THE OCCUPATION OF THE SEDENTARY FISHERIES OFF THE AUSTRALIAN COASTS

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There are current reports of a unilateral decision of the Japanese Government to approve (without any prior consultation with Australia) of the sending of a pearling fleet to exploit the fructus of the sea bed off the Australian coasts.1 Prominence has also been given to Japan's reported intention to ignore Australia's claim to regulate and control exclusively the sedentary fisheries off her coasts. It is clear that the policy behind the decision is to challenge any special status of the submarine areas in question. The object of this policy is to manoeuvre Japan into a favourable position, by giving an appearance of continuity to her activities during 1936-1939 (which were, it is believed, no more than poaching), in any pending negotiations with this country similar to her Fishery Agreements with Canada and the United States. By having a fleet actually working on the pearling grounds in question Japan may attempt to forestall the proclamation of the Pearl Fisheries Act12 and to create an interest adverse to any wide definition of "proclaimed waters".1c However, it is submitted that the argument set out below demonstrates that Japanese conduct in this matter should not be permitted to affect Australia's rights in international law, which had become settled before the mid '30's.

Recently the Commonwealth Parliament enacted the Fisheries Act1d and the Pearl Fisheries Act,2 intended to have cognate operation "in Australian waters".3 These enactments may be regarded as an expression, long overdue, of Australia's intention to control the fisheries, or at least the sedentary fisheries off her coasts, which for a century have been explored and developed by Australian energy. These Acts are both within section 51, placitum (x) of the Australian Constitution; but their several operations fall within different categories of international law. With respect to the former, unless some doctrine of "contiguous zones" can be extended to include this legislation, or a category of "inseparable appurtenance"4 be developed in this field, or a sound foundation upon international agreement for conservation purposes be provided, appearances suggest

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1 A.A.P. Report, Tokyo, Saturday, January 31, 1953 (Sunday Sun, Sydney, February 1, 1953).
1a By Article 12 of the Peace Treaty between Australia and Japan, Japan "declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis."
1b No. 8 of 1952.
1c Section 6 of No. 8 of 1952.
1d No. 7 of 1952.
2 No. 8 of 1952.
3 In contrast with the enactments of the Australasian Federal Council relating to pearl shell and beche-de-mer fisheries beyond territorial waters (viz., The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act of 1888, and The Western Australian Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act of 1889) these Commonwealth Acts are not restricted, in their express words, to "British Ships and boats attached to British ships", as were the 1888 and 1899 Acts (vide The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of 1888, s. 19, and The Western Australian Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act of 1889, s. 2, contra s. 6 of the Pearl Fisheries Act (No. 8 of 1952) with those provisions).
4 Vide "The Proclamation by the President with respect to the Natural
that such a law may conflict with the doctrine of the Freedom of the High Seas. Whatever the rubric of international law under which the Fisheries Act may be subsumed, or upon which it may be wrecked, the following argument adumbrates a possible safe premiss for the justification in international law of the Pearl Fisheries Act. Submarine areas, by their nature, should not necessarily be subjected to the same legal regime as the waters of the high seas. These waters are primarily a highway of commerce and for this purpose are most useful when open freely to all. But the utility of submarine areas is of a wholly different character. Accordingly, even if the high seas are res omnium communi the multitude of special local problems in all parts of the world, from Tunisian sponge fisheries to oil wells in the Gulf of Mexico, require the recognition of exclusive interests so that orderly development of resources may be furthered. At the discussions of the International Law Commission the assertion that title to sedentary fisheries depended on occupation was criticised. Acquisitive prescription was suggested as the proper basis for sovereignty over these resources. But at best this suggestion can only be regarded as de lege ferenda. It is submitted that the writings of the most eminent jurists in this field, as well as the practice of States, accept the doctrine of occupation as the proper category of International Law for ascribing property rights in a sedentary fishery to the littoral State.

The doctrine of occupation operates as a mode of acquiring a res nullius by a State recognised as a subject of international law. At this point it may be objected that the term res nullius should only be ascribed to territory, to soil as yet not subject to the sovereignty of a State and not to a mere "geographical expression". However, can it be said that Greenland is more than a geographical expression? Yet in the Legal Status of Eastern Greenland case between Norway and Denmark, it was held that the whole of Greenland had been sufficiently "occupied" to exclude Norwegian claims to East Greenland. And bold would be the statesman who would, in seeking fresh territories for his own nation, dispute the "occupation" by Canada of her Arctic archipelago. Yet is not this again a "geographical expression"? Furthermore, in support of the argument that submarine areas may be occupied by the littoral state, Vattel states that a maritime people may appropriate and convert to their own profit "an advantage which nature has placed within their reach".

The various uses to which the sea near the coasts can be put render it a natural object of ownership. Fish, shells, pearls, amber, etc., may be obtained from it. Now, with respect to all these things, the resources of coast seas are not inexhaustible, so that the nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership?  

An argument has been advanced that these property rights are anomalous


5 (1933) Series A/B No. 53: 3 Hudson's World Court Reports, 151.

6 Le Droit de Gens, translation in Professor G. Fenwick, 3 Classics of International Law. Note also Sir Cecil Hurst, International Law. The Collected Papers
in modern international law and are only recognised because they arose before the application of international law in the areas in question, and, because they originated in Moslem law, have continued by virtue of a continuous succession to the early title even after international law became operative in relative areas. This line of reasoning cannot, it is submitted, be sustained any more than can the claims of Latin American States to Antarctic territories if these be based solely on the Bull Inter Caetera. In such cases as these the "inter-temporal law" as enunciated by Huber in The Island of Palmas Case operates to exclude extraneous historical and religious considerations. Rights claimed in international law can only be sustained if provision is made for them to be found in the categories of international law; and here the doctrine of occupation is the category relevant to our task. If, then, property rights in the ancient pearling banks are based upon the doctrine of occupation, it may be asked whether similar rights exist in the pearl and other sedentary fisheries off the Australian coasts. Such a question does not admit of a short answer.

The doctrine of occupation requires the co-existence of two essential facts, possession and administration. The element of possession requires settlement by the claimant State towards the object of occupation, and in this context, mere private acts by the citizens or subjects of the sovereign state do not of themselves constitute possession (Jan Mayern Island Case). Administration requires that . . . . This argument is employed by Lauterpacht in his discussion of the British in the Persian Gulf and Ceylon pearl fisheries in 1 Oppenheim, International Law, 567-568, note 3. This argument is, however, based on his premiss that "the bed of the open sea is not a possible object of occupation". But on p. 576 the same author states " . . . it is submitted that it would be not inconsistent with principle, and would be more in accord with practice, to recognise frankly that, as a matter of law, a State may by strictly local occupation acquire, for sedentary fisheries and other purposes, sovereignty and property in the surface of the bed, provided that in so doing it in no way interferes with freedom of navigation . . . " This patent contradiction lies in the learned author's and his editor's adherence to a strict application of the concept of "effective occupation". The strict adherence to the requirement of "settlement" implicit in Oppenheim's and Lauterpacht's concept of occupation has been decisively rejected by arbitral and judicial decisions of this century, vide the Island of Palmas Case (supra), the Legal Status of Eastern Greenland Case (supra), and the Clipperton Island Case (1932) 26 A.J.I.L., p. 396; on this question of occupation of areas not capable of permanent settlement by man, vide C. H. M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", (1948) 25 B.Y.B.I.L., 311, esp. 314-318. On the subject of this "inter-temporal law" Huber considered the position to be: "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case—the so-called inter-temporal law—a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."

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the State in question should have intended to act as sovereign, i.e. to exclude the operation of the laws of other States. There is no requirement that a specified period of time should elapse during which the acts of sovereignty are to be performed, and against which no valid protest is made by other States. Accordingly, it may be submitted that the time scale is relative, being dependant on the object of such acts of sovereignty.

EVIDENCE OF POSSESSION

In 1885 the Imperial Parliament established the Federal Council of Australasia. In section 15 of the constituting Act the Council was granted "legislative authority with respect to" certain listed heads of power. Among these was: "(c) Fisheries in Australasian waters beyond territorial limits". This, then, is the first claim to control the activities of pearl fishers beyond territorial limits. It may be noted, as this point, that there is no restriction, in the words of the power itself, of its exercise in respect to British ships only. However, section 20 of The Federal Council of Australasia Act, 1885, is as follows:

20. All Acts of the Council, on being assented to in manner hereinbefore provided, shall have the force of law in all Her Majesty's possessions in Australasia in respect to which this Act is in operation, or in the several colonies to which they shall extend, as the case may be, and on board all British ships, other than Her Majesty's ships of war, whose last port of clearance or port of destination is in any such possession or colony.

It may be seen that this provision relates to two different objects of legal authority. It deals with two distinct matters: Firstly, the enforcement of the laws of the Council in all the courts throughout Her Majesty's possessions in Australasia; and secondly, it provides that these laws shall also be operative "on board" such British ships as fall within the specified classes. Does this provision restrict the laws of the Council which may concern ships, British or foreign, to such ships as are described in the section? That is, is the section to be read as restrictive on the operation of laws made under section 15? It is submitted that this latter part of section 20 should be read in the light of the Merchant Shipping Act 1854 as amended, together with section 2 of the Colonial Laws Validity Act, 1865. As Isaacs J. said in the Union Steam Ship Co. of New Zealand Ltd. v The Commonwealth: "The Merchant Shipping Acts . . . treat merchant shipping as an Imperial subject. They indicate or endeavour to provide on a national basis for all contingencies of British mercantile navigation throughout the Empire, partly by direct enactment and partly by optional local enactment imperially sanctioned. . . . But the Acts in one way or another cover the whole subject." Although these words related in particular to the Merchant Shipping Acts, 1894 to 1906, and especially sections 711, 735 and 736, they were equally true of the Merchant Shipping Act 1845 as amended and the Merchant Shipping (Colonial) Act, 1869, sec. 4 of which was as follows:

Coasting Trade.

4. After the commencement of this Act the legislature of a British possession, by any Act or Ordinance, from time to time, may regulate the coasting trade of that British possession, subject in every case to the following conditions:

(i) The Act or Ordinance shall contain a suspending clause, providing that such Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in

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11 By the Federal Council of Australasia Act, 1885, 48 & 49 Vict., c. 60.
12 17 & 18 Vict., c. 104.
13 28 & 29 Vict., c. 63.
14 36 C.L.R., 130 at pp. 142-143.
15 57 & 58 Vict., c. 60, as amended.
16 Loc. cit.
17 Loc. cit.
which it has been passed.

(ii) The Act or Ordinance shall treat all British ships (including the ships of any British possession) in exactly the same manner as ships of the British possession in which it is made.

(iii) Where by treaty made before the passing of this Act Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.

Under these Acts and the Colonial Laws Validity Act any enactment of a legislature of one of “Her Majesty’s Australasian possessions” with respect to a British ship would have been void for repugnancy except in the following circumstances:

Upon its entry into the territorial waters, that is, within the three-mile limit of any colony, say Western Australia, it still remained subject to British Merchant Shipping Acts, but in addition thereto it became subject to the local laws of Western Australia, civil and criminal, including local navigation and shipping regulations, so far as those laws and regulations were not contrary to British Merchant Shipping Acts. On leaving the ports of Western Australia and passing beyond the three-mile limit, the British ship ceased to be subject to West Australian laws, and became once more subject only to Imperial laws. Upon the same ship entering the territorial waters of South Australia it, in like manner, came under the local laws of South Australia, civil and criminal, including local navigation and shipping regulations, so far as those laws and regulations were not repugnant to the Merchant Shipping Acts. On clearing the port of Adelaide and resuming its voyage on the high seas, the British ship again came and continued solely under British laws until it reached the Victorian waters, where it once more came under local laws as in the cases of the other colonies mentioned; and so on from one Australian port to another.18

The object of section 20 becomes clear. It was to permit the Council to make uniform laws governing British ships on the high seas “whose last port of clearance or port of destination” was in Australasia. In this relation the section is permissive. It does not restrict the law-making powers of the Council to only such vessels as come within the categories of section 20. It permits legislation which would otherwise be void for repugnancy, and operates as an implied repeal pro tanto of the Colonial Law Validity Act19 and the Merchant Shipping Acts.20 Nor was there any restriction on the law-making powers of the Council with respect to foreign ships—insofar as the third condition in section 4 of the 1869 Act21 operated.

In further support of this argument it is submitted that the words “beyond territorial limits” in The Federal Council of Australasia Act 1885,22 section 15 (c), become at the best otiose if they are read down to apply only to British ships. When read with section 20 of that Act and section 4 of the Merchant Shipping (Colonial) Act, 1869,23 the words “Fisheries in Australasian waters” would, it is submitted, be a sufficient grant of power to the Council to enact legislation controlling British ships merely. Accordingly, to give the words “beyond territorial limits” their full meaning and effect as would be consistent with the other

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18 Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), 360.
19 Loc. cit.
20 Loc. cit.
21 Vide supra p.
22 Loc. cit.
23 Loc. cit.
provisions of the Act (and this, it is submitted, is a cardinal rule for interpreting any statute), it becomes necessary to assert that this power was claimed internationally and against foreign vessels. And as early as 1911 claims to an exclusive fishery were made. In that year three Dutch schooners were arrested by H.M.A.S. *Cayunda* in the vicinity of Scott's Reef and beyond the marginal sea. In ensuing years Dutch schooners and Malay proas were arrested when found pearling both within and without the three-mile limit or gathering beche-de-mer from rocks and reefs many miles out to sea and far beyond the territorial waters of Australia.

**EVIDENCE OF ADMINISTRATION**

(1) **WESTERN AUSTRALIA**

Pearl fishing was apparently first undertaken in Australian waters when in 1850 three tons of mother-of-pearl were fished in Shark Bay by the *Pelsart*. Later in 1850 Captain F. Helpman, commanding the Colonial schooner *Champion*, was sent to investigate the resources of Shark Bay. An abundance of pearl shell was reported. While awaiting the explorer A. C. Gregory in 1861 at Nickol Bay the crew of the *Dolphin* took several tons of shell from the waters of that bay. In 1866 a north-west settler named Tays started gathering shell along the coast to the eastwards of Condon. Hereafter the industry rapidly expanded and pearling stations opened up in all of the principal bays and creeks of the north-west coast. Fleets of boats took to sea exploiting and exploring the waters and pearl banks opposite their stations, and all the time extending their range of operations. Circa 1866, then, the object of administration and other acts of sovereignty in this context first came into existence. As at this earliest stage pearling was carried on by collecting shells exposed at low tide, by wading, and by naked diving from small boats. Questions involving the regulation of activities beyond territorial waters were not immediately apparent.

In 1873, the earliest legislation in Western Australia was enacted. This, however, merely regulated the employment of aboriginal labour, and was aimed at checking abuses of natives, which had, according to contemporary reports, become scandalous. After this date, a pearling inspector was appointed, who exercised his jurisdiction both within and without the marginal belt from aboard a vessel chartered for the purpose. These facts, from the standpoint of international law, may so far be deemed inconclusive.

In 1886, a system of licensing vessels engaged in the industry was introduced, together with an export duty on pearl shell. In the meantime, pearling vessels from Singapore, Port Darwin and Sydney, using diving dresses, had commenced exploiting the waters off the north-west coast, both within and without territorial limits. From the representatives of the owners of these vessels, a petition was forwarded to the Colonial Secretary in London protesting against the levying of customs duties on the stores carried on their vessels, and of export duties on their pearl shell. With respect to this petition, the opinion of the law officers of the Crown was that vessels fishing entirely within the three-mile limit, and vessels fishing both within and without territorial waters were within the competence of Colonial legislation; but that vessels fishing entirely beyond

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24 Brisbane Courier, 17th October, 1930.
25 Brisbane Courier, 17th October, 1930.
28 A. C. and F. J. Gregory, *Journals of Australian Explorers*, p. 96. He stated: “... the aggregate value of which, I am told, is between £500 and £600, beside pearls.”
31 37 Vict., c. 11.
32 Pearl Shell Act, 30 Vict., c. 7.
the marginal belt were outside the competence of such legislation, unless their owner had taken out a pearling permit. Pursuant to this advice, Instructions for the Guidance of the Inspector of Pearl Shell Fisheries and all other Officers Concerned were issued, whereby the inspector was directed not to deal with vessels pearling without permits and entirely beyond the three-mile limit. In order to prevent an unregulated situation arising on the pearling grounds beyond territorial limits, both on the Western Australian and Queensland coasts, the Australasian Federal Council, acting under section 15 (c) of The Federal Council of Australasia Act, 1885, enacted in 1888 The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of 1888 and in the following year enacted The Western Australian Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of 1889. The Act with respect to the Western Australian fishery extended the licensing requirements of the colonial Western Australian Pearl Shell Fishing Acts to vessels pearling outside territorial waters, but within “Australasian waters adjacent to Western Australia”. These waters were defined in the Act as:

THE SCHEDULE.

A parallelogram of which the north-western corner is in longitude 112° 52' east, and latitude 13° 30' south, of which the north-eastern corner is in longitude 129° east, and latitude 13° 30' south, of which the south-western corner is in longitude 112° 52' east, and latitude 35° 8' south, and of which the south-eastern corner is in longitude 129° east, and latitude 35° 8' south.

By Section 2, the operation of the Act was limited to “British ships and boats attached to British ships”. The question now arises as to whether this legislation, being limited as above, is an act of sovereignty in international law.

(2) QUEENSLAND

The history of Queensland’s regulation of her sedentary fisheries follows a somewhat similar pattern to that of the north-western fisheries, although arising out of very different beginnings. Owing to atrocities committed against shipwrecked passengers and crews of vessels travelling through Torres Strait by the cannibals who inhabited the islands dotted throughout that Strait, a harbour of refuge was established in 1861 at Somerset on the mainland opposite Albany Island. In the ensuing decade the industry became established so that in 1871 the value of pearl shell taken amounted to £25,000. Pearling at this date was done by “swimmers”, diving dresses not being introduced until 1874. The first legal regulation of the industry was not by the Queensland legislature, but by the application, to ships engaged in pearling (as they were British ships), of the Imperial Pacific Islanders’ Protection Act, 1872 (commonly known as the “Kidnapping Act”). In 1877 the base of operations of the pearling fleets was shifted from Somerset to Thursday Island, which has ever since been the headquarters of the Torres Strait fisheries. In 1881, the Queensland Government

33 Papers of the Legislative Council of Western Australia, 1888, Second Session, No. 26.
34 Loc. cit.
35 No. 1 of 1888.
36 No. 1 of 1889.
37 Sections 5, 6 and 7.
37a The historical background of this definition is the subject of an annexed note infra p. 95.
39 Stanley Wilson, P.M., op. cit., 110.
40 Stanley Wilson, P.M., op. cit., 111.
41 35 & 36 Vict., c. 19, and vide also 38 & 39 Vict., 3, 51.
introduced a system of licensing pearling vessels and regulated the employment of Torres Strait Islands crews and of other coloured personnel.\textsuperscript{43} In 1891,\textsuperscript{44} legislation for the conservation of pearl shell was introduced. In the case of Queensland, also, the cramping effect of the inability of the Colony to legislate with respect to pearl fisheries carried on beyond the three-mile limit led to the intervention of the Federal Council of Australasia which, in 1888, enacted \textit{The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act, 1888}.\textsuperscript{45} By this Act, the operation of Queensland legislation was extended to “Australasian waters adjacent to Queensland”, which were defined as:

THE SCHEDULE.

All waters included within a line drawn from Sandy Cape northward to the south-eastern limit of the Great Barrier Reefs, thence following the line of the Great Barrier Reefs to their north-eastern extremity near the latitude of nine and a half degrees south, thence in a north-westerly direction, embracing East Anchor and Bramble Cays, thence from Bramble Cays in a line west by south (south seventy-nine degrees west) true, embracing Warrior Reef, Saibai and Tuan Islands, thence diverging in a north-westerly direction so as to embrace the group known as the Talbot Islands, thence to and embracing the Deliverance Islands, and onwards in a west by south direction (true) to the meridian of one hundred and thirty-eight degrees of east longitude, and thence by that meridian southerly to the shore of Queensland.

As in the 1889 Act with respect to Western Australia, section 19 of this Act limits its operation to “British ships and boats attached to British ships”\textsuperscript{46}

\textbf{EVALUATION}

It is now necessary to discuss the operation of these two extra-territorial Acts and of the Imperial Act by virtue of which they were made, their characterisation, the powers which they exemplified and their function in the sphere of international law. And an enquiry is required as to whether the insertion of the words limiting the operation of these Acts to “British ships and boats attached to British ships” renders them domestic solely and without any effect in the sphere of international law.

With reference to section 19 of the Act, in respect of the Queensland fishery L. C. Green\textsuperscript{47} writes: “...but by section 19 this Act applies only to British ships and boats attached to British ships. The limiting character of this section is, however, rendered nugatory by section 2 of the Queensland Pearl Shell

\textsuperscript{43} 45 Vict., c. 2.
\textsuperscript{44} 55 Vict., c. 29.
\textsuperscript{45} loc. cit.
\textsuperscript{46} It is of interest to note that the “Province of South Australia” also regulated the sedentary fisheries of the Northern Territory. In 1885 the Customs Department at Port Darwin appointed a landing waiter at Bowen Straits to collect import duties from the Malay proas which fished for trepang (beche-de-mer), tortoise and pearl shell in the waters off the coasts of the Northern Territory. From 1885 to 1890 customs revenue of approximately £500 per annum was received from this source—\textit{vide} South Australian Parliamentary Papers 1885 No. 53 [Report of J. Langdon Parsons (Government Resident) dated 1st January 1885], and \textit{The Province of South Australia} (written for the South Australian Government) by J. D. Woods, J.P., 1894: Published by South Australian Government Printer. It may be noted that no legislation was passed by the Australasian Federal Council with respect to this fishery. In 1891 the licensing system was introduced by South Australia with respect to the Port Darwin Fishery (under s. 84 of The Northern Territory Crown Lands Act (S.A.), 53 & 54 Vict., No. 501). This system has been continued by the Federal Government as the Northern Territory is now a Federal territory (\textit{vide} the Pearling Ordinance, No. 19 of 1930).
\textsuperscript{47} L. C. Green, “The Continental Shelf” (1951) \textit{Current Legal Problems}, p. 54 at p. 67.
Fisheries Act, 1898, which provides that no further licences shall be granted other than to British subjects, born or naturalized, denizens of Queensland, and bodies corporate established under and subject to British law."

It is submitted that this reasoning fails to take into account the proposition which was accepted throughout the 19th century that the legislatures of colonies, being subordinate, had no power to enact extra-territorial legislation other than such as may have been specifically granted to them by the Imperial Parliament (see Ray v McMakin; Brisbane Oyster Fishery Co. v Emerson; Regina v Plowman; Regina v Call, ex parte Murphy; and McLeod v Attorney-General for New South Wales). In this connection it is of interest to advert to the opinion of the Queen's Advocate, which, although of course not authoritative, is instructive. In August 1854 he advised that foreigners could only be forbidden from engaging in catching seals or whales within three marine miles from the Falkland Islands. Again, in February 1855, the law officers advised that the legislation of British Guiana was operative only within the territory and territorial waters and possibly beyond those limits to persons domiciled in the Colony. By virtue of this proposition, section 2 of the Queensland Pearl Shell Fisheries Act, 1898, could not operate, proprio vigore, against non-licensed foreign pearl fishing vessels operating beyond territorial waters. Furthermore, the extension of Queensland legislation into extra-territorial waters by the 1888 Act of the Federal Council of Australasia would still have been limited in the same way as the extending Act was itself limited—by section 19, that is, limited to British ships and boats attached to British ships.

It may be seen that the colony of Western Australia, in the Instructions for the Guidance of the Inspector of Pearl Shell Fisheries and all other Officers Concerned, resigned, as was proper in view of its legal status as conceived at that time, any claim to control coastal sedentary fisheries situated beyond the territorial limits. But what the colonies of Queensland and Western Australia were incapable of doing was within the competency of the Imperial Parliament, or such a body as the Australasian Federal Council to which had been specifically

48 63 Vict., No. 3.
49 1 V.L.R., 274.
50 Knox (N.S.W.) 1877, 80; 1 Supreme Court Reports (N.S.W.), 80.
51 (1894) 25 O.R., 656. It is of interest to note that in this case the Queen's Bench of Ontario overruled or dissented from its earlier decision in Regina v Brierly, (1887) 14 O.R., 525, preferring to follow McLeod v Attorney-General for New South Wales [(1891) 1.A.C. 455].
52 7 V.L.R. 113 at 123 quaere this decision.
53 (1891) A.C., 455.
54 1 Kieth, Responsible Government in the Dominions (1st edn.) 373.
55 Kieth, op. cit., 372.
56 63 Vict., No. 3.
57 In the same article the learned author, reading Manchester v The Commonwealth of Massachusetts, (1890) 130 U.S. 240, and Skiriotes v Florida, (1941) 313 U.S., 69, together, infers that "... the Florida legislation could have been sustained even if Skiriotes had been a foreigner." In the Manchester Case the United States Supreme Court held that legislation of Massachusetts restricting certain fisheries (menhaden) applied to a citizen of Rhode Island fishing within three miles of the Massachusetts coast. In Skiriotes' Case the same Court held that Florida legislation restricting the taking of sponges was binding on a Florida citizen outside the three-mile limit. These cases are only authorities for the relationship of a State of the United States with a foreigner within its borders and with a citizen of that State outside its borders, and by no means can be extended to cover the relationship of such a State with a foreigner outside its borders. However, the statement quoted above could be true if it were demonstrated that Florida had acquired property in a sovereignty over the sponge fisheries off its coasts and beyond the three-mile limit by occupation. However, this argument was not employed.
delegated this power of extra-territorial legislation.

Section 15 (c) of the Federal Council of Australasia Act, 1885 when section 20 is placed in the setting of the Merchant Shipping Acts, ceases to appear as a grant of power with a limitation annexed to it by section 20. The power under which the Pearl Shell and Beche-de-mer (Extra-territorial) Acts of 1888 and 1889 were enacted was unlimited as to the nationality of vessels which could be affected by its operation. The Acts themselves are to be characterised, therefore, as being with respect to the pearl shell and beche-de-mer fisheries in the submarine areas defined in their schedules. The limitation of the operation of these Acts to "British ships and boats attached to British ships" was not required by the constitutional authority of the Council nor by its authority in international law. It was required only by Imperial policy. The Imperial Parliament and Government at that time advocated doctrines permitting the greatest freedom in the exploitation of the wealth of the seas. In the perennial conflict of interests throughout the world between overseas fishermen and coastal fishermen the United Kingdom was the champion of the former. Imperial policy could not, on behalf of an obscure Antipodean fishery, jettison arguments defending the activities of British subjects in the Behring Sea, and the waters off Norway and Iceland. This limitation now appears as incidental to the exercise of the power inherent in section 15 (c). Thus the legislative objects were the pearlimg and beche-de-mer grounds, not British ships. Accordingly the claim to occupy, to take possession of and to administer the submarine areas above defined was good in international law.

It is of interest to note that in reply dated 6th December, 1928, to the Questionnaire of the Preparatory Committee for the Conference for the Codification of International Law the British Government observed, inter alia, that while it disclaimed any jurisdiction over the high seas outside the belt of territorial waters—

There are certain banks outside the three-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or beche-de-mer on the sea bottom are practised, and which have by long usage come to be regarded as the subject of occupation and property. The foregoing is not intended to exclude claims to the sedentary fisheries on these banks. The question is understood to relate only to claims to exercise rights over the waters of the high seas.

Similarly, the Commonwealth of Australia, while making no claim to exercise rights over the high seas outside the territorial belt, considered—

sedentary fisheries for pearl oysters and beche-de-mer, etc., on certain portions of the sea bottom outside the three-mile limit which, by long usage, have come to be regarded as the subject of occupation and property.

Although in neither the reply by Great Britain nor in that of Australia does there appear any reservation of specific fisheries or banks, a claim was here made that a property right in beds of sedentary fisheries may exist. The general right, the category of international law, was asserted. That property rights in such fisheries may be acquired by "occupation", through development and "long usage" of customary international law. On this context, it is submitted, the words "long usage" in these two replies related to the development of the relevant category of customary international law, which may be said to have arisen "by long usage". "Long usage" is seen therefore not a necessary element of the acquisition of property rights in a sedentary fishery but in the growth of this branch of customary international law. Occupation, even recent

58 Loc. cit.
59 Loc. cit.
60 Loc. cit.
occupation, is all that is required. That these principles do not derogate from
the principle of the freedom of the high seas has been conceded in international
law, at least since the time of Vattel; and in this context they are claimed by
the international law subject in respect of, inter alia, Australian fisheries.

But not only is it necessary that the claim should be made by the subject
of the right in question; it is further necessary that the occupation should be
recognised by other States. Once the right in sedentary fisheries is generally
ascribed to a State along whose coasts these resources exist, that State may
specify the actual banks and fisheries by its municipal law. Vide, e.g., the
Ceylon Pearl Fisheries Ordinance of 12th February, 1925, which forbade
pearling on "any pearl bank" without a licence (section 4) and delineated a
pearl bank as an area between the three and five fathom lines on the one hand
and the hundred fathom line on the other (the hundred fathom line runs at a
distance from four to sixteen miles from the mainland and islands of Ceylon).
If, however, any municipal laws happen to be extravagant in over-reaching a
reasonable claim, the proper mode of curtailing such a claim is by diplomatic
protest with respect to any specific areas. In the light of the above points it is
of interest to note that by 1923 the Australian rights in the north-western
fisheries had become sufficiently crystallised for the American Consul-General
in London to inform the Department of State as follows:

... I continued my investigation of this matter and I now find that not
only is a very extensive maritime jurisdiction claimed along the coast of
Ceylon and Madras but this is also the case in other parts of the world
where pearl fishing is undertaken. I have ascertained particularly that along
the coast of Western Australia jurisdiction is claimed and exercised at great
distances from the coast, apparently as much as fifty miles. It appears to
be the fact, moreover, in relation to Western Australia that non-Australian
pearl fishers objected to this extensive jurisdiction, whereupon a long
controversy ensued and in the result the Colonial Office in London upheld
the position of the Government of Western Australia.

"While definite information is not at present available respecting every
British possession, I believe it to be the case that, throughout the world,
wherever there are valuable pearl fisheries, the government concerned
claims jurisdiction over the marine areas where such fisheries can be carried
no, not only to the distance out to sea where actual operations are under-
taken but to wide reaches of the open sea beyond, the object being to deal
effectively with poachers and to prevent them from gaining access to the
pearl beds themselves."

In conclusion, the following points appear from the foregoing pages:
(1) The legislatures of the colonies of Western Australia and Queensland, at
that time being considered subordinate, had no power to legislate beyond
their territorial waters;
(2) The Imperial Parliament delegated to the Australasian Federal Council, in
section 15, paragraph (c) of the constituting Act, its plenary power of
legislating extra-territoriality with respect to fisheries.
(3) The power of the Commonwealth of Australia to legislate in respect of
Fisheries in Australian waters beyond territorial limits" [Constitution,
section 51, pt. (x)] is not a power granted to the Commonwealth by the
States, but is a delegation of the power of the Imperial Parliament (vide
Croft v Dunphy) and is also independent of the Statute of Westminster.

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63 2 Hackworth, Digest of International Law, 677-678, U.S. Department of
State file 811, 114/1884.
64 (1933) A.C., 156, and vide Evatt J. in The Trustees Executors and Agency
Company Limited and Another v The Federal Commissioner of Taxation, 49
C.L.R., 220 at 230-240, and in Crowe and Ors. v The Commonwealth and Anor.,
54 C.L.R., 69 at 93.
65 22 & 23 Geo. V, c. 4.
The extra-territorial legislation in Australasian waters of the Imperial Parliament and the Australasian Federal Council, and similar legislation by the Commonwealth of Australia, together with acts policing the relevant statutes, ordinances and regulations, have constituted occupation of, and vested in the Commonwealth of Australia the rights of property in sovereignty over the Western Australian and Queensland sedentary fisheries, so far as these are conducted beyond the marginal waters. Within the three-mile limit such fisheries remain in the said States. But these States are represented by, and are included within, the Commonwealth in international law, and in relations with foreign countries.

It is most strongly advocated that any Australian Government, in entering into international negotiations concerning the valuable sedentary fisheries in our northern waters, should take up its stand with the attitude that it is the established property-owner of these fisheries and not a suppliant seeking, from nations with an adverse interest, recognition of rights which, for the past thirty years and more, have received firm international recognition.

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ANNEXED NOTE ON THE SCHEDULE IN THE WEST AUSTRALIA FISHERIES ACT
(Referred to on p. 90)

The historical background to the definition of the area in the Schedule may give rise to the suggestion that the doctrine of "occupation" does not exhaust the legal conceptions whereby these waters may be considered as Australian waters. An alternative category under which these waters may be subsumed is the legal concept of "historic waters" as enunciated by the International Court of Justice in The Fisheries Case (Judgment of December 18, 1951: I.C.J. Reports 1951, p. 116, at pp. 130-131). On such an alternative view the documents listed below would show a systematic extension of the boundaries of Queensland to all the islands included within the Schedule to the 1888 Act of the Federal Council (on this point see Fisheries Case supra at 133 ff. for the test of "whether certain sea areas... are sufficiently closely linked to the land domain to be subject to the regime of internal waters") whereby all the waters between the islands, reefs, and rocks included within the boundaries of Queensland should be regarded as placed under her jurisdiction and sovereignty: 1859 Letters Patent under N.S.W. Constitution Act, 1885, erecting new colony of Queensland and giving Governor jurisdiction over narrowly interpreted "adjacent islands"; 1862 (13th March), Letters Patent annexing the islands in the Wellesley Group, in the Gulf of Carpentaria; 1863 (22nd August), Commission under the Great Seal to the Governor of N.S.W. authorising him to lease certain islands for the purpose of working guano deposits (under this authority the Governor of N.S.W. granted, by a seven-year lease dated 22nd August, 1865, Raine Island lying outside the Barrier Reef about 60 miles from the Queensland coast); 1872 (5th May), Letters Patent appointing the Governor of Queensland to be Governor of all the islands within 60 miles of the colony and authorised the annexation of those islands. (Necessary Resolutions were passed in August, 1872, and on 24th August the Proclamation and a Deed Poll transferring to the colony the islands within 60 miles of the coast were gazetted in the Queensland Government Gazette of 24th August, 1872, pp. 1325-1326); 1878 (11th October), Letters Patent authorising annexation of the islands in Torres Strait by Proclamation in the event of the Queensland Legislature passing an Act providing for their annexation by Proclamation. In June 1879 the Legislature passed an Act authorising the annexation of the islands in Torres Strait outside the 60-mile limit already annexed, but also all the islands of the Barrier Reef which thereby became part of Queensland. (The Queensland Coast Islands Act, 1879, 43 Vict. No. 1.) F. W. S. Cumbrac-Stewart's conclusion in Boundaries of Queensland (Brisbane, 1930) that "Queensland's alleged rights to the open sea inside the Barrier Reef seem to be ill-founded" does not take account of cases and materials discussed in this comment.