THE TERRITORIAL SEA.¹

The recent decision of the United States Supreme Court,² in what will probably be known as the Sea Stores cases, is one of the most important pronouncements of that court on an international law subject, for it is the first authoritative decision by any tribunal, whose judgments command respect beyond its own jurisdiction, declaring the area or limits of the Territorial Sea and defining the character and extent of the control of the littoral sovereignty over those waters.

The Supreme Court, expressing what will probably be regarded as the American doctrine respecting both limit of area of these marginal waters and the extent and character of the sovereignty of the littoral power, employs language so clear and positive as to leave no room for doubt as to what is intended to be decided. The opinion of the Court is not a contribution to the discussion of vexed questions of international law, but a definite and ultimate decision of them, and for this reason as well as because of the general interest to lawyers and laymen alike of the subject itself and of the circumstances out of which the cases arose, I have chosen The Territorial Sea as the subject of my address.

In the Sea Stores cases, the plaintiffs, who were steamship companies, operating passenger ships between United States ports and foreign parts, filed a bill in equity in the Federal District Court for the Southern District of New York, to enjoin the threatened application to them and to their ships of certain regulations promulgated in enforcement of the National Prohibition Act.

The defendants were officers of the United States, charged with the Act’s enforcement. The cases are cited under the title of Cunard Steamship Co. v. Mellon, the defendant named being Secretary of the Treasury.

Ten of the complainants were foreign corporations and their ships of foreign registration; the remaining two were domestic corporations and their ships of United States registry. All the ships had long carried, as part of their sea stores, intoxicating liquors, intended to be sold or dispensed to their passengers and crews at meals or otherwise for beverage purposes. By the laws of all the

¹ Address to the Canadian Bar Association at its Eighth Annual Meeting. Mr. Conboy represented the American Bar Association at the meeting.
foreign ports at which the ships touched this was permitted and by the laws of some it was required. The liquors were purchased for the ships and taken on board in foreign ports, and were sold or dispensed in the course of all voyages, whether from or to those ports.

The first section of the Eighteenth (The Prohibition) Amendment to the Constitution of the United States is as follows:—

“Section 1: After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”

The National Prohibition Act, known popularly or otherwise as the Volstead Law, was enacted to enforce the Eighteenth Amendment, and, in order to make its provisions effective certain departmental and administrative instructions were issued. In October, 1922, the Attorney-General, in answer to an inquiry by the Secretary of the Treasury, gave an opinion to the effect that the National Prohibition Act, construed in connection with the Eighteenth Amendment to the Constitution, made it unlawful for any ship, either domestic or foreign, to bring into the territorial waters of the United States, or to carry while within such waters, intoxicating liquors, intended for beverage purposes, whether cargo or sea stores, and for any domestic ship, even without those waters, to carry such liquors for such purposes, either as cargo or sea stores.

The President thereupon directed the preparation, promulgation, and application of new instructions conforming to that construction of the Act. Being advised of this, and that, under the new instructions, the defendants would seize all liquors carried in contravention of the Act as so construed, and would proceed to subject the plaintiffs and their ships to penalties provided in the Act, the plaintiffs filed their bills to enjoin the enforcement of such regulations.

It is apparent at once that the determination of the contentions involved in these suits depended upon the manner in which the terms of the Eighteenth Amendment should be defined by the Court, for the Court was required to say whether the carriage on board ships operating between foreign ports and United States ports of intoxicating liquors, as part of the sea stores of such ships, constituted the transportation within, or the importation thereof into, the United States and territory subject to the jurisdiction thereof.

The United States Supreme Court, by a process of definition, has answered the question in the affirmative.

41 Stat. 305.

Oct. 6, 1922. (See opinion of the Supreme Court in the case cited.)
Transportation, in the constitutional provision, says the Court, “comprehends any real carrying about or from one place to another.”

Importation, “consists in bringing an article into the country from the outside. If there be an actual bringing in, it is importation, regardless of the mode in which it is effected. Entry through a customs house is not of the essence of the Act.”

 Territory, in the phrase “the United States and all territory subject to the jurisdiction thereof,”—and this is the word that involved a definition of the extent and character of jurisdiction over the Territorial Sea—territory “means the regional areas of land and adjacent waters over which the United States claims and exercises dominion and control as a sovereign power.” No distinction is made, therefore, between land and adjacent waters, and the Court declares with a positiveness that borders on the dogmatic that: “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 coastline outward a marine league or three geographic miles.”

May I direct your attention, at this point, to the fact that this definition is a judicial and not a legislative one. It is not to be found in the Constitutional Amendment nor in the Enforcement Act. It is not taken from any general or statutory construction statute. In fact it may be doubtful that Congress has any power to define the territorial limits of the United States. I am not considering at

If the law were “settled” prior to the announcement by the Supreme Court in the case cited, it was by Justice Story on circuit in The Ann. 1 Fed. Cas. 926; (Case No. 397); 1 Gall. 62; Circuit Court District of Mass., May Term, 1812, in which he said: “All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot or marine league over the waters adjacent to its shores. Indeed such waters are considered as a part of the territory of the sovereign.” Chief Justice Marshall’s language in Church v. Hubbard, 2 Cranch, 187, as follows: “The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory and is a hostile act which it is its duty to repel.”

The significant qualification “not on a vessel of another nation,” seems to have been ignored in the latter opinion. California only claims maritime jurisdiction to the extent of three English miles, i.e., approximately half a mile less than a marine league. It is possible that one of the seaboard states may claim jurisdiction to cannon range as indeed an old case would seem to indicate that the State of New York might do (Lahiter v. Transportation Co., 35 N. Y. 352, where Long Island
this point the extensile power that a nation may exercise in its own
defence, but only the extent of territory subject to the exclusive and
absolute jurisdiction of the nation susceptible of no limitation not
imposed by the nation itself. The definition is, therefore, the Supreme
Court’s understanding of what is comprised within the territory of
the United States.

The Supreme Court’s opinion transfers the boundary of the margin-
nal sea out of the realm of debatable things into the realm of the
absolute, and likewise determines the nature and extent of the author-
ity of the littoral sovereignty. It applies an unvarying standard of
measurement to the area and certain terms of precise meaning to the
jurisdiction to be exercised within that area. The marginal belt of
the sea, extending from the coast line outward a marine league or
three geographic miles, is as much a part of the territory of the United
States, under this decision, as the State of Kansas. In the interest
of accuracy, there is one qualification to be applied in connection
with this statement. The marginal sea is subject to a servitude,
resulting from the common ownership by all nations of the seas
beyond the three-mile limit, of the right of innocent passage through
territorial waters. The qualification is expressed in the opinion
of the United States Supreme Court in the case of Manchester v.
Massachusetts (139 U. S. 240, at page 257), as follows:—

“The open sea within this limit is, of course, subject to the com-
mon right of navigation.”

However, it is doubtful, to say the least, whether the common
right of navigation or the doctrine of innocent passage as interna-
tional jurists call it, permits the carriage within our territorial waters
of intoxicating liquors. The Attorney-General’s opinion of October

Sound was held to be territorial water because the entrance could be com-
mmanded by cannon. The question may well be asked whether Congress can
add a federal strip outside the limits to which California has sought to with-
draw and refuse to another State what it claims under international law. The
answer to such a question is beyond the scope of the present article and it may
be hoped will never become a practical one, but it introduces some further
confusion into the subject by raising a distinction between territorial sov-
ereignty and the extent of specific rights and duties such as customs inspection
and neutrality which are national in nature.

1This right, which is recognized by practically all writers on the subject,
is thus phrased in Article 5 of the Rules adopted by the Institute of Inter-
national Law at Paris in 1894:

“All ships without distinction have the right of innocent passage through
the territorial sea saving to belligerents the right of regulating such passage and,
for the purpose of defense, of forbidding it to any ship, and saving to neutrals
the right of regulating the passage of ships of war of all nationalities through
the said sea.”

Trans. of H. B. Crocker, The Extent of the Marginal Sea, Government
Printing Office, 1919.

Bluntschi: Le Droit International Codifié 1895, says: “The juris-
diction of the adjacent sea only extends over the littoral sea within the limits
considered necessary by the police and military authorities. The ship in all
other respects is as free as if it were in the open sea; that is, it is regarded as
a floating part of the territory of the State whose flag it flies.” (Sect. 322,
6th, 1922, declared that it is unlawful for any ship, whether domestic or foreign, to bring into territorial waters of the United States, or to carry while within such waters, intoxicating liquors intended for beverage purposes. This would seem to be as plain a declaration as language permits against the entry into our territorial waters of ships with intoxicating liquors aboard.

The doctrine of territorial ownership of the marginal belt of sea to the distance of a marine league from low water mark on shore was in the year 1909 declared by a federal judge to be applicable in determining the extent of the territory of one of the States of the United States. New Jersey adopted a statute extending its border to a space of one marine league from low water mark, and the validity of this enactment was upheld by the United States Circuit Court for the Southern District of New York. Referring to the opinion of the United States Supreme Court in *Manchester v. Massachusetts*, the circuit Judge held that the Court had there "declared that it must be regarded as established that as between nations the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast. Both from the language quoted and from the nature of the decision in the *Manchester case*," he continues: "it seems to me to follow that New Jersey may, in the exercise of its sovereignty, extend its own borders for the space of one marine league from low water mark and make the region so annexed as much a portion of the State as any other part of its territory." And in the same case, the circuit Judge declared that the "existence of territorial jurisdiction must imply territorial ownership."  

The doctrine announced by the Supreme Court of the United States and subordinate federal courts will be scrutinized elsewhere in the light of international law principles, and in speaking to an association of lawyers of another country, the decision should undoubtedly be discussed in its relation to the opinions held by international jurists regarding the Territorial Sea.

The *London Morning Post*, shortly after the rendition of the opinion by the Supreme Court, contained a contribution from a British jurist, who had been associated with Sir Charles Russell in the Behring Sea Arbitration in 1896. The article directed attention particularly to the opinion of Sir Alexander Cockburn, Lord Chief Justice, in

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Trans. H. G. Crocker, p. 10. A distinction may of course be made between carriage of liquor for the purpose of smuggling into the country and carriage from one foreign port to another, which might reasonably be regarded as innocent. Carriage of liquor in either case is apparently forbidden by the Volstead Act as interpreted. It is difficult to see how the latter case might arise without the complicating element of the ships entering a United States port.

the case of *The Franconia* reported as *Queen v. Keyn*, 2 Exch. Div. 63, as expressing the correct legal conception of territorial waters as the writer believed it to be understood by the greatest English lawyers. The views therein expressed do not differ substantially from those maintained by de Lapradelle, who is probably the foremost champion of the opinion maintained by those writers on international law who emphatically deny the territorial character of the maritime belt and concede to littoral states in the interest of safety of the coasts only certain powers of control, jurisdiction, policing and the like, but not sovereignty.

The views of Sir Alexander Cockburn, as expressed in his opinion in *The Franconia* case, were adopted and advanced by Mr. Choate in his argument in the *Manchester* case. He contended there that the marine league distance had prominence merely because of its adoption as a boundary in certain agreements and treaties and from its frequent mention in text-books, but had never been established in law as a fixed boundary. It is apparent from the language of the Supreme Court in the *Manchester* case and from the character of its reference to the opinion of the Court of Crown Cases Reserved in *The Franconia* case, that the views of Sir Alexander Cockburn were not then adopted by our Supreme Court, and the insistence in the *Sea Stores* cases of complete sovereignty in the Territorial Sea brings into sharp relief and contrast the conflict between the views of that great jurist and those of our Supreme Court.

In view of this diversity of opinion, is the decision of the United States Supreme Court in the *Sea Stores* cases out of harmony with the views of recognized authorities on international law?

There are really two questions involved:—

First: What is the area within which the littoral state exercises jurisdiction?

Second: What is the nature of that jurisdiction? Is it territorial ownership, complete sovereignty or merely a series of servitudes of definite character?

First: *As to the area of the Territorial Sea.*—The Institutes declared that the sea is “*communis omnium naturali jure.*” Examples,
however, of certain states having prescribed rules of navigation to other states may be found in ancient history. The city of Tyre claimed the adjoining seas; the Romans gave directions to the Carthaginians; the Athenians prohibited the Median ships of war from entering their seas and also dictated to the Lacedæmonians.11

It was not until the early middle ages, however, that extensive claims to sea jurisdiction were made. The origin of such claims is attributed to the necessity of protecting maritime and commercial nations from piracy, and the idea of protection is still frequently invoked by writers on public international law as the basis of sea sovereignty. In 1299 Venice began to demand dues from all vessels sailing in the north Adriatic. Bologna and Ancona resisted, but Venice, by force of arms, established her sovereignty. In 1299 procurators of merchants and marines of Genoa, Spain, Germany, Holland, Iceland, Denmark and Norway, presenting a memorial to certain commissioners sitting in Paris to redress injuries inflicted on merchants of various countries by a French Admiral in English waters, recognized in England "the exercise of sovereign dominion."

Soon after the assertion of jurisdiction over the sea, attempts were made, especially in the writings of the early Italian jurists, to assign legal limits to maritime jurisdiction. One whose authority in the middle ages was very great, declared the law to be that jurisdiction extended to a distance of one hundred miles from the coast or less than two days' journey from it. Within this space the ruler had power to apprehend and punish delinquents just as he had on land. Another Italian jurist, a pupil of the first, allotted a wide limit to the maritime rights of the Prince of the adjoining territory, but reduced the space from one hundred to sixty miles, a distance which was supposed to be equal to one day's journey from the coast.

In the bulls of Alexander VI. of May 3rd and 4th, 1493, after the discovery of the new world, the lands and seas were divided between the Spaniards and Portuguese. The pretensions of these nations, based upon the papal bulls, were denied by England; and Queen Elizabeth refused to admit any right in Spain to deprive her subjects from freely navigating the waters of the Indies. A similar attitude on the part of England was maintained against the pretensions of Denmark at the Conference at Bremen in 1602.

Seven years later, in 1609, Grotius published his famous *Mare Liberum*. It was a time when some nations were asserting a wide maritime dominion. In the basin of the Mediterranean the Adriatic was treated as a part of the dominion of Venice; the Ligurian Sea

belonged to Genoa, and France claimed, to some not very well defined extent, the waters stretching outwards over the coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside of Ireland, but more vaguely claimed the Bay of Biscay and the Ocean to the north of Scotland. The latter claim was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. The Baltic was shared between Denmark and Sweden. Spain asserted dominion over the Pacific and the Gulf of Mexico. Portugal declared the Indian Ocean and all the Atlantic south of Morocco to belong to it.  

*Mare Liberum* was principally an attack upon the pretensions of the Portuguese, but it also inferentially denied the claims of the English, and Charles I. answered through Selden in a dissertation symmetrically styled *Mare Clausum*. Selden, while he combated the views of Grotius in the interests of England, admitted that a State could not forbid the navigation of its seas by other peoples without being wanting in the duties of humanity.

There were in operation at all times forces which constantly tended to a modification of the extremer views of the protagonists of these conflicting schools. The inhabitants of the littoral state were accorded special and even exclusive fishing privileges in the marginal waters. In time of war a neutral sovereignty was entitled to protection against the consequences of engagements fought in these waters. The protection of the revenue involved the necessity of preventing smuggling and similar considerations produced quarantine regulations. It was contrary to the experience of nations to deny the existence of the territorial sea, and even Grotius admitted its necessity for purposes of national protection. *Mare Liberum* sought to restrict its limits and was successful in so doing. As the seas became safer it was no longer necessary to keep their peace and the boundaries of the *Mare Liberum* were enlarged and those of the territorial sea diminished. In the first half of the eighteenth century Van Bynkershoek made definite the extent of the area of the marginal sea controlled by a littoral sovereignty in the maxim, "*Potestas terrae finitur ubi finitur armorum vis.*" In definite terms, the area was limited by the range of ordnance. He specifically denied the extension to one hundred miles, sixty miles, the two days' and one day journey of the Italian jurists, discussed and discarded the doctrine that "dominion over the sea extends as far as the eye can reach," defined by Philip

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13 Van Bynkershoek, *De Dominio Maris*, Cap. II.
15 "This measure has been championed by de Rayneval, *Institutes du droit de le nature et des gens*, Vol. I, p. 300, and Godoy, *Les limites de la mer terri-
II., King of Spain, in the Nautical Law which he gave to the Nether-
landers in 1563, and expressed his epochal conclusion as follows:—

"Wherefore on the whole it seems a better rule that the control of
the land (over the sea) extends as far as cannon will carry; for that is
as far as we seem to have both command and possession."

Fulton, a modern British authority,¹⁵ says:—

"The almost universal practice which had grown up regulating
the salute of a vessel coming within range of a battery on a foreign
coast had prepared the way for the acceptance of the doctrine. It
was a recognition that the vessel had passed within the sphere of
territorial authority of the particular State. It was the rule in Eng-
land at least that 'the sea should salute the land,' and the range of
guns determine the limit within which the salute ought to be rend-
ered."

Beyond the reach of cannon no salute was expected; within it,
usage, international courtesy, or the law required it. No foreign ship
with its flag aloft could come within range of an English fort or
castle without exposing itself to the risk of a shot.

The gunshot limit had also been long established in connection
with another international relationship—namely, the right of visita-
tion of neutral vessels in the open sea. Many treaties had been made
which stipulated that a visiting ship was not to approach nearer
than within cannon shot and was then to send one of its boats with a
few men to conduct the examination necessary.

The doctrine of Van Bynkershoek expressed in the aphorism
quoted, while eventually accepted almost everywhere, did not command
immediate assent. Publicists who came after him in the eighteenth
century did not as a rule adhere to it as the sole principle for delimit-
ing the territorial belt. Nor was there any unanimity among the
international authorities on the distance that might be regarded as
the reach of guns from the coast, and it was not until 1789 that
Von Martens, one of the greatest authorities on international law,
gave the equivalent distance as three miles and declared this distance
to be the least that a nation ought to claim as the extent of its domin-
ion in the neighboring sea.

The United States were the first power to adopt one sea league as

¹⁵Fulton, The Sovereignty of the Seas, p. 556.
the equivalent of a gunshot from the shore. When the war between Great Britain and France broke out in 1793 the United States found it necessary to define the extent of the line of territorial protection which they claimed on their coast in order to give effect to their neutral rights and duties. Washington, who was then President, instructed the executive officers to consider the line restrained for the time being to be the distance of one sea league or three geographic miles from the shores. In the next year Congress passed a law authorizing the district courts of the United States to take cognizance of all captures made within one marine league of the American shores.\(^{16}\)

The new boundary of one marine league or three geographic miles as the equivalent of the gunshot limit was introduced into English law and practice shortly after its adoption by the United States, through the decisions of the High Court of Admiralty in questions affecting the extent of neutral waters. The decisions were those of Sir William Scott, who in 1800 in the case of Twee Gebroeders adopted both the gunshot limit and the distance of three miles as its equivalent for the boundary of neutral waters, and repeated the holding in 1805, in the case of The Anna, which was captured at the mouth of the Mississippi by a British privateer. Fulton says that it is in these decisions of the High Court of Admiralty that the three mile limit originated in England. They furnished the legal precedents which regulated subsequent practice. The gunshot limit was a doctrine borrowed from continental publicists and three miles as its equivalent from recent American practice. Both were previously unknown to English law.\(^{17}\)

Modern ordnance has materially increased cannon range beyond the limit attained in the early part of the eighteenth century, but the three mile limit persists despite the international logicians and is today, as the United States Supreme Court says, recognized elsewhere than with us. Even where cannon range is still expressed as the extent of the jurisdiction of the littoral state over the Territorial Sea, the limit is definitely measured as three geographic miles from the shore. The alternative declaration, cannon shot or three miles, is to be found in the Russian law of 1869 on Captures and Re-captures and in the Japanese declaration of neutrality in 1870, at the time of the Franco-German war. At the Hague conference on North Sea Fisheries, October 10th, 1881, it was at the limit of three miles that the delegates fixed the confines of the Territorial Sea. At the Paris conference on the neutralization of the Suez Canal and of the Territorial Sea thereto approaching, the Russian Government tried in vain...

\(^{16}\) Fulton, *The Sovereignty of the Seas*, pp. 573, 574.
\(^{17}\) Fulton, *The Sovereignty of the Seas*, pp. 576, 577.
to have the limit extended beyond the three miles. It was at three miles that the Paris Conference and the Constantinople Treaty on the Suez Canal, October 29th, 1888, stood firm. The Behring Sea Arbitral Tribunal affirmed "three miles as the ordinary limit of the Territorial Sea." The French decree of June 12th, 1896, on the conditions of admission and sojourn of ships in time of war, preserved the distance of three miles for the Territorial Sea. The English Territorial Waters Act of 1878, passed as a result of the decision of the Court of Crown Cases Reserved, in The Franconia case, extended the justice of the shore to three miles out.

Great Britain, France, Austria, the United States of America and other States, in municipal laws and international treaties, accept the breadth of one marine league as the range of the Territorial Sea.

It is a fair statement to make, therefore, that by the overwhelming usage and practice of nations, the three mile limit is accepted as the boundary of the Territorial Sea. 18

I have not attempted to discuss the methods adopted for determining when bays are to be regarded as part of the adjacent state. The limit of ten miles from headland to headland is generally accepted. 19

Our own authority, Mr. John Bassett Moore, now a Judge of the World Court, suggests reasons both of convenience and of safety for the adoption of that limit. In his opinion, the ten mile line is a practical rule:

"The transgression of an encroachment upon territorial waters by fishing vessels is generally a grave offence, involving in many instances the forfeiture of the offending vessel, and it is obvious that the narrower the space in which it is permissible to fish the more likely the offense is to be committed. In order, therefore, that fishing may be both practicable and safe and not constantly attended with the risk of violating territorial waters, it has been thought expedient not to allow it where the extent of free waters, between the three mile line drawn on each side of the bay, is less than four miles. This is the reason of the ten mile line. Its intention is not to hamper or restrict the right to fish, but to render its exercise practicable and safe. When

18 The extent to which three miles has been adopted by international usage is indicated by the declarations of neutrality during the world war. In the Italian declaration 6 nautical miles were fixed. Norway, which had formerly claimed 4 miles, was forced to limit its declaration to 3 miles. Sweden insisted on 4 miles. Note of March 5, 1915, to American Secretary of State Bryan. Most of the neutral powers, however, adopted 3 miles.

19 This line from headland to headland is regarded as a continuation of the coast line for the purpose of measuring the marine league of marginal sea seaward from such line as a base. The Institute of International Law recommended 12 miles in accordance with its recommendation of a general extension of the marginal sea to 6 miles. (Crocker's Collection, p. 155.) Certain bays are historically accepted as territorial waters, although more than 10 miles across, e.g., Conception Bay, Newfoundland, Chesapeake Bay, Delaware Bay, and the Gulf of Fonseca.
fishermen fall in with a shoal of fish the impulse to follow it is so strong as to make the possibility of transgression very serious within narrow limits of free waters. Hence, it has been deemed wiser to exclude them from space less than four miles each way from the forbidden lines.  

In the enforcement of our prohibition statute there is contemporary history indicating that the Executive Department of our Government, as well as the judicial, recognizes the three mile limit. From 1799 Congress has provided for the enforcement of our Revenue Law within four leagues of shore “against vessels bound to our ports.” Such provisions are contained in the present Act of 1922 relating to Customs Duties. Probably every nation, as well as our own, has revenue enactments authorizing the boarding of inbound foreign ships and forbidding the unloading and transhipping of cargo at distances in excess of the three mile limit except in compliance with specified regulations. Our own statutes prescribe a distance of four marine leagues or twelve geographic miles within which this jurisdiction may be exercised.

\[9^9\] Crocker’s Collection, p. 119; Annuaire de l’Institute de droit international, Vol. 13, 1894-5, p. 146.

[21] These statutes have been supported on the ground that a nation has a general right to protect itself even when such protection requires action beyond the three-mile limit. Church v. Hubart, 2 Cranch, 187, is the leading judicial authority for the principle. A celebrated diplomatic example is thus recounted by John Bassett Moore. “The leading illustration of the distinction that has sometimes been drawn between the exercise by a nation of its protective power and the claim of exclusive possession and jurisdiction, is found in the position taken by the French Government in the case of the “Alabama” and the “Kearsarge” in 1864. When the “Kearsarge” appeared off Cherbourg, France, in pursuit of the “Alabama,” which was then lying in that harbor, M. Drouyn de J’Eusys, the French Minister of Foreign Affairs, who had been advised that the “Alabama” intended to meet the “Kearsarge,” and that the ships probably would attack each other as soon as they were three miles off the coast, made to Mr. Dayton, Minister of the United States, in an interview, the following statement:

“That a sea fight would thus be got up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in those days. That the distance to which the neutral right of an adjoining Government extended itself from the coast was unsettled, and that the reason of the old rule, which assumed that three miles was the outermost reach of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance from their coast would be offensive to the dignity of France and they would not permit it.”

Mr. Dayton replied that: ‘No other rule than the three-mile rule was known or recognized as a principle of international law,’ but that, ‘if a fight were to take place and we would lose nothing and risk nothing by its being further off, I had, of course, no objection.’ Mr. Dayton immediately advised Captain Winslow of the “Kearsarge” by letter, of the representations of Mr. Drouyn de J’Eusys, and added:

‘Under such circumstances, I do not suppose that they would have, on principles of international law, the least right to interfere with you if three miles off the coast; but if you lose nothing by fighting six or seven miles off the cost instead of three, you had best do so. You know better than I . . . whether the pretense of the “Alabama” of a readiness to meet you is more than a pretense, and I do not wish you to sacrifice any advantage if you have it. I suggest only that you avoid all unnecessary trouble with France; but if the “Alabama” can be taken without violating any rules of international law and may be lost if such a principle is yielded, you know what the government would expect of you. You will, of course, yield no real advantage to which you are
By order of the Treasury Department during the summer and fall of 1922 some twenty ships were seized outside the three mile limit under the provisions to which I have referred.

In the case of *Grace v. Ruby*, the federal district court in Massachusetts asserted jurisdiction over a British schooner lying off the coast beyond the three mile limit but within the four league limit unlawfully unloading a cargo of intoxicating liquors. A number of other vessels were seized under similar circumstances by the federal authorities.

While these activities of the Treasury Department were in progress Secretary Hughes suggested to Great Britain a proposal for a treaty between the two nations under which the authorities of each would be authorized to exercise, beyond the three mile limit of territorial waters, the right of search for the purpose of preventing the smuggling of liquor into the United States. The proposal for such a treaty was submitted on June 26th. On October 16th the British rejected the American Government’s proposal, basing their refusal on the time-honored principle under which the British Government has opposed the search in time of peace of British vessels anywhere on the high seas outside the three mile limit. About the same date Great Britain also protested against the seizure of the Canadian schooner *Emerald* eight miles off the Atlantic coast. In the meantime, the President had ordered a modification of the activities of the Prohibition Navy outside the three mile limit. The *Emerald* was released October 27th, by order of Secretary Mellon acting on the request of Secretary Hughes and on November 10th, 1922, Secretary Mellon ordered the release of all ships seized beyond the three mile limit entitled, while you are careful to so act as to make uselessly, no unnecessary complications with the government.’

This letter was duly delivered to Captain Winslow, but the messenger by whom it was sent found on his arrival at Cherbourg, that the Prefect had already made the wishes of the French Government as to the distance within which a fight should not occur. The fight took place on the morning of June 19, 1864. When the “Alabama” left the harbor she was accompanied by a French man-of-war, apparently for the purpose of seeing that the battle was not begun too near the shore. It began soon after the man-of-war left the “Alabama.” The “Kearsarge” was then lying probably from seven to nine miles off shore. The fight lasted for an hour and a half, and the “Alabama,” when she began to fill, made for the coast, from which she was five miles distant when she sank. In acknowledging the receipt of Mr. Dayton’s report of the transaction, Mr. Seward said: ‘I approve of your instructions to Captain Winslow. It will be proper for you, nevertheless, while informing M. Drouyn de l’Huys that I do so in a spirit of courtesy towards France, to go further and inform him that the United States do not admit a right of France to interfere with their ships of war at any distance exceeding three miles. Especially must we disallow a claim of France so to interfere in any conflict that we may find it necessary to wage in European waters with piratical vessels like the “Alabama,” built, armed, manned, and equipped, and received as a belligerent in opposition to our persistent remonstrances to commit depredations on our commerce.’

*John Bassett Moore, Digest of International Law, Vol. 1, p. 723.*

*283 Fed. 475.*
where there was no evidence of boats going ashore. The attitude of 
the British Government is in doubtful harmony with the British 
Hovering Acts of 1736 and 1784, which assert jurisdiction for revenue 
purposes to a distance of four leagues from the shore. There are Acts 
setting up a similar claim for health purposes. In 1797, 1799 and 
1807 our Congress legislated to the same effect and many other 
maritime nations have embodied like provisions in their laws. Dana, 
in his edition of Wheaton's International Law, argues, however, that 
the right to make seizures beyond the three mile limit has no exist-
ence in modern international law and maintains in regard to the Act 
of Congress of 1797 that it did not authorize the seizure of a vessel 
outside the marine league, but only of seizure and punishment within 
that limit for certain offences committed more than three miles, but 
less than twelve from the shore.

So much for the extent of the area of the Territorial Sea. The 
general recognition that it comprises "a marginal belt of the sea 
extending from the coast line outward a marine league or three 
geographic miles" amply sustains the declaration to that effect in the 
Sea Stores cases.

This brings us to the consideration of the sovereignty of the littoral 
power over the maritime belt. Oppenheim, cited as one of the authori-
ties for the view expressed by the United States Supreme Court, in the 
Sea Stores cases, declares that, while no unanimity exists with 
regard to the nature of the sway of the littoral State, "many writers 
maintain that such sway is sovereignty, that the maritime belt is a 
part of the territory of the littoral state, and that the territorial 
supremacy of the latter extends over its coast waters. Whereas it is 
nowadays universally recognized that the open sea cannot be State 
property, such part of the sea as makes the coast waters would, accord-
ing to opinion of these writers, actually be the State property of the 
littoral states, although foreign States have a right of innocent pas-
sage for their merchantmen through the coast waters."

This is the view taken by our Supreme Court, in contradistinction 
to that adopted by other writers of great authority, who emphatically 
deny the territorial character of the maritime belt and concede to 
the littoral state in the interests of the safety of the coast only certain 
powers of control, jurisdiction, police and the like, but not sovereignty. 
"This is purely erroneous," says Oppenheim, "since the real facts 
of international life would seem to agree with the first mentioned 
opinion only."

23 For a review of the events referred to, see note Columbia Law Rev., Vol. 
XXIII., No. 5, p. 472.

A substantial part of the writings of authorities on international law is devoted to these antagonistic contentions. Elaborate distinctions are drawn between imperium and dominium, potestas and jurisdiction. Unlike the history of the three mile limit, it is at least doubtful whether these distinctions have been resolved into a universally accepted doctrine as to the character of the jurisdiction over the Territorial Sea vested in the littoral sovereignty. At the meeting at Paris of the Institute of International Law, held in 1894, it was proposed to adopt as Article 1 of a suggested modification of the rules concerning the status of the Territorial Sea that “the State is sovereign over a zone of the sea which washes the coast.” The article as adopted by the Institute changed the phraseology so as to read, “The State has a right of sovereignty,” although it was pointed out that a right of sovereignty is less than sovereignty, just as a right of property indicates less than absolute property. The action of the Institute is characteristic of the caution or timidity with which the subject of the extent or character of the jurisdiction over the Territorial Sea is usually approached, but it is very doubtful that any power will hereafter adopt a position in contradiction of that declared by the United States Supreme Court in the Sea Stores cases, for denial of the correctness of that position necessarily involves a declaration of a definite character as to the nature of the position to be affirmed.

One result of the Supreme Court’s decision, therefore, would seem to be an acceptance of the doctrine announced by the Court that the jurisdiction over the Territorial Sea implies territorial ownership of that sea up to its accepted limits.

Are there any qualifications on such ownership? There is at least one: “The common right of navigation,” as it is called by the Supreme Court in the Manchester case, or the right of innocent or inoffensive navigation as international jurists describe it. The maritime belt is open to merchantmen of all nations for inoffensive navigation, cabotage, or the coastwise trade excepted, “and it is,” says

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25 Du Vigneaux: *Le Droit de l’Etat sur la Mer Territoriale* (p. 13, seq.) classifies writers on the subject into those advocating, (1) a right of property, (2) of sovereignty, (3) of “mitigated sovereignty or jurisdiction,” and (4) of costal servitudes in the littoral state.

26 *Annuaire de l’institut de droit international*, vol. 13, 1894-5, p. 323 (Crocker, p. 146).

27 It would seem that the Supreme Court might have decided the case before it upon the opposite theory. Even writers who deny the extent of the sovereignty of the littoral state over the marginal sea admit that harbors and bays within fauces terrae are subject to that sovereignty (Twiss, *The Law of Nations considered as Independent Political Communities*, p. 222, sec. 179; Crocker’s Collection, p. 451, Nys: *Le Droit International*, Vol. I, p. 411 (Crocker, p. 219). As the vessels affected in the Sea Stores cases were probably all in port when the effort was made to enforce the law upon them, the broader question of sovereignty in the marginal belt may not have been necessarily involved.
Oppenheim, “the common conviction that every State has by customary law a right to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State.” Only one writer, Klüber, upholds the exclusive right of the littoral sovereignty to the navigation of the Territorial Sea and affirms that “the State could not be accused of injustice if it prevented the passage of vessels over the sea under the cannon of its coast.”

What is the nature of this right of innocent navigation with respect to territorial ownership? It may not improperly be described as a servitude or easement, the dominant tenement being the sea outside the three-mile limit and the servient tenement the territorial waters of the littoral power.

It is not mere phraseology or explanation which recommends this doctrine in contradistinction to the theory supported by De Lapradelle, with its multitude of servitudes in favor of the littoral State imposed upon the belt of marginal waters considered as a part of the common sea. Such an accumulation of servitudes, involving practically every element with which the littoral State is concerned for its protection and defence, the collection of its revenues, and the health and welfare of its inhabitants, leaves to the community of nations no residuum of rights in the Territorial Sea, except the right of innocent navigation.

The territorial ownership of the littoral State must have definite geographic limits. Our Supreme Court has determined that such ownership includes a belt of marginal waters measured by a marine league from low water. Beyond that the sea is the property of all nations, res communis, and by virtue of that common ownership there is constituted a proprietorship in all to which the right of inoffensive passage through the territorial waters of each of them is appurtenant. It is only inoffensive passage, however, which is permitted. Into such waters may not come those whose mission or errand is to do things that are prohibited by the law of the littoral State. Were it otherwise, the sovereignty of the land itself would be flouted, if not denied: It follows that the determination of what constitutes a violation of the right of inoffensive passage must be the exclusive prerogative of the littoral power. For the protection of the sovereignty, therefore, the littoral State cannot be satisfied with less than complete authority over the Territorial Sea, and this must imply “territorial ownership.”

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