THE DOCTRINE OF HOT PURSUIT.*

PART I.

CHAPTER I.

JURISDICTION IN MARGINAL SEAS.

For the purpose of this study it is proposed to indulge in the assumption that bordering the coast of the maritime State is a belt at least three miles in breadth of waters essentially territorial in their nature (paradoxical as that phraseology may seem), outside of which there may be special zones extending for various distances out onto the high seas in which the littoral State exercises jurisdiction in certain ways. No attempt will be made to establish the validity of this proposition in fact; but it will afford a degree of satisfaction if it can be agreed, upon a sketchy history of the development of the idea and reference to some of the authorities supporting it, while admitting weighty opinions to the contrary, that it provides a plausible approach to the problem, without entering into the controversy that would ensue were the truth of this arbitrary assumption sought to be proved.

In early times very little importance was attached to the possibilities of the sea. Of course, scattered references made in comparatively early days to the ownership of the sea are to be found. If we go back to the Glossators, for example, we discover some degree of interest in the problem evidenced by the statement that the sea belongs to no one.[1] But there appear no indications of a burning desire to control it, such as might have led Alexander the Great in the 4th century, B.C., instead of weeping because there were no further lands to conquer, to conduct campaigns to subject the sea, too, to his dominion. Had he felt such an urge probably he would have encountered no opposition. His battles for supremacy over the sea consisted in enduring its storms, in overcoming the barrier it imposed between himself and the distant countries he wished to subdue. And ten centuries after Christ we see the Norsemen in their reaching out for new continents to explore, still fearing

*NOTE.—This, and succeeding parts of the article to be published in the REVIEW, constituted a thesis for the degree of S.J.D. at the University of Michigan, U.S.A.

[1] D.1.8.2. *Mare est commune, quo ad usus: sed proprietas est nullius.*

the unknown, the sea, over whose edge they were in dread of being swept into oblivion. Characteristic of this fearful attitude are the grotesque monsters illustrating the brief assertion printed beside them, "Here be demons," near the margin of a map lying on the desk in a painting of the 15th century navigator, Sir John Franklin, hung in the National Art Gallery in London. The sea was a nuisance.

Later as standards of living rose, and exploration and education advanced to the extent that men learned of commodities in other parts of the world that would augment their own comfort and convenience, the sea assumed a new rôle, the medium through which foreign trade might be carried on. The sea became a luxury.

But, as the saying goes, every plant has its bug. And as the usefulness of the sea began to be exploited by those engaged in commerce, parasites appeared who lived by preying upon that commerce. And as commerce grew in importance, piracy, sea robbery, flourished. Consequently we should expect the trading nations to offer protection to their merchantmen sailing the routes of the parts of the seas they most frequented. So we are not surprised to learn that King John in an ordinance issued in 1201 decreed that ships refusing to lower their sails at the command of the King's lieutenant or admiral in any voyage appointed by the Council should be considered enemies, and seized and forfeited along with their cargoes, and that their crews should be punished. This ordinance probably marks the origin of the custom of lowering top-sails and striking the flag, which was generally required at a later time as an admission of the English sovereignty of the seas. One author has explained this regulation as a scheme intended to provide the King's officers a better opportunity of determining the character of the vessel challenged, whether a peaceful trader or a pirate.[2] The lowering of the sails was designed to prevent the escape of the pirates, who usually sailed very speedy craft. The necessity of such an arrangement lay in the fact that England did not pretend to keep foreign ships out of the waters over which she claimed dominion, a plan adopted with various degrees of success by other States. And in excluding suspected vessels and in some cases foreign ships generally, they began to look upon the seas themselves as belonging to them. The nations accepted the idea that the sea was a proper subject for the exercise of sovereignty: the ownership of the most desirable and strategic seas by the powerful maritime States was, in

[2] Fulton—The Sovereignty of the Sea, 1911, p. 9.

principle, undisputed. Venice asserted the Adriatic to be peculiarly hers; England effectually claimed the Channels, the North Sea, and vast tracts of the Atlantic; Sweden and Denmark held doubtful sway in the Baltic.[3]

And not only did these States try to guard against the depredations of pirates but they sought also by other measures to render safe the waters over which they had assumed sovereignty. Charts were drawn, soundings taken, and dangerous places marked by buoys, bells and lighthouses. And for the enjoyment of these privileges, when they were permitted to navigate there, vessels were required to salute the ships of the State by whose authority they were thus allowed to sail there, to strike their flags, or give other signals of respect. And frequently these demonstrations of gratitude insisted upon assumed a more practical form, such as the familiar Danish Sound dues.[4] The seas had developed into assets.

Oppressive abuses of this profitable idea in the 16th century led other powers to contend that the entire theory was unwarranted. Indeed, it had been suggested[5] that if the States had permitted the free use by the ships of other nations of the seas over which they claimed sovereignty, giving full effect to the principle laid down by Ulpian that "The sea is open to everybody by nature" and by Celsus when he wrote, "the sea like the air is common to all mankind" and using their sovereignty, as did England, to guarantee to other States free undisturbed use of those seas, the sea might well still be to-day, as is the land, subdivided under the sovereignty of individual States. But such was not the mode in which they dealt with the seas they claimed. Spain proclaimed the Pacific as a whole, and the Gulf of Mexico, to be within its dominion, and Portugal, the Indian Ocean, and most of the Atlantic; and both forbade the entry of foreigners.[6] Such comprehensive claims led the Dutch writer, Grotius, to embody in his *Mare Liberum,* which appeared in 1609, the concept of the freedom of the seas, their impossibility of ownership: and soon the slogan spread to other countries, in which the advantages that would accrue to the world from supporting such a contention were apparent After bitter opposition many of the States concluded that: the seas should be a highway.

So great has become the degree of importance attached to the control of the sea in modern times that it has shaped the national

[3] Brierly—Law of Nations, 1928, p. 150.
[4] Article by Temple Grey, Law Quarterly Review, 1926, Vol. 42, p. 352.
[5] Laws of Maritime Jurisdiction, Article by H. M. Cleminson, British Year Book of International Law, 1925, p. 144, at p. 146.
[6] Brierly—*op. cit.,* p. 150.

policy of great nations. A leading educationalist,[7] speaking on "The Freedom of the Seas," has stated that Great Britain has for the last six hundred years governed her history by the fundamental principle of "sea power," her desire to command the seas being primarily designed towards keeping them free: the greatest contribution of the United States to international law had been her fundamental principle of "neutrality": and on the two occasions when United States has abandoned that principle, in 1812 when she fought England, and in 1917 when she opposed Germany, she entered the wars at least partially because of violations of her naval rights. Many wars have been fought in the name of the freedom of the seas.

However, Grotius' revolutionary declaration did not stand unchallenged. It provoked bitter attacks by English scholars, whose claims found voice in the *Mare Clausum* of John Selden, published in 1635. Selden stoutly maintained that most of the important zones of the seas had already been reduced to possession, and argued very powerfully that such steps could properly be taken by maritime powers. Almost a century later this side of the dispute was still being carried on weakly in England. A patriotic Englishman at that time, believing as he said in his preface[8] that, "The Empire of the Sea is the most effectual means to increase the strength of any Nation by Land," and recalling the grand days when, on occasions of urgency, foreign ships which happened to be within the jurisdiction of England were pressed into the service, and

> The Kings of England were wont to extend that Embargo all over the English seas, seizing the Ships of Foreigners passing there, as well as if they had been within their Harbours; because they thought that Sea no less comprehended within the Verge of their Jurisdiction, than they did the Land itself.[9]

exhorted his readers to agree with him that the sea is capable of dominion. He quoted Bible texts that might be stretched to support his views,[10] employed the naïve old argument that the sea must be capable of dominion, since it is less fluid than the air space owned along with subjacent land.[11] The writer even went the limit of attributing to the pen of Hugo Grotius a compliment to King James I of England, in which he considered Grotius conceded the

[7] H. F. Munro, M.A., Superintendent of Education of Nova Scotia, in an address to The Empire Club, Toronto, Canada, January 30th, 1930.
[8] Dominion and Laws of the Sea, 1705, credited to Alexander Justice.
[9] *Op. cit.*, p. 159.
[10] *Op. cit.*, pp. 46ff.
[11] *Op. cit.*, p. 13.

very ground he was defending, and which the translator rendered in English thus:

> Tho' all great Things a Fall do fear,
> The power of James must stand;
> His Empire being established,
> Both on the Sea and Land.[12]

But the English school were upholding a losing cause. The concept of the freedom of the seas was triumphing: the pretentious claims of dominion over immense tracts of unsupervised waters were subjected to reasoned criticism which made them appear ridiculous. The new Anglo-American position is revealed by statutes in Great Britain in 1736,[13], and in the United States in 1790,[14] the so-called hovering acts, by which jurisdiction was not attempted to be established to some indefinite margin distant from the coast, but was simply claimed over certain acts committed on the high seas adjacent to their territorial waters and within the modest distance of four leagues of their coasts. Such legislation is evidence of the general abandonment of the ancient claims of dominion over the seas of the world. In 1817, Sir William Scott could say in an English court that all nations "have an equal right to the unappropriated parts of the ocean for their navigation."[15]

The new theory fitted very harmoniously into existing precepts of international law. Because no single States had to be considered as owning the seas or the exclusive right to use them, all States took an interest in the maintenance of their recently won freedom. Those who interfered with it by committing acts of war or piracy were punishable not only under the provisions of municipal codes generally,[16] but were deemed *hostes humani generis,* outlawed by the Law of Nations.[17]

In 1876 Great Britain took the final step incidental to achieving her present position as the champion *par excellence* of the freedom of the seas; for by the Customs Consolidation Act[18] passed in that year, the hovering acts under which a measure of control over smugglers had been made available up to twelve miles from the shore were discarded, with certain minor and very obscure reserva-

[12] *Ib.*, p. 191.
[13] 9 Geo. II, c. 35, particularly ss. 18 and 23.
[14] 1790-1, Stat. at Large, 2nd sess. c. 35, p. 145.
[15] *Le Louis* (1817), 2 Dodson, 210, at p. 243.
[16] Laws of Oleron, 12th century, 1 Peters, Ad. Cas., App. III Art. XLVII. 35 U.S. Stat. at Large, 1088, 1145; 1909, sec. 290. Canadian Criminal Code, R.S.C., 1927, c. 36, s. 137.
[17] Wynne—Life of Jenkins, Vol. I, pp. lxxxv, lxxxvi. Opinion on Piracy, 1668.
[18] 39 & 40 Vict., c. 36 (July 24, 1876).

tions,[19] and British municipal legislation was made to conform with accepted rules of international law.[20]

But it must not be inferred from the general recognition of the freedom of the seas that as soon as a ship sailed out of a port onto the high seas it ceased to be within the jurisdiction or control of any State. Exceptions grew up which removed some of the obvious implications of the rule. A list of these exceptions would include: (1) the jurisdiction of the flag State; (2) territorial waters; (3) zones outside territorial waters for certain purposes of jurisdiction, such as customs, quarantine, protective police,[21] and blockade; (4) the doctrine of hot pursuit; (5) abuse of flag and verification of flag.[22] Such exceptions make the freedom of the seas a more convenient working basis upon which to build up this branch of international law.

The function of the rule that the jurisdiction of the State under whose flag the ship sails shall follow it is to obviate the consequence which would otherwise ensue upon our acceptance of the freedom of the seas as a fact, namely, that a ship having set out upon the high seas would be subject to the jurisdiction of no State whatsoever. Various fictions have been invented in attempts to justify this extension of the jurisdiction of the State of the flag. The picturesque assimilation to "a floating island," a part of the territory of the flag State, has been made,[23] and seemingly found to be of service,[24] though it has been rather contemptuously set aside on other occasions as "a figure of speech, a metaphor."[25] A similar illustration of which use has been made is that of a "floating community" of persons "governed by the law they took with them."[26] Another explanation offered is that a ship is a "movable chattel" of

[19] See Piggott—Nationality, 1907, Pt. II, p. 41.

[20] Jessup—Law of Territorial Waters and Maritime Jurisdiction (1927), p. 4.

[21] Wharton, Digest, I, pp. 114-115.

[22] Oppenheim—International Law, 1928, ed., Vol. I, p. 496.

[23] *Reg.* v. *Anderson*, 1868, 11 Cox's Crim. Cas. 198, Byles, J., at p. 205; Attorney-General Cushing to Hon. Wm. L. Marcy, Sec'y of State, 1856, Opinions of Attorneys-General, Vol. 8, p. 73; Fred K. Nielsen—Lack of Uniformity in the Law and Practice of States with Regard to Merchant Vessels, Article in American Journal of International Law, 1919, Vol. 13, p. 1.

[24] *E.g.*, see *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 1913, 207F., 209, Warrington, Circuit Judge.

[25] *Cunard Steamship Co.* v. *Mellon* (1923), 262 U.S.; 100, at p. 123; *Scharrenburg* v. *Dollar S.S. Co.* (1917), 245 U.S. 122, at p. 127.

[26] Jurisdiction over Vessels—Note in Harvard Law Review, Vol. 27, 1914, p. 268, at p. 269.

a very special nature, and not a place.[27] Another writer, citing as authority section 75 of Henry's work on Admiralty, tells us:

> Admiralty conceives of a vessel as an entity, like a person. The sovereign of the flag gives protection at all times to this subject. In return, the ship, like the subject, may be thought of as owing a duty of allegiance, and may be punished for a breach of this duty, though it occurs in some other territorial jurisdiction.[28]

Still another view has been expressed, that a ship is the "quasi-territory" of the State to which it belongs.[29]

But were the widest possible scope to be permitted in the application of this rule inconvenience to other States would result. Ships would be enabled to sail up very close to their shores without coming within their control or having to observe their laws in any way. So the law as to territorial waters, with the saving right of innocent passage, was evolved. Finding even such protection inadequate, a considerable number of maritime States, while not claiming to enlarge their territory, further provided for jurisdiction over certain matters and for special purposes for certain distances outside territorial waters. Another measure adopted in the paring down of the freedom of the seas was the turning of an old, rusty tool in the international jurist's kit to renewed usefulness in a new sphere, employing the old doctrine of pursuit *dum fervet opus* from the high seas into territorial waters, in dealing with pursuits of ships onto the high seas from the opposite direction.[30] But before proceeding directly to the study of our main topic, let us consider cursorily the nature and extent of the waters along its coasts over which a maritime State has control, not indeed with a view to substantiating any beliefs of the writer, which is no part of the objects of this introductory chapter, but only to lend confidence in the reasonableness of the proposition being put forward avowedly as an arbitrary assumption, made in order that we may start from common ground, rather than from opposite angles of a controverted matter. For international disputes which have arisen and have in numerous instances engendered international arbitration and diplomatic correspondence from comparatively petty matters must have shattered the complacency of those who had believed the law as to territorial

[27] *The Lotus Case* (1927), Publications of the Permanent Court of International Justice, Series A. Judgment No. 9, p. 53, Lord Finlay, dissenting.

[28] Jurisdiction over Vessels—Note in Harvard Law Review, Vol. 27, (1914), p. 268.

[29] *Rhodes* v. *Fairweather*, Newf. (1884-1896), p. 321, at p. 330, Pinsent, J.

[30] Lee—Captures in War, 1803, p. 123.

waters to be well-settled.[31] Naturally enough, controversies concerning territorial waters have been complicated by

> the circumstance that neither the nature nor the extent of the territorial zone in the marginal seas has ever been exactly settled by international usage or agreement.[32]

And the assumption here made and used as a taking-off place is not intended as a profession of its proof.

But the statements of some authors and the dicta and decisions of some judges are rendered unintelligible by their failure to enunciate the view as to the very nature of territorial waters upon which they are proceeding. Clarity of thought upon this subject demands identification with either one of two schools, with those who contend that territorial waters are within the scope of the sovereignty of the littoral State, or with those who argue from the assumption that its rights there are jurisdictional.[33] The accomplishment of this distinction in a recent treatise on the subject has been emphasized as one of its most commendable features.[34] It has been suggested to the International Law Association that the terminology used should permit a differentiation between "territorial waters" and "shore waters."[35] And an optimistic outlook upon the work which has been undertaken in this field by the Committee of Experts of the League of Nations has been expressed by one writer because of the care exercised in distinguishing the jurisdictional questions from "pure questions of territorial waters."[36] Nor is this distinction one of recent origin, for it was pointed out by Chief Justice Marshall as early as 1804, in the case of *Church* v. *Hubbart*,[37] that there is a zone in the marginal seas within which jurisdiction is territorial and outside which any jurisdiction exercised is extraterritorial and based upon the necessity of insuring territorial security.

One conception of the nature of territorial waters that has been definitely taken in some instances and has in others been uncon-

[31] *E.g.*, Lord Alverstone, C.J., in *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B.D. 391, at p. 402, said *obiter*: "Perhaps it is in regard to the extraterritorial privileges of ambassadors, and in regard to the system of limits of territorial waters, that it (a consensus of civilized states) is least open to doubt or question."

[32] Dickinson—Jurisdiction at the Maritime Frontier, 1926, Harvard Law Review, Vol. XL, pp. 1, 29.

[33] League of Nations—Publications (1927), C. 196, M. 70, v. (C.P.D.I. 95(2)) p. 31.

[34] Jessup—*op. cit.*, foreword by Hyde.

[35] International Law Association—25th Report, 1908, paper by Dr. Deszö Dârday on Notes upon the Question of the Delimitation of Territorial Waters, p. 547, at p. 555.

[36] Dickinson—Article cited in note (32).

[37] (1804), 2 Cranch, 187, at p. 234.

sciously permitted to obscure thought is that a State has simply a right to exert jurisdiction for some purposes over the waters adjoining its shores, that the authority exercisable over those waters does not approach that over the actual land of the State. Even when entertained this view has usually remained unstated, and when given definite expression it is generally followed by a statement of the other view also. So we may read:

> Nations are entitled by international law to impose certain protective regulations within three miles of the coast line.[38] But this jurisdiction is of a limited sort. International law gives every vessel a right to proceed lawfully within the three-mile belt. The territorial jurisdiction has therefore not yet attached to a vessel in the lawful exercise of this right of way, since the littoral sovereign is powerless to forbid its passage. The conception of territorial jurisdiction must involve the right to exclude. As soon as the vessel does any act requiring the consent of the littoral sovereign, it would seem that the new territorial jurisdiction has superseded the law of the flag. The vessel is no longer thereof right.[39]

This right of innocent passage has been the most persuasive argument advanced by jurists who assert that the control over territorial waters amounts only to jurisdiction and not to dominion; but another point of attack has been the rule that no dues or charges may be levied upon foreign ships by reason of their passing through territorial waters. This would seem an indication of a right to jurisdiction only, but has apparently arisen only by agreement and must be upheld by conventions or treaties. It has been included in the bases of discussion drawn up for the League of Nations Conference for the Codification of International Law to be assembled in 1930,[40] and also as a regulation under the draft code proposed.[41]

And though territorial waters are to be treated as within the sovereignty of the littoral State, I do not think they may be accurately accounted for as being within that sovereignty, if such be the case, by a description as "a remnant of Middle Ages claims to sovereignty,"[42] for, though such a narrowing process might seem discernible in the slow curtailment of the Danish pretensions over the Norwegian Sea and the North Atlantic due to gradual concessions to the opposition of other nations, the proposition does not seem

[38] Citing Manning—Law of Nations, new edition, 119; and Wheaton—International Law, 8th ed., s. 177.

[39] Jurisdiction over Vessels—Note in Harvard Law Review, Vol. 27, 1914, p. 268.

[40] Publication. C. 74, M. 39, 1929 v. Point xiii. Basis of Discussion No. 25.

[41] *Ib.*, p. 193, article 10.

[42] Law of Maritime Jurisdiction—Article by H. M. Cleminson in British Year Book of International Law, 1925, pp. 144, 146.

applicable to British or American territorial waters, the justification of the origin of which appears to be in the familiar doctrine of Bynkershoek.[43] Obviously it cannot explain territorial waters attributed to-day to States which were in the early period referred to either not in existence or not laying claim to any waters whatever. Rather, it would seem that the idea of territorial waters must have been growing up independently of the claims of dominion which by the end of the fifteenth century involved practically every part of the seas of the world;[44] claims to the narrower belt do not appear to rest on the same basis, to have the same object in view, as the former claims to dominion. The provisions of the modern law seem designed to insure territorial security and not the exclusion of other nations from the enjoyment of the use of the seas. Nevertheless the development of the principle of territorial waters was consistent with the idea of sovereignty.

Some writers have attributed the first proposals to assign legal limits to the maritime jurisdiction of neighbouring States to early Italian jurists following the era of the claims of Venice to the Adriatic.[45] Azo said the sea was capable of some sort of appropriation either by grant of a privilege or through long continued custom, and has been mentioned as the first jurist among those who have been influential in formulating a theory of the territoriality of coastal waters.[46] The famous jurist of the fourteenth century, Bartolus of Saxoferrato, introduced the doctrine, *Mare dicitur illius, sub cuius territorio comprehenditur.* He said that a State had jurisdiction to apprehend and punish delinquents in a zone extending one hundred miles from its coasts and that it owned the islands within that territory.[47] His pupil, Baldus of the Urbaldi, though he narrowed the belt to sixty miles, one day's journey, included sovereignty as well as jurisdiction in the rights of the neighbouring prince, and treated the area of adjoining waters as a "district" attached to the territory for certain purposes of government including the right to tax or levy tolls.[48] And finally Gentilis, writing about 1600, took the step of including within "territory," when he used that term, the sea as far as one hundred miles from the coast and even farther unless the proximity of another State interfered. So that after

[43] See note (56).
[44] Article referred to in note (42). Maine—International Law, 1918, p. 80.
[45] Fulton—*op. cit.*, p. 538; Fenn—Origins of the Theory of Territorial Waters American Journal of International Law, 1926, Vol. 20, p. 465.
[46] Fenn—*op. cit.*, p. 466.
[47] *Ib.*, p. 475.
[48] *Ib.*, p. 472.

Gentilis it is not an offence to legal theory to speak of waters as territorial.[49]

During the 17th and 18th centuries the theory of "effective sovereignty" became the outstanding idea in the law relating to territorial waters, that a State enjoyed dominion over the adjacent waters because and as far as it was able to maintain continuous possession.[50] The belt of sea that could be controlled and commanded by artillery on shore was considered widely to be territorial sea belonging to the contiguous State. Dutch ambassadors, who came to London in 1610 petitioning King James to renounce his proclamation against unlicensed fishing in English waters, probably at the instigation of Hugo Grotius as one modern writer has suggested,[51] put forward this idea as imposing a limit on possible claims of sovereignty over the sea. Grotius had the year previous propounded the formula *terrae potestas finitur ubi armorum vis,*[52] which was a century later made current by Bynkershoek and revised by later jurists by the substitution, properly made,[53] of the word *imperium* or *dominium* for *potestas*. Grotius later made reference to the same principle when he wrote, in 1625: *Ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperentur.*[54] Later his countryman, Bynkershoek, adopted the same criterion, both in his work of 1703,[55] and in 1737, when he coined the oft-quoted maxim, *Imperium terrae finiri ubi finitur armorum potestas.*[56] Most modern writers have employed this statement more frequently as a definition of the extent of the sovereignty over the waters within a State than as a justification for the imposition of that sovereignty. It is upon this foundation that the familiar cannon shot and three-mile limit rules have been based. But the original use of the statement was as an illustration of the writer's contention that a State had a right to dominion over seas which were within both its command and possession,[57] by analogy to or borrowing from the private law doctrine

[49] *Ib.*, p. 478.

[50] Sir T. Barclay—Article on Territorial Waters, in International Law Association, 27th Report, 1912, p. 81, at p. 82.

[51] Fulton—*op. cit.*, p. 549.

[52] Grotius—*Mare Liberum*, 1609, lib. I, c. III, para. 10.

[53] Grey—Article on Territorial Waters, in Law Quarterly Review, 1926, Vol. 42, p. 350, at pp. 353, 397.

[54] Grotius—*De Jure Belli ac Pacis*, 1625, lib. ii, c. iii, s. xiii 2.

[55] Bynkershoek—*De Dominio Maris Dissertatio*, c. iii.

[56] Bynkershoek—*Questions Juris Publici*, lib. i, c. viii.

[57] See note (53).

of effectiveness of occupation.[58] The possession of a thing, he said, is vested in him "who so holds it that another cannot hold it against his will," and

> there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory.[59]

There are those who dispute the validity of this proposition. Temple Grey, considering the question, "Whose property is the open sea?"[60] says,

> There are three schools: the first allows sovereignty over territorial waters, the open sea being *"res nullius"*; the second allows sovereignty over the territorial waters, the open sea being *"res communis"*; the third would make the entire seas *"res communis"* allowing limited authority (a sort of local government) in territorial waters.

Even the third class provide for territorial waters, though they pretend to treat them only as an unusual area over which for some purposes States may maintain jurisdiction; and if the category of matters over which the States may properly claim jurisdiction be made sufficiently inclusive, the distinction becomes of less importance, though, of course, the subject of territorial waters would be treated from a different angle by such jurists. Another fact which seems at first sight to support such a view is that States do not contend that rights in territorial waters are exclusive. So we find a court in Great Britain[61] claiming jurisdiction to try an American member of the crew of a British ship accused of a murder committed on board the ship when it was forty or fifty miles up the River Garonne in France, and the British Legislature has conceded a foreign ship in British territorial waters a foreign status for a limited purpose, in ordaining that,

> A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.[62]

Perhaps we might reconcile these two positions that have been assumed, that rights in territorial waters are merely jurisdictional as opposed to the claim that they are territorial, or make the distinction meaningless, by taking a judicial dictum out of its context and inserting it at this point. I refer to a terse statement made by

[58] Lauterpacht—Private Law Sources and Analogies of International Law, 1927, p. 111, s. 46.
[59] *De Dominio Maris*, p. 43.
[60] Grey—Article referred to in note (53).
[61] *Reg.* v. *Anderson* (1868) 11 Cox Crim. Cas., 198.
[62] Nationality and Status of Aliens Acts, as amended 1914-1922, 4 & 5 Geo. V, c. 17: 12 & 13, Geo. V, c. 44, s. 1, subs. 2 of the earlier act.

the Earl of Selborne in delivering a judgment of the Judicial Committee of the Privy Council, that "All jurisdiction is properly territorial.[63]

Then again, most publicists who attribute to States territorial waters do so by virtue of rules of international law, though a contrary view has been emphatically expressed by an eminent English writer who contends that the boundaries of a State or of its marginal waters are not a matter to be settled by international law, but by the municipal law of the State itself. And though he does admit that perhaps such a right of annexation or appropriation is permitted by international law, he does not explain whether he believes it to be a right of jurisdiction, as he terms a narrowly restricted right of control, or a right of territorial appropriation. That, he tells us, is "a matter full of uncertainty."[64] But his true position is evident when we see him, relying on the majority opinion in *The Franconia Case*[65] for support, stating that no marginal belt of territorial water is recognized by the constitutional law of the British Empire, but that the true boundary of the United Kingdom and all the other dependencies of the Crown is low-water mark.[66] The influence of this theory is clearly demonstrated in 'a Report to the Council of the League of Nations on the Questions which appear Ripe for International Regulation,' adopted by the Committee at its third session held in March-April, 1927, from which we may read:

> In spite of divergencies of doctrine, the theory most widely accepted accords to the riparian State the right to extend the limit of its territorial sea to the range of the coastal guns by unilateral acts.[67]

Other writers have definitely put forward proofs contemplated to demonstrate that the rights of States in adjoining waters are only jurisdictional.[68] Nevertheless, for the purposes of this study I venture to treat such waters as territorial, parts of the States themselves, though with, perhaps, peculiar features, feeling warranted in

[63] *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* (1894), A.C. 670, at p. 683.

[64] Salmond—Territorial Waters, Article in Law Quarterly Review, 1918, Vol. 34, p. 235, at p. 239.

[65] *The Queen* v. *Keyn* (1876), L.R. 2 Ex. 63.

[66] Salmond—*op. cit.*, p. 242.

[67] Publications—c. 196, M. 70, 1927, v. (C) D.I. 95(2), at p. 36; and see, Grey, article in note (53), *res nullius cedit primo occupanti.*

[68] *E.g.*, Wildman—Institutes of International Law, Vol. 1, p. 72, 1850. Ortolan—*Régles et Diplomatie de La Mer*, 1864, T. 2, c. 7 & 8. Twiss—Law of Nations, 2nd ed., 1892, s. 173. Hautefeuille—*Des Droit et des Devoirs*, 3rd ed., 1868, Vol. 1, p. 190. Massé—*Le Droit Commercial*, 1844, tom. i, Liv. ii, tit. i, ci, s. 104. Calvo—*Le Droit International*, 1896, s. 244. Heffter—*Le Droit International*, 1883, trad. par Bergson, ss. 74-75.

adopting this premise by the statements of numerous writers on the subject of international law.[69]

Such diversity of opinion as to the very nature of territorial waters is not conducive to an anticipation of unanimity as to their extent. But it is convenient to assume that waters within three miles at least of the coasts of a State are territorial. That this is a rule of international law has been flatly contradicted,[70] and another, though granting the rule a place among the precepts of international law, and characterizing the doctrine that it can be violated in the interests of self-defense or self-preservation as "non-legal"; expressed his doubt of the sincerity of the popular endorsation of the rule as he pointed out that it

> usually finds ardent championship or abusive condemnation, not in proportion to the learning of the critic, but rather in proportion to the personal viewpoint which he may entertain toward the toxic or hygienic effects of beverage alcohol.[71]

In fact the purposes for which territorial waters were designed did exert a profound effect on the extent assigned to them. They were claimed by States before the idea of the three-mile limit was conceived. And early writers who wished to make the zone a very wide one would assert its breadth to be a hundred miles as did Casaregis,[72] or thirty leagues as did Bodin.[73] DeRayneval,[74] Godey,[75] and others would concede to a State the waters as far out from the coast as the horizon. Another object no doubt lay behind the support of a still more indefinite limit, which has been fixed at the point where the leadline no longer finds botton, sponsored by Valin.[76] Other principles for the demarcation of territorial waters have been outlined by Fulton: as the doctrine of Thalweg, or mid-channel;[77] the range of vision on a fair day from the sea to the

[69] *E.g.*, Bynkershoek—*De Dominio Maris*, 1702, c. ii; Vattel—*Le Droit Des Gens*, 1758, liv. i, c. xxii. s. 289; Valin—*Commentaire sur l'Ordonnance de la Marine*, 1766, ii, 688; Moser—*Versuch des Neuesten Europäischen Volker-Rechts*, 1778, Vol. V, 486; Lampredi—*Jur. Pub. Univ. Theorem*, p. iii, c. ii, s. 8; De Martens—*Précis du Droit des Gens*, 2nd ed., 1864, Vol. 1, s. 153; Azuni—*Droit Maritime de l'Europe*, 1805, pt. i, c. ii, art. ii, s. 14; Hyde—International Law, 1922, p. 252; Hall—International Law, 8th ed., 1924, p. 190; Publication in note (67), article I of Draft Convention. British Year Book of International Law, 1925, at p. 147.

[70] Note in Columbia Law Review, Vol. 23, 1923, p. 472, at p. 476.

[71] F. R. Coudert—Article in North American Review, Sept. 1923, p. 289.

[72] Casaregis—*Discours legaux de Commerce*, Disc. 186.

[73] Bodin—*De Republica*, Book I, c. x.

[74] DeRayneval Gérard—*Institutions*, c. IX, para. 20, 1811.

[75] Godey—*Des limites de la Mer territorialle in Revue générale de droit internationale public*, 1896.

[76] Valin—*Nouveau commentaire sur l'ordonnance de la marine*, 1766, lib. V, t. I.

[77] Fulton—*op. cit.*, p. 541.

land;[78] or the space within which exclusive rights of fishing must belong to the riparian State in order to supply its needs.[79] The theory has also been suggested that the seaward boundary of a State should be a natural one if such be present, for instance, the Gulf Stream off the coast of America.[80] But a determining principle frequently applied to-day is the three-mile rule that has grown out of the cannon-range of Bynkershoek.

Along with the United States, Great Britain is known as a powerful exponent of the three-mile limit. But even after the abandonment of the ancient claims to the owned seas known as the King's Chambers, the first assertions of jurisdiction seaward, contained in the so-called hovering statute of 1736, were not confined within a limit of three miles, but operated over a zone extending four leagues from the coast.[81] The later hovering laws, passed for the purpose of enforcing the customs and revenue laws and preventing smuggling, laid down various limits ranging from five miles to eight leagues.[82] The Quarantine Laws of 1753[83] as first enacted provided for their application four leagues from the shore-line, though this was cut down to two leagues by an amending act of 1825.[84] It is typical of these and other English statutes specifying enforcement of their provisions over areas outside a zone of three miles that the jurisdiction or control to be exerted over the waters in question was very narrow in its scope; it was for a particular purpose, and not in any sense an assertion of general or exclusive jurisdiction or ownership of the areas involved. And even these attempts to control foreign vessels in such minor ways outside the ordinary zone of territorial waters were abandoned by acts of 1853 and 1876,[85] when Britain definitely declared her position, which she still occupies, as legislating in regard to foreigners only to a limit three miles from the coast.[86] And the extent of the claim to territorial waters surrounding the British Colonies has been made clear by a Report in 1864 to the Treasury by the Board of Customs, on the advice of

[78] *Ib.*, p .544.
[79] *Ib.*, p. 546.
[80] Reference by President Jefferson of the United States in 1805; and referred to in: Jessup—*op. cit.*, p. 51; Moore—Digest, Vol. I, p. 703; Fulton—*op. cit.*, p. 650; Crocker—The extent of the Marginal Sea, 1919, p. 641; Wharton—Digest, I, c. 2.
[81] 9 Geo. II, c. 35.
[82] 4 Geo. III, c. 15, 1763; 24 Geo. III, c. 47, 1784; 42 Geo. III, c. 82. 1802; 3 & 4 Wm. IV, c. 52, 1833.
[83] 26 Geo. II, c. 6.
[84] 6 Geo. IV, c. 78.
[85] 16 & 17 Vict. c. 107; 39 & 40 Vict. c. 36, s. 179.
[86] See note (19) concerning qualifications.

the Solicitor to the Board and confirming an opinion of the Law Officers of the Crown delivered in 1854, that

> the colonies did not have the power to impose penalties on persons other than inhabitants thereof, or to confiscate vessels not owned by them, for acts committed beyond the distance of three miles of the shore.[87]

Great Britain has also consistently upheld the three-mile limit in her legislation with regard to fisheries.[88] And the meticulous care with which this detail has been observed in the drafting of bills by the government department is brought out in sharp relief in the terms of the proviso to a statute of 1895 prohibiting the use of certain trawling methods within thirteen miles of the coast of Scotland, that,

> No area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882.[89]

The Convention referred to, ratified by Great Britain, Germany, Belgium, Denmark, France, and the Netherlands, had fixed the limit of the exclusive right of fishery in the littoral State at three geographic miles.[90] In an earlier treaty Great Britain had forbidden unregulated fishing by Americans within three miles of certain parts of the coasts of British territories in America.[91] The propriety of such a treaty was not questioned by the Great Britain-United States Mixed Claims Commission in 1853 when its interpretation was considered in the case of *The Washington*.[92] This treaty has been referred to as the first in which the three-mile limit was specified.[93]

As far as the English judiciary were concerned, when the doctrine was introduced into English jurisprudence by Sir William Scott (afterwards Lord Stowell) at the beginning of the nineteenth century in such cases as *The Three Gobreeders*,[94] *The Vrow Anna Catharina*,[95] and *The Anna*,[96] it was considered as applicable only in

[87] See Masterson, Jurisdiction in Marginal Seas, with Special Reference to Smuggling, 1929, p. 163.
[88] See statutes referred to in Jessup—*op. cit.*, p. 11, note 27.
[89] 58 & 59 Vict. c. 42, sec. 10, ss. 3.
[90] For. Rel. U.S., 1887, p. 439.
[91] Convention of 1818, following the treaty of Ghent after the War of 1812-1814; 8 U.S. Stat. L., 248.
[92] Moore—History and Digest of the International Arbitrations to which the United States has been a Party, 1906, Vol. IV, p. 4342.
[93] Henderson—American Diplomatic Questions, p. 497; Fulton—*op. cit.*, p. 581.
[94] 3 C. Rob., 162, 1800.
[95] 5 C. Rob., 15, 1803.
[96] 5 C. Rob., 373, 1805.

dealing with questions of neutral rights, as, for instance, the capture of prizes, in the maritime wars that prevailed at that period.[97] Fulton asserts that the matter of the three-mile limit became of little importance and received attention in only a few civil cases during a period of many years after Lord Stowell's decisions, since there were no naval wars of any magnitude; and he points out, as illustrative of his assertion, that British statutes did not deal with the matter. Even the Foreign Enlistment Act of 1870,[98] which did refer to territorial waters, failed to define them, as he says.[99] And had the use of the three-mile limit been so restricted there is no doubt that the interest in it in Great Britain and other countries would have been much less keen than it actually has been during the last hundred years.

But although not required to do so by engagement in maritime wars, Great Britain continued her policy of maintaining the three-mile limit as a rule of international law. She objected strenuously when the Emperor of Russia announced in a ukase of 1821 that foreign ships were to be prohibited from approaching within one hundred Italian miles of certain parts of the coast of Russia surrounding Behring Sea.[100] And the British opposition to this proposal was not, as was that offered by the United States, founded upon an alleged right to fish and engage in commerce in the waters in question acquired by long-continued usage, but upon the validity of the three-mile limit rule and the corollary that the Northen Pacific could not be made a closed sea.[101] Nor would Britain ratify a convention reducing the prohibited zone to two leagues or six miles. So it was finally arranged to let the matter rest "on the law of nations as generally received."[102] In 1910, when Russia indicated her intention to extend her jurisdiction to every vessel within twelve marine miles from low-water mark of the coasts of the Russian Empire,[103] Great Britain and Japan entered formal protests,[104] especially since the decree would involve fisheries and not only customs regulations. Russia inquired of the United States whether or not Great Britain had protested against the American four-league statutes, and on receiving a reply in the negative,[105] let the law stand, though it

[97] Fulton—*op. cit.*, p. 585.
[98] 33 & 34 Vict., c. 90.
[99] Fulton—*op. cit.*, p. 589.
[100] American State Papers, For. Rel., V, 432-471.
[101] *Ib.*, p. 452; Fulton—*op. cit.*, p. 584.
[102] *Ib.*, p. 583.
[103] U.S. Foreign Relations, 1912, p. 1289.
[104] See Masterson—*op. cit.*, pp. 287ff.
[105] U.S. For. Rel., 1912, p. 1287.

remained a dead letter for years, and when enforced in 1921 by the seizing by the Soviet of a trawler, The Lord Astor, outside the three-mile limit, it promptly evoked further British protests,[106] followed, it is alleged, by an agreement on the part of Russia to pay compensation for any vessels seized.[107]

Another indication of the adherence of Great Britain to the three-mile limit was *The Franconia* incident dealt with in the case of *Regina* v. *Keyn*.[108] The officer in command of the German steamer Franconia, was indicted at the Central Criminal Court for the manslaughter of a passenger on board the British vessel, Strathclyde, with which his ship had collided through the negligence within three miles of the coast of England. The passenger had been drowned, the ship having sunk. The Central Criminal Court had convicted the accused, overruling summarily the objection tendered to the effect that that court had no jurisdiction, but a question of law on this point was reserved, and it was decided by a majority of seven judges to six that the court had no jurisdiction.[109] However, as has been pointed out by Jessup,[110] only a minority felt that by international law the sovereign of the littoral state was not entitled to complete rights over the three-mile zone. The six judges composing the minority of the court as far as the delivering of the decision was concerned expressed the view that the three-mile zone was a part of the territory of England, and that the Admiral, from whom jurisdiction had been transferred to the Central Criminal Court, had jurisdiction over crimes committed there. One of the majority judges maintained that Parliament could, consistently with rules of international law permit the exercise of jurisdiction such as was contended for by the Crown, but found that it had not done so. Two of the majority stated beliefs that international law accorded no such jurisdiction. The other five simply looked to the English law itself and found there no provision for jurisdiction such as the Crown claimed; and had these last judges been questioned as to their criticisms of the minority on the matter of the international law involved in the controversy it seems plausible that they would have replied that such discussion was merely *ob iter*, the actual decision in the case being prescribed by the English statutes on the subject, which alone could, as far as English courts were concerned, lay down binding rules as to their jurisdiction. After such an

[106] 163 Parl. Deb. (1923), Commons, col. 2578.
[107] Jessup—*op. cit.*, p. 30; New York Times, May 10, 1923, p. 21, col. 5.
[108] (1876), L.R. 2 Ex. 63.
[109] Jessup—*op. cit.*, p. 129.
[110] *Id.*

analysis it is incontrovertibly evident that the decision in this *Franconia case,* construed with the narrow meaning with which it was delivered, is not in conflict with the three-mile rule in international law and does not detract from England's support of that rule.

As a consequence of this decision the Territorial Waters Jurisdiction Act was passed in 1878 declaring Her Majesty's criminal jurisdiction to extend to Her territorial waters of three miles extent measured from low-water mark.[111] And the express terms of section 7 of the statute that

> "the territorial waters of Her Majesty's dominions" . . . means such part of the sea . . . as is deemed by international law to be within the territorial sovereignty of Her Majesty

put statements such as those of Lord Salisbury and Lord Halsbury in the debate in the House of Lords[112] preceding the passing of the Sea Fisheries Regulation Act of 1895,[113] and that of Sir John Salmond in an article of later date,[114] all seeking to establish that the Act of 1878 did not name three miles as the territorial limit of the United Kingdom and the other British possessions, in a rather ludicrous light. The British Parliament was, I believe, conceding formal recognition to what was deemed a well-established rule of international law.

And so ingrained into the fabric of British foreign policy has become the principle of the three-mile limit that, when questioned as to whether Britain had "at any time, with any nation, recognized any limit outside the three-mile limit" upon British territorial waters, a British Under-Secretary of State, Lieutenant-Colonel Buckley, for the Foreign Office, replied, "Not that I am aware of."[115] And in the same year, 1923, a letter of July 10,[116] from the British Chargé d'Affairs, H. G. Chilton, to the Secretary of State of the United States, concerning the seizing of the vessels, The Grace and Ruby and The Henry L. Marshall, indicated the importance attached by Great Britain to the maintenance of the three-mile limit. On instructions from His Majesty's Principal Secretary of State for Foreign Affairs, the writer informed the United States Government that

[111] 41 & 42 Vict. c. 73.
[112] Hansard, xxxiii, 504.
[113] Concerning which, see note (89).
[114] Law Quarterly Review, Vol. 34, 1918, p. 235, at p. 243.
[115] Hansard, Parliamentary Debates, Commons, 1923, Vol. 163, Cols. 1346-7.
[116] United States Department of State, Press Release, Letter No. 578.

any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation.

Great Britain has clung very tenaciously to the three-mile limit.

United States also includes itself among the nations who support the three-mile 'limit.[117] Indeed, Fulton says its general use has been more largely induced by the influence of the United States than of any other State,[118] although he admits that United States has varied more than any other Power her claims as to the extent of territorial waters.

As in England, so in America, there had been a smuggling problem to cope with even before the American colonies gained their independence.[119] For Parliament had in 1660,[120] and in 1663,[121] regulated in certain ways the importation of goods. This smuggling did not diminish in volume, or daring, or profit to the smuggler after the Union; and Congress found it expedient in the first revenue statute of the United States[122] to adopt the four-league limit of the British hovering statutes into American law, where, having been found useful, it has remained long after the English pattern from which it was modelled has been discarded. This Act of August 4, 1790, permitted officers to go on board ships bound for the United States for the purposes of demanding the required manifests and examining and searching the ships, within four leagues of the coast.[123] It also provided that the vessel from which, and the vessel into which, goods from foreign countries should be unloaded without authority within four leagues of the shore should be forfeitable.[124] These provisions were substantially carried over into a similar Act of 1779,[125] and have been continued in various parts of the Revised Statutes.[126]

Another field in which United States early in her history extended her control beyond ordinary territorial limits was in dealing with the smuggling of slaves from Africa. An Act of 1807[127] pro-

[117] See texts of Liquor Treaties cited in Chapter 4, *infra.*
[118] Fulton—*op. cit.*, p. 650.
[119] Masterson—*op. cit.*, p. 176.
[120] 12 Chas. II, c. 18.
[121] 15 Chas. II, c. 7; and see, also, Masterson—*op. cit.*, p. 176.
[122] 1 Stat. at Large, 2d Sess., c. 35, p. 145.
[123] *Ib.*, s. 31.
[124] *Ib.*, ss. 13 & 14.
[125] 1 Stat. at Large, 3rd Sess., 1799, c. 22, p. 627.
[126] *E.g.*, s. 2811, s. 2812, s. 2813, s. 2814, s. 2815, s. 3067, s. 3069, s. 3070, s. 2867, s. 2868.
[127] 2 Stat. at Large, March 2, 1807, p. 428, s. 7, re-enacted in ss. 5555 and 5557 of the Revised Statutes and the Federal Penal Code of 1909—35 Stat. at Large, part 1, p. 1140, ss. 258 and 260.

vided for the seizure any place on the high seas of any vessel having on board negroes and "hovering on the coast" intending to sell them as slaves or land them.

A further useful principle that has been invoked by the United States in seeking to frustrate attempts of criminals to avoid punishment by operating extra-territorially is embodied in section 332 of the Criminal Code, which provides that whoever aids or abets in the commission of an offense shall be regarded as a principal, which provision, it has been pointed out, may even apply so as to make acts crimes against the laws of the United States although committed by foreigners on board foreign ships upon the high seas beyond all territorial or jurisdictional boundaries.[128]

Several factors have doubtless contributed towards the policy which has led United States to continue her claims of control over the high seas to a greater distance from the shore for certain purposes than Great Britain. Naturally her extremely long coast line is more difficult to police, especially since some of the adjacent lands are uninhabited. Besides, convenient bases in foreign countries from which to carry on their smuggling campaigns have been close at hand.[129] The state of the law in the United States is conducive to smuggling also. There is in force a very high tariff protecting a great market. Still greater difficulty is presented by the liquor prohibition acts, opposed by many in the United States, some of whom are willing to cooperate with smugglers working outside the limits of the country. So United States has for certain purposes found is necessary to extend her control beyond the three-mile limit, and other States have acquiesced in her doing so.

But in spite of these features which have produced deviations from the three-mile limit rule in American policy, frequent insistence by the United States, particularly on the part of the Executive, upon its application have strengthened other States in adhering to it. Indeed it was she who first adopted three miles as the equivalent of gun-shot range, the elastic measurement of Bynkershoek. This

[128] Dickinson—Rum Ship Seizures under the Recent Treaties, in American Journal of International Law, 1926, Vol. 20, p. 111, at p. 112, cites: *Latham* v. *United States* (1924), 2 F. (2d), 208; and *United States* v. *Ford* (1925), 3 F. (2d), 643; (1927), 273 U.S. 593.

[129] The problem of American law enforcement has been appreciably complicated by refusal of co-operation by neighbouring governments. Clearances from lake ports in Canada to unseaworthy boats with cargoes of liquor for Europe are alleged to have been used. The Canadian Government proposes to deal with this matter early in 1930.

precise distance was announced in 1793,[130] at the outbreak of hostilities between France and Great Britain, not as an arbitrary settlement by Washington's Government as to the extent of American territory, but merely as a temporary expedient to insure the observation and performance of what United States claimed to be her neutral rights and duties. So noncommittal and revocable was this early adoption of the three-mile limit that it could be argued plausibly a month later that if it wished the United States could attach to its coasts an extent of sea beyond the range of cannon-shot,[131] and twelve years later that the Gulf Stream should be adopted as the boundary to be observed.[132] The next year it was claimed that neutral immunity off the United States coast should be coextensive with that maintained by Great Britain around her own territory.[133] But, after all, these were only proposals not put into execution. And the United States had on occasion actively protested against assumptions of excessive maritime jurisdiction by other countries. With Great Britain she had objected to the Russian ukase of 1821 prohibiting foreign vessels from approaching within one hundred Italian miles of Russian possessions in the Pacific Ocean north of the 45th degree of latitude on the coast of Asia, and of the 51st degree on the coast of America.[134] Again, in 1864, when the French authorities requested that in the interests of safety a battle might not be staged in dangerous proximity to the coast of France between The Alabama and The Kearsarge which had chased her into the port of Cherbourg, and conducted the former warship about seven or nine miles away from the shore before the engagement commenced, United States displayed the jealousy with which she asserted the freedom of the seas. Mr. Seward, Secretary of State, wrote to Mr. Dayton, United States Minister to France, instructing him to inform the French Minister of Foreign Affairs that

> the United States do not admit a right of France to interfere with their ships of war at any distance exceeding three miles[135]

[130] President's Proclamation of Neutrality, April 22, 1793; Wheaton—Elements of International Law, 1929, 6th ed., p. 723; Mr. Jefferson, Sec'y of State, to M. Genet, 8th Nov., 1793; Wharton—Digest of International Law of the United States, 1887, 2d ed., I, c. 2 s. 32, p. 114.

[131] Opinion of Attorney-General, 14th of May, 1793; Letter of Sec'y of State to the Foreign Minister, 15th May, 1793; Kent's Commentaries, I, 30.

[132] See note (80).

[133] Mr. Madison to Messrs. Monroe and Pinkney, 17th May, 1806; Kent—*op. cit.*, I, 31.

[134] See page 101, for English and American attitudes.

[135] Dip. Cor. 1864, III, 120-121; Moore—Digest, I, p. 723; see, also, Jessup—*op. cit.*, pp. 97-101.

from the coast. Two years previous, in 1862, Mr. Steward had denied the right of Spain to assert six miles as the equivalent of gun-shot in determining the extent of territorial waters surrounding Cuba, since the law of nations fixed the limit at three marine miles.[136] Nevertheless, in 1806, the American Government had attempted to persuade England to endorse a belt six miles in breadth, reducing this distance to five miles in the draft treaty submitted in 1807.[137] And again in 1922 the United States tried unsuccessfully to secure from Great Britain consent to a mutual extension of their territorial waters with a view to the suppression of the rum trade, and the one-hour's sailing distance ultimately conceded by several countries was only established for a very limited purpose.

The United States judiciary has also been studious to preserve the distinction between the types of control claimed in the marginal sea. The recognition by Mr. Justice Story in 1824 in the case of *The Apollon*[138] of the difference between "revenue jurisdiction" and

> the ordinary maritime jurisdiction over waters within the range of a cannon shot from our shores.

forecasted judicial support of the three-mile territorial limit, but the careful reservation of the right to extend the zone for particular purposes must be noted. Another early case in which the same idea was expressed was *Cucullu* v. *Louisiana Insurance Co.*,[139] an action on insurance policies warranting freedom from loss arising from participation in illicit trade, in which the main question to be considered by the Supreme Court of Louisiana was the conclusiveness of degrees of foreign Courts of Admiralty. Mr. Justice Porter said, at page 480 of the report:

> Strictly speaking, the authority of a nation cannot extend beyond her own territory. By the common consent of nations this authority has been enlarged, where the sea is the boundary, to the distance of a cannon shot, from the shore. Within these limits foreigners are protected, and prizes cannot rightfully be made of their vessels by enemies.

Then the judge proceeded to make the same exception as in the preceding case:

> But the right of the nation to protect itself from injury, by preventing its laws from being evaded, is not restrained to this boundary. It may watch its coasts, and seize ships that are approaching it with an intention to violate

[136] Mr. Seward to Mr. Tassara, Spanish Minister, Dec. 16th, 1862, M.S. Notes to Spain, VII, 331.
[137] Hall—A Treatise on International Law, 1924, Part II, c. ii, s. 2.
[138] (1824), 9 Wheat. 362; 6 L. Ed. 111.
[139] (1827), La., 5 Mart. N.S. 464.

its laws. It is not obliged to wait until the offence is consummated before it can act. It may guard against injury as well as punish it. If, indeed, in the exercise of this right an unreasonable range was taken, other nations might object.

Here again we see a definite enunciation of the three-mile rule, coupled with an indefinite provision for the exercise of special rights in the interests of self-preservation and protection.

In 1891 the Supreme Court of the United States, in the case of *Manchester* v. *Massachusetts*,[140] pronounced the Commonwealth of Massachusetts entitled to control the fisheries within three miles of its shores; but qualified its statement of the three-mile limit rule by the admission that

all Governments for the purpose of self-protection in time of war or the prevention of frauds on its revenue, exercise an authority beyond this limit.

A plain statement of the rule is to be found in the majority opinion in the case of *Cunard Steamship Co., Ltd., et al.* v. *Mellon, Secretary of The Treasury, et al*,[141] in which the matter in contention was the construction of the words "the United States and all territory subject to the jurisdiction thereof" of the Eighteenth Amendment to the Constitution, which was put into execution by the National Prohibition Act.[142] Mr. Justice Van Devanter, in holding that foreign ships in territorial waters were to be included, said, at page 122 of the report,

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.

This collection of American cases supporting the three-mile limit might be enlarged considerably, some judges, for instance Mr. Justice Morton of the Massachusetts District Court, having credited it with binding effect so great as to preclude the putting into effect of a twelve-mile limit even for limited purposes;[143] or Mr. Justice Ervin of the Alabama District Court, who, in dealing with the seizure of a British ship twenty-four miles out to sea, relied upon the *Cunard case*[144] in holding, even after the conclusion of the treaty in 1924,

[140] (1891), 139 U.S. 240, at p. 258; 11 Sup. Ct. 559; 35 L. Ed. 159.

[141] (1923), U.S. Sup. Ct., 262 U.S. 100.

[142] 1919, c. 85, 41 Stat. 305.

[143] *The Marjorie E. Bachman* (1925), 4F. (2nd), 405; appeal dismissed, 270 U.S. 666.

[144] See note (141).

that the Volstead Act did not extend in its application more than one league from the coast.[145]

Another class of cases in which United States courts have held themselves bound to enforce other limits than three miles has been those dealing with so-called "political questions." In 1892 the District Court of Alaska dismissed a libel which had been filed against *The Kodiak*[146] on behalf of the United States for the forfeiture of that schooner because of a violation of section 1956 of the Revised Statutes forbidding the killing of fur-bearing animals within the limits of Alaska territory, or the waters thereof. Though it was not necessary to the decision of the case for him to do so, Mr. Justice Truitt, considering whether or not Cook's Inlet, where the seizure took place, was part of the waters of Alaska, adopted a rule referred to by Mr. Justice Hanford in the case of *United States* v. *The James G. Swan,*[147] and which Mr. Justice Truitt himself termed "an ususual doctrine" a couple of years later,[148] namely that national dominion and sovereignty may be extended over the sea by statute so as to bind the courts of the legislating littoral State. He expressed himself thus, at page 130 of the report:

> It is not the province of courts to participate in the discussion of the questions arising out of this claim of jurisdiction or dominion, for they are of a political nature, and not judicial. National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, when congress and the president assert dominion and sovereignty over any portion of the sea, or over any body of water, the courts are bound by it.

Having seen the attitude toward the matter of the two countries in which we are chiefly interested, let us digress from the path of our main theme for a brief and somewhat kaleidoscopic survey of the position of some of the other maritime states of the world and of juristic writers.

The formula propounded by Grotius was employed by the Powers first in their military, trade and navigation treaties towards the end of the eighteenth century, for example in Article 28 of a navigation treaty between France and Russia in 1787.[149] And we have seen already how the three-mile limit rule early established itself in the law of prize as the basis upon which to stand neutral rights;[150] so firmly did it become founded that a writer could discover a century

[145] *United States* v. *Archer,* 1926, 12 F. (2nd), 137.
[146] (1892), 53 F., 126.
[147] (1892), 50 F., 108.
[148] *The Alexander,* 1894, 60 F., 914.
[149] Vittoria-Adami—National Frontiers in Relation to International Law, translated by T. T. Behrens, 1927, p. 45.
[150] See pp. 100, 101.

later no case in which a Prize Court had declared invalid a seizure made within an area outside the customary three-mile limit when that area represented a particular wartime assertion.[151]

The three-mile limit has also been upheld in the field of international arbitration and diplomacy. Russia was literally compelled to adopt it for a great part of her coasts in 1847 under the pressure of the American and British protests that greeted the Russian ukase of 1821.[152] In a case before the Second Court of Commissioners of *Alabama* claims, that of *The Alleganean*,[153] which arose out of the American Civil War, waters within three nautical miles, one marine league, of the shore were expressly excepted from the high seas as defined by international law. And in 1891, during the Civil War in Chile, when *The Itata*, a transport in the service of the Chilean insurgents, was pursued by two American ships within the three-mile limit of Chilean territorial waters and there taken, the United States-Chile Mixed Claims Commission held United States answerable in damages for such conduct.[154]

So thoroughly incorporated into the rules of international law had the three-mile rule become by 1892, that it was not even a disputed issue in the celebrated Fur Seal Arbitration between United States and Great Britain.[155] The defense by the United States of her position rested on special rights to protect the property in the seals for her citizens arising out of the special circumstances to be met, and not upon a denial of the binding force of the three-mile limit as a rule of international law. Great Britain's unwillingness to admit such a possible defense is apparent from the phrasing of the last of the five questions submitted to the arbitral tribunal, the only one in which reference is made to the three-mile limit and where its validity is taken for granted. It read:

> Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?[156]

The use of the term "ordinary" is significant. And when, before the Paris Tribunal, Mr. Edward J. Phelps sought to justify the American four-league statutes on the ground of self-defence,[157] Sir Charles Russell, Attorney-General of England, did not fall in with

[151] Jessup—*op. cit.*, p. 105.
[152] See pp. 100, 101
[153] *Stetson* v. *United States*, No. 3993, class 1; IV. Moore—Arbitrations, 4332.
[154] III. Moore—Arbitrations, p. 3070; I Malloy—Treaties, p. 185.
[155] I Moore—Arbitrations, p. 920.
[156] *Ib.*, p. 801.
[157] Fur Seal Arbitration, Proceedings, XV., pp. 128-135.

his reasoning, but accounted for the absence of objection by other States by the observation that:

> No civilized state will encourage offences against the laws of another state, the justice of which laws it recognizes. It willingly allows a foreign state to take reasonable measures of prevention within a moderate distance even outside territorial waters.[158]

Of course, international law being more or less a reflection of municipal law, we should not anticipate an unanimous acceptance of the three-mile limit rule into international law. Fulton,[159] in 1911, wrote that on four thousand miles, or one-third of the coast of Europe the three-mile limit was not accepted by the bordering States; since Portugal, after abandoning her attempt to maintain a six-mile limit, had adopted a system of reciprocity, observing the limit upheld by the country represented by the ship in question; Spain has consistently claimed a six-mile limit though she too has experienced difficulty in enforcing her claim;[160]; and Norway, Sweden, and Denmark had clung to their ancient four-mile limits, a claim Norway had to confess herself bound to relinquish temporarily at least in May, 1918, since neither the British nor German governments recognized her neutral rights beyond the three-mile limit.[161] Russia's visions of more expansive territorial waters have been uniformly unproductive also.[162] Italy, who in 1912 claimed territorial waters of ten miles' extent, reduced her claim in August, 1914, to six sea-miles.[163]

However, to-day many states support the rule, and Jessup has declared it to stand as a rule of international law.[164] Among those supporting it, some more effectively than others, and some claiming extended zones for certain purposes are: Great Britain;[165] United States;[166] France;[167] Germany;[168] Belgium;[169] The Netherlands;[170] Canada, Australia, South Africa, India, New Zealand, and other

[158] *Ib.*, XIII, pp. 1076 and 1079; see, also, Hyde — International Law Chiefly as Interpreted and Applied by the United States, 1922, p. 419, Vol. I.
[159] Fulton—*op. cit.*, p. 664.
[160] Jessup—*op. cit.*, pp. 42-43.
[161] Hyde—*op. cit.*, p. 256, Vol. I.
[162] See pp. 101, 102.
[163] Vittoria-Adami—*op. cit.*, p. 46.
[164] Jessup—*op. cit.*, p. 7.
[165] See pp. 103, 104.
[166] See p. 104.
[167] Jessup—*op. cit.*, p. 18.
[168] *Ib.*, p. 22.
[169] *Ib.*, p. 43.
[170] *Id.*

parts of the British Empire;[171] Japan;[172] China;[173] parts of Latin-America, for example Argentina, subject to a ten-mile fishery zone;[174] Chile;[175] Ecuador;[176] Uruguay;[177] El Salvador;[178] and Mexico.[179] It has been pointed out that some of these countries, did not, as did Great Britain, insist on the mention of the fact that they supported the three-mile limit in their liquor treaties with the United States,[180] but this fact does not prove they do not support the limit. It would seem justifiable to regard the three-mile limit at least as a minimum within which concur all the alleged duties and rights pertaining to neutrality and sovereignty, and the limit of truly territorial waters.[181]

Nevertheless, publicists of considerable repute have denied the validity of the three-mile limit rule,[182] seeking the recognition of wider zones, some because of a notion that Bynkershoek's cannon-shot illustration should involve a progressive broadening of the territorial zone as modern progress in the science of ballistics increases cannon range, and others simply from a supposed observation that with modern armaments and speedy marine transportation the antiquated three-mile zone is proving inadequate. Even Fulton ventured a prophecy that a naval war would prove the uselessness of the old limit and would lead to a new measurement more in conformity with the new range of guns.[183] but, though some States did temporarily try to extend their marginal zones during the Great War,[184] the effect was not a permanent dropping of the old rule.

A very reliable index of the present state of the law on this point, I believe, is the work of the preparatory committee for the League of

[171] Masterson—*op. cit.*, pp. 164ff.
[172] Jessup—*op. cit.*, p. 45.
[173] See *The Tatsu Maru* (1908), American Journal of International Law, Vol. 2, p. 391.
[174] Civil Code, s. 2374. See, also, Jessup—*op. cit.*, pp. 9, 46.
[175] Civil Code, Art. 593.
[176] Jessup—*op. cit.*, pp. 48-49.
[177] See note 176.
[178] See note 176.
[179] Treaty of Dec. 14, 1899, with China; see, also, Crocker—The Extent of the Marginal Sea, 1919, p. 513.
[180] See Masterson—*op. cit.*, p. 352, for references to U.S. Treaties with Germany, The Netherlands, Cuba, Panama, Italy, Sweden, Norway, Denmark, Spain, France, Belgium.
[181] Grey—Article in Law Quarterly Review, Vol. 42, 1926, p. 350, at p. 367; Masterson—*op. cit.*, p. xiii of Introduction.
[182] *E.g.*, Bishop—Commentaries on Criminal Law; Fiore—*Trattato di Diritto Internazionale Pubblico*, 1898, ii, c. 3, pp. 65-67; Woolsey—Introduction to the Study of International Law, 1879, s. 56, p. 70; Hall—International Law, 1924, 8th ed., p. 191; Westlake—International Law, 1907, Vol. I., p. 184; G. F. deMartens—1894 *Annuaire de l'Institut de Droit International*, p. 288.
[183] Fulton—*op. cit.*, p. 22.
[184] See Vittoria-Adami—*op. cit.*, p. 48.

Nations conference for the codification of international law proposed to be convened early in 1930.[185] Before the Committee met at Geneva on May 6th, 1929, thirty Governments had replied to the questionnaire on territorial waters that had been sent out. In answer to the question as to the breadth of territorial waters subject to sovereignty: one State declared it to be one mile, but advocated that it be fixed at six miles; three miles was the reply of sixteen, one of which advocated a change to six miles; two stated it at four miles; one at six; and one insisted it should be not less than eighteen miles.

These replies, the resolutions adopted by the Institute of International Law and the International Law Association, the Harvard research work by Mr. George Grafton Wilson, Mr. Richard W. Flournoy and Mr. Edwin M. Borchard, were all taken into consideration and harmonized in drafting a number of bases of discussion, which, though not law, should, considering the splendid auspices fostering their formulation, be not unreasonable.

The first basis of discussion was:

A State possesses sovereignty over a belt of sea round its coasts; this belt constitutes its territorial waters.

Number three:

The breadth of territorial waters under the sovereignty of the coastal state is three nautical miles.

The fourth offered a possibility for the expression of the opinions of States that claimed broader areas:

Nevertheless, the breadth of the territorial waters under the sovereignty of the coastal state shall, in the case of the States enumerated below, be fixed as follows . . . .

And the fifth basis of discussion was provided in deference to the States claiming special rights in a broader zone,

On the high seas adjacent to its territorial waters, the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its customs or sanitary regulations or interference with its security by foreign ships. Such control may not be exercised more than twelve miles from the coast.

And the draft Convention drawn up by M. Schücking, Rapporteur of the Committee of Experts, read, in part, as follows:[186]

The State possesses sovereign rights over the zone which washes its coast, in so far as, under general international law, the rights of common user of the international community or the special rights of any State do not interfere with such sovereign rights . . .

[185] For which see, League of Nations, Publications, C. 74. M. 39. 1929. v.
[186] *Ib.*, p. 193.

The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast. Beyond the zone of sovereignty, States may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection. Outside the zone of sovereignty no right of exclusive economic enjoyment may be exercised.

All of the foregoing, I feel confident, establishes at least the reasonableness of the assumptions I have presumed to make, namely, that territorial waters are zones of sovereignty at least three miles in breadth, recognized as such by maritime States generally as a rule of international law, insisted upon particularly by Great Britain and the United States. While outside of the territorial waters may be other areas over which States exercise certain rights of jurisdiction for restricted purposes.

(To be continued.)

J. STAFFORD H. BECK.

Ann Arbor, Mich., U.S.A.