schooner carrying liquor about one and three-quarter miles off the shore of the County of Saint John. The question was whether or not the courts of New Brunswick had jurisdiction over an offence committed in such a locality, and the Court of Appeal of New Brunswick held that the court did have such jurisdiction. In the judgment considerable reference was made to the:

> —Royal Instructions issued to Governor Carleton upon the separation of what is now the Province of New Brunswick from the Province of Nova Scotia [in which] the southern boundary of the new Province was defined as a "line in the centre of the Bay of Fundy . . . clearly indicating [it said] the claim of Great Britain at that time to the whole of the Bay of Fundy as a portion of her territory.

The decision goes on to examine this at some length, but I will not burden honourable senators by reading any further extracts from it.

• (1600)

I just would say that notwithstanding the view expressed in the *British Columbia Reference* case, which was not essential to the decision therein, it is respectfully submitted that it did not overturn the *Burt* case, and that case clearly holds that the Province of New Brunswick has legislative jurisdiction over the territorial sea, which is part of the case, which I think all the things which I have been mentioning support, and which was not the case in British Columbia. The court held there clearly that British Columbia had no jurisdiction over the territorial sea.

The question of the ownership of the solum, or the earth lying under the coastal waters, was in part dealt with by the Supreme Court of Nova Scotia in the case of *Dominion Coal Company Limited vs. Municipality of the County of Cape Breton.* This is a fairly recent case, and is reported in (1963) 48 Maritime Provinces Reports, at page 174. Though it may be argued that this case is authority only with reference to the solum of waters which are interior waters—that is, not part of the territorial sea—there are a number of comments in the various judgments of the Court of Appeal in that case which appear to deal with the question in wider terms. These, like some of the comments of the Supreme Court, may, at best, be simply *dicta*, but are of value in considering the problem.

For instance, at page 199, Mr. Justice Currie says that, in his opinion, under pre-Geneva Conference law it was generally recognized that a coastal state can exercise sovereignty over its territorial waters, up to three miles; and then he goes on to say that as part of the soil and territorial property of the Crown, the minerals under the sea beyond low water mark were vested in the Crown. He then refers to the "hovering" act, which I have mentioned, and how it supports the contention of Nova Scotia's ownership off her coasts.

I must say, however, that the comments of one of the other judges, Mr. Justice MacDonald, raise certain questions without expressing any clear subject. Mr. Justice Patterson, quoting from a recognized text, says:

> As regards the bed of waters and the subsoil beneath the territorial and the interior waters, it is now generally admitted that they belong, to an unlimited extent, to the state which is sovereign of the territory on the surface. It therefore possesses the right to carry out the exploitation of both the surface and its subsoil by tunnelling or mining for coal and other minerals.

I should say here that that particular case was about the right of the municipality to assess coal mines extending out under the sea, and I should say also that for more than a century, long before Confederation, Nova Scotia has been taking coal from under the sea, and beyond—very substantially beyond—anything which could be called the territorial waters.

Senator Deschatelets: Excuse me, Senator Smith, but in the last case you mentioned was the matter referred to a higher court?

Senator Smith: No, it ended with the Supreme Court of Nova Scotia, although it could have been appealed had either party wanted to do so, I suppose, and had the Supreme Court given leave. However, there was no appeal. You will be glad to know, honourable senators, that I am approaching, or am within sight of, the end of this dissertation.

I would like now to make reference to a well-known author, who has written a number of articles on various aspects of mineral rights, and more particularly with regard to oil. His name is John Ballem, and I refer to a particular article of his which was delivered as a lecture to the Law Society of Upper Canada in 1978, and which is printed in the volume of their special lectures of that year at page 251 and succeeding pages.

With reference to the solum of the territorial sea, Ballem acknowledges, at pages 267 and following, that the historical claim of the maritime provinces is supported by legislative and judicial authority pre-dating Confederation. He goes on to say, however, that in his view—with which, incidentally, I do not agree—much of the case law upon which the maritime provinces base their arguments was disposed of in the *British Columbia Reference* case. I say he has gone as far astray as some other people have. He has not really examined the question to see what the Nova Scotia situation really is, although he does recognize that it may be different. He says that in the case of Nova Scotia his comments should perhaps be qualified to some extent, because of the uncertainty and arguments surrounding the status of Sable Island, which clearly was a part of the colony of Nova Scotia at the time of Confederation. Whether Sable Island ceased to be part of Nova Scotia at the time of Confederation I will deal with a little later—I hope briefly—in this memorandum. Ballem then goes on to say:

> It would appear that to substantiate their jurisdiction over these resources the Provinces will have to prove their ownership to the lands under the territorial sea. Secondly to prove their ownership to these lands in the light of the Supreme Court's approval of the *Keyn* case—