619 the issue was formally precipitated by the grant of a license by the Virginia Company and a protest by the Plymouth Company against such encroachment. Exhibit 466, pp. 34-35 n. 330; Exhibit 734, pp. 98-99; Preston, Gorges of Plymouth Fort 167, 413 (1953).

The dispute was referred to the Privy Council, and was arbitrated in 1619 by the Duke of Lennox and the Earl of Arundel under delegation by the Council. Their decision of 1619 was confirmed by orders of 1620 and 1621 by the Council itself. The decision was that, "by the consent of both colonies," the two colonies "should fish at sea within the limits and bounds of each other reciprocally, with this limitation that it be only for the sustentation of the people of the colonies there." Exhibit 237. This most interesting order (1) made it clear that both colonies did have "limits and bounds" in the sea, (2) provided a strictly limited right of reciprocal fishing by each within the seas of the other, and (3) by implication excluded all other Englishmen from fishing within the seas of either colony.

The latter implication was made explicit three months after the 1621 order, when the Council directed a letter to the mayors of the fishing towns of the southwest of England warning them against permitting their residents to invade the exclusive rights of the New England colony. U.S. Exhibit 72. Such invasions, the Council

declared, "would not only be a prejudice to the plantation adventurers who by their industry have discovered those remote places, and with the hazard of the lives of their people and with the expense of their estates have laid the first foundation of so honorable an enterprise, but would also bring a confusion to the said plantation and an overthrow unto that trade, and be likewise an utter discouragement to all future endeavors of the like kinds." See also Tr. 899, 2126-31.

It is universally recognized that the 1620 charter of New England, which was issued immediately following the above decision of the Privy Council, did confer a monopoly of fishing on the grantees, with the sole exception of the agreed concession to the Virginia colony. The Council for New England sold fishing licenses, and indeed its entire scheme of colonization was based on the far-sighted plan that the revenue derived from such licenses would provide the capital necessary to support plantations. Exhibit 663, pp. 263, 322, 346; Exhibit 683, pp. 29-31; Exhibit 740; Exhibit 777, pp. 303-04, 311. The Council appointed Captain Francis West as admiral and sent him over to enforce the licensing requirement and to expel unlicensed fishers from the New England seas. Exhibit 683, pp. 31-33.

While the problem of keeping large expanses of seas in a remote area free of trespassers was a most difficult one, the Council had some degree of success:

> "The policy which it [the Newfoundland Company] adopted after 1620 was directly in line with that followed by Sir Ferdinando Gorges and the New England Council during the same period. Sir William Alexander and his Scottish supporters also sought to establish a colony in Nova Scotia along similar lines. In all cases the scheme of creating feudal domains and disposing of them to persons favorable to their cause was followed. Although not identical in personnel, all these associations had a common purpose, the control of the fishery adjacent to their particular field of colonization. In both New England and Newfoundland the policy of excluding independent fishermen was tried, but Gorges' group was more successful in keeping out 'interlopers' than was the Newfoundland Company and its grantees, who had the well-established western adventurers to oppose them." Exhibit 465, p. 46.

See also Exhibit 719, p. 53.

The southwestern English fishing interests did not passively submit to their exclusion from the New England fishery, and they were likewise alarmed about the similar developments at the same time in Newfoundland. They took the question to Parliament, and in 1621 and 1624 introduced "free fishing" bills which passed the Commons but not the Lords. These bills would have allowed liberty of fishing to all English subjects in the seas of Newfoundland, Virginia, New England and all other English possessions; there was never, of course, any question of admitting foreigners. Exhibit 683, pp. 30, 33; Exhibit 719, pp. 50-54; Exhibit 734, pp. 100-01; Exhibits 733, 740; Exhibit 750, p. 82.

Gorges opposed these bills on the ground that a fishery in the seas of a new English dominion was a proper subject for monopolization under established principles. Sir Edward Coke, one of the principal proponents of the free-fishing bills, based his argument on the allegation that Gorges and the Council for New England had not discovered the New England fisheries but that fishermen of both England and other nations had fished there before. Thus Coke, now in opposition to the crown, adhered to the same doctrine concerning monopolies which he had formulated as law officer to Elizabeth I many years previously. As a matter of legal analysis, then, the issue really boiled down to one of fact: whether fishing by the southwestern Englishmen prior to the 1606 charter had been extensive and regular enough to amount to an "established" fishery which it would be improper to cut off by a subsequent monopolization. All this makes it wholly clear that if, once a charter had been issued, an admittedly new resource had been discovered in the sea or seabed of the colony, it would have been regarded as properly falling within the monopoly without question.

### 2. The Anglo-French Struggle for Monopoly of Fishing in American Waters

#### (a) In General

By the mid-17th century France and England were well advanced in their rivalry for control of North America. From 1689 to

1783 that rivalry was a major factor in five great wars and frequent intermittent skirmishes. It is universally recognized that one of the principal motives and ingredients in the colonial rivalry for mastery of North America was the determination on each side to control the rich North American fisheries. Neither side was willing to share those fisheries; each wished to monopolize them. While this may seem selfish to us, it was an integral part of the reigning mercantilist theory of that era. Both sides agreed that as a matter of law the possessor of a sea coast had the right to exclude nationals of all other countries from the fisheries adjacent to that coast. Thus, over and over again, we find the desire to monopolize a rich fishery operating as a primary motive in efforts to secure the mastery of the adjacent coast. */ Once that mastery was secured, the exclusive legal right to fishing in the adjacent seas followed as a matter of course, and was rigorously enforced, unless a treaty provided otherwise. See generally Exhibit 664, p. 212; Exhibit 665, pp. 341-46; Exhibit 673, passim; Exhibit 719, pp. 61, 93-94, 182-84, 229-43; Exhibit 720, pp. 70-75, 78-81; Exhibit 742; Exhibit 768, pp. 92-93; Exhibit 794; Tr. 2284.

Throughout the period, the French excluded English fishermen from the sea fisheries of those parts of North America which they controlled, and asserted the legal right to do so in peacetime. Exhibit 673,

*/ During the American Revolution, "to enhance her fishing opportunities France hoped to acquire Newfoundland and her old possessions around the Gulf of St. Lawrence. It must be borne in mind that

pp. 37-39, 42-43; Exhibit 681; Exhibit 719, pp. 61, 182-84; Exhibit 720, pp. 74, 98-99; Exhibit 742, pp. 186-87; Exhibit 766, p. 603; Exhibit 803; Tr. 2284. On occasion, the French taxed the English fishermen instead of excluding them. Exhibit 720, p. 72; Exhibit 742, p. 284.

By the Treaty of Utrecht of 1713, an attempt was made to resolve the fisheries issue. By Article X, France undertook to restore to England "the bay and straits of Hudson, together with all lands, seas, sea-coasts, rivers, and places situate in the said bay and straits." Nova Scotia, in French hands until the war, was ceded to England; and by Article XII, French subjects "shall hereafter be excluded from all kinds of fishing in the said seas, bays, and other places, on the coasts of Nova Scotia; that is to say, on those which lie towards the east within thirty leagues, beginning from the island commonly called Sable inclusively, and thence stretching along towards the southwest." By Article XIII, the French ceded to England that part of Newfoundland which they had thitherto occupied, "but it shall be allowed to the subjects of France to catch fish, and to dry them on land, in that part only, and in no other besides that, of the said island of Newfoundland, which stretches from the place called Cape Bonavista to the northern point of the said island; and from thence running down by the western side, reaches as

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eighteenth-century statesmen looked upon the fisheries as the nursery of seaman and as holding one of the keys to a powerful maritime and naval establishment. In the light of this traditional point of view the French national interest in the North Atlantic fisheries seems perfectly comprehensible." Richard B. Morris, The Peacemakers 14 (1965). In 1779 France agreed with Spain that if France regained Newfoundland it "would admit Spanish subjects to the fishery there, [and] presumably no one else." Id. at 15. (Emphasis added.)

far as the place called Point Riche." Exhibit 673, p. 45; Exhibit 719, pp. 239-40; Exhibit 768, p. 97; for the full text of the treaty see 1 Israel (ed.), Major Peace Treaties of Modern History 177 (1967).

The 30-league line thus established in the sea off Nova Scotia corresponded to the 30-league territorial sea established by the English charter of 1662 (p. 209, supra). The fact that in the treaty no line was specified on the western coast of Nova Scotia makes it clear that the entire Bay of Fundy was regarded as British territorial waters from which the French were excluded. While the text of the treaty would indicate that the 30-league line applied only to Nova Scotia, it appears that the British regarded such a line as continuing on southward all along the coasts of the British colonies as far as the Georgia-Florida border. Exhibit 327. That interpretation was never put to the test since there were never any substantial French fishing encroachments southwards from Nova Scotia. (See p. 252, infra.) It was natural, in any event, for the British to regard 30 leagues as the exclusive-fishing limit even apart from the treaty, because 30 leagues are the substantial equivalent of 100 miles, and the 30-league line was itself a frequently encountered limit for territorial waters among international-law scholars, particularly the French. */

*/ Thirty English marine leagues equal 90 nautical miles or 103.5 statute miles. Thirty leagues was proposed as the normal limit for territorial waters by the French publicist Bodin in 1577, and achieved a wide currency. 5 La Pradelle, Revue Générale de Droit International Public 264 ff. (1898), reprinted in Crocker, op. cit. at 188-89. See also p. 306, infra.

By the Peace of Paris in 1763, the provisions of the Treaty of Utrecht relating to Nova Scotia and Newfoundland were confirmed (Articles IV, V). Canada (that is, Quebec), Cape Breton Island and all other islands and coasts in the Gulf of St. Lawrence were ceded to England, together with "in general, everything that depends on the said countries, lands, islands and coasts" (Article IV). Britain "consents to leave to the subjects of the most Christian king the liberty of fishing in the Gulf St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at a distance of three leagues from all the coasts belonging to Great Britain" (Article V). As to the Cape Breton fisheries, the French were forbidden to fish within 15 leagues. Ibid. The islands of St. Pierre and Miquelon were ceded to France for the sole purpose of serving as a shelter to French fishermen (Article VI). The Spanish renounced all pretentions to share in the Newfoundland fishery (Article XVIII). Exhibit 673, pp. 83-85; Exhibit 674, pp. 422-23; Exhibit 742, pp. 197-98; Tr. 2297-2300.

As in Article XIII of the Treaty of Utrecht (p. 240, supra), the language regarding the French liberty of fishing in the Gulf of St. Lawrence is explicitly, indeed ostentatiously, permissive, making clear the understanding of both parties that no one had a right to fish in the territorial waters of another sovereign but could do so only if a "liberty," or license, were conferred by treaty.

The limits established for French fishing by the treaties of 1713 and 1763 were rigorously enforced by the British. Exhibits 766-774, 787, 789, 792-794, 798-800, 804, 805, 810-812.

The treaties were never regarded as establishing British rights to exclusive fisheries for the first time. To the contrary, the treaties were bitterly resented by Englishmen both in England and in North America as having made unnecessary concessions to the French. Exhibit 741, pp. 311-14; Exhibit 752, pp. 317, 322-23. The Common Council of London protested against the Peace of Paris on the ground that "the sole and exclusive right of fishing in the American seas should be reserved to the subjects of the British crown." Exhibit 741, p. 313.

The New Englanders, who were heavy users of the Newfoundland and Nova Scotia fisheries, were particularly vehement in denouncing concessions to the French. William Bollan, an able lawyer and colonial agent for the Massachusetts government in London from 1745 to 1762 (Exhibit 669), well expressed the New England attitude in a series of tracts published in London. His Observations on the Preliminary Articles of Peace, Exhibit 670, denounced the draft articles of 1762 for their concessions to the French. Previously, in 1746, after the first capture of Louisbourg by the New Englanders, Bollan had written desperately in an attempt to ward off its restoration to the French, highlighting the importance of the Cape Breton fisheries; in that work he also denied that the Spanish had any right to fish in the Newfoundland seas. Exhibit 671.

Bollan's most comprehensive work was The Ancient Right of the English Nation to the American Fishery, published in 1764. He traced the English title to the Newfoundland fisheries, as was conventional, from the Cabot discoveries and the Gilbert ceremonial acts of taking sovereignty, and interpreted the Gilbert patent as including all the seas and fishing banks adjacent to Newfoundland. Exhibit 673, p. 12. Bollan was well aware of the English claims to sovereignty in the English seas, and maintained that the somewhat cryptic treaty of Whitehall (p.194 , supra), which confirmed English rights in the American seas without identifying them, should be interpreted in the light of English law and practice in the English seas themselves. Id. at 40-41. Bollan denounced the Treaty of Utrecht on the ground of its fishing concessions to France, id. at 49, and continued to attack the Peace of Paris on the same ground. Id. at 85. Bollan urged that, at least, Britain should regulate the fisheries, including those which the French were allowed to enter, to prohibit fishing during the spawning time so as to avoid depletion of the resources. Id. at 104.

The New Englanders had taken an exclusionary position consistently since 1650, when the Plymouth colonists petitioned the English Council of State complaining that the Newfoundland government had allowed the French to fish in Newfoundland waters. U.S. Exhibit 266; Tr. 2197-98. In that same year of 1650 the Massachusetts government ordered the publication of Malynes' Lex Mercatoria. Exhibits 529, 530. It will be

remembered that Malynes' influential work asserted maritime sovereignty and the 100-mile limit for territorial waters. See pp. 72-73, supra. Much further documentation could be adduced, if the point were disputed, to demonstrate that throughout the 17th and 18th centuries the New Englanders were intensely zealous in asserting exclusive fishing rights and demanding the expulsion of the French from the fisheries on which their economy so heavily depended. See also Tr. 1696-97.

As late as 1816, John Quincy Adams, American minister to England, summed up the traditional New England view in a letter to Lord Castlereagh:

> "The fisheries on the banks of Newfoundland, as well in the open seas as in the neighboring bays, gulfs, and along the coasts of Nova Scotia and Labrador, were by the dispensations and the laws of nature, in substance, only different parts of one fishery. Those of the open sea were enjoyed, not as a common and universal right of all nations; since the exclusion from them of France and Spain, in whole, or in part, had been expressly stipulated by those nations, and no other nation had in fact participated in them. It was, with some exceptions, an exclusive possession of the British nation . . . ." 7 British and Foreign State Papers 99, 107 (1834).

(b) Newfoundland

For the history of Newfoundland and its uniquely rich fishery, see generally Exhibits 465, 719, 741. The distinctive factor in the history of Newfoundland was the dominance of the fishery from early times

not by settlers but by fishing interests based in southwestern England. For most of the period they were in control of the fishery, to the point where they were even able to discourage and in some cases to prohibit settlement on the island itself on the ground that such settlement would interfere with their monopolization of the fishery.

Other nations -- principally the French, Portuguese and Spanist -- fished in the Newfoundland seas from a very early date, though by the mid-17th century the Spanish and Portuguese had been effectively excluded and the seas divided into French and English zones. Exhibit 719, p. 55. The English at first pursued an ambivalent policy regarding attempts to exclude other nations, who after all had preceded them in exploitation of the fisheries. As we have seen, Raleigh's charter and the charter of 1610 (p. 221, supra) reserved liberty of fishing both to English subjects and to aliens, though during Elizabeth I's reign the English did attempt to monopolize the fishery (pp. 46-48, supra).

Within the English zone, different groups strove for control and monopoly of the fishery. Under Governors Guy and Mason the settlers attempted to gain a monopoly, but were frustrated by the southwestern English. Exhibit 465, pp. 44-49. The southwesterners themselves obtained a substantial monopoly of the fishery in 1634. Exhibit 663, p. 313; Exhibit 719, pp. 76-77.

In 1637, a group headed by Sir David Kirke attempted to secure a monopoly, but was compelled to compromise with the west-country fishing interests, whose rights were preserved. However, Kirke did obtain the right to license and to tax foreign fishermen, which he exercised. Exhibit 719, pp. 78-82, 85-86, 137; Exhibit 784, p. 3; Exhibit 790, p. 4.

In 1671 the king in Council issued comprehensive regulations for the Newfoundland fishery, which was declared to be open to all English subjects. Aliens were excluded from the fishery between Cape Race and Cape Bonavista, that is, off the coast of that part of Newfoundland then occupied by the English. Exhibit 719, pp. 128-31. "The admirals were required to preserve peace and order among the fishermen and seamen ashore as well as at sea, to execute the royal charter concerning the fishery, and to apprehend and punish all offenders." Id. at 130-31. These regulations were confirmed by the crown in 1675. Exhibit 741, pp. 191-92. The royal instructions excluding aliens from the Newfoundland fishery were still in full force in 1749, Exhibit 795, and indeed down to the American Revolution.

In 1689 Britain, in its declaration of war against France, asserted ownership of all the Newfoundland fisheries and named French incursions thereon as one of the causes for the war, which began the long

series of conflicts to determine which nation should have supremacy in North America:

> "It was not long since the French took license from the Governor of Newfoundland to fish upon the coast and paid a tribute for such licenses as an acknowledgement of the sole right of the Crown of England to that Island; but of late the encroachments of the French on his Majesty's subjects trading and fishing there had been more like the invasions of an enemy than becoming friends, who enjoyed the advantages of that trade only by permission." Exhibit 741, p. 224; see also Exhibit 751, p. 4, n.9.

In 1698/9, Parliament enacted an Act To Encourage the Trade to Newfoundland, which excluded all aliens and strangers from fishing in Newfoundland, "the seas, rivers, lakes, creeks, harbours in or about Newfoundland or any of the islands adjoining or adjacent thereto." Exhibit 749, p. 515; see also Exhibit 671, p. 39; Exhibit 673, pp. 43-44. This act remained in force, and was enforced, throughout the century. Exhibit 714, p. 693; Exhibit 804, p. 7. "'The Act of 1698 remained the fundamental law of Newfoundland for more than a century, that is to say, until its repeal in 1824.'" 2b Parry (ed.), British Digest of International Law 428 (1967).

During the negotiations preceding the Treaty of Utrecht, the Guipuscoans or Biscayans, a fishing community of Basques in Spain, asserted an established right to fish for cod and whales in the Newfoundland seas. Exhibit 781, p. 2. The claim was referred to the Board of Trade, who reported that "some Spaniards have come hither with passes

from her majesty, and others may have fished there privately, but never any that we can learn did do it as of right belonging to them." The Board pointed out that of course the alleged right was inconsistent with the act of 1699, since the enactment of which "instructions have been given every year to the commodores of the convoy to prevent foreigners coming thither." Exhibit 781, p. 3. Article XV of the Anglo-Spanish Treaty of Utrecht dealt with the claim as follows: "And whereas it is insisted on the part of Spain that certain rights of fishing at the island of Newfoundland belong to Guipuscoans, or other subjects of the Catholic King, her Britannic Majesty consents and agrees that all such privileges as the Guipuscoans and other people of Spain are able to make claim to by right shall be allowed and preserved to them." Exhibit 790, pp. 2-3; 28 Parry, Consolidated Treaty Series 295, 334-35. (Emphasis added.)

Following ratification of the treaty, the Guipuscoans naturally again presented their claim. It was rejected in a most illuminating decision by the Board of Trade in 1719. Exhibit 790. The Board relied on the Cabot discoveries and Gilbert's symbolic acts of sovereignty as establishing an exclusive English right to the sea fisheries as well as to the island of Newfoundland. The Board asserted the English "undoubted right and interest over that country and fishery," Exhibit 790, p. 4, and declared that any Spanish fishery in Newfoundland waters had been conducted pursuant to English license. Id. at 5. The conclusion was that

the Spanish had no legal right and their claim was denied. See also Exhibit 671, pp. 38-39; Exhibit 741, pp. 276-77; Exhibit 766, p. 401; Exhibit 768, pp. 90, 102, 104-05; Exhibit 810, p. 219. The Spanish claim was renewed later in the century on several occasions, Exhibit 770, p. 135; Exhibit 682, pp. 410-11, and was "justly resented." Exhibit 673, p. 82. The Spanish finally renounced their "pretention" by Article XVIII of the Peace of Paris of 1763.

This history of the Guipuscoans decisively refutes any argument by plaintiff that exclusive fisheries in American waters in the 17th and 18th centuries were established only by treaty. To the contrary, the English legal position was clear throughout that England was sovereign over the land and the fisheries and that only a treaty or some other vested right could warrant any foreign fishing in the American seas.

In 1723 the British navy expelled French fishing ships from the great bank of Newfoundland, but the Board of Trade discountenanced this act on the ground that the great bank was 35 to 50 leagues distant from the land at its nearest point and was therefore considered free to all nations. Exhibit 769, pp. 49, 51-53, 124-25. The Board did not on this occasion state its belief as to the limits of the exclusive fishery; it was probably applying the 100-mile rule.

After the British acquisition of Labrador by the Peace of Paris in 1763, Labrador was annexed to Newfoundland and the Labrador fisheries were regulated in the same manner as those of Newfoundland. The French

were, of course, excluded. Exhibits 800, 801, 805. In 1765 the Board of Trade, in an address to the king, urged even more diligence in ensuring the exclusion of the French from the fisheries of Newfoundland, Labrador and the Gulf of St. Lawrence, "where both the territorial property and the sovereignty of the seas are vested in your majesty." Exhibit 805, p. 2. (Emphasis added.)

(c) Cape Breton and Nova Scotia

The French systematically, and under claim of right, excluded the British from the Cape Breton fisheries while that island was in French hands. Exhibit 783. Acquisition of the Cape Breton fisheries was one of the principal motives for the New England expeditions which twice seized the island during the wars of the mid-18th century. Exhibit 659; Greene, The Foundations of American Nationality 363-64 (1922).

Nova Scotia changed hands several times, becoming permanently British by the Treaty of Utrecht in 1713. Both the French and the English asserted the right to exclude, and did exclude, nationals of the other from the rich Nova Scotia fisheries during their respective possessions of the province. The New Englanders were most interested in the Nova Scotia fisheries, and solicited permission to fish there from the British crown. Exhibit 780. After the final change of sovereignty in 1713 the French never disputed the exclusive British right to the Nova Scotia fisheries, although there were nagging disagreements as to whether

certain areas fell within that exclusive fishery or not. See Exhibit 768, pp. 43, 91.

(d) The Fisheries of the Common Counsel States

The colonists of what are now the Common Counsel States were no more prepared than their neighbors to the north to tolerate French intrusions upon their fishing, and one of the motives for the seizure of Louisbourg in 1745 by the New Englanders was to prevent French incursions on the New England fisheries. Exhibit 659, p. 9; see also Exhibit 768, pp. 92-93. The issue rarely arose, however, because -- except perhaps in Maine waters -- French incursions were infrequent and on a small scale. This was so essentially for two reasons: the New England fisheries were distant both from France and from any French-occupied territory; and, while at first believed to be even richer than the Newfoundland fisheries, those of New England turned out to be relatively modest and not such as to attract foreigners in any significant number. Exhibit 663, p. 300; Exhibit 665, p. 345; Exhibit 671, pp. 88-90; Exhibit 673, p. 37; Exhibit 740, pp. 33-34; Tr. 2125-26. Also, the New England fisheries rarely required action by the authorities in England, "probably because the people of that region were conducting the industry so successfully that they had no cause to bring pressure upon the home government." Exhibit 719, p. 103. In a notable understatement, Dr. Kavenagh conceded that if the French had attempted to

fish in New England waters, the colonists would have "asked them to leave." Tr. 2061-62.

The Board of Trade was interested in the New England fishery and regularly collected information concerning it. Exhibit 766, p. 615; Exhibit 768, pp. 31, 34-35, 122; Exhibit 791; Exhibit 810, p. 288. If there had been any French or other foreign threats to the fishery it cannot be doubted that both the British government and the colonists would have taken steps to combat it, just as they did in more northerly waters where foreign incursions did take place.

Southward of New England, the fisheries were not so rich as to attract any French or other foreign interest at all, so that the necessity of excluding foreigners never arose there. Exhibit 683, p. 58; Tr. 2283, 2290.

Plaintiff herein has relied on a Massachusetts statute of 1646, which recited in its "whereas" clause that "it hath been a custom for foreign fishermen to make use of such harbors and ground in this country as have not been inhabited by English men." Exhibit 499, p. 113; Exhibit 724, p. 52; Tr. 2287-88. This act -- which was repealed in 1661, Exhibit 724, p. 52 -- indicates that some fishermen who in some sense were foreign had been tolerated at one period. An act of 1667 stated that the 1646 act had been in accordance with "a reservation in the patent," that is, the Massachusetts Bay charter of 1629. Id. at 53. As we have

seen (p. 222, supra), that charter included a free-fishing clause for the benefit of "any of our loving subjects." It is difficult to understand exactly what the Massachusetts legislature believed to be the relation between that free-fishing clause and the "custom" allowed to foreign fishermen in 1646; a possible explanation is that by "foreign fishermen" the legislature meant only subjects of the crown other than Englishmen, e.g., Scots, or that it considered Englishmen themselves, or residents of other English colonies, to be foreigners. The whole episode seems obscure; but on the basis of the behavior and attitude both of New Englanders and of other colonists throughout the colonial period we may be sure that if there ever was any "custom" of tolerating French or other non-British fishermen it was because very few of them came to be tolerated and that such toleration was regarded as a matter of permission rather than of right.

Instructions issued in 1683 for the settlement of the Duke of York's colony at Pemaquid, in Maine, prohibited all vessels "that do not belong to this government ".from fishing for herring; vessels from outside the government could otherwise come to fish, but only after procuring licenses. Exhibit 721, pp. 77-78; Tr. 2161-63.

In 1693 the Pennsylvania government required a payment by all foreigners of a royalty of 10% of oil and bone for the killing of any whale within Delaware Bay. Exhibit 281; Tr. 796. The government of New Jersey adopted a similar measure the same year. Exhibit 481.

Both these acts applied to all persons not residing in Pennsylvania or New Jersey.

In 1700 the Massachusetts governor and legislature referred to "the undoubted right and privilege of your majesty's subjects to fish in the seas on the whole eastern coast, comformable to your majesty's rights of sovereignty over the seas." Exhibit 270, p. 419; Tr. 779.

3. Licensing of Fishing by the Colonies

Most of the colonial governments at one time or another asserted the right to grant fishing licenses and to charge royalties or taxes therefore. The Virginia Company, even while embroiled with the Council for New England on the fishing issue, issued licenses; the Virginia Company's position was not that there was no licensing power, but that the two companies chartered in 1606 had the reciprocal right to fish in each other's waters. Preston, Gorges of Plymouth Fort 157, 167, 413 n.20 (1953). In 1622 certain foreigners wishing to settle in Virginia applied for permission to fish in the seas thereof. U.S. Exhibit 261; Tr. 2196.

Pennsylvania, in chartering a society of traders in 1682, included in the grant a license to fish for whale, sturgeon and all royal and other fishes in the main sea and bays of the province. Exhibit 283; Tr. 797, 2194-96.

New Jersey on a number of occasions granted licenses and charged royalties for whale fishing. Exhibits 482, 483, 484.

The New York government over a period of many years sold licenses for whale fishing; this practice was challenged in court, but was upheld. Exhibits 470, 474, 478, 782, 785; Exhibit 748, p. 15.

The Plymouth colony licensed its mackerel and bass fisheries (p. 257, infra), and Nantucket licensed whale fishing. Exhibit 748, p. 16.

In Bermuda, a corporation was given the monopoly of whale fishing in Bermuda waters, and issued licenses to others in return for royalties. Exhibit 777, p. 294.

Nova Scotia by proclamation of 1665 ordained that no one should fish without license. Scott, Hague Court Reports 161 (1960).

Under the administration of Governor Pallisser in the 1760's, American participation in the fisheries of Newfoundland, Labrador and Canada was permitted only "within certain limits and under certain restrictions"; in general, Americans were licensed for the whale fishery only and were excluded from other branches of the fishing trade. Exhibit 801, pp. 3, 8; Exhibit 748, pp. 45-46.

Frequent colonial legislation licensed the taking of drift whales whether on the shore or at sea, typically requiring the payment of a royalty to the colonial government by anyone taking such a whale.*/ See

*/ We know of no basis whatever for plaintiff's assertion (Pl. Br. 139) that such statutes related only to whales caught "within a short distance of shore"; even if they did, they would still be irreconcilable with plaintiff's position that colonial property rights stopped at the water's edge. Nor do

Exhibits 374, 493, 501, 538; Exhibit 731, p. 252; Exhibit 732, p. 134; Exhibit 734, pp. 478-79; Exhibit 748, pp. 4-9, 12; U.S. Exhibit 9, pp. 86-87, 98; U.S. Exhibits 195, 199, 200, 208; Tr. 795-96, 2216, 2230-33, 2246-47. As we have seen (pp. 11-13, supra) the sovereign right to whales had been regarded from the earliest times in England as an attribute of sovereignty and property in the territorial sea.

4. Grants of Exclusive Fishery

The Plymouth colony regarded the rich mackerel and bass fisheries in the waters off Cape Cod as one of the important economic resources and rights of property belonging to the colony. At times licences were sold, but the usual procedure was for the government to lease the exclusive right to the fishery to entrepreneurs for a term of years. Such leases resulted in substantial receipts of revenue by the colony. Exhibit 720, p. 64; Exhibits 730, 731, 732; Exhibit 734, pp. 478-79; Exhibit 742, pp. 277-78, 354-55.

In 1647 the Connecticut colony offered John Whiting a monopoly for the taking of whales within the colony. Tr. 2242-43.

In 1715, and again in 1726, New York created monopolies for the exclusive fishing for porpoises "in the seas, harbours, rivers and other waters within this colony." Exhibit 276, p. 839; Exhibit 476; Tr. 794-95.

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we know of any basis for plaintiff's inconsistent and contrary, and incredible, assertion (Pl. Br. 149) that a New Jersey statute established jurisdiction over whales caught anywhere in the world. By far the more natural construction of all these statutes is that they applied to the territorial sea.

The whaling company licensed by New Jersey had apparently only a non-exclusive license to take whales in the sea, but an exclusive right to all drift whales coming on shore. Exhibits 484, 485, 490.

In 1763 the Board of Trade received an application for a grant of the Madeleine Islands in the Gulf of St. Lawrence and the exclusive fishing thereof. Disposition of the application does not appear in the record, but in 1766 the Board of Trade recommended to the crown that an exclusive fishery be established there. Exhibit 681, pp. 347-48; Exhibit 806, pp. 7-8. In 1770 the Board expressed its opinion that if an exclusive fishery were to be granted the crown should receive "a valuable consideration" therefor. Exhibit 774, p. 227.

When Labrador was ceded to Britain by the Peace of Paris of 1763, it was annexed to the government of Newfoundland for the express purpose "that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands." U.S. Exhibit 367, p. 164. Governor Pallisser carried out this mandate with great vigor, to the extent of interfering with exclusive seal and sea-cow fisheries on the Labrador coast which had been granted, together with posts or settlements on land, by the French government of Quebec and confirmed by the British on first taking possession. The owners of these exclusive fisheries protested to the Board of Trade. At first the Board was skeptical, regarding title to the property rights in question as unproved and taking the view that the initial British confirmation had only

the nature of temporary licenses to carry on the fisheries. Exhibit 802, p. 9; Exhibit 806, pp. 7-8.

By 1772, however, the Board of Trade had become convinced that these exclusive fisheries were legitimate rights of property and also that the fisheries in question could as a practical matter be carried on only on an exclusive basis. Exhibit 786, pp. 2-4. The Board of Trade therefore memorialized the crown to re-annex the coast of Labrador to the province of Quebec. Exhibit 786, p. 6. This was done by the famous Quebec Act of 1774, which expressly declared the reason for the re-annexation of Labrador to Quebec to be the fact that under the Newfoundland regime the exclusive fisheries of the Labrador coast had been "subjected to regulations inconsistent with the nature of such fisheries." U.S. Exhibit 365, p. 549.

The instructions to the Quebec government in 1775 required that "the real and actual property and possessions" of the owners of fisheries on the Labrador coast should be "preserved entirely, and that they should not be molested or hindered in the exercise of any sedentary fisheries they may have established there." Exhibit 714. (Since these were seal and sea-cow fisheries, the word "sedentary" is obviously not used in the modern sense but appears to refer to a fishery carried on within a relatively restricted area from an established point on shore.) See

also Exhibit 773, pp. 56, 76, 256, 266-67, 272-75, 277, 279-80; Exhibit 774, pp. 70, 308.

5. Regulation of the Fisheries

The record contains many examples of regulations enacted by every colonial government which had important fisheries within the seas of its province. Such regulations are found in Maine (Exhibit 721), Massachusetts (Exhibit 499, p. 114; Exhibits 503, 505, 511; Exhibit 724, pp. 53-54); the Plymouth Colony (Exhibit 731, pp. 139-40; Exhibit 732, pp. 220, 228); Rhode Island (U.S. Exhibit 9, p. 92); New York (Exhibit 473); Nova Scotia (Exhibit 768, pp. 31, 34-35; Scott, Hague Court Reports 161), and Newfoundland and Labrador (Exhibits 465, 714, 719, 741; Exhibit 748, p. 45; Exhibit 766, p. 609; Exhibit 773, pp. 37, 259, 273-80; Exhibit 774, p. 62; Exhibits 798, 799, 801, 802, 804, 805, 806, 811).

The types of regulatory measures enacted, many of which we have previously encountered in England, included the chartering of fishery companies, the prohibition of certain types of nets and other methods of fishing, the specification of times and seasons for fishing, the prohibition of the taking of young fish, prohibitions of the dumping of garbage or waste in certain areas of the sea, exclusion of foreigners or of certain classes of subjects from fisheries, protection of foreigners where they enjoyed treaty rights to a fishery, suppression of one type of fishery in

order to promote another conflicting type which was regarded as more valuable, protection and convoying of fishing fleets, and the encouragement and improvement of fisheries generally.

B. The Colonies Asserted and Exercised Control and Jurisdiction Over the Seabed and Its Resources Whenever the Occasion Arose.

1. Sedentary Fisheries

On several occasions colonial legislatures asserted and exercised their jurisdiction over the seabed by regulation of sedentary fisheries. The New Jersey act of 1719 (Exhibits 326, 491) prohibited the gathering of oysters within the province from May 10th to September 1st of each year; forbade all persons not living in that province to take any oysters; provided for the seizure of any oyster-raking equipment found on foreign ships and imposed fines for violations.

In New York there were four 18th-century statutes regulating the raking of oysters. Exhibits 277-280. The first three of these dealt with oyster beds below low-water mark in the sea; the fourth dealt specifically with oyster beds "lying at and near Richmond county, within this colony." As Professor Smith testified, "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." Tr. 795.

Professor Henkin conceded (Tr. 2642-43) that it is "likely" that foreigners seeking to exploit the sedentary fisheries in American colonial waters would have been driven off as late as 1765.

2. Grants of Submerged or Derelict Lands

Given the great wealth of unappropriated land in North America during the colonial period and the constant availability of land for expansion westward, it is not surprising to find few colonial grants of land covered with water. However, several examples of such grants have been found.*/ While most of these grants did not deal with land under the open sea, we have seen that English property law never made any distinction between the different classes of tide waters.

In 1693 Sir Thomas Chicheley was granted derelict land in York County, Virginia. Survey Report No. 140, Virginia 350th Anniversary Corporation, Colonial Records Project, British Museum, Harleian MSS 7639.

In New York in the 1680's, the governor granted to the mayor and corporation of New York City lands reclaimed from the sea on which a dock was built. Exhibit 286, pp. 334, 367; Tr. 801.

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*/ It can be stated with some confidence that there must be many such grants besides those here mentioned. Random searches through the deed books of every coastal county would be hopelessly time-consuming, and have not been undertaken. The few grants here mentioned were encountered essentially by chance.

A Rhode Island statute of 1707 authorized every town to develop the "waters" bordering thereon (without any limitation to internal waters) by constructing wharves or reclaiming the submerged lands. Armour & Co. v. Newport, 110 Atl. 645, 646 (R.I. 1920); New York, N.H. & H.R.R. v. Horgan, 56 Atl. 179 (R.I. 1903). A grant made under this statute conferred the right to build a wharf for 800 feet below low-water mark. U.S. Exhibit 11, pp. 18-19. A New Hampshire statute of 1763 was similar. Id. at 19.

Massachusetts statutes of 1641 and 1647 provided that the owner of coastal land had property in the foreshore (with no limitation to the foreshore of internal waters) down to the low-water mark. Exhibit 533. It is not to be supposed that the Massachusetts government were ignorant of the law of England that the foreshore partook of the nature of the sea and was a proper subject for ownership because of the crown's ownership of the seabed. The same statute cautioned that owners of the foreshore were prohibited from stopping or hindering the passage of boats "through any sea."

Grants of the foreshore were very frequent in New York. See Mershon, The Power of the Crown in the Valley of the Hudson 156-57, 166-68, 177-89 (1925). In New York we also frequently find grants of land under rivers, bays and Long Island Sound. Id. at 146, 169-76. An Indian deed of 1640 of what became the town of Southampton included "all emoluments and profits thereto appertaining or in any wise belonging from sea or land within our limits." Exhibit 554.

Finally, Professor Smith testified as to a number of grants in the West Indian colonies of salt ponds and other waste lands below low-water mark. Tr. 799-801, 1268-69, and exhibits there cited.

3. Mining.

The desire to discover and to exploit mines, particularly mines of precious metals, was of course one of the principal reasons for English colonization in North America. The colonial charters and instructions to governors contain frequent and pervasive references to mines and mining.

It is hardly to be supposed that the colonists would have turned a blind eye to mines below low-water mark, or would have regarded them as incapable of ownership. In 1630 Governor Harvey of Virginia hoped to discover a saltpeter mine in the Chesapeake Bay, and "will find out if there be any silver mines." Exhibit 233. Mining concessions in the royal colonies were frequently granted out to royal favorites. In 1687 the Duke of Albemarle received a grant of all mines of gold, silver, saltpeter, salts and any other minerals in Carolina "as largely as is in our power to grant such license or authority," he to pay a percentage of net proceeds to the crown. Exhibit 232. Thomas Neale, Master of the Mint, in 1691 received a 31-year lease of all mines and minerals belonging to the crown in Virginia, at a royalty of one-tenth. The following year Neale received a 51-year lease of all ungranted mines, including saltpeter, in the American colonies, with stated exceptions. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11.

We have found no evidence of the actual discovery and exploitation of any subsea mines in the North American seas during the colonial period. This is not surprising, in view of the state of technology at the time and the vast expanse of unexplored land to the west which naturally dominated the economic ambitions of the colonies. But as Professor Smith testified, the lack of exploitation for these reasons "is not at all inconsistent with a quite general awareness that the exclusive right of exploitation was vested in the adjacent sovereign" if such mines had been discovered. Tr. 793.

Professor Morris admitted that under the common law in force in the 17th and 18th centuries mining rights on land in the American colonies were proper subjects of ownership all the way down to the center of the earth, even though they were not exploited during that era to any great depth below the surface. Tr. 2293-97; see 2 Blackstone, Commentaries 18. Likewise, as we have seen, the English common law which was in force in colonial North America recognized the crown, or his palatine grantees, as owners in fee of the property of the soil of the seabed in marginal waters. That ownership of course entailed ownership of any minerals found in the seabed or subsoil.

Even on Professor Thorne's view that the coastal sovereign's rights in the adjacent seas were mere rights of jurisdiction and the right to ownerless property, and that seabed minerals were therefore ownerless until discovered, there can be no question that the prerogative right

would have extended to any mineral resources discovered and exploitable there, just as it extended to wreck, flotsam, treasure trove and royal fish. Professor Thorne was at great pains to argue that the crown did not own the waters of the sea and the fish floating therein while they were still free, but that the prerogative attached only to things of value found in or extracted from the sea. While Professor Thorne's view has been shown to be erroneous as to the law of England at any time since the 16th century at the latest, that view, had it been the law, would still be entirely adequate to sustain the position of the defendant States in this proceeding. Even if the sovereign's right in the American marginal seas were viewed only as an inchoate or potential right to assert ownership of things of value found therein or extracted therefrom, the States must prevail once such things of value are found or extracted.

In one sense there is an analogy here to the power of Congress under the Constitution of 1787 over interstate and foreign commerce. When that power was conferred, it did not apply to airplanes, railroads, radios and television, because those inventions were unknown at the time; but there was never any question that once they came into being they were embraced under the provisions of the commerce clause. Here the case is much stronger, since during the American colonial period mining was well known and even subsea mining was not unheard of (p..117, supra). Thus to argue, as the United States does, that colonial ownership did not extend to subsea mines because there were no such mines in

American waters prior to 1776 is even more preposterous than an argument that the commerce clause could not be applied to airplanes or to television. A closer analogy would be an argument that the commerce clause did not apply to traffic by sea between Georgetown, South Carolina, and New London, Connecticut, on the ground that no ships sailed between those two ports prior to 1787.

We submit that no one familiar with the English and colonial background can have the slightest doubt that in fact, if valuable mineral resources had been discovered in the seabed or subsoil of the American marginal seas during the colonial period, the adjacent colonial government or the crown would have asserted jurisdiction and ownership over them, the right to control or to license exploitation, and of course the right to exclude foreigners, and that these assertions would have been upheld in the courts in the unlikely event that any one had challenged them. There is an analogy to fishing, but the reasons for assertion of ownership and exclusion of foreigners would have been much stronger in the case of mines than in the case of the fisheries.

Unlike fishing, which had been practiced for centuries, and as to which there were arguably vested rights, based on prescription, for subjects and possibly even for foreigners, such seabed mineral exploitation would have been a new industry or invention and therefore would have been plainly proper for monopolization or licensing under the established law. Likewise, the prevailing mercantilist theory would have required

the orderly harnessing and exploitation of such resources as a part of the economy and wealth of the empire. Moreover, mining, which requires permanent and immobile installations, would have been far easier to regulate than was fishing; we have seen that licensing or exclusion of foreigners from the sea fisheries, while always insisted upon as a matter of legal right, was sometimes given up as more trouble than it was worth in view of the ability of illicit fishing boats to slip in and out of territorial waters undetected. No such difficulty would have arisen in the case of mining installations. Finally, it is inconceivable that a colony would have tolerated the construction of such installations by foreigners in its marginal waters; that would have been regarded not only as larceny of the colony's wealth but, even more seriously, as a threat to the security and defense of the colony itself.

The United States may say that all this is hypothetical. It is no more hypothetical than the application of the commerce clause of the 1787 Constitution to airplanes or television, or than the ownership by the surface proprietor of mining rights far below the level of exploitation possible at that time. Yet no one doubts how those questions would have been resolved had they arisen, and they were resolved without controversy or doubt once they did arise. There is no greater room for doubt here.

C. The Territorial Jurisdiction of Admiralty Existed in the American Seas Just as in the English Seas.

As we have seen (pp. 25-32, 102-07, 147-48, supra), throughout the 17th and 18th centuries in England, as well as earlier, the admiralty jurisdiction was regarded as an attribute or corollary of the crown's sovereignty over the English seas. As the English colonies in North America sprang up, the admiralty jurisdiction was extended to their seas as a matter of course. All the colonial charters conferred admiralty jurisdiction; some (e.g., Exhibit 683, p. 35) reserved part of the jurisdiction to the admiral of England, but there is no need to discuss the somewhat complex subject of the division of the jurisdiction among the Lord High Admiral, the colonial vice-admirals and the various admiralty courts. The patents of the English admirals included territorial jurisdiction over the seas of the colonies, which were listed by name. Exhibit 642; see also Exhibit 675, preface. The jurisdiction was exercised, except so far as it was reserved to the crown, by the colonial legislatures and courts throughout the 17th and 18th centuries, including of course jurisdiction over ships at sea. See generally Exhibits 502, 541, 633. Appeals from decisions of the colonial admiralty courts lay in the High Court of Admiralty. 3 Blackstone, Commentaries 69.

The patents of the colonial vice-admirals conferred jurisdiction in unmistakably territorial terms. For example, the patent to Thomas Boone as Vice-Admiral of New Jersey granted him jurisdiction "throughout our province of . . . New Jersey . . . and territories thereof and

maritime parts whatsoever adjacent thereto and also throughout all and every the sea shores public streams ports fresh waters rivers creeks and arms as well of the sea as of the rivers and coasts whatsoever of our said province . . . and maritime parts whatsoever of the same and thereto adjacent." U.S. Exhibit 322. The patent in several places speaks of things to be done "within the maritime jurisdiction of our vice admiralty of our said province," and confers all that jurisdiction "which of right and by the statutes laws and ordinances and customs anciently observed were wont and ought to be enquired after," including wreck, manslaughter and other felony, royal fish, etc. Ibid. These formulas leave no doubt that the jurisdiction was territorial and that it was intended to be of precisely the same nature and scope as the jurisdiction in the English seas themselves. See also U.S. Exhibits 323, 324, 325.

The language differed slightly from patent to patent; for example, William Shirley's commission of 1741 as Vice-Admiral of Massachusetts conferred jurisdiction "in our province of Massachusetts Bay aforesaid and territories thereon depending and in the maritime parts of the same, and thereto adjoining, whatsoever," and so on. 2 Collections, Colonial Society of Massachusetts 237 (1913). Two commissions have been encountered which set express geographical limits on the territorial jurisdiction conveyed: Joseph Dudley's commission as Vice-Admiral of New England, in 1685, conferred jurisdiction "of our colony of New England and maritime parts to the same adjoining, that is, from New York and Long Island

toward the south and southwest to 40 degrees of north latitude." Id. at 369. And the charter of the Providence Island Company, in 1630, granting certain islands off the coast of Central America, conveyed admiralty jurisdiction "in and upon the seas, rivers and coasts of the said islands, and every or any of them adjoining, within 40 leagues of the islands." 1 Marsden, Law and Custom of the Sea 471 (1915). As we have seen, the Maine charter of 1639 granted admiralty jurisdiction out to 20 leagues from the coast. Tr. 716.

There is substantial authority for the proposition that a principal purpose and function of the admiralty jurisdiction in colonial North America was the exclusion of foreigners and other unauthorized or unlicensed persons from the fisheries in the territorial seas. Exhibit 683, pp. 25-27, 29, 31-32, 58. The New England colony unquestionably used the admiralty jurisdiction for that purpose, and the same was true of Newfoundland. Exhibit 683, pp. 31-33; Exhibit 719, pp. 128-31. This was, of course, wholly consistent with the scope of the admiralty jurisdiction in English home waters at the time; see pp. 102-07, supra.

D. Other Aspects of Sovereignty, Ownership and Jurisdiction Confirm that the American Seas Were Regarded as Subject to the Same Law as the English Seas.

1. Wreck and Other Admiralty Droits

In 1713 the British Parliament adopted an act, confirmed by another act in 1717, which codified the common law of wreck and was to be applied on the coasts both of Great Britain and "any other of her majesty's dominions." The act required royal officers to assist all ships, British or foreign, in danger of being wrecked on the shore, and provided for the custody of all wrecked goods and their appropriation by the crown if not claimed within 12 months. While these acts applied of their own force to all royal colonies, the New Jersey legislature in 1766 enacted a statute specifically recognizing their application there. Exhibit 492.

In 1692 the governor of Maryland appointed an officer to salvage all "drifts, wastes and wrecks," including whales, "as shall be driven or cast on shore or shall be found floating within the limits and bounds" of the colony. Exhibit 374; Tr. 795-96. The reason for the appointment was stated to be incursions of Pennsylvanians and other foreigners "upon and within the limits and bounds of this province at the seaboard side" to take drift whales. Ibid.

The right of wreck in the royal colonies was granted, leased or sold by the crown on various occasions. In 1691 Thomas Offley was granted one-half of any proceeds to be realized "from several Spanish

wrecks in America." In 1690 Thomas Neale received a grant of all wrecks within 20 leagues of Bermuda, and another grant of wrecks in certain specified Caribbean waters. Also in 1692, the Duke of Leinster was granted wreck in America between the latitudes of 12 degrees south and 40 degrees north, except as already granted. Neale and a partner received a grant of wreck within 30 leagues of the isle of Sables, off the coast of Nova Scotia between 40 and 50 degrees of northern latitude. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11. Neale's grant of wreck in the seas for 20 leagues around Bermuda included flotsam, jetsam and lagan as well as wreck properly so called, Exhibit 657; other grants doubtless did likewise.

In 1719 the North Carolina government claimed certain captured goods which had been seized "within the seas of the soil of the lords proproprietors" of Carolina. Tr. 901.

The treatment of wreck and similar prerogative rights on the American seas and coasts is further confirmation that English law regarded those seas and coasts as subject to the sovereignty, jurisdiction and ownership of the crown in precisely the same senses as were the seas and coasts of England itself.

About 1615, the Bermuda (Somers Island) Company made substantial profits from "an immense piece of ambergris found on the coast." These profits supplied the capital which permitted the establishment and development of the Bermuda colony. Rowse, The Elizabethans and America 77 (1959).

2. Establishment of Ports

It is common knowledge, of which judicial notice can be taken, that the colonial governments as a matter of course exercised the right to establish seaports and to define their limits.

It will be remembered that in England the right to establish seaports -- which often extended quite considerable distances into the sea -- was an undoubted prerogative of the crown, and was regarded as an attribute of, or evidence for, the crown's sovereignty and ownership of the sea and seabed, on the ground that if the king so chose he could designate ports covering the entire coastal seas. See pp. 111, 125, supra.

3. Regulation of Marine Pollution

Massachusetts enacted statutes against the throwing of ballast, dung or other matter from ships into the waters of roads, ports, harbors and coves within the province. Exhibits 507, 531, 537.

Other statutes of several colonies, already cited under the heading of fisheries regulations (pp. 260-61, supra), forbade the dumping of garbage or waste by fishing boats in various other parts of the sea outside harbors.

4. Smuggling Jurisdiction

In 1764 the British jurisdiction over smuggling (pp. 153-55, supra) was extended to American waters by a "hovering act" of Parliament

providing for the seizure and forfeiture of any foreign ships and all goods on board found within two leagues of the coast of any British colony or territory in America. Masterson, Jurisdiction in Marginal Seas 38-39 (1929).

E. Several Maps Made in the Colonial Period Provide Additional Evidence for the American Territorial Seas.

In the colonial period as today, maps very rarely indicate maritime boundaries or the width of the territorial sea. There are a few colonial maps, however, which do show such boundaries, and others which contain nomenclature evidencing recognition of maritime sovereignty.

Professor Flaherty offered a number of maps from the colonial period designating the waters off the Virginia coast as the Sea of Virginia or the Virginian Sea. Virginia Exhibits 2-8. While suggestive, such designations could be interpreted either as merely geographical or as indicative of a claimed sovereignty or ownership.

Two maps of 1726 and 1733, drawn up in connection with a Massachusetts-New Hampshire boundary controversy, show the colonial boundaries in New England as extending out into the sea. Exhibits 615, 616. An earlier, 17th-century map, by William Reed of Boston, does likewise. Exhibit 815.

Exhibit 816 is an English map of North America, made in 1680 by William Berry and dedicated to King Charles II. The map includes

maritime boundaries, labeled the north and south "bounds of the dominion of the British seas," extending from Van Staten and Finisterre due westwards across the Atlantic Ocean to the coast of North America. This was in accordance with the then-current doctrine that a nation owning opposite coasts owned all the waters, no matter how extensive, between those coasts. The map thus shows the British seas, properly so called, as having their southwestern corner at a point on the North American coast due west of Cape Finisterre, that is, at approximately the present Maine-New Hampshire boundary. But the map also recognizes that the American colonies to the southwards had their own territorial seas, which are designated as the "sea of Carolina, Virginia, Maryland, New York, New England."

Exhibits 817, 818 and 819 are English maps deriving respectively from about 1685, about 1690 and 1715. The first two designate the marginal seas of the North American Atlantic coast as the "Sea of the English Empire." Exhibit 819, which was dedicated to the president of the Privy Council, uses the term "Sea of the British Empire." These are quite obviously not mere geographical designations.

Exhibit 613 is an official map made about 1720 by Captain Cyprian Southack, who was a royal naval commander and Commissioner of Treaties of the province of Nova Scotia, and dedicated by him to Francis Nicholson, Governor and Vice-Admiral of South Carolina. Southack's map, which covers the American coast from Cape Breton

Island to New York, divides the sea off each province by precise designations: "the Sea of Nova Scotia," "the Sea of the Province of Maine," "the Sea of New Hampshire," "the Sea of New England," "the Sea of Rhode Island," and "the Sea of New York." These are obviously recognitions of territorial sovereignty rather than mere geographical designations, because of their precision and the fact that the various "seas" are in no possible sense separate bodies of water, the divisions among them being purely artificial and political.

In the St. Croix arbitration under the treaty of 1794 between Britain and the United States, the United States regarded Southack's map as authoritative and relied on it heavily. The United States agent declared of Southack, "there was in that day no man who possessed more ability for such a work, who had a greater opportunity to acquire knowledge in the business or who, for such a business, in a higher degree possessed the confidence of his country." 1 Moore, International Adjudications 141-42 (1929); see also 2 id. at 284-88 (1930). One of Southack's naval duties was the seizure of any French ship caught fishing or trading in Nova Scotia waters. Exhibit 768, p. 54; Exhibit 789. Southack was in a good position to know just what Britain was claiming in that era regarding sovereignty and propriety in the American seas.

Exhibit 820, a portion of a map of 1720, shows the Carolina-Florida boundary, identified as the "limit of King Charles II granted

to the present proprietors of Carolina in 1663." The line does not stop at the coast but rather extends a considerable distance into the sea.

Exhibit 821 is an early 18th-century French map of what is now the United States. The English possessions have been shaded in; most interestingly, the shading includes the marginal sea of each of the English colonies. While the boundaries of this maritime shading are somewhat eccentric -- usually following north-south and east-west lines rather than the indentations of the coast, and therefore producing a curious notching effect -- in most areas the shading extends approximately 100 miles from the coast.

In the arbitration of 1817 between the United States and Britain concerning the islands in Passamaquoddy Bay and the Bay of Fundy, the agent of the United States presented a rough map on which he drew a maritime boundary off the Maine coast to show his understanding of the Massachusetts charter of 1691. The line is labeled "an imaginary line ten leagues from the shore being the Province boundary of Massachusetts." 6 Moore, International Adjudications, map opposite p. 110 (1933).

These maps, especially when examined in the light of what we already know concerning the British attitude towards maritime sovereignty in the 17th and 18th centuries, furnish powerful supporting evidence for the existence of the territorial sea off the North Atlantic coast and of general awareness thereof.

F. There Was No Curtailment of Colonial Rights in the Marginal Sea Between 1752 and 1776, and If There Had Been Such a Curtailment It Would Never Have Been Recognized in American Law.

One of plaintiff's principal contentions is, in the words of Professor Morris, "that after 1752 there was a deliberate effort on the part of the Crown to reassert its claims to the unoccupied and undistributed lands of the colonies and to tighten royal authority over disposition by the colonies of public lands." Tr. 1701. Plaintiff seems to contend that the process of curtailment of colonial rights after 1752 was so drastic and comprehensive that by 1776 the colonies had virtually nothing left which could be inherited by the successor State governments. To this contention there are three short answers, each of which would be separately adequate to deprive Professor Morris' thesis of any benefit to plaintiff in this proceeding.

1. The attempted curtailment of colonial rights was the principal cause of the American Revolution, and such curtailment never became part of the law of this country. The statesmen of the Revolution continuously and vehemently asserted that the colonial charters, charter rights and charter boundaries were in full force and vigor and that any British attempt to curtail or abrogate them had been and was unlawful. Our courts have uniformly so held.

2. To the extent that the crown did curtail colonial rights, it did so for its own benefit and aggrandizement, not for the benefit of foreigners or the world at large. Professor Morris conceded

that the crown never took away any territory or right from any colony in order to make it res nullius. Tr. 2331-32. And anything the crown took away from the colonies came back to the States individually at the Revolution. Professor Morris' theory is that rights which under British law had been taken away from the colonies by the crown by 1776 passed "directly to the United States, not to the individual states." Tr. 1701. It would be difficult to formulate a thesis more alien or repugnant to the views of the revolutionary statesmen or to the legal doctrine on which the American Revolution and Constitution were founded. Professor Morris has not brought forward any judicial or jurisprudential pronouncement from 1776 until today in which any American authority has ever used any version, let alone the British version, of the division between crown and colonial rights in 1776 as a measure of the allocation of powers between the States and the Federal Government. In 1782 Madison called such a notion "so extravagant that it could not enter into the thought of man." Levitan, "The Foreign Relations Power," 55 Yale L.J. 467, 484 n. 67 (1946).

3. As Professor Morris admitted, Tr. 1877, 2331, there is not the slightest evidence or indication that the crown ever took away or curtailed any colonial rights of sovereignty or property in the seabed. With one interesting exception, there is no evidence that the crown ever attempted to curtail any colonial rights on the surface of the seas either.

The exception is the New England Restraining Act of 1775, which prohibited the New England colonists from fishing on the banks of Newfoundland and in all other American waters. Tr. 1697-98; Exhibit 720, pp. 113-20; Exhibit 742, pp. 315-23. This was a war measure, based on a finding that the New England colonies were in a state of rebellion. Exhibit 742, p. 316. Obviously, it was never regarded as being any part of American law. Most interestingly, Lord North justified the act on the ground of British ownership of the fisheries in the American seas. Exhibit 720, p. 114; Exhibit 742, p. 316. Moreover, the government advocated the measure, aside from its principal purpose of injuring the New England colonies, on the ground that it would encourage and strengthen British fisheries in North American waters. Exhibit 742, pp. 322-24. Thus the significance of the act for this litigation is as evidence that at the outset of the American Revolution the British government still fully asserted that the American seas and their fisheries were subject to sovereign ownership and were not free to all. While there were bitter debates in Parliament on the wisdom and humanity of the measure, there is no record that anyone opposed it on the ground that the American seas and their fisheries were res nullius. Quite to the contrary, the opposition argued that "the people of New England, besides the natural claim of mankind to the gifts of Providence on their own coast, are especially entitled to the fishery by their charters, which have never

been declared forfeited. These charters, we think . . . to be of material consideration. The bill therefore not growing out of any judicial process seems equally a violation of all natural and all civil right." 3 Parliamentary Papers 519 (1797).

A few other observations are in order concerning plaintiff's curious thesis as to the events of 1752-1776 and their legal implications. While at times plaintiff argues sweepingly that the crown had the absolute right to revoke charters and to change colonial boundaries, plaintiff elsewhere admits, Tr. 2541, and it is in fact clear, that such measures could be taken only by legal proceedings such as quo warranto or scire facias, which required proof that a charter had been breached by the grantees. Exhibit 711, pp. 42-43. The crown never claimed the power to interfere with vested rights of proprietary colonies. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (Marshall, C.J.); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 739 (1838). In the Passamaquoddy Bay arbitration of 1817, the United States unequivocally took the position that the crown had no power to change any charter boundary without the consent of the colony involved. 6 Moore, International Adjudications 47, 126-29 (1933).*/ Jurisdiction in the crown over boundary disputes among colonies -- which disputes were invariably resolved on the basis of construction of the colonial charters -- is of course a wholly different matter. See Tr. 2332-33.

*/ "[T]o dispossess the government and province [of Massachusetts] of any part of this territory [the territory included in the Massachusetts

As to property rights, Professor Morris admitted that the crown could not and did not interfere with private property rights either in the proprietary colonies, Tr. 1876, or in royal colonies, Tr. 2300-03. Professor Morris' contention therefore amounts to no more than that the unappropriated lands in royal colonies became crown lands. But this is meaningless, since they had always been crown lands! The most that happened is some reallocation, as between the royal governments in the colonies and the authorities at Westminister, of control over the management and distribution of such lands. Such a reallocation, to the limited extent it occurred, has nothing to do with any issue in this proceeding.

Plaintiff relies especially on four documents: the Albany plan of union of 1754, the royal proclamation of 1763, the Board of Trade's proposal of 1768 for the erection of interior colonies, and the Quebec Act of 1774. Each of these documents avails plaintiff precisely nothing.

The Albany plan of union (U.S. Exhibit 366) proposed a federation of eleven of the British North American colonies. Each colony would retain its "present constitution," and the federation was

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charter of 1691] required an explicit renunciation on the part of Massachusetts, either expressed or necessarily and fairly implied . . . . And . . . no act has ever been done by Massachusetts from which her relinquishment of sovereignty over the islands in question can be justly inferred." "Case of the United States," id. at 126.

proposed by the colonies themselves -- hardly an imposition on them from above. In fact the plan was never implemented. The only significant fact about the plan for purposes of this proceeding is that it spelled out the colonies' charter boundaries, extending as far as the Pacific, and regarded them as still in force. Id. at 885-86.

The proclamation of 1763, U.S. Exhibit 367, imposed, on a provisional basis, limits of western settlement into areas beyond the Appalachians then occupied by the Indians. Tr. 1706-07, 2308-13. This was a temporary measure adopted to allow time for the working out of a comprehensive plan for the administration and settlement of all the western territories, including those just acquired from France by the Peace of Paris, and for a peaceful settlement with the Indian tribes. The proclamation did not purport to change the boundaries of any colony; it was not contemporaneously construed as changing any such boundaries (U.S. Exhibit 368, last page; Exhibit 662, p. 83; Tr. 2325-27), and the official position of the United States taken during the peace negotiations of 1781-83 was that it changed no boundaries and that the charter boundaries survived as the foundation of the States' title to their territories. Exhibit 661, pp. 129-30; Exhibit 707; Tr. 2322-23; Greene, The Foundations of American Nationality 518 (1922).

The Board of Trade's proposal of 1768, U.S. Exhibit 368, envisaged the creation of new colonial governments in the western territories. The proposal, which like the Albany plan was never adopted,

included elements devastating to plaintiff's position. First, the proposal acknowledged that the charter boundaries extending to the Pacific were still in force and had never been altered. U.S. Exhibit 368, p. 22. The map attached to the report, U.S. Exhibit 368, last page, Tr. 2325-26, shows the colonies with their ancient charter boundaries as far as the Mississippi, proving that they were still in force in 1768. Second, one of the principal reasons which the Board of Trade put forward for the erection of new colonies in the interior was in order not "to divert your majesty's subjects in America from the pursuit of" the "important objects" for which the original colonies had been founded. Id. at 29. First among those objects was listed "promoting the advantageous fishery carried on upon the northern coast." Id. at 27. (Emphasis added.) Thus in the Board of Trade's view, if expansion of the Atlantic colonies to the westward was curtailed or was sought to be curtailed, one of the prime objects was to avoid diverting those colonies from their proper and originally intended concerns, chiefly the exploitation of the sea fisheries. This is hardly consistent with Professor Morris' thesis that curtailment of colonial rights westwards necessarily entailed their curtailment on the coasts and in the seas also. See Tr. 2329-31.

The Quebec Act of 1774, U.S. Exhibit 365, purported to incorporate the territory north of the Ohio River and west of Pennsylvania into the province of Quebec. Curiously, the act expressly provided that nothing therein contained "shall in any wise affect boundaries

of any other colony," id. at 550, though of course it was well known that the territory in question was within the charter boundaries of Virginia. The act also provided that nothing contained therein altered the status of any lands previously granted by the crown. Id. at 552. In any event, the Quebec Act, being one of the principal causes of the American Revolution, Tr. 2335-38, and adopted on the eve thereof, was never regarded as part of the law of this country. The Declaration of Independence listed the Quebec Act as one of the unlawful and tyrannical acts of George III that justified revolution. The official United States position in 1781-83 was that the act was unlawful when adopted and had always been a nullity. Tr. 2335-38. Finally, the act said nothing with respect to the sea and seabed.

In sum, despite plaintiff's earnest contention, it is plain that nothing happened between 1752 and 1776 which in any way altered, voided or curtailed the rights of the American colonies in their marginal seas and the seabed thereof.

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