Marginal Seas Around the States

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THE CONTROVERSY

Our Navy, which admits that for a delightful period in the West Indies it "made not one single mistake,"1 is not always equally fortunate in home waters, and on the coast of California seems to be particularly unlucky. There is no question this time of piling up a destroyer squadron on jagged gray rocks; but an attempt to take advantage of a fight among local oil and political interests to gain for itself property and power ran headlong into legislative and legal reefs which are as yet uncleared. The gold striped arms dropped the melon halfway to the fence, and the loud resulting squash aroused not only the owners but some of the neighbors. The Board of Strategy (Domestic) stands at attention beside its blackboard, wondering glumly where the customary rote formula of first-line-of-defense-brave-and-bold-grab-it went astray, and is still foggily trying to perceive how questions of constitutional and international law could possibly have obtruded themselves into the issue. The admirals no more than the legislators give signs of having any comprehension of the extended implications of what they were doing.

A brief review of the events in California which led up to the present situation is necessary. California at first2 classed oil as a mineral and included wells in the placer mining law, according to which patents were allowed by right of discovery;3 but after much discussion, wavering among inconsistent views and piecemeal legislation, including an attempt to legislate against injury to oilbearing strata by the infiltration of water,4 extensive regulations for the drilling and operation of oil wells under the

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2. The Summerland oil field was opened about 1870; general commercial development began in the early '80s and increased greatly after 1895.
3. One of the earliest provisions for the protection of petroleum mining interests was the Act of March 17, 1866, Cal. Stat. 1865-66, c. 261. See Davis, Fifty Years of Mining Law (1937) 50 Harv. L. Rev. 897, 906.
authority of a license from the state were put into effect. Meanwhile, the United States had also begun by treating oil in federal public lands as the subject of placer mining claims, for which patents could be issued; then closed all oilbearing lands for a time, and finally, to promote mining, and therefore prospecting on the public domain, initiated a policy of leasing under permit from the Department of the Interior. California expressly assented to the provisions and accepted the benefits of this act. Under the local laws, individuals and corporations opened new fields in California lands, drilled many wells and fought each other for control, paying royalties or taxes to the state. As long as operations were confined to the dry land, and it was plainly ascertainable which was federal and which local property, there was no conflict of jurisdiction; but presently, in the hunt for new fields it was discovered that some of the likely areas lay in part at least under the Pacific Ocean or its bays, beneath land between high and low water mark, or even below low water mark. This region could be tapped either by driving slant wells or whipstocking from adjacent upland already lawfully possessed by the prospector, or by sinking vertical wells (three hundred feet or more to oil) through the surface water and tide flats or the deeper water below low water mark. With the prospect of revenue thus held out, municipalities and local authorities whose jurisdiction ran to the shore, promptly began considering their rights in tax or license control over the new fields; and in particular an additional struggle between so-called monopolists and independents at Long Beach precipitated the present crisis.

California in 1925 granted to the city of Long Beach tidelands and submerged lands, so far as the state had rights within

9. Off shore fields already known or suspected run for about 6% miles along the coast: in Santa Barbara County at El Capitan, Elwood (second discovered, 1928), Coal Oil Point, Goleta and Summerland (first under water wells in California, 1897. Illustration (1920) 37 Nat. Geog. Mag. 188); Ventura County, at Rincon; and Los Angeles County, at Venice, Playa del Rey, Redondo, Hermosa Beach, Wilmington, Long Beach and Huntington Beach. Hearing before the Committee on the Judiciary, H. R., on S. J. Res. 208, Serial 16, 75th Cong., 3rd Sess. (1938) [referred to herein as 1 Hearing] 29; 2 Hearing, supra note 5, at 110, 179.
the city limits below mean high tide, in trust for park and harbor purposes only, with power to grant easements, franchises or leases for limited periods but not to alienate, and the city thereupon granted to individuals easements in the harbor district for wharves and rights of way for thirty years. Presently it was found, besides a minor issue on fishing, which the state had reserved, that many of the larger lessees, under permits from and paying royalties to the state, had driven wells and were taking out oil. Independent operators and residents of Long Beach who were interested appeared unable to get the municipal authorities to take any action to determine the title to the lands and the legality of the oil operations. It was charged that one suit was proceeding to a settlement by a conference among friendly attorneys all of one political faith, until the federal district attorney sat in, whereupon the city's specially employed counsel quit and the proceedings apparently lapsed. Suits by the state to restrain the removal of oil until title could be determined also seemed to get nowhere. The objectors appeared to be pretty well stopped, when someone opened Pandora's box in Washington.

On April 15, 1937 Senator Nye introduced a bill "declaring lands under territorial waters of the United States to be a part of the public domain" and providing that except as to lands inside the lines dividing inland waters from the high seas

"... all submerged lands lying under the high seas off the coasts of the continental United States between the low-water mark and the three-mile limit are hereby declared to be a part of the public domain, and such lands and all minerals located on or under such lands are withdrawn from settlement, location, sale, entry, occupation, encroachment, or acquisition." [Any of such lands which the President shall find probably contain oil or petroleum deposits are to be included in General Naval Petroleum Reserve No. 1.]

11. Said to include the Ford Company, General Petroleum Corporation, Pacific Dock and Terminal Corporation (reported to be largely owned and controlled by Ex-President Herbert Hoover and the Estate of Henry Robinson), Proctor & Gamble, Southern California Edison Co., Standard Oil Co., Union Pacific Railroad, and members of the Long Beach Harbor Commission.


13. United States throughout means the continental United States, excluding Alaska.

The California Legislature took prompt notice of this bill and urged its defeat in a joint resolution passed June 11, 1937, reciting that since 1850 rights in tide and submerged lands had been in the state. The Senate Committee on Public Lands and Surveys, after deliberation on this bill, "considered that a better approach to the problem involving the submerged oil deposits would be had through a joint resolution," and accordingly approved on August 17, 1937, one which had been introduced by Senator Nye and referred to the Committee. The Committee obtained reports from the Attorney General, the Secretary of the Interior, and the Acting Secretary of the Navy, and found no opposition to the direction assumed in the resolution as reported. On the earlier bill, the Navy Department, in a long letter dated July 21, 1937, after a very cursory glance at the rights of the Crown in tidewaters under the common law and three English cases, announced that:

"No legislation appears to have been enacted by the Congress to declare the status or sovereignty of the submerged lands lying under the high seas off the coasts of continental United States. However, all writers upon public law concede that every nation has exclusive territorial property and jurisdiction to the distance of a marine league, or what was formerly considered to be the distance of a cannon shot, over and in the waters adjacent to its shores, that being the distance from the shore that in earlier times was considered could be defended from the shore. This concession is not based on the common law but upon a well recognized rule of international law which has the tacit assent of substantially all of the nations of the world. . . .

"Where certain States bordering on the sea pursuant to constitutional provisions have laid down their territorial boundaries in the high seas, 3 miles off the line of low-water mark, such boundary does not annex additional proprietary rights to those States. It merely extends territorial dominion and political jurisdiction of the States to perform certain functions in the interest of the general public, such as regulation of fisheries, preventing of frauds on custom laws, exaction of harbor and lighthouse dues, and general protection of the territory from violation.

"On the other hand the outer boundary of this 3-mile

16. Signed by "William D. Leahy, Acting."
maritime belt thus laid down is also the boundary of the territorial dominion of the United States and its rights therein are paramount, especially in the interest of commerce and navigation. The United States makes full and free use of the submerged lands for sites of its anchorages, buoys, piers, lighthouses, and other aids to navigation, and it otherwise exercises proprietary dominion over such submerged lands by requiring that no such improvement shall be placed thereon without express authority of Congress.

"It is well recognized that all unappropriated lands within the borders of the United States and its Territories belong to the Federal Government. . . . To all intents and purposes the submerged lands under the waters of the 3-mile maritime belt surrounding the United States are unappropriated in a proprietary sense. While submerged lands of this character have not heretofore been classified as public lands there seems to be no good reason why Congress may not so classify them and deal with them in the same way as it deals with the public domain of the United States.

"Reason and necessity demand a practical and positive solution at the earliest practicable date of the problem that has arisen by reason of the exploitation of immensely valuable and unappropriated areas of submerged lands along the coasts of the United States. That solution it is believed may best be accomplished through an act of Congress declaring and enacting the submerged lands to be a part of the public domain of the United States and applying thereto its well-established policy for the conservation and development of mineral resources.

"Such an act would be of a political nature and therefore it would be sustained by the courts. It is not the province of the courts to participate in the discussion of questions arising out of jurisdiction or dominion for they are of a political nature, and not judicial. National dominion and sovereignty may be extended over the sea as well as over the land, and in our Government when Congress and the President assert dominion and sovereignty over any portion of the sea, or over any body of water, the courts are bound by it. [Four cases cited].

"The bill S.2164, if enacted into law, in the opinion of the Navy Department will provide the means by which exploitation may be stopped and prevented, and the oil deposits
in the submerged lands off the coast of the continental United States may be conserved for the future use of the Navy in line with the well-established policy of maintaining a naval petroleum reserve in the ground. Such legislation will be in the interest of national defense. The Navy Department recommends that the bill S.2164 be enacted."

Nevertheless, as the "better approach" approved by the Senate Committee, the joint resolution18 "relative to the establishment of title of the United States to certain submerged lands containing petroleum deposits," after six Whereases asserting among other things that "the petroleum reserves in the United States are constantly decreasing," and "are in serious danger of depletion or loss from various causes," asserted that all submerged lands below low-water and within a distance of three miles under the ocean along the coast of the United States were the property of the United States. It further stated that "immediate action on the part of the United States" was necessary "to preserve such petroleum deposits for the future use of the United States" and sought to authorize and direct the Attorney General of the United States "through speedy and appropriate proceedings, to assert, maintain, and establish the title and possession of the United States to the submerged lands aforesaid, and all petroleum deposits underlying the same," to remove "all persons trespassing upon or otherwise occupying the said submerged lands" and to stop the removing of petroleum products therefrom.

The joint resolution was promptly called up and passed by the Senate19 and went to the House where it was referred to the Committee on the Judiciary, which six months later held a three days’ public hearing on it.20 Representatives of the Interior, Justice and Navy Departments appeared in support of a redraft of the joint resolution; the independent oil operators and Long Beach residents already referred to21 appeared or filed communications in favor of the joint resolution if amended; the Governor and State School Fund representatives of Texas,22

18. S. J. Res. 208, introduced by Senator Nye, August 14, 1937, read twice and referred to the Committee on Public Lands and Surveys.
20. 1 Hearing, supra note 9.
Attorneys General of Florida, Louisiana, Mississippi, New York and Texas and numerous Port Authorities appeared or were recorded in total opposition; and the token appearance pro sedibus of "our able and distinguished colleagues" from "all of the States interested" was politically noted. It appeared at once that the Interior, Justice and Navy Departments had been conferring upon amendments proposed by the latter department and were in accord in supporting a redrafted joint resolution which was made known to Senator Nye for the first time on the morning of the hearing. The revision changed "within a distance of three miles under the ocean" to "under the territorial waters;" omitted entirely the recital that all such submerged lands "are asserted to be the property of the United States," and added to "for the future use of the United States" in a new Whereas "for purposes of national defense and future maintenance of the Navy." The Long Beach contestants desired that tidelands, meaning land between high and low water marks, be added to the submerged lands, below low water mark, reached by the original and redrafted joint resolution, Representative Scott frankly stating as to the submerged land now filled in, in the harbor district:

"I do not care who finally owns it. . . . Naturally I would hope that the land belongs to the State and that the State gave it to the city of Long Beach for harbor purposes. . . . But if it is not the property of the city, if it was not the property of the State, I would rather that the United States Government have it as a naval reserve than for these private companies who do not own it and have no title to it, [to] go in there and take that oil out. . . ."

23. Lawrence A. Truett (Assistant) Florida; Gaston L. Porterie and Joseph A. Loret (Assistant) Louisiana; Greek Rice, Mississippi; Warren H. Gilman (Assistant) New York; William McCraw, Texas.
25. Naming Alabama, California (on which side?), Florida, Louisiana, Mississippi and Texas. 1 Hearing, supra note 9, at 83.
26. The Secretary of War, fourth member, with the Secretaries of these three Departments, of the Federal Oil Conservation Board created by President Coolidge in December 1924, does not seem to have been in on the party. The National Resources Committee, consisting of the Secretaries of Agriculture, Commerce, Interior, Labor and War, the Works Progress Administrator and two private members (Frederic A. Delano and Charles E. Merriam) reported to the President on Jan. 28, 1939 that the resolution setting aside the naval petroleum reserve ought to be presented again to Congress.
27. 1 Hearing, supra note 9, at 3, 4.
28. 1 Hearing, supra note 9, at 109.
The four gulf states in complete opposition were afraid that the proposed assertion of right and taking dominion by the United States would deprive them of varying areas from which they had been or hoped to be deriving revenue; and New York and the various Port Authorities were afraid that the "seizure" by the United States would cloud titles, impair grants and unsettle the future market, especially for "reclaimed" lands, with wharf, bridge, tunnel, park and other improvements. The Navy Department, "really behind the legislation," stood practically alone and undertook singly to sustain the burden of open support of the redrafted joint resolution as to submerged lands; but its representatives abandoned even such thread of argument as appeared in the letter from "Leahy, Acting" of July 21, 1937, and from intention or ignorance dodged so lightly among the interesting and seemingly pertinent questions of whether any additional legislation was necessary for the Government to establish its title to the submerged lands, whether the Government "absolutely owned" or "had a dominant interest in" the lands and whether if they were privately owned the Government could take them for the Navy without compensation, under its power to provide for the common defense, to regulate foreign and interstate commerce and therefore control navigation, or to provide and maintain a navy, that the Committee evidently became not only confused but suspicious.

Whatever the cause, the House Committee on the Judiciary, as might perhaps have reasonably been expected from a group whose Chairman and eleven others of its twenty-five members were from potentially involved coast states, discarded the broad

29. Rep. Hatton W. Summers (ex-Judge), Texas, Chairman. 1 Hearing, supra note 9, at 42.
31. Note 18, supra. See also the letter of Feb. 2, 1938, signed by Secretary of the Navy, Claude A. Swanson, to the Chairman of the House Committee on the Judiciary, supra note 9, at 54.
32. The Chairman: "I do not see why you are here. That is what we want to know about. These boys are not smart. They get all 'bumfuzzled' when you tell us so much." 1 Hearing, supra note 9, at 46. The Committee was composed entirely of lawyers: "able lawyers." Smith, The Present Situation in the Fight to Save the Court (1937) 23 A.B.A.J. 401-402.
33. Earl C. Michener (Michigan): "I cannot help but feel that you understand it and that you are attempting to avoid answering definitely." 1 Hearing, supra note 9, at 48. The Chairman: "In other words, you are uncertain as to where the title is?" Mr. Buettner: "Yes, sir." The Chairman: "Are you uncertain?" 1 Hearing, supra note 9, at 49.
34. Alabama, California, Connecticut, Massachusetts, New Jersey, New York (3 members), North Carolina, Pennsylvania, Texas and Virginia.
redrafted joint resolution altogether. On May 19, 1938, the Committee reported to the House with the recommendation that it do pass, a joint resolution called an amendment but in fact a wholly new proposal, withoutWhereases, limited to "submerged lands adjacent to and along the coast of the state of California, below low-water mark and under the territorial waters of the United States of America," declaring that the right of the United States to take petroleum from any part of such lands, set aside as a naval petroleum reserve, was "an attribute of its sovereignty and paramount and exclusive," and directing the Attorney General to protect such reserve. The lone Representative from California on the Committee put in a minority report, foreseeing "untold harm" in the passage of such legislation, and declaring the amended resolution, although aimed at California alone, was only the entering wedge for similar proceedings against other states. But he need not have worried unduly, as the event showed, for the new joint resolution was committed to the Committee of the Whole House on the state of the Union, and there it was still slumbering when the 75th Congress expired on January 3, 1939. The California Legislature on January 24, 1939 passed a second resolution opposing the Nye resolution and all similar legislation.

In the new Congress, Mr. Hobbs for the Navy Department introduced on February 20 and Senator Nye on March 14, 1939 a joint resolution substantially like the "amended" California one, with a more elaborate title and the change of the separate declaration of "an attribute of sovereignty" to a clause reciting "the exercise of the paramount and exclusive powers of sovereignty of the United States" in setting aside the petroleum as a naval reserve. Senator Nye on January 4 and Mr. O'Connor on February 23, 1939 introduced a joint resolution in the exact

36. "Strike out the preamble and all after the resolving clause."
37. John H. Tolan, Dem., 7th Dist., Oakland, Alameda County.
40. S. J. Res. No. 92. Read twice and referred to the Committee on Public Lands and Surveys. 84 Cong. Rec., Part 4, 3800 (1939).
language of Senator Nye's original joint resolution (S. J. Res. 208) before it was redrafted by the three Departments. A sub-committee of the Committee on the Judiciary of the House, with most of the full Committee sitting in, held a two-day hearing on the two proposed House resolutions. The same principal proponents and objectors as in February 1938 again appeared, and most of the same arguments were repeated. Representative Hobbs explained that he thought the United States should assert its claim over oil under submerged waters everywhere around its coast, but when he found he could not get that, he took what he could get and limited his resolution to California; also, to land below low water mark, only; and subject to "vested rights," such as the grants and improvements the Port Authorities were exercised about. The Navy, with some corrections of their estimates and figures of the year before, stubbornly repeated their arguments, but of course agreed on the whole with Judge Hobbs as sponsor of their resolution. Senator Tom Connally reviewed the history of the admission of Texas, and urged merely a direction to the Attorney General of the United States to bring suit. The offices of the Attorneys General of Florida, Louisana, Mississippi, New York and Texas, other official bodies of California, Florida and Texas, and the American Association of Port Authorities, Inc. presented much the same opposition as in 1938. The Attorney General of California with all the California Congressional delegation and a Representative from Oregon, urged by joint memorial from the Oregon Legislature, now joined in opposi-

43. 2 Hearing, supra note 5, at 281.
44. 2 Hearing, supra note 5.
45. Capt. Harry Allen Stuart, Director of Naval Petroleum Reserves, Office of the Judge Advocate General, U.S. Navy (by Leslie C. McNemar, Senior Attorney); Letters from Secretaries of the Navy and the Interior.
46. Lawrence A. Truett, Assistant Attorney General of Florida; Joseph A. Lorot, Special Assistant Attorney General of Louisana; Warren H. Gilman, Assistant Attorney General of New York; Robert E. Lee Jordan of Los Angeles, California; Ex-Sen. Robert A. Stuart, attorney for Texas State Teachers' Association, and other representatives of the Texas School Fund.
47. 2 Hearing, supra note 5, at 3-20.
48. Id. at 27-52, 270-281.
49. Id. at 20-26.
50. Id. at 149, 136, 232, 254, 84.
51. Id. at 110, 152, 158, 163, 178, 283, 151, 20, 52, 61.
52. Id. at 232.
53. Id. at 194.
54. Id. at 281.
56. H. J. Memorial No. 3 of March 6, 1939, opposing confiscation by the federal government of submerged lands owned by the states.
tion; and Washington attorneys\textsuperscript{57} for various applicants for federal leases appeared on both sides; but little that was new in fact or in law was developed. Senator Nye withdrew his bill (S. J. Res. 92) in favor of Mr. Hobbs' H. J. Res. 176; which, however, was unfavorably reported by the Subcommittee to the Committee on the Judiciary of the House\textsuperscript{58} and there the matter rested when the Congress adjourned on August 5, 1939, no further public action on the subject having meanwhile been taken in the Senate. The Special Session of October, 1939, considered only neutrality legislation; but with the current agitation over increased appropriations and power for the Navy, it is not to be expected that some further attempt to solve the under water oil problem will not be made. A report on action at the regular session of the 76th Congress, which began January 3, 1940, will be found at the end of the present article, in the March number. While the matter is thus suspended, we may examine the present state of the law.

**Prior and Present Law**

Water borne traffic has been an important element of prosperity apparently since commerce began; and the importance of controlling the ship-going highways led from the earliest times to the convenient theory of actual ownership of the known seas by the current rulers of the world: from the Roman "Mare Nostrum" through the successive supremacies of Venice, Portugal, Spain, Holland, England, among others.\textsuperscript{59} As the navigated seas grew wider and dominion of the commercial world more effectually disputed, the theory of national ownership of the waves shrunk until with the beginning of modern common law each principal sovereign had come to claim only a margin of sea around his dry land domain. In 1604 Hugo Grotius included in his *De Jure Praedae* a doctrine of *mare liberum*\textsuperscript{60} which was disputed in 1632 by John Selden with *Mare Clausum*, and the issue became of theoretical importance in the succeeding naval struggle between Holland and England; but before 1676 Lord Chief Justice Hale could write:

"The sea is either that which lies within the body of a

\textsuperscript{57} Samuel A. King and Raymond M. Hudson. 2 Hearing, supra note 5, at 219, 261.
\textsuperscript{58} Letter of May 25, 1939, from Rep. Sam Hobbs.
\textsuperscript{60} Cf. A.S. de Biécourt (1931) 7 Revue de Droit International 429.
county or without. That arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county. . . . The part of the sea which lies not within the body of a county, is called the main sea or ocean. The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not. . . . In this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. . . . The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea.”

The question immediately occurs: how wide was this “narrow sea,” adjoining the coast, over which the king had jurisdiction and ownership? In 1565 Philip II fixed the visual horizon as the limit of Spain’s jurisdiction, but there was no general agreement on this or any other rule. Cornelius van Bynkershoek in 1702 suggested a line one league from shore, as the distance over which a cannon shot of those days would carry and therefore the reasonable width of a strip which could be protected from shore. This offered at least a convenient unit generally familiar to maritime nations; and whether for that reason or the logic of the cannon-shot distance, though as a measure that must always have been indefinite, and have begun almost at once to vary, the rule of one league was gradually adopted by many important nations throughout the eighteenth century. Like most other rules affecting relations between nations, there has been and still is dispute as to whether or not this limit for the mar-


63. De dominio maris (1703) c. 2: Generaliter dicendum esset, potestatem terrae finiri ubi finitur armorum vis. 1 Moore, Int. L. Digest (1906) 699.

64. Common linear units of distance are for land the English statute mile, and for water the marine or nautical league. These will be meant herein when mile and league are used without further qualification: 1 English statute mile=5280 feet=1609.3 meters. 1 marine or nautical mile=1 minute or 1/21,600 of a great circle=(U.S.) 6080.27 feet=1852.248 meters=1.151 (1 3/20 or 1 1/7 nearly) English statute mile. 1 marine or nautical league=3 marine miles=3.453 English statute miles.
ginal sea has become an established rule of international law; but at least most of the maritime powers have adopted it for general purposes and in the absence of special agreements for particular cases. Text authorities treat it as generally recognized, and some, foreseeing arguments relying on the increased range of modern ordnance, explicitly declare that the cannon-shot basis is no longer potent, if it ever was conclusive, and the one league distance cannot be changed without express agreement among the powers. Municipal laws which affect or appear to assume jurisdiction beyond one league are not known ever to have been successfully asserted in practice against an objecting nation. A modern recommendation\footnote{Dr. Walther Schücking (died 1935), Reporter for the Second Sub-Committee of the Committee of Experts for the Progressive Codification of International Law (1926) 20 Am. J. Int. L., Spec. Supp. 62; Fraser (1929) 3 Revue de Droit International 163.} that the zone be widened to two leagues was after discussion rejected by a committee of experts and one league retained in the proposed international code. Since 1793 the United States has been definitely committed to support of the one league rule.\footnote{Trivial indentations of the shore line, by small coves or inlets, the mouths of small rivers and nature's normal irregularities will not be taken into account, and the boundary will run smoothly as nearly as may be in accord with the general trend of the coast; but there will occur larger harbors, estuaries and wide bays which obviously require further consideration. For a rule as to how wide an entrance may be before its enclosed waters will be considered part of the main sea, Hale's line across an arm of the sea between the jaws of the land "where a man may reasonably discern from shore to shore" was of course unworkable with no specification of how much detail must be seen and no standard of optics. Various limits have been proposed and discussed from time to time, as, for example, ten miles, \footnote{Cf. Rowe v. Smith, 51 Conn. 266, 50 Am. Rep. 16 (1883) (New Haven harbor).} but in

general, international usage seems to have settled down to the empirical rule of accepting as within a nation's dominion every body of water, regardless of its size, over which that nation can show long continuous claimed, established and maintained jurisdiction, possession and other exercise of sovereignty, original or transferred, exclusive of all other nations. For cases in which no established dominion is shown, the United States, making consistent application of its rule of one league on the open coast, holds that bays up to two leagues across at their entrance are domestic waters, those above that width, open sea. A suggestion that the United States might claim control of waters inside of lines between more distant headlands, as Cape Ann to Cape Cod, Nantucket to Montauk Point, Montauk Point to the Delaware Capes and Florida South Cape to the Mississippi, in the absence of protagonists appears never to have been followed up. The State Department, however, perhaps spurred by the Navy-California problem above described and the Louisiana-Delaware type of legislation discussed hereinafter, was, before the outbreak of the Hitler War, considering whether to attempt to extend the United States claim of marginal sea generally to 12 miles internationally by individual treaties or ex parte notice.

The Inter-American Neutrality Conference which met at Panama City from September 23 to October 3, 1939, most of the delegates being the Foreign Ministers of their Republics, to consider measures for the protection of the western hemisphere against the European War, announced on October 3 the adoption of a "Declaration of Panama," which provided for the American nations to take joint action, requesting the belligerent governments to agree not to commit acts of war within a neutral zone in waters surrounding North and South America, excepting Canada and the possessions of European nations, such as British and French Islands in the West Indies, British Honduras and British and French Guiana. What was to be done if the belligerents refused to agree was not indicated, further than that the Republics would then consult. The very exceptions in the Declaration itself pointed to some practical difficulties, and the reser-

70. 1 Moore, Int. L. Digest (1906), §§ 131, 153, 164, 172; the Mississippi, p. 623; the St. Lawrence, p. 631; Gulf of California, p. 639; the Paraná, p. 640; the Amazon, p. 640; the Orinoco, p. 649; Delaware Bay, p. 735; Bristol Channel, p. 739; Conception Bay (Newfoundland), p. 740; Chesapeake Bay, p. 741; Buzzards Bay, p. 742; Bay of Fundy, p. 783; Bering Sea, p. 890.
71. 1 Moore, Int. L. Digest (1906) 806.
72. 1 Kent's Comm. 29 (1832); 1 Moore, Int. L. Digest (1906) 699.
vations of Argentina as to the Falkland Islands and of Guatemala as to British Honduras caveated old diplomatic problems. The tasks of making observation, taking precautions and obtaining information were impliedly left to a patrol chiefly by the United States Navy, which promptly rejected them as impracticable if not impossible; although a map of the proposed zone which Under Secretary of State Sumner Welles showed the Conference was said to have been prepared in Washington. The width of the proposed sea safety belt was tentatively suggested as 300 miles; which the British immediately criticized as a unilateral decision having no force or sanction in international law to change the established three mile territorial waters rule; and, moreover, dangerous to those respecting it, unless enforced on all belligerents by a neutral force which would, in the present state of the rules, then itself be committing acts of war.

President Juan D. Arosemena of Panama communicated the terms of the Declaration to England, France and Germany, and received from England and France polite acknowledgments giving no definite answer and no indication of acceptance of the safety zone. After the fight on December 13 in the Plata, within waters claimed as territorial by Argentina and Uruguay and in part within three miles of the Uruguayan coast, between the British cruisers Achilles, Ajax and Exeter and the German battleship Graf Spee, Acting President Augusto S. Boyd of Panama (successor to President Arosemena, who died December 16), in the name of the twenty-one American republics on December 23, 1939, telegraphed to England, France and Germany a protest against acts of war within the Pan-American sea safety zone; which, incidentally, would take in about five million square miles of ocean. Great Britain replied to both communications on January 15, 1940, declaring that "the proposal, involving as it does abandonment by belligerents of certain legitimate belligerent rights is not one which, on any basis of international law, can be imposed upon them by unilateral actions and that its adoption requires their specific assent," and indicated drastic safeguards as to German ships and activities which must be assured before Great Britain's consent could be expected. Germany criticized the British reply as insulting to the American nations, but at the time of writing has not answered either of the notes from Panama. The French reply, delivered to President Boyd on January 21st was more conciliatory in tone but parallel in argument to the British note, insisting that the renunciation by belligerents of well-established rights in such a vast zone could only result
from an accord between all the interested states; which, France says, the demarches on behalf of the American governments rather seem to imply they indeed understood. Meanwhile, the Pan-American Permanent Neutrality Committee of Five, meeting at Rio de Janeiro on January 15th to sit for the duration of the European War, was considering the whole matter further; and on January 16th it was announced that Costa Rica had granted permission to the United States Navy to patrol Costa Rican territorial waters on both the Atlantic and Pacific coasts in connection with the enforcement of the safety zone. It is interesting to observe that the idea, concededly as impractical as it is contrary to international law, has brought out direct and indirect declarations by belligerents and neutrals of adherence to the traditional three mile territorial waters rule.

Having thus suggested the outer and inner limits of the marginal sea, the question of its depth naturally occurs; or, from a slightly different point of view, the question of the ownership of what is in and under this strip of water. By the common law of England the king owned the bed of the sea below high water mark (even after the doctrine of *mare clausum* had shrunk to the coastal waters), and everything that was in the waters above it.74 The applications of this theory are not of much service now, however, for the royal control and grants of fishing rights were not limited to a league from shore but purported to cover the high seas wherever Englishmen had been accustomed to fish; and claims of prerogative rights in sedentary fish, sunken wrecks and treasure from the bottom are weakened as evidence by the existence on the land and over private property of similar royal rights in *ferae naturae*, jetsam and treasure trove. In the United States75 questions have arisen concerning, in the sea below high water mark, probably every class of property right known or claimed over dry land,76 as well as those peculiar to the nature of this strip as covered with water, and (deferring to a subsequent section consideration of rights as between the United States and an individual state) always the decision by executive, legislative or judicial authority, in court or other

74. Hurst, *Whose is the Bed of the Sea?* (1923) 4 British Year-Book of International Law 34.
75. 1 Moore, Int. L. Digest (1906) 701.
76. Such as: phosphate rocks, piers, fortifications, lighthouses, and other buildings and improvements resting in and on the bottom; sponge, oyster, scallop, mussel, lobster, crab, shrimp, free swimming; fisheries; customs, coast defense, navigation, quarantine and liquor police regulations. Cf. also: coal (Great Britain), coral (France and Italy), pearl (Ceylon).
tribunal, has been consistent with a theory of original absolute ownership by the sovereign state. Only a few opinions, indeed, come out boldly and say, beyond the probable requirements of the particular case at hand, that title to the soil under these waters is in the state, but such is the implication of all the cases; and clarity in viewing the past and certainty in judging the future would be highly served by receiving and adopting such rules as a general principle necessarily to be deduced from the precedents.

Definitions and Measurements

With these views of the California contest and its echoes in Congress and of the legal propositions broadly involved, we should be able to define and restrict the discussion to the topic with which we are concerned: the marginal seas around the United States.

Upland, inland or dry land, is that portion of the earth's surface not normally constantly or periodically covered with water. In view of their uselessness from a marine point of view, as well as their general tendency to become dryer, swamps, marshes or occasionally inundated flatlands tend to be treated as upland rather than water. The foreshore, tideland or tidal lands, sometimes loosely called merely the sea-shore, is that strip of more or less solid matter, mud, sand or rock, which lies between high water mark and low water mark,\textsuperscript{7} so that it is regularly submerged and then exposed twice each tidal day of 24 hours 50 minutes. It may vary in position from a vertical cliff to very broad flats, and in surface from a smooth plane to an area covered with holes, channels, shoals or reefs and islands, i.e. with areas never quite dry and others never wholly submerged. High and low water marks are those lines reached by the edge of the water at ordinary flood and ebb tides. Extraordinary or even seasonal storm tides are not to be considered, nor spring and neap tides separately, but their mean so far as possible; and, if we wish to be so accurate as to take into account a very small coefficient due to the rotation of the lunar nodes, the average for 18.6 years\textsuperscript{78} over which term the oceanographers

\textsuperscript{77} No port in the United States has a tidal range exceeding 10 feet.
\textsuperscript{78} Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935). From theoretical considerations of an astronomical character, it follows that there should be a periodic variation in the rise of high water above sea level having a period of 18.6 years. Marmer, Tidal Datum Planes (U.S. Coast & Geodetic Survey, Special Publication No. 135, 1927) 81. Based on the saros cycle of 18 years, 11 1/3 days, or 223 lunations.
learn from the astronomers there should be a recurrent periodicity in the strength of tides. Tidal waters\textsuperscript{79} are the open sea waters over the foreshore and waters as far inland as any rise and fall of the tide can be detected. At mean low water mark begins the high seas, main or open sea\textsuperscript{80} or ocean, which extends to mean low water mark around the whole of its terrestrial basin. Its surface may be broken by permanent natural formations, in size from a point of rock to an area of dry land large enough to be called a continent. Such islands are to be classed not according to size, but according to their distance individually or as a group or chain from the mainland. If every member of an archipelago is within two leagues of one or more other members, and the nearest inshore is within two leagues of the mainland, the whole group with the intervening waters and a marginal strip of water one league wide on the seaward sides belongs to and goes along with the nation that has the adjoining shore.\textsuperscript{81} Such, for example, would be the series of bars, sand spits and barrier islands that constitute the seaward shelter for the Intracoastal Waterways from New Jersey to Florida. If the island is isolated, and more than two leagues from the coast, it, with a marginal belt of water one league wide all around it, will belong to the shore and nation to which by custom it has long been attached, but the water between the two marginal limits, from shore to island, will remain

\begin{table}[h]
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\begin{tabular}{lccc}
\hline
Shores & Mainland & Islands & Total \\
\hline
Atlantic & 5,565 & 6,114 & 11,679 \\
Gulf & 3,641 & 2,777 & 6,418 \\
Pacific & 2,730 & 1,035 & 3,765 \\
\hline
Total & 11,936 & 9,926 & 21,862 \\
\hline
\end{tabular}
\caption{Tidal shore lines in miles, measured in steps of one mile, according to the U.S. Geological Survey.}
\end{table}

The area of a strip one league wide along the Atlantic coast is estimated at 5,000 square miles. Douglas, Boundaries, Areas, etc. of the United States and the Several States [Geological Survey Bulletin No. 817, U.S. Dept. of the Interior (1930); H. Doc. No. 115, 71st Cong., 1st Sess. V. 14, Serial 9139 (1929)]. Hereinafter referred to as States Boundaries. All water distances are approximate. Lengths of tidal shore line for the several states given in a subsequent section are on the same basis and from the same source.


Other nomenclature cuts across these natural lines. In England, from the nature of the island, and the small size of the rivers, tidal water has been taken to be synonymous with *navigable water*, but in America, where many rivers are navigable far above the point to which tides reach, the issue of navigability appears to be a question of fact to be determined for each case, although no general requirement of size of vessel or other definite conditions have been laid down. *Inland waters* are those on the upland side of shoals, reefs or coastal islands, and of lines between the headlands of domestic bays, subject to a more exact definition for the United States presently to be discussed. The *marginal sea* is that strip or belt of water next to the foreshore commencing at low water mark, or the line of inland waters across domestic bays, and extending oceanward as far as the sovereign of the adjacent upland may be able to maintain its theory of authority; for the United States, one league. Lands under the marginal sea are sometimes called *submerged lands*, in distinction from the ocean bed, under the open sea. It is evident that navigable water will include all the high seas, a small border of surf and shallows below low water mark excepted, and a portion of the inland waters determined by actual circumstances at the locality. Tidal water may or may not be navigable, but will commonly extend into inland waters making them salt with decreasing brackishness away from the sea; and the marginal sea may be measured from land or (inland) water, and will be tidal but may sometimes be fresh. Navigable, tidal and salt or fresh are therefore not useful for us as classifications.

**United States Practice**

When it was concluded above that in the United States the doctrine seemed to be that the soil below high water mark belonged originally in absolute ownership to the sovereign state, the issue as between the United States and the individual states was postponed. Here at once a distinction has to be made. The thirteen original Colonies when they formed the Union had

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83. 1 Moore, Int. L. Digest (1906) 621.
84. The Genesee Chief, 53 U.S. 443, 13 L.Ed. 1058 (1853); Barney v. Keokuk, 94 U.S. 324, 337, 24 L.Ed. 224, 227, 228 (1876).
85. The current of the Mississippi makes the water fresh around the Delta for a considerable distance into the Gulf; and the far flowing streams of the Amazon and the Plata enabled vessels to fill their water casks far out of sight of land.
already been independent sovereign states, and brought with them all the attributes of such sovereignty; retaining, under the established constitutional doctrine of delegation of rights, all those rights and powers which they did not expressly or by implication give over to the federal government. Texas also, when admitted as a state, had already been created and functioning, even if for a comparatively brief period, as an independent sovereign state, with the corresponding rights and powers. The remaining thirty-four states, created and admitted from territory which had been held by the federal government for a greater or less time, became states only at the moment when they became members of the Union. It happens that included in the coastal states are eleven of the original thirteen (the other two having access to the open sea only through another's inland waters), Texas, and eight other states created and admitted to the Union after its formation; so that all three groups of states, classified according to their previous conditions of existence, have to be considered here.

From the Declaration of Independence in 1776 until the adoption of the Constitution in 1787 the thirteen states were too busy fighting the Revolutionary War, establishing the peace and quelling internal and interstate disturbances to pay much attention to any international policy as to their ocean boundary; but within six years of the formation of the Union and the bestowal on the Federal Government of the control of foreign relations, it adopted, as we have seen, the width of one league for the marginal sea of the United States and has maintained that rule consistently ever since. Some of the original charters purported to grant to certain of the colonies control over a great deal more than that distance in the Atlantic Ocean, but while the states contested ardenty for land boundaries to the fullest extent arguable from their historical documents, it is not recorded that they uttered any protest, on the ground of charter or other claims, at the determination of the extent of the marginal sea by the national government and its fixing at one league. The states,

86. Wright, The Control of Foreign Relations (1922), reviewed by Edward S. Corwin (1923) 36 Harv. L. Rev. 499.
87. Georgia: The Charter of 1732 granted to General James Oglethorpe "20 leagues of the seacoast." Virginia: The Charters of 1606 and 1609 granted to the London Company "100 miles of the coast," and the Charter of 1611-12 granted "300 leagues of any part hertofore granted." Cf. Florida (Constitution, 1868), "to the edge of the Gulf Stream." More detailed reference will be made to boundaries of the particular states in the concluding installment of this article.
however, had not given up all rights in this border strip: they surrendered to the federal government such control as was necessary for the granted purposes\textsuperscript{8} of collecting duties, providing for the common defense, regulating foreign commerce, punishing felonies on the high seas, and offenses against the law of nations, and maintaining army, navy, forts and dock-yards, but they retained all the incidents of ownership which did not interfere with these purposes, such as the right to fill in, build upon or otherwise improve, grant title or easement, lease, and regulate free or bottom fisheries, within inland waters and the marginal sea. As the United States Supreme Court has put it:

"... the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution."

and

"The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states. ..."

and a Circuit Court declared that a state bordering on the sea 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."

Texas seceded from Mexico and erected itself into an independent Republic in 1836 and after the adoption by the Congress of the United States of a joint resolution offering statehood on conditions, which some Texans talk of as "the annexation treaty," was admitted as a state into the Union in 1845. Because one of the conditions was that:

"Said State, when admitted, ... shall also retain all the

\textsuperscript{88} U.S. Const. Art. I, § 8.


\textsuperscript{90} Louisiana v. Mississippi, 202 U.S. 1, 52, 26 S.Ct. 408, 422, 50 L.Ed. 913, 931 (1906).

vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas. . . .”

and notwithstanding that the state was admitted “on an equal footing with the original States in all respects whatever,” Texas official spokesmen argued with great fervor and some eloquence that Texas “stands in a peculiar position” and owns the soil under navigable water three leagues out into the Gulf of Mexico. The width of the strip will be dealt with later, in considering the water boundary of that particular state. The ownership, however, against the theory that no one has the title to the soil below low water mark, is put quite unnecessarily upon the ground that the marginal strip was public land formerly under the jurisdiction of Mexico, owned by the Republic of Texas and retained by the State after admission to the Union. The error is obvious. Aside from the fact that by long usage and acceptance in the United States “public lands” have always been taken to be upland, the lands to be retained by Texas were specifically “vacant and unappropriated lands,” and if the soil under the marginal sea is unappropriated, it is not waste or vacant in any legal or reasonable meaning of the word. Moreover, the lands to be retained were to be used for payment of the Republic’s debts, and the meaning, if doubtful, could not arguably be extended to an area then supposed to have no value and so unfit for any such purpose and not in fact in contemplation at all. In distinction from vacant and unappropriated lands, whose entire public function is to be sold outright to private owners by grant or patent for the benefit of the state treasury, the strip of soil under the marginal sea resembles rather the soil of forts and parks or under armories, courthouses, schoolhouses, libraries and other state,

92. J. Res. No. 8, March 1, 1845; 5 Stat. 797. 1 Hearing, supra note 9, at 102, 139, 210, 214, 249.
93. J. Res. No. 1, Dec. 29, 1845; 9 Stat. 108. 1 Hearing, supra note 9, at 211, 249.
94. Governor James V. Allred: “When they came to Texas a hundred years ago, they never dreamed of some of the riches that their children and their children’s children would enjoy.”
The Chairman: “I know they never did, Governor, but let us go ahead.” 1 Hearing, supra note 9, at 73.
Attorney General William McGraw: “Texas is a proud State but not arrogantly proud. We find our greatest pride in being one of the States of this great Union, upon an equal footing with all the other States.” 1 Hearing, supra note 9, at 254.
95. 1 Hearing, supra note 9, at 67.
96. Id. at 50, 72.
97. Id. at 72.
county or town buildings, whose title is in some municipal unit charged with a public purpose for the benefit of the community and not to be alienated into private hands at least until some substitute has been provided so far as necessary. Finally, the admission of Texas "on an equal footing with the original States in all respects whatever" is conclusive that as is the strip of soil under the marginal sea in the original States, so it must be in Texas, without distinction by reason of any peculiar historical or legal situation: owned by the State as a sovereign, subject to the delegated rights of the United States. There is neither reason nor authority to limit the words "in all respects whatever" to "political rights and privileges" and to allow distinction in ownership of public lands among the states, however created.99

The situation as to States created out of the lands which had been territories under the federal government is clear. Title to soil acquired by the United States, at least within the continental limits where states have been created, is held by the United States "only in trust for the future state" which, when admitted upon equal footing with the original States, takes "absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits."100 Those who urge, as especially for California, that on admission the United States never expressly conveyed and therefore retained the title to public lands within the new states, forget that as a universally recognized incident of government on change of sovereignty title to much public land, such as that under forts, parks, armories, courthouses, and other public buildings and uses already mentioned, necessarily passes without enumeration to the new state. For the operation of this principle, it is as immaterial that no list is made, to include eo nomine "the strip of soil under the marginal sea," as it is improper to conclude therefrom that such strip forms any part of the salable public domain. The eight coastal states, however, created from ceded territory,101 like the others, own the strip of soil under the marginal sea, subject to the delegated rights of the United States. For many purposes it is wholly permissible to consider this strip as analogous to public park lands ashore: the title is in the state, subject to use by citizens and others so long

99. Cf. argument by Blanton, 1 Hearing, supra note 9, at 10.
101. From an existing state, Maine; by purchase from Spain, Florida; by purchase from France, Louisiana Purchase; by treaty from Great Britain, Oregon Country; by conquest from Mexico, Cession of 1848.
as they obey state and federal regulations; the shell, crawling or sedentary fish being like the wild animals in the forests, belonging in the absence of other regulations to him who first reduces them to possession; the free swimming fish corresponding to the local or migrating birds; and the ships of the sea to their newer sisters of the air, certainly as to passage and perhaps other rights.

Although by the federal determination the States are restricted to the one league limit for their territorial jurisdiction, the United States may under special circumstances extend its jurisdiction extraterritorially into the high seas for the exercise of various proper governmental functions. To prevent smuggling, the United States revenue laws pushed the line for customs waters out to four leagues (13.8 miles) from the coast; and the acts have been held constitutional and to deal with an exclusively political matter with which the courts will not interfere.\textsuperscript{102} The prevention of smuggling entered also into the liquor treaties, to be considered presently. As one means of providing for the common defense, Congress thought it desirable that "defensive sea areas... [be] authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense...."\textsuperscript{103} This act, though apparently directed chiefly at the Canal Zone, sets no water limit, but seems to have been interpreted to cover navigable waters of the United States; and such areas as were established are said to have been all outside the low water mark.\textsuperscript{104}

The federal government has the power to regulate foreign commerce, and

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie."\textsuperscript{105}

Regulation of navigation includes primarily the right to pre-


\textsuperscript{104} 1 Hearing, supra note 9, at 119, 122.

\textsuperscript{105} Gilman v. Philadelphia, 70 U.S. 715, 724, 18 L.Ed. 96, 99 (1865).
scribe harbor and channel lines, quarantine regulations, also under the police power to safeguard the public health, and requirements as to taking pilots, all common functions among maritime nations. In further aid of control of navigation by the United States, Congress authorized the Secretary of the Treasury "from time to time to designate and define . . . the lines dividing the high seas from rivers, harbors and inland waters"106 of the United States, pilot and navigation rules made for inland waters to apply inside the lines so designated, and the international rules for navigation by vessels of all nations on the high seas to apply on waters outside of such lines. In fulfillment of that duty the Department of Commerce now publishes from time to time a statement of the lines so designated, nearly all well within one league of the coast or of lines between the headlines of bays or harbors under two leagues wide or across other waters domestic by long usage and general acquiescence, as already discussed. The United States has by this Executive method established and all other nations appear to have accepted without protest the

"General Rule. At all buoyed entrances from seaward to bays, sounds, rivers or other estuaries for which specific lines are not prescribed herein, Inland Rules of the Road shall apply inshore of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation of any system of aids.

"Modification of General Rule. Lines of demarcation have been established for the following specific areas of inland waters on the Atlantic and Pacific coasts of the United States . . . and inland waters of the United States bordering on the Gulf of Mexico."107

Twenty-six sets of lines thus specially established will be treated in connection with the water boundaries of the eighteen states off which they lie.

To execute the delegated federal power to punish felonies on the high seas, Congress provided for jurisdiction over crimes committed

". . . upon the high seas, or in any arm of the sea, or in any


107. Pilot Rules for Certain Inland Waters, Bureau of Marine Inspection and Navigation, Department of Commerce (1938) 11-17. General summaries have been made successively effective March 1, 1913, Jan. 1, 1931 and June 1, 1935. Referred to hereinafter as Inland Lines.
river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state. . . .”

Much more recently Congress indulged in some statutory fact-making by providing that certain offenses committed “on any of the Pacific Islands, or on waters, rocks, or keys adjacent to said Islands, lying within Lat. 20°N and Lat. 40°S and Long. 120°W and Long. 120°E of Greenwich, not being in the possession of any civilized power, shall be deemed committed on the high seas on board a merchant vessel belonging to the United States.”

The area thus described lies between the parallels of Hawaii on the North and New Zealand on the South and the meridians of Santa Rosa Island (California) on the East and Luzon (Philippine Islands) on the West, thus including most of the southern Pacific Ocean, with multifarious islands, especially in the southwest part, involving the rights or claims of many nations, by mandate or ownership.

Prohibition brought an interesting and much discussed development of extra-territoriality into the foreign relations of the United States. After vain efforts for some years by several federal Departments, working more or less together, to put an end to the running ashore of liquor from vessels under various foreign flags, anchored off the United States coasts outside the one league limit, the Hovering Acts and friendly representations as to abuse of registry privileges alike proving futile, the United States, beginning in 1924, undertook to strengthen its defensive ability by a series of treaties negotiated with each of the nations whose flags had been seen or seemed at all likely to appear in Rum Row. In six years the State Department procured the signing of sixteen “conventions to prevent the smuggling of intoxicating liquors into the United States,” whose main feature was an agreement by the contracting nation that no complaint would

be made in any case of pursuit and capture at sea by the United States authorities of a vessel under that nation’s flag for such distance from the United States coast as could be traversed in one hour by the suspected vessel or by any faster vessel from the shore with which she was trying to make contact. We are not here so much interested in the legal issues of the registration, ownership, hot pursuit, warning and reasonable force that arose internationally out of Coast Guard and other federal activities following these treaties as in a difference that separated them into two classes. One group of six, including the first such treaty, signed with Great Britain, recited that the parties

"... declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters;"

while the remaining ten, not conforming to the United States doctrine in this respect provided that the parties

"... respectively retain their rights and claims, without prejudice by reason of this agreement with respect to the extent of their territorial jurisdiction."

So far as the three Scandinavian countries in the latter group are concerned, it is interesting to note that their objection was not to the one league limit, which they all support in principle; but it happened that “league” in the international rule was originally taken to be the equivalent of the Danish “mil,” which is 4.684 miles, and Denmark, Norway and Sweden have consequently

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111. E. g., Cook v. United States, 288 U.S. 102, 53 S. Ct. 305, 77 L.Ed. 641 (1933).


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| Signed  |                                             |
| Aug. 11, 1924 | 694 | 43-1815 |
| Sept. 19, 1924 | 707 | 43-1875 |

| Panama |                                             |
| Signed  |                                             |
| Jan. 19, 1924 | 712 | 44-2013 |
| Apr. 8, 1925 | 738 | 44-2395 |

| Netherlands |                                             |
| Signed  |                                             |
| June 18/19, 1926 | 807 | 46-2448 |
| June 19/20, 1926 | 807 | 46-2448 |

| Cuba |                                             |
| Signed  |                                             |
| June 16/19, 1926 | 836 | 46-2448 |
| July 20, 1926 | 836 | 46-2448 |

| Japan |                                             |
| Signed  |                                             |
| Jan. 16, 1930 | 836 | 46-2448 |
| Mar. 16, 1930 | 836 | 46-2448 |

| Norway |                                             |
| Signed  |                                             |
| July 2, 1924 | 689 | 43-1772 |
| June 24, 1924 | 689 | 43-1772 |

| Denmark |                                             |
| Signed  |                                             |
| July 25, 1924 | 693 | 43-1809 |
| Aug. 18, 1924 | 688 | 43-1809 |

| Sweden |                                             |
| Signed  |                                             |
| Oct. 22, 1924 | 702 | 43-1844 |
| Nov. 17, 1926 | 749 | 44-2465 |

| Italy |                                             |
| Signed  |                                             |
| Mar. 12, 1927 | 755 | 45-2403 |
| Jan. 11, 1928 | 759 | 45-2458 |

| Spain |                                             |
| Signed  |                                             |
| Feb. 18, 1929 | 772 | 45-2736 |
| Aug. 2/8, 1930 | 821 | 46-2773 |

| France |                                             |
| Signed  |                                             |
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| Aug. 2/8, 1930 | 821 | 46-2773 |

| Belgium |                                             |
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| Greece |                                             |
| Signed  |                                             |
| Feb. 18, 1929 | 772 | 45-2736 |
| Aug. 2/8, 1930 | 821 | 46-2773 |

| Poland |                                             |
| Signed  |                                             |
| Aug. 2/8, 1930 | 821 | 46-2773 |
| Nov. 25/26, 1940 | 829 | 46-2852 |

| Chile |                                             |
| Signed  |                                             |
| Nov. 25/26, 1940 | 829 | 46-2852 |
always maintained their marginal sea to be four marine miles in width. Of the others, historically, Italy and Spain have supported six miles, and Russia (with whom, however, no treaty of this sort was signed), twelve miles.

Under our dual federated system of government, as Congress cannot change the boundary of a State without its consent\(^\text{114}\) so

"No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."\(^\text{115}\)

and it will be noticed, in the discussions of the boundaries of the twenty-two several coastal states which follow, every agreement between States made since 1787 has been thought to require and has received the consent of Congress before federal courts will recognize its validity. It is a further established constitutional doctrine that "state action affecting interstate or foreign commerce is altogether inadmissible in the absence of federal action if the subject is one demanding uniformity of legislation."\(^\text{116}\) Few subjects can be suggested in which, for the correct information of and responsible dealing with sister states or foreign nations, it could be conceived to be more important to have uniformity and constancy than the width of the marginal sea subject to claims of jurisdiction and sovereignty. Arbitrary leaps or jogs of the line in or out as it crosses the end of an interstate state boundary line projected into the sea would be impracticable of permanent demarcation in so fluid an element and intolerable nuisances in international relations. Fortified further by a precedent of Congressional permission to change a state's boundary which, though not on the ocean, did not affect any sister state,\(^\text{117}\) it must be con-

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\(^\text{115}\) U.S. Const. Art. 1, § 10.


\(^\text{117}\) Texas permitted to extend her eastern boundary to meet Louisiana; Act of July 5, 1848, c. 94, 9 Stat. 245.
cluded that no state may change her ocean boundary without the consent of the federal government.¹¹⁸

This conclusion is vital in considering a type of state legislation which was first enacted in 1938 and threatens to spread. Meeting the anticipation of the text writers,¹¹⁹ some of the speakers before the Judiciary Committee²²⁰ toyed with the idea that with the modern extension of artillery range an argument could be made for broadening the one league limit, as to thirty²¹¹ or thirty-five²¹² miles. The Louisiana representatives²¹³ in particular were so intrigued with this notion, coupled with their desire to forestall the federal authorities from pulling possible revenue-producing areas out from the state’s grasp, that they went home and produced a remarkable bill in a field theretofore wholly unapproached by any state. Passed by the State Legislature and approved by Governor (ex Judge) Richard W. Leche on June 30, 1938, the Act provides that:

“Whereas dominion . . . over its marginal waters by a State has found support . . . .

“Whereas, according to the ancient principles of international law it was generally recognized by the nations of the world that the boundary of each sovereign State along the seacoast was located three marine miles distant in the sea, from low water mark along its coast on the open sea. . . .

¹¹⁸. In denying an injunction against officials of the state of Florida to prevent them from enforcing a law of 1917 regulating the sponge fishery in the Gulf of Mexico to persons who sought to continue fishing as they had theretofore (1934) done 5 to 10½ miles offshore (opposite Taylor County), a three judge district court said that since the Florida Constitution of February 25, 1868 changed the Gulf boundary of the state from 1 league offshore, as it had been theretofore, to 3 leagues, not affecting the boundary of any other state; since such constitution had been approved by Congress, under the Reconstruction Acts admitting Florida again to representation in Congress; and since the current Constitution of 1885 with the same provisions had been acquiesced in for nearly 50 years by the citizens of Florida and foreign nations, a resident of Florida was estopped to deny the jurisdiction of the state over the wider belt in the Gulf of Mexico. Pope v. Blanton, 10 F. Supp. 18 (D.C.N.D. Fla. 1935). On appeal, the case was remanded with directions to dismiss the bill for absence of the requisite jurisdictional amount. 299 U.S. 521, 57 S.Ct. 321, 81 L.Ed. 384 (1937). So far as the decision below is to be taken as authority, it must be limited to a case where (1) Congress has by affirmative action approved the change of boundary and (2) a citizen is questioning the 50 year old constitution of his own state.

¹¹⁹. See note 65, supra.

¹²⁰. With up-to-date cynicism, the printer makes a Committee member speak of “the laws of nations, the cannon law that governs international affairs.” 1 Hearing, supra note 9, at 132.

¹²¹. 1 Hearing, supra note 9, at 174.

¹²². Id. at 15, 232.

"Whereas, the said three mile limit was so recognized as the seaward boundary of each sovereign State, because at the time it became so fixed, three marine miles was the distance of a cannon shot and was considered the distance at which a State could make its authority effective on the sea by the use of artillery located on the shore;

"Whereas, since the said three-mile limit was so established as the seaward boundary of each sovereign State, modern cannon have been improved to such an extent that now many cannon shoot twenty-seven marine miles and more and by the use of artillery located on its shore a State can now make its authority effective at least twenty-seven miles out to sea from low water mark. . . .

"Whereas, a State can define its limits on the sea. . . .

"Section 1. . . . the gulfward boundary of the State of Louisiana is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three-mile limit as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four marine miles further out in the Gulf of Mexico than the said three-mile limit.

"Section 2. . . . subject to the right of the government of the United States to regulate foreign and interstate commerce under, Section 8 of Article 1 of the Constitution of the United States, and to the power of the government of the United States over cases of admiralty and maritime jurisdiction, under Section 2 of Article 3 of the Constitution of the United States, the State of Louisiana has full sovereignty over all of the waters of the Gulf of Mexico and of the arms . . . . and over the beds and shores. . . . of the said Gulf within the boundaries of Louisiana, as herein fixed.

"Section 3. . . . Louisiana owns in full and complete ownership . . . [such waters, arms, beds and shores] including all lands that are covered by the waters of the said Gulf and its arms either at low tide or high tide. . . .

Section 4. . . . this Act shall never be construed as containing a relinquishment by the State of Louisiana of any dominion sovereignty, territory, property or rights that the State of Louisiana already had before the passage of this Act."124

124. La. Act 55 of 1938 [Dart's Stats. (1939) §§ 9311.1-9311.4]. Hebert and Lazarus, Louisiana Legislation of 1938 (1938) 1 Louisiana Law Review 80,
In view of actual occurrences in the last war\textsuperscript{125} and possible development in the present European conflict, the United States should perhaps be thankful, especially if it has to answer any polite foreign inquiries, that the authors of this astonishing example of states' rights gone autonomous were so modest and restrained as to annex but twenty-four miles. The idea is pleasing to rugged individualistic statesmen, of course. A bill in the same language even to the Whereases, with only appropriate changes \textit{pari passu}, was passed by the Delaware Senate on February 22, 1939;\textsuperscript{126} and similar acts are reported to be under consideration in other coastal states. Federal opinion and executive or judicial action on such legislation has not yet had time to appear, but hints may be gathered. The Bureau of Marine Inspection and Navigation of the Department of Commerce says:

"To date the Bureau has not prepared any opinion relative to the effect of State statutes purporting to extend the maritime zone to a distance of 27 miles from shore, but were it required to do so, the cases of the United States vs. Greenleaf Lumber Co., 237 U.S. 251; Philadelphia Co. vs. Stimson, 223 U.S. 605; U.S. vs. Chandler Dunbar Co., 229 U.S. 53 and E. Pat Kelly vs. Washington, 302 U.S. 1, would be given consideration in determining the solution of the question."

The four cases cited display in common an emphasis upon the paramount quality of federal authority over that of the states in navigable waters. In view of all our preceding discussion we may now predict quite confidently that the United States Supreme Court will hold that the determination of maritime boundaries is exclusively a federal function, and that any state legislation attempting to deal with it is wholly unconstitutional.

We proceed to a detailed determination of the water boundary of each of the twenty-two coastal states\textsuperscript{128} (with 146 marginal counties), as fixed historically by charters, constitutions, legisla-

\textsuperscript{125} Six "Big Berthas," caliber 210 mm. (8.28 in.) fired 367 rounds, all of which burst, into Paris between March 23 and August 8, 1918, from near La Fère, a distance of 75 miles.

\textsuperscript{126} S. 53. The (Delaware) House of Representatives had no action upon this bill when the regular session of the 107th General Assembly adjourned on August 28, 1939.

\textsuperscript{127} Letter of March 7, 1939.

\textsuperscript{128} Where an interstate boundary touches the marginal sea, it will be found treated herein under the earlier alphabetically of the two states concerned.
tive definitions for State or counties, and such few decisions as bear directly on the maritime line. We may assume it to be settled with considerable uniformity that, subject to federal control of navigation and the other functions already discussed, each State may determine according to its own laws the nature, extent, and incidents of grants to individuals of rights in the soil above low water mark and fisheries of all sorts or other privileges in waters within its domestic bays; questions which in fact do not bear at all upon the issue as to rights in the marginal sea, which we are discussing, and therefore need not be further examined in detail.

**The States' Sea Boundaries**

**Alabama**

The state adjoins on the south (30°15'N Lat.) the Gulf of Mexico for a distance of sixty miles by air line from Florida (87°25'W Long.) on the east to Mississippi (88°25'W Long.) on the west, with a tidal shore line of 174 miles on the mainland and 117 miles around islands, a total of 291 miles. Territory on the Gulf west of the Perdido River was part of the Province of Louisiana sold by France to the United States by treaty of April 30, 1803 or part of West Florida ceded by Spain to the United States by treaty of February 22, 1819, but in 1812 all land in the Purchase east of the Pearl River was detached from Louisiana and annexed to the Territory of Mississippi. When this Territory was cut in two (and Mississippi admitted as a State), the median line or western boundary of Alabama Territory came down to the northwest corner of Washington County (Alabama) and “thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore, to the Perdido river, and thence up the [Perdido River].” This de-

129. States Boundaries, supra note 79, at 34, 162, 252.
130. Sold by Carlos IV of Spain to France by the Treaty of San Ildefonso, Oct. 1800. 1 Treaties (Malloy, 1910) 506. Tratados de España (Cantillo, 1843) 692.
133. Proclaimed Feb. 22, 1821. 8 Stat. 252. 2 Treaties (Malloy, 1913) 1651. 1 Moore, Int. L. Digest (1906) 440. Tratados de España (Cantillo, 1843) 819. The United States gave up all claims to Texas, Fernando VII of Spain to the Oregon country, and Spain sold Florida to the United States for $5,000,000, the boundary on the Gulf to be thereafter the Sabine River.
scription was continued in the act admitting Alabama as a State, with the proviso that if the surveyors should find that

"... so much of said line ... running due south, from the northwest corner of Washington county to the Gulf of Mexico, will encroach on the counties of Wayne, Greene, or Jackson, in ... Mississippi, then the same shall be so altered as to run in a direct line from the northwest corner of Washington county to a point on the Gulf of Mexico ten miles east of the mouth of the river Pascagoula."

The surveyors did find such encroachment and swung the southern part of the interstate line eastward accordingly, so that the boundary has since run from

"... the northwest corner of Washington county, in this state, as originally formed; thence southerly along the line of Mississippi to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido river; and thence up the [said river]..."

The State has always claimed title to lands under navigable waters below high water mark, allowed by a recent case to at least one league from the coast. There are but two counties which adjoin the Gulf: Baldwin County from the Florida line at the Perdido River to a line in Mobile Bay, and Mobile County from that line in Mobile Bay to the Mississippi line ten miles east of the Pascagoula River; but the boundary lines of both were fixed very early, and neither makes any mention of the Gulf on the south. The Commerce Department inland waters line runs from

"... a point located 1 mile 90° true (east) from Mobile Point Lighthouse, a line drawn (southwestward 5 miles) to Mobile

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139. Toulmin, Digest of the Laws of the State of Alabama (1823) tit. 10, c. 3, p. 81 (Baldwin County, Act of Dec. 21, 1809); tit. 10, c. 6, p. 83 (Mobile County, Act of Dec. 18, 1812).
Entrance Lighted Whistle Buoy; thence (westward 22 miles to the Mississippi state line, projected) to Ship Island Lighthouse (off Biloxi, Miss.) This covers the entrance to Mobile Bay three miles across (widening inside to twenty miles, and thirty miles in depth) from Fort Morgan on Morgan or Mobile Point on a low narrow sand spit seventeen miles long attached to the mainland on the east to Fort Gaines on Dauphine Island on the west, and includes, besides some very small bars, Sand, Pelican, Dauphine and the eastern two thirds of Petit Bois Islands, all within eleven miles of the mainland and the outermost ones within a mile of each other and of Dauphine Island. There appear never to have been nor to be now any other islands within six leagues of the Alabama shore; and if any should be formed, they would not necessarily carry the marginal sea out to include them, but would leave open sea between the one league belt encircling them and the line one league out from the south side of the coastal islands now known.

California

The state adjoins on the west (117°10' to 124°25' W Long.) the Pacific Ocean for a distance of 780 miles by air line from Oregon (42° N Lat.) on the north to Baja California, Mexico (32°30' N Lat.) on the south, with a tidal shore line of 1,264 miles on the mainland and 291 miles around islands, a total of 1,555 miles. It formed part of the country conquered from Mexico and ceded by the Treaty of Guadalupe Hidalgo of February 2, 1848 with the boundary between Mexico and the United States to follow

"... the division line between Upper and Lower California, to the Pacific Ocean ... a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782...."

The first state constitution (California never having been a Territory) describes the state boundaries as

"... down the middle of the channel of [the River Colorado]
to the boundary line between the United States and Mexico, as established by the treaty of May 30, one thousand eight hundred and forty-eight; thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree parallel of north latitude; thence on the line of said forty-second degree. . . . Also all the islands, harbors, and bays along and adjacent to the coast.\textsuperscript{145}

and is supplemented in the Political Code by definitions:

"The words 'in,' 'to,' 'from' the ocean shore mean a point three miles from shore. The words 'along,' 'with,' 'by' or 'on' the ocean shore, mean on a line parallel with and three miles from the shore."\textsuperscript{146}

The question as to whether public lands in California are different in any respect from those in any other admitted state has already been discussed in the section on United States Practice,\textsuperscript{147} but it may be noted that there is an outer marginal ribbon, 0.453 miles in width,\textsuperscript{148} representing the difference between the express three English miles of the state constitution and the one league or three nautical miles of the real marginal sea which is probably already included in the state by the grant and usage of the United States, but which the state may some day want to bring within its express bounds by amendments of its constitution. The state has always claimed title to lands under navigable water below high water mark\textsuperscript{149} and, subject to the obligation imposed by the treaty on the United States to protect all rights of property which emanated from the Mexican Government prior to the cession,\textsuperscript{150} has freely exercised jurisdiction over and disposed of such lands according to local law. There are fifteen counties which adjoin

\begin{footnotesize}
\begin{itemize}
\item 146. Cal. Pol. Code (1872) § 3907.
\item 147. See text and note 100, supra.
\item 148. Compare the section on Georgia which is to appear in the concluding installment of this article.
\item 150. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935) (Mormon Island in San Pedro Bay, now known as Los Angeles Harbor).
\end{itemize}
\end{footnotesize}
the Pacific\footnote{151} but fourteen do not mention any western water boundary and one (Santa Cruz) perhaps runs out three nautical miles. There are three Commerce Department inland waters lines\footnote{152} across bays or harbors on the California coast:

"San Francisco Harbor. A straight line from Bonita Point Lighthouse drawn (southeastward $2\frac{1}{2}$ miles across the Golden Gate) through Miles Rocks Lighthouse to the shore (at Point Lobos in the City of San Francisco).

"San Pedro Bay. A line drawn from Los Angeles Harbor Lighthouse (on Point Fermin) through the axis of the new breakwater\footnote{153} (southeastward 1 mile, then northeastward at an angle of $126^\circ$ with the preceding 3.8 miles) and extended in a straight line (northeastward 5 miles) to the shore of Long Beach (at Point Lasuen in the City of Huntington Beach?).

"San Diego Harbor. A line drawn (southwestward 3.5 miles) from the southerly tower of the Coronado Hotel (on Coronado Beach) to Outside Bar Lighted Bell Buoy 1 SD: thence (northwestward at an angle of 100 degrees with the preceding 1.2 miles) to Point Loma Lighthouse."

These cover the entrances to San Francisco Harbor, 2.4 miles across (widening inside to forty-seven miles and thirteen miles in depth), San Pedro Bay\footnote{154} or Los Angeles Harbor, seven miles across (a shallow crescent $2\frac{1}{2}$ miles deep) and San Diego Harbor, one-half mile across (widening inside to $2\frac{1}{2}$ miles and 14 miles in depth) from Point Loma inner light to North Coronado Beach Island, leaving the Bay of Monterey,\footnote{155} eighteen miles across (widening inside to twenty-two miles and nine miles in depth) the only other principal indentation on the California coast. The principal islands claimed by the state are the Farallones, San Miguel, Santa Rosa, Santa Cruz, Anacapa (twelve miles from the mainland, across Santa Barbara Channel), San Nicholas, Santa Catalina and San Clemente, and courts have up-

\footnote{151}{North to south: Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Francisco, San Mateo, Santa Cruz (northwest corner in the Pacific Ocean S. 45°, W. 3 nautical miles from the intersection of the east line of Rancho Punta del Año Nuevo with said ocean), Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, and San Diego. Cal. Pol. Code (1872) §§ 3909-3966.}

\footnote{152}{Inland Lines, supra note 107, at 14, 17.}

\footnote{153}{Built 1910. See illustration (1934) 66 Nat. Geog. Mag. 542.}

\footnote{154}{Three miles into ocean from line joining headlands. United States v. Carrillo, 3 F. Supp. 121 (D.C.S.D. Cal. 1933) (piracy and robbery on gambling vessel anchored in San Pedro Bay).}

\footnote{155}{Three English miles into the ocean, not into the bay. Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 Pac. 722 (1927) (sardine fishery).}
held jurisdiction in a belt of water three miles in width around these islands\textsuperscript{156} or even for a limited purpose across the whole of San Pedro Channel, twenty miles wide between Santa Catalina Island and the mainland.\textsuperscript{157}

**Connecticut**

This original state, like Pennsylvania, though spoken of as a coastal state, is in fact enclosed by the water boundaries of two other states which meet at its southeast corner, and it therefore has no access of its own to the open sea. The State adjoins on the south (41°15'N Lat.) Long Island Sound, one hundred miles long by twenty miles at its widest, for a distance of ninety-five miles by air line from Rhode Island (71°54'W Long.) on the east to New York (73°39'W Long.) on the west, with a tidal shore line of 126 miles on the mainland and 18 miles around islands, a total of 144 miles.\textsuperscript{158} The grant in 1662 by Charles II to the Colony of Connecticut was bounded "on the east by Narragansett River, commonly called Narragansett Bay, where the said river falleth into the sea..."\textsuperscript{159} The next year he granted to Rhode Island the country west to the middle of the Pawcatuck River, and the resulting dispute was not settled until 1728.\textsuperscript{160} Commissioners appointed to run the line reported on April 27, 1840 that it should begin "at a rock near the mouth of the Ashaway river, where it empties into Pawcatuck river, and from said rock a straight course northerly."\textsuperscript{161}

In 1683 the royal Governors of New York and Connecticut agreed that the boundary between those Colonies should "... begin at Byram Brook or River between the Towns of Rye and Greenwich at the mouth of the said Brook where it falleth into the Sound at a Point called Lyon's Point, which is the eastward point of Byram River."\textsuperscript{162}

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\textsuperscript{157} For purposes of the California Penal Code: whether or not high seas as between California and the United States or between the United States and foreign nations, the court was not agreed. Ex parte Keil, 85 Cal. 309 (1890).

\textsuperscript{158} States Boundaries, supra note 79, at 103, 252.

\textsuperscript{159} Rhode Island v. Massachusetts, 55 U.S. 591, 629, 11 L.Ed. 1116, 1133 (1846).

\textsuperscript{160} Cady, Rhode Island Boundaries, 1636-1936 (1936) 9, 10, 14.


\textsuperscript{162} Agreement of Nov. 28, 1883; carried out, 1684, by New York; by Connecticut not until 1731. Report of Comm'rs to Ascertain the Boundary
Continued pressure by New York and objections and withdrawals by Connecticut finally ended in Connecticut's transfer of the "equivalent territory" in 1731. Commissioners in 1825 described the south end of the line as "Beginning at Lyon's Point in the mouth of a brook or river called Byram River where it falls into Long Island Sound." At first there was some hesitation about considering Long Island Sound as wholly inland waters and acknowledging that the southern boundary of Connecticut adjoined New York somewhere along its surface, early cases declining to say that the Sound belonged to either State. Later disputes arose, and after negotiations it was agreed that the two States came together in the Sound, and that the boundary should run from a point in the center of the channel, about six hundred feet south of the extreme rocks of Byram Point (formerly called Lyons Point), to the east and southeast so far as said states are co-terminous; provided nothing in the agreement should be construed to affect existing titles to property or existing rights of said states for fishing, for shell or floating fish. The boundary Commissioners in 1880 accepted a survey of 1860 and ran the line from a point in the center of the channel in line with the breakwater at Lyon's or Byram Point in Lat. 40°59'03.152 and Long. 73°39'24.546; thence (four southeast and northeast courses); thence S 70°07'26" E 6424 ft. toward Point No. 3 (on a certain U.S. Coast Survey chart) until said line intersects the westerly boundary of Rhode Island at a point (No. 174) in Lat. 41°18'16''249 and Long. 71°54'28''477, as determined by Commissioners of Connecticut and Rhode Island by memorandum of agreement dated March 25, 1887.

A re-survey of 1909-10 kept substantially the same line through the Sound but rather nearer the Connecticut than the

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New York shore. Part of the line with Rhode Island was also disputed, and after various efforts at settlement, the Commissioners' report was finally accepted and ratified, and the boundary agreed upon as running down the middle line of the Pawcatuck River eighty-eight courses to

"... a point numbered 89, where said middle line intersects a line drawn across the mouth of the river; thence running in a straight line to point 90; thence running northwesterly to point 91, being the spindle on the granite beacon known as Rhodes Folly, thence in a straight line S 20°15'W true meridian to the boundary line between Connecticut and New York and at right angles therewith or thereabouts, being point 92."

This last point, where the boundary lines with Rhode Island from the northeast and New York from the west meet to enclose Connecticut wholly to the north, is in Fisher's Island Sound southwest of Stonington (Conn.) and approximately 1½ miles from Stonington Point, Napatree Beach, (R.I.) to the east and East Point of Fisher's Island (N.Y.) to the southwest.

The State has always claimed title to lands under navigable waters below high water mark, but it allows the owner of the adjoining upland to build wharves or dig channels and otherwise occupy the flats even below low water mark, so long as he does not interfere with navigation. The four counties adjoining Long Island Sound, New London, Middlesex, New Haven and Fairfield (from east to west) "extend southerly to the southerly boundary line of the state as settled and defined by the agreement with


169. See supra note 168.

With the center of co-ordinates at Fort Hill (R. I.) triangulation station at 41°20'01".266=39.1 meters, 71°49'15".129=351.8 meters, these four points are No. 89, S.4820', W.10614'; No. 90, S.5300', W.12579'; No. 91, S.995', W.20360'; No. 92, S.10617', W.23916'.


New York dated December 8, 1879.172 The Commerce Department inland waters line173 runs from Block Island (R.I.) to Montauk Point (N.Y.), and so entirely outside all possible Connecticut waters. None of the principal islands174 in Long Island Sound now belongs to Connecticut, for although she claimed originally Long Island and in 1680 under Gov. William Leete, Fisher's Island, she lost them both to New York.175 The claim to Long Island was ended by a report of Commissioners on November 30, 1664 who found that the southern bound of Connecticut was "the sea," meaning then Long Island Sound. Fisher's Island, discovered by the Dutch in 1614 (only two miles off shore from Noank [Conn.] and five miles from Great Gull Island, the nearest New York land) was owned by the cautious John Winthrop under a grant from Massachusetts in 1640, purchase from the Indians in 1644 and confirmation from Gov. Richard Nicolls of New York before 1668, and was definitely assigned to New York by the agreement of December 8, 1879,176 although Connecticut sought then to reopen the question.

Delaware

This original State adjoins on the east (75°05'W Long.) the Atlantic Ocean for a distance of thirty-three miles by air line from New Jersey across Delaware Bay on the north (38°55'N Lat.) to Maryland (38°27'N Lat.) on the south, with a tidal shore line of 140 miles on the mainland and 14 miles around islands, a total of 154 miles.177 Part of the territory seized by the English from the Dutch in 1664, the Delaware country was sold by the Duke of York on August 24, 1682 to William Penn for an outlet to the ocean, bounded on the north by a circle of twelve miles radius about the town of New Castle, the center of government. It remained "the three lower counties" of Pennsylvania until given a separate legislature in 1704 and made an independent Colony in 1776. Maryland, under Lord Baltimore's Charter of 1632 claimed the whole of Delaware and the dispute was not settled until the approval of the Commissioners' report of No-

173. Inland lines, supra note 107, at 12, 15.
176. See note 166, supra.
November 9, 1768 for a line seventy miles long across the peninsula from Fenwick's Island, Cape Henlopen (now Cape James) to Chesapeake Bay by a line from the verge of the main ocean, the eastern end or beginning of the said due east and west line. The eastern boundary, in Delaware River and Bay, was the subject of a long dispute with New Jersey. The twelve mile circle about New Castle was finally agreed to carry Delaware to low water mark on the New Jersey side of the Delaware River, where the circle intersected the river both above and below New Castle. Below the lower intersection of circle and river the boundary was long declared by Delaware to be the middle lines of Delaware River and Bay to the mouth of said Bay and the Atlantic Ocean, but New Jersey would not agree, except as to a common right of fishery and service of criminal process, and it has only recently been decided in a suit pending since 1927 that the correct boundary below the circle is "the thalweg or main channel of navigation in Delaware River and Delaware Bay." The State has always claimed title to lands under navigable waters. The recent legislative attempt, following Louisiana, to


push the eastern boundary out twenty-seven miles in the Atlantic has already been mentioned. Of the three counties, New Castle is on Delaware River, Kent on Delaware Bay and only Sussex adjoins the Ocean. The Commerce Department inland waters line runs:

"Delaware Bay. A line drawn from Cape May East Jetty Light (south) to Cape May Harbor Whistle Buoy; thence (southwest) to Overfalls Lightship; thence (southwest) to Cape Henlopen Coast Guard Station."

This covers the entrance to Delaware Bay, 11.7 miles across (widening inside to 28.6 miles and 60 miles in depth) from Cape May Point (N.J.) to Cape Henlopen (formerly called Cape Cornelius). The capture of the British ship "Grange" by the French frigate "l'Embuscaded" in Delaware Bay "within the capes" was the occasion for the first assertion (1793) by the United States of the doctrine of one sea league for the marginal sea; and on representation by the Federal Government that Delaware Bay was in fact domestic waters, the vessel was finally restored by the French.

[To be concluded]

185. See text and note 126, supra.
186. Inland Lines, supra note 107, at 12, 15.
187. The original Cape Henlopen is 21½ miles farther south, at the Delaware-Maryland line, and is now called Cape James.