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SITUATION I

MARITIME JURISDICTION

States X and Y are at war. Other States are neutral. An act of Congress of the United States, February 19, 1895, provided for the delimitation of the high seas from rivers, harbors, and inland waters. Lines were later drawn on maps published in accordance with this authorization. Some of these lines were 10 miles off the coast.

(a) (1) The Lark, a vessel of war of X, passes within these outer lines and when 8 miles off the coast summons merchant vessels of the United States and of other States to stop for visit and search. The master of each of these vessels appeals for protection to the authorities of the United States on the ground that the vessels are within the lines drawn under the act of 1895.

(2) The Thrush, a vessel of war of Y, attacks the Cygnet, a vessel of war of X, on the following day at the same location, and the commander of the Cygnet protests on the ground that his vessel is in neutral waters.

(b) The Cygnet by gunfire drives the Thrush 12 miles off the coast. The Thrush continues the battle using dangerous gas. Some of this gas floats within 3 miles of the United States and life there is endangered.

(c) Later the Thrush, still having a large amount of dangerous gas on board, is about to enter a harbor of the United States. The port authorities decline to permit entrance with the gas on board. The commander of the Thrush protests, as he is short of fuel to continue his voyage to a home port.
What action should the authorities of the United States take in each case?

**SOLUTION**

(a) (1) The right of visit and search beyond the 3-mile limit upon the high sea is an undeniable belligerent right and the authorities of the United States can afford no protection against its lawful exercise.

(2) The protest of the Oygenet is not valid, as these waters are not, for the purposes of neutrality, within the jurisdiction of the United States.

(b) The authorities of the United States may use the means at their disposal to prevent the diffusion of dangerous gas within 3 miles of the coast.

(c) The authorities of the United States may exclude from its harbors vessels having dangerous gas on board, or may prescribe the conditions of entrance thereto for such vessels.

**NOTES**

**Historical.**—The development of a clearly defined law of maritime jurisdiction has been slow. As the desire to control a utility or a presumed utility would ordinarily underlie the exercise of jurisdiction, the attitude toward maritime jurisdiction would vary with the use of the sea. It might be possible that there would be no conflict of jurisdiction between States when one State used the sea merely as a source of food supply while another regarded it as an effective barrier against hostile invasion. The attitude of States toward jurisdiction, or the exercise of State authority over the sea has rested upon different bases. Sometimes the main reasons for the exercise of authority have been for self-defense, sometimes for economic or other reasons.

In the account of creation in the first chapter of Genesis, God is represented as saying, "Let us make man in our image after our likeness; and let him have domin-
ion over the fish of the sea.” This seems to be a general injunction to the effect that fish are to be for man. The problem as to the limits of rights in fish when different men or groups of men claim the fish still remains unsettled. Man has been given dominion on the earth; he has shown himself able to exercise dominion, and there has been disagreement as to the exercise of this dominion. The water area of the earth from its very nature is less subject to permanent control than the land area. The advantages of permanent control would not ordinarily be equal to the effort. In early times this was particularly true of the sea, which was unknown and feared.

From the works of ancient writers it is evident that the sea was often regarded as susceptible of possession in the same manner as land. There were also early declarations, as among Roman jurists, that “the use of the sea is as free to all men as the air.” Et quidem naturali jure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. (Inst. 2, I, 1.)

The claims of the Phœncians, the Persians, the Greeks, the Macedonians, and others over the Eastern Mediterranean Sea gave rise to many struggles as did the claims of Carthage and Rome to the mid-Mediterranean. Other rivalries for control of the Mediterranean followed to which the Crusades added importance.

The idea of maritime sovereignty came to be the prevailing one, however, during the Middle Ages. The prevalence of lawlessness at sea in the form of piracy and otherwise during the Middle Ages required a strong hand to suppress. It was natural that a state should protect its neighboring trade routes, and its own traders, as well as foreign traders who also would gladly yield obedience in return for this protection. The commerce of the Italian state was, during this period, very important. The marriage of the sea celebrated by the city of Venice from the latter part of the twelfth century was emblematic of the authority which that city had at the time over the Adriatic. Venice from time to time
claimed and exercised the privilege of excluding others from the use of the Adriatic. The restrictive measures were usually taken with a view to protecting trade and commerce in these early days.

The Italian writers even before Bartolus maintained that cities like Venice and Genoa having ports had jurisdiction and sovereignty in the neighboring sea to 100 miles and even farther if it was not near another State.

With the traversing of the great seas by voyages of discovery and commerce and the opening of the Western Hemisphere new problems arose. The Portuguese had cruised along the coast of Africa and to India. Spain was also striving for maritime power and Columbus discovered America under Spanish patronage. The papal bull of Alexander VI in 1493 confirmed to Ferdinand and Isabella all lands found or to be found west of a meridian 100 leagues west of the Azores. Spanish maritime power was unable to maintain exclusive control of the seas. The English, Dutch, and French sought control of the sea.

Even as early as the twelfth century the Black Book of the Admiralty (1.58) refers to the sea belonging to the King of England—"la mer appartenant au roi d'Angleterre." Other States also claimed extended maritime jurisdiction and it was inevitable that with the growth of maritime commerce and the use of the sea conflicts would arise.

The documents of the late Middle Ages show many conflicting claims to maritime jurisdiction. Not merely were there conflicting claims but often the attempt to maintain the claims resulted in the use of force and varied reprisals. Occasionally treaties were made in regard to the use of the sea, but till modern times treaties and practice showed little tendency toward the recognition of fundamental principles of maritime jurisdiction.

Rulers in their titles and proclamations sometimes asserted dominion which was never exercised. Power was
often exercised arbitrarily because there were no accepted bounds of authority. After the Middle Age period appeal to precedent and custom in support of State acts became more common. Claims and counter claims fill many pages of royal proclamations and decrees, and of argumentative treatises. It was not till the seventeenth century that the questions of maritime jurisdiction in the modern sense became especially prominent. The titles, king of the sea, lord of the ocean, successor to Neptune, had been used by different rulers and in varying sense throughout many centuries and medals had been struck proclaiming these titles.

Hugo Grotius had prepared in 1604–5 a treatise De Jure Praedae which was in the nature of a brief for the Dutch East India Co. This remained unknown till 1864 and was published in 1868. Chapter XII of this brief appeared anonymously in 1608 as Mare Liberum. It defends the rights of the Dutch as against the Portuguese pretensions particularly in the East Indian waters. Grotius endeavors by reference to the writers of Greece and Rome, to the Holy Scriptures and other sources to maintain that no nation could have exclusive jurisdiction over the sea and its navigation and trade.

Gentilis seems to have been unduly hopeful when writing in the early seventeenth century he expressed himself in Hispanicae Advocationis, 1613, Book I, Chapter VIII, De marino territorio tuendo, saying “Fruantur Hollandi, fruantur mari omnes, sed citra injuriam aliæ jurisdictiōnōrum. Sed et meminerint omnes, esse et modum marini, atque omnis itineris. Meminerint, alia olim indistincta, quae distincta sunt Hodie, et cautissime servandum distinctionem juris gentium dominiorum atque jurisdictionum.” “Let the Dutch enjoy, let all enjoy the use of the sea, but without violation of another’s jurisdiction. On the other hand also let all remember there is likewise a limit to marine as well as to other journeying. Let them remember that other things once unsettled are now
settled and that the demarcation as to dominion and jurisdiction of the law of nations should be most carefully observed.” In this chapter Gentilis also affirms territory consists both of land and water: “At ego, quod olim scripsi in libris bellicis, territorium et de terris dici, et de aquis.” In the discussion following this statement Gentilis makes the distinction between territory and jurisdiction and shows that it has been recognized.

Grotius sums up the best opinion of the early days of the seventeenth century, though not following Gentilis, saying:

It would seem that dominion over a part of the sea is acquired in the same manner as other dominion; that is, as said above, because it appertains to a person or to a territory—as appertaining to a person when he has a fleet, which is a sea army, in that part of the sea; as appertaining to territory in so far as those who sail in the adjacent part of the sea can be commanded from the shore no less than if they were upon land. (De Jure Belli ac Pacis. Lib. II., c. 3, 13.)

The Mare Liberum of Grotius did not attract immediate attention. Séraphin de Freitas made a clever reply in behalf of the Spanish, which was published in 1625.

The Mare Clausum seu de Dominio Maris by John Selden published in 1635 particularly called attention to the Mare Liberum of Grotius and joined issue with the positions taken by Grotius. Selden endeavors with many supporting references to prove that the sea may be subjected to the private dominion or ownership as well as the land and that the sea about Great Britain has always belonged to Great Britain.

Other pamphlets and books on either side of the question appeared. Graswinckel, in an ostensible reply to Burgus, who in 1641 had defended Genoa’s claim to dominion of the Ligurian Sea, attacked Selden. Graswinckel also replied to Welwod. The works of Boroughs, Loccenius, Burman, von der Reck, Schook, Boxhorn, and others as well as a translation of Selden’s Mare Clausum were published about the middle of the
seventeenth century. Every possible source was cited in support of opposing points of view. Many of these books were vitriolic in their references to those whose views were not in accord with their own. Discussion of maritime jurisdiction reached its maximum in the seventeenth century and continued active through the first half of the eighteenth century. More and more with the recognition of the principle of equality of states and the development of the idea that the sea was res nullius there was need of definition of maritime rights.

From the latter part of the seventeenth century the Roman law, the commentaries, and the classical writers of Greece and Rome were less the bases upon which writers rested their arguments. Texts upon the laws of war, on the laws of nations and of nature, reference to practice and detailed treatment of special topics multiplied and had to be considered. The early idea of property in the sea was that of complete dominion, involving the right to use, to enjoy, or to alienate to the exclusion of others, usus, fructus, abusus. This is what Plutarch considers Pompey to have attained in 67 B.C., calling it "not a sea-command but an out-and-out monarchy and irresponsible power over all men. For law gave him dominion over the sea this side of the pillars of Hercules." (Plutarch, Pompey XXVI.) The Middle Age period generally reaffirmed earlier ideas. The revolutionary ideas as to the laws of the seas came in the seventeenth century, though germs of these ideas can be found in earlier periods.

Codes of sea law for merchants had of necessity grown up, otherwise commerce would have been impossible. These codes were not always in accord with local law but were observed for mutual advantage. As the Law of Rhodes served merchants in early times so such codes as the Consolato del Mare served the later ages.

It came to be realized that limits must be set to the exercise of authority of one state if other states bordered
upon the same sea. Some admitted that any state, whether large or small, weak or strong, was entitled to some authority over the marginal sea which touched its coasts. Accordingly if two states were upon opposite sides of a sea, as Great Britain and Holland on the opposite sides of the North Sea, there must be a line limiting the extent of the authority of each state. Even Selden, referring to the Atlantic and Arctic Oceans, admits of that area, "it can not all be called British seas"; yet "the nation of Great Britain has very large rights and privileges of their own in both seas" (Mare Clausum, Bk. 1. c. 2). Cicero had held that the main body of the sea should be common to all. This was admitted by some of the ardent advocates of the mare clausum, while certain supporters of mare liberum claimed the open sea extended to the shore. Gradually, with the development and recognition of mutual rights and obligations, extreme nationalistic claims were found to be of little advantage or to be of positive disadvantage. Grotius in 1625 had spoken of jurisdiction of the sea as "ratione territorii, quatenus ex terra cogi possunt, qui in promixa maris parte versantur, nec minus quam si in ipsa terra reperirentur" (De Jure Belli ac Pacis, Lib. II. c. 3.13).

Bynkershoek at the beginning of the eighteenth century in his De Dominio Maris proposed a formula not unlike earlier ideas but brief, which appealed to man's sense of appropriateness. He declared "potestatem terræ, finiri, ubi finitur armorium vis." (cap. 2.) "Pronunciamus mare liberum, quod non possidetur vel universum possideri nequit, clausam, quod post justam occupationem navi una pluribusque olim possessum fuit." (cap. 7.) This principle set forth by Bynkershoek in 1702 was not a new principle. Nearly one hundred years before the Dutch representative arguing against the proclamation issued by James I in 1610 in regard to fishing off the English coast had maintained "2. For that it is by the laws of nations, no prince can challenge fur-
ther into the sea than he can command with a cannon except gulfs within their land from one point to another.
3. For that the boundless and rolling seas are as common to all people as the air which no prince can prohibit.”

The treatise of Bynkershoek marks a transition from the abstract discussion of the extent of authority of an adjacent state over the sea to a concrete basis for the authority, namely the ability to exercise the authority. Earlier writers had found divine law, natural law, dicta of the classics and of Roman law, practice of certain states, the claims of rulers, bases for their positions; Bynkershoek reduced his formula to the simple basis of effectivity. The early writers had approved in some cases unlimited control, necessity (Molloy), the horizon (Valin), 100 miles (Bartolus), 60 miles (Bodin), 2 days journey (Loccennius), etc. Bynkershoek’s proposition to limit jurisdiction by the range of cannon from the shore was therefore welcomed. The range of cannon in the early eighteenth century being about 3 miles, the marine league became a commonly accepted limit of maritime jurisdiction.

Early in the eighteenth century the claims of control of the Indian seas, the routes to America and other wide ocean areas were for the most part discontinued, but just how far a state had jurisdiction from its coast was not settled even though Bynkershoek’s formula was so well received.

Other theories had from early times been put forward for control over the sea. The needs of the adjacent State were put forward by Sarpi in support of the claims of Venice. Scandinavian claims to extended control were supported by the argument that the nature of their mainland and their dependence upon the sea required control of a large maritime area. The configuration of the coast, had been put forward as a basis for authority over the sea. Long exercise of control was referred to as evidence that control should be continued.
Treaties, judgments of courts, etc., were put forward to maintain claims.

During many years there had been growing up a tendency to differentiate in the exercise of jurisdiction according to the nature of the end to be secured. Claims to extended jurisdiction to satisfy national and royal vanity were, however, often merely empty words.

While the Roman law showed uniformity in principles relating to dominion of water areas, later legislation showed great diversities. National ideas, ambitions, and exigencies were reflected in laws. While Roman law phraseology was sometimes retained, the meaning of the words was not uniform. Claims were sometimes more or less extended according to the power of the ruler of the adjacent territory to enforce his claims. Sometimes a ruler would fight for abstract claims but usually they had to find an ostensible support in some national advantage such as security from attack.

Some of the extreme claims were first waived by allowing navigation or simple passage of vessels along the coast waters within the area claimed by the State. Salutes by lowering of flag or of sails by foreign vessels were sometimes required even when navigation was otherwise free. It was one of the early claims that the passage of a vessel over the sea leaving only the wake which soon disappeared was not to be denied by the adjacent State because it in no way injured the adjacent State. The wind that filled the sails of the passing ship did not take away from the breeze that touched the shore.

There might, however, be just claim to fisheries along the coast or to the salt, minerals, and other deposits upon the sea bottom adjacent to a State. The fishery rights in marginal waters were among the earliest to be asserted and maintained. When fish constituted an important part of the food supply of Europe, particularly during the Middle Ages, fishing rights were the bases of many controversies and the transportation of fish gave rise to other controversies. Records of the thirteenth century
show attempts of States to control fisheries along their coasts. Long before the questions of jurisdiction were of importance, fisheries were the subject of control.

There were many pamphlets put forth during the seventeenth and eighteenth centuries supporting or denouncing rights at sea and particularly fishing rights. The rulers had by laws and decrees, particularly during the seventeenth century, regulated fishing and trade in fish. There had been many earlier decrees upon the same subject but they were not so detailed as some of the eighteenth century decrees, which even regulated the sale of oysters in the shell. Decrees, ordinances, etc., prescribed for licenses, permits, registration, place of fishing, nationality of crew, days of fishing, Sundays and fast days, and a French Arrêt du Conseil d'État du 20 Mars 1786, Art. VI, provided favors for foreigners who married women of Marseille and also that they "soient reçus membres de la communauté des pêcheurs français aussitôt après leur dit mariage." These decrees did not, however, prescribe the limits of the marginal seas, but only asserted rights in these seas so far as fishing was concerned.

Though much had been written, and treaties had been made and judgments had been rendered, the questions of jurisdiction were far from completely settled at the beginning of the nineteenth century. Rayneval in the preface to his work De la Liberté des Mers in 1811 said, "L'Ocean seul semble être abandonné aux caprices des nations, à l'instabilité ou à l'exagération de leurs vues, de leurs prétentions et de leur puissance." (P. VII.)

This uncertainty of the law before the nineteenth century was natural owing to the continual opening of new maritime areas by exploration and trade which led to readjustments in ideas as to rights. During the eighteenth century there had been developing also the distinction between belligerent and neutral rights at sea. These rights were somewhat defined by the armed neu-
tralities of 1780 and 1800 and by the American neutrality proclamation of 1793 and the act of Congress of 1794. It came to be held that a state which took no part in a war should not be liable to injury and consequently no act of hostility should take place within range from the shore of guns on the vessels at sea, which was held to be 3 miles.

In all the discussions, opinions, and writings there was little difference of opinion as to the jurisdiction of a state over the shore itself upon which the sea washed. The Roman law granted this even to the lowest tide mark. (Inst. II, 1, 3.) The same principles was introduced in domestic legislation in different states as in the ordinances of France of 1534, 1596, and 1581, "Sera réputé bord et rivage de la mer tout ce qu'elle couvre et découvre pendant les nouvelles et pleines lunes, et jusqu'ou le plus grand flot de mers se peut étendre sur les grèves." In some states as in England the area between high and low-water mark was held to be within the jurisdiction of the maritime authorities at high tide and of the land authorities at low tide, but it was rarely denied that the authorities of the adjacent state had jurisdiction to the low-water mark. This ancient principle seemed at the beginning of the nineteenth century about the only one to which there might be said to be adherence.

During the nineteenth century there were many attempts by writers of great ability to set forth principles which would be generally accepted, but the development of commerce and nationalism introduced new problems as had exploration and discovery in earlier periods.

Property on the sea had from earliest times been exposed to danger. The forces of nature had often destroyed such property with the lives of those who accompanied it leaving no trace. The temptation to man to take property on the sea had been too great to be resisted apparently even in periods reaching far back of recorded history. Pirate communities vied with each other and their leaders lived in state. In the days of Pompey
pirates controlled the Mediterranean even to the Columns of Hercules. Pompey in 67 B.C. by the lex Gabinia was given for 3 years unlimited command of the Mediterranean and for 50 miles along its shores. With this authority, and within 3 months, he cleared the Mediterranean of pirates. They returned and later rulers had to repeat the campaigns of Pompey in order that the Romans might call the Mediterranean mare nostrum.

Private citizens were sometimes authorized by a state to make reprisals upon the citizens or property of the citizens of another state. Their acts were often very like those of pirates. Other states demanded tribute at times which tribute differed very little from the exactions of pirates. Privateering in the time of war added another peril to seafaring life. The attitude of states toward these acts varied and the exercise of control over the sea varied correspondingly. The slave trade gave rise to other differences in law and practice among the so-called civilized states. Impressment upon the sea continued through the early days of the nineteenth century. At the beginning of the nineteenth century it would be possible to find precedents or to cite authorities for almost any claim a state might wish to make as to jurisdiction over the sea.

The rapid development of the idea of neutrality in the nineteenth century following the armed neutralities of 1780 and 1800 introduced new problems. These problems were further complicated by the introduction of new means and methods of warfare. Three miles became a very short range for cannon and many wished the range extended.

_Eighteenth century treaties._—Almost as soon as there came to be any agreement upon territorial waters, treaties were made. The eighteenth century saw the gradual development of the idea of a marginal sea and the cannon shot was the basis of measurement. This followed the idea of Bynkershoek in 1702 of control as far as cannon shot could reach.
The treaty between France and Russia of January 11, 1787, provided:

Art. 28. In consequence of these principles, the high contracting parties pledge themselves reciprocally, in case one of them makes war against another power, to never attack the vessels of his enemy within cannon range of the coasts of his ally. They pledge themselves also to mutually observe the most perfect neutrality in the harbors, ports, gulfs, and other waters included in the name of inclosed waters, which belong to them, respectively.

The treaty between the United States and Great Britain, November 19, 1794, provided:

Art. 25. * * * Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannon shot of the coast, nor in any of the bays, port, or rivers of their territories, by ships of war, or others having commission from any prince, republic, or State whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

Austrian ordinance, 1803.—An ordinance respecting the observance of neutrality issued by Austria, August 7, 1803, also provided for the gun range:

Art. 11. As all vessels without exception should enjoy the protection that is derived from neutrality and perfect security in all of the ports, roadsteads, and along the coasts subject to our dominion, hostilities by one or more vessels of powers at war will not be permitted in the said parts or within gun range of the shore, nor, consequently, any combat, pursuit, attack, visit, or seizure of vessels. All our authorities, and particularly the military commanders in seaports, must use especial vigilance to this end.

Kent's opinion.—Chancellor Kent was inclined in the early nineteenth century to take a very liberal view of American rights in adjacent waters. He regarded the principles applied in England, of including the waters between headlands as King's Chambers, as also applicable to the American coast.
Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coasts, far beyond the reach of cannon shot, as cruising ground for belligerent purposes. * * * It ought, at least, to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of 4 leagues, or from a right line from one headland to another." (Commentaries on American Law, 14th ed., p. 26.)

"Alabama" and "Kearsarge."—In 1864 the problem of an engagement between two vessels of considerable gun range arose in consequence of the arrival of the Confederate steamer Alabama at Cherbourg. On June 13, 1864, Mr. Dayton, minister to France, informed Secretary Seward that he had immediately telegraphed to Captain Winslow of the United States ship Kearsarge at Flushing and received reply that Captain Winslow "will be off Cherbourg about Wednesday." Mr. Dayton also protested against the sojourn of the Alabama as an unneutral use of French ports and to Mr. Seward sent the following information:

You will, doubtless, have received, before this, notice of the arrival of the Alabama in the port of Cherbourg, and my protest to this Government against the extension of any accommodations to this vessel. M. Drouyn de l'Huys yesterday informed me that they had made up their minds to this course, and he gave me a copy of the written directions, given by the minister of marine to the vice admiral, maritime prefect at Cherbourg, a translation of which accompanies this dispatch. But he, at the same time, in-
formed me that the United States ship of war, the *Kearsarge*, had appeared off the port of Cherbourg, and there was danger of an immediate fight between those vessels. That the *Alabama* professes its entire readiness to meet the *Kearsarge*, and he believed that each would attack the other as soon as they were 3 miles off the coast. 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 these 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 rules, which assumed that 3 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. I told him that no other rule than the 3-mile rule was known or recognized as a principle of international law; but 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. I had no wish to wound the susceptibilities of France by getting up a fight within a distance which made the cannon shot liable to fall on her coast. I asked him if he would put his views and wishes on this question in writing, and he promised me to do so. I wrote to Captain Winslow this morning, and herewith inclose you a copy of my letter. I have carefully avoided in this communication anything which would tend to make the *Kearsarge* risk anything by yielding what seemed to me an admitted right. (Diplomatic Correspondence, U. S. 1864, vol: 3, p. 104.)

The instructions to the maritime prefect at Cherbourg mentioned in Mr. Dayton's dispatch were translated as follows:

We can not permit the *Alabama* to enter into one of our basins of the arsenal, that not being indispensable to place it in a state to go again to sea. This vessel can address itself to commerce (commercial accommodations), for the urgent repairs it has need of to enable it to go out; but the principles of neutrality, recalled in my circular of the 5th of February, do not permit us to give to one of the belligerents the means to augment its forces, and in some sort to rebuild itself: In fine, it is not proper that one of the belligerents take, without ceasing, our ports, and especially our arsenals, as a base of their operations, and, so to say, as one of their own proper ports.

You will observe to the captain of the *Alabama* that he has not been forced to enter into Cherbourg by any accidents of the sea,
and that he could altogether as well have touched at the ports of Spain or Portugal, of England, of Belgium, and of Holland.

As to the prisoners made by the Alabama, and who have been placed ashore, they are free from the time they have touched our soil; but they ought not to be delivered up to the Kearsarge, which is a Federal ship of war. This would be for the Kearsarge an augmentation of military force, and we can no more permit this for one of the belligerents than for the other. (Ibid. p. 105.)

To Captain Winslow in the letter mentioned in his dispatch Mr. Dayton said:

This will be delivered to you by my son and assistant secretary of legation. I have had a conversation this afternoon with Mr. Drouyn de l'Huys, Minister of Foreign Affairs. He says they have given the Alabama notice that she must leave Cherbourg; but in the mean time you have come in and are watching the Alabama, and that this vessel is anxious to meet you, and he supposes you will attack her as soon as she gets 3 miles off the coast. That this will produce a fight which will be at best a fight in waters which may or may not be French waters, as accident may determine. That it would be offensive to the dignity of France to have a fight under such circumstances, and France will not permit it. That the Alabama shall not attack you, nor you her, within the 3 miles, or on or about that distance off. Under such circumstances I do not suppose that they would have, on principles of international law, the least right to interfere with you if 3 miles off the coast; but if you lose nothing by fighting 6 or 7 miles off the coast instead of 3, you had best do so. You know better than I do (who have little or no knowledge of the relative strength of the two vessels) whether the pretence of the Alabama of a readiness to meet you is more than a pretence, 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 entitled, while you are careful to so act as to make, uselessly, no unnecessary complications with the Government. I ought to add that Mr. Seward's dispatch, dated May 20, 1864, was in the following words: "The Niagara will proceed with as much dispatch as possible to cruise in European waters, and that the Dictator, so soon as she shall be ready for sea (which is expected to be quite soon), will follow her, unless, in the meantime, advices from yourself and Mr.
Adams shall be deemed to furnish reasons for a change of purpose in that respect." That you may understand exactly the condition of things here in regard to the Alabama, I send you herewith a copy of a communication from the minister of marine of the naval prefect at Cherbourg, furnished me by the Minister of Foreign Affairs. (Ib'd. p. 104.)

Naval War College Discussion, 1913.—In Topic I, 1913, the subject was, "What regulations should be made in regard to the use in time of war of the marginal sea and other waters?" In the discussion of 1913 it was said: "In time of war there is still much difference in the practice of states. (1913 Naval War College, Int. Law Topics, p. 15.) Following this examples of the diversity of practice were given. It was shown that the Institute of International Law had in 1894 and in 1912 proposed 6 miles as the limit of the marginal sea. The Government of the United States in 1896 indicated that it would "not be indisposed to consider the adoption of a 6-mile limit and in 1913 it was said "The present tendency as shown in international conferences is to extend the limits of maritime jurisdiction" and the drift was before 1914 toward a 6-mile limit.

Waters adjacent to the 3-mile limit.—It has long been recognized that for certain purposes a littoral state may exercise jurisdiction beyond the 3-mile limit. In early times claims to such authority were very extended. While exclusive claims over the water area adjacent to the 3-mile limit have been abandoned, there has been a general admission that the needs and safety of the neighboring state may sanction the exercise of certain powers in the high sea adjacent to its marginal sea.

One of the most common grounds of the exercise of jurisdiction outside the marginal sea is for the enforcement of customs regulations and the prevention of smuggling. Laws upon this subject were enacted by nearly all maritime states. The states maintained that if they had the right to regulate commerce within their ports and coasts and to enforce regulations, it was necessary
to exercise authority at considerable distances from the coasts. These laws in regard to the enforcement of customs have gradually become better defined and in some instances have been repealed.

Special legislation for other purposes such as sanitation, safety of life at sea, etc., has been regarded as essential by some states.

**Attitude of United States.**—In a letter from Mr. Bayard, Secretary of State, to Mr. Manning, Secretary of the Treasury, May 28, 1886, it was stated that for the United States—

We may, therefore, regard it as settled * * * that so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of 3 miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

The position I here state, you must remember, was not taken by this department speculatively. It was advanced in periods when the question of peace or war hung on the decision. When, during the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters. When we were involved, in the earlier part of Mr. Jefferson's administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late Civil War, when there was every inducement on our part not only to oblige Spain but to extend, for our own use as a belligerent, territorial privileges. (1 Wharton, Int. Law Digest, p. 107.)

In 1902 in the hearing on the arbitration of whaling and sealing claims at The Hague, Mr. Herbert H. D.
Pierce, Assistant Secretary of State and delegate of the United States, on July 4 said:

In the first session the arbitrator asked me, "What is the extent of jurisdiction which the United States claim to-day in Bering Sea?" and I replied that the American Government now claims an extent of 3 miles. I wished that this reply might be sustained by the Secretary of State, Mr. John Hay. I am now in receipt of a dispatch, and in accordance with the authority which I have received from the Secretary of State of the United States, dated July 3, 1902, I repeat that the Government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to jurisdiction upon the following principle: The Government of the United States claims and admits the jurisdiction of any State over its Territorial waters only to the extent of a marine league, unless a different rule is fixed by treaty between two States; even then the treaty States alone are affected by the agreement. (1902 Foreign Relations Appendix 1, p. 440.)

Navigation laws of the United States.—As early as 1790 the United States passed laws in regard to the enforcement of its customs regulations. (1 U. S. Stat. 145.) The tariff act of the United States of September 21, 1922, provides for the exercise of authority for customs purposes up to 4 leagues from the coast and other states have similar legislation as in the codes of several of the South American and European states.

The safety of navigation has led to the enactment of many laws under which authority for the purpose specified was to be exercised outside the 3-mile belt. The act of Congress of the United States of February 19, 1895, was of this character.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after March first, eighteen hundred and ninety-five, the provisions of sections forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers, and inland waters of the United States.

The provisions of said sections of the Revised Statutes and regulations pursuant thereto are hereby declared special rules
duly made by local authority relative to the navigation of harbors, rivers, and inland waters as provided for in article thirty, of the act of August nineteenth, eighteen hundred and ninety, entitled "An act to adopt regulations for preventing collisions at sea."

Sec. 2. The Secretary of the Treasury is hereby authorized, empowered, and directed from time to time to designate and define by suitable bearings or ranges with lighthouses, light vessels, buoys, or coast objects, the lines dividing the high seas from rivers, harbors, and inland waters.

Sec. 3. Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights. Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

Sec. 4. The words "inland waters" used in this act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal; and this act shall not in any respect modify or affect the provisions of the act entitled "An act to regulate navigation on the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five.

Approved, February 19, 1895. (28 U. S. Stat. p. 672.)

Under the above act lines were established along the coast of the United States at some points more than 8 miles beyond the low-water mark. These lines at times were within the 3-mile limit and usually terminated at designated marks on shore or at buoys, lightships, or lighthouses, thus having little or no relation to the marginal sea as accepted in international law:

Interpretation of act of 1895.—In 1899 a case arose involving the act of February 19, 1895, and raising question of liability in case of an accident in which it was argued that an accident within the limits of a line established under the act of 1895 would be within the jurisdiction of the United States.

In this case through an accident, Carlson was killed by a boat belonging to the respondents and Judge Brown said:
As the maritime law gives no action for death caused by negligence on the high seas (The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140), this action can rest only upon the State statute; and to make that applicable the negligence, or the death, or both, must happen within the jurisdiction of the State. The location of the accident according to the weight of evidence, seems to me clearly more than a marine league, or 3 miles, from any part of the shores of the State of New York or New Jersey; nor is there any manner of drawing lines from headland to headland, except as below stated by which this location could be brought intra fauces terrae. Under the act of Congress, however, approved February 19, 1895 (28 Stat. 672), having reference to the regulations for preventing collisions at sea and authorizing the Secretary of the Treasury to designate and define the lands dividing the high seas from rivers, harbors, and inland waters, the Secretary drew a line extending from Navesink Lighthouse NE. 5° E. about 4 ½ miles to the Scotland light vessel, which is 3 miles from the nearest shore on Sandy Hook, and thence NNE. ½ E. through the Gedney Channel whistling buoy to Rockaway Point Life Saving Station on the Long Island shore. The accident occurred undoubtedly to the westward of that line. Even if this line was a couple of miles beyond the usually recognized limit of 3 miles from a shore, it is contended that the line thus established by the Secretary of the Treasury would be valid as an assertion of the exclusive jurisdiction of the United States as against other nations, because this extension seaward is undoubtedly less than the range of our modern shore batteries (see Pom. Int. Law, §§ 144, 150; Wheat. Int. Law, 177) and any such extension by the United States, it is urged, extends pari passu the jurisdiction and boundaries of the State as its necessary incident. In the case of Bigelow v. Nickerson, 17 C. C. A. 1, 70 Fed. 113, however, to which reference on this point is made, the question had reference to the State jurisdiction over the waters of Lake Michigan and was quite different from the present; since there the acts establishing the boundaries of the State expressly included the waters of the lake. In that case, moreover, it was assumed that upon the ocean the State jurisdiction extends but a marine league from shore. (See also Manchester v. Massachusetts, 130 U. S. 240, 11 Sup. Ct. 559.) But I doubt whether in fixing the line as above indicated, the Secretary of the Treasury intended to pass beyond the limit of a marine league, the usually accepted boundary. The Scotland lightship does not exceed that distance from shore, and if from that vessel a line be drawn to a point 1 marine league south of the western end of Rockaway Beach, that line will pass through the whistling buoy; so that the
Secretary's line seems to agree accurately with the old rule of jurisdiction, and the accident would be found to be within the State limits. (Carlson v. United New York Sandy Hook Pilots Association (1899), 93 Federal Reporter, p. 468.)

The accident was found to be due to the negligence of fellow servants. The libel was dismissed.

So in this case the action was settled on other grounds; but the conclusion is, from the above decision, that the act of February 19, 1895, was not intended to, and did not, change the old rule of jurisdiction extending a marine league off shore.

Russo-Japanese War, 1904.—Cases arising in the Russo-Japanese War, 1904, showed a clear recognition that jurisdiction of the coastal state in time of war is limited to three miles. In the case of the Rossia, a Russian merchant vessel, captured February 7, 1904, 6 miles off the coast of Korea, the Sasebo Prize Court said:

The limit of territorial waters generally recognized by existing international law is 3 nautical miles from the coast. Therefore the capture of this vessel at sea, 6 nautical miles from Kushing-ham, Corea, was a capture on the high seas, and in no way unlawful. (2 Hurst and Bray, Russian and Japanese Prize Cases, p. 39.)

Similarly in the case of the Michael, a Russian deep sea fishing vessel, captured 5½ miles off the coast of Korea, the Sasebo Prize Court said:

It can not be denied that the Michael was an enemy vessel, and that her capture took place after the commencement of hostilities. Further, the place of capture was 5½ nautical miles from the Corean coast, and since the international law regards territorial waters as not extending beyond 3 nautical miles from the shore, the vessel's capture took place on the high seas. (Ibid. p. 80.)

Hague rules on maritime war—There had been for many years wide differences of opinion concerning rights and duties of neutral powers in maritime war. A convention bearing the title, “Rights and Duties of Neutral Powers in Maritime War” was drawn up at The Hague in 1907 and has been generally accepted. According to its preamble the aim of the Convention, XIII Hague,
was to harmonize the relations which should exist between belligerents and neutrals in time of war. The articles relating particularly to territorial waters were the first three, as follows:

**ARTICLE 1**

Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a nonfulfilment of their neutrality.

**ARTICLE 2**

All acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent vessels of war in the territorial waters of a neutral power, constitute a violation of neutrality and are strictly forbidden.

**ARTICLE 3**

When a ship has been captured in the territorial waters of a neutral power, this power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not within the jurisdiction of the neutral power, the captor government, on the demand of that power, must liberate the prize with its officers and crew.

In the Second Peace Conference at The Hague (the same conference) the following comment was made upon Article I:

"It has sometimes been asked if there is any occasion to distinguish between ports and territorial waters. The distinction is comprehensible as to what concerns the duty of the neutral, who can not be responsible in the same degree for what happens in his territorial waters, over which he often has only a feeble control, as for what takes place in the ports subject to his immediate authority. The distinction is not recognized as to the duty of the belligerent, which is the same everywhere." (Deux. Conf. Int. de la Paix, vol. I, p. 298.)

In ratification by the Senate of the United States, it was stated that this was voted—
"With the understanding that the last clause of article 3 of the said convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction."

(Proclamation by the President, Feb. 28, 1909.)

Articles 25 and 26 provided—

Art. 25. A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

Art. 26. The exercise by a neutral power of the rights laid down in the present convention can under no circumstances be considered as an unfriendly act by one or the other belligerent who has accepted the article relating thereto.

Doctor Wehberg’s comment.—Doctor Wehberg writing before the World War said of the Hague Convention XIII:

The right of prize can, of course, only be exercised outside neutral waters, as is expressly laid down in article 1 of the “Agreement touching the rights and duties of neutrals in case of naval war.” No decision as to which waters are to be regarded as neutral has been arrived at, so that the old international disputes on this point still continue.

While this latter article is only meant as “The expression of the dominating idea of this portion of international law,” (Prot. I., p. 297; III., p. 572) article 2 of the agreement gives a special decision as to neutral coasts: “All hostilities committed by war-ships of belligerents within coastal waters of a neutral power, including seizure and the exercise of the right of search form a breach of neutrality, and are unconditionally forbidden.” In case of action in contravention of this, article 3 lays down the following: “If a ship has been captured within the coastal waters of a neutral power, that power must, in so far as the prize is still within its sovereignty employ all the means at its disposal to bring about the release of the prize with her officers and crew, and to hold captive the prize crew placed on board her by the captor. Should the prize be beyond the bounds of its sovereignty, the capturing Government must release the prize, with officers and crew, at the demand of that power.” (Wehberg, Capture in War on Land and Sea, p. 62.)
Russia, 1912.—A dispatch from the American ambassador to Russia on February 3, 1912, referring to the laws of the years immediately preceding said:

Russia proposes ultimately to extend her control in every way to a distance of 12 miles from all her coasts bordering on the ocean. This has not yet been fully accomplished, but only in part. The question naturally groups itself into three divisions:

1. The exercise of customs authority to a distance of 12 miles from all her coasts on the open sea.

This law was approved by the Emperor, December 10/23, 1909, promulgated January 1/14, 1910, and is now in force. As yet, so far as can be ascertained, no case calling for special international protest has occurred under it.

2. The extension of Russian jurisdiction over all open-sea fisheries on the Pacific coasts within 12 miles of the lands of the Russian Empire.

This law was passed May 29/June 11, 1911, and went into force December 25/January 7, last.

3. The law extending jurisdiction over fisheries conducted in the White Sea and within 12 miles of the Archangel Government was reported favorably by the committee to the Duma last June, but has not yet been passed. It lies on the table and it is reported that English influence is responsible for the delay in its passage.

England has formally protested against all three of these laws in particular and against the attitude of Russia in general in regard to the extension of jurisdiction from 3 miles to 12. Not being, however, specially interested in the Pacific coast fisheries, England has confined vigorous action to the Archangel and White Sea fisheries, where her interests are large. England hopes to be able to get this proposed law postponed long enough to permit the matter to be presented before the next Hague Conference in 1915. The President of the Duma has assured the British ambassador that the project can not be reached by the present Duma, and M. Sazonov practically admitted the same thing to me.

Japan also has protested in general against the whole proposition of extension of jurisdiction to 12 miles from shore in the open sea, but she has confined her vigorous action to the fisheries in the Pacific, where her direct interests are enormous. The annual Japanese catch of fish in what are now claimed to be Russian waters is valued in gross by the Japanese Embassy at 80,000,000 rubles.

Japan contends that the section of these laws dealing with Pacific fisheries is not only in violation of international law, but is
also a violation of the spirit of the existing Russo-Japanese fishery agreement.

Two Japanese delegates representing the fishing fleet of Japan are now here seeking amelioration of present conditions.

The Japanese Embassy filed a formal note of protest on October 31 last in regard to Russia's action in the Pacific fisheries, but as yet has received no answer.

The item mentioned by you from the American press of December 13 in regard to the abandonment by Russia of this policy is an error.

On the contrary, M. Sazonov in a long interview last night assured me that Russia proposed to maintain the 12-mile limit as a permanent policy, though he hinted that it might be modified in detail, and frankly stated that Russia had agreed to hold conversations with the representatives of Japan and of England, especially on the points in which the two countries were respectively interested.

Russia contends that the 3-mile limit is obsolete. The distance of 3 miles having been set as the conventional range of a cannon, it is claimed that with the extension of the range of modern ordnance the limit of jurisdiction should be increased to correspond. (1912 For. Rel., p. 1304.)

**Attitude of Governments, 1914–1918.**—The World War made it necessary for many States to pronounce what limits they proposed to fix for their territorial waters as regards belligerent and neutral rights.

In a decree of November 5, 1914, Chile stated—

It is decreed:

The contiguous sea, up to a distance of 3 marine miles counted from the low-water line, is considered as the jurisdictional or neutral sea on the coasts of the Republic for the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts. (1916 Naval War College, Int. Law Topics, p. 19.)

Subsequently, a decree prescribed that the interior waters of the Straits of Magellan, "Even in the parts which are distant more than 3 miles from either bank should be considered as forming part of the jurisdictional or neutral sea." (Ibid. p. 21.)

The Netherlands, which had brought the matter of a 6-mile limit to the attention of the United States in 1896,
and to which Secretary Olney had replied he would "not be indisposed" to consider such a limit, in its declaration of neutrality of August 5, 1914, stated:

Art. 4. No warships or ships assimilated thereto belonging to any of the belligerents shall have access to the said territory.

Art. 13. It is forbidden, in State territory, to equip, arm, or man vessels intended for military purposes on behalf of a belligerent, or to furnish or deliver such vessels to a belligerent.

Art. 14. It is forbidden, in State territory to supply arms or ammunition to warships or ships assimilated thereto belonging to a belligerent, or to come to their assistance in any manner whatsoever with a view to augment their crew or their equipment.

Art. 15. It is forbidden in State territory failing previous authorization by the competent local authorities, to repair warships or ships assimilated thereto belonging to a belligerent, or to supply them with victuals or fuel.

Art. 16. It is forbidden in State territory to take part in the dismantling or repairing of prizes, except in so far as is necessary to make them seaworthy; also to purchase prizes or confiscated goods and to receive them in exchange, in gift, or on deposit.

Art. 17. The State territory comprises the coastal waters to a distance of 3 nautical miles, reckoning 60 to the degree of latitude, from low-water mark. (Ibid. p. 63.)

Uruguay decree on August 7, 1914—

Art. 2. In accordance with the principle established by the treaty of Montevideo in 1889 (Penal Law, art. 12), and with the principles generally accepted in these matters, the waters will be considered as territorial waters to a distance of 5 miles from the coast of the mainland and islands, from the visible oulying shoals, and the fixed marks which determine the limit of the banks not visible. (Ibid. p. 107.)

A Swedish decree of July 19, 1916, provided that—

Submarines belonging to foreign powers and equipped for use in warfare may not navigate or lie in Swedish territorial waters within 3 nautical minutes (5,556 meters) from land or from extreme oulying skerries, which are not continuously washed over by the sea, under peril of being attacked by armed force without previous warning. (1917, Naval War College, Int. Law Documents, p. 215.)
Morocco on July 18, 1917, issued regulations fixing 3 miles as the marginal sea limit. (1918 Ibid. p. 116.)

On June 18, 1918, Norway issued new regulations stating—

1. The Norwegian Government, who have in the past claimed that the territorial waters of Norway extend to 4 miles from the shore, have recognized the difficulty of upholding this claim during the war, since it is not recognized by either the British or the German Governments.

2. The Norwegian Government accordingly intimated to His British Majesty's Government, on May 3, 1918, that Norwegian naval officers have now received instructions that they are to confine their efforts to maintaining the neutrality of the waters within the 3-mile limit, and are not to fire on belligerent ships operating outside that limit. (Ibid. p. 118.)

The limits of territorial waters, stated in other proclamations and decrees, varied.

The United States and Italy, 1914.—A royal decree of August 6, 1914, "for the purposes of neutrality," fixed the limit of Italian territorial waters at 6 nautical miles and further provided that—

Art. 2. In bays, bights, and gulfs, territorial waters, for the purposes set forth in the foregoing article, lie within a straight outward line tangent to 2 circumferences with a 6-mile radius and having their centers at the extreme points of the opening of the bay, bight, or gulf; provided the distance between the said points does not exceed 20 nautical miles (37,040 meters).

If the distance between the extreme points of the opening exceeds 20 nautical miles, the territorial waters lie within a straight line drawn between the 2 outermost points of the bay, bight, or gulf separated by a distance of at least 20 nautical miles." (1914 For. Rel. Sup., p. 664.)

The above action was made known to the Department of State of the United States by the Italian Ambassador and the receipt of the information was acknowledged.

In a note of November 6, 1914, the Italian Ambassador said to the Secretary of State:

Whether because of the fact that the limits of the marginal sea are not regulated by international conventions or general rules of international law—thus leaving every state at liberty
to fix them within the sphere of its own sovereignty without subjecting its decision to the recognition of the other states—or because of the fact that no comment was made by your excellency on the Royal Embassy's communications, His Majesty's Government knows that no objections are made by the Federal Government to the 6-mile limit set by us on our territorial waters for the purposes of neutrality.

Yet, with a view to removing any possible uncertainty, His Majesty's Government would be very thankful for a declaration which would explicitly convey acceptance by the Federal Government of the decision as adopted. And, in compliance with instructions I have just received on the subject, I have the honor to apply to your excellency's tried courtesy for such a declaration. (Ibid. p. 665.)

On November 28, the Acting Secretary of State replied:

I am compelled to inform your excellency of my inability to accept the principle of the royal decree in so far as it may undertake to extend the limits of the territorial waters beyond 3 nautical miles from the main shore line and to extend thereover the jurisdiction of the Italian Government.

An examination into the question involved leads to the conclusion that the territorial jurisdiction of a nation over the waters of the sea which wash its shore is now generally recognized by the principal nations to extend to the distance of 1 marine league or 3 nautical miles, that the Government of the United States appears to have uniformly supported this rule, and that the right of a nation to extend, by domestic ordinance, its jurisdiction beyond this limit has not been acquiesced in by the Government of the United States.

There are certain reasons, brought forward from time to time in the discussion of this question and advanced by writers on international law, why the maritime nations might deem the way clear to extend this determined limit of 3 miles, in view of the great improvement in gunnery and of the extended distance to which, from the shore, the rights of nations could be defended; but it seems manifestly important that such a construction or change of the rule should be reduced to a precise proposition and should then receive in some manner reciprocal acknowledgement from the principal maritime powers; in fine, that the extent of the open or high seas should better be the result of some concerted understanding by the nations whose vessels sail them than be left to the determination of each particular nation, influenced by the interests which may be peculiar to it. (Ibid. p. 666.)
Later, on December 12, 1914, the Secretary informed the Italian Ambassador —

That upon further consideration of this subject, while the department is obliged to adhere to the opinions expressed in its note of the 28th ultimo, it has taken steps to furnish the department of the Navy with a copy of the diplomatic correspondence on this matter, with the request that orders be issued to the public ships of the United States notifying them of the royal decree of August 6 last mentioned above, and giving such further instructions as may be appropriate with a view to avoid so far as is possible any incident which may raise a question between the Governments of Italy and the United States as to the extent of the territorial waters of the former country. (Ibid. p. 666.)

Hovering, 1915-16.—The correspondence between the American and British Governments in regard to operations of British vessels of war off the coast of the United States during the World War touched upon the limits of jurisdiction. The British maintained their right to cruise beyond the 3-mile limit and the State Department said:

In reply it may be stated that the Government of the United States advances no claim that British vessels which have been and are cruising off American ports beyond the 3-mile limit have not in so doing been within their strict legal rights under international law. The grounds for the objection of the Government of the United States to the continued presence of belligerent vessels of war cruising in close proximity to American ports are based, not upon the illegality of such action but upon the irritation which it naturally causes to a neutral country. (Spec. Sup. 10 Amer. Jour. Int. Law, p. 384.)

The "Elida."—The German Imperial Supreme Court in Berlin in 1915 had before it a case involving the extent of maritime jurisdiction in time of war. In the discussion of the case of the Elida, May 18, 1915, the court said:

It is true that a considerable number of States have extended by national law their territorial jurisdiction beyond the 3-mile limit, either generally or with regard to certain legal rights. This particularly applies to Sweden and Norway, which extended their national waters to a distance of 4 miles. A number of
other States even went much further in this respect. But a special international title, valid in relation to the German Empire, and therefore to be taken into account by the prize court, does not exist, for up to the present time the Swedish claim has been recognized only by the Norwegian Government. According to official information from the German Foreign Office, Germany especially in the course of the discussions concerning this matter which took place in 1874, did not accept Sweden's point of view but treated the question of national waters as an open one, while England insisted upon the 3-mile limit. Similarly in 1897, when the Swedish Government addressed a communication to the German Legation at Stockholm concerning the fishery jurisdiction, the German Government restricted itself to raising no objection against Sweden's claim to a 4-mile boundary for the fishery and the question of the neutralization of this marine area in case of war was not thereby affected. * * *

Heretofore the maritime boundary of States has been generally recognized in theory and practice as being 3 nautical miles distance from the coast. Originally it was based on the carrying distance, corresponding to the gunnery technique of those times, of ships and coast guns. It is true that nowadays this reason is no longer applicable. Here, however, the axiom cessante ratione non cessat lex ipsa applies, and although numerous proposals and opinions have been put forward with regard to a different delimitation of the national waters, it can not be asserted that any other method has in practice met with the general concurrence of the maritime States. * * *

Furthermore, it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the 3-mile zone, this by no means represents a concession to the effect that in all other respects the waters in question are included within the territorial jurisdiction. * * *

The British Government during the negotiations in the year 1911 with regard to the holding of an international congress for the regulation of the question of coastal waters, decidedly adhered to the 3-mile zone; and, accordingly, even in the present war, it had Admiral Craddock inform the Government of Uruguay that it would not recognize the claims of Uruguay and Argentina to an extension of the territorial waters beyond the 3-mile zone. It can, therefore, be still less assumed that this boundary has been supplanted by another generally acknowledged international regulation. (Translation, 10 Amer. Jour. Int. Law, p. 916; 1 Entscheidungen des Oberprisengerichts [1915], No. 9.)
The "Bangor."—In the case of the Bangor, a Norwegian vessel captured on the ground of unneutral service in the Straits of Magellan, March 14, 1915, the question of the jurisdiction of neutral waters was raised. The British prize court passed upon this case on May 30, 1916, and said, as to the waters of a neutral State:

Upon the assumption made for the purposes of this case that the Bangor was in fact captured within the territorial waters of a neutral, the question is whether the vessel was immune from legal capture and its consequences according to the law of nations. In other words, can the owners of the vessel, who are, ex hypothesi, to be treated as enemies, rely upon the territorial rights of a neutral State and object to the capture? Or must the objection to the validity of the capture come from the neutral State alone?

No proposition in international law is clearer or more surely established than that a capture within the territorial waters of a neutral State is, as between enemy belligerents, for all purposes rightful, and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. *

Assuming for the purpose of this judgment that Convention XIII is binding, it is clear that the convention was only directed to the relations between neutral powers and belligerent powers, and was only intended to apply to questions arising between neutral powers and belligerent powers as such. Its provisions were not intended to deal with any question between belligerents, and did not affect the rule relating to capture in territorial waters of a neutral State as between two belligerent powers, where the neutral State did not intervene.

For these reasons I decide that the objection made by the claimants to the validity of the capture, even if it took place in neutral territorial waters, is not well founded, and I disallow the claim with costs. ([1916] P. 181; 5 Lloyd's Prize Cases, p. 308.)

Treaties.—The treaties concluded with a view to making effective the provisions of legislation of the United States in regard to the smuggling of intoxicating liquors are of two categories. One group of treaties recognizes the 3-mile limit and another group leaves the matter without prejudice.

In the treaties of the United States with Great Britain, January 23, 1924 (43 U. S. Stat., pt. 2, p. 1761); Cuba,
March 4, 1926 (44 U. S. Stat., pt. 3, p. 2395); Germany, May 19, 1924 (43 U. S. Stat., pt. 2, p. 1815) The Netherlands, August 21, 1924 (44 U. S. Stat., pt. 3, p. 2013); and Panama, June 6, 1924 (43 U. S. Stat., pt. 2, p. 1875), the provisions of Article I made pronouncement similar to the following:

The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outward and measured from low-water mark constitute the proper limits of territorial waters.

The corresponding article with certain other states reads as follows:


Opinion of Supreme Court.—On April 30, 1923, the Supreme Court of the United States said: “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 inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles.” (Cunard S. S. Co. v. Mellon (1923) 262 U. S. 100.)

Central American Court of Justice, 1917.—In the case between the Republic of El Salvador and the Republic of Nicaragua decided March 9, 1917, referring to the Gulf of Fonseca, the court said:

The theory that the high party defendant accepts as the true test of the territoriality of the gulf is one that must be examined in the light of the distances traced on the maps, because they give an idea of the real, or at least probable, extent of the gulf. The
geographer Squier fixes it approximately at 50 miles in length by 30 in width. The technical study by the engineers Barberena and Alcaine declares the existence of two zones in which, according to the law of nations and the internal laws of the riparian States, they may exercise their jurisdiction, to wit, the zone of 1 marine league contiguous to the coasts, wherein the jurisdiction is absolute and exclusive, and the further zone of 3 marine leagues, wherein they may exercise the right of imperium for defensive and fiscal purposes. (11 Amer. Jour. Int. Law, pp. 674, 706.)

**British attitude, 1923.**—In reply to a question as to the Russian claim to a 12-mile zone for fishing rights, the Undersecretary of State for Foreign Affairs said, April 30, 1923:

The doctrine of territorial waters is not laid down in any international instrument, but the jurisdiction of nations over their coastal waters has been accepted by usage and is now a recognized rule of international law; His Majesty's Government have always maintained that by international law and practice the general limit of territorial jurisdiction is 3 miles, but from time to time claims to extend the 3-mile limit have been advanced by different States. Such claims, which amount to annexation of the high seas, could only be made effective by international agreement. (163 House of Commons Debates, 5 s., p. 961.)

**The "Fagernes."**—On March 17, 1926, a collision in the Bristol Channel occurred 10½ or 12½ miles off the English coast and 9½ or 7½ miles off the Welsh coast. In this collision the steamship Fagernes was sunk and the steamship Cornish Coast was damaged. The lower court held that the collision occurred within British jurisdiction and the case was then brought to the court of appeal and it was argued that the part of the Bristol Channel in question was within the pilotage district, and therefore within the sovereignty of Great Britain. The Attorney General in response to a request from the court said that he had been instructed by the Secretary of State for Home Affairs to say that—

The spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends. ([1927] P. 311, 319, C. A.)
In the opinion of Bankes L. J. it is stated that in international law writers and jurists do not agree in their opinions as to the extent of territorial waters. Lawrence L. J. in agreeing that the waters where the collision took place were not within British jurisdiction said:

It is common ground that there is no international treaty or convention expressly sanctioning or recognizing any territorial rights of the Crown over the Bristol Channel. Further, no evidence has been adduced that the Crown has possessed itself of, or has effectively asserted any territorial rights over, that part of the Bristol Channel where the collision occurred. In the absence of any express treaty or controlling executive act of the Government, the question arises whether there is any established general rule of international law for determining the territorial character of bays. The consideration of this question has occupied the greater part of the hearing both in the court below and in this court.

The Attorney General, in the course of his able argument, has cited and commented upon the opinion of jurists, the practice of nations and the relevant judicial decisions. I do not propose to deal with these sources of information in detail, but content myself by saying that in my judgment the Attorney General has established the proposition that, although the principle of claiming territorial rights over bays is well established as a rule of international law, and although there is no question as to the applicability of that principle in the case of bays, the entire land boundaries of which form part of the territory of the same state and the entrances of which do not exceed 6 sea miles in width, yet there is no recognized general rule of international law by which it can be determined whether any given bay, with an entrance wider than 6 sea miles, does or does not form part of the territory of the State whose shores form its land boundary. Each such case must depend upon its own special circumstances. (Ibid. 311, 327.)

Some of the early contentions of Great Britain were not in accord with this decision. Some of the judges of the court of appeal testified they would have agreed with the judgment of the lower court if they had been sitting with similar evidence before them. There was, however, a plain statement of the Government and a decision in accord with it that these waters were not within British jurisdiction. Lord Justice Bankes stated that the reply
of the Crown, though given at the instance of the court and for the information of the court, did not in his opinion "necessarily bind the court in the sense that it is under an obligation to accept it."

**High sea and national legislation.**—The rights of states in the high seas are now regarded as fundamental. Fundamental rights are never renounced by states without express and clearly intended act as by an international convention or by a proclamation, e.g., Panama by the convention of 1903 grants to the United States "all the rights, power, and authority within the zone which the United States would possess and exercise if it were sovereign." Panama does not renounce or grant sovereignty and the United States pays $250,000 per year to Panama "as the price or compensation for the rights, powers, and privileges granted in this convention."

The freedom of the sea outside the 3-mile limit is a generally recognized right which no single state may limit. Laws enacted by certain states sometimes seem to be contrary to international law but courts have regularly held that such a construction of the law ought not to be admitted. In the case of the *Charming Betsey*, 1804, Chief Justice Marshall, in referring to neutral rights said:

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. (2 Cranch Reports, Supreme Court, p. 64.)

In an earlier decision Chief Justice Marshall admitted that—

> "The laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." (Talbot v. Seeman, 1801, 1 Cranch Reports, Supreme Court, p. 1.)

Other states have taken the same attitude in regard to domestic legislation affecting rights on the high sea.
In international communications and agreements the United States has for many years upheld the 3-mile limit as the extent of territorial waters.

Such recent international agreement as that relating to the Aaland Islands, October 20, 1921, states that—

The territorial waters of the Aaland Islands are considered to extend for a distance of 3 marine miles from the low-water mark on the islands, islets, and reefs not permanently submerged.

In general it may be maintained that the right of a state to protect itself and to be secure is fundamental and this is not lessened because other states engage in war, e. g., retaliation even should not in time of war be aimed at neutrals though neutrals may be indirectly injured by retaliation. Belligerents do not by their declaration of war acquire rights to injure neutrals, e. g., Alabama and Kearsarge, 1864, of which Mr. Bayard said in 1886, “We claim also that the sovereign of the shore has the right, on the principle of self defense to pursue and punish marauders on the sea to the very extent to which their guns would carry their shot, and that such sovereign has jurisdiction over crimes committed by them through such shot, although at the time of the shooting they were beyond 3 miles from the shore.” (Letter to Mr. Manning, Secretary of Treasury, 1 Moore, p. 721.) A state may also determine the conditions of entrance or even prohibit the entrance of vessels of war both in time of peace and in time of war, e. g., the Netherlands, declaration of neutrality, August 5, 1914.

SOLUTION

(a) (1) The right of visit and search beyond the 3-mile limit upon the high sea is an undeniable belligerent right and the authorities of the United States can afford no protection against its lawful exercise.

(2) The protest of the Cygnet is not valid, as these waters are not, for the purposes of neutrality, within the jurisdiction of the United States.
(b) The authorities of the United States may use the means at their disposal to prevent the diffusion of dangerous gas within 3 miles of the coast.

(c) The authorities of the United States may exclude from its harbors vessels having dangerous gas on board, or may prescribe the conditions of entrance thereto for such vessels.