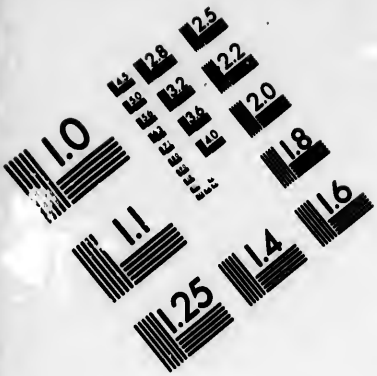

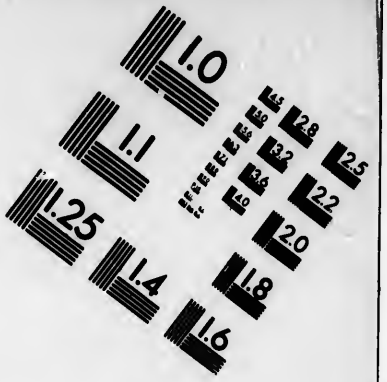

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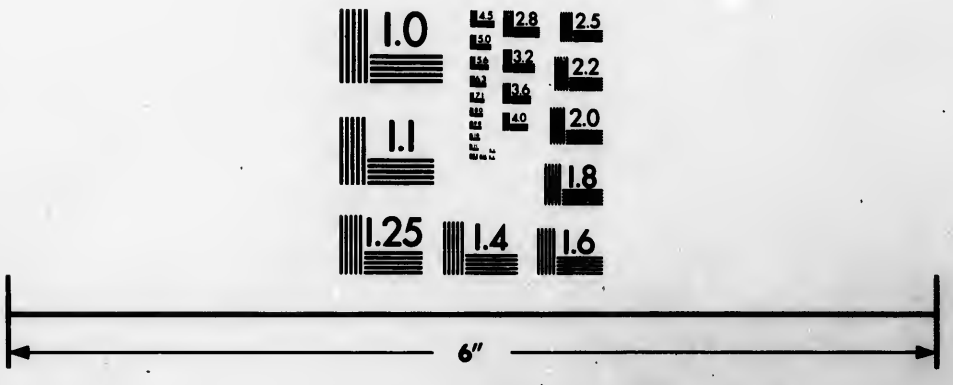

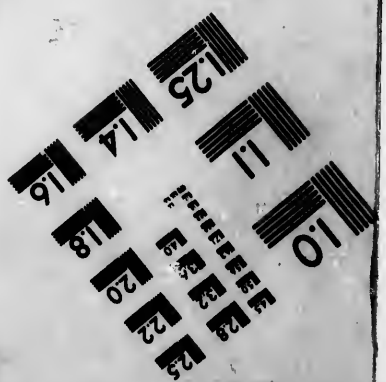

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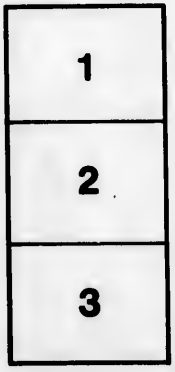

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THE BEHRING SEA DISPUTE

SUBMITTED AS ONE OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN THE SCHOOL OF POLITICAL SCIENCE, COLUMBIA COLLEGE

BY

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THE BEHRING SEA DISPUTE.

CHAPTER I.

Not infrequently does a fever of popular excitement lend to national weakness an apparent, yet unreal strength. The Behring Sea dispute is an illustration. Like all disputes about the national domain, it has called out an abundance of bluster. So that a claim asserted by our government uncertainly and perhaps unwittingly, has been borne aloft on the shoulders of the people into a position of dangerous prominence. It therefore becomes important to examine this controversy in the cold, clear light which international law and history shed upon it. Accordingly what follows is less an argument than an exposition.

The necessity of knowing precisely what we are to discuss, leads me to present, first, a

Statement of Facts.

U. S. Revised Statutes.—"Section 1954. The laws of the United States relating to customs, commerce and navigation, are extended to and over all the main-land, islands, and waters of the Territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March. A. D. one thousand eight hundred and sixty-seven, so far as the same may be applicable thereto.

"SEC. 1956. No person shall kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof. * * *

"SEC. 1957. * * * The collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties or forfeitures under this and the other laws extended over the Territory * * ."

Such were the laws which first apprised the world that the United States had stretched over the Behring Sea its iron hand of dominion. They were enacted July 1st, 1870, immediately after the cession of Alaska.

The vague term in these laws, "waters thereof," remained for a time unfocused. It did not at first give rise to a claim of more than ordinary maritime jurisdiction. This is evident from the following incident:

In 1872 Mr. Phelps,[1] collector of the Port of San Francisco, reported to the Secretary of the Treasury that expeditions were being organized in Australia and the Hawaiian Islands to capture seals on their annual migration to the Seal Islands of St. Paul and St. George. He recommended that a revenue-cutter be sent to prevent this. But Sec. Boutwell's reply was:

"I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such attempt within a marine league of the shore." [2]

1881, however, seems to mark the change of opinion on this point. The occurrence in that year of similar expe-

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[1] Enclosure No. 156. Let. to Mr. Boutwell, Sec. of Treas., March 25, 1872. This and the succeeding references given by number refer to 50 Cong., 2d Sess. Sen. Ex. Doc. No. 106.

[2] No. 56. Letter to Mr. Phelps, April 19, 1872.

ditions prompted Collector D. A. D'Ancona to request from the Treasury Department more accurate information as to the meaning of the above laws. The interpretation now put upon them was as follows:

"You inquire in regard to the interpretation of the terms 'waters thereof' and 'waters adjacent thereto' as used in the law, and how far the jurisdiction of the United States is to be understood as extending.

"Presuming your inquiry to relate more especially to the waters of Western Alaska, you are informed that the treaty with Russia of March 30, 1870, by which the Territory of Alaska was ceded to the United States, defines the boundary of the Territory so ceded. * * *

* * * "All the waters within that boundary, to the western end of the Aleutian Archipelago and chain of islands, are considered as comprised within the waters of Alaska Territory. All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described." [1]

In 1886 this ruling was affirmed by Secretary Manning in a letter [2] to Collector Hagan:

"TREASURY DEPARTMENT,

"March 6, 1886.

"*Sir.*—I transmit herewith for your information a copy of a letter addressed by the Department on the 12th March, 1881, to D. A. D'Ancona, concerning the Jurisdiction of the United States in the waters of the Territory of Alaska and the prevention of the killing of fur seals and other fur-bearing animals within such areas as prescribed by chapter 3, title 23, of the Revised Statutes. The attention of your predecessor in office was called to the subject on

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[1] No. 212. Treas. Regs. Let. of Acting-Sec. French to Mr. D'Ancona, March 12, 1881.

[2] No. 156.

the 4th April, 1881. This communication is addressed to you inasmuch as it is understood that certain parties at your port contemplate the fitting out of expeditions to kill fur seals in these waters. You are requested to give due publicity to such letters, in order that such parties may be informed of the construction placed by this Department upon the provision of law referred to.

"Respectfully, yours,

"D. MANNING,

"Secretary."

But as yet no captures were made.[1] British Columbian sealers, in Alaskan waters, remained unmolested so late as 1885; and this, although spoken by American revenue-cutters. In the spring of 1886 a large fleet prepared for the coming seal fishing season in Behring Sea.[2]

In August, however, of that year, the United States cruiser *Corwin*, acting under instructions from the Treasury Department, seized at a distance of 115, 45 and 70 miles from the island of St. George, respectively, the British Columbian seal-schooners *Onward*, *Carolena* and *Thornton*. They were taken into Sitka, confiscated and condemned to be sold.

The libel of information of the United States District Attorney for Alaska against these vessels declared them "forfeit to the use of the United States" on the ground of being "found engaged in killing fur seals within the limits of Alaska Territory and in the waters thereof in violation of section 1956 of the Revised Statutes of the United States."[3]

The brief for the defendants, on the other hand, contained the following argument:

"The first question then to be decided is what is meant

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[1] No. 12. Let. Mr. Bayard to Sir L. S. S. West, April 12, 1887;
No. 117. Let. Lord Lansdowne to Mr. Stanhope, Nov. 29, 1886.

[2] No. 156. Let. Mr. Lubbe to Mr. Baker, March 30, 1886.

[3] No. 14. U. S. *vs.* The Carolena, &c.

by the waters thereof. If the defendants are bound by the treaty between the United States and Russia ceding Alaska to the United States, then it appears that Russia in 1822 claimed absolute territorial sovereignty over the Behring Sea, and purported to convey practically one-half of that sea to the United States. But are the defendants, as men belonging to a county on friendly terms with the United States, bound by this assertion of Russia? And can the United States claim that the treaty conveys to them any greater right than Russia herself possessed in these waters? In other words, the mere assertion of a right contrary to the comity of nations can confer on the grantees no rights in excess of those recognized by the laws of nations.

"It also appears that the United States in claiming sovereignty over the Behring Sea is claiming something beyond the well-recognized law of nations, and bases her claim upon the pretensions of Russia, which were successfully repudiated by both Great Britain and the United States. A treaty is valid and binding between the parties to it, but it cannot affect others who are not parties to it. It is an agreement between nations, and would be construed in law like an agreement between individuals. Great Britain was no party to it and therefore is not bound by its terms." [1]

Judge Dawson, after quoting the first article of the Alaska cession treaty, charged the jury:

"All the waters within the boundary set forth in this treaty to the western end of the Aleutian archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must, therefore, attach against any violation of law within the limits heretofore described.

"If, therefore, the jury beiieve from the evidence that the defendants by themselves or in conjunction with others

[1] No. 166.

did, on or about the time charged in the information, kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behrings Sea, east of the 193d degree of west longitude, the jury should find the defendants guilty." [1]

Sir L. S. Sackville West, British Minister in Washington, made a formal protest in the name of Her Majesty's Government against these seizures. [2]

Thereupon Attorney-General Garland issued the following order:

"Judge LAFAYETTE DAWSON and
"M. D. BALL,
" United States District Attorney, Sitka, Alaska:

"I am directed by the President to instruct you to discontinue any further proceedings in the matter of the seizure of the British vessels *Carolina*, *Onward* and *Thornton*, and discharge all vessels now held under such seizure and release all persons that may be under arrest in connection therewith."

But its authenticity was suspected by those to whom it was directed, [3] and consequently its execution was delayed until its repetition in the following fall. [4]

Secretary Bayard, in communicating to Sir L. S. S. West the above order, hastened to assure him that this action was taken "without conclusion at this time of any questions which may be found to be involved in these cases of seizure." [5] He steadily refused to give any assurance of the discontinuance of such seizures. In answer to an inquiry of Sir L. S. S. West as to whether vessels fitting out for the approaching fishing season in Behring Sea

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[1] No. 14.
[2] No. 2. Let. to Mr. Bayard, Oct. 21, 1886.
[3] No. 24. Let. Mr. Garland to Mr. Bayard, Oct. 12, 1887.
[4] Telegram of Oct. 12, 1887; id.
[5] No. 9. Let. Mr. Bayard to Sir L. S. S. West, Feb. 3, 1887.

might rely on being unmolested by the cruisers of the United States when not near land,[1] he wrote:

"The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur-seals is now being considered, and I will inform you at the earliest day possible what has been decided, so that British and other vessels visiting the waters in question, can govern themselves accordingly." [2]

And when later informed that "Her Majesty's Government had assumed that pending the conclusion of discussions between the two governments on general questions involved, no further seizures would be made by order of the United States Government," [3] he promptly denied ever saying anything to justify such an assumption, but declared that "having no reason to anticipate any other seizures, nothing was said in relation to the possibility of such an occurrence." [4]

Here the matter might have ended, but fresh seizures now reopened the healing trouble. All through July and August of 1887 the events of the preceding year were repeated. During those two months the U. S. revenue-cutter *Richard Rush* captured the British Columbian fishing schooners *W. P. Sayward*, 59 miles; *Dolphin*, 40 miles; *Grace*, 96 miles, and *Anna Beck*, 66 miles, from Oonalaska Island; and the *Alfred Adams*, 60 miles from the nearest land.

Formal protest was again entered by the British Minister at Washington.[5] An opportunity was given the owners of these vessels to release them on appeal bonds.[6] But owing to a failure of the proctors to take an appeal within the

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[1] No. 11. April 4., 1887.

[2] No. 12, April 12, 1887.

[3] No. 15. Sir L. S. S. West to Mr. Bayard, Aug. 11, 1887.

[4] Let. to Sir L. S. S. West, Aug. 13, 1887.

[5] No. 23. Lets. Sir L. S. S. West to Mr. Bayard, Ocs. 12 and 19, 1887.

[6] Let. Mr. Garland to Mr. Bayard, March 9, 1888.

prescribed time this privilege was lost to four of the vessels[1] and the decrees of condemnation became final.[2]

These four vessels were the *Anna Beck*, *Dolphin*, *Grace* and *Ada*. At the request of the British Government,[3] their sale was postponed and bonds in lieu of the vessels ordered to be received, until the legality of their seizure could be investigated.[4] No advantage, however, was taken of this offer to bond, and their value, while lying at Port Townsend in the custody of the marshal, depreciated so rapidly that a total loss was feared.[5] Accordingly, and, in the case of the *Grace* and *Dolphin*, at the express wish of the owner,[6] these schooners were, on the 14th of November, 1888, ordered to be sold.[7]

The Act of Congress, approved March 2, 1889, cannot be regarded as adding anything to the history of these events. It simply declared[8] that Sect. 1956 of the Revised Statutes already given, includes and applies to "all the dominions of the United States in the waters of the Behring Sea." But as it does not further define what "these dominions" are, it begs the question.

It also lays upon the President the duty of making an annual proclamation accordingly; and on March 22d of last year President Harrison did warn "all persons against entering the waters of the Behring Sea within the dominion of the United States," &c. But this expression is equally unenlightening.

Already, pending these difficulties, negotiations for their international settlement had been begun. On August 19, 1887, Secretary Bayard sent circular letters to the U. S.

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[1] No. 46. Let. of Sir L. S. S. West to Mr. Bayard, Aug. 6, 1888.

[2] No. 45. Let. Mr. Garland to Mr. Bayard, May 31, 1888; No. 42. Let. Sir L. S. S. West to Mr. Bayard, May 28, 1888.

[3] No. 46. Let. Sir L. S. S. West to Mr. Bayard, Aug. 6, 1888.

[4] No. 49. Let. Mr. Jenks to Mr. Bayard, Aug. 10, 1888.

[5] No. 59. Let. Mr. Garland to Mr. Bayard, Oct. 20, 1888.

[6] No. 52. Let. Mr. Atkins to Mr. Garland, Aug. 25, 1888.

[7] No. 61. Let. Mr. Garland to Mr. Bayard, Nov. 14, 1888.

[8] 3d section.

legations in England, Germany, France, Japan, Russia and Norway and Sweden. The situation was thus described:

"Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea.

"Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international co-operation."

Thereupon the respective ministers to those countries were "instructed to draw the attention of the Government to which" they were "accredited to the subject, and to invite it to enter into such an arrangement with the Govern- of the United States as will prevent the citizens of either country from killing seal in Behring Sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind."[1]

It will be noticed that the submission of this matter to the international tribunal is so worded as to preclude any idea of retraction or confession of wrong on the part of the United States. This step must, therefore, be regarded as taken solely from motives of comity.

Favorable replies to these invitations were received from Great Britain,[2] Russia,[3] France[4] and Japan.[5] Norway and Sweden approved the plan; but, while desiring the future privilege of joining in such an arrangement, they thought that their lack of interest in the seal fisheries

[1] No. 69. Let. Mr. Bayard to Mr. Vignaud.
[2] No. 74. Let. Mr. Phelps to Mr. Bayard, Nov. 12, 1887,
[3] No. 103. Let. M. de Giers to Mr. Lothrop, Nov. 25, 1887.
[4] No 70. Let. Mr. McLane to Mr. Bayard, Oct. 22, 1887.
[5] No. 93. Let. Mr. Hubbard to Mr. Bayard, Sept. 29, 1887.

made their present participation unnecessary.[1] Nothing had been heard from Germany up to February 12, 1889, when the papers on this subject were published.

To Mr. Bayard's proposal that a close time for fur seals be established between April 15 and November 1, and between 160° of longitude west, and 170° of longitude east in the Behring Sea,[2] Lord Salisbury assented.[3] Russia eagerly favored the international conference, and through her minister in London, Mr. de Staal, proposed to include in the treaty both her portion of the Behring Sea around the Commander Islands and the sea of Okhotsk.[4] The American Department,[5] readily agreed to this proposition and Lord Salisbury suggested the extension of the regulated area to those parts of the Sea of Okhotsk and the Pacific Ocean north of north latitude 47°[6]

Just at this juncture, however, these negotiations so amicably pending at London were stopped. In June, 1888, the Canadian Government informed Lord Salisbury that a memorandum on this matter was being prepared for forwarding to London, and begged that Her Majesty's Government would delay all further action until its arrival.[7] In consequence, all proceedings toward a solution through the channel of diplomacy came to a temporary standstill. Although they have since been resumed,[8] and are now pending in Washington; yet their subsequent course is hidden beneath the sands of official secrecy.

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1 No. 106. Let. Mr. Magee to Mr. Bayard, March 20, 1888.
2 No. 76. Let to Mr. Phelps, Feb. 7, 1888.
3 No. 78. Let Mr. Phelps to Mr. Bayard, Feb. 25, 1888.
4 No. 81. Let. Mr. White to Mr. Bayard, Aprll 7, 1888.
5 No. 83. Let. Mr. Bayard to Mr. White, April 18, 1888.
6 No. 84. Let. Mr. White to Mr. Bayard, April 20, 1808.
7 No. 87. Let. Mr. White to Mr. Bayard, June 20, 1888.
8 Report of Secretary Bayard to President Cleveland, Feb. 12, 1889. Preface to Sen. Ex. Doc., No. 106, 50 Cong., 2d Sess.

CHAPTER II.

"You will observe, from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Bering Sea lying east of the westerly boundary of Alaska, as defined in the first article of the treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly [westerly ?] from the mainland of Alaska."[1]

Such was the moderate language used by the Earl of Iddesleigh, British Secretary of State for Foreign Affairs, in instructing the British Minister at Washington. Such, at the outbreak of these troubles, was the view taken by the British Government. How shall we shield ourselves from this apparently just criticism; or how shall we answer the riddle which a Victoria, B. C., paper presents to us? "A nation disregarding on one coast the belt of the sea literal which constitutes the range belonging to coast defenses, is actually assuming on another coast supreme maritime jurisdiction over a waste of waters comprising half of the northern portion of a vast ocean."

Before we speak of the position of the State Department itself, let us consider one or two arguments unofficially advanced in support of our Behring Sea policy.

First, it has been said that we have derived our right of exclusive jurisdiction over those waters from Russia.[2] This rests upon the two suppositions: first, that Russia herself ever possessed such rights, and secondly, that she was able to, and actually did, transfer them by treaty to the United States. To answer the questions thus raised we shall have to turn to diplomatic history.

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[1] No. 3. Oct. 30, 1886.

[2] No. 17. Let. Marquis of Salisbury to Sir L. S. S. West, Sept. 10, 1887.

Russian Rights in the Behring Sea.

In 1821 Russia first proclaimed to the world her sovereignty over the north Pacific Sea. The extent of the dominion claimed is shown by the regulations published in pursuance to the ukase of September 4 of that year:

"Sec. 1. The pursuits of commerce, whaling and fishing, and of all other industry, on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring Strait to the fifty-first degree of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Strait to the south cape of the island of Urup, viz, to 45° 50′ northern latitude, are exclusively granted to Russian subjects.

"Sec. 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo."

It will be noticed that Behring Sea is not alleged to be a closed sea; exclusive jurisdiction to only a marginal belt of one hundred miles is insisted upon. To be sure, Mr. Poletica, Russian envoy at Washington, declared Russia's right to regard Behring Sea as a closed sea, and rested it on reasons of bi-lateral possessions. But that Russia did not stand upon that right, is evident from his words:

"I ought, in the last place, to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend, on the northwest coast of America, from Behring's Strait to the fifty-first degree of north latitude, and on the opposite side of Asia and the islands adjacent, from the same strait to the forty-fifth degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées), and the Russian Government might conse-

quently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities."[1]

Nevertheless, Mr. Adams, Secretary of State, instantly took up cudgels in defense of our privilege of entering *even* within the limit of one hundred miles. After opposing the coast claim set up in the preceding assertions, he proceeds thus:

"This pretension is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of the United States as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence. * * To exclude the vessels of our citizens from the shore, beyond the ordinary distance to which the territorial jurisdiction extends, has excited still greater surprise."[2]

Against the *mare clausum* doctrine of the Russian diplomat he urged an argument, of which a well-known writer at that time says, "A volume on the subject could not have placed the absurdity of the pretensions more glaringly before us:"[3]

"With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles."[4]

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1 No. 166. Let. Mr. Poletica to Mr. Adams, Feb. 28, 1882.
2 No. 167. Let. Mr. Adams to Mr. Poletica. March 30, 1822.
3 North American Review, Vol. 15, p. 359.
4 Same letter.

What would Mr. Adam's language have been, had Russia possessed but one shore of this tract of sea?

Diplomatic agencies were hereupon set in motion to harmonize these antagonistic views. The Secretary of State instructed our Minister to Russia, Mr. Middleton, regard- the pending negotiations that "the United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions."[1] The outcome was the treaty of the 17th of April, 1824. Its first and fourth article regulate this matter:

"ART. I. It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles."

"ART. IV. It is, nevertheless, understood that during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country." (State papers, Vol. 12, p. 595.)

The right confirmed by Article I, was secured also to England by the treaty of February 28, 1825.

It has been urged that the American contentions at this time were confined to the interdiction not of fishing but of free commerce, and that they had no reference to the

[1] No. 171, July 22, 1823.

Behring Sea.[1] But there is nothing in Mr. Adams words above referred to which limit their application to commerce. And in his instructions to Mr. Middleton we have seen that he distinctly mentions "the right of fishing."

Again, there is nothing in the language either of the Russian ukase or of Mr. Adams, or of the resulting treaty, which would show that the Behring Sea was not intended. In fact the ukase expressly says, "beginning from Behring Strait." So that we must conclude with Lord Landsdowne that "It is impossible to believe that when, by the convention of 1825, it was agreed that the subjects of Great Britain, as one of the contracting parties, should not be "troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same or in fishing therein," any reservation was intended with regard to that part of the Pacific Ocean known as Behring Sea. The whole course of the negotiations by which this convention and that between Russia and the United States, of the same year, were preceded—negotiations which, as pointed out in the report, arose out of conflicting claims to these very waters—points to the contrary conclusion."[2]

At the expiration of the term of continuance of Article IV., a question arose as to what rights remained under Article I. of the same treaty. Mr. Forsyth, Secretary of State, declared the meaning of the fourth article to be the extension of Article I, so as to include within its provisions interior bays, &c., occupied or about the occupation of which there might be doubt. Accordingly, the expiration of that article did not affect the right granted by Article I to frequent the unoccupied coasts.[3]

Russia on the contrary declared the American right to frequent the interior bays, &c. of Alaska, occupied or un-

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1 "American Rights in Behring Sea," Pres. J. B. Angell, "Forum" for Nov., 1889 ; N. Y. Tribune, March 19, 1890.

2 No. 117, Let. to Mr. Stanhope Nov. 29, 1886.

3 No. 187, Let Mr. Forsyth to Mr. Dallas, Nov. 8, 1837.

occupied, to rest solely on Article IV, and hence to be of only equal duration.[1]

A settlement of this difference was never reached. And so rested the rights in these waters down to the cession of Alaska in 1867. In that treaty ratified by the United States on May 28, 1867, Russia ceded to the United States a tract of which :

"The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's Straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in course nearly southwest, through Behring's Straits and Behring's Sea, so as to pass midway between the northwest point of the Island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude ; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."[2]

In a sea so full of islands as the Behring, a line similar to the one drawn above, is necessary to a clear division of the sovereignty of those islands. It avoids the tedium of an enumeration. Therefore the apparent grant of sea which the drawing of such a line effected ought not to deceive.

On the other hand if the apparent grant was intentional,

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[1] No 190. Count Nesselrode to Mr. Dallas, April 27, '38.
[2] No. 191.

yet the elements of law teach that no nation can transfer larger rights than it possesses. And from the foregoing bit of Russian-American diplomatic history, it is clear that Russia succeeded in gaining for herself in Alaskan waters no more than the jurisdictional three-mile belt allowed by international law.

Still further, even if the United States should be willing to stultify itself so far as to concede that Russia had prior to the cession acquired a valid supremacy in the Behring Sea over against the United States, yet the rights of other nations would remain unaffected.

CHAPTER III.

It is also contended, possibly in ignorance of the international law on the subject, that the Behring Sea is a closed sea; and that over such a sea the exclusive sovereignty of the United States must be tolerated. Properly to decide this point, we shall need an answer to the general question, What seas are capable to-day of inclusion within national jurisdiction? What seas are free, what seas are closed? International law alone can give us this answer.

Mare Liberum vs. Mare Clausum.

"There is no writer, there is no government which would dream at this day of renewing these pretentions of another epoch."[1]

With this language, Ortolan, the great writer on maritime diplomacy, disposes of the pretense of sovereignty over the high seas.

I shall therefore not feel bound by patriotic motives to incur with my country the stigma of that remark. But, in my inquiry into the status of the seas, I shall begin, at that time when "Le principe de la liberté des mers, tant combattu par l'Angleterre, est sorti du champ des discussions théoriques pour entrer triomphalement dans le domaine pratique de toutes les nations."[2]

We may fix this time roughly at the appearance of Grotius "Mare Liberum," in 1609. Venice had for centuries maintained her supremacy over the Adriatic. Spain and Portugal had, on the foundation of naval prowess and Papal grant, set up an extensive claim in the Pacific and Indian oceans. England ruled mistress of her surrounding seas. And Holland stretched her rod of dominion over the

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[1] Ortolan, Règles I., p. 137.

[2] Calvo Le Droit International, I., § 211.

North Sea. These pretensions had their juristic champions in Father Paul Sarpi, who, in 1676, wrote a vindication of the rule of Venice over the Adriatic; and Selden (Mare Clausum, 1635), and Albericus Gentilis (Advocatio Hispanica, 1613) who succeeded in strengthening for a few years the crumbling claims of England.[1] But this mist of selfish national pretensions hanging over the high seas soon dispersed before the piercing light of international principle. Grotius, Vattel,[2] Puffendorf,[3] and Bynkershoek,[4] have established so firmly the law of the freedom of the ocean, that it can be said with strict truth:

"Aujourdhui les discussions sur le domaine et sur l'empire des mers, dont nous venons de tracer le tableau, sont reléguées dans le pur domaine de l'histoire."[5]

But the grasp by single nations of certain portions of the sea was so firm that only by removing one finger at a time has the union of nations finally forced it to relax.

1. England particularly thought that her sway over the four surrounding seas furnished an instance of might making right. This claim, backed by the authority of Albericus Gentilis,[6] she asserted over the British Channel, from the island of Quessant, even after she had given up the Duchy of Normandy and Calais, "a circumstance," says Phillimore, "of considerable weight with respect to her claim."[7] Elizabeth seized some Hanseatic vessels even off Lisbon, for passing without permission through the sea north of Scotland.[8]

This pretension on the part of England consisted chiefly of the right of exclusive fishing and of exacting from com-

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1 Wheaton Elements, pp. 267 and 268.
2 Droit des Gens, 1758.
3 De Jure Naturæ et Gentium, 1672.
4 De Dominio Maris, 1702.
5 Ortolan, I., p. 137.
6 Advocatio Hispanica, Lib. I., Cap. viii
7 Phillimore's Commentaries I., § 181.
8 Id.

mon vessels the homage of salute.[1] But it has never been sanctioned by general acquiescence.[2]

Holland held out strenuously against it, and Cromwell was forced to make war upon her to compel its acknowledgment.[3] Yet it is true that by payments and by taking out licenses to fish, the Dutch occasionally admitted these claims, and by the Treaty of Westminster, 1674, they conceded in the amplest manner to the English flag, the homage sought. Sir W. Temple, who negotiated this treaty, speaks, however, of the right hereby conceded to Great Britain as one "which had never yet been yielded to by the weakest of them that I remember in the whole course of our pretence; and had served hitherto but for an occasion of quarrel, whenever we or they had a mind to it, upon either reasons or conjectures."[4]

France never formerly acknowledged the British claims. In 1689, Louis XV. published an ordinance forbiding his naval officers to give the demanded salute. This insult to the British flag was alleged by William III., in his manifesto of 27th May, 1689, as one of the causes of war with France.[5]

Yet since that proclamation, Great Britain has never again insisted upon any such pretension. And even in the days of Charles II. and James II., Sir Leoline Jenkins, expounder of all international law to those monarchs, had refused to assert Great Britain's dominion into the sea beyond a line drawn from headland to headland, comprising what are called the Kings Chambers.

2. Denmark has from the earliest days jealously guarded the three entrances to the Baltic, the Greater and Lesser Belt and the Sound; and exacted toll from passing commerce.[6] The Danish jurists rested this right upon imme-

1 Phil. I., § 183.
2 Wheaton, p. 262.
3 Id., § 182; Comte Gardens, Traité de Diplom., t. i., p. 402.
4 Phil. I., § 184.
5 Id., § 186.
6 Wheaton, p. 264.

morial prescription and treaties. The earliest of these treaties is that with the Hanseatic Republics in 1368; and the right was subsequently confirmed by treaties, with all the maritime powers. Although by the treaty of Roeskild, 1658, the Province of Scania was ceded to Sweden, yet Denmark preserved her dominion over these straits intact by the payment to Sweden of a compensation.[1]

Underlying Denmark's jurisdiction over the passages which form the key to the Baltic, was her just right to remuneration for maintaining along these coasts lighthouses and buoys.[2] To this element of the claim is undoubtedly due the fact that not until 1857 were these Danish straits recognized as free. The great European powers then paid to Denmark a gross sum for the perpetual maintainance of proper coast and channel demarcation.[3] And on April 11, 1857, the same privilege was secured to the United States by the payment of $393,011.[4]

But at the beginning of the Seventeenth Century, Denmark had put forward much broader claims than those just mentioned. In 1602, Queen Elizabeth sent to Copenhagen an embassy to adjust generally the relations between the two countries. The instructions given it were these:

"And you shall further declare that the Lawe of Nations alloweth of fishing in the sea everywhere, * * * so if our men be barred thereof, it should be by some contract."

"Sometime, in speech, Denmark claymeth propertie in that sea, as lying between *Norway* and *Island*,—both sides in the dominion of oure loving brother the King; supposing thereby that for the propertie of a whole sea, it is sufficient to have the banks on both sides, as in rivers. Whereunto you may answere, that though property of sea, in some small distance from the coast, maie yeild some oversight and jurisdiction, yet use not princes to forbid passage or

1 Wheaton, p. 265; Phil. I., § 179.
2 Twiss' Rights and Duties of Nations in Time of Peace, § 179.
3 Phil. I., § 179.
4 Wheaton, p. 266, note.

fishing, as is well seen in our seas of England, and Ireland, and in the Adriaticke Sea of the *Venetians*, where we in ours, and they in theirs, have propertie of command ; and yet we neither in ours, nor they in theirs, offer to forbid fishing, much lesse passage to ships of merchandize ; the which by Lawe of Nations cannot be forbidden ordinarilie ; neither is it to be allowed that propertie of sea in whatsoever distance is consequent to the banks, as it hapneth in small rivers. For then, by like reason, the half of every sea should be appropriated to the next bank, as it hapneth in small rivers, when the banks are proper to divers men ; whereby it would follow that no sea were common, the banks on every side being in the propertie of one or other ; wherefore there remaineth no color that Denmarke may claim any propertie in those seas, to forbid passage or fishing therein."[1] * *

The constant opposition of both Holland and England to these pretensions of Denmark, sufficed to reduce them so late as the eighteenth century only to the contracted form of exclusive fishing within fifteen miles of Iceland.[2] The capture in 1740 by a Danish man-of-war of Dutch vessels fishing within the prescribed limits, and their subsequent condemnation at Copenhagen, led to a vehement protest on the part of the States General.[3] In the Remonstrance to the Danish Government passed April 17, 1741, they declared that the sea being free, it was proper for every one to fish in it, "pourvu qu'il ne fasse pas d'une manière indue." Fishing within four German miles of the coast was not such a "manière indue;" for although Denmark might make such a *municipal* prohibition binding on her own subjects, she could not convert it into an *International* obligation.[4]

3. The peculiar status to-day of the Dardanelles, Bosphorus and Marmora Sea, rests on treaty regulation. In

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[1] Rymer Fœd., t. xvi., pp. 433-4.
[2] Phil. I., § 190 and 191.
[3] id. I, § 192.
[4] Martens Causes Célèbres, Vol. I., p. 359.

the days when the shores of the Black Sea were entirely within her domain the Porte was entitled to the exclusive exercise of jurisdiction over these marine avenues. But when Russia obtained a foothold on the Black Sea, she acquired by international law an easement of communication with the Mediterranean. Owing, however, to the non-recognition of Christian law by the Turks, this right was not granted to Russia until the treaty of 1774. Subsequent treaties with Austria in 1784, with Great Britain in 1799, with France in 1802, and with Prussia in 1806, secured to these powers the same free navigation for merchant vessels.[1] So in 1829 by the Treaty of Adrianople the same privilege was conceded to all European nations in amity with the Porte.[2] On February 25, 1862, the rights of the most favored nations with regard to passage through these straits were accorded to the United States.[3]

But Turkey still claims the power to exclude from these seas foreign war ships. Immemorially asserted, this claim has been formally sanctioned by the European powers in the treaties at London, July 13, 1841,[4] and at Paris of March 30, 1856.[5]

There is an insidious form in which the doctrine of closed sea still makes it appearance to-day. Great store is laid upon it by certain controversialists in the support of our pretensions to the Behring Sea seal fisheries. It is that the sea may be prescribed against. It lurks usually in the timid and specious pleas that our right is the best right, and that to us belongs the *regulation* merely of fishing. But it assumes a bolder front when it bases itself upon Vattel:

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[1] Twiss, § 180; Wheaton, p. 263.
[2] Wheaton, p. 263; Martens Nouveau Recuell, tom. viii., p. 143.
[3] Wheaton's, p 234, note. Wheaton's History of Law of Nations, 583-5.
[4] Martens N. R. Gén. II., p. 128; Wheaton, p. 263.
[5] Martens N. R. Gén. T. XV., p. 782; Wheaton, p. 264, note.

"Qu'une nation en possession de la navigation et de la pêche en certain parages, y prétende un droit exclusif et défende à d'autres d'y prendre part; si celles-ci obéissent à cette défense, avec de marques suffisantes d'acquiescement, elles renoncent tacitement à leur droit en faveur de celle-là, et lui en établissent un qu'elle peut légitimement soutenir contre elles dans la suite, surtout lorsqu'il est confirmé par un long usage."[1]

And especially when it triumphantly adds that Phillimore quotes this passage with the remark:

"The reasoning of Vattel does not seem to be unsound."[2]

Lord Stowell also lent some aid to this position in the case of the *Twee-Gebroeders* when he said: "Portions of the sea are prescribed for."[3]

The fact is that these words of Vattel do not support the doctrine of prescription at all, but refer to another matter. Wheaton commenting upon them in connection with the doctrine of common use in the seas, says:

"The authority of Vattel would be full and explicit to the same purposes, were it not weakened by the concessions that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, now lost to others by non-user on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favor of one nation against another."[4]

From this criticism it becomes clear that not the long continued user or non-user affects the right, but the obedi-

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[1] Vattel, Le Droit des Gens, T. 1; l. i., cxxiii, S 286.

[2] Phil. I.. § 176.

[3] 3 Rob., p. 329; Twiss, § 175, cites this opinion without comment; his reference here to Story in "The Schooner Fame," 3 Mason, p. 150 is an error; it is intended for the preceding sentence.

[4] Wheaton p. 268.

ence of other nations to the prohibition of one, accompanied by what Vattel calls "sufficient marks of acquiescence." But there is no reason why nations should not waive their privileges in this manner.[1] To deny it would be to assert that international rights can be varied only in writing, whereas to such an open and unequivocal acknowledgment might well be given the binding effect of a treaty. And history contains many illustrations of such treaty concessions. A prominent one to-day is the agreement with China by which Great Britain has jurisdiction over British subjects "being within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China."[2]

But such a concession must not be thought so much to make property in the ocean possible, as to the rest for its validity upon the bona fides of the nation making it and the consequent estoppel which it works.[3]

The authority on this point, however, even of these writers is weak. Phillimore confesses of this principle that "the case for its application is not often likely to occur."[4] And Lord Stowell adds that "the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming under it * * * by clear and competent proof."[5]

But on the contrary when he speaks against prescription proper in the sea, there is no uncertainty in Phillimore's language:

"The right of navigation, fishing and the like, upon the open sea, being *jura meræ facultatis*, rights which do not require a continuous exercise to maintain their val-

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1 Phil. I., § 173.
2 Papers presented to Parliament 1853.
3 Ulpian Dig., L. viii., t. iv., leg. 13.
4 Phil. I., § 176.
5 The Twee Gebroeders, 3 Rob. p. 339.

idity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by non-user or prescribed against, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights, have abandoned the intention of ever doing so." [1]

Calvo [2] recognizes the temptation which the proximity to the coast of "fish, oysters and other shell-fish" affords to nations, to extend their sovereignty beyond the three-mile limit. Yet, instead of permitting such an extension, especially when supported by long use, he distinctly says: "De pareilles dérogations aux principes universellement reconnus * ont besoin, * pour devenir obligatoires, d'être sanctionnées par des conventions expresses et écrites."

The reason which flows from the nature of prescription, however, is sufficient to establish the point in question, without the aid of authority. Unlike adverse possession or limitation, prescription rests for its validity on a presumed prior grant. Now in International Law there is no room for such a presumption. National archives are not so susceptible of oblivion and destruction as to call it into existence.

On the other hand, such exact and artificial ideas as adverse possession and limitation not only as a fact have no place in International Law, but are utterly inconsistent with such undeveloped legislative and administrative organs as are the International.

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[1] Phil. I, § 174,
[2] § 201.

CHAPTER IV.

Exceptions to the Rule of Mare Liberum.

Yet the welfare and safety of nations has always demanded that certain portions of the sea should be subject to their dominion. This principle has existed side by side with that of the freedom of the seas. By the interaction and attrition of these two forces in the chaotic rights of the sea, there has been evolved the law on maritime sovereignty of to-day.

In general, whenever the reasons for the freedom of the sea cease, the law ceases. These reasons are given by the best writers as two,[1] and are tersely expressed by Ortolan, as follows:

"Il n'y a que deux raisons décisives sans réplique, l'une physique, matérielle, l'autre morale, purement rationelle. L'impossibilité de la propriété des mers résulte de la nature de cet élément, qui ne peut être possédé et qui sert essentiellement aux communications des hommes * * L'impossibilité de l'empire des mers résulte de l'égalité des droits et de l'indépendance réciproque des nations."[2]

The portions of the sea which are thus regarded as falling outside the pale of these objections are:

A. Gulfs and bays.

B. Enclosed seas (*maria clausa*).

C. Straits.

D. Marginal belt.

These divisions include, of course, all similar formations of the coast line, although called by other names.

Within certain limits, which we shall now study, such bodies of water are subject to national jurisdiction.

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[1] Wheaton, p. 269.

[2] Ortolan I, p. 112. Sommaire, de ch. 7.

A.—*Gulfs and Bays.*

Measuring these against the two objections to sovereignty over the high sea, Wheaton concludes that the latter have no application. For, says he, "the State possessing the adjacent territory by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding at its pleasure, the action of any other State or person which * * constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land * *" [1]

There is no doubt then that a gulf does not fall under this head, irrespective of the breadth of its communication with the sea, although Pomeroy asserts this to be the pretension of Great Britain to her own coasts.[2] (I do not, however, think this to be a correct statement of England's attitude, as will later appear.)

On the other hand, there is no warrant for such a narrow limit as set by Martens:[3] "Surtout en tant que ceux-ci ne passent pas la largeur ordinaire des rivières, ou la double portée du canon." Nor for the vague definition of Grotius:[4] "Mare occupare potuisse ab eo qui terras ad latus utrumque possideat, etiamsi aut supra patet ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris ut non cum terris comparata portio earum videri possit."[5]

"The real question * * is, whether it be within the physical competence of the nation, possessing the circum-

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[1] Wheaton, p. 270.

[2] Lectures on International Law. Pomeroy, § 147.

[3] Droit, Lib. ii, c. i, S 40.

[4] Lib. ii, c. iii, S 8.

[5] Phil. I, § 200.

jacent lands, to exclude other nations from the whole portion of the sea so surrounded." [1]

The principle here then may be stated in Vattel's terse expression: "Une baie dont on peut défendre l'entrée, peut être occupée et soumise aux lois du souverain." [2]

On authority it is immaterial whether this defense be natural or artificial[3]—whether the mouth be blocked by "islands, banks of sand or rocks"[4] or swept "by the cross-fire of cannons."[5].

So that now it is "*res adjudicata* that the only question is whether a given sea or sound is, in fact, as a matter of politico-physical geography, within the exclusive jurisdiction of one nation." [6]

But this limit of the mouth of an inner gulf or bay, above set forth, is in the case of a particular country liable to be extended or contracted, according as that country holds or rejects the doctrine of "headlands." This doctrine will be discussed under "The Marginal Belt."

B.—*Enclosed Seas.*

These are the seas which the territory of one or more nations *entirely* surrounds. Ortolan is very particular about the absolutely close character of this territorial circumvention. "Un droit exclusif de domaine et de souveraineté de la part d'une nation sur une telle mer n'est incontestable qu'autant que cette mer est totalement enclavée dans le territoire de telle sorte qu'elle en fait partie intégrante, et qu'elle ne peut absolument servir de lien de communication et de commerce qu'entre les seuls citoyens de

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[1] Phil. I, § 200.

[2] Vattel Le Droit, &c., t. i, l. i, xxiii, S 291. See also Phil. I, § 200; Klüber, Droit des Gens, § 130; Twiss, § 174.

[3] Ortolan, § 145. Martens, *Primae Lineae Juris Gentium*, L. IV. c. IV. S. 110.

[4] Calvo I, § 190.

[5] *Id.*

[6] Dana's Wheaton, 270. Note.

cette nation."[1] Though perhaps Twiss is more exact in his definition of a closed interior sea, when he says that it "is entirely enclosed by the territory of a nation, and has no other communication with the ocean than by a channel, of which that nation may take possession."[2]

The Black and Caspian Seas are the usual illustrations of this kind of sea.[3] The former, however, by the treaty of Paris, in 1856, confirming previous treaties, has been made free.[4]

Seas land-locked, though not entirely surrounded by land, like the Baltic Sea, fall under the same rule.[5] But the dominion in this case may be called qualified rather than absolute, for of course the doctrine of innocent use by other nations applies to these waters.[6]

C.—*Straits.*

The only question which can arise here, is in the case of straits which connect two free seas. Straits leading into an inner bay, or enclosed sea, are subject to the same rules discussed in connection with those bodies of water.[7]

There are two extreme theories about straits where both banks belong to one and the same nation, and when they join two open seas. One is that be they never so narrow and capable of possession, yet they are not subject to national domination. The other, that without regard to their width, or defensibility, they fall under the jurisdiction of the bordering country. The first view is held by Calvo,[8]

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[1] Ortolan, I, § 147.
[2] Twiss, § 174.
[3] Phil., I, § 205.
[4] Pomeroy, § 143.
[5] Pomeroy § 143, Phil. I § 206.
[6] Ortolan, I, p. 147; Pomeroy, § 143.
[7] Calvo. I, § 191.
[8] I, § 191.

Ortolan,[1] Rayneval, Pomeroy,[2] and Wheaton[3]; the second by Phillimore[4] and Puffendorf.[5] There is also a third view, represented by J. L. Klüber[6] Pinheiro-Ferreira, Twiss[7] and Martens,[8] which makes even here capabiity of defense the test of sovereignty. Accordingly those straits would be free in which a ship passing along the centre is beyond the range of cannon.[9]

The reason for the first rule is best expressed by Rayneval: "Si l'usage de ces mers et libre, la communication doit l'être également; car autrement la liberté de ces mêmes mers ne serait qu'une chimère."[10]

"It is not sufficient, therefore," says Ortolan, "In order that property in a strait may be attributed to a nation, mistress of its shores, to say that in fact the strait is in the power of this nation; that it has the means to control the passage by its artillery, or by every other mode of action or defense. * * The material obstacle to proprietorship being removed, there always remains the moral obstacle, the essential and inviolable power of peoples to communicate with each other."[11]

But this view concedes to the bordering State the right to charge such tolls as shall compensate it for lighthouses, buoys and pilots.[12] And subjects ships passing under the cannon of that country to such reasonable regulations of navigation as it may make.[13]

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1 I, p. 146.
2 § 139.
3 P. 272, § 190.
4 I, § 189.
5 De Jure, L. IV, C, V, S 8.
6 Droit des gens moderne. Ed. 1861, §§ 130 and 131.
7 § 174,
8 L. IV, Ch. IV, § 13.
9 Notes of Pinheiro-Ferreira and Ch. Vergé on De Martens, Droit, &c., Vol. I, p. 147.
10 Inst. du droit de la nature et des gens. Liv. 2, Chap. 9, § 7.
11 Ortolan, I, p. 146. See also Wheaton, p. 272, § 190.
12 Grotius, L. II, Ch. III, § 4.
13 Ortolan, I, p. 146; Bluntschli. Vol. IV, § 310.

The second and third rules are based on the safety of the bordering nation.[1] They, in turn, mitigate their rigor by adopting the doctrine of what Vattel calls "innocent use."[2]

"One must remark in particular," he says, "with respect to straits, that when they serve for a communication between two seas, the navigation of which is common to all nations, or to several, that nation which possesses the strait cannot refuse passage thereon to the others, provided that such passage be innocent and without danger to her. In refusing it without just reason, she would deprive that nation of an advantage which is accorded to her by nature: and still further, the right of such passage is a residue of the primitive common rights."[3]

I am of opinion with Pomeroy, however, that "Any apparent difficulty or discrepancy will vanish when we consider the various kinds and degrees of rights which a nation may exercise over such waters. * * It can hardly be said of any such strait, even though it be so wide as not to be commanded from the shores, that the right to fish, or to traverse with armed ships, as well as with ships of commerce, is given by the general law to all peoples; while at the same time, it can be said of few or none, that, independent of convention, the innocent use for purposes of traffic and intercommunication is, or may be, forbidden."[4] So that out of all this discussion we get as a principle that a nation owning both sides of a strait connecting two free seas, has the property in or dominion over such strait, subject, however, to an easement of passage, or right of way in other nations.

Regarding the three bodies of water just discussed, gulfs, enclosed seas and straits, there exists a singular un-

1 Vattel, Des Détroits en particulier, L. I, Ch. XXIII, S 292.
2 Twiss, § 174.
3 *Id.*
4 § 139.

certainty among the writers as to whether a division of their shores among several nations affects their close character. Puffendorf declares sweepingly: "Quod si autem diversi populi fretum, aut sinum accolant, eorum imperia pro latitudine terrarum ad medium usque ejusdem pertinere intelligentur."[1] Twiss[2] and Phillimore[3] repeat the statement in regard to straits on Puffendorf's authority. But as to straits we have good authority for the opposite view[4], and there is certainly no reason why the marine jurisdictional belt of a nation should be any more extended in a strait than in the open sea.

As to bays and enclosed seas, however, the view of Puffendorf is probably the correct one. Yet Dr. Twiss speaks of the Black Sea as being an instance of a closed sea, "whilst its shores were in the exclusive possession of the Ottoman Porte."[5] He thereby implies that the *exclusive* possession of the Porte was the reason for its close character.

Accordingly the status of these waters is assimilated to that of lakes where the middle is the boundary between bordering countries; while to these countries and, in the case of waters communicating with the open sea, to all countries, belongs the right of free navigation. [6]

D.—*Marginal Belt.*

A nation has always been deemed to command so much of the open sea off its coast-line as it could protect from the shore. In early days, therefore, this limit was found in the longest stone's throw or the farthest flight of an ar-

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[1] Puffendorf, De Jure, Nat. et Gent. L. IV., C. V., s. 8.
[2] § 174.
[3] I, § 189.
[4] Pomeroy, § 139.
[5] Twiss, § 174.
[6] Bluntschli, IV. §§ 301, 305 and 306.

row. [1] A further application of this principal of limitation, "Terrae dominium finitur, ubi finitur armorum vis," [2] eventually increased this distance to cannon range. At the time of the the recognition and spread of International Law in the seventeenth century, cannon range happened to be three marine miles. Thus for a time the two terms three miles and cannon-range were equivalents. But a precise limit having once been adopted, International Law was loath to leave it; and it has not since succeeded in totally divorcing itself from it. Although recognized to-day as arbitrary, this limit of three miles has the merit of precision, and has been sanctioned in many instances by laws and treaties. Let Mr. Seward be the exponent of this sentiment:

"The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the range of a cannon-ball. The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvement of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the high seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast." [3]

But the distance of defense is still theoretically and in many instances practically the limit of the marginal belt.

The extremes between which the pendulum of opinion on this point has swung are twenty miles, the extent of human sight, and one sea league, the shortest cannon shot. These are the greatest and the least distances which have ever gained any respectable assent among nations. [4]

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1 Bluntschli Vol. IV, § 302.

2 Bynkershoek, De dom. maris, cap. 2.

3 Letter to Mr. Tessara, Dec. 16, 1862, MSS. Notes, Spain.

4 Let. Mr. Jefferson to M. Genet, Nov. 7, 1793, MSS., Notes for Leg.

Rayneval [1] is authority for the proposition that the horizon limits the jurisdiction of a nation over the bordering ocean. This and the equally impracticable test of Valin that the dominion of a country in the sea ceases only when one can no longer sound bottom,[2] may be dismissed as being without foundation—either in fact or reason.

The bulk of authority, however firmly establishes the rule that jurisdiction extends as far as guns will carry. [3]

As already mentioned, the distance has been and always may be varied by specific law or agreement.

An illustration of a precise limit in excess of three miles thus fixed is the "Guadalupe-Hidalgo" treaty with Mexico of Feb. 2d, 1848. The boundaries of the United States and Mexico were thereby placed at a distance of three leagues from the coast.[4] But such an arrangement can affect no other but the contracting parties.[5]

On the other hand, the English act of 1833, and the Act of Congress in 1794 [6] have fixed the jurisdictional limit for Great Britain and the United States at one sea-league or three marine miles.

Yet even in these cases where the sea-league is taken as the limit, there are some purposes for which the distance of defense must still be taken as the limit of jurisdiction. "The ground of the rule" (as to maritime jurisdiction of this character), says Field shortly, "*is the margin of sea within reach of the land forces or from which the land can be assailed.*" [7] No nation can afford to deprive itself of the

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1 Inst. Liv. II, ch. 9, § 10.

2 Comm. sur l'Ordonance de 1681, liv. V, Tit., I.

3 Wheaton, p. 255; Kent I, p. 158; Ortolan I, p. 152-158; Phil. I, § 198; Grotius L. II, cap 3, §§ 13 and 14; Heffter, Europ. Völker., § 75; Bynkershoek, De dom. maris cap. 2; Vattel 1 I., ch. 23, § 289; Azuni, t.I, cap. 2, § 14; Klüber, § 130; De Martens, Droit des Gens, § 40; Pomeroy, § 150; Bluntschli, Volkerrecht, vol. IV., § 303.

4 Wharton Int. Law Dig. Vol. I, § 32, p. 105.

5 Let. Mr. Buchanan, Sec. of St., to Mr. Bankhead, Aug. 19, 1848.

6 Act of June 5, 1794, C. 50.

7 Field Int. Code, 2 Ed., § 23.

power to protect its shore against marauders or in case it is a neutral against belligerent cannonade. France exercised this power in 1864, at the time of the sea duel between the "Kearsage" and the "Alabama." "Nor does this reason apply exclusively to hostile operations," says Wharton. "We can conceive, for instance, of a case in which armed vessels of nations with whom we are at peace, might select a spot within cannon range of our coast for the practice of their guns. A case of this character took place not long since in which an object on shore was selected as a point at which to aim, for the purpose of practicing, projectiles to be thrown from the cruiser of a friendly power. Supposing such a vessel to be four miles from the coast, could it be reasonably maintained that we have no police jurisdiction over such culpable negligence? Or could it be reasonably maintained that marauders, who at the same time would not be technically pirates, could throw projectiles upon our shores without our having jurisdiction to bring them to justice? The answer to such questions may be drawn from the reason that sustained a claim for a three-mile police belt of sea in old times. This reason authorizes the extension of this belt for police purposes to nine miles, if such be the range of cannon at the present day. This, it should be remembered, does not subject to our domestic jurisdiction all vessels passing within nine miles of our shores, nor does it by itself give us an exclusive right to fisheries within such a limit. * * For the latter purposes, the three-mile limit is the utmost that can be claimed." [1]

Another instance of the over-stepping of this sea-league bound are the so-called "Hovering acts." Great Britain passed such an act in 1736. [2] The United States in 1797. [3] They provide substantially "for certain revenue

[1] Int. Law Dig., § 82, p. 114.
[2] 9 Geo. III., cap. 35.
[3] Act of March 2d, 1797, § 27.

purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties." [1] The United States law on the subject is found at § 2760 of the Revised Statutes.

"The officers of the revenue cutters shall * * go on board all vessels which arrive within the United States or within four leagues of the coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination."

Here then is presented a conflict of municipal with international law. The analogy between it and a similar conflict in the Behring Sea question renders it peculiarly relevant to the present issue.

The real explanation of the validity of such a revenue regulation is contained in the language of Mr. Fish, while Secretary of State, 1875: "Although the Act of Congress was passed in the infancy of this Government, *there is no known instance of any* complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations." [2]

Is not acquiescence on the part of other nations, then, a condition precedent? Is this not virtually a confession that such a regulation can be nothing more than municipal, and must never be allowed to trench upon the rights of other nations? Such a view seems borne out by an incident which occurred shortly after. Mexican officials attacked United States merchant versels, for breach of the Mexican revenue laws, at a distance of more than three

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[1] Wheaton, § 179.

[2] Let. to Sir Ed. Thornton, Jan. 22, 1875; MSS. Notes, Great Brit. For. Relat., 1875.

miles from the shore. This was styled by Secretary Evarts an international offence.[1]

Phillimore is very positive in support of this view:

"It cannot be maintained as a sound proposition of international law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these *hovering* cases judgments have been given in favor of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by international law. Such a judgment, however, could not have been sustained if the foreign States whose subjects' property had been seized, had thought proper to interfere" [2]

Dana says: "It will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States." But he goes still farther and denies: "that a clear and unequivocal judicial precedent now stands sustaining such seizures when the question of jurisdiction has been presented." [3]

The explanation of such acquiescence on the part of other nations is that "the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other State with which he is in amity, and to have consequently forfeited any just claim to his protection." [4]

Accordingly a State executes these extra territorial enactments at its "peril," hoping for ratification from "motives of comity by other nations."[5] For "it cannot now be successfully maintained either that municipal visits and search may be made beyond the territorial waters, for special purposes, or that there are different bounds of that

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[1] Let. to Mr. Foster, Apl. 19, 1879; MSS. Inst. Mex.

[2] I, No. 198.

[3] Wheaton, § 179; note.

[4] Rept. of Dr. Twiss to the Sardinian Gov't, in the Cagliari case, Wharton, § 32, p. 111.

[5] Wheaton, § 179, note.

territory for different objects. * * In later times it is safe to infer that judicial as well as political tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike."[1]

There is, however, an open place in all the positions thus far taken in this subdivision. Shall we say with Secretary Bayard "that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same limit. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign."[2]

Or shall we take to be true what Martens says on the subject? "A fictitious line is always drawn from one promontory to another, and this is taken as the point of departure for the cannon range: this practice also applies to small bays, gulfs of a great extent being assimilated to the open sea."[3] A doctrine by which, as Pomeroy lucidly puts it, "all the rest of the land is treated as though extended out as far as these promontories."[4]

In other words, shall we accept or reject the doctrine of "headlands"?

I think England's attitude on this question indicative of the drift of modern opinion. In 1839 she concluded a fisheries treaty[5] with France, by the terms of which it was

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1 Wheaton, p. 260, note.

2 Let. to Mr. Manning, Sec'y of Treas., May 28; MSS. Dom. Let.

3 Martens' Precis, Vol. i, p. 143; So Hautefeuille, Droit des Nats. Neutr., I, 89, 239.

4 Pomeroy, § 151.

5 Wheaton, p. 260.

"equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishing upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."[1]

The treaty of 1818, between Great Britain and the United States, after enumerating certain limits of free fishing, provided that "the United States * renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine leagues of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions in America not included within the above-mentioned limits."[2]

In 1849, difficulties arising as to the construction of this article, owing to its alleged non-observance by United States citizens, the British Law Officers were consulted.[3] They gave as the true construction that "the prescribed distance of three miles is to be measured from the headlands or extreme points of land, next the sea or coast, or of the entrance of bays or indents of the coast, and that consequently no right exists on the part of American citizens to enter the bays of Nova Scotia, there to take fish, although the fishing, being within the bay, may be at a greater distance than three miles from the shore of the bay, as we are of opinion that the term 'headland' is used in the treaty to express the part of the land we have before mentioned, including the interior of the bays and the indents of the coasts."[4]

Nevertheless the jurisdictional line thus drawn must be regarded as resting more on the precise words of the treaty, "within three marine leagues of any of the coasts, bays," &c., than on any doctrine of headlands. Besides

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1 Treaty of 2d of Aug.; Martens' U. R., xvi, p. 954.

2 Annual Reg., Vol. xciv (1852), pp. 295-6.

3 Phil. I, § 196.

4 Ann. Reg., Vol. xciv (1852), pp. 296-7.

this decision was given on the supposition that the word "headland" occurred in the treaty. Whereas, as Sir Robert Phillimore has pointed out, it does not. He accounts for this curious error by saying that "the Law Officers probably gave their opinion on a statement of the colonists in which the word did occur."[1] While the essence of the headland doctrine is that it applies exactly there where no mention is made of headlands, and no precise method of drawing the line of marginal jurisdiction is provided. For these reasons, this interpretation put upon the fisheries treaty of 1818 cannot be cited as an instance of England's grasping claim in regard to headlands.

The rights under this treaty were extended in 1854; but, in 1865, they were abrogated by the United States in the exercise of a power reserved to it in the treaty.[2]

On May 14, 1870, the Provincial Minister of Marine and Fisheries, Mr. Peter Mitchell, re-asserted, now without treaty sanction, this doctrine of headlands. Lord Granville, British Foreign Secretary, instantly telegraphed: "Her Majesty's Government hopes that the United States fishermen will not be, for the present, prevented from fishing, except within three miles of land, or in bays which are less than six miles broad at the mouth."[3]

The tendency of England may, therefore, be said to be away from the doctrine of headlands.

In striking contrast to this attitude on the part of a country which in the case of the Kings Chambers on her own coasts has always been most tenacious of this doctrine, is the language of our own Chancellor Kent:

"Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety

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1 I, § 196, note.
2 Phil. I., § 196.
3 Wharton, § 29, p. 76.

and welfare the control of waters on our coasts, though included within lines stretching from quite distant headlands—as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of Delaware, and from the South cape of Florida to the Mississippi. * * *

"There can be but little doubt that as the United States advance in commerce and naval strength, our Government will be disposed more and more to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British Isles, because we shall stand in need of similar accommodation and means of security."[1]

To be sure, the context makes it clear that the learned Chancellor had particularly in mind the right to investigate the nationality of an armed vessel hovering "on our coasts," rather than a proprietary right such as that of exclusive fishing. Yet it is strange that Dr. Phillimore should have quoted this passage as indicative of American opinion on this point.[2] For it has been repeatedly disclaimed by the highest American authorities. President Woolsey declares "that such broad claims have not, it is believed, been much urged, and they are out of character for a nation that has ever asserted the freedom of doubtful waters as well as contrary to the spirit of more recent times."[3] While Pomeroy as unhesitatingly asserts: "From the main propositions and doctrines in this extract of Chancellor Kent, I, as an American lawyer and citizen, must emphatically dissent. * * I should add that these pretensions on the part of our government seem to have been abandoned."[4]

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1 Commentaries, Vol. I, p. 30.
2 I, § 201.
3 Int. Law. § 56.
4 Pomeroy, § 157.

The history of the headland doctrine, therefore, warrants the conclusion of Dr. Wharton:

"It cannot be asserted as a general rule that nations have an exclusive right of fishery over all adjacent waters to a distance of 3 marine miles beyond an imaginary line drawn from headland to headland. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain on the 2d of Aug., 1839."[1]

With the preceding principles fresh in mind I shall not fear the charge of partiality if I adopt the official language of the Canadian Privy Council and say:

"It does not appear necessary to insist at any great length that the conditions attaching to *Maria clausa* can not by any possibility be predicated of Behring Sea, and that the seizure of Canadian vessels at a distance of over 100 miles from the mainland, and 70 miles from the nearest island, constitutes a high-handed extension of maritime jurisdiction unprecedented in the law of nations."[2]

The Behring Sea can be brought under the head of neither strait nor marginal belt. In that it is not entirely surrounded by land, it falls short of the requisites of an enclosed sea. For not only is the Behring Strait 36 miles wide, and the distance between many of the islands forming the southern boundary of this sea far in excess of that, but the distance between the last island of the Aleutian chain, and the nearest Russian island of the Commander group is 183 miles.

Again, regarded as a bay or gulf, the Behring Sea fails to enter the category of closed seas. For waiving all physico-geographical objections to such a classification, there still

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[1] Dig., § 29, p. 76.

[2] No. 117, Report approved by Gov. Gen., 29 Nov. 1886.

remains to its character of closed sea the insuperable objection of impossibility of possession.

The name bay or gulf does not necessarily carry with it the idea of possessibility, and international law, when importuned to accord such a character to the Behring Sea, cries out with Vattel:

"Mais je parle des baies et détroits de peu d' étendue, et non de ces grand espaces de mer, auxquels on donne quelquefois ces noms, tels que la baie de Hudson, le détroit de Magellan, sur lesquels l'empire ne saurait s'étendre, et moins encore la propriété."[1]

We have learned that defensibility of its entrance from the sea is a prerequisite to the possession of a gulf. This requisite, the Behring Sea, for the obvious reasons just mentioned, does not fulfill.

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[1] Droit, &c., T. I, L. I, C. XXIII, s 291

CHAPTER V.

Mare Liberum in American History.

But there are those in whose hands the scales of justice do not dip with the weight of international precedent. A precedent is never a parallel; at best it argues by analogy. The precedent most directly in point is but an approximate parallel. There being, therefore, neither in law nor history a precise instance of all the conditions involved in the Behring Sea dispute, these exacting, rather than exact, reasoners, using this as a point of departure, practically create in the interest of the United States a margin for despotism. Our progressive country, say they, ought not to be chained to old world ideas, but, as often before, should set the fashion for the world. To rouse the diplomatic conscience of such as these I shall conjure up before their gaze the ghost of our national past.

When, in 1855, the United States was invited to participate in the European Conference to adjust the gross sums which should be paid to Denmark for the right of passage through the Sound and the two Belts, President Pierce declined to have anything to do with such payment "because," said he, "it is in effect the recognition of the right of Denmark to treat one of the great maritime highways of nations as a *close sea*, and prevent the navigation of it as a privilege, for which tribute may be imposed upon those who have occasion to use it."[1]

In 1862, when Spain insolently pushed her claim to an extended jurisdiction around the Island of Cuba, Secretary Seward's forcible response was:

"It cannot be admitted, nor, indeed, is Mr. Tessara understood to claim, that the mere assertion of a sovereign, by an *act of legislation*, however solemn, can have the effect to establish and fix its external maritime jurisdic-

[1] Pierce's 3d Annual Message, 1855.

tion. * * * He cannot, by a mere decree, extend the limit and fix it at six miles, because, if he could, he could in the same manner, and upon motives of interest, ambition and even upon caprice, fix it at ten, or twenty, or fifty miles, without the consent or acquiescence of other powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never could be successfully or rightfully maintained."[1]

This language is peculiarly applicable to our Behring Sea claims, because, unless we concede that they were derived from Russia, they rest solely on an Act of Municipal Law.

In 1871, the Secretary of State, Mr. Fish, wrote to our Minister at Constantinople:

"This Government is not disposed to prematurely raise any question to disturb the existing control which Turkey claims over the straits leading into the Euxine. * * But while this Government does not deny the existence of the usage * * the President deems it important to avoid recognizing it as a right under the laws of nations."[2]

This same view with regard to sovereignty over a strait finds more determined expression in a letter from Mr. Evarts, Secretary of State in 1879:

"The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any Government that undertakes, no matter on what pretext, to lay any impost or check on the United States commerce through those Straits."[3]

In 1875, a question arising as to Russia's authority to grant licenses for the use of her contiguous seas, Mr. Fish yet more pointedly said:

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1 Let. to Mr. Tessara, Aug. 10, 1863. MSS. notes, Spain.

2 Let. May 5. MSS. Inst. Turkey; For. Rel., 1871.

3 Let. Mr. Evarts to Mr. Osborn. Jan. 18, 1879. Wharton's, Dig, § 80, p. 80.

"There was reason to hope that the practice which formerly prevailed with powerful nations, of regarding *seas* and bays, *usually of large extent*, near their coast, *as closed to any foreign commerce or fishery* not specially licensed by them, was, without exception, *a pretension of the past*, and that no nation would claim exemption from the general rule of public law which limits its maritime jurisdiction to a marine league from its coast. We should particularly regret if Russia should insist on any such pretension"[1]

And finally, our latest official word on this matter. In 1886 warning was given by the Canadian authorities to American fishermen not to carry on their occupation within the waters of the Bay of Chaleurs, a bay which measures about eighteen miles at its mouth. In a dispatch of June 14th, Secretary Bayard stigmatized such action as a "wholly unwarranted pretension of extra-territorial authority" and an "interference with the unquestionable rights of the American fishermen to pursue their business without molestation at any point not within 3 marine miles of the shore."[2]

We may well give heed to Lord Lansdowne's comment: "It is, I think, worth while to contrast the claims now urged by the Government of the United States to exclusive control over a part of the Pacific Ocean, the distance between the shores of which is, as was pointed out by Mr. Adams, in 1822, not less than 4,000 miles,"[3] with these indignant remonstrances of Secretary Bayard; and echo the question of a newspaper of that time: "What would be said if the British undertook to prevent an American whaler from entering Hudson Bay, or traversing the western half of that arm of the Atlantic Ocean which leads to it? Maritime law and international are the same whether on the Atlantic or the Pacific, and there is cer-

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1 Mr. Fish, Sec. of St. to Mr. Boker, Dec. 1, 1875. MSS. Inst., Russia.
2 No. 117. Let. of Lord Lansdowne to Mr. Stanhope, Nov. 29, 1886.
3 *Id.*

tainly something grotesque in the sight of hundreds of American fishermen hovering on the Canadian Atlantic coast just beyond the 3-mile limit, and claiming to enter all bays more than 3 miles wide at the mouth and fish, while on the Pacific Canadian vessels are captured 300 miles from the main-land, and the claim is made that a bay more than 1,000 miles wide at the mouth shall be a closed sea to them."[1]

The above expressions of our policy, together with our attitude toward Russia, before the Alaskan cession, force me to admit the justice of Canada's criticism: The United States "appear to have done this in spite of the admitted principles of international law, and in direct opposition to their own contention of what constitutes common waters upon the Atlantic coast."[2]

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[1] *Brooklyn Eagle.*

[2] No. 109. Report of the Minister of Marine and Fisheries to Privy Council, approved by Administrator, Sept. 24, 1886.

CHAPTER VI.

OFFICIAL EXPLANATION OF THE BEHRING SEA POLICY OF THE UNITED STATES.

The United States has not, thus far, officially explained its acts of supremacy in the Behring Sea. It has exercised in those waters the sovereign power of seizure, yet it has not expressly asserted sovereignty. It has by an act of Municipal Law extended over that sea its jurisdiction; yet it has not actively and regardless of foreign protest, but only permissively and until specific remonstrance, insisted upon the execution of that act. Indeed, the only official basis for these actions which can be found must be gathered from two conversations with Secre[illegible]y Bayard, which the British Minister at Washington [illegible]ted to the Earl of Iddesleigh:

"In fact, he [Mr. Bayard] said the territory was not properly organized. He had not, moreover, reached the exact nature of the rights ceded by Russia to the United States, but it seemed clear that Russia, previous to the cession, contended that Behring Sea was a *mer fermée;* whereupon I remarked, 'and against which contention the United States protested.' 'Yes,' he replied, 'at that time.'"[1]

Continuing later, Mr. Bayard said that the "nature of the jurisdiction over the Behring Sea ceded by Russia * * was a complicated question, but one which would be met in all fairness by the United States Government. He continued to explain to me that the value of Alaska consisted in the seal fisheries; that the seals frequented chiefly the islands of St. Paul and St. George, where the great catch was made, and that these islands, although situated (as he stated) more than 200 miles from the main-land, were, he conceived, comprised in the jurisdiction ceded by Russia;

[1] No. 124, Nov. 12, 1886.

but he did not wish to pronounce upon this point at present. He would observe, however, that the value of the seal "rookeries" on these islands would be destroyed if it was opened to all vessels to kill seals outside the 3-mile limit, for no seals would ever reach them."[1]

Protection of the seal fisheries from destruction is here the prevailing thought. Whether or not a justifying excuse, the extreme stress which in his instructions to our foreign envoys Secretary Bayard puts upon it, shows that thought to have been supreme in his mind. He evidently relied more on the reasonableness of such protection than the legality of the claim of sovereignty; and the sincerity of this purpose is attested by the fact that during 1887 ten American vessels were seized and United States citizens arrested for killing fur seals in the Behring Sea.[2]

Certainly if anything will justify our seizures in the Behring Sea, the peculiar facts of the seal life in those waters will. They present a strong case for single nation interference.

Connecting Behring Sea with the Pacific Ocean are the passes which separate the islands of the Aleutian chain. Through these, in the late spring, draw the returning hordes of the fur seal after their wintering in the warmer waters of the Pacific. "The convergence and divergence of these watery paths of the fur seal to and from the Sea Islands resembles the spread of the spokes of a half wheel—the Aleutian chain forms the felloe, while the hub into which these spokes enter is the small Pribyloff group."[3] So that upon the Seal Islands of the Pribyloff group,

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[1] No. 124. Let. Dec. 10, 1886.

[2] No. 76. Let. Mr. Bayard to Mr. Phelps, Feb. 7, 1888.

[3] No. 76. Report of Hon. Henry W. Elliott of the Smithsonian Institute to Mr. Bayard, Dec. 8, 1887.

St. George and St. Paul, is cast nearly the whole mass of these returning fur seal millions. Here then are their natural rookeries.

In these islands the fur seal is obliged annually to haul out for the purpose of breeding and shedding its pelage. The male seals or bulls require little food during the five or six summer months, sustaining existence on the blubber secreted beneath their skin. They, therefore, remain ashore watching the rookeries. So that the greater part of the seals found during the summer at any distance from the islands are females in search of food for themselves and their young.

Great discrimination is exercised and enforced by the Alaska Company in the killing of these seals; only the young bulls are permitted to be slain; they are driven inland from the sandy parts of the islands whither the old bulls have driven them, and clubbed in order that their skins may not be perforated.

On the contrary, if these seals are hunted in the sea, not only is discrimination impossible but nearly one out of every three so slaughtered sinks and is lost. Besides as I have said only females frequent these seas at this season.[1]

I need not point out the utter ruin which thus threatens this valuable industry. Anywhere from 3 to 100 miles south of the Seal Islands, the pelagic sealer "has a safe and fine location from which to shoot, to spear, and to net these fur-bearing amphibians, and where he can work the most complete ruin in a very short time." Continues Mr. Elliott, "with gill nets, under run by a fleet of sealers in Behring Sea, across these converging paths of the fur seal, anywhere from 3 to 100 miles southerly from the Seal Islands I am extremely moderate in saying that such a fleet could and would utterly ruin the fur seal rookeries of the Pribyloff Islands in less time than three or four short seasons. * * * Open these waters of Behring Sea to

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[1] Mr. Elliott's Report.

unchecked pelagic sealing, then a fleet of hundreds of vessels—steamers, ships, schooners and whatnot—would immediately venture into them bent upon the most vigorous and indiscriminate slaughter of these animals. A few seasons then of the greediest rapine, then nothing left of those wonderful and valuable interests of the public which are now so handsomely embodied on the Seal Islands."

The great need of immediate regulation is apparent. The history of seal fisheries in other parts of the world ought to serve as a warning. Whereas, formerly hundreds of thousands of seals were annually taken off the coasts of Chili, the South Pacific Islands, Southern Africa and the Falkland Islands, through indiscriminate slaughter the whole annual catch in those localities has now been reduced to a few thousand. In some places it has led to the entire destruction of the rookeries. So that out of 192,000, which is the average yield of the fur seal fisheries of the world since 1880, 136,000 or nearly three-quarters are captured on the islands of the Pribyloff and Commander groups; and 25,000 more are taken out of the adjacent waters by the British and American sealing fleets. Mr. A. Howard Clark, who furnished the statistics for the article on Seal Fisheries in the Encyclopedia Britannica, says:

"There can be no question concerning the advisability of regulating the number of animals to be killed and the selection of such animals as will not interfere with the breeding of the species."[1]

While such a partisan authority as the Inspector of Fisheries for British Columbia, reports that a repetition of the enormous catch in 1886-7 of 40,000 to 50,000 fur seals by schooners from San Francisco and Victoria, "with the increase which will take place when the vessels fitting up every year are ready, will soon deplete our fur seal fishery,

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[1] No. 70. Review of the fur seal fisheries of the world in 1887.

and it is a great pity that such a valuable industry could not in some way be protected."[1]

Seal fishing, and by reason of its almost sole survivorship, particularly the Behring Sea seal fishery, is a world interest; not only are all nations indirectly profited by its preservation, but England directly. Nearly all undressed fur seal skins are shipped to London; and it is estimated that their dressing and dying gives employment in that city to 10,000 people. Are we then not acting in the interest of these other nations?

But regulation by the United States means also monopoly by the United States, and the dictate of International Law is plain: "The rich treasures of the sea are open to all humanity."[2]

Now regarded merely as an international interlocutory injunction, our action seems reasonable and just. To allow the indiscriminate slaughter of seals pending international negotiations for their protection would lead to the destruction of the subject matter of the dispute, and would be folly. Either the seal fishery must go unregulated or be temporarily regulated by a power ready to undertake the duty. On this theory then the United States might properly play the role of international agent.

But not in the capacity of agent have we offered our services. We have assumed the policing of these waters and the regulation of these fisheries in our own right. For years past, the matter might have been settled by International action; yet nothing was done. Suddenly vessels are seized and confiscated in the face of solemn protests by the offending nation. Can we be called the agent of that nation? Can we be said to be exercising this power on sudden emergency, and only pending some concerted action by nations, when for our authoriza-

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[1] Report of Thomas Mowat; Sessional papers, Vol. 15, No. 16, p. 268, Ottawa, 1887.

[2] Bluntschli, Vol. IV., § 307.

tion we look to a municipal act of twenty years standing? Evidently our laws and our attitude are based not on an international power of attorney, but on national title-deeds.

Secretary Bayard's plea that the exigencies of seal fishing demand from us the course we have pursued must, therefore, stand on other ground than that of international authority. There are two arguments wrapped up in it: either he must prove that the exercise of police power is not an act of sovereignty; or else he must hold that the sea, so far as its use is not inexhaustible, as in the case of a fishery, is capable of dominion.

First then, as to the nature of the police power. The argument here is that, although we may have no property in the broad Behring sea itself, no ownership in the seals when swimming through those waters, yet we have the right to police those seas, to regulate fishing.

We need not here discuss the distinction made by writers between property on the one hand and "empire" or sovereignty on the other.[1] There exists no shadow of doubt that the powers exercised by us fall clearly under the head of empire. A single quotation will suffice. Ortolan defines empire as "Un sorte de droit de souveraineté, de tribut, de police ou de jurisdiction."[2] How then if a nation has no property in a sea, can it exercise sovereignty over it? As Ortolan says, "Il faudrait donc que ce peuple se prétendit personellement le supérieur, le souverain des autres * * L'empire des mers ne peut donc exister au profit de qui que ce soit, pas plus que le droit de propriété."[3]

The second argument, drawn from the exhaustible nature of seal fishing, is like one given by Mr. Lothrop, when United States Minister to Russia. He had heard it applied in Russia to the fisheries off the coasts of northeastern Asia. Its substance as given by him is as follows:

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[1] Martens, IV c. IV § 1, p. 157; Ortolan I, p. 119.

[2] Ortolan, I, p. 119.

[3] Ortolan, I, pp. 119 and 120.

"The seal fishery on our Behring coasts is the only resource our people there have; it furnishes them all the necessaries of life; without it they perish. Now international law concedes to every people exclusive jurisdiction over a zone along its coast sufficient for its protection; and the doctrine of the equal rights of all nations, on the high seas, rests on the idea that it is consistent with the common welfare, and not destructive of any essential rights of the inhabitants of the neighboring coasts. Such common rights, under public law, rest on general consent, and it would be absurd to affirm that such consent had been given, where its necessary result would be the absolute destruction of one or more of the parties. Hence, the rule cannot be applied blindly to an unforeseen case, and these alleged common rights must rightfully be limited to cases where they may be exercised consistently with the welfare of all. Behring Sea partakes largely of the character of an inclosed sea; two great nations own and control all its inclosing shores. It possesses a peculiar fishery, which, with reference to its preservation, can only be legitimately pursued on land, and even there only under strict regulations. To allow its unrestrained pursuit in the open waters of the sea is not only to doom it to annihilation, but, by necessary consequence, to destroy all its coast inhabitants. If this result is conceded, it follows that the doctrine of common rights can have no application to such a case."[1]

But as President Angell[2] says of this reasoning: "We can hardly assert with much plausibility that the members of the Alaska Commercial Company, which has the monopoly of seal-catching on and near the Pribyloff Islands, can plead, *in forma pauperis*, for protection on grounds of charity." The extinction which indiscriminate capture of the fur seal threatens "deplorable as it may be, would furnish a most flimsy excuse to a Government whose regulations

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1 No. 103. Let. to Mr. Bayard, Dec. 8, 1887.
2 *Forum*, Nov., 1889. "American Rights in Behring Sea."

of the industry in Alaskan waters is prompted not by philanthropy, but by strictly mercenary considerations."[1]

Unfortunately, this line of argument seems to receive weight from Vattel:

"The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, &c. Now, in all respects its use is not inexhaustible; wherefore, the nation to which the coasts belong, may appropriate to itself an advantage which nature has so placed within its reach, as to enable it conveniently to make itself master of it and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property? And though where the catching of (swimming) fish is the object, the fishery appears less liable to be exhausted, yet, if a nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that natural benefit, as an appendage to the country which it possesses * * ?"[2]

And Dr. Twiss not only quotes the above with approval but declares that the right of fishery "comes under different considerations of law from the right of navigation." For, says he: "The *usus* of all parts of the open sea in respect of navigation is common to all nations, but the *fructus* is distinguishable in law from the *usus*, and in respect of fish, or zoophites, or fossil substances, may belong in certain parts exclusively to an individual nation."[3]

What he means, however, by "certain parts" of the sea, turns out to be something very conventional. "The practice of nations," adds he, "has sanctioned the exclusive right of every nation to the fisheries."—Where? "In the

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1 Victoria, B. C., paper.

2 Droit des Gens, L. I, § 287.

3 Twiss, § 182.

waters adjacent to its coasts within the limits of its maritime jurisdiction."[1]

So that Twiss' remarks have no application to an exclusive claim to fisheries beyond the ordinary jurisdictional limit; and will not support the argument in question.

If, on the other hand, Vattel in spite of his limiting words "on its coast" intended such extra marginal fisheries, his reasoning had weight only so long as the inexhaustible nature of the sea was urged as an argument for its freedom. This, as we have already shown, is no longer done by the best jurists,[2] and I will add one more illustration in the words of Calvo:

"Au point de vue pratique, celui de la pêche, par exemple, l'argument tiré de la prétendue immensité des mers n'a qu'une valeur relative, et conduirait, contrairement à la pensée de ceux qui le mettent en avant, à soutenir que l'océan est susceptible d'appropriation dans certains cas et qu'il ne l'est pas dans d'autres, qu'il peut à la fois, constituer un domaine collectif ou national et une propriété individuelle."[3]

But the law failing, the *fact* of exclusive possession by England of the Ceylon pearl fisheries has been offered in evidence.[4] The British Government does regulate and control these fisheries to a distance in the open sea of twenty miles from the northern end of Ceylon. But it has never excluded other nations; nor have these ever acknowledged any monopoly to England.[5] If they have never exercised their right of fishing, it is to be presumed that they could not at a distance compete with native divers. We are here, therefore, in the face not of a right but of a bare fact.

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1 *Id.* and Wheaton, El., Part II, C. 4, § 5; Azuni, T. I, C. II, Art. 8.
2 Wheaton, p. 269.
3 I, § 205.
4 *N. Y. Tribune*, March 19, 1890.
5 *Forum*, Nov. 1889. Pres. J. B. Angell.

The regulation of the Behring Sea fisheries is now awaiting settlement before the International Tribunal. The seals will become wards of the Supreme Court of nations. The Behring Sea controversy will be buried and a question of the day turned into a question of *a* day. But as this disposal of the dispute is to be made without determination of any issue of marine ownership, the questions here discussed will become dormant rather than dead. The annoyance caused by their ephemeral life, however, leads to the hope that from this sleep there will be no awakening.