

Ch.9 Internal Waters: Bays, Ports, Straits

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(p. 338) Chapter 9 Internal Waters: Bays, Ports, Straits

The expression ‘internal waters’, or ‘inland waters’, is used in international law to refer to all areas of sea which lie within (or on the coastal side of) the baseline from which the territorial sea is measured. It thus covers a group of cognate but separable legal areas, namely: bays, gulfs, estuaries, and creeks; ports and roadsteads; and waters inside straight baselines linking the coast with offshore features. Although the Geneva Convention omits to state this, internal waters, like territorial waters, are invested with sovereignty; but, in contrast with the case of territorial waters, foreign shipping has no international legal rights of transit within them, except in the particular case where a straight baseline system is adopted which has the effect of transforming into internal waters what were previously territorial waters or high seas.¹

The fact that internal waters constitute a comprehensive category, and have done so throughout the history of the matter, makes it pedagogically difficult to expound the law relating to the delimitation of internal waters under a particular rubric.

A. Bays as Internal Waters

1. The Common Law

(1) The genesis of the concept of bays

Historically the concept of internal waters is a product of special rules of law about bays, river mouths, estuaries, ports, and roadsteads. These rules are partly rules of municipal law, and partly of international law. The primary influence upon the rules of international law relating to bays has been English law, but here the analysis is confronted by contradictions deriving from two streams of English law concerning bays, which were unconnected in origin and evolution, and infiltrated the literature of international law in the nineteenth century in independent ways.

(p. 339) One of these rules was that of the King’s Chambers, which dates from the early seventeenth century. This was concerned with the delimitation of neutral waters and hence had affinities with international law; because it embodied, essentially, a headland to headland notion, it was revived by jurists in the nineteenth century as an antecedent of the international law rules relating to bays. The other rule was that of the *fauces terrae*, which derived from the Middle Ages and was concerned exclusively with a domestic problem, namely the determination of the jurisdictional limits respectively of the Common Law and Admiralty Courts. It embodied notions of finite limits which the ‘Chambers’ doctrine did not. It was absorbed into the literature of the nineteenth century because of its revival in two nineteenth-century court cases, which wrongly led to the

assumption that the rule had something to do with the limits of British territory, when really it was concerned only with the division of judicial jurisdiction between two tribunals of municipal law.

The infusion of these two streams of authority into international law occurred in the nineteenth century with the intention of adding precision to the extremely vague concept of bays which had been embodied in the Continental literature for a long time. But the result has been to compound rather than diminish the confusion on the matter, from which customary law has persistently suffered.

In order to illuminate the problems it is necessary to consider separately these several strains of legal influence.

(a) The King's Chambers

In 1604, James I issued a Proclamation² that the Crown's officers should protect merchant shipping from attack on the coasts near to harbours within straight lines drawn from headland to headland and cut in a map of brass and published by royal command. These lines were drawn by twelve skilled mariners, who, acting as a jury in the High Court of Admiralty, recorded in an instrument presented by them to Sir Julius Caesar, a judge of that court, that they had fetched a compass round from the north by the east and south to the west, and had calculated the distance between the headlands of the coast, beginning at Holy Island and finishing at Solway Firth, and the latitudes on which these points were to be located. The pretence was made that Sir Julius Caesar was making a finding upon 'ancient limits'.³

(p. 340) This system of straight lines enclosed the greater sinuosities of the coasts of England and Wales and became known as 'the King's Chambers'. They constituted in fact only a limit within which foreign belligerent rights were denied in time of war, and they were inconsistent with the much broader claims to sovereignty of the seas which James I shortly afterwards made for other purposes. Selden was embarrassed by the contradiction, which implied that there was an inner zone for neutrality purposes within the British Seas, leaving the balance of these available for foreign naval operations. He sought to explain this away on the argument that the King could choose the areas in which he would act as 'Arbiter' of foreign conflicts, and had in fact chosen to forbid the taking of prize only within the inner area of his Chambers: the King could, had he wished, have extended his proclamation to the whole area of his sovereignty.⁴

In truth, of course, it was the inability of the Crown to enforce its broader pretensions in the face of superior naval power which required this partitioning of the British Seas. In the year in which Selden was published, Charles I issued a new Proclamation⁵ forbidding the exercise of belligerent rights in the whole of the Narrow Seas, without regard to the King's Chambers, but the defeat in 1639 of Oquendo by Van Tromp in The Downs demonstrated the inefficacy of this gesture. Although further Proclamations of 1663 and 1683⁶ on the same subject likewise omitted all reference to the King's Chambers, these remained in practice the only areas where the Proclamations could be enforced, and so

this notion seems to have remained in men's minds. Sir Leoline Jenkins reported on several occasions to the Privy Council concerning the validity of prizes taken within the limits of the lines laid down in the Proclamation of 1604, which he in fact recited.⁷ In one of (p. 341) these instances the line between South Foreland and Dungeness was recalled,⁸ in another the line at Orfordness, and in another that at Harwich.⁹ So the tradition appears to have lingered on, although it was apparently moribund, until the early nineteenth century, when the King's Chambers were resurrected for the purposes of establishing the baseline from which the three-mile limit could be measured, so enabling the latter to escape from the limitation of the cannon-shot notion.

(b) The Fauces Terrae Doctrine

(i) The Doctrine of Fitzherbert.

Although the Crown's sovereignty extended, according to English doctrine, to areas of sea far beyond the indentations of the British coast, the common law distinguished for administrative purposes between those areas which lay within and without the arms of the sea. Within the arms of the sea, common law jurisdiction was exercisable, whereas in the British Seas outside them, only the Admiral had jurisdiction. For the purposes of determining the line of intersection between these jurisdictions the test was that of range of vision, and it was traced in the Renaissance period to a finding in the reign of Edward II that the medieval coroner, whose functions included administration of certain royal property, exercised these functions *intra fauces terrae*. The text was included in the Grand Abridgement of Fitzherbert, *Corone*, which read:

That is not part of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered] that is such a place the county shall have conusance ...¹⁰

It will be noticed that this passage embodies two inconsistent statements. In the first sentence the emphasis is upon a man being able to see what is done, although this is qualified by the statement about him being able to see from one land to one other. In the second sentence (p. 342) only the latter is emphasised. It is obvious that much more water is enclosed by a test which requires only that the other side of an indentation can be seen than one which requires that a man standing on one side can see what is happening on the other.

(ii) The Doctrine of Coke.

When Coke restated the law on the subject he took the alternative of range of visual knowledge rather than that of range of sight, referring to the arms of the sea 'where a man standing on the side of the land may see what is done on the other'.¹¹ If this was a correct statement of the common law the extent of sea which would be *intra fauces terrae* was small.

(iii) The Doctrine of Hale.

Hale, in dropping all reference to the ability of a man to see what is going on upon the opposite shore of an arm of the sea, restated the common law rule by reference to the range of sight. He said: 'That arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sherriff or coroner.'¹² This statement allowed for the enclosure of much greater areas of water within the common law jurisdiction than that of Coke. But, whereas Coke's doctrine provided for what was virtually a uniform distance to be applied to all arms of the sea, Hale's distance test was as elastic as the actual range of vision, which would vary according to the elevation of the headlands.

When Hale said that an arm of the sea which satisfies the visibility test 'is, or at least may be' within the body of a county, what did he intend by 'may be'? Perhaps he meant that evidence would have to be given that a particular arm of the sea had been treated as within a county, but if this is so his rule loses its character of being a criterion.

Elsewhere, Hale restated the rule somewhat differently, suggesting that 'upon the arms of the sea below the bridges within the bodies of counties', the coroner of the Admiral had jurisdiction over ships, but this was not 'exclusive of the jurisdiction of the coroner of the county, (p. 343) who may inquire in any great river upon these articles, where a man may see from one side to the other.'¹³

(iv) The Coke-Hale Controversy.

Hale's range of vision test was a faithful rendition of the doctrine of Staundford,¹⁴ which was the last expression of the Fitzherbert rule in Norman French, and antedated Coke's statement. But the latter was followed by Hale's contemporary Zouche,¹⁵ while Hawkins in 1721, pointing to the difference between Coke and Hale, thought the former 'to be more accurate'.¹⁶ East, recalling this emphasis of Hawkins, suggested that in the event of doubt as to which of the interpretations was the correct one, 'the common law ought to have the preference',¹⁷ which would shift the emphasis in Hale's favour. Comyns stated only the range of vision test.¹⁸

The question of choice between the two authorities came before the Admiralty Session of the Old Bailey in a murder trial before Lord Ellenborough in 1812. The place of the murder was Milford Haven, where the river is three miles wide and seven or eight miles from the open sea, and sixteen miles below any bridges. The accused contested the indictment at common law, and the jury was left to find whether the spot where the murder was committed was within the body of a county or not. The jury's affirmative finding was referred for the opinion of twelve judges, who were unanimous in preferring Hale's to Coke's version.¹⁹ On the other hand, two United States courts followed the latter.²⁰

(v) The Significance of the Act of 15 Richard II.

The statute of 15 Richard II (1391) on the Admiral's jurisdiction was the source of the rule that the waters within the arms of the sea where one could see from side to side were within the body of a county. Coke relied upon this statute to seek to limit the scope of the

Admiral's jurisdiction so far as possible, in favour of that of the common law. The purpose behind the statute was to resolve a conflict between the two jurisdictions in tidal rivers, where the respective jurisdictions ebbed and flowed with the (p. 344) tide, and perhaps overlapped. The last bridge on a river was henceforth to be the limit of the Admiral's jurisdiction, whatever the tide. Zouche in 1663, in a criticism of Coke which has passed altogether unnoticed, suggested that the whole Coke doctrine was due to a transliteration of 'pountz' (*infra primos pontes* in the Latin, meaning 'below the first bridges') into 'pointz' (translated into 'between the extreme headlands' or *intra fauces terrae*.)²¹ This suggestion of Zouche, if correct, would explain the apparent anomaly that in rivers the Admiralty and common law jurisdictions mutually advanced and receded with the tide, but only on the seaward side of the first bridges, whereas it came to be thought that bays were within the bodies of counties, but not subject to the Admiralty jurisdiction, despite the fact of ebb and flow.

(vi) The Significance of the Controversy for the Distinction between Bays and Other Internal Waters.

The view that the Admiral was altogether excluded from bays is due to Coke, who asserted that he 'shall have no jurisdiction' there.²² But the correctness of this depends not only on his interpretation of the Fitzherbert doctrine, but also upon the unwarranted inference from it that the Admiral did not have concurrent jurisdiction in bays.²³ Hale, on the other hand, seems to have drawn a distinction between jurisdiction over ships (the Admiral) and over events in the water (the common law). In the case of death aboard a ship in a bay, the Admiral's coroner might enquire; in the case of a body in the water, the county coroner might enquire. And, somewhat ambiguously, he stated that this rule applied 'upon the arms of the sea below the bridges within the bodies of the counties'.²⁴ If by 'arms of the sea' he meant both rivers and bays, then he intended no distinction between them.

It is likely, then, that the distinction which emerged in the nineteenth century between bays as one legal category, and rivers, creeks, ports, and harbours as a different one, is the product of two legal errors: first, the linguistic error to which Zouche drew attention, which unwarrantably extended the county jurisdiction into bays; and, secondly, the unsupported assertion of Coke which unwarrantably excluded the Admiral therefrom.²⁵ Story J., in the best judgment ever written on the Admiralty jurisdiction, came to the conclusion that, except in rivers above the first bridges, the common law was confined to the low-water mark, and its extension into bays was mistaken.²⁶ Hale, consistently (p. 345) with his view that the Admiral had concurrent jurisdiction in bays, linked together roads, havens, ports and creeks, and this catalogue became standardized in British practice and legislation, and the whole miscellany was eventually held in conjunction by the generic idea that these were internal waters.

(vii) The Significance of the *Fauces Terrae* Doctrine for the Determination of the Baseline of the Territorial Sea.

It is evident that the Fitzherbert doctrine, being concerned only with a question of competing judicial jurisdictions, had nothing to do with the area subject to the Crown's sovereignty, and so the dividing line between them was not coincidental with the national

boundary. Story J. went into this question in 1815 and adduced three powerful arguments in favour of this view: land submerged may be manorial, even within the Admiral's jurisdiction;²⁷ Hale's expression that the sea within bays 'is or may be' within the body of a county indicated no connection between county boundaries and external jurisdictional boundaries at sea;²⁸ and the bodies of counties in rivers and creeks follow the line of the tide, yet are unquestionably within the Crown's sovereignty, so why should not bays be also?²⁹

To these intrinsic arguments may be added equally cogent extrinsic ones: in the seventeenth century, the Crown claimed sovereignty over the seas, so that clearly the national domain extended beyond the *fauces terrae*; and, after the adoption of the cannon-shot rule, the Crown had property at least in the area described by the arcs of traverse of cannon, of which the *fauces* were the radial points, which again extended the limits beyond those *intra fauces*, and these limits lay within the Admiral's jurisdiction.³⁰

(2) The nineteenth-century revivals

In the nineteenth century both the chambers doctrine and the *fauces terrae* doctrine were revived, and both came to be treated as cognate with the international law doctrine on bays.

(a) The Chambers Doctrine

From the statement on the 'King's Chambers' by Sir Leoline Jenkins in the reign of Charles II until the Napoleonic Wars again raised the question of the extent of neutral waters, there is scarcely any recorded reference to this doctrine.³⁴ But it remains within the corpus of legal (p. 346) memory, because Lord Stowell made passing reference to it in the second phase of the *Twee Gebroeders*³² while the Secretary of State employed the expression in 1806.³³ The doctrinal revival of the King's Chambers seems to have been the achievement of Wheaton, who in 1836 noticed the reference of Jenkins.³⁴ It is not clear whether he relied on this to support his doctrine that there was property in parts of the sea enclosed by headlands belonging to the same State,³⁵ because he seems not to have been prepared to support the extent of the jurisdiction in the King's Chambers as laid down in the Proclamation of 1604, but only the principle which it embodied of the invalidity of prize taken in territory; and he made no mention that the doctrine was available to designate which bays fell within the international law rule.

It was Phillimore's reliance upon Wheaton twenty years later which seems to have treated the doctrine as generic in international law.³⁶ But even he was diffident about suggesting that such bays were exclusive to England for all purposes. Having referred to Sir Leoline Jenkins's statement, he said that 'in time of war at least', the Solent might be justly asserted to belong to Great Britain as completely as the soil of the adjacent shores.³⁷ In his judgment in *R. v. Keyn* in 1876, Phillimore again referred to the King's Chambers. Having distinguished the three-mile limit from what he called 'inland waters', he said that the question as to dominion over portions of the seas enclosed within headlands or contiguous shores 'such as the King's Chambers' was not now under consideration.³⁸

(b) The Fauces Terrae Doctrine

The *fauces terrae* doctrine had been kept alive by the references made to Hale in the standard works on Crown pleadings in the eighteenth century, and it made its reappearance in case law in *Bruce's Case* in 1815,³⁹ which influenced the arguments of counsel in *R. v. Cunningham* in 1859.⁴⁰ This latter was a case concerning felonious wounding on board an American ship in the Penarth Roads in the Bristol Channel, three quarters of a mile from the coast of Glamorganshire and within a quarter of a mile of the low water mark. The question was whether the offence was committed within the body of the county of Glamorgan, or within the Admiral's jurisdiction. Lord Hale's text was (p. 347) cited frequently in argument, not with respect to the national jurisdiction of England, but with respect to the intersection of the common law and Admiralty jurisdiction; and counsel sought to establish that the appropriate doctrine to apply was that of the cannon-shot, not that of the *fauces terrae*, so making the two doctrines mutually exclusive for the purpose of determining which court had jurisdiction. Cockburn C. J. upheld the conviction at common law, on the ground that 'looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded.'⁴¹ This 'local situation' test was a test of English law for judicial jurisdictional purposes only, but it was obvious that a finding that an arm of the sea was within the body of a county had a bearing on the international boundary of England.⁴²

So the expression *fauces terrae* came to embody properties which had not previously appertained to it, and to establish an affinity with the concept of the King's Chambers which it had not previously possessed. Both Lord Hale's text and the King's Chambers decree of James I suddenly acquired new vigour, in total disregard of the fact that the latter had been virtually lost to memory for over a century.

In the United States the *fauces terrae* doctrine was revived in connection with the construction of the Act of Congress of 1790 which provided for the punishment of felonies committed 'upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State.'⁴³ The power of Congress to enact this derived from Article III of the Constitution, which declares that 'the judicial power shall extend to all cases of Admiralty and maritime jurisdiction.' The question was whether the courts of common law had concurrent jurisdiction with the Admiralty over felonies committed in rivers, havens, basins, or bays within the States. This turned on the meaning of the expression 'high seas' in the Act.

Story J. held in 1813 that this expression meant any waters on the sea coast below the tideline, although within a roadstead or bay,⁴⁴ and two years later, in a remarkably thorough analysis of the history of the Admiralty jurisdictions, he affirmed his view.⁴⁵ He was reversed in the (p. 348) Supreme Court in 1818⁴⁶ in a case arising out of a murder committed on board USS *Independence* in Boston harbour, in which Webster and Wheaton of counsel argued powerfully that the *fauces terrae* doctrine meant that 'high seas' began only in the unenclosed and open ocean, recalling Hale's dictum that the sea which is not within the body of a county 'is called the main sea'. Marshall C. J. said that Congress had not created a jurisdiction within the territorial boundaries of the States. In a

case two years later⁴⁷ concerning a felony on board an American ship in a Chinese river, counsel argued that the expression 'high seas' was used in contradistinction to 'that portion of the sea where the tide ebbs and flows, but which is enclosed by headlands, or forms parts of rivers above their mouths.'⁴⁸ Although Marshall C. J. did not discuss bays in his judgment, this argument reveals a tendency to equate the *fauces terrae* doctrine with a doctrine of headlands.⁴⁹

The effect of the construction put upon the Act of 1790 by Marshall C. J. was that it became necessary to determine which bays, rivers, creeks, harbours, and roadsteads had been excluded from the Federal jurisdiction. Having been reversed in his view of the meaning of 'high seas', Story J. now adopted the *fauces terrae* doctrine so as to exclude Boston harbour from the Federal jurisdiction, as being within the body of a county. The test which he adopted was the narrow one of Coke.⁵⁰ The question of the limits of the counties came before the Supreme Court of Massachusetts in another case of felony on a ship in Boston harbour, and this time it was held that the counties had not been defined so as to include tidal waters.⁵¹

The *fauces terrae* doctrine, at this point in time, was demonstrating a propensity to escape from the context of the Admiralty jurisdiction, and to become a criterion for the delimitation of coastal waters. The Supreme Court of Massachusetts, for example, interpreted 'territorial limits' in fisheries legislation as extending from 'an inlet so narrow that persons and objects can be discerned across it by the naked eye'.⁵² A few years later the Court of Appeals of New York referred to the (p. 349) extremities of Long Island as the *fauces terrae* in a case arising out of a collision in the Sound at a point where the width was four miles. The reference was made in connection with a broad claim to extend the 'sovereign domain' to 'an ocean line stretching much farther from headland to headland',⁵³ and so divorced from the visual limitations of the Coke doctrine.⁵⁴ The evolution terminated with the Supreme Court decision in *Manchester v. Massachusetts*,⁵⁵ a case concerning the question of the fishery limits around Buzzard's Bay. Evidence was given that it was impossible to discern objects across the bay from one headland to the other, and so an argument based on Coke was directed at the constitutionality of the Massachusetts legislation designating Buzzard's Bay within the limits of a county. Citing the finding of the Halifax Commission,⁵⁶ the Supreme Court put this criterion to one side, and applied the test of double the territorial sea limit. Thereafter the *fauces terrae* expression lapsed in the United States courts in favour of contests between arithmetical limits.

2. The Concept of Bays in the Law of Nations

The concept of 'bay' in diplomatic practice long antedated the preoccupation of English lawyers with the questions of their jurisdictional limits, so that the two streams, one of English law and practice, the other of the law of nations and practice, ran in parallel courses until they tended to converge in the nineteenth century. The expression *sinus maris* was used in treaties,⁵⁷ and Grotius adverted to it in the pamphlet which he wrote in reply to Welwood's assertion of the claims of the British Crown. He said:

The controversy is not over a gulf or strait in this ocean, nor indeed of all that which is visible from the shore ... We are not treating of the inner sea ... Indeed, in the case of a diverticulum of the sea, just as in the case of a diverticulum of a river, if I have occupied such a place and fished therein, especially if I have given evidence of intention to possess it as private property through a succession of years, I shall prohibit another from using the same right.⁵⁸

When the Netherlands delegation to James I in 1610 sought to settle the limits of fishery they admitted that ‘gulfs within their land from one point to another’ were within the power of princes.⁵⁹

(p. 350) The expression ‘diverticulum’ is used throughout the seventeenth century, although it seems to want for Roman Law antecedents.⁶⁰ It conveys the notion of limited scale, yet this is not a factor to which the jurists adverted. Pufendorf in two texts merely refers to possession of bays enclosed by a nation’s territory.⁶¹ About the same time Vitriarius expressly said that the size of a bay was not a decisive question.⁶² A number of seventeenth and eighteenth century treaties proclaimed that bays, harbours or rivers should be neutral territory, without reference to size.⁶³ The only criterion of size used in diplomatic practice was that of the range of vision, as in the decree of Philip II forbidding access to the harbours, roadsteads, or rivers of the Netherlands, as well as within sight of the land.⁶⁴ There is little evidence, however, that this test persisted beyond the seventeenth century.⁶⁵ Galiani, who in 1782 appears to have been an innovator of the idea that bays are to be designated by reference to a closing line between headlands, did not suggest any limitations as to scale.⁶⁶

(p. 351) (1) The relationship between common law and international law doctrines

(a) The Linking of the Fauces Terrae Doctrine and the Concept of ‘Bay’ in International Law

It is clear that the law of nations had no rule as to the size of bays that might be treated as territory, but that the range of vision test had some slight elements of plausibility about it when the question of limits came to be considered in the nineteenth century. Not surprisingly, the cognate doctrine of the *fauces terrae* was grafted onto international law by some jurists who were intent upon finding a criterion of delimitation. The occasion of this infusion was the decision in *R. v. Cunningham* in 1859.⁶⁷ There was no question in that case that the ship was in British waters, so that international law did not enter into the matter; the question was one of municipal law alone: was the offence committed within the body of the county of Glamorgan or within the Admiral’s jurisdiction, since upon this depended the form of the indictment.⁶⁸ The actual finding in the case was no more than that part of the Bristol Channel was part of a county, but the significance of it, as quickly recognized by the judges and jurists, was that the area was a ‘bay’ in international law because that brought it within the national boundary. So a link was established between the *fauces terrae* doctrine and the international concept of internal waters.

(b) The Linking of the Chambers Doctrine and the Concept of 'Bay' in International Law

Although the expression was not actually employed, the idea of the King's Chambers lingered on in the eighteenth century in the hovering legislation, which provided for control over smuggling within straight lines linking the headlands of England and Scotland.⁶⁹ This system coincided only in some areas with that of the Proclamation of 1604, although in these areas the details on parts at least of the coast were practically identical. On the whole, the system was more restricted than its predecessor, but included Scotland. The assumption seems to have been that the straight lines so drawn were the limits of maritime sovereignty, and if this was so they represented the residue of the more pretentious claims of the previous century, partaking of the character of closed seas.

There is nothing in the literature or practice before the late nineteenth century to suggest that the doctrine of the King's Chambers (p. 352) either was anachronistic in international law, or had fallen into desuetude. The suggestion arose only when jurists sought to constrict bays within precise arithmetical limits and then had to explain away the revival of the King's Chambers by Wheaton and Phillimore. This process of putting bounds to the size of bays is not strongly evident before the last half of the nineteenth century. In the early part of the century, authors, adverting to the possible argument that gulfs, bays, and estuaries should be territorial when they were within the range of cannon, allowed that gulfs abutting the continental territory of a State might be enclosed, even if they did not lie entirely within the range of cannon, when nonetheless recognized by other countries.⁷⁰ The capability of forbidding entry to bays was thought to be a criterion, but this was not dependent upon the range of batteries.⁷¹ Other factors taken into account were the effect of land on currents and winds, and the security afforded by the land, which were elements of geography withdrawing inlets of the sea from the traffic of nations.⁷² It is interesting to note that all of the jurists dealt with bays in the comprehensive category of harbours, ports, and roadsteads.

What emerges from this study of the bringing of the English doctrines into conjunction with the international law doctrines in the nineteenth century, is that the Chambers doctrine and the international law doctrine tended mutually to support each other in a perspective of the law which warranted no standard of distance; while the *fauces terrae* doctrine, which embodied such a standard, tended to be divested of it when attached to a more general and generic notion of headland to headland.⁷³

(2) The closing line as a baseline

Until the nineteenth century there seems to have been no suggestion that a straight line linking headlands should constitute a baseline, in the nature of a fictitious shoreline, to which an additional belt of territorial waters would be added. The supposition appears to have been that the headland to headland line would constitute the outer limits of the coastal State's jurisdiction, except where affected by the traverse of batteries on the two promontories. But if it had been supposed that this line represented stationary warships defending the entrance, then it was logical to add an additional belt equal to the (p. 353)

range of cannon.⁷⁴ After the Napoleonic Wars, the idea of extending the territorial sea from the closing line of bays quickly consolidated itself on the basis of treaty practice,⁷⁵ beginning with the Anglo-American Fisheries Treaty of 1818.⁷⁶ In the Anglo-French Fisheries Convention of 1839, it was agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries should, with respect to bays the mouth of which did not exceed ten miles in width, be measured from a straight line drawn from headland to headland.⁷⁷ That notion became standard in British fisheries treaties, appearing in the unratified treaties with France of 1867⁷⁸ and the United States in 1888,⁷⁹ and also in the North Sea Fisheries Convention of 1882.⁸⁰ In this way, the closing line of bays became also the baseline of the territorial sea, and so bays came to be regarded as internal rather than as territorial waters.

3. Bays in Customary Law

Until the middle of the nineteenth century, international law and the common law were equally vague about the question of which sinuosities of a coast were to be classified as internal waters. In both systems it seems that the dominant criterion was the ratio of the penetration inland of an indentation to its scale, so that the length of the closing line at the mouth of the indentation was a factor of the size and shape of the indentation, and not an independent criterion for judging the juridical condition of the waters.

When, in the second half of the nineteenth century, legal attention was drawn to the question of the criteria for determining the bays that would be enclosed as inland waters by a closing line which, at the same time, would constitute the baseline for the territorial sea, four possible criteria were proposed by the jurists:

The first of these possible tests did not survive the attachment of the *fauces terrae* doctrine to international law, so that the competition is really between the last three.

(1) The headland theory generally

The predominant trend throughout the practice of the nineteenth century was for bays to be enclosed by reference to straight lines linking the headlands wherever the geographical situation really withdrew the waters within them from the traffic of nations. The principle could be found in Galiani,⁸¹ who may have influenced Attorney General Randolph in his opinion in the case of *The Grange* in 1793.⁸² This ship had been taken in prize by a French privateer in Delaware Bay. Randolph advised the United States Government that it could claim that the capture had occurred in its territory because 'the United States are proprietors of the lands on both sides of the Delaware and from its head to its entrance into the sea.' The same principle was reflected in a statement of Secretary of State Pickering in 1796 that jurisdiction was fixed at three miles except in the case 'of waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may.'⁸³

The headland theory made its appearance in English law in the case of the *Twee Gebroeders* in 1800,⁸⁴ and was adopted by the United States in its negotiations with

Great Britain in 1806.⁸⁵ It owed its popularization to Kent, who, no doubt with these precedents in mind, wrote in 1826 that

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 References(p. 355) assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands.⁸⁶

The elements of the theory, as it seems to have developed between 1782 and 1840 were: (a) straight lines linking the promontories of the coast; (b) some penetration of the coast by the sea, although there was great vagueness about this: the use of the word 'landlocked' in 1796 seems to convey this idea, and would exclude mere curvatures; and (c) the straight lines might be of 'indefinite distance', and certainly beyond the range of vision.

(2) The practice of Great Britain

(a) The North Atlantic Coast 'Bays'

It was the interpretation of the word 'bays' in the Anglo-American Fisheries Convention of 1818 which stimulated the adoption of the headland theory in British policy. In that treaty, the United States renounced the right of fishing within three miles of the 'coasts, bays, creeks or harbours' of British North America.⁸⁷

(i) The Anglo-American Controversy.

The position taken by the British Government with respect to the 'bays' referred to in the Convention was that any indentation of the coast answering to the geographic description of a bay was to be legally regarded as such, whether or not the headlands were mutually in sight. The United States, however, argued that the three-mile limit in the treaty was the standard to be applied in determining what constituted a 'bay'.⁸⁸

To give effect to the Convention, the British Parliament in 1819 enacted legislation⁸⁹ authorizing the making of fishery regulations for certain parts of the coasts of Newfoundland, Labrador, and the Crown's possessions in North America. Legislation was also enacted by Nova Scotia⁹⁰ and New Brunswick,⁹¹ but since there were doubts respecting the areas of three miles from which American fishermen might be excluded under the legislation, a Resolution and Report of References(p. 356) the House of Assembly was made to the Colonial Office, on which the opinion of Dr. Dodson, the Queen's Advocate, was sought. On 31 October 1837, he reported that, since the three miles was to be drawn from 'bays, creeks or harbours' as mentioned in Article 1 of the Convention, 'the Citizens of America have no right to calculate, as it is reported they do, their Three Marine Miles as being beyond a line curving and corresponding with the Coast.'⁹²

When this opinion was communicated to the Government of Nova Scotia, action was taken by the colonial authorities to restrain American fishermen accordingly. In 1839 it was reported that Nova Scotia was disposed to claim as 'bays' all waters within 'a line

from headland to headland, including the Bay of Fundy and the Bay of Chaleurs',⁹³ and during the session 1839–40 the House of Assembly voted an address to Her Majesty suggesting an extension to adjoining British colonies of the same rules and regulations. Matters were exacerbated as the result of the colony of Nova Scotia fitting out its own armed vessels and pursuing American fishermen.⁹⁴ In a despatch to Whitehall in 1841, urging that this local force be augmented by the employment of two steamers, the Governor enclosed a Case Stated for the opinion of the Law Officers, which he was directed by resolution of the Assembly to refer to the Prime Minister.⁹⁵

This sought opinion on whether the Treaty of 1783 had been annulled by the War of 1812, and whether United States citizens had any rights other than those ceded by the Convention of 1818; whether they had the right to fish in any of the bays of Nova Scotia, or 'should the prescribed distance of Three marine miles be measured from the Headlands at the entrance to such Bays'; and whether the distance of three miles was 'to be computed from the indents of the Coasts of British America or from the extreme Headlands, and what is to be considered as a Headland?'

The Case Stated was referred to Dr. Dodson and Mr. Wilde, who delivered their opinion on 30 August 1841⁹⁶ that the Treaty of 1783 was annulled by the War of 1812, and that American citizens were excluded from fishing within the distance of three miles, measured References(p. 357) from the headlands, or extreme point of land, next to the sea, of the coast, or of the entrances of the bays and not from the interior of such bays or indents of the coast. The term 'headland' was used in the treaty to express 'the part of the land we have before mentioned excluding the interior of the bays and the indents of the coast.'⁹⁷ The British Government decided, on the basis of this advice, to take no action, since the matter was securely in the hands of the Government of Nova Scotia, which had not exceeded its authority. However, the question of the Bay of Fundy constituting a 'bay' was raised by the capture of the American schooner *Washington* for fishing in the Bay ten miles from the coast, and was referred to Dr. Dodson and Mr. Pollock, who advised on 9 April 1844 that 'the Bay of Fundy, meaning thereby the water lying between the British Provinces of Nova Scotia and New Brunswick, is to be considered and treated as a Bay in the sense in which the term Bay is used, in the Convention of the 29th September 1818.'⁹⁸

Following receipt of this opinion, the Foreign Office on 10 March 1845 informed the United States Minister that the Bay of Fundy was 'rightfully claimed by Great Britain as a bay', and that in this the Government was 'fortified by high legal authority'.⁹⁹

The dispute over the capture of the *Washington* was submitted to an arbitral tribunal of three members instituted by a treaty of 8 February 1853. During the hearing of the case the British Government argued in favour of the headland theory. The British and American arbitrators disagreeing, the Umpire, Mr. Bates, decided that the headland theory was a new notion which had been reduced to the ten-mile limit as a result of the Franco-British Treaty of 1839.¹⁰⁰

Following the adverse decision in the case of the *Washington* that the Bay of Fundy was, like the Bays of Bengal or Biscay, high seas, Great Britain agreed in 1854 to provision being included in the so-called Reciprocity Treaty,¹⁰¹ whereby reciprocal fishery rights were References(p. 358) added to trading rights for Canadians and United States nationals. The subjects of either country were accorded the right to fish on each other's shores without restriction, except in the case of salmon and river fisheries. The Treaty expired according to its terms in 1866, whereupon the provision of the 1818 Convention again became effective, although for four years gratuitous concessions were made to American fishermen, which were terminated because of their non-observance of the conditions prescribed.

In the meantime, the Government of Newfoundland became involved in controversy respecting the equality of treatment of British and American fishermen implicit in the 'liberty to take fish' in common with British subjects. The Law Officers advised on 6 January 1863 that American fishermen were bound to obey the law enacted by the colonial legislatures, within the three-mile limit, and, they added, '(possibly) the cases of bays and other inlets lying between headlands and other points of the mainland.'¹⁰²

The Fishery Acts of the colonies which incorporated the 1818 Convention formula without specifying limits in the case of bays, were superseded by federal legislation made under the British North America Act by the Canadian Parliament in 1868,¹⁰³ which, however, adopted the same text. The Canadian Government considered that it was entitled to enforce this legislation within lines linking the headlands, but instructed its fishery protection officers that it was the policy of Her Majesty's Government not to do so in the case of Americans, and that a ten-mile limit to bays was to be observed. When the text of these instructions reached London,¹⁰⁴ the Foreign Secretary, Lord Granville, telegraphed the Governor-General of Canada, expressing the hope that United States fishermen would not for the present be prevented from fishing, except within three miles from land, or in bays which were less than six miles broad at the mouth.¹⁰⁵ The Canadian Government on 27 June 1870 issued instructions that fishery protection was to be limited, pending further instructions, to within three miles of a line drawn across the mouth of a bay or creek which was less than six geographical miles wide at its mouth. In other bays, including the Bay of Chaleurs, the three-mile limit was to be measured from the shore.¹⁰⁶

References(p. 359) The reciprocity provisions were re-established in the Treaty of Washington, 1871,¹⁰⁷ which provided for commissioners to be appointed to determine the amount of compensation to be paid by the United States for this privilege. A Foreign Office Memorandum of 10 October 1870 on the subject of the proposed Commission stated that: 'When a bay is less than six miles broad, its waters are within the three-mile limit, and therefore clearly within the meaning of the treaty; but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's dominions. This is a question which has to be considered in each particular case with regard to international law and usage.'¹⁰⁸ The Halifax Commission in 1877 made an award, which was not satisfactory to the United States, and after the expiration of the stipulated term of ten years the treaty-provisions were abrogated, and those of the Convention of 1818 again

entered into force, leading to further arrests of American fishermen and resulting diplomatic exchanges.¹⁰⁹ In 1888 the Chamberlain-Bayard Treaty¹¹⁰ was negotiated to provide that, apart from certain named bays, the ten-mile rule in the form adopted in the North Sea Fishery Convention of 1882 should apply to bays on the North Atlantic coast of America. Since it would take some time to pass the Treaty through the Senate, the British Government agreed, in order to prevent the continuance of friction, to a 'temporary arrangement for a period not exceeding two years'.¹¹¹ The Senate in fact failed to ratify the Treaty, and the *modus vivendi* continued, with a six-mile closing line applied to all bays except Chaleurs. The United States argued that it had agreed to the ten-mile limit only because the bays susceptible of this limitation were such that fishing in them would expose the fishermen to danger of encroaching upon the six-mile limit. However this last was the limit which the United States might legitimately have claimed.¹¹²

(ii) The North Atlantic Coast Fisheries Arbitration.

So matters continued into the twentieth century. Great Britain continued to argue that the word 'bays' meant all bays in the geographical sense and therefore reserved for British fishermen exclusive rights therein. The United States, on the other hand, continued to argue that bays must be interpreted to mean only bays which were included in national territory by virtue of the application of international law, which was the References(p. 360) double territorial sea, or six-mile standard, to which Great Britain replied that in 1818 there was no rule to this effect. The matter was referred by the parties to an arbitral tribunal in 1910, in the case known as the *North Atlantic Fisheries Arbitration*.¹¹³

The Tribunal said that the Convention of 1818 must be interpreted in a general sense as applying to every bay on the coast that might reasonably be supposed to have been considered as a bay by the negotiations of the Treaty under the general conditions then prevailing.¹¹⁴ Respecting the six-mile standard, it rejected the United States contention, holding that, on the interpretation of the word 'bay' as used in the 1818 Convention, the geographical sense was intended, so that all the water within a line drawn where an indentation ceased to have the configuration of a bay would constitute exclusive fishery. Because of the intemporal rule, the tribunal regarded itself bound by the construction which the parties intended in 1818, and could not apply subsequent international law, including the supposed ten-mile rule for bays.

The tribunal expressed the opinion that the only test of a bay was that of relative dimensions and configurations considered in relation to security. It said:
... the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control

by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule.

... the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three-mile rule should not be strictly and systematically applied to bays...¹¹⁵

So it decided that 'In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the (p. 361) place where it ceases to have the configuration and characteristics of bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.'¹¹⁶

However, realizing that this was an unsatisfactory finding, the Tribunal recommended to the parties that a ten-mile line be used in practice, considering that this had been adopted in the European treaties: '... though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers.'¹¹⁷ This recommendation was accepted by the parties and adopted by treaty in 1912.¹¹⁸

(iii) The Bay of Fundy Question.

The award did not apply to the Bay of Fundy, which remains controversial because of the history of the matter. On 15 November 1962, the Prime Minister of Canada informed the House of Commons that the Bay of Fundy had always been considered from the earliest periods of Canadian history as forming part of Canadian territorial waters, and that there were good geographical and economic reasons for that opinion.¹¹⁹ This raises the question whether the Geneva Convention rules on bays do not apply to the Bay of Fundy because it can be regarded as an historic bay. It has been argued that it can be so regarded, because the boundaries between Nova Scotia and New Brunswick had been defined as the middle line of the bay in Governors' Commissions before the American revolution.¹²⁰ Subsequent practice of the British Government should then be regarded as a concession to the United States, but the legal basis of that concession has been thought to be questionable in the light of the award of the *North Atlantic Coast Fisheries Arbitration* in 1910, when three bays, Chaleurs, Conception, and Miramichi, were treated as historic bays. The legislative history of those bays, being no different from that of the Bay of Fundy, and the only difference between them being one of scale, the ten-mile rule adopted on the recommendations of the Permanent Court of Arbitration was arguably wrongly applied to the Bay of Fundy.¹²¹ The argument is also made that, in any event, the relative configuration and (p. 362) dimensions of a bay are relevant to the merits, and that the Canadian Prime Minister in the House of Commons on 15 November 1962 expressly acknowledged the geographical factors involved.

While it is true that the British Government had never finally committed itself on this question, it had given effect to the Award in the case of the *Washington*, and American fishermen had been permitted to treat the waters of the bay as high seas except those

parts of it which fell under the determination of the term 'bay' in the 1912 Treaty. The Customs Act maps issued between 1938 and 1940 did not show the whole of the bay as Canadian, so that its historic status may be in doubt.

(b) The Law Officers' Opinions

The architect of the British Government's policy respecting bays¹²² was Dr. Dodson, the Queen's Advocate, who adumbrated the headland to headland notion in his opinion of 31 October 1837 on the meaning of the word 'bays' in the Fisheries Convention of 1818.¹²³ He was again preoccupied with that question in 1841 when the Governor of Western Australia sought advice on the right of American fishing boats on the coast.¹²⁴

On 24 July 1856, Dr. Dodson's successor, Mr. Harding, referred to 'exclusive Jurisdiction over certain Bays, Chambers and Waters lying between headlands', recalling the opinions of his predecessors of 30 August 1841 and 9 April 1844.¹²⁵ And in an opinion of 30 May 1859 on the right of capture by French warships of Austrian merchant ships during the war of that year, he said that, in addition to the neutral zone of three miles' limit,

there are indeed certain waters as in the 'Queen's Chambers', and certain bays and estuaries within capes peculiarly situated in a geographical point of view, to which the application 'British Waters' and the Neutral privileges consequent thereon may be practically extended beyond the distance of three miles from shore, but these cannot be defined or described 'ab ante' with any such precision as would authorise your Lordship to allude to them for your answer to the Austrian Government.¹²⁶

Reference was made to the Queen's Chambers again by the Queen's Advocate in an opinion of 30 June 1859 when answering an enquiry (p. 363) concerning capture in the St. Georges Channel. He said that there were many arguments in favour of St. Georges Channel being, as it were, *mare clausum*, at least *quoad* belligerents when Great Britain was neutral. These were: the fact that the whole of the shores were in the possession of the Crown; the Channel did not form a great commercial thoroughfare except for ships bound to or from the Crown's dominions; communication on its waters by British vessels between British ports was great and incessant so as to render any interruption of navigation by belligerent action practically injurious and dangerous to British rights and interest as to be almost intolerable; and hostile operations would almost inevitably be limited to ships bound to or from British ports. However, in the absence of any formal and public assertion of the right in question by the British Government, and of the recognition of such rights by foreign nations and the constant and practical exercise of the right by Great Britain, he was unable to say that the St. Georges Channel was actually *mare clausum* in international law.¹²⁷ He sought further information on the facts and these were furnished by the Foreign Office, leading to a further opinion on 31 July 1859, in which it was said that the right of England over the Four Seas was of very ancient origin, and had been maintained by immemorial prescription and possession from the earliest period.¹²⁸

The Law Officers in their opinion of 6 January 1863 on the Newfoundland bays,¹²⁹ mindful of the current controversy with the United States, avoided any reference to distance. The same avoidance of fixed limits is found in their opinion of 26 May of the same year respecting the Queensland coast islands.¹³⁰ On 3 November 1864, they advised the Foreign Office: 'Her Majesty's Government also claims as part of her dominion the whole waters of maritime creeks and inlets, and the mouths of rivers included between headlands part of her territory, although such headlands or some parts of the coasts included within them may be more than six miles apart from each other.'¹³¹

Their most important opinion on the subject of bays was that of 18 March 1887 respecting Shark Bay in Western Australia, the legislative (p. 364) history of which is given by Edeson.¹³² In this opinion they employed the headland theory without any distance qualification:

That in our opinion the three-mile limit is determined by a line following the indentation of the shore, when such shore fronts the open sea, but in the case of bays or inlets having the character, by their configuration, of inland waters, the base line crosses from headland to headland at the mouth of such bay or inlet; a much wider range of exclusive dominion may be established not only by treaty, but by long acquiescence or recognition by other nations.¹³³

The headland theory they also applied in their opinion on the Newfoundland fisheries of 27 December 1888.¹³⁴

These opinions make it clear that throughout the whole of the nineteenth century the British Government avoided commitment to any specific limits to the closing line for bays, and relied on the vague and general headland notion. This background explains the statement of the Prime Minister, Lord Salisbury, in 1895 that it was an 'unsettled question in international law' how the territorial sea was to be drawn 'when the coast is folded and doubled'.¹³⁵

(c) The Moray Firth Controversy

Throughout the last quarter of the nineteenth century complaints had been made to the British Government by fishery interests that fish stocks in the coastal waters of the North Sea were drastically depleted. Select Committees of Parliament substantiated these complaints. In 1885 legislation empowered the Fishery Board of Scotland to make bye-laws for fishing 'in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands'.¹³⁶ Various inlets on the Scottish coast were treated as within these limits. Pursuant to these provisions, the Fishery Board of Scotland made a bye-law providing for the prohibition of the use of beam-trawl by any person for taking fish in the Firth of Clyde within a line drawn between the Mull of Galloway and the Mull of Kintyre. Before confirming it, the Secretary of State for Scotland sought the opinion of the Law Officers who, although rejecting the notion of any arithmetical formula for bays, nonetheless advised that they thought it impossible 'to assert that it is a matter of

international law that the Queen's subjects have exclusive right of fishing over the waters comprised in this Bye-law.¹³⁷ The Secretary of State for Scotland, accordingly, did not confirm the bye-law.

Further legislation relating to herring fisheries was enacted in 1889, in which the areas of the Board's powers were expressly laid down as including the Moray Firth between Duncansby Head and Rattray (p. 365) Point, and the Firth of Clyde.¹³⁸ Other Scottish inlets were covered only by the provisions of the North Sea Fishery Convention. Following the arrest, within this line, of the Danish trawler *Dania* in 1898, further opinion was sought from the Law Officers, who advised that there was 'no definite rule of international law on this subject, and every case must be decided on its own special circumstances'. They rejected a general rule as to a width of ten miles, although this had been adopted in the North Sea Convention and other treaties. They said that where the gulf is very deep the waters may be territorial, even if the mouth be of a width which would exclude the idea of territoriality in the case of a shallower gulf. In the present case they thought that foreign trawlers might be excluded from the waters in question.¹³⁹

In 1892 a by-law was made closing the Moray Firth to trawling between the headlands mentioned. From 1895 onwards, Danish, Dutch, and German trawlers began to appear in the Moray Firth, and after 1900 larger numbers of Norwegian boats arrived, which in many cases were British owned and landed their catches in England. Arrests were effected, but in 1905 a prosecution of a Norwegian fisherman for fishing within three miles of the ten-mile baseline across Dornoch Firth, an inlet of the Moray Firth, was dismissed on the ground that Norway was not a party to the North Sea Fishery Convention. On appeal, the Court of Justiciary of Scotland reversed the decision, holding that the Act of 1889 was general and applied to foreigners as well as to British subjects, and the court was bound by it.¹⁴⁰

A prosecution against a Danish fisherman named Mortensen was then made a test case with respect to the Act's application to foreigners in the larger area of Moray Firth. Convictions were obtained, both on the ground of the Act's generality and the *fauces terrae* doctrine, the Sheriff holding that the Moray Firth was a bay between headlands *intra fauces terrae*, which in England would have been called one of the King's Chambers.

On appeal to the Court of Justiciary the conviction was upheld,¹⁴¹ Lord Dunedin saying that the question was solely one of construction of the Act, and it was not for the court to decide whether the Act contravened international law or not. The expression in the Act 'every person' made it clear that Parliament had not restricted the Act's operation to British subjects. However, like the Sheriff, he went further and said there was evidence to show that the Firth was *intra fauces terrae*, particularly in the writings of Stair and Bell, the comparison with the Act's operation in the Firth of Clyde, and the instances in (p. 366) decided cases where the right of a nation to legislate for waters which were more or less landlocked had been admitted. Lord Kyllachy also held that the whole Firth was a bay, having well-marked headlands and deep penetration. All that could be said against this was its size, but there was no established rule on the subject in international law, and no rule 'so arbitrary and artificial as that of the ten-mile limit measure'.

When further convictions were entered against Norwegians on the authority of this test case, the Norwegian Vice-Consul at Aberdeen read a protest from the Foreign Minister of Norway, and as a result of representations made to the Foreign Office the Scottish convictions were set aside.¹⁴² The question was debated in Parliament, when the possibility of a treaty with Norway was raised which would provide for prohibition of fishing by Norwegians in specified areas. The Government, however, was preoccupied with the problem of reciprocity which would arise, since both Norway and other countries would be encouraged to close off areas of their waters to British trawlers. The Under-Secretary for Foreign Affairs, Lord Fitzmaurice, made a speech which has often been cited in support of the double territorial sea standard. He said that, according to the views of the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade, and the Board of Agriculture, territorial waters were:

First, the waters which extend from the coast-line of any part of the territory of a State to three miles from the low-water mark of such coast-line; secondly, the waters of bays the entrance to which is not more than six miles in width, and of which the entire land boundary forms part of the territory of a State. By custom, however, and by treaty and in special convention, the six-mile limit has frequently been extended to more than six miles.¹⁴³

The last sentence of this statement greatly qualifies the rest, and the whole impact of Lord Fitzmaurice's speech is altered by his comment in the House of Lords the following year in which, quoting Lord Salisbury's speech of 1895, he indicated that the whole question was open.¹⁴⁴ Other opinions about the Moray Firth were also expressed. Lord Loreburn said that if byelaws were to affect foreigners within a line eighty-five miles between headlands, it would be the obvious contention of other nations, and one difficult to counter, that Parliament would be trying to legislate for the high seas.¹⁴⁵ The Secretary of State for Foreign Affairs said that he had every sympathy with the (p. 367) advocates of enclosure of the Moray Firth, but that, when it came to enforcing the law in the case of foreigners, the British Government was in a difficult position, since the national policy had been to uphold the three-mile limit, and to protest against and resist the pretension of any foreign country to enforce its own jurisdiction on the sea beyond the three-mile limit. If there was to be a modification of the rules relating to trawling in the North Sea, this must be a matter of international agreement. It had generally been understood that the qualification of the three-mile limit applied to bays ten miles wide, and care must be taken as to how far the British Government pressed the doctrine as to the width of a bay, or laid down an international doctrine on any particular bay.¹⁴⁶

(d) Evaluation of British Policy on the Extent of Bays

When the history of the matter is examined it becomes clear that there has been no consistent British Government policy respecting the limits of bays. In the correspondence with the United States concerning the interpretation of the 1818 Convention, Great Britain initially took the position that the three-mile limit was to be drawn from straight lines linking all headlands — the 'headland theory' — and it conceded the double territorial sea limit only because concessions were made in other respects by the United States. Even when the ten-mile rule was being supported in other matters, counsel for the

British Government argued in the 1910 Arbitration that there was no settled rule for the enclosure of bays. There the Attorney-General, Sir William Robson, said that the claim to the King's Chambers 'still stands perfectly good',¹⁴⁷ and Sir Robert Finlay said that 'the usage of nations is absolutely opposed to the existence of the six-mile limit; and the discussions of jurists show that no general rule has ever been agreed upon.'¹⁴⁸

(e) Commonwealth Judicial Practice

Since the common law rule as to bays was not a determinant of the enclosure of bays within the national boundary, but was concerned with an internal question of municipal law; and since the only antecedent for the purpose of designating the national boundary in bays was the doctrine of the King's Chambers, or the headland to headland idea, the common law courts had no principle available, other than that of a relation of dimension and configuration of bays to the coast as a whole, when called upon to determine which bays were national (p. 368) waters. For the purpose of vindicating this notion, they drew on the statement in *R. v. Cunningham*, that, 'looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded.'¹⁴⁹ The doctrine of relative dimensions and configuration became explicit in *Direct United States Cable Co. v. Anglo-American Telegraph Co.*¹⁵⁰ This case concerned the application of Newfoundland legislation to a cable laid to a buoy more than thirty miles within Conception Bay in that colony, but at no point within three miles of the shore. The bay is about forty and fifty miles deep measured from the respective headlands, and its average width is fifteen miles and the closing line between the headlands is rather more than twenty miles, and beyond the range of vision. The Privy Council held that the bay was part of Newfoundland. Various elements went into the decision, including the fact that British legislation had treated it as part of British territory, and that 'in point of fact the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain.'¹⁵¹ But the Board did not treat this as the essence of the matter, or as creating a legal situation which, but for history, would not have existed. On the contrary, it treated the bay as an instance rather than as an anomaly. Lord Blackburn, delivering the Board's opinion said:

It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configurations, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination... .

It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory.¹⁵²

In 1916 the New Zealand Supreme Court interpreted the expression 'ocean' in the Counties Act, which had so designated the boundary of Bay of Islands county, to mean the sea beyond the closing line of the bay of that name, so that islands on the landward side of

the line were ratable by the County.¹⁵³ The closing line happened to be about ten miles from headland to headland, but that was not the basis of the decision. The Court said that 'the ability to discern the opposite shore cannot now be regarded as the sole test of whether the waters are in the body of the mainland. The common law itself and the rules of international law recognize that a much larger enclosed area of water than References(p. 369) would be comprised within a view from shore to shore may be deemed part of the adjacent mainland.' The correct standard in the common law was said to be relative dimensions and configuration:

It is not because a place is called a 'bay' that its waters are to be deemed territorially part of the mainland. The size and configuration of the bay may decide the question almost on sight, so to speak. If those circumstances leave the decision doubtful, then acts of administration and other historical facts showing proprietorship may be decisive. All this, of course, leaves the ocean boundary in an indefinite state until some judgment or other formal act renders it definite. But that difficulty is no objection to a rule.¹⁵⁴

The decision in *Mortensen v. Peters* affirmed that in Scottish law there was no fixed limit to the closing line,¹⁵⁵ and an English Prize Court in 1918 said that 'what was a bay, and what were its exact boundaries or delimitations, had never been decided as a matter of law, although it had been discussed in various cases.'¹⁵⁶

*The Fagernes*¹⁵⁷ in 1927 did not negate the common law doctrine of relative dimensions and configuration, for it was a political decision directed by the executive branch of government in the interests of sustaining the British position respecting the interests of British fishermen on the coasts of Norway, Iceland, the Faeroes, and Greenland. The case concerned a collision which occurred in the Bristol Channel at a point 9½ miles from the coast of Glamorgan and 10½ miles from that of Devonshire. In view of the earlier finding that the Bristol Channel was within the bodies of the counties respectively, it came as a surprise when the Attorney-General argued that there was no recognized rule of international law on the question, and that it was not desirable that the Court should lay down any principles unless bound so to do, although the high seas should be as wide as possible. He submitted that, at any rate where the width of the waters was over six miles, unless there was evidence that the littoral country has established definite dominion over them there was no effective sovereignty. Atkin and Lawrence L.JJ. accepted this statement as binding upon them. Bankes L.J. considered that the Court was not necessarily bound to accept the information as conclusive, but that it should do so in this case since the tendency of jurists had been to reject exaggerated maritime claims.¹⁵⁸

References(p. 370) The High Court of Australia has held¹⁵⁹ that St. Vincent's Gulf and Spencer's Gulf in South Australia are within the territory of the State by virtue of imperial legislation in 1834 establishing its boundaries, which contained the words 'including therein all and every the Bays and Gulfs thereof'.¹⁶⁰ The finding that the legislative intention was to make these two Gulfs internal waters, although their entrances are beyond the range of vision, implies that the 'common understanding'¹⁶¹ at the time was consistent with both English law and international law, and was a reflection of the headland doctrine that was then current in both systems. That was recognized by Stephen

J., who said that the classical expression of the test of relative dimensions and configuration in the *North Atlantic Coast Fisheries Arbitration* 'reveals a multifactoral approach in which geography is a major consideration, but, as their Lordships pointed out in the *Conception Bay case*, at page 419, usage and history also play a part.'¹⁶²

The Supreme Court of British Columbia has held¹⁶³ that the Imperial legislation¹⁶⁴ setting up that colony, when read with the Treaty of 1842 which established the boundary with the United States in the Strait of Juan de Fuca,¹⁶⁵ incorporated that Strait and Georgia Strait as territory of the colony, although it was suggested that international law was irrelevant to this question of statutory construction.¹⁶⁶ Two dissenting judges took the view that these areas of waters did not qualify as *inter fauces terrae*,¹⁶⁷ but this was to attribute a quality to that doctrine for constitutional purposes which actually it did not possess, and to overlook the prevalence of the headland doctrine which constituted the background to the draftmanship of the legislation.

The Supreme Court of Nova Scotia has held that Spanish Bay is not a part of Cape Breton County, by considering geography in relation to the Geneva Convention rules.¹⁶⁸

(a) United States Policy

The shift in United States policy from the headland doctrine¹⁶⁹ to the double territorial sea standard occurred in the 1850s as a product of the controversy with Great Britain over the interpretation of the 1818 Convention, leading Secretary of State Seward on 10 October 1862 to instruct the Secretary of the Navy that 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 foreign conversion or shipping, was a 'pretension of the past'.¹⁷⁰ On 28 May 1886, Secretary of State Bayard instructed the Treasury Secretary that 'the headland theory, as it is called, has been uniformly rejected by our Government'. The *modus vivendi* reached with Great Britain over the North Atlantic Fisheries '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.'¹⁷¹

After the award in the *North Atlantic Coast Fisheries Arbitration*, United States policy incorporated the ten-mile rule, and remained faithful to it.¹⁷²

(b) United States Judicial Decisions

United States courts in the early part of the nineteenth century did not attempt to put limits upon the size of bays, but enunciated a general headland doctrine, although in 1847 the Supreme Court of Massachusetts said that the test to be applied was whether the bay was 'not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side'.¹⁷³

In 1890, the Supreme Court dealt cautiously with the question of bays, in a case in which a Massachusetts statute for the protection of fishery in Buzzard's Bay was held to be constitutional on the ground that the bay was part of the State, having been included within the limits of its counties by legislation in 1859. Evidence was given that the line between the headlands was less than two marine leagues, when drawn between islands at either side, although the distance across the bay was greater than two leagues at the spot where the offence was References(p. 372) committed. The Supreme Court said that the limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, had never been placed at less than a marine league from the coast on the open sea. Bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie.¹⁷⁴ The Supreme Court did not lay down the six-mile standard as mandatory. In fact, having cited with approval the Privy Council, it went on to say that this was 'the minimum limit'.¹⁷⁵ In view of the facts of the case the Court was not required to say more.

The headland doctrine was revived later in the interpretation of the word 'bays' in the Constitution of California, which, following the terms of the cession in the Treaty of Guadalupe Hidalgo, defines California as including 'all the islands, harbors, and bays along and adjacent to the coast'. In 1926, the District Court held¹⁷⁶ that Monterey Bay was within California, although the line linking the headlands is nineteen miles, and the maximum indentation is nine miles. The plaintiff contended that, because of the great breadth at the mouth of the bay and its shallowness, it was in fact open sea, and had been designated a bay merely for convenience. He argued that if a bay exceeds six miles in a straight line measured from headland to headland it is not a bay in law. The Court rejected this, saying: 'There is authority supporting the proposition that, to constitute a bay under the law, there is no limit to distance between headlands fixed at an arbitrary limit of 6 miles.'¹⁷⁷ The authorities cited were almost all English and Scottish.

In 1935 the District Court held¹⁷⁸ that San Pedro Bay was within California, partly on the authority of the previous case, and partly from its designation on ancient maps as a bay. On the link between the legal and geographical nomenclature, the Court said: 'The practice of governments, explorers, geographers, etc., has generally confined such formula [sic] to bays which are not in fact open sea, and so the coasts of the continents have been mapped, the points between which the sea curves inward have been designated, and the waters between such points have been designated as bays.'¹⁷⁹

Although the Supreme Court has more recently upheld the right of the Federal Government to foreclose the question of State claims to bays by ratifying the Geneva Convention,¹⁸⁰ the judicial pronouncements in References(p. 373) the United States have repudiated any mathematical limitations to the size of bays.¹⁸¹

(c) The Alleganean Case, 1882

Among the cases referred to the Court of Commissioners of Alabama Claims after the American Civil War was that of *Stetson v. U.S.*, commonly known as *The Alleghanean*,¹⁸² from the ship of that name destroyed in Chesapeake Bay by the Confederate Navy while at anchor more than three nautical miles from the shore. The Agreement of 5 June 1882 between Great Britain and the United States, setting up the Court, referred to jurisdiction respecting the 'high seas', and it became necessary to determine if Chesapeake Bay qualified for this description. It was found that the distance between the headlands of the Bay was twelve miles, and that lines starting from points between the capes, three miles from each, and running up the bay that distance from either shore, would not intercept each other within 125 miles from the starting points. The Court said: 'Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; and from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another ...'¹⁸³ Chesapeake Bay was not part of the high seas.

Although the Court made reference to an element of historic right in the United States, its principal ground of decision was the doctrine of relative dimensions and configuration, associated with the headland theory; and it made this clear by its reliance upon the English decisions on the Bristol Channel and Conception Bay. The decision thus contradicted the policy of the United States Government respecting the six-mile standard.

(4) The practice of other countries

(a) France

The French *loi* of 1 March 1888, giving effect to the North Sea Fisheries Convention, incorporated the formula thereof with respect to bays: 'Dans chacun des arondissements maritimes, et pour l'Algérie, References(p. 374) des décrets déterminent la ligne à partir de laquelle cette limite est comptée.'¹⁸⁴ A Presidential *décret*¹⁸⁵ of 9 July 1888 specified the straight base lines on the coasts of Corsica and Mediterranean France from which the territorial sea would be measured. None of these lines was longer than ten miles, although most were longer than six, and the waters which they enclosed were in most cases not bays but curvatures and even straits between the mainland and islands. A similar *décret* of the same date adopted the same straight baseline system for Algeria, and another of 9 December 1926 applied section 1 of the *loi* of 1888 to the territorial sea of all colonies.¹⁸⁶ The ten-mile limit was also adopted in the *décret* of 18 October 1912 respecting French neutral waters, and in that of the Presidential *décret* of 22 September 1936 specifying the exclusive fishery zone of Indo-China.¹⁸⁷ French post-Geneva legislation is discussed in connection with baselines.¹⁸⁸

(b) Italy

The Italian Act of 16 June 1912 governing the passage of merchant ships through Italian coastal waters, which is still in force, adopted the double territorial sea standard.¹⁸⁹ Having specified a limit of ten miles, the Act went on to prescribe that in the case of a gulf, inlet or bay, the ten-mile zone should be measured from a straight line drawn across the gulf, bay or inlet at the point lying furthest to seaward at which the opening is not more than twenty miles wide.

(c) Germany

For purposes of neutrality, Germany adopted the six-mile standard in the Naval Prize Regulations of 1909,¹⁹⁰ but for fishery purposes, the ten-mile rule was used for the areas covered by the North Sea Fishery Convention.¹⁹¹

(d) Spain and Portugal

The ten-mile standard was adopted in the fishery treaties of 1885¹⁹² and 1893¹⁹³ between these countries. However, Spain employed the double territorial sea standard to yield a twelve-mile line in neutrality decrees of 27 May 1910 and 13 October 1913.¹⁹⁴ Portugal in the References(p. 375) Fisheries Act¹⁹⁵ of 1909 stated that in the case of bays the three-mile limit would be calculated in accordance with the principles of international law, without specifying what these were.

(e) Soviet Union

No specific limits for the closing line of bays were adopted by Russia. The Fishery Treaty of 1907 with Japan¹⁹⁶ listed the bays in which fishery should be exclusive, and policy seems consistently to be based upon a configuration notion. The twenty-four mile rule of the Geneva Convention was incorporated in the definition of 'Soviet internal waters' in the 1960 Statute on the State Boundary.¹⁹⁷ The implication appears to be that the bays earlier enclosed are regarded as historic bays.¹⁹⁸

(f) Sweden

In 1868 there was an Exchange of Notes between France and Sweden concerning the prohibition of fishing in Vestfjord around the Lofoten Islands. Sweden took its position that the waters in question had always been exclusively fished by the inhabitants of Norway.¹⁹⁹ The straight closing line as a baseline for the territorial sea between Storholmen and Svinöy where the distance expressed was more than eight leagues, was adopted by Swedish Royal Decree of 16 October 1869. The Swedish Government stated on 28 January 1870 that it was unnecessary to follow the sinuosities of the coast, and that straight lines might enclose bays and gulfs. In the correspondence with France which followed, the Swedish Foreign Minister rejected the view that the ten-mile limit should be applied to the lines between islands.²⁰⁰

In 1917, the Danish ship *Maja* was seized by a German warship in Laholm Bay. The Swedish Government contended that it had been taken in Swedish waters, and the ship was released, although Germany did not concede that any waters outside a six-mile closing line could be regarded as national waters.²⁰¹ In 1925, the German trawler

Heinrich Augustin was arrested for fishing within 1.4 miles of the closing line of the bay, and the Court of Halmstad rejected a plea to the jurisdiction on the argument that the Swedish Government was entitled to fix the extent of its national waters, and that Laholm Bay had been treated as References(p. 376) exclusive to Swedish fisheries by a treaty of 1899 with Denmark.²⁰² This finding was upheld by the Swedish Supreme Court.²⁰³ In commentaries upon the case, the Legal Adviser to the Swedish Foreign Office and his successor both expressed the view that there was no general agreement among nations as to the length of baselines within bays, and that the ten-mile standard was not a rule of law.²⁰⁴ Laholm Bay was expressly enclosed by a Royal Order of 1933, giving effect to the Fishery Treaty of 1932 with Denmark.²⁰⁵

(g) Denmark

Legislation of 1900 relating to trawling in the territorial sea employed the ten-mile rule,²⁰⁶ which was also incorporated in fishery treaties with Germany in 1880,²⁰⁷ Great Britain in 1901,²⁰⁸ and with Sweden in 1932.²⁰⁹ The ten-mile limit was again adopted in the Fisheries Regulations of 1950,²¹⁰ and also in the Fisheries Act for Greenland of 1953.²¹¹ In 1912, Denmark wrote to Norway supporting the ten-mile rule.²¹²

(h) Latin America

A Venezuelan Presidential Decree of 1939,²¹³ defining the neutrality limits, specified that the territorial sea should be measured from a straight line drawn across the openings of bays, without any distance being specified. The Navigation Law of 1944²¹⁴ made similar provision for bays. Brazil adopted the ten-mile rule in 1923,²¹⁵ but replaced this by twelve miles in 1940.²¹⁶ Argentina in 1907 applied its fishery laws to the waters of the Gulfs San Jorge, Nuevo, and San Matias.²¹⁷ Uruguay adopted the ten-mile principle in its Neutrality Declaration of 1914.²¹⁸ The Chilean territorial waters decree of 1924²¹⁹ mentioned the closing lines of bays without specifying distances, and the same expression was imported into the decree of 1941.²²⁰ The same is true of References(p. 377) the Ecuadorian Territorial Waters Law of 1951²²¹ and the Maritime Police Code of 1944.²²² The headland formula was adopted in Peruvian regulations of 1940,²²³ but in practice the Peruvian Navy regarded as bays those features whose apertures are greater than six and less than twenty marine miles.²²⁴ In 1967 the Dominican Republic referred in legislation to bays 'according to the traditional geographical definition of the term';²²⁵ and in 1968 Mexico declared the Upper Gulf of Baja California to be a bay.²²⁶ Cuba proclaims as internal the waters between islands, islets and in bays within the range of ten miles.²²⁷

(i) Morocco

A *dahir* of 1919 with respect to fishing, provided that the territorial sea of six miles should be measured from a straight line drawn across a bay, in the part nearest to the entrance, at the first point where the opening does not exceed twelve miles. This formula is continued in a *dahir* of 1962.²²⁸

(j) Middle East

In 1951 Egypt claimed all bays as national waters without reference to distances. The United Kingdom protested against the legislation as contrary to international law.²²⁹ Libya in 1973 decreed that the Gulf of Sirte (Sidra) which is 290 miles wide, was national territory.²³⁰ Sudan and South Yemen both claim any gulfs and waters between land and islands less than twelve miles apart.²³¹ In 1934 Iran adopted the ten-mile rule for bays.²³²

(k) People's Republic of China

The declaration on the territorial sea of 1958 assimilated bays and other sections of the coast in a system of closing lines.²³³

(l) Thailand

In 1959 a Notification was published in the Royal Thai Government Gazette enclosing the Bight of Thailand by a line fifty-three miles References(p. 378) long.²³⁴ The Acting Legal Adviser to the Ministry of Foreign Affairs said that the translation 'territorial waters' was an error and the waters were 'internal waters'. The line is fifty-three miles long. Although it was said that Thailand had possessed these waters from time immemorial, this appears to be the first time that Thailand claimed these waters, and no historic evidence has been offered. No protests were made.

(5) The codifications, 1894– 1930

(a) The Institut de Droit International, 1894.

The *Questionnaire* circulated by Renault, Rapporteur of the Third Committee of the Institut before the Hamburg meeting in 1891 raised the question of bays and gulfs. Aubert, in answer to this *Questionnaire*, submitted a special report on the peculiar case of Norway, in which he pointed out that the questions of the extent of the territorial sea and its baselines were aspects of the same question of national security. Where the coastline was complex, special problems of defence existed, for belligerents engaged in combat in the waters between islands and the coast and between one group of islands and another could harm the inhabitants by the fall of shot; and the problems of control of smuggling were obviously greater than where the coastline was simple. In addition to this, the navigational hazards demanded control of shipping by the coastal State, and lighting and pilotage were necessary services which the coastal State had to provide.²³⁵ On the Committee there was near unanimity that, where the limits of the territorial sea drawn from the headlands touched, the bay should be considered as territory: that is, the double territorial sea theory. This was then embodied in the draft Convention prepared by the Rapporteur.²³⁶

In the Report which he presented to the Paris session in 1894, Barclay, the Rapporteur, proposed a ten-mile line, as the functional continuation of the low-water mark.²³⁷ When the draft was debated at the plenary session at Paris on 28 March 1894, some members supported the figure of twelve miles as more logical, since it was double the territorial sea (six miles) as proposed in the draft. This brought the discussion back to the general principle upon which the enclosure of bays was based. Barclay argued that it had nothing

to do with the extent of the territorial sea, because the baseline was only a fictive (p. 379) shoreline. But obviously the length of that baseline, if it was not to be altogether arbitrary, must correspond with the basic criterion for delimiting coastal waters. However, the text as proposed was adopted with little further debate.²³⁸

(b) The Codification of the 1920s

In his draft presented to the International Law Association in 1924, Alvarez adopted the text of the Institut of 1894.²³⁹ At the 1926 Conference, the International Law Association adopted something less specific: the territorial waters should follow the sinuosities of the coast, unless an occupation or an established usage generally recognized by nations had sanctioned a greater limit.²⁴⁰ The American Institute Draft adopted the North Sea Fishery Convention formulation, but left blank the number of miles to be specified, and allowed that a greater width might be sanctioned by continued and well-established usage.²⁴¹ The Institut de Droit International in 1928 abandoned its twelve-mile limit with the adoption of a three-mile territorial sea, and incorporated the ten-mile standard as a compromise.²⁴² The same limit was adopted by the Harvard Research,²⁴³ and the draft of the Japanese Branch of the International Law Association,²⁴⁴ but Strupp's draft employed the six-mile formula.²⁴⁵

(c) The Hague Codification Conference, 1930

Schücking, in the commentary to his draft Convention which he prepared for the Sub-Committee of the Committee of Experts preliminary to the Hague Codification Conference, drew attention to the variety of usages and the multiplicity of conceptions prevailing with respect to the enclosure of bays for the purpose of delimiting the territorial sea.²⁴⁶ He pointed out that, if a six-mile territorial sea was to be agreed upon, it would seem logical to adopt a twelve-mile closing line for bays, as double-the-territorial-sea limit, and to assign the waters within the bay to the coastal State, not *qua* territorial sea but *qua* inland waters. In other words, he accepted as inferential what was not inferential at all, that the intersection of two opposite territorial seas would transform the area of sea within the arcs of intersection into something other than territorial sea. This effect could not occur if the practice of nations had established as a rule of international law that a References(p. 380) bay of such dimensions could be enclosed by a straight line from which the territorial sea would be drawn outwards. This would be the headland theory, but that theory was not a necessary corollary of the double territorial sea theory.²⁴⁷

The other two members of the Sub-Committee also glossed over the logical difficulties of this formulation. Barbosa de Magalhaes, with a qualification about what has since come to be termed 'vital bays', accepted it as in harmony with the Drago theory,²⁴⁸ as containing 'its own justification'. He said that to regard as part of the high seas narrow areas of sea within the limits of territorial waters, and running inland following the broken line of the coast, would involve great difficulties and risks both for the State itself

and for the community of nations, owing to the disputes to which such a situation might give rise. This, of course, would only be the case on the police theory of the territorial sea.²⁴⁹

The Preparatory Committee of the Hague Conference dealt with bays in Point IV (b),²⁵⁰ and sought opinions from Governments on the question of how the territorial sea should be drawn in front of bays. The replies made it clear that the straight closing line theory was accepted as practice, and also that the length of the closing line was normally double the territorial sea limit, except in the case of historic bays, and, in the opinion of some Governments, such as the Danish, Norwegian, and Swedish, in the case of exceptional geographical circumstances. The ten-mile rule was mentioned, but not asserted to be practice, by Belgium and France, but was supported as the basis of the law by Denmark and the Netherlands. Various other standards were proposed.

The Preparatory Committee's Observations on the Point were that divergent views existed as to the maximum size of the entrance to bays, but that it was clear that agreement could not be reached on more than a ten-mile rule.²⁵¹

At the Hague Codification Conference the discussion was limited to the question whether the ten-mile rule was established in law or was only a treaty limit.²⁵² Since the issue was obviously connected with that of the extent of the territorial sea there was no point in taking it further once exploratory discussions had revealed that agreement was unlikely to be reached on the more general question.

(p. 381) (6) The alternative tests in customary law

In customary international law before the Geneva Conference adopted its novel formula for bays, it is clear that there was a spectrum of views as to the criteria for enclosing bays. These were:

1. (i) double territorial sea limit;
2. (ii) ten miles;
3. (iii) headland-to-headland, as qualified by relative dimensions and configuration.

(a) The Double Territorial Sea Limit

The cannon-shot rule was recognized by authors in the early nineteenth century as having the potentiality of determining the limits of enclosure of bays, by reference to the intersection of the arcs of traverse from the respective headlands, but there is no evidence that the jurists accepted this as annulling earlier doctrines of *mare clausum*. Ortolan in 1848 is the first author systematically to advance this doctrine.²⁵³ Gardner in 1860, however, expressly contested the implication that the cannon-shot rule would yield a six-mile, or double territorial sea limit.²⁵⁴ The question became caught up with the debate over the effects of the increasing range of cannon, so that a division of opinion developed between those who supported an actual double territorial sea limit, and those who argued that the limit was stabilized at six miles.²⁵⁵

In British practice the six-mile limit was said by the Queen's Advocate in his opinion of August 1854 on the Falkland Islands to be beyond question, but he did not commit himself to it.²⁵⁶ While the British Government accepted that limit for a time in its relations with the United States,²⁵⁷ it did not subscribe to it. In its reply to the International Fisheries Commission at Halifax in 1877, it said of the United States contention that six miles was the recognized limit, that 'it is distinctly asserted on the part of Her Majesty's Government, that this alleged rule is entirely unknown to, and unrecognized by, Her Majesty's Government.'²⁵⁸ Despite what was said at the time of the (p. 382) Moray Firth Controversy,²⁵⁹ it is clear that British policy never embraced the double territorial sea standard.

That standard was adopted only by the United States,²⁶⁰ and then for the purpose of its contest with Great Britain over the bays of Nova Scotia and Newfoundland. It was dropped in favour of ten miles when the award in the *North Atlantic Coast Fisheries Arbitration* was issued in 1910.²⁶¹ It found considerable support in the Institut de Droit International in the 1890s, but not in the codification of the 1920s. It thus remained an anomaly for want of general recognition.

(b) The Ten-Mile Limit

This limit precluded the likelihood of a six-mile rule ever establishing itself, and therefore it became the only alternative to the headland doctrine. It owes its origin to the Anglo-French Fisheries Convention of 1839.²⁶² This limit was not, as Dr. Drago said in the *North Atlantic Coast Fisheries Arbitration*,²⁶³ entirely arbitrary. In most northern European waters, and especially around the Channel Islands, ten miles is the ordinary range of vision, not only because at that distance low coastlines disappear over the horizon, but also because atmospheric conditions tend to make higher elevations invisible, or at least so to affect their dimension as to make coastwise navigation unreliable. It also had the practical merit of eliminating inconvenient gaps of four miles or less in bays slightly wider than double the three-mile limit, and in which fishermen could hardly fish without danger of crossing the territorial waters line, given the habits of fishermen to ignore sights when pursuing schools of fish; and it had the further practical merit of applying to the coast a geometrical construction which was convenient, simple, and relevant to existing navigational methods. Finally, as the range of artillery expanded, it came to represent the actual double cannon-shot limit, so that it embodied the generating principle of the territorial sea — although that limit was never static.

The standard in the 1839 Convention was adopted in the Anglo-French Convention of 1867,²⁶⁴ which was designated to extend the area of operation and clarify certain aspects of the earlier Convention, but which was not ratified by France, although it was given effect to by the British Parliament.²⁶⁵ The ten-mile rule was also applied by agreement with the North German Government in 1868 in a British Board of Trade Notice to Fishermen, advising them of the areas of exclusive fisheries on the German coast;²⁶⁶ in an Order in Council of 1877 References(p. 383) relating to identification marks on fishing boats;²⁶⁷ and in the Fishery Conventions between Spain and Portugal in 1885²⁶⁸ and

1893.²⁶⁹ It gained currency mainly through its embodiment in the North Sea Fisheries Convention of 1882 between Great Britain, Germany, France, Belgium, Denmark, and the Netherlands.²⁷⁰

The draftsmanship of the 1882 Convention, however, differed from the earlier Conventions, in which the three-mile limit was measured from lines ten miles long or less joining the headlands, and in which the stipulated distance was merely a restriction imposed upon the 'headland theory'. It had been open to interpretation that this draftsmanship omitted sinuosities without obvious headlands, though less than ten miles across, and bays which narrowed to ten miles. The 1882 Convention read: 'As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles.'²⁷¹ This meant a departure from the 'headland theory' in favour of a ten-mile limit as an independent standard.

The same formula was adopted in the Anglo-Danish Treaty of 1901 relating to the fisheries of Iceland and The Faeroes²⁷² and the Anglo-Soviet Agreement of 1930²⁷³ providing for temporary fishery limits; and also in the legislation of Iran in 1934, relating to the extent of territorial waters,²⁷⁴ the Prize Regulations of the Netherlands, 1940,²⁷⁵ and the Territorial Sea and Maritime Districts Ordinance of the Netherlands Indies of 1939.²⁷⁶

Considering this extensive treaty practice it is surprising to find little academic support for the ten-mile rule. The principal proponent was Gidel, who in 1933 propounded an elaborate argument in its favour. What he said, in fact, was not only plausible in refuting the double territorial sea rule but favoured a concept of straight baselines. He suggested that the double territorial sea principle was inconvenient inasmuch as it inserted triangular curvilinear surfaces of high seas in the exterior line of the territorial sea, so creating navigational problems, which the whole notion of enclosure of bays was designed to eliminate. The only logical device was a transversal line drawn at a convenient place, but the question was whether this must be from headland to headland. The headland system broke down, he argued, because of its internal contradictions: if a line links all headlands, it encloses waters which are not strictly bays; if it is a line limited in length, it cannot be drawn between all headlands. Since there was no References(p. 384) agreement on the extent of the territorial sea, the double territorial sea formula was no longer applicable; and since indefinite lines were equally excluded, a fixed limit was the only possible standard, and ten-miles was the only figure which commanded substantial support. Its adoption would prevent fishermen from stumbling inadvertently into the commission of an offence.²⁷⁷

The ten-mile proposal was interred by the International Court of Justice in the *Anglo-Norwegian Fisheries Case* in the following words:

In these circumstances the Court deems it necessary to point out that although the 10-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the 10-

mile rule has not acquired the authority of a general rule of international law. In any event the 10-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.²⁷⁸

This refutation of the ten-mile rule implied *a fortiori* the refutation of the six-mile rule. It cannot be contested that the Court was correct in its statement. Not only had the ten-mile rule been confined in practice to treaty limits for fishery purposes, but there was an impressive body of juristic opinion that general agreement was lacking on the extent of the closing line across bays and gulfs.

(c) Headland-to-Headland

This analysis leaves the headland-to-headland theory, as circumscribed by relative dimensions and configuration, as the only standard to which customary international law has attained.²⁷⁹

When the International Law Commission was called upon to consider the question, therefore, it was confronted with the fact that the one possible claimant to universality among the arithmetical limits to the closing line of bays, namely the ten-mile limit, had lost whatever status it possessed.

Although the *fauces terrae* had its origin in English law in connection with bays, it had historical affinities with the question of common law jurisdiction in rivers, and it was explicitly linked in the nineteenth century with the cognate question of port limits. The Proclamation of 1604 affirmed the ancient tradition that the ports, harbours, and creeks of England were in a special legal condition,²⁸⁰ and Hale devoted his *First Treatise*²⁸¹ to an examination of that condition. He began by essaying certain definitions: a road, he said, was an open place in the sea, where, because of the protection of the shore or the convenience of the channel, ships might safely ride at anchor. A haven was a part of the sea 'within certain neckes or cinctures of land', in which ships might ride because protected on every side from the violence of winds, and near the convenience of a port. Some havens, he said, were large, some straight, some purely made up by nature, and some made, or at least helped, by art. A port was an 'aggregate thinge, partly natural, vizt. the contiguity of the sea or some creeke thereof, or some navigable river' and partly artificial with quays, landings, and warehouses. Creeks, he said, were of two kinds, such as were really members of ports, and such as were by their nature ports but were not subject to customs control.

This catalogue of roads, havens, ports, and creeks became standardized in British practice and legislation, and the whole miscellany was eventually held in conjunction by the *fauces terrae* doctrine. A similar notion existed on the Continent, although in time the English device was imported into the civil law literature because of its notoriety. So the single concept of internal waters came to embrace bays, ports, harbours, roadsteads, creeks, river-mouths, and estuaries, and the terminating lines of these features became at the same time the baseline for measurement of the territorial sea.

C. Straits as Internal Waters

There is little history of straits being treated as inland waters when subject to the right of transit passage, but that does not mean that straits cannot be included within the baseline of the territorial sea so as to constitute the waters on their landward side 'fictitious' bays, especially when linked with bays properly so-called.²⁸² The fact that there is (p. 386) access to the sea at either end of landlocked waters does not deprive these of the essential characteristics of internal waters. The Solent was held in 1861 to be within the body of the County of Hampshire,²⁸³ and in the Channel Continental Shelf Case, the Court of Arbitration said that the Isle of Wight, being divided from the mainland only by narrow passage, might be said to be comprised within the coastline of the mainland itself.²⁸⁴

Is it, then, a question of scale that is decisive as to whether or not a strait is a fictitious bay, or is it a question of whether its waters are withdrawn from the traffic of nations? The headland doctrine of bays as it prevailed in the nineteenth century would seem to have embodied the latter criterion, and therefore to have been susceptible of being applied to determine the closing lines of bays which are fronted by islands. However, that aspect of the matter was overlooked by the High Court of Australia and the Supreme Court of British Columbia when they considered this situation, although they reached different conclusions in somewhat different legal contexts.

The High Court of Australia held that the reference to 'bays and gulfs' in the legislation of 1834 establishing the limits of South Australia was confined to Spencer's and St. Vincent's Gulfs and did not include Investigator Strait which links them on the landward side of Kangaroo Island.²⁸⁵ While that construction of the expression took into account the usage of language among the early explorers, it was arrived at without close consideration of the understanding that lay behind the English doctrine on bays in the early nineteenth century.

The comparison with the opinion of the Supreme Court of British Columbia is not close, but the two cases are connected if one assumes a common understanding as to the scope of internal waters among the draftsmen of Imperial legislation in the nineteenth century. In this case, the Court was asked to advise whether the Province had property rights in lands covered by waters of the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait, by virtue of Imperial legislation which had proclaimed the limits of British Columbia to comprise the Crown's territory as bounded by the United States frontier and the Pacific Ocean.²⁸⁶ The reference to the Crown's (p. 387) territory and the frontier was held by a majority to be a legislative inclusion within the Province of the waters in Juan de Fuca Strait up to the boundary line which was established in the middle of the Strait by treaty in 1846;²⁸⁷ and the reference to the Pacific Ocean was held to imply that the Crown's territory included the seabed on the landward side of Vancouver Island.

The opinion did not say that the waters of these straits are internal waters, but it is difficult to resist that inference once the expression 'territory' was so construed. Two judges dissented, largely on the ground that, because this was a case of straits, they could

not be treated under the common law rubric of bays because there were no *fauces*.²⁸⁸ That was to attribute a literal significance to the *fauces terrae* doctrine which it did not necessarily possess when divested of its original function of attributing curial jurisdiction.²⁸⁹ If the headland theory was appropriate for bays it was equally appropriate for fictive bays of which the case of Vancouver Island would seem to be a good example.

The reason for extending the customary law of bays to the cases of some straits is that, as the Supreme Court of the United States said of Breton Sound or the Strait of Juan de Fuca, they lead to cul-de-sacs and are not useful routes of communication between two areas of open sea.²⁹⁰ If that is the criterion of internal waters in customary law, then bays are merely instances and are not an exclusive category; and distance is less important than geographical configuration. Even a single island, or two or three islands off a relatively straight coast, have been used in a straight baseline system, as in the French Mediterranean in 1888,²⁹¹ when the Îles d'Hyères, among others, were linked with the mainland so as to be included in a primary territorial sea, even though the distance between Île de Levant and Cap Lardier is over eight nautical miles, or more than double the three-mile limit adopted in the French legislation for fishing purposes. The affinity of the questions of bays and coastal islands, demonstrated by this system, was also recognized by Gidel, who said that in respect of narrow gaps between islands and the mainland there were two opinions, namely that the territorial sea might at no point be further from the low-water of both island and mainland than its ordinary limit; and that the rule for bays could be applied.²⁹² He preferred the latter 'for practical (p. 388) reasons', and suggested that the ten-mile rule be used to solve the resulting problem of distance. The discrediting of the ten-mile rule by the International Court of Justice²⁹³ undermined this solution, but not the regime, which, as in the case of the French Mediterranean system, treats the waters within a closing line linking coast and islands as inland waters, assimilated in all legal respects to the waters of bays.

If it is legitimate to link offshore islands with the coast in the French fashion, there is something artificial about a rigid insistence upon the territorial sea being drawn around single islands so as to leave passages of high seas between them and the coast. The question of the distance between the island and the mainland is not merely one of degree, so that, as it were, the cogency of a case for linking the island with the mainland is in ratio with space, because the critical factor to be appreciated is the 'general direction of the coast'. Obviously, the further away from the coast an island lies, the less it is likely to fall within that general direction.

Footnotes:

¹ Castberg in 47 *Annuaire* (1957), II, 167. Draft Convention (1980), Art. 8.

² State Papers, Dom., James I, Vol. 13 (1605), No. 11; Fulton, App. E.

³ Selden, 369. The text reads: 'Wee, whose names are subscribed, beeing called before the Right Honourable Sir Julius Caesar Knight, Judg of his Majestie's High Court of Admiraltie, and there beeing inrolled, admitted, and sworn, for the describing of the

limits and bounds of the King's Chambers, Havens, or Ports, in their full extent, do by these presents make answer, and to the best of our knowledg and understanding, declare that the said Chambers, Havens or Ports of his Majestie, are the whole Sea-Coasts which are intercepted or cut off by a straight line drawn from one point to another, about the Realm of England. For the better understanding whereof, wee have made a Table concerning that business; whereto wee have annexed this our Schedule, shewing therein how one Point stands in a direct line towards another, according to that Table.'

⁴ 'As the Citie of London hath of old been called in our Law the Chamber of the King of England, whereby the rest of his Dominion round about is set forth, as it were by the use of a more narrow Title: So these Creeks, though very large, beeing called by the like name and limited at the pleasure of the Kings of England, do in like manner shew his Dominion over the rest of the Sea': 365, 370.

⁵ Fulton, App. H.

⁶ *Ibid.*, 553.

⁷ 'However the Truth be as to the Chamber, 'tis certain the Seizure was made in your Majesty's Seas: But so it is, that notwithstanding your Majesty's undoubted Right of Dominion and Protection in these Seas, Strangers do hold themselves, if not permitted, yet excused for such Hostilities, when they are acted at a due Distance from your Majesty's Ports, Harbours, and Chambers; grounding themselves upon what was done and observed in that long War between Spain and the Netherlands': Wynne, *Life of Sir Leoline Jenkins* (1724), Vol. II, 727–8, 732, 755, 780, 783. In 1675, during the war between Holland and France, a vessel belonging to Hamburg was captured by a French privateer in the English Channel within a musket shot from the shore. The French privateer having demurred to the jurisdiction of the Admiralty, the matter was referred to Sir Leoline Jenkins who on 20 November 1675 reported to the Council that the inference which the French captain made, 'as if reach of Languard Fort guns for the utmost Buoys in the Gun Fleet were the limits of Your Majesty's Chambers there', contradicted the verdict of the jury and also 'universal Tradition amongst us touching the King's Chambers': *ibid.*, 755. This was later cited by the Law Officers: Parry, *Opinions*, Vol. II, 232.

⁸ See *infra*, p. 398.

⁹ Dealing with a case where prize was taken just outside a line laid down in the Proclamation of 1604, but in the British Seas, Jenkins indicated that he too was conscious of the fact that the Proclamation seemed to be inconsistent with the broader claims of the Crown.

¹⁰ (1308), *Corone et plees del corone*, No. 399. This is the translation from Norman-French used by Lord Blackburn in the *Conception Bay Case* (1877) 2 App. Cas. 394, at 417. The extract was a note made by Staunton J., in the Eyre of Kent, and there is nothing to indicate what was the subject matter of the case. The edition used for verification is by

Tottell (1565), fol. 259. For a modern edition of the case, see *Selden Society*, Vol. 24, 133. The main implication was the summoning of a jury: *The Public Opinion* (1832) 2 Hagg. Adm. 398; 166 E. R. 298; *R. v. Keyn* (1876) 2 Ex. D. 63, at 162.

¹¹ *Fourth Institute*, cap. 22, 140. It is doubtful if Coke's statement accurately expressed the common law tradition, and it seems to have been an innovation when compared with the common law and Admiralty pleadings which were summarized by Staundford in 1583 as follows: 'Ideo quere & c., si un soit occise ou nees in les braches ou sauses del meere, lou homme peut veyer terre dun part & dauter, le Coron inquire de ceo, & nemy ladmiral, lo que le pais peut bien de ceo aver coinsace ... ladmiral nauer iurisdiction sinon sur le haut meere': *Les Plees del Coron* (Tottell, 1583), 51. In fact, Coke's restrictive text may have been due to inadvertence, because in *Leigh v. Burley* (1609) Owen 122; 74 E. R. 946, he adopted its alternative: 'The admiral shall have no jurisdiction where a man may see from one side to the other: but the coroner of the county shall enquire of felonies committed there.' Coke's version was adopted in the case of *The Admiralty* (1611) 12 Co. Rep. 79; 77 E. R. 1357. Rolle commented that the Edward II rule was denied by the judges to be law: (1618) 2 Rolle 49.

¹² *De jure maris*, in Moore, *Foreshore* (1888), 376. In the *Conception Bay Case*, Lord Blackburn regarded the qualification as relating to appropriation of a bay by the Crown: *Direct US Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394.

¹³ *A History of the Pleas of the Crown* (2nd ed, 1778), Vol. 2, 54.

¹⁴ See *supra*, [n. 11](#).

¹⁵ *The Jurisdiction of the Admiralty of England-Asserted*, in Malynes, *Consuetudo vel lex mercatoria* (1686), 113. Written in 1663.

¹⁶ *Pleas of the Crown* (1721), Book II, 44.

¹⁷ *Pleas of the Crown* (1803), Vol. II, 804.

¹⁸ *A Digest of the Law of England* (1822), Vol. I, 506, citing Coke's judgment in *Leigh v. Burley* rather than Hale.

¹⁹ *Bruce's Case* (1812) 2 Leach 1093; 168 E. R. 643. In *R. v. Forty-Nine Casks of Brandy* (1836) 3 Hagg. 257, it was held that Poole Harbour was within the body of the County of Dorset, and in *The Public Opinion* (1832) 2 Hagg. 402, that the Humber estuary was within Lancashire. The effect of the cases was that the admiral's jurisdiction was concurrent with the county jurisdiction.

²⁰ *U.S. v. Grush* 26 Fed. Cas. No. 15268, at 51, col. 2 (1829); *Dunham v. Lamphere* 3 Gray 268, at 269 (1855).

²¹ (1663), at 111.

²² *Leigh v. Burley* (1609) Owen 122; 74 E.R. 946.

²³ For criticism of Coke's doctrine on Admiralty Law, see *infra*, Vol. II, Ch. 24, pt. A, sect. 1(1).

²⁴ *History of the Pleas of the Crown* (2nd ed., 1778), Vol. 2, 54.

²⁵ See *supra*, p. 342, n. 11.

²⁶ *De Lovio v. Boit* 7 Fed. Cas. No. 3776 (1815), at 428, col. 1. He rejected the view that the Fitzherbert text applied to creeks where a person may see from shore to shore. A creek, he said, is where the sea flows and reflows, without reference to the distance of the enclosing shores: at 422, col. 2.

²⁷ *Ibid.*, at 423, col. 1.

²⁸ *Ibid.*, at 428, col. 1.

²⁹ *Ibid.*

³⁰ This was the essence of the decision *R. v. Keyn* (1876) 2 Ex. D. 63 on the Admiral's jurisdiction.

³¹ In an opinion of Dr. Paul of Doctors' Commons of 28 Feb. 1753, reference was made to the King's Chambers and to dominion of the British Seas: PRO, ADM. 7/298.

³² (1801) 3 C. Rob. 336, at 341; 165 E. R. 485. The expression was used in *Legal Dictionary* (1770).

³³ See *infra*, p. 354.

³⁴ Pt. II, s. 179.

³⁵ Pt. II, s. 187.

³⁶ Vol. I, 239. Subsequent authors seem to have copied from Phillimore, thus giving the Chambers doctrine an autonomous theoretical existence.

³⁷ In fact the Solent was so held in *The Eclipse and the Saxonia* (1861) 1 Lush 410.

³⁸ (1876) 2 Ex. D. 63, at 71. The expression 'Queen's Chambers' appears in the opinions of the Queen's Advocate of 20 May 1857 and 30 June 1859, the year of *R. v. Cunningham*.

³⁹ 2 Leach 1093; 168 E. R. 643.

⁴⁰ Bell's C. C., 72 (1859); 169 E. R. 1171.

⁴¹ *Ibid.*, at 86. The case supplemented the Hale test by adding that the local authorities had regarded the waters as within the county.

⁴² The expression next made its appearance in Dr. Lushington's judgment in *The Annapolis* (1861) Lush. 295; 167 E.R. 128. Following the first *Cornwall Mines Case*, the Arbitrator was asked by the Lord Chancellor to clarify that his award did not apply to estuaries and tidal rivers. He did so on 25 Feb. 1858: H.C. Sess. Pap, 1857–8, Vol. 47, 245. In the second *Cornwall Mines Arbitration*, the Duchy argued that the *fauces terrae* could only be resolved in a boundary line on the basis of the third proposition in 6 & 7 Vict, c.79, s.2. As recently as 13 April 1972, the Minister for Local Government confirmed that the bodies of the counties include bays: Hansard, H.C. Deb, 5th ser., Vol. 834, col. 1443.

⁴³ 1 Stat. 113, Ch. 9, s.8.

⁴⁴ *U.S. v. Ross* 27 Fed. Cas. No. 16196 (1813).

⁴⁵ *De Lovio v. Boit* 7 Fed. Cas. No. 3776 (1815). Also *U.S. v. Hamilton* 26 Fed. Cas. No. 15290 (1816).

⁴⁶ *U.S. v. Bevans* 3 Wheat. 336 (1818).

⁴⁷ *U.S. v. Wiltberger* 5 Wheat. 76 (1820).

⁴⁸ *Ibid.*, at 85.

⁴⁹ There is a learned argument on the subject by counsel in the trial court: 28 Fed. Cas. No. 16738 (1819).

⁵⁰ *U.S. v. Grush* 26 Fed. Cas. No. 15268, at 51, col. 2 (1829), dealing with the identical expression in the US Crimes Act, 1825. Shortly afterwards, the Circuit Court of Pennsylvania held, in a case of felony on board an American ship in a Bahamian port, that the *fauces terrae* delimited the Federal jurisdiction: *U.S. v. Morel* 26 Fed. Cas. No. 15807 (1834). The case is interesting for its assimilation of all the non-high seas categories: 'If we look to the English lexicographers for the meaning of these terms, "haven", "basin", "bay", we shall find no difference between them and Lord Hale.'

⁵¹ *Commonwealth v. Peters* 12 Met. 387 (1847). This was rectified by legislation: Act of 1859, Public Statutes of the State, Pt. 1, Title 1, Chap. 1, ss. 1 & 2; Chap. 22, s.1.

⁵² *Dunham v. Lamphere* 3 Gray 268 (1855). The court was perhaps influenced by the award in *The Washington* the previous year: see *infra*, p. 357.

⁵³ *Mahler v. New York Transportation Co.* 35 N.Y. 352 (1866).

⁵⁴ The distance from Montauk Point to Fisher's Island is 12 miles.

⁵⁵ 139 U.S. 240 (1891).

⁵⁶ See *infra*, p. 359.

⁵⁷ e.g. the Treaty between Charles V and François I of 1521: ‘intra portus et sinus maris quoscumque, flumina ostia fluminum gurgites, aquas dulces, stationes navium et praesertim stationem vulgariter vocatam les Dunes, aut alia loca maritima quaecumque jurisdictioni dicti Regis Angliae’: Dumont, Vol. IV, i, 352.

⁵⁸ *Defensio capitis quinti Maris Liberi oppugnati a Guilielmo Welwode*, in *Bibliotheca Visseriana*, Vol. 7 (1928), at 145.

⁵⁹ Fulton, 156, n.1.

⁶⁰ The expression *deverticulum fluminis publici* derives from *deverto* + *culum* meaning a turning off a main road, or deviation. There are only two classical texts which use *deverticulum* in the derivative sense. Papinian, D.41.3.45 (Pap. 10 Resp.) uses the word in connection with the rule against prescription by adverse possession against public property. He mentions the case of a person who fishes in a *deverticulum* of a public river; he cannot acquire a prescriptive right. Marcianus, D. 44.3.7 (Marc. 3 Inst.) paraphrases Papinian, but reverses the conclusion. Other classical uses of the word concern by-ways on land. But the general import is of an insignificant departure from the main way, and suggests in Grotius’s case an intention to exclude from *mare liberum* only small bays.

⁶¹ *De jure naturae et gentium* Bk. IV, Ch. V, 8 (1688); *Elementorum jurisprudentiae universalis* Bk. I, Ch. V, 8 (1672). Similarly Abreu y Bertondano (1758), 55; Moser (1760), 345. Vattel merely said that a bay whose entrance could be defended might be occupied and subjected to the laws of the sovereign: c.13, s. 291. Günther in 1792 similarly, 53.

⁶² II, 17. ‘Tamen magnitudo ejus in omnibus non obstat, quominus in quibusdam alii possint ab usu ejus arceri, vel ex terra, ubi per argustum fretum in nostras terras sinus maris infunditur, vel per naves armatas.’

⁶³ Anglo-Danish and Netherlands, 1691, Parry, Con. T.S., Vol. 10, 305; Franco-Russian, 1787, Vol. 50, Art. 28; Russo-The Sicilies, 1787, *ibid.*, 147; Russo-Swedish, 1801, Vol. 56, 1; The Jay Treaty (GB – US) 1794, 1 *BFSP* 784. Also the Neutrality Decree of Tuscany, 1778; Neutrality Decree of Genoa, 1779.

⁶⁴ In 1563. See *supra*, p. 125.

⁶⁵ On 8 September 1804, President Jefferson instructed the Secretary of the Treasury ‘As we shall have to lay before Congress the proceedings of the British vessels at New York, it will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction and which on the high seas. The rule of the common law is that wherever you can see from land to land, all the waters within the line of sight are in the body of the adjacent county and within the common law jurisdiction. Thus, if in this curvature a c b you can see from a to b, all the water within the line of sight is within common law jurisdiction, and a murder committed at c is to be tried as at common law’. Cancrin (1800), 69, Rayneval (1803), 162, and Jouffroy (1806), 24, treated bays and ports as applications of the cannon-shot rule.

⁶⁶ ‘But in places where the land curves and opens into a bay or gulf, it is accepted practice among the more developed nations to draw a line from point to point of the mainland, or of islands which protrude beyond the promontories of the mainland, and treat the inlet of the seas as territory, even if the distances from the middle of it to the land should be more than three miles’: at 422.

⁶⁷ (1859) Bell’s C.C. 72; 169 E.R. 1171.

⁶⁸ That was the issue later in *R. v. Keyn* (see *supra*, p. 93) whether the Admiral had jurisdiction over foreign ships.

⁶⁹ See *infra*, Ch. 27, sect. 1.

⁷⁰ e.g. Klüber (1819), 69. One called them *mare clausum*: Schmelzing (1819), II, para. 221.

⁷¹ Lucchesi-Palli (1840), 40; Massé (1844), I, 115.

⁷² *Ibid.* Also von Kaltenborn, referring to the ‘portals of the land’ such as the Zuyder Zee and Friesian Islands: (1851), Vol. 1, 343. He was followed by Nizze, 33; Neumann, 36; and Huhn, 181.

⁷³ See the loose language of the Law Officers’ opinions: 18 May 1877 (Hong Kong): O’Connell and Riordan, 132; 20 July 1881; *ibid.*, 351; the Solicitor of Customs, 12 November 1889: *ibid.*, 135.

⁷⁴ Hautefeuille (1848), 237.

⁷⁵ Casanova (1858), 179. He thought this was available only in the case of little bays, and not in the case of large gulfs, which must be relegated to high seas: Gardner (1860), 18.

⁷⁶ 6 *BFSP* 3. It is doubtful if the technique introduced into the Treaty of 1839 for the purpose of drawing the territorial sea across bays was perceived to embody any general principle before the middle of the century. The United States Secretary of State wrote in 1849 that ‘the exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers and adjacent parts of the sea inclosed by headlands; and, also, to the distance of a marine league or as far as a cannon-shot will reach from the shore along its coasts’: Moore, *D.*, Vol. 1, 705. This is ambiguous, but the juxtaposition of bays and the marine league in the context suggests the older view that the closing-line of a bay was the limit of jurisdiction.

⁷⁷ 27 *BFSP* 983, Art. 9.

⁷⁸ 57 *BFSP* 8.

⁷⁹ See *infra*, p. 359.

⁸⁰ 73 *BFSP* 39. It did not, however, appear in the Reciprocity Treaty of 1854: see *infra*, p. 357. But when the Treaty was due to expire in 1866, the British Government instructed the Admiralty to act on the same principle as in the 1839 Convention: Fulton, 626. The theorists of limited jurisdictional power should logically have regarded the waters of a bay as territorial waters subject to police power only. On this ground Nuger criticized Ortolan: at 197.

⁸¹ See *supra*, p. 350.

⁸² 1 *Opinions of the Attorney-General of the United States* 32; U.S. For. Rel., Vol. 1, 167.

⁸³ Moore, *D.*, Vol. 1, 704.

⁸⁴ (1801), 3 C Rob. 336. See *supra*, p. 346.

⁸⁵ Instructions of Secretary of State Madison to Messrs. Monroe and Pinckney, American State Papers, *Foreign Relations*, Vol. 3, 119.

⁸⁶ Vol. 1, 29.

⁸⁷ 6 *BFSP* 3.

⁸⁸ American vessels were arrested for being found within three miles of the Island of Grand Manan, without any proof that they had fished. The argument was made that the waters of Fundy Bay were to be considered as common to both countries. Robinson could not agree with this since the treaty excluded American vessels from fishing within those limits: Parry, *Opinions*, Vol. 3, 27. On the drying of fish, see his Opinion of 7 Jan. 1828: *ibid.*, Vol. 3, 285. The Report of the House of Assembly of Nova Scotia was concerned mainly with the right to land and take wood and dry and cure fish: Dodson's Opinion of 31 Oct. 1837, *infra*, n. 92.

⁸⁹ 59 Geo. 3, c.38. For the Order-in-Council of 19 June 1819 to give effect to the Regulations made under the Act, see *North Atlantic Coast Fisheries Arbitration: Proceedings*, Vol. 1, 72.

⁹⁰ No. 937 of 1819; No. 1073 of 1825. No question arose respecting the Convention until this enactment: *North Atlantic Coast Fisheries Arbitration: Proceedings*, Vol. 1, 75.

⁹¹ No. 472 of 1822; No. 769 of 1831.

⁹² Parry, *Opinions*, Vol. 3, 477. Lord Palmerston adopted this Opinion: *North Atlantic Coast Fisheries Arbitration: Proceedings*, Appendix to the Case of Great Britain, Vol. 4, 198.

⁹³ *Ibid.*, Vol. 1, 96, 100.

⁹⁴ The papers for the events of 1841 are in the following dockets: C.O. 217/18, 217/177.

⁹⁵ This despatch appears to have crossed another from Whitehall to Nova Scotia enclosing a Note from the United States Minister dated 27 March 1841, in which he stated that he was instructed to protest against the interruption of the vessels of the United States engaged in fishing and to demand prompt interposition of the British Government. It was represented that the Government of Nova Scotia, 'under colour of' a Provincial law, claimed to prohibit the approach of such vessels 'within three miles of a line drawn from Headland to Headland, instead of Indents of the shores of the Province'. This construction placed upon the Convention was directly in conflict with its object: *North Atlantic Coast Fisheries Arbitration: Proceedings*, Vol. 4, 213.

⁹⁶ Parry, *Opinions*, Vol. 4, 127.

⁹⁷ *Ibid.*, 132–3.

⁹⁸ McNair, Vol. I, 351. This opinion shows that the view taken by some authors that the British Government claimed the whole Bay of Fundy, although a small part of the western shore was in the United States, is a misconception. The true closing line of the Bay links Manan Island in New Brunswick with Whipple Point in Nova Scotia and is about forty miles in length. The United States-Canadian boundary is the median line between Manan Island and Maine, and takes the United States coastline out of the Bay altogether.

⁹⁹ *North Atlantic Coast Fisheries Arbitration: Proceedings*, Vol. 4, 240. For a vigorous demonstration that the headland theory could not be applied in every case without absurdity, see the speech in Congress of Senator Cass of Michigan on 3 Aug. 1852: *ibid.*, 266. But cf. Senator Seward's rejection of the six-mile rule.

¹⁰⁰ Moore, *IA*, Vol. 4, 4342 (1853). La Forest argues that the decision was wrong: In 1 *Can. YBIL* (1963), 162.

¹⁰¹ 44 *BFSP* 25. In 1850 the Government of New Brunswick submitted a sketch showing the fishery limits of the Colony and this was approved by Dodson in an opinion of 30 August 1850: Parry, *Opinions*, Vol. 5, 175. On fishery instructions issued to the Royal Navy to police the Treaty of 1818, see the request of Harding of 30 July 1852 for opinion: *ibid.*, 254. This information was furnished by the Admiralty and the Law Officers advised that no commission was needed from the Governor or Colonial Government for Royal Navy Officers to enforce the Convention: *ibid.*, 271. However the matter was different in respect of certain powers derived from Colonial legislation. See their advice on the allowance of fishery legislation of New Brunswick, Opinion of 3 Aug. 1853: *ibid.*, 367.

¹⁰² O'Connell and Riordan, 369.

¹⁰³ 31 Vict., c.61, as amended in 1870, 33 Vict., c.15.

¹⁰⁴ *Documents and Proceedings of the Halifax Commission* (1877), Vol. I, 145.

¹⁰⁵ *Ibid.*, 155.

¹⁰⁶ Fulton, 627. The federation of the Provinces in 1867 raised the question whether the federal fisheries legislation applied in Chaleurs Bay. It was held by the Canadian Supreme Court that, since Imperial legislation had designated the boundaries of the adjacent provinces to the mouth of the bay, it was part of the Provinces: *Mowat v. McFee* (1880) 5 S.C.R. 66.

¹⁰⁷ 61 *BFSP* 40, Arts. 18 and 19.

¹⁰⁸ *North Atlantic Coast Fisheries Arbitration: Proceedings*, Vol. 2, 629.

¹⁰⁹ Fulton, 628.

¹¹⁰ 79 *BFSP* 272.

¹¹¹ Protocol to the 1888 Convention: 79 *BFSP* 272; Fulton, 629.

¹¹² Fulton, 630. This was a popular American argument. It was used by the State Department in 1888: Moore, *Dig.*, Vol. I, 717; and by Moore in the preparation of the Institut's draft in 1891: see *infra*, p. 378.

¹¹³ U.N. Rep., Vol. XI, 167, at 195. In the Case of Great Britain, *North Atlantic Fisheries Arbitration: Proceedings*, Vol. 4, 95, 96, it was argued that there was no principle or practice of the law of nations under which the right of a State to exercise territorial sovereignty over bays, creeks, or harbours on its coasts was limited to those bodies of waters which were contained within headlands not more than six miles apart. 'The usage of nations is absolutely opposed to the existence of a six-mile limit; and the discussion of jurists shows that no general rule has ever been agreed on ... it is also no doubt law that a State can exercise sovereignty over certain portions of the sea enclosed within its territory by headlands or promontories.'

¹¹⁴ *Ibid.*, at 196.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, at 199.

¹¹⁷ *Ibid.*

¹¹⁸ 105 *BFSP* 207. One of the arbitrators, Dr. Drago, delivered a celebrated dissent, on the ground that the ten-mile limit had become a rule of international law. He also argued that a treaty clause should be construed in the light of later changes in the law.

¹¹⁹ Debates, Sessions 1962/63, 1738. *The North Atlantic Coast Fisheries Award* did not apply to the Bay of Fundy, it being agreed that the parties' views on that area should not be prejudiced: *Proceedings*, Vol. 1, Protocol 32.

¹²⁰ La Forest in 1 *Can YBIL* (1963), 161; Morin: *ibid.*, 105.

¹²¹ It has been pointed out, however, that if one drew a twenty-four-mile closing line between Gannet Rock and Brier Island, which are separated by twenty-three miles, the Bay of Fundy would automatically fall into the category of internal waters. The difficulty with this suggestion is that the measurement is across only one of the entrances to the bay separated by Grand Manan Island, and that for this reason its treatment under the ordinary rules of the Geneva Convention would appear to be questionable: La Forest, *sup. cit.*

¹²² The question of 'bay' seems first to have arisen for opinion in British practice in 1814 in connection with prize taken in the Bay of Cagliari in Sardinia. The Queen's Advocate realized that these were neutral waters because they were within the harbour limits of the Government of Sardinia whose conduct was unneutral: Parry, *Opinions*, Vol. 65, 23.

¹²³ O'Connell and Riordan, 121.

¹²⁴ *Ibid.*, 159.

¹²⁵ Parry, *Opinions*, Vol. 7, 205.

¹²⁶ *Ibid.*, Vol. 11, 160.

¹²⁷ *Ibid.*, 220.

¹²⁸ *Ibid.*, 229. Importance was attached to *Constable's Case*, which was said to have held that the Queen had the whole jurisdiction of the seas between England and France because she was Queen of both countries, and therefore the same must be true of the waters between England and Ireland. Reference was also made to the Treaty of 15 Nov. 1653 between Great Britain and the Netherlands giving the Dutch the right of passage through the British seas.

¹²⁹ See *supra*, p. 358.

¹³⁰ O'Connell and Riordan, 291.

¹³¹ *Ibid.*, 160. The Solicitor of Customs, interpreting the Customs Consolidation Act, 1876, in an opinion of 12 Nov. 1889, expressed himself similarly: 'The power to search, therefore, resting on this section, extends to all the coast-line (besides waters *inter fauces*) and three miles out to sea, taking, in the case of headlands, three miles from the points, and the power covers all vessels, whether British or foreign': *ibid.*, 135.

¹³² [1968–9] *Aust. YBIL*, 5.

¹³³ O'Connell and Riordan, 291.

¹³⁴ *Ibid.*, 159.

¹³⁵ Fulton, 592.

¹³⁶ 48 and 49 Vict., c.70, s.4.

- ¹³⁷ McNair, Vol. 1, 356.
- ¹³⁸ 52 and 53 Vict., c.23, s.7.
- ¹³⁹ McNair, Vol. I, 360.
- ¹⁴⁰ *Peters v. Olsen* (1905) 7 F. (J.) 86; 13 S.L.T. 337.
- ¹⁴¹ *Mortensen v. Peters* (1906) 8 F. (J.) 93; 14 S.L.T. 227.
- ¹⁴² Fulton, 727–8. In the *Anglo-Norwegian Fisheries Case*, the United Kingdom argued that it thereby indicated that it did not consider that the jurisdiction which the Court had exercised was compatible with international law: I.C.J. Rep, 1951, *Pleadings*, Vol. 1, 92.
- ¹⁴³ Parl. Deb., Hansard, H.L., 4th ser., Vol. 169, Col. 989, 21 Feb. 1907.
- ¹⁴⁴ *Ibid.*, Vol. 196, Col. 235, 11 Nov. 1908.
- ¹⁴⁵ *Ibid.*, Vol. 170, Col. 1383.
- ¹⁴⁶ Parl. Deb., Hansard, H.C., Vol. 191, col. 1770, 8 July 1908.
- ¹⁴⁷ North Atlantic Coast Fisheries Arbitration, *Proceedings*, Vol. II, 4164.
- ¹⁴⁸ Charteris, ‘Recent Territorial Disputes Regarding Territorial Bays’, in ILA, *Report of the Twenty-Seventh Conference* (1912), 115.
- ¹⁴⁹ (1859) Bell’s Cr. Cas. 72, at 86; 169 E.R. 1171. See *supra*, p. 346.
- ¹⁵⁰ [1877] L.R. 2 A.C. 394.
- ¹⁵¹ *Ibid.*, at 420.
- ¹⁵² *Ibid.*
- ¹⁵³ *Adams v. Bay of Islands County* [1916] N.Z.L.R. 65.
- ¹⁵⁴ *Ibid.*, at 71.
- ¹⁵⁵ See *supra*, p. 365.
- ¹⁵⁶ *The Loekken* (1918) 34 T.L.R. 594, at 595.
- ¹⁵⁷ [1927] P. 311.
- ¹⁵⁸ The decision of the Supreme Court of Prince Edward Island in *Gavin v. R.* [1956] 3 D.L.R. (2d) 547, at 552, that, on the authority of *R. v. Keyn*, the territory ended at the low-water mark, and hence the Gulf of St. Lawrence was not internal waters, did not contribute to the common law concept of bays. However, the English Court of Appeal in 1967, upholding the constitutionality of and interpreting the Territorial Waters Order in Council which drew a baseline across the Thames Estuary, adverted to the question and

related it to the Geneva Convention. Diplock L.J. said: 'bay is not a term of art in English law. In ordinary parlance it is an indentation or concave curvature in the coastline; but for the purposes of determining what are the areas of the sea over which a state is entitled to claim complete or qualified sovereignty in international law it is given a more precise meaning by the Convention.': *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740. See *infra*, p. 396.

¹⁵⁹ *Raptis v. South Australia* (1977) 138 C.L.R. 346.

¹⁶⁰ 4 & 5 Wm. IV, c.95.

¹⁶¹ *Raptis v. South Australia*, *sup. cit.*, per Gibbs J. at 361.

¹⁶² *Ibid.*, at 377. The case is more fully discussed *infra*, Ch. 11, sect. 2.

¹⁶³ *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* [1976] 1 BCLR 97.

¹⁶⁴ 21 & 22 Vict., c.99; 26 & 27 Vict., c.83; 29 & 30 Vict., c.67.

¹⁶⁵ 30 *BFSP* 360.

¹⁶⁶ Expressly by Seaton J.A., dissenting at 113, but impliedly by the majority.

¹⁶⁷ Seaton J.A., at 110, 113, 126; McIntyre J.A., at 140.

¹⁶⁸ *Re Dominion Coal Co. and County of Cape Breton* (1963) 40 DLR (2d.) 593.

¹⁶⁹ See *supra*, p. 354.

¹⁷⁰ Moore, *Dig.*, Vol. I, 705.

¹⁷¹ *Ibid.*, 720.

¹⁷² *U.S. v. California* 332 U.S. 19 (1947).

¹⁷³ *Commonwealth v. Peters* 12 Met. 387(1847). Followed in 1855 in *Dunham v. Lamphere* 3 Gray 268 (1855).

¹⁷⁴ *Manchester v. Massachusetts* 139 U.S. 240, at 257 (1891).

¹⁷⁵ *Ibid.*, at 258.

¹⁷⁶ *Ocean Industries v. Green* 15 F. (2d) 862 (1926).

¹⁷⁷ At 863.

¹⁷⁸ *U.S. v. Carrillo* 13 F. Supp. 120 (1935).

¹⁷⁹ *Ibid.*, at 122.

¹⁸⁰ *U.S. v. California* 332 U.S. 19 (1947); 381 U.S. 139 (1965).

¹⁸¹ See *Ocean Industries v. Superior Court of California* 200 Cal. 235 (1927); *The People v. Stralla and Adams* 96 Pac. (2d.) 941 (1939); *U.S. v. Morel* 16 Fed. Cas. No. 1310; *Commonwealth v. Manchester* 152 Mass. 230 at 236 (1890); *Mahler v. Norwich and New York Transportation Co.* 35 N.Y. 352 at 355 (1866).

¹⁸² Moore, *IA*, Vol. 4, 4332.

¹⁸³ *Ibid.*, at 4341.

¹⁸⁴ U.N. Leg. Ser., ST/LEG/SER.B/6,497. Section 1 of the *projet de loi* of fisheries submitted to the French Senate on 11 June 1885 provided that 'le rayon de 3 milles est mesuré de partir d'une ligne droite tirée en travers de la baie, dans la partie la plus rapprochée de l'entrée, au premier point ou l'ouverture n'excède pas 10 milles. Dans chacuns des arrondissements maritimes, des décrets déterminent la ligne à partir de laquelle cette limite est comptée.'

¹⁸⁵ U.N. Leg. Ser., ST/LEG/SER.B/6, 15.

¹⁸⁶ J.O. 15 Dec. 1926, 13026.

¹⁸⁷ J.O. 26 Sept. 1936, 10192.

¹⁸⁸ See *supra*, p. 213.

¹⁸⁹ Law No. 612.

¹⁹⁰ U.N. Leg. Ser., ST/LEG/SER. B/6, 168.

¹⁹¹ 107 *BFSP* 1182.

¹⁹² 14 *MNRG* (2nd Ser.) 77.

¹⁹³ 22 *MNRG* (2nd Ser.), 432. The Royal Decree of 20 June 1852 respecting smuggling merely mentioned bays without specifications.

¹⁹⁴ Meyer, 194.

¹⁹⁵ 192 *BFSP* 788.

¹⁹⁶ 1 *MNRG* (3rd Ser.), 864.

¹⁹⁷ Butler (1967), App. No. 10.

¹⁹⁸ A *ukase* of 1853 enclosed the sea of Okhotsk; a Decree of 1921, the White Sea and Cheshskaya; and in 1957, Peter the Great Bay: Romanov in *Sovetskoye Gos. Pravo*, No. 5 (1958), 47; Butler (1967), 108. Poland enclosed the Bay of Danzig in 1956: Decree No. 9, *Dziennik Ustan*, No. 51.

- ¹⁹⁹ *Annuaire, Abridgment*, Vol. 2, 877.
- ²⁰⁰ *Anglo-Norwegian Fisheries Case*, I.C.J. Rep., 1951, *Pleadings*, Vol. II, 70.
- ²⁰¹ Kalijarvi in 26 *AJIL* (1932), 63.
- ²⁰² 3 *Ann.Dig.* (1925–26), Case No. 90.
- ²⁰³ 6 *Ann.Dig.* (1931–32), Case No. 60; Bellquist in 24 *AJIL* (1930), 776.
- ²⁰⁴ Gihl in *Bulletin de l'Institut Intermédiaire International*, Vol. 19 (1928), 4.
- ²⁰⁵ U.N. Leg. Ser., ST/LEG/SER.B/6, 564, 795.
- ²⁰⁶ Hertslet, Vol. 21, 355.
- ²⁰⁷ *Ibid.*, Vol. 15, 207.
- ²⁰⁸ *Ibid.*, Vol. 23, 425.
- ²⁰⁹ 139 *LNTS* 205, Art. 2(2).
- ²¹⁰ U.N. Leg. Ser., ST/LEG/SER.B/6, 473.
- ²¹¹ *Ibid.*, 476.
- ²¹² *Status of Eastern Greenland Case*, P.C.I.J., Ser.A/B, No. 53 (1933), 34.
- ²¹³ U.N. Leg. Ser, ST/LEG/SER.B/6, 130.
- ²¹⁴ *Ibid.*, 131.
- ²¹⁵ Accioly, Vol. 2, 153.
- ²¹⁶ U.N. Leg. Ser., ST/LEG/SER.B/6, 79.
- ²¹⁷ Fulton, 661.
- ²¹⁸ U.S. Naval War College, *International Law Topics, 1916*, (1917), 107.
- ²¹⁹ Meyer, 443.
- ²²⁰ U.N. Leg. Ser, ST/LEG/SER.B/1, 61.
- ²²¹ U.N. Leg. Ser., ST/LEG/SER.B/6, 13.
- ²²² *Ibid.*, 124.
- ²²³ *Anglo-Norwegian Fisheries Case*, I.C.J. Rep, 1951, *Pleadings*, Vol. III, 708.
- ²²⁴ *Ibid.*

- ²²⁵ Law No. 186 of 1967, s.2.
- ²²⁶ Presidential Decree, *Diario Oficial* 8 (8-30-68).
- ²²⁷ Decree No. 108 of 1964, limited to 10 miles by Legislative Decree No. 1948 of 1955.
- ²²⁸ U.N. Leg. Ser., ST/LEG/SER.B/1, 77; 67 *RGDIP* (1963), 181.
- ²²⁹ 6 *Revue égyptienne de droit international* (1950), 176.
- ²³⁰ For U.S. protest see 68 *AJIL* (1974), 510. U.S. and Libyan aircraft were involved in an incident over the waters of the Gulf in August 1981.
- ²³¹ P.R. Yemen, Act of 1970, Art. 8; Sudan, Act. of 1970, s.4.
- ²³² U.N. Leg. Ser., ST/LEG/SER.B/1, 87. See *supra*, p. 199, n. 125.
- ²³³ 62 *RGDIP* (1958), 673.
- ²³⁴ U.N. Leg. Ser., ST/LEG/SER.B/16, 34; IBS, No. 31.
- ²³⁵ *Annuaire, Abridgment*, Vol. 2, 872.
- ²³⁶ Ibid., Vol. 3, 70.
- ²³⁷ Ibid., 377. Moore supported this with the argument that it was more than just to the foreign fishermen, who, while pursuing fish, might be drawn unawares within the radii of territorial sea limits: at 377-8.
- ²³⁸ Ibid., 459.
- ²³⁹ *Report of the Thirty-Third Conference*, 267, Art. 5.
- ²⁴⁰ *Report of the Thirty-Fourth Conference*, 101, Art. 7.
- ²⁴¹ 20 *AJIL* (1926), 318, Art. 6.
- ²⁴² 34 *Annuaire*, 756, Art. 3.
- ²⁴³ 23 *AJIL* (1929), 243, Art. 5.
- ²⁴⁴ Ibid., 376.
- ²⁴⁵ *Reichsgerichtfestgabe* (1929), 66, Art. 6.
- ²⁴⁶ LoN Doc. C. 196. M.70. 1927 V.1, 39 et seq.
- ²⁴⁷ Ibid., 58.
- ²⁴⁸ See *supra*, n. 118.

- ²⁴⁹ LoN Doc. C.196. M.70. 1927. V.1, 66.
- ²⁵⁰ LoN Doc. C.74. M.38, 1929. V., 39 et seq.
- ²⁵¹ *Ibid.*, 45.
- ²⁵² LoN Doc. C.351 (b). M.145 (b). 1930. V. 16, 103 et seq.
- ²⁵³ At 165. Followed by Negrin, Vol. II, 27; Gola, 151; Cussy, 21.
- ²⁵⁴ Vol. I, 259.
- ²⁵⁵ Those supporting the six-mile limit were Hall (with qualifications) (1895), 127; Bulmerincq, 281; Gareis, 75; Walker (1895), 172; Despagnet, 437; Saráchaga, 161; Rivier, Vol. I, 154; Westlake, Vol. I, 187; Smith (1900), Gould (1900), 367. The following supported the double cannon-shot: Fiore, Vol. II, 69; Bidau, 135; Duvigneaux 52; Diena, 187 and Hershey, 200. Schücking thought this logical but questioned it in practice, 21. Oppenheim, likewise: (1905), Vol. I, 246. Perels referred in different places to double the territorial sea, the ten-mile rule and the chambers doctrine.
- ²⁵⁶ O'Connell and Riordan, 159.
- ²⁵⁷ See *supra*, pp. 358–9.
- ²⁵⁸ Fulton, 731. The British Instructions on Prize Law adopted six miles: Holland, *A Manual of Naval Prize Law* (1888), 1.
- ²⁵⁹ See *supra*, sect. 3(2)(c).
- ²⁶⁰ See *supra*, p. 371.
- ²⁶¹ See *supra*, sect. 3(2)(a)(ii).
- ²⁶² See *supra*, p. 353. Parliament gave effect to the ten-mile rule in this case in 1843, 6 & 7 Vict., c.79. See the Regulations between Great Britain and France, 24 May 1843: *Hertslet*, Vol. 6, 416.
- ²⁶³ U.N. Rep, Vol. XI, at 210.
- ²⁶⁴ 57 *BFSP* 8.
- ²⁶⁵ 31 & 32 Vict., c.45.
- ²⁶⁶ *Hertslet*, Vol. 14, 1055.
- ²⁶⁷ *Ibid.*, 1052.
- ²⁶⁸ 77 *BFSP* 1182.
- ²⁶⁹ 22 *MNRG* 2nd ser., 432.

²⁷⁰ Ibid., Vol. 9, 557. See *supra*, Ch. 4, sect. 2(4).

²⁷¹ Art. 2 (2).

²⁷² *Hertslet*, Vol. 23, 425.

²⁷³ 132 BFSP 332.

²⁷⁴ U.N. Leg. Ser, ST/LEG/SER. B/6, 24.

²⁷⁵ Ibid., 33.

²⁷⁶ Ibid., 194.

²⁷⁷ Vol. 3, 538–545. Münch, while admitting that the ten-mile rule was not accepted in law, agreed for practical reasons in favour of its adoption: at 94. Bustamante similarly, at 165. Among the few authors to support 10 miles were Bonfils, 260; Nys, 443; Ruiz Moreno, Vol. II, 27; Redslob, 151; Cavaré, Vol. II, 512. Fulton frankly rejected it, 726, as did Jessup, 358.

²⁷⁸ I.C.J. Rep, 1951, 116, at 131.

²⁷⁹ Hyde, Vol. I, 259; Wilson in 1 *Hague Recueil* (1923), 127 at 148; Mercker, 98; Jauréguiberry, 25; Coenen, 61; Mochot, 177; François (1949), Vol. I, 136; L’Huillier, 252; Guggenheim, Vol. I, 392; Sibert, Vol. I, 738; Suy in *Friedenswarte* 1957, 111; Dahm, Vol. I, 657; Verdross, 209; Bouchez, 115; Wetering, 43, supported the straight line principle. See also Yates in 49 *North Carolina L.Rev.* (1971), 943 (Special issue).

²⁸⁰ See *supra*, p. 339.

²⁸¹ In Moore, *Foreshore*, 319.

²⁸² See *infra*, Ch. 10, sect. 5.

²⁸³ *The Eclipse and the Saxonia* (1861) 1 Lush. 410.

²⁸⁴ Cmnd. 7438 (1978), para. 4.

²⁸⁵ *Raptis v. South Australia* (1977) 138 CLR 346. In 1875 the Supreme Court had held that the Strait was within South Australia, in connection with a charge of murder in HMS *Sappho* which occurred there. Stow J. said that ‘according to international law any land-locked Gulf is part of a country’: O’Connell in 55 *BYIL* (1958), 237. Other cases of internal waters in straits situations are *Mahler v. Norwich & N.Y. Trans. Co.* 35 N.Y. 352 (1866); *Manley v. People* 7 N.Y. 295 (1852); *Lord Advocate v. Glengarnock Steam Co. Ltd.* (1909) 1 S.L.T. 15. A Soviet Aide Mémoire of 21 July 1964 stated that Dimitri Lapter and Sannikov Straits were internal waters: U.S. Dept. of State, *Limits in the Seas*, No. 36 — National Claims to Maritime Jurisdiction (2nd Rev. 1974), 107.

²⁸⁶ *Re Strait of Georgia* 1BCLR 97 (1976).

²⁸⁷ Malloy, Vol. 1, 656.

²⁸⁸ *Re Strait of Georgia, sup. cit., per* Seaton J.A. at 110, 115, 126; McIntyre J.A. at 134.

²⁸⁹ There are no *fauces* in the case of the Isle of Wight in the sense used in the dissenting opinions. In fact Seaton J.A. conceded that *fauces* are not strictly necessary because he said that the fact that Johnstone Strait 'is a strait does not prevent it becoming inland water': at 116. On Juan de Fuca Strait see *Capital City Canning Co. v. Anglo-British Columbia Packing* (1905) 11 BCR 333; 2 W.L.R. 59.

²⁹⁰ *U.S. v. Louisiana* 363 U.S. 1, at 66 (1960); *U.S. v. California* 381 U.S. 139, at 171 (1965).

²⁹¹ See *supra*, p. 374.

²⁹² Vol. 3, 687.

²⁹³ See *supra*, Ch. 5, pt. A, sect. 3.