No. 35, Original

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

REJOINDER BRIEF FOR THE COMMON COUNSEL STATES

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February 12, 1974

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TABLE OF CITATIONS

Cases

International Courts and Arbitral Tribunals

Statutes

Textbooks and Miscellaneous

REJOINDER BRIEF FOR THE COMMON COUNSEL STATES

This Rejoinder Brief consists merely of discussion of a limited number of miscellaneous points made in Plaintiff's Reply Brief ("P.R.B.") as to which we believe additional comments might be of some assistance to the Special Master. We have tried to keep this brief as short as possible, and to avoid rehashing material already fully covered. Obviously, failure to comment here on a particular assertion by plaintiff in no way indicates our agreement therewith.

We present our comments in the order of the passages in Plaintiff's Reply Brief to which they refer.

P.R.B. p. 3, n.3. It is striking that plaintiff now claims that post-1800 developments in British and Commonwealth law are "irrelevant," considering the major reliance plaintiff attempted to place on such developments in presenting its affirmative case (Plaintiff's Brief ("P.B.") pp. 21-25; U.S. Exhibits 18-48). Our position is not, as plaintiff incorrectly states, that such developments are irrelevant, but that they would be irrelevant if they changed the pre-1776 British law and the same change did not occur in our law. Brief for the Common Counsel States ("Br."), p. 518. The

fact that post-1776 British law is generally consistent with the prior law, and with our contentions, is obviously relevant though not determinative.

P.R.B. pp. 3-9. We think it so clear as not to require extended discussion that in declining to grant plaintiff's motion for judgment on the pleadings, and in granting the motion of the Common Counsel States for reference to a Special Master, the Supreme Court indicated its desire that the States' contentions be examined on their merits, rather than being foreclosed at the outset by reliance on the California decision as plaintiff had urged. So far as that requires, the Special Master has a mandate to take a wholly fresh look at the soundness of the California and subsequent decisions and to recommend in his report that they be overruled if they are found to have been historically and constitutionally unsound. Otherwise the entire proceeding before the Special Master would have been a pointless exercise. As we understand plaintiff's position, it recognizes that the Special Master may properly recommend the overruling of California, but contends that he should do so only if defendants

have sustained "a heavy burden." We think this position is inconsistent with the desire for a fresh evaluation which the Supreme Court's action expressed, and also unsound for the reasons stated at Br. pp. 5-7. Finally, while we believe it unnecessary that we sustain "a heavy burden," we submit that the evidence adduced in this proceeding does decisively demonstrate the historical and constitutional unsoundness of California and its progeny.

We do not, of course, contend that the holding of the California decision (as distinct from both its result and its reasoning) has already been overruled, either by Congress in the legislation of 1953 or by United States v. Louisiana, 363 U.S. 1 (1960). In Louisiana the Court in fact said that the California decision is "applicable to all coastal States," 363 U.S. at 7. Our contention, rather, is twofold: (1) that Congress believed, as the Court recognized in Louisiana, that the California decision was historically and legally unsound (see passages set forth at Br. pp. 423-28, 484-89), and acted to reverse the result of that decision to the extent Congress was then aware of historic State titles; and (2) that both Congress and the Court, in assenting to State ownership of the

resources underlying large portions of the continental shelf, undercut the rationale of the California opinion, which, plaintiff to the contrary, was that foreign affairs and defense considerations require federal ownership and that imperium and dominium in such submerged lands are inseparable. These facts, we submit, confirm our demonstration herein that the California decision was indeed both historically and constitutionally unsound and should now be overruled.

In his Report in United States v. Florida (Supreme Court, Oct. Term 1973, No. 52 Original, January 18, 1974), the Special Master relied on United States v. California in rejecting Florida's claims, and pointed out the language in Louisiana to the effect that California is "applicable to all coastal States." Report, pp. 9-11.

The Special Master's earlier Report of March 29, 1971, recommending severance of Florida from the instant litigation, had held that "there are no questions of law or fact, except possibly with respect to the construction of the Submerged Lands Act, common to" Florida's claims and those of the other twelve Atlantic States. Report of the Special Master upon Motion of the State of Florida for Severance, p. 3. Apparently the course of the Florida litigation after severance

raised an issue concerning the validity of the California decision, which, as indicated by the language just quoted, neither the Special Master nor any of the parties -- certainly not the Common Counsel States -- anticipated at the time the motion for severance was made and granted. We believe that the Special Master's reliance on California in his Florida Report was conditional upon the following language of his earlier Report recommending severance:

> "Florida disclaimed any intention to claim any rights derived from England under colonial grants or charters or any purely constitutional rights of a proprietary character in its capacity as a state of the Union, except that if any such rights should hereafter be determined in this case to exist with respect to any of the other 12 defendant states, Florida would want to be entitled to the benefit of that determination to the extent relevant and applicable to its factual situation." Report of the Special Master upon Motion of the State of Florida for Severance, p. 3.

We think it apparent that the effect of the above language was to hold the question of the validity of California in abeyance in the Florida litigation, with Florida later to obtain the benefit of any overruling of California in the instant litigation "to the extent relevant and applicable to its factual situation." Consequently, the Report in applying California to Florida's case presumably did so by

assuming the correctness of that decision arguendo and did not foreclose Florida, let alone the Common Counsel States, from the benefits which might accrue if, in this case, the Master determines to recommend that California be overruled.

P.R.B. p. 8, n.6. It is significant that plaintiff does not deny, and apparently concedes, that the federal legislation of 1953 is unconstitutional if the States' claim to prior ownership of continental-shelf rights is held to have been established in this litigation.

P.R.B. pp. 9-10. While of course it is true that California might attempt to institute new litigation in the event that the California decision were now overruled, it is far from clear that such litigation would be successful. Not only would the United States there have a valid "acquired rights" argument, but victory for the Atlantic States on the ground of their historic title is by no means automatically translatable into victory for California, which never had or claimed such a title. As plaintiff points out (P.R.B. p. 186), "the 'equal footing' doctrine applies only to political rights, not to property rights." The fact that the Atlantic States had certain historic maritime boundaries and vested property rights in the continental shelf would not appear to require any automatic recognition of equivalent rights on behalf of other

States, any more than the "equal footing" doctrine is violated because Texas has wider land boundaries and more extensive public lands than does Rhode Island.

P.R.B. p. 13. It is entirely clear from pre-17th century sources, as well as from Hale as plaintiff admits, that the right to royal fish applied to fish "taken or found upon the sea." 1 Twiss (ed.), Black Book of the Admiralty 153 (1871). The Black Book always uses the term sea in its conventional modern sense, and carefully distinguishes ports, "great streams," havens, etc., when those rather than the open sea are meant. Ibid.; id. at 149, 165.

Plaintiff asserts, purporting to quote 1 Nichols (ed.), Britton 68 (1865), that Britton "described royal fish as 'sturgeons taken within our land [and] whales found within our jurisdiction.'" Plaintiff has simply falsified this passage. In fact the text cited reads, "sturgeons taken within our dominions" (emphasis added) and "whales caught within our jurisdiction," just as does Nichols' later edition which we quoted at Br. p. 12.

P.R.B. p. 13, n.7. We nowhere "suggest," as plaintiff states, "that Bracton recognized the power to levy tolls as stemming from ownership of the sea." See Br. pp. 21-22 Our point is that even Bracton recognized royal rights in

the sea which, since they included the right to levy tolls or license fees for use of the sea and extraction of its resources, included the right at issue in the present litigation.*/

P.R.B. p. 14. Plaintiff denies our contention that the term "taken in the sea or elsewhere within the realm" implies that the sea is within the realm. If the authors of De Prerogativa Regis had believed that the sea was outside the realm, the use of the term elsewhere (alibi) would have been both unnecessary and unnatural. Plaintiff is repudiating its own witness Professor Thorne, who agreed with our construction:

> "Q That implies, does it not, that the author of that document believed that the seas were themselves within the realm, since he says within 'the sea or elsewhere within the realm'?
>
> "A Yes, I never thought of that, but it sounds right." Tr. 2691.

Alternatively, plaintiff claims, as it does in many other contexts, that when legal documents or other writings use the word

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*/ The description by Bracton and others of fish as ownerless apart from the king's prerogative carries no implication that the sea and seabed were not crown property. These authorities treated fish exactly as they did wild beasts, which were ownerless although the land on which they were present of course had owners. See, e.g., 2 Thorne (ed.), Bracton on the Laws and Customs of England, 167, 293, 339 (1968). Surely plaintiff does not contend that the ancient doctrine of ferae naturae means that all land is res nullius; yet this is where its argument leads.

"sea" or "seas," "such language could have been used narrowly to refer only to bays, rivers, ports, havens, and arms of the sea." Nowhere does plaintiff offer the slightest evidence for so strained and implausible a meaning. Nor does plaintiff offer any citation or support for its allegation that "this narrow meaning apparently is the one understood by Hale, Britton and Bracton" (P.R.B. pp. 14-15). Innumerable quotations in our brief and in the record prove that the term was not used in so limited a sense. Merely as one example, Hale referred to "the seas parcel of the dominion and crown of England or . . . any creeks or arms thereof." Br. p. 12; see also Br. p. 97. Hale regarded the English seas as extending to "at least so much" of the sea "as adjoins nearer to our coast than to any foreign coast." Br. p. 122.

P.R.B. p. 15. Every statement made in the text on this page is incorrect or unsupported. Plaintiff offers no authority for its allegation that "most" exclusive sea fisheries involved weirs. Moreover, weirs are by no means limited in their use to "enclosed" areas; counsel for the Common Counsel States will testify, if necessary, that he has seen many of them on open coasts. Here, as in many other

places, plaintiff uses the term "tidal waters" with a meaning that is undefined and is by no means clear; but if (as appears from P.R.B. p. 15) plaintiff includes in the term areas which are "quite shallow" at low-water mark we are uncertain what plaintiff thinks it is proving, since such waters are in its view outside the realm, and ownerless.

Plaintiff cites p. 230 of Moore's A History of the Foreshore, but nothing on that page supports any of plaintiff's statements. For one of many possible refutations of plaintiff's claim that "generally speaking, regulations affecting fishing were limited to inland waterways," see the admiralty inquisition record, Br. pp. 30-31; admiralty, of course, had no jurisdiction over "inland waterways." For a refutation of plaintiff's claim that jurisdiction over weirs and the grant of rights to construct weirs were not based on ownership of the submerged lands, see Br. pp. 33-34 and the authorities there discussed.

P.R.B. p. 15, n.8. Even plaintiff's feeble attempt at humor fails to avoid error. Defendants, of course, do not contend that the seabed here at issue is "loose," i.e., ownerless and subject to appropriation by the first finder, but to the contrary that it (or at least the exclusive right to

exploit its resources) has been the property of the defendant States and their predecessors since the first discovery and settlement of this country. Moreover, Melville's account is by no means "fully consistent" with plaintiff's claim that the right to royal fish was limited to whales taken in internal waters. Melville describes an application of the royal-fish doctrine to a whale which "mariners of Dover, or Sandwich, or some one of the Cinque Ports, had after a hard chase succeeded in killing and beaching . . . which they had originally descried afar off from the shore." Moby Dick, ch. XC, p. 511 (Feidelson ed.). The precise location of the killing itself is not specified, but is hardly likely to have been above low-water mark.

P.R.B. p. 16. Plaintiff claims that we have "conceded" that the grants of fisheries on which we rely were legally invalid because they were made after Magna Carta. Plaintiff bases this on its own description of the grants on which we rely as having been made during the reigns of Henry III and Edward I (P.R.B. p. 15). In fact we showed that many such grants did antedate Magna Carta, having been made "by King John" and "before the reign of Henry II," Br. p. 19. Our reference, also at Br p. 19, to the reigns of Henry III and Edward I was not to grants made during those reigns, but to

records showing that exclusive fisheries then existed. Moreover, the doctrine that exclusive fisheries not antedating Magna Carta were invalid was unheard of during the Middle Ages, but grew up long afterwards, Br. p. 43, n.; it was not yet established in the 17th century, and indeed was still a matter of dispute in the 19th century.

P.R.B. p. 18. We here repeat our assertion (see Br. p. 115) that at no time has English law ever made any distinction, with respect to rights of property, between arms of the sea (rivers, bays, etc.) and the English seas themselves. Plaintiff has not brought forward an iota of evidence to suggest that such a distinction was ever made. There was indeed such a distinction with respect to jurisdiction: arms of the sea across which a man could see were within the bodies of counties, and therefore subject to the jurisdiction of the common-law courts rather than to that of admiralty. That distinction was never made with respect to rights of property: there the difference recognized by the law was between (1) non-tidal waters, where ownership of the bed was in the riparian owner; (2) all tide waters, including tidal rivers, bays, ports, and the English seas, where ownership was in the crown; and (3) the high seas outside the English seas, which were ownerless. This point is fundamental to the entire litigation. To repeat,

plaintiff has brought forward no evidence whatsoever -- and we know of none -- which in any way suggests that English law ever knew any distinction with respect to rights of property corresponding to the jurisdictional distinction between the bodies of counties and waters outside the counties. See, e.g., Exhibit 729, pp. 95-108.

P.R.B. p. 20. With respect to the statute of 1389, plaintiff writes as though its counsel were simply unaware that the English word but has two meanings, one of which is except or unless: "all but John went to the dance," etc. See any dictionary. While perfectly common today, this meaning was even more so in earlier times. Thus in English the statute of 1389 is ambiguous with respect to the point at issue. Latin, however, is not similarly ambiguous: but in the conjunctive sense is sed; but in the sense of except or unless is nisi. That is why the Latin version of the text in question is decisive. All this is wholly obvious; plaintiff's discussion is a curious and futile exercise at obfuscation.

Plaintiff observes that "the critical phrase in French was 'mes seulement,' which has always been translated

into English as 'but only.'" The matter of translation simply begs the question, in view of the dual meaning of but. As to the French text itself, the word mais (mediaeval mes, mez) is derived from the Latin magis, which means more; and more is the original and primary meaning of mais, though its use in this sense is generally now archaic. At the period in question mais had not yet acquired its usual modern meaning (but in the conjunctive sense) at all, but always meant more or a meaning immediately derived therefrom, specifically including, when combined with ne (ne mais, i.e., no more or not more), the meaning except, unless. Greimas, Dictionnaire de l'Ancien Français jusqu'au milieu du XIVe siècle 382;*/ see also 4 Littré, Dictionnaire de la Langue Française 1855-57 (1957); Robert, Dictionnaire Alphabetique et Analogique de la Langue Française 211 (1970). Thus the literal meaning of the statutory language in mediaeval French ("les admiralx et lour deputees ne soi mellent desore enavant de null chose fait deinz la roialme mes soulement de chose fait sur le meer," 2 Statutes of the Realm 62 (1816)) is: "the admirals and their deputies shall not meddle from henceforth of any thing done within the realm more than only of a thing done upon the sea," that is,

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*/ The synonyms given by Greimas for mais in this sense are excepté and sinon, the modern French words for except and unless.

except for a thing done upon the sea. Here, then, mais is but in the sense of except -- indeed at that period mais was synonymous with but in that sense only -- and the French text confirms our construction as does the Latin.*/ The statute is proof that the English seas were inside the realm, not outside it.

Plaintiff cites (P.R.B. pp. 19-20) five authorities for the proposition that the statute of 1389 "barred the exercise of any admiralty jurisdiction 'within the realm.'" Two of these, Holdsworth and Pritchard, merely quote the words of the statute with no interpretation whatever, and thus in no way support plaintiff's allegation. Marsden, likewise, merely refers to the existence of the statute in a manner which contains no interpretation and nothing helpful to plaintiff. Even Lord Cockburn's repudiated opinion in Regina v. Keyn does not take a position on the point here at issue; in the passage

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*/ The above sources give many examples of the use of mais in this sense. Another example, which likewise makes the usage clear, is found in a rather ribald context in a mediaeval tale of Charlemagne's legendary journey to Jerusalem. See Koschwitz (ed.), Karls des Grossen Reise nach Jerusalem und Constantinopel 40-41 (1923). The old French text is "li coens ne li fist mais la nuit que trente feiz" (another version: "li quens ne li fist la nuit mes q:XXX feiz"). The literal English translation is "the count did not do it (during) the night more [mais] than 30 times," whereas he had boasted that he would do it 100 times. A 14th-century Englishman would probably have translated, "the count did not do it during the night but 30 times."

cited by plaintiff Cockburn quotes the statute and goes on to discuss the boundary between the admiralty and the common-law jurisdictions, but does not construe the statute or draw any conclusions from it with respect to whether the realm included the English seas. That leaves plaintiff still with no support but Finch, as to whom see Br. pp. 17, n., and 75-76.

Blackstone well understood that the statute used but in the sense of except; he paraphrased the statute as providing "that the Admiral and his deputy shall not meddle with any thing, but only things done upon the sea." 3 Blackstone, Commentaries 106 (1765).

P.R.B. p. 21. Plaintiff incorrectly alleges that Fenn at Exhibit 690, p. 76, was speaking of Baldus; Fenn was there describing the views of a much less well-known mediaeval publicist named De Afflictis. While De Afflictis answered in the negative the question whether the sea is included in the term "territory," Fenn remarks, ibid., that "the fact that the question was asked is of more importance than the answer to it." What Fenn means by this is that "the theory of territorial waters is latent, if not implicit, in the theory of littoral waters," id. at 130, and that once such questions were asked it would not be long, as in fact it was not, before they came to be answered in the affirmative.

P.R.B. p. 22, n.10. Plaintiff challenges our citation of Fenn, Exhibit 690, p. 130, for the proposition that "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." Br. p. 29. The cited page from Fenn plainly supports that proposition.

P.R.B. p. 23. Plaintiff's assertion that the 1286 case involved "merely . . . the inland waters of the county of Gloucester" demonstrates merely that plaintiff has no comprehension of where the case arose. In fact the adjacent county was Dorset, not Gloucester; and the location in question is described as "in fundo maris juxta Portland" (in the bed of the sea near Portland). Gloucester does not even have a seacoast, which presumably accounts for plaintiff's allegation about "inland waters"! The reference to Gloucester at Exhibit 728, p. 95, is to the earl of Gloucester, not to the county (comes, not comitatus); defendants traced their title through the earl of Gloucester, who held coastal lands in Dorset. Portland is at the end of a narrow peninsula in Dorset which extends far out into the open sea. Moore recognizes that the case dealt with "the bed of the sea." Exhibit 728, p. 96. (Even if it had dealt with "inland

waters" that would avail plaintiff nothing, since the law made no distinction between the soil of internal tide waters and the seabed. See pp. 12-13, supra.)

P.R.B. p. 24. A host of quotations from Diggs could be given to refute plaintiff's contention that he "understood that right [ownership of the seabed] to occur only when lands emerged from the sea." Here are a few only. "As the sea of all waters is the chief, . . . so the property thereof ought unto the chief the king himself to be attributed." Quoted at Moore, A History of the Foreshore 185. If what was formerly land territory is inundated by the sea and becomes submerged, that submergence "by continuation of time giveth the property to the prince." Id. at 188. "If any man doubt of the prince's interest in the sea let him consider the statute in 18 Ed. 3, where he licenseth his sea shall be open to all merchants for traffic." Id. at 190. See also the long passage, id. at 203, in which Diggs declares that the kings have always owned the seas "about this island," and the resources thereof, in property. "And also to make it manifest that the soil of the seas is also entirely the king's, no man can let fall any anchor in any road about this realm but he payeth for breaking the king's ground to the officers of the king." Ibid.

P.R.B. p. 25. We are not, of course, "urging an overruling" of Regina v. Keyn; such an "urging" would be, to put it mildly, superfluous. The decision was overruled two years after its promulgation, and the highest English courts have repeatedly denounced both its holding and Lord Cockburn's dicta as bad law. See Br. pp. 521-25.

P.R.B. pp. 25-26. Plaintiff now concedes that "the admiral had at least a limited jurisdiction over foreigners," but claims that it "existed . . . only for the protection of British subjects and property, including the keeping of the peace on British ships, and to prevent piracy." Plaintiff does not say in which of these categories it proposes to place our Exhibits 621 through 629, which show the conviction of foreigners for failure to give the flag salute. Obviously plaintiff's categories cannot encompass such an offense, which (as the exhibits make very clear) was punished in England law as a matter of principle, as an insistence on foreign recognition of English sovereignty in the English seas.

Not one of the authorities cited at P.R.B. p. 26 contains a word which, as plaintiff alleges, supports the proposition that English maritime sovereignty "did not embrace matters of exclusively foreign concern," whatever that may

mean. Jenkins, Exhibit 762, p. xc, defines the purpose of the admiralty criminal jurisdiction as to punish offenses "either against the dignity of the king, against the peace and good government of the kingdom, or against the rights and security of the subject." Molloy, Exhibit 726, p. 120, says that the prince exacts justice on the sea because it is his territory, and he has a general duty to exact justice in all his territories, whether land or sea. An act of piracy by, say, a French against a Spanish ship would be a matter "of exclusively foreign concern"; yet even plaintiff concedes that admiralty would have punished such a crime. Plaintiff's point thus seems to be limited to the fact that there is no recorded case of admiralty's taking jurisdiction over a crime by one foreigner against another involving only one foreign ship, not two. While the formulations of the admiralty jurisdiction, and the basis therefor, cited by plaintiff itself would probably warrant the taking of such jurisdiction,*/ it is

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*/ There are, however, at least two theories on which admiralty might have refused such jurisdiction even in principle, without any inconsistency with the established view that the seas were within the realm. One such theory is that the right of innocent passage through territorial waters entails immunity from such jurisdiction as long as the acts in question have no effect outside the ship. The other theory is that a ship is part of the territory of the sovereign of its flag, and carries its own

hardly surprising that this rarely if ever occurred. The admirals would be most unlikely even to know of the existence of such a crime. Does plaintiff seriously mean to infer that admiralty would have declined to take jurisdiction of the extraction of minerals by foreign ships from the seabed of the English seas? Even on plaintiff's theory, such conduct is hardly "of exclusively foreign concern."

P.R.B. p. 36. For the refutation of plaintiff's argument that Hale "doubted whether the body of the sea belongs to the king while it is still covered with water," see Br. pp. 121-26.

P.R.B. pp. 39-40. It is really unbelievable that plaintiff attempts to twist the very clear writings of Sir Matthew Hale as it does. All that is necessary is to read

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(Footnote continued.)
territoriality with it, resulting in immunity from the jurisdiction of the state through whose territorial waters it passes -- again, so long as no effects outside the ship are produced. Both these theories are good law today; we have not investigated the extent to which they were known and accepted prior to and during the 17th century.

Admiralty demonstrably exercised jurisdiction within the English seas of civil cases involving collisions between two foreign ships, with no English involvement whatever except for the location of the incident. See The Johann Friederich (1839), 1 Robinson, Cases in the High Court of Admiralty 35, 40 (1842), where such jurisdiction was founded, among other reasons, on the fact "that the collision took place on the high seas close to the English coast."

the passages from Hale referenced at Br. p. 121, and those quoted at Br. pp. 122-24, against the wholly different views plaintiff here attributes to Hale. Hale does not say, as alleged at P.R.B. p. 40, "that the basis of the crown's prerogative right, both to islands rising in the sea and the foreshore, was the crown's right to ownerless property." The passages quoted at Br. pp. 123-24 very clearly state, to the contrary, that the crown owns islands rising in the sea, the foreshore and articles of flotsam, etc., because the English seas belong to the crown in property.

Similarly, plaintiff is wholly wrong (P.R.B. p. 40) in asserting that in the passage quoted at Br. p.124 Hale makes a distinction between "such property . . . [and] the soil of inland waters." The passage in question says nothing about "the soil of inland waters." What it says is that the seashore and derelict lands belong to the crown because (1) the seas and the soil thereof are within the realm ("within the king's jurisdiction or royalty") and (2) ~~that~~ all land within the realm belongs to the crown unless alienated by it. The numbered paragraphs (1) and (2) in the quotation on p. 124 do not deal with different subjects -- the seas and inland waters -- as plaintiff suggests, but rather are the two premises in

the syllogism by which Hale proves his argument that the crown owns the seashore. See also Exhibit 729, pp. xxxviii-xliii.

It is of small importance how many texts Hale wrote, and at what times; but we think our view is plainly the correct one. Plaintiff's sole reliance is on Moore, who as we noted (Br. p. 123) assumed or thought that there was only one text apart from De Jure Maris. However, textual analysis of the passages quoted at Br. pp. 122 and 123 makes it clear that they are different drafts of the same passage. The text quoted on p. 124 is slightly more different, but would also appear to be a reworking or modification of the same basic text. Plaintiff is also wholly incorrect in alleging (P.R.B. p. 40, n.17) that the passages of Hale we quoted deal with different subjects. All three passages, as their context proves, deal with derelict lands, and hold that these belong to the king as a corollary of his ownership or dominion of the sea and seabed. See the first full paragraph at Moore, op. cit. at 358; the second full paragraph at Moore, op. cit. at 362, and the second full paragraph at Moore, op. cit. at 367. Each of these introductory paragraphs -- which introduce the passages quoted at Br. pp. 122, 123 and 124 respectively -- defines the subject to be discussed as the jus alluvionis.

P.R.B. p. 44. Plaintiff misunderstands the passage from Welwood which it cites. Welwood is not asserting a requirement of effective occupation in any modern sense, but rather dealing with the question of how extensive a maritime territory is acquired by the performance of symbolic acts of sovereignty. Welwood, like Selden (Br. p. 191), there pointed out that the rules for acquiring title to sea are the same as those for the acquisition of land, and that "it is not needful for him who would possess himself in any part of the land to go about and tread over the same; but it is sufficient to enter in upon any part thereof with a mind to possess all the rest thereof, even to the due marches. And what can stay this to be done on sea, as well as on land? And thus far concerning the validity." Welwood, An Abridgment of All Sea Laws 67 (1613).

We did not "state" that "Selden based sovereignty over the seas on 'prescription, appropriation and occupation.'" What we said is that Selden "based his position largely on a doctrine of prescription, appropriation or occupation." Br. p. 97. (Emphasis added.)

P.R.B. pp. 49-50. Plaintiff to the contrary, Keller, Lissitzyn and Mann nowhere "acknowledge that actual occupation, of more than a merely symbolic nature, was necessary to establish sovereignty." The passage from pp. 111-12 of Keller which plaintiff cites merely comments on the absence, in a French grant of 1603, of instructions to perform symbolic acts, and suggests that the French king believed that if actual occupation did occur the performance of symbolic acts would be unnecessary. The passage on p. 120, again dealing with French practice, merely states that "in spite of the fact of an effective occupation of New France, Champlain was moved to strengthen his sovereign's title further by an act of symbolic possession." Neither of these passages lends the slightest support to plaintiff's assertion. The passage from Keller which we quoted at Br. p. 180, as well as innumerable other passages throughout the book, asserts that (as the authors fully demonstrate) "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.'" Ibid. Innumerable

other modern authors could be cited who have recognized that this was the law in the period in question. The Supreme Court so held in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823), and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409 (1842).

1 Oppenheim, International Law 510 (1947), cited and relied on by plaintiff, is fully in accord with our position:

> "In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. Although even in the age of the discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations, the taking of possession was frequently in the nature of a mere symbolic act. Later on a real taking possession was considered necessary. However, it was not until the eighteenth century that the writers on the Law of Nations postulated an effective occupation,3/ or until the nineteenth century that the practice of the States accorded with this postulate.
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> ---
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> "3/ For an interesting and scholarly survey see Keller, Lissitzyn and Mann, Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800 (1938)."

P.R.B. pp. 53-54. As we demonstrated at Br. pp. 134-37, English law made a sharp distinction between the English seas which were part of the realm and the much more limited waters in which neutrality would be enforced. Gentili's failure to persuade the prize court to extend the right of neutrality beyond the king's chambers in no way implies that sovereign English waters were regarded as limited to the chambers, which clearly they were not.

P.R.B. p. 54. Plaintiff seems to believe that at Br. p. 189 we suggested that England claimed sovereignty over the island now known as Greenland. We put "Greenland" in quotes, and at Br. pp. 93-94 we made it clear that Spitzbergen, not Greenland, was the "nearest land mass" by virtue of sovereignty over which England claimed ownership of the "Greenland" whale fishery.

Plaintiff claims that even at Spitzbergen England based its ownership of the fishery on "prescription and effective occupation of the fishery." The instructions to Carleton set forth at Exhibit 775, p. 43, make it clear that the English claim was based on first discovery of the fishery and on possession of the island and erection of the royal standard there.

The only basis for plaintiff's assertion that "England . . . advocated free fishing throughout" the northern seas is Fulton's unreferenced assertion that about 1740, long after the period under discussion, the British minister at Copenhagen interceded "in favor of the Dutch Republic and the freedom of the seas." Fulton, The Sovereignty of the Sea 530. Inspection of whatever text Fulton may have been relying upon would be necessary to determine just what the British minister said and how far it represented his government's policy.

P.R.B. p. 55. We think the passage from Boroughs quoted at Br. p. 190 is quite plain and needs no "explication"; but we gladly accept plaintiff's invitation to provide one. Boroughs' position, like that of many others in this period, was that by virtue of sovereignty over both shores of the North Atlantic the crown is sovereign over all the waters in between ("crossing in a manner the whole ocean") and therefore that all international trade must come within English "power and jurisdiction" in going from one part of the world to another. Plaintiff's interpretation that Boroughs was merely asserting English sovereignty over England and the West Indies is preposterous, since it can hardly be contended that all international trade involved entry into one or both of those places.

P.R.B. p. 57. There is no reference to the "Indian Ocean" in Exhibit 640. In its non-territorial sense the admiral's jurisdiction did embrace the "entire open sea"; we explained and documented the distinction between the territorial and the non-territorial jurisdiction of admiralty at Br. pp. 102-03, and plaintiff offers no rebuttal.

P.R.B. p. 57, n.24. Possibly our assertion (Br. p. 194) that Exhibit 640 "expressly" referred to the North American colonies was a touch strong. However, the exhibit does (p.3) confer admiralty jurisdiction in the seas of "England and Ireland and the dominions of the same or elsewhere in all the parts beyond the seas." Plaintiff presumably does not deny that the North American colonies fell within this language.

P.R.B. p. 59. Plaintiff's construction of the law officers' term "in any place at sea . . . in any of his majesty's . . . colonies" as meaning only inland waters is refuted by the law officers' use of the term "the sea adjoining" the colonies as synonymous. Br. p. 196.

P.R.B. p. 62, n.27. Plaintiff claims that Lord Oxford "contended that colonies and foreigners alike possessed the right to fish in" "the American seas." What Oxford actually said was that "the subjects of France

should have the liberty of fishing and drying fish in Newfoundland." Exhibit 720, p. 80. Not the right, but rather the liberty; not "the American seas," but only Newfoundland; not all foreigners, but only the French (probably on the basis of long-established usage, or perhaps mere policy). Plaintiff's paraphrases are truly remarkable. For saying even what he did say, Lord Oxford was impeached. Ibid.

P.R.B. pp. 66-67. None of the authorities relied on by plaintiff stands for so absurd a proposition as that a conveyance of "all royalties" passes nothing because each royalty must be mentioned separately. The cases abstracted in 17 Viner, General Abridgment 130-39 (2d ed. ~~1973~~ 1792), simply show that where the granting language is vague or ambiguous it will be construed rather narrowly. A typical example is Grabham v. Gaeles, 81 English Reports 995 (1619), specifically relied upon by plaintiff. The rule was, moreover, one of intent, 17 Viner at 133, 135; Grabham v. Gaeles; supra; Basket v. University of Cambridge, 96 Eng. Rep. 59, 61, 64-65 (1758),*/ and applied to grants to "a common person," 17 Viner at 133, it not being presumed that the crown intended

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*/ Plaintiff herein cites the argument for defendant (not the opinion) in the Basket case, 96 Eng. Rep. at 64, that "the king cannot convey special prerogative rights by general words, where there are general prerogative rights, that may pass to satisfy the grant." The

to grant governmental or royal rights to such persons unless the intent was made very clear. Thus the rule did not apply to colonial charters, which were plainly governmental, see Br. pp. 216-18, 406-07, and indeed was expressly negated by the most-favorable-construction clauses of the charters, Br. pp. 198, 206.

A good illustration of the application of the rule in cases involving private parties is the case discussed at 17 Viner at 138-39. While the general rule was that a grant of "all mines" did not include royal mines, nevertheless, if the king had a royal mine and no other mine in the land of J.S. and granted "all mines, which he has in the land of J.S., by this grant the mine royal shall pass; for otherwise the words shall be void." This is hardly consistent with plaintiff's claim that the words "all royalties" passed nothing, even in a conveyance to a private grantee, much less in a colonial charter to a governmental body.

(Footnote continued.)

argument went on to give illustrations that the rule is never applied, if at all possible, to make words in a grant wholly void. That is exactly the application plaintiff seeks here. another construction is

Plaintiff's construction of Attorney General v. Trustees of the British Museum, [1903] 2 Ch. 598, is expressly negated by the passage immediately following the passage which plaintiff quotes:

> "The same argument to some extent applies to the word 'royalties.' Mr. Warmington argued that the word 'royalties' would be sufficient to pass these flowers of the Crown on the authority of Dyke v. Walford, cited above. The Attorney-General does not admit this, and I express no opinion on the point; but if it would, it is not suggested that treasure trove belongs to the office of vice-admiral, and the fact that the only royalties granted are those that belong to that office raises a strong presumption that none other were intended to pass. I have arrived at the conclusion that treasure trove does not pass by the charters by applying the ordinary rules of construction, so far as is compatible with the subject-matter of the grant, and it is therefore unnecessary for me to express any opinion on the contention of the Attorney-General as to the rules by which the Crown is entitled to have its grants construed." [1903] 2 Ch. at 614.

The grant there at issue conveyed all franchises, but the court held that treasure trove was a royalty, not a franchise. The grant contained no conveyance of all royalties, but only all royalties pertaining to the office of vice admiral, of which treasure trove was not one. As shown by the above quotation, the court expressly declined to decide the point for which plaintiff erroneously seeks to make the case stand, i.e., that under a conveyance of "all royalties" treasure trove would not have passed.

In Dyke v. Walford, 5 Moore's Reports 434 (1846), the Privy Council, the highest court in England, held in an exhaustive opinion that the words "all royalties" in a grant of governmental and property rights to a county palatine were effective to convey such royalties. The losing party argued, just as plaintiff does here, that "grants by the crown are to be strictly construed," that "prerogative rights, unless specially named, do not pass," and that "general words will not carry, in Kings' grants, which pass nothing by implication," id. at 454, 455, 468. The court's holding was as follows:

> "The material words of the grant do not differ in the several Charters. The grant in the Charter of 1377, is, that the Duke of Lancaster shall have within the County of Lancaster, his Chancery, his Justices to hold Pleas of the Crown, as all other pleas at Common law, and all manner of executions, to be made by his writs and his ministers; then 'et quae cumque alia libertatis et jura regalia ad Comitum Palatinum pertinentia, adeo liberè et integrè sicut Comes Cestriae infra Eundem Comitatum Cestriae dinoscitur obtinere;' saving to the Crown certain rights, only material to the present purpose, as showing the great extent to which the preceding words of grant, but for the reservation, might be held to reach.
>
> "Upon the construction of this Charter, two questions were made: First, whether the original words of the grant are sufficient to pass the right; and Secondly, whether they are restrained, by the subsequent reference to the Earl of Chester.

"The grant is, first, of all 'jura regalia,' belonging to a County Palatine. These rights appear to have been very extensive. Lord Coke lays it down (4 Inst. 204), that a "Count Palatine has "jura regalia," within his county, as fully as the King himself.' In Coke Littleton, 114 a, he states that, though a man cannot claim directly by prescription, to have such franchises and liberties as cannot be seized, before the forfeiture appears on record, as the goods of felons, yet he may make a title to them indirectly by prescription, for he may claim a County Palatine by prescription, and by reason thereof, to have the goods of traitors, felons, &c. In the case of The Queen v. Archbishop of York (Cro. Eliz. 240), it was held, that the Queen was entitled to the same prerogative when she was seised in right of the Duchy of Lancaster, as when she was seised in right of Her Crown. In the case of Bowes v. Bishop of Durham, (2 Bulstr. 219), it was held, that the Bishop of Durham, having a County Palatine and 'jura regalia,' should have, incident to a County Palatine, 'bona et catalla felonum, and of such as stand mute,' although he should not have had the goods of such as stand mute, under a grant of bona et catalla felonum. The same point appears to have afterwards come before the Court, on a Quo Warranto, and is reported under the title of The King v. Bishop of Durham (3 Bulstr. 156). The decision was to the same effect, and on the same grounds: and Lord Coke appears to have laid it down, (though there is some inaccuracy in the printing of the passage,) 'that if one prescribe for a County Palatine, and to have "jura regalia" within this; it extends to all which the King himself may have.'

"Upon these authorities, which are quite unopposed by any to a contrary effect, we cannot doubt that the right in question, passed to the Duke of Lancaster, amongst other 'jura regalia,' unless there be something in the grant restricting its effect.

"Then are there any such words? The words relied on, are, that the Duke is to have these rights, 'adeo libere et integre sicut Comes Cestriae dinoscitur obtinere.' There is nothing restrictive in these words. It is not a grant of such privileges and franchises belonging to a County Palatine, as the Earl of Chester enjoys; but it is a grant of all liberties and royal rights belonging to a County Palatine, to be enjoyed as freely and entirely as they are known to be enjoyed by the Earl. It is not necessary for the Duke of Lancaster to show an enjoyment of rights by the Earl of Chester, in order to found his title; but if it were necessary inasmuch as it appears that 'jura regalia,' generally, was enjoyed by the Earl, and we are of opinion, that the right in question, is amongst 'jura regalia,' we should presume the enjoyment of this right by the Earl of Chester, unless some evidence were offered to the contrary.

"Upon the whole, we are of opinion, that the right to goods belonging to persons dying intestate, without leaving husband, or widow, and without kindred, was vested in the King, in right of His Crown, at the date of these Charters; that this right, within the County Palatine, passed, with other 'jura regalia,' to the Duke of Lancaster, and is now vested in Her Majesty, in right of Her Duchy, and that the sentence complained of, must, therefore, be affirmed." 5 Moore at 496-98.

This authoritative holding, applied to a palatine charter which, so far as appears, unlike the colonial charters did not even contain a most-favorable-construction clause, is dispositive of plaintiff's contention.

P.R.B. p. 71. We "rely" on Bartolus as the originator of the 100-mile rule, not, as plaintiff attempts to suggest, as holding that the seas were subject to ownership. We expressly recognized, Br. pp. 201-02, that Bartolus did not so hold; but, as Fenn amply demonstrated, "that development followed inexorably."

P.R.B. p. 74, n.32. Plaintiff to the contrary, the language in the third Virginia charter which Professor Smith declined to interpret as extending maritime sovereignty to 300 leagues is by no means "identical" to "language in the second Virginia charter and in other charters." As Professor Smith pointed out (Tr. 705), in the third charter "the clauses granting jura regalia were limited to the mainland area and the Bermuda islands area and the seas adjoining each area." The charter language in question appears at Tr. 702, lines 19-23. For the corresponding, but quite different, language in the second Virginia charter, see Tr. 697, lines 8-11.

P.R.B. p. 75. In the fourth line on this page, as in many other places, plaintiff uses the term "tidal waters" without definition; the sense plaintiff intends is by no means

clear to us. As pointed out at Br. p. 15, the normal and proper meaning of tide waters comprises those waters, including the seas, in which a perceptible tide ebbs and flows.

Plaintiff's claim that the grant of all royalties in the New England seas "falls far short of a grant of ownership of the seas themselves" is wide of the mark. As shown exhaustively in our brief, the crown's ownership of the soil of adjoining seas was universally described as a royalty in 17th-century English law. But even if there were some doubt (which we think there is not) concerning title to the submerged lands themselves, there could be no doubt as to the right of extraction of minerals and other valuable resources therefrom. Plaintiff, focusing as always solely on "general property rights," i.e., fee-simple title to land (see our Br. pp. 1-3), never once denies that the crown's royalties included, at the very least, a property right in all things of value found upon or extracted from the bed of the adjacent seas. That is ample to sustain the States' title to the only right at issue in this litigation -- the exclusive right to explore and to exploit seabed resources. To repeat, plaintiff has never once denied that the crown had this royalty in the 17th century and intended to convey it in the colonial charters. Plaintiff has simply ignored our demonstration on these critical points.

Thus, in analyzing the New England charter, plaintiff claims that the reference to the "seas adjoining" falls short of "ownership of the seas themselves," and that the "adjoining" seas must have been outside the boundaries of the colony. We think plaintiff's arguments on these points are wholly unpersuasive. But even if they were right, what does plaintiff make of the express grant of "Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all . . . other . . . Royalties . . . within the said . . . Seas adjoining" (Br. p. 205)? Plaintiff does not and cannot tell us, and the reason is obvious: there is no possible construction of these words which fails to sustain the States' title to the right at issue in this litigation.

P.R.B. p. 76. Plaintiff is entirely in error in arguing that the language used by the Council for New England in 1622 and 1629, quoted at Br. pp. 206-07, was not a construction of the New England charter of 1620 but rather "a paraphrase of the provision in the Virginia charter of 1606." The Council identified the charter it was construing as "his highness' letters patents, under the great seal of England bearing date at Westminster the 3d day of November, in the 18th year of his reign." Exhibit 2, p. 1621; see also Exhibit 12, p. 19, and Exhibit 13, p. 2433. This was the charter of

1620; see Exhibit 11, p. 1840. Each grant further identifies the charter referred to by listing the names of the patentees, who were those of 1620, not 1606. Compare Exhibit 11, p. 1830, and Exhibit 41, p. 3784.

P.R.B. p. 83. Plaintiff's allegation that Dr. Kavenagh said that a colony could have obtained exclusive rights to sea fisheries "only . . . by effectively occupying the fishery" bears no citation, and we find no such suggestion in his testimony. Plaintiff's "occupation" theory as explaining away all our evidence is an afterthought of which Dr. Kavenagh was innocent throughout his testimony. Dr. Kavenagh's (wholly erroneous) position was that the sea and its resources were incapable of ownership, whether acquired by occupation or otherwise. Tr. 2072-74, 2097, 2120-21, 2132-37, 2142, 2151, 2153-56, 2174.

P.R.B. p. 83. Plaintiff claims that when Professor Morris conceded there were territorial waters off the North Atlantic coast in the 18th century he was "speaking of the position of the United States in 1793." Plaintiff quotes a remark by Professor Morris at Tr. 2269. Our reference was to the discussion at Tr. 1853-57, which plainly relates to the period before the American Revolution, since Professor

Morris repeatedly referred to the "colonies." His express statement that there were territorial waters during this period is at Tr. 1856.

P.R.B. p. 83, n. 35. Plaintiff alleges that Dr. Kavenagh's testimony respecting the Pemaquid regulations involved inland waters, with the clear implication that only inland waters were involved. At Tr. 2163 Dr. Kavenagh testified as follows:

> "Q. Do you think they were internal waters?
>
> "A. By the nature of the coastline there were a number of harbors, bays and river mouths; it could possibly be inland as well as at sea. . . ."

P.R.B. p. 85. In stating that Angell, in the passage which we quoted at Br. p. 218, referred solely to "tide waters" and "arms of the sea," plaintiff again fails to give any definition of the former term. Angell was using the term in the normal sense, described at Br. p. 15, which includes the marginal sea. Angell's position is quite clear: "in the arms and inlets of the sea, and also in the sea itself, so far as the right of national dominion extends, the sovereign power not only exerciseth a right of jurisdiction, but also a right of property or ownership." (Emphasis in original.) Angell, A Treatise on the Right of Property in Tide Waters xiii-xiv (1826).

P.R.B. p. 85, n.36. Nothing in the congressional report set forth at Tr. 1793-99 limits claims to exclusive fisheries to three leagues from shore. As shown at Br. pp. 371-72, the sole subject of that report was the outer banks of Newfoundland, and the argument was that they were too far out for exclusive ownership since, being 35 leagues from shore at their closest point, they were outside any of the conventional limits for exclusive fisheries.

P.R.B. p. 87. The Privy Council did not "deny" the Council of New England's claim to exclusive fisheries under its charter. The Privy Council ratified an agreement between New England and Virginia to allow reciprocal fishing to a limited extent to the residents of each in the seas of the other. With that sole exception, the Privy Council confirmed New England's exclusive rights, directing English fishermen to stay away from those waters. Br. pp. 234-36.

P.R.B. p. 91. Plaintiff's assertion that the Nova Scotia boundary was 30 leagues from shore only at Sable Island is incorrect. The 30-league boundary extended all along the eastern coast of Nova Scotia, Br. pp. 209, 240-41, and was regarded by the British as extending along the coasts of the Common Counsel States as well. Br. p. 241.

P.R.B. pp. 90-92. We think that plaintiff's argument that precedents from Newfoundland, Nova Scotia and other areas now in Canada are irrelevant is wholly unconvincing. Of course questions of maritime sovereignty and dominion arose most frequently where maritime resources were richest. But there is no reason for believing that Britain and the colonists would have changed or abandoned their claims if the richest fisheries had been located off, say, Virginia. The precedents from the areas where the relevant issues most clearly and most often arose are dispositive of the extent of British and colonial rights throughout the American marginal seas under British law and practice.

P.R.B. pp. 92-93 and n.43. Plaintiff offers no evidence for its contention that the New England colonies, "for the most part" permitted foreign fishing, except for the single Massachusetts statute of 1646, which could hardly justify plaintiff's sweeping assertion even if it meant what plaintiff claims.

At n.43, plaintiff contends that the explanation in the 1667 statute that the 1646 statute was enacted "according to a reservation in the patent" -- the significance of which we explained at Br. pp. 253-54 -- related only to the disposition of "certain lands." The 1667 statute reads in toto as follows:

> "For the explanation of an order bearing date, 1646, and the repealing of the same, 1667, for giving a liberty to fishermen, according to a reservation in the patent, to cut down wood for flakes or stage and other uses about their fishing employ, that it is intended only in that order to give liberty to such as are strangers, and come only to make fishing voyages, and not to fishermen that are inhabitants, who are not to trespass upon any person in their propriety, but are liable to make satisfaction with damages as in any other action of trespass, no way restraining fishermen in common lands, any law, custom or usage to the contrary notwithstanding." Exhibit 724, p. 53.

Nothing in this statute deals with the disposition of any lands, and what is said to have been "according to a reservation in the patent" was the giving of a liberty to fishermen to cut wood on shore for fishing purposes. This is a plain reference to the free-fishing clause in the 1629 charter, which reserved to "any of our loving subjects" fishing in the seas adjoining Massachusetts (or arms of the sea or rivers) and also certain ancillary activities on land, including, specifically, cutting trees. Tr. 723. Plaintiff suggests no other clause in the 1629 charter which could be meant by "a reservation in the patent."

The fact that this reservation was for the benefit only of British subjects makes it plain that when in 1646 the Massachusetts legislature, acting as it later explained in

accordance with that "reservation," spoke of "foreign fishermen" it was speaking of some class or classes of British subjects whom the legislature considered "foreign." If non-British subjects were included, the reference to "a reservation in the patent" simply made no sense. The reference in the 1667 statute to "strangers," as synonymous with "foreign fishermen" in the 1646 statute, and the distinction made between them and "inhabitants" of the colony, further demonstrates that the reference in the 1646 statute was to residents of British North American colonies other than Massachusetts itself, and to fishermen from the British Isles also if any were then coming so far to fish.

P.R.B. p. 94. Plaintiff attempts to cast doubt on whether the Privy Council order really contained the expression "at sea within the limits and bounds of each other." The text at Exhibit 237, p. 41 is from the official British Government publication Acts of the Privy Council and is obviously authoritative. Plaintiff's unofficial version, U.S. Exhibit 71, p. 4, represents a typographical error or a misreading of the handwritten text by the compiler. This version -- "at and within the limits and bounds of each other" -- makes no sense and is plainly in error. On reading plaintiff's contention, we immediately wrote to the Public Record Office to

obtain a copy of the original handwritten text of the Privy Council order, and shall submit it as an exhibit as soon as it is received.

P.R.B. p. 95, n.45. It is incredible to us that plaintiff can contend that the Privy Council did not exclude Englishmen from the New England fishery, in view of the evidence submitted by plaintiff itself, U.S. Exhibit 72, showing that the Privy Council wrote to the mayors of the southwestern English fishing towns warning them to prevent their residents from invading the exclusive fishing rights of the New England colony. See also Br. pp. 235-36.

P.R.B. p. 96. Nothing cited by plaintiff indicates that Coke or any one else advocated opening the American seas to "free fishing by all nations." That the New England Council's fishing monopoly was limited only for the benefit of other British subjects is proved by the fact that the free-fishing clauses, which implemented the limitation, applied only to British subjects. Br. pp. 222-24.

P.R.B. p. 96, n.46. Plaintiff claims that Pennsylvania did not border on the open seas. Pennsylvania, of course, included Delaware, which does so border. Cf. Br. p. 254.

P.R.B. p. 97. Plaintiff's argument that the Cape Cod fishery was merely a "shore" fishery, by which plaintiff apparently means a fishery carried on solely from shore without the use of boats, is preposterous. None of the authorities cited in lines 3 and 4 of P.R.B. p. 97 refer to "shore" fisheries, except for Exhibit 720, p. 33, which deals not with Cape Cod or Plymouth but with certain fisheries in Maine. Exhibit 732, p. 228 refers to fishing "voyages," obviously by water, and the appointment of a bailiff "by land and water" to collect license fees.

Plaintiff alleges, "indeed, vessels were not even used in this fishery until the close of the 18th or beginning of the 19th century. Exhibit 742, p. 354." The authority cited reads as follows:

> "It is frequently said that the mackerel fishery is of very recent origin, or that, at least, vessels were not employed in it until about the close of the last or the beginning of the present century. Both suppositions are entirely erroneous."!! (Emphasis added.)

For merely a few of the numerous references in the record to the use of boats in the Cape Cod offshore fishery in early colonial times, see Exhibit 730, p. 63; Exhibit 732, p. 220; Exhibit 742, pp. 276-78.

For its contention that the Cape Cod bass fishery was "of course located in rivers and creeks" plaintiff cites Exhibit 742, pp. 275-76. That passage merely notes a statement by Edward Winslow in 1622, only two years after the founding of the Plymouth colony, that "our bay and creeks were full of bass and other fish." The word "bay" plainly refers to Cape Cod Bay.

Innumerable other record references could be adduced to demonstrate the utter unsoundness of plaintiff's factual allegations concerning colonial fishing and fishing regulation; we assume the above are sufficient. Even plaintiff admits that fishing existed and was regulated "near shore" (P.R.B. p. 97, n.48) and "within a short distance of the shore" (P.R.B. p. 98). These concessions are of course fatal to plaintiff's contention that sovereignty stopped at low-water mark.

P.R.B. p. 102. Plaintiff's assertion that "the colonies asserted a right only to whales found within inland waters, cast up on shore, or found floating near and taken on to shore" is supported only by citations from Tower and Starbuck, who say nothing about what rights the colonies asserted but merely point out that, prior to 1712, whaling was generally carried on within sight of land, since whales were then so plentiful that enough could be obtained by pursuing those

sighted from land. Tower, A History of the American Whale Fishery 27 (1907); Starbuck, A History of the American Whale Fishery 19 (1878). We are baffled in attempting to understand what comfort plaintiff thinks it gets from these passages.

P.R.B. 103. Plaintiff alleges that the royal grants of right of wreck covered "the seas . . . of Central and South America." In fact they covered only limited, specified portions of the Caribbean which were claimed as British waters. Exhibit 751, pp. 352-53; Exhibit 752, pp. 10-11.

P.R.B. pp. 110-11. Plaintiff says: "apparently defendants do not deny that by 1754, with few exceptions, the vacant unappropriated lands of the colonies reverted to the crown." What we said, and what we repeat, is that this is an utterly meaningless statement, since plaintiff does not claim it was true of proprietary colonies, and in royal colonies the unappropriated lands had always belonged to the crown and thus could not have "reverted" to it. Br. p. 283.

P.R.B. pp. 118-19. We never "suggested," as plaintiff claims, that "prior to the American Revolution the colonies were treated by the crown as nation-states." What we said was that the theory held by the American revolutionary statesmen regarded the colonies prior to the Revolution as states or nations, capable of full individual sovereignty once the authority of the crown was removed. Br. p. 319.

P.R.B. p. 119, n.56. Plaintiff gives no citation for its allegation that James Brown Scott "recognized that upon independence the colonies became a single entity," which is utterly contrary to everything Scott ever wrote. The case of Respublica v. Sweers, 1 Dall. 41 (Pa. Sup. Ct. 1779), merely held that the United States became "a body corporate" so as to sustain an indictment charging a forgery "with intent to defraud the United States." The forgery was of a receipt for goods supplied to the Continental Army.

P.R.B. p. 119, n. 57. Plaintiff's presumed reference is to the phrase "both countries" in the first line of Exhibit 758, p. 141. It is plaintiff, of course, which ignores the context. The entire discussion at pp. 140-45 of Exhibit 758 is replete with passages showing that the claim made by the congressional committee, and rejected by Lord Howe, was to treat as representatives of "independent States." For the irrelevance of phrases like "both countries" to the point at issue, see pp. 53-54, infra.

P.R.B. p. 120. Plaintiff alleges that Goebel, at p. 146 of his book, "points out" "that although the resolves of Congress were ordinarily cast as recommendations, they apparently had binding force on the States when issues affecting maritime jurisdiction were involved." What Goebel actually said was:

> "The instrumentality used by Congress to record its action was the 'resolve,' a medium of registering legislative will hitherto most freely employed in the New England colonies, and there, as to subject matter, as legally effective as an act of assembly. This was a quality that owing to the political constitution of Congress could hardly be claimed for its resolves, which more often than not embodied recommendations. These were on no better footing than the precepts of the law of nations to which colonial leaders so often adverted; vigor, as law, depended upon compliance by the jurisdictions affected. So it was with the resolve dealing with captures at sea wherein Congress recommended establishment of provincial prize courts and reserved to itself appellate authority." Exhibit 694, p. 146.

P.R.B. p. 121. Plaintiff's allegation that Congress had "executive and enforcement power within the states" is supported only by authorities indicating that the Continental Army conducted courts martial. This is like saying that the United States exercised "executive and enforcement power" in England in the summer of 1944. The specific trial by court martial cited by plaintiff, 5 The Writings of George Washington 182 (Fitzpatrick ed.), was of a soldier in the Continental Army for attempting "to enlist soldiers from the Continental Army into the British service," ibid., a matter of purely internal military discipline.

P.R.B. p. 122. Plaintiff can take no comfort from the fact that treaties were binding on the States -- which of course they were in theory, though Congress had no power of enforcement. Vattel gave the conclusive answer: "a person does not cease to be free and independent, when he is obliged to fulfill engagements which he has voluntarily contracted." Br. p. 332. Each State had agreed in the Articles of Confederation to be bound by treaties; further, each State had in fact entered into and ratified those treaties through its representatives in Congress, who were regarded as exercising the sovereign powers of the States to the extent consistent with their instructions and with the limitations in the Articles on the power of Congress. See Br. pp. 322-23, 333-37.

P.R.B. pp. 122-23. Plaintiff alleges, citing Exhibit 761, p. 793, that "the refusal of the American Peace Commissioners to accept a treaty provision relating to the return of confiscated property of British subjects . . . was based not on the incapacity of Congress but on the reluctance of the American citizens themselves to accept such a clause, due to 'the wanton devastation these citizens have experienced.'" The passage relied on by plaintiff reads as follows:

> "Nor can they [Congress] refrain from making known to his majesty that any claim of restitution or compensation for property confiscated in the several States will meet with insuperable obstacles; not only on account of the sovereignty of the individual states, by which such confiscations have been made, but of the wanton devastations which the citizens of these states have experienced from the enemy, and, in many instances, from the very persons in whose favor such claim may be urged . . . ." Exhibit 761, p. 793. (Emphasis added.)

P.R.B. p. 125. Plaintiff's theory here apparently is that a confederated state, consisting of several sovereigns cognizable under international law, can exist only when there has been a previous period of time in which each of the constituent sovereigns was independent and unconfederated, and carried on its foreign affairs unilaterally. Plaintiff offers neither authority nor logic for so arbitrary a view. Why cannot independence and confederation come simultaneously? The details of Dutch, Swiss and German history would carry us too far afield; suffice it to say that in none of the three cases is it at all clear that the existence of separate sovereignties antedated confederation. Indeed the Dutch and Swiss federations came into existence very much as did the United States -- as leagues of former subordinate units of another country achieving independence through coordinated military action.

P.R.B. p. 126. Plaintiff claims the use in diplomatic instructions and treaties of the terms "both nations" and "both countries" as proof that the States were not sovereign. But similar terms were used in 17th-century treaties made with various countries by the kings of Great Britain at times when, beyond question, England and Scotland were separate states, being linked only by a joint personal sovereign. Exhibit 674, p. 361 ("both sides," "both Parties"); Exhibit 684, pp. 711, 714, 733, 734 ("either Party"). Moreover, while plaintiff admits at P.R.B. pp. 124-25 that the Dutch confederacy was composed of units which were "sovereign and independent under international law," the Treaty of 1654 between England and The Netherlands uses the terms "either side," "neither republic," "either republic," "either State," "the respective States," "either party," and "both parties." 3 Parry, Consolidated Treaty Series 248-52. The British-Dutch Treaty of 1674 -- England and Scotland still being separate sovereign states, and the Dutch confederacy still consisting by plaintiff's own admission of units "sovereign and independent under international law" -- uses the terms "both parties," "both sides," "both nations," "either party," and "the two nations." 13 Parry, Consolidated Treaty Series

136-39. This type of usage, which could doubtless be found in many other treaties as well, makes it wholly clear that the use of such terms was in no way inconsistent with the fact that a contracting party consisted, and was well known to consist, of more than one sovereign state.

P.R.B. p. 126, n.63. Plaintiff quotes certain language from 5 Journals of the Continental Congress 827 which plaintiff claims appears in the letters of credence issued to Franklin and other diplomats and refutes our contention that those letters did not mention Congress as such. The letters of credence are set forth in their entirety at 5 Journals 833. The language quoted by plaintiff does not appear in the letters at all.

P.R.B. p. 127. Plaintiff asserts: "Benjamin Franklin apparently understood there to be a common citizenship for he administered many oaths of United States citizenship throughout those years" (i.e., "the revolutionary and confederation periods"). The passage relied upon by plaintiff for this allegation is from a reply by Franklin in 1781 to a letter in which Jay had said he did not see how he could administer oaths to the United States, because "though a person

may by birth or admission become a citizen of one of the states, I cannot conceive how one can either be born, or be made a citizen of them all." U.S. Exhibit 388. Franklin's reply was as follows:

> "Mr. Vaughan is not indeed an american, but desires to become one. And the Constitutions of most if not all of the States show a Disposition to receive Strangers by making the Residence of one or two Years entitle them to all the Privileges of Denizens without a formal Naturalisation. My Brother Ministers here I believe considered themselves as vested with Consular Powers, and to be therefore capable of administering an Oath, and I have continued the Practice conceiving them to be better Lawyers than myself. I did not consider the matter in the Lights, you state it; I think your Objections reasonable, and wish the Congress would Give some Instructions about it. On reflection, however, there seems to me some Difference between Requiring an Oath, and being witness to the taking of an Oath. He that requires another to take an Oath ought to be vested with authority for so doing. But when a Man is pleased to take an Oath voluntarily, may not any other Person testify its being done in his Presence? This I apprehend is the Case of those which have been taken before us." U.S. Exhibit 388. (Emphasis added.)

P.R.B. p. 131, n.67. Plaintiff claims that "Webster recognized that the states were sovereign, but only in a 'municipal' sense." The passage from Webster quoted at Br. pp. 344-45 expressly denies that State sovereignty is limited to "municipal sovereignty."

P.R.B. p. 132. Plaintiff is wholly incorrect in contending that the Curtiss-Wright dicta have been criticized only with respect to the disposition of power as between Congress and the executive. Every one of the authorities listed at Br. p. 410, n., also denounces Justice Sutherland's theory that the federal government has any "inherent" powers not derived from the Constitution, and the alleged historical basis for that theory; that is the primary emphasis of most of those authorities.

P.R.B. p. 141. There is not a word in 19 Journals of the Continental Congress 208, or indeed anywhere else in the Journals, which says that the western lands "were claimed by the United States," as plaintiff asserts. The page cited merely sets forth the resolution of the New York legislature which ceded its western lands in recognition that they "ought to" belong to the States in common.

P.R.B. p. 142. We think the authorities quoted and cited at Br. pp. 353-56 and 360-66 make it altogether plain that Congress consistently took the position that the western lands were within the boundaries of individual States and were acquired as a "national" domain only by State cession. In the resolution set forth at 25 Journals

of the Continental Congress 560-64, it was Virginia's "remaining territory," not the western lands being ceded, which Congress declined to guarantee. Id. at 562. Since the same portions of the western lands were claimed by two and in some cases more than two States, Congress did avoid preferring one conflicting claim over another. But Congress left no doubt of its consistent view that at independence all land within the United States had that status by virtue of being within one State or another.

P.R.B. p. 142, n.72. What Madison said in The Federalist No. 38 was that "a very large proportion of this fund [the western lands] has been already surrendered by individual States; and it may with reason be expected, that the remaining States will not persist in withholding similar proofs of their equity and generosity. We may calculate therefore that a rich and fertile country . . . will soon become a national stock." The Federalist 248 (Cooke ed. 1961). (Emphasis added.)

P.R.B. pp. 143-44. Plaintiff correctly states that Article IV, Section 3, Clause 2 of the Constitution provides that "nothing in the Constitution shall be construed to prejudice any claims either of the United States or of any particular State; thus the only relevance it has to the decision in

this litigation is to show that there is no constitutional presumption in favor of either party." We agree. Plaintiff thereby concedes our Conclusion of Law No. 50, that no rights of the States in the continental shelf were transferred to the plaintiff by operation of the Constitution. Plaintiff recognizes, then, that to prevail it must show that federal powers prior to or under the Articles of Confederation, without any assistance from the larger federal powers conferred by the Constitution, were effective, assuming the existence at that time of any rights in the continental shelf, to transfer those rights to the United States considered as a separate entity. We think this concession is most significant, and we agree that it is compelled by Article IV, Section 3, Clause 2 and other constitutional provisions. Plaintiff's concession is flatly inconsistent with its own proposed Conclusion of Law No. 16, insofar as that Conclusion contended that any State rights were lost or transferred "through the ratification of the Constitution." Conclusion No. 16 must therefore be deemed pro tanto withdrawn.

P.R.B. p. 145. The passage we quoted from Harcourt v. Gaillard is in no sense dictum, but the Court's holding, and the reasoning therefor, that the United States had no claim in its own right to the territory in question. Br. p. 401.

P.R.B. p. 147, n.74. Manchester v. Massachusetts, 139 U.S. 240, 264 (1891), expressly held that "there is no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters," because in fact Congress had not attempted to do so. The Court indicated considerable skepticism as to whether "the regulation of fisheries within the territorial limits of a state was a regulation of commerce" within the power of Congress. 139 U.S. at 258-59.

Contrary to plaintiff's contention, in The Abby Dodge, 223 U.S. 166, 175 (1912), the Court squarely held that it would construe the federal statute in question to apply only to sponges taken outside the State's waters, on the ground that such a construction was required in order to avoid unconstitutionality, since to regulate the landing of sponges taken within the States' territorial waters would be outside "the authority of Congress to regulate." The Court's entire opinion makes it plain that the Court regarded the decisive question as where the sponges were caught, not where they were landed as plaintiff claims.

P.R.B. p. 150. If in asserting that "the United States possesses, within its mainland territory, plenary jurisdiction over aliens" other than diplomats, plaintiff means to

suggest that aliens present within the land territory of the United States have no rights under international law, the suggestion is absurd. Such rights are one of the principal subjects of international law; plaintiff's own authorized summary of international law requires more than 900 pages to describe them. 8 Whiteman (U.S. Dept. of State), Digest of International Law 348-1291 (1967). If a State government infringes such rights, the United States is internationally responsible. But that has never been regarded as a reason for extinguishing the territorial boundaries of the States, let alone their ownership of their public lands. Plaintiff's contention is at least as far fetched as applied to the seabed, on which aliens are rather less likely to stroll about than they are on the streets and sidewalks of New York.

P.R.B. pp. 150-54. Plaintiff exaggerates the extent of potential conflict between State action and international rights; for example, the seizure of fishing vessels (P.R.B. p. 152) has nothing to do with the States' claims here, which involve only the resources of the seabed -- admittedly within the exclusive control of this country to the exclusion of foreigners. More fundamentally, as we showed at Br. pp. 477-94, unquestioned federal powers are wholly adequate to restrain any State which sought or attempted to act in any manner inconsistent

with the obligations of this country and of international law. This is equally true on land and with respect to the seabed.

Plaintiff does not and cannot claim that any of the horrendous consequences it portrays have occurred in the 21 years since the States have been administering large portions of the continental shelf, lying both under international waters (the 3-to-10-mile belt) and under territorial waters (where aliens have the right of innocent passage).

Of course plaintiff is wrong in contending (P.R.B. p. 154) that "it would be necessary to obtain the consent of the States to use the seabed for military purposes." The federal right of eminent domain runs against the States and its exercise does not require "consent." See 28A Federal Digest 58-59 (1953) and authorities there cited.

P.R.B. p. 151, n.77. The authorities cited by plaintiff do not say that there is a boundary dispute between the United States and Canada, but only that there had been discussions concerning the delimitation of the boundaries. Even if a boundary dispute exists or might arise, that would avail plaintiff nothing. Resolution of such disputes is unquestionably within the federal foreign-affairs power, and of course the States would be bound by such a resolution. Boundary disputes can arise on land also, yet that fact has not been

regarded as requiring federal ownership of all the land in the country, or even of land near international boundaries.

P.R.B. p. 155. Of course we "deny that the negotiations for the resources of the North American seas were conducted by Congress on behalf of the United States collectively," if by "the North American seas" plaintiff is referring to the marginal seas of the defendant States, and if by "collectively" plaintiff means that anything in the negotiations was inconsistent with the maritime rights of the individual States. Plaintiff has not offered an iota of proof to support such an allegation.

P.R.B. pp. 156-57. For reasons fully set forth at Br. pp. 360-66, we think it wholly wrong to describe "reliance on the treaty of 1763" as "reliance on a common title," which appears to be plaintiff's only argument.

P.R.B. p. 156, n.80. It is incomprehensible how plaintiff can argue that Congress' decision not to send the draft letter of August 1782 shows "a Congressional purpose of emphasizing only arguments based upon claims of common title." The record is clear, see Br. p. 365 and authorities there cited, that the report was not sent because of objections to the one short passage which did assert a common title.

P.R.B. p. 162. Nothing in the works cited by plaintiff supports its propositions that the federal government can "cede the territory of a State without its consent and that it

has done so several times." Henkin and Maggs describe the Maine-New Brunswick boundary dispute, but as we showed at Br. pp. 432-33 the States in question did consent to the boundary clarification in question and were paid for such consent, and the federal government expressly and officially took the position that their consent was necessary. The only other evidence cited by either Henkin or Maggs is Maggs' reference to the case of Lattimer v. Poteet, 39 U.S. (14 Pet.) 4 (1840). There the Court upheld a federal treaty with the Indians on the ground that it did not cede territory or create a new demarcation, but merely "substantially designated" a preexisting one, and that in any event the treaty did not even deal with the boundaries or jurisdiction of North Carolina but merely recognized an Indian property interest in the nature of "a right of occupancy." 39 U.S. at 13-14.

We are mystified by plaintiff's citation of our Exhibit 698 for the proposition that "this plenary authority of the federal government [to cede State territory] was recognized by the founding fathers." Exhibit 698 is a speech by Alexander Hamilton, made before the Constitution was written, advocating that the State of New York recognize the independence of Vermont and arguing that the legislature had the power to do so. The speech contains no word or implication concerning any "authority of the federal government."

P.R.B. pp. 165-66. While Jefferson's language quoted at Crocker, The Extent of the Marginal Sea 641 (1919), is not wholly clear, on further reflection we think plaintiff is probably accurate in its construction.

Chancellor Kent's recognition of sovereign rights of coastal states was not limited, as plaintiff claims, to jurisdiction for defense and customs purposes. Kent also referred generally to "domestic purposes connected with our sovereignty and welfare," and declared that "the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end." Crocker, op. cit. at 181. We think it quite clear from such language that Kent would have recognized the precise right at issue here if the occasion had arisen. Br. p. 441.

P.R.B. p. 170. For its preposterous contention that in the Bering Sea arbitration the United States claimed only that "prescriptive rights could exist outside the 3-mile limit," plaintiff cites only its own brief, p. 213. At that page plaintiff made a similar assertion, without any citation whatever. On the next page of its brief, p. 214, plaintiff admitted that Mr. Carter denied that prescription was necessary. Since the Mr. Carter in question was the United States' representative in

the arbitration, and made the denial in presenting the United States' case, it is difficult to understand what plaintiff thinks is the basis for its position.

P.R.B. p. 175, n.90. The citations in this footnote are alleged to support the statement in the text that in the 18th century the cannon-shot rule was not limited to neutrality but rather "was considered the limit of a coastal State's inherent exclusive right in the adjacent sea." Not one of the citations supports plaintiff's position. Crocker, p. 518 contains no treaty between Denmark and Norway; the cannon-shot rule is not mentioned on that page, and all the materials on the page deal with neutrality only. The statement by the French ambassador (p. 519) deals with neutrality only. As to pp. 535-38 of Crocker, only two treaties at pp. 537-38 refer to the cannon-shot rule, and they deal with neutrality only; the treaties at pp. 535-37 all use for neutrality purposes the line of sight or other limits in excess of cannon shot. The materials at Crocker, pp. 596-97 deal with neutrality only. At pp. 608-09 there is no reference to the cannon-shot rule at all; these materials use various measures, including several much greater than cannon shot, for exclusive fishing and neutrality.

P.R.B. p. 177. Plaintiff's version of Lauterpacht is as follows:

> "Thus Lauterpacht, whom defendants cite (C.C. Br. 470-471) as believing the doctrine of prescription could be satisfied by a mere proclamation, in fact stated that a proclamation would create an inchoate title which could be perfected only by taking further action toward occupation; moreover, Lauterpacht held the view that until a coastal State proclaimed its ownership, any nation was free to exploit the offshore resources, a view directly contrary to defendants' position here. See, Br. 248-251."

What Lauterpacht actually said is diametrically opposed:

> "It is possible to say that the littoral state is entitled ipso jure to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'." Tr. 552.

There is nothing at plaintiff's brief pp. 248-51, or anywhere else that we know of, which supports the proposition for which those pages are cited by plaintiff.

P.R.B. p. 180. For our position on the Abu Dhabi arbitration, see Tr. 517-19. Arbitral decisions have no status in international law greater than what can fairly be ascribed to them on the basis of their intrinsic merits, including the force of their reasoning, and the stature of the arbitrator or arbitrators. See 1 Whiteman (U.S. Dept. of State), Digest of International Law 94-97 (1963). Lord Asquith of Bishopstone, the sole arbitrator in the Abu Dhabi arbitration, was not a recognized international jurist or publicist

in any sense comparable, for example, to Jessup or Lauterpacht. The dicta in his decision on which plaintiff relies are hardly "authoritative" in any substantial sense, and have been demolished by the contrary factual demonstration in Judge Jessup's testimony.

P.R.B. p. 181. Plaintiff does not accurately state our contentions regarding international law; those contentions, found at pp. 287-313 and 453-77 of our brief, speak for themselves.

P.R.B. p. 183. O'Connell, International Law in Australia 280-83 (1965), relied on by plaintiff, shows that Australia's decision up to 1952 not to assert exclusive rights in sedentary fisheries beyond three miles was due to three factors: (1) British constitutional restrictions on Australian jurisdiction; (2) the fact that foreign fishermen had exploited these resources from time immemorial, long before the coming of the British to Australia, and thus were regarded as having a vested right; (3) the fact that until shortly before World War II foreign exploitation was on a small scale and posed no threat to the Australian pearling industry. Since 1952, Australia has asserted and exercised the exclusive power to control and to regulate these fisheries. Id. at 282-83.

P.R.B. pp. 184-85. It is striking that plaintiff offers no answer whatever, other than reliance on California and its progeny, to our argument (Br. pp. 502-08) that, even if continental-shelf rights arose ex nihilo by virtue of a 20th-century change in the law, the States have the better title as residual sovereigns and property-owners of the coastlines to which the shelf is "a natural prolongation" and an "inherent" appurtenance. Plaintiff thus offers no reason why this argument should not succeed if, as we think clear, the soundness of California is now to be re-examined.

Respectfully submitted,

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February 12, 1974