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INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

THE MINQUIERS AND ECREHOS CASE

(UNITED KINGDOM/FRANCE)

VOLUME II

Oral arguments.—Documents.—Correspondence.—Index

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DES MINQUIERS ET DES ÉCRÉHOUS

(ROYAUME-UNI/FRANCE)

VOLUME II

Procédure orale. — Documents. — Correspondance. — Index

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(UNITED KINGDOM / FRANCE)

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(ROYAUME-UNI / FRANCE)

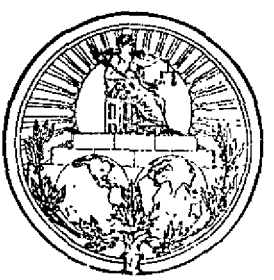
INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

THE MINQUIERS AND ECREHOS CASE

(UNITED KINGDOM / FRANCE)

JUDGMENT OF NOVEMBER 17th, 1953



MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DES MINQUIERS ET DES ÉCRÉHOUS

(ROYAUME-UNI / FRANCE)

ARRÊT DU 17 NOVEMBRE 1953

PRINTED IN THE NETHERLANDS

PART II

ORAL ARGUMENTS

PUBLIC SITTINGS

held at the Peace Palace, The Hague,
from September 17th to October 8th, and November 17th, 1953,
the Vice-President, M. Guerrero, presiding

DEUXIÈME PARTIE

PROCÉDURE ORALE

SÉANCES PUBLIQUES

tenues au Palais de la Paix, La Haye,
du 17 septembre au 8 octobre et le 17 novembre 1953,
sous la présidence de M. Guerrero, Vice-Président

MINUTES OF THE SITTINGS HELD FROM SEPTEMBER 17th TO OCTOBER 8th, AND NOVEMBER 17th, 1953

YEAR 1953

NINTH PUBLIC SITTING (17 IX 53, 10.30 *a.m.*)

Present: Vice-President GUERRERO, *Acting President; President* Sir ARNOLD MCNAIR; *Judges* ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, LEVI CARNEIRO, ARMAND-UGON; *Deputy-Registrar* GARNIER-COIGNET.

Also present:

For the French Republic:

Professor André GROS, Legal Adviser to the Ministry of Foreign Affairs,

as Agent;

assisted by:

M. BURNAY, *Conseiller d'État;*

Admiral DURAND DE SAINT-FRONT;

M. Prosper WEIL, Professor at the Law Faculty of Grenoble;

M. Pierre DUPARC, Assistant Keeper of Archives at the Ministry of Foreign Affairs,

as Expert Advisers;

For the United Kingdom of Great Britain and Northern Ireland:

Mr. R. S. B. BEST, Third Legal Adviser to the Foreign Office,

as Agent;

assisted by:

Sir Lionel HEALD, Q.C., M.P., Attorney-General;

Mr. C. S. HARRISON, O.B.E., Attorney-General for the Island of Jersey;

Mr. G. G. FITZMAURICE, C.M.G., Legal Adviser, Foreign Office;

Professor E. C. S. WADE, Downing Professor of the Laws of England in the University of Cambridge;

Mr. D. H. N. JOHNSON, Assistant Legal Adviser, Foreign Office,

as Counsel;

and by:

Mr. J. D. LAMBERT, Research Department, Foreign Office,

as Expert Adviser.

PROCÈS-VERBAUX DES SÉANCES TENUES DU 17 SEPTEMBRE AU 8 OCTOBRE ET LE 17 NOVEMBRE 1953

ANNÉE 1953

NEUVIÈME SÉANCE PUBLIQUE (17 IX 53, 10 *h.* 30)

Présents : M. GUERRERO, *Vice-Président faisant fonction de Président ;* Sir ARNOLD MCNAIR, *Président ;* MM. ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, LEVI CARNEIRO, ARMAND-UGON, *juges ;* M. GARNIER-COIGNET, *Greffier adjoint.*

Sont également présents ;

Pour la République française :

M. le professeur André GROS, jurisconsulte du ministère des Affaires étrangères,

en qualité d'agent ;

assisté par :

M. BURNAY, conseiller d'État ;

Amiral DURAND DE SAINT-FRONT ;

M. Prosper WEIL, professeur à la Faculté de droit de Grenoble ;

M. Pierre DUPARC, conservateur adjoint des archives du ministère des Affaires étrangères,

comme experts ;

Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :

M. R. S. B. BEST, troisième jurisconsulte au Foreign Office,

en qualité d'agent ;

assisté par :

Sir Lionel HEALD, Q. C., M. P., Attorney-General ;

M. C. S. HARRISON, O. B. E., Attorney General pour l'île de Jersey ;

M. G. G. FITZMAURICE, C. M. G., jurisconsulte au Foreign Office ;

M. le professeur E. C. S. WADE, titulaire de la chaire Downing sur les lois de l'Angleterre à l'Université de Cambridge ;

M. D. H. N. JOHNSON, jurisconsulte adjoint du Foreign Office,

comme conseils ;

et par :

M. J. D. LAMBERT, Service des recherches du Foreign Office,

comme conseiller expert.

The VICE-PRESIDENT, Acting President in the case, opened the hearing and stated that the Court was assembled to deal with the dispute between the French Republic and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the islets and rocks of the Minquiers and Ecrehos. Proceedings in this case were instituted by a Special Agreement dated December 29th, 1950, which was notified to the Court on December 6th, 1951. The written pleadings had been filed within the time-limits fixed by the Court and the case was now ready to be heard.

Two Members of the Court were not sitting to-day: Judges Zoričić and Sir Benegal Rau, who were prevented by the state of their health from taking part in the present case. Furthermore, M. Golunsky had resigned from the Court for reasons of health; this resignation was notified to the Secretary-General of the United Nations on July 27th, 1953.

The Vice-President, Acting President, noted the presence in Court of the Agents of both Parties with their Counsel and Experts, and stated that pursuant to the agreement between the Parties, in accordance with Article 51 of the Rules of Court, the Court would hear in the first place the Agent of the Government of the United Kingdom. He requested speakers to interrupt their speeches from time to time at convenient intervals, for example every ten minutes, in order to allow the oral translation to be made.

The Vice-President, Acting President, called upon the Agent of the Government of the United Kingdom.

Mr. R. S. B. BEST requested the Court to allow the Attorney-General to open his Government's case.

The VICE-PRESIDENT, Acting President, called upon Sir Lionel HEALD, who began the statement reproduced in the annex [1].

(The Court adjourned from 1 p.m. to 4 p.m.)

The Attorney-General, Sir Lionel HEALD, continued the statement reproduced in the annex [2].

(The Court rose at 6 p.m.)

(Signed) J. G. GUERRERO,
Vice-President.

(Signed) GARNIER-COIGNET,
Deputy-Registrar.

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[1] See pp. 19-33.
[2] " " 33-45.

Le VICE-PRÉSIDENT faisant fonction de Président, ouvrant l'audience, déclare que la Cour se réunit pour examiner le différend existant entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord concernant la souveraineté sur les îlots et rochers des Minquiers et des Écréhous. Cette affaire a été introduite par un compromis daté du 29 décembre 1950 et notifié à la Cour le 6 décembre 1951. Les pièces de la procédure écrite ont été déposées dans les délais impartis par la Cour et l'affaire est maintenant en état.

Deux membres de la Cour n'ont pas pris séance aujourd'hui : il s'agit de M. Zoričić et sir Benegal Rau, qui sont empêchés par leur état de santé de prendre part à la présente affaire. D'autre part, M. Golunsky a donné sa démission de membre de la Cour, pour raisons de santé ; cette démission a été notifiée au Secrétaire général des Nations Unies le 27 juillet 1953.

Le Vice-Président faisant fonction de Président constate la présence devant la Cour des agents, conseils et experts des deux Gouvernements et déclare que, suivant l'accord intervenu entre les Parties conformément à l'article 51 du Règlement, la Cour entendra en premier lieu l'agent du Gouvernement du Royaume-Uni. Il prie les orateurs d'interrompre de temps à autre leurs exposés, aux intervalles qui leur conviendront, par exemple toutes les dix minutes, pour les traductions.

Le Vice-Président faisant fonction de Président donne la parole à M. l'agent du Royaume-Uni.

M. R. S. B. BEST prie la Cour de permettre à l'Attorney-General de plaider le premier.

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à sir Lionel HEALD, qui prononce l'exposé reproduit en annexe [1].

(L'audience est suspendue de 13 heure à 16 heures.)

Sir Lionel HEALD, Attorney-General, continue la plaidoirie reproduite en annexe [2].

(L'audience est levée à 18 heures.)

Le Vice-Président,
(Signé) J. G. GUERRERO.

Le Greffier adjoint,
(Signé) GARNIER-COIGNET.

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[1] Voir pp. 19-33.
[2] » » 33-45.

TENTH PUBLIC SITTING (18 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon the Attorney-General, Counsel for the United Kingdom Government.

Sir Lionel HEALD concluded the statement reproduced in the annex [1].

(The Court adjourned from 12.50 p.m. to 4 p.m.)

The VICE-PRESIDENT, Acting President, called upon Mr. G. G. Fitzmaurice.

Mr. FITZMAURICE began the statement reproduced in the annex [2].

(The Court rose at 6.05 p.m.)

[Signatures.]

ELEVENTH PUBLIC SITTING (19 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Mr. G. G. Fitzmaurice to continue his speech on behalf of the United Kingdom Government.

Mr. FITZMAURICE continued the statement reproduced in the annex [3].

(The Court rose at 12.55 p.m.)

[Signatures.]

TWELFTH PUBLIC SITTING (21 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Mr. G. G. Fitzmaurice, Counsel for the United Kingdom Government, to continue his speech.

Mr. FITZMAURICE concluded the statement reproduced in the annex [4].

The VICE-PRESIDENT, Acting President, called upon Professor E. C. S. Wade.

Professor WADE began the statement reproduced in the annex [5].

(The Court adjourned from 1 p.m. to 4 p.m.)

Professor WADE continued the statement reproduced in the annex [6].

(The Court rose at 6.35 p.m.)

[Signatures.]

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[1] See pp. 46-60.
[2] „ „ 61-72.
[3] „ „ 72-85
[4] „ „ 85-95.
[5] „ „ 95-101.
[6] „ „ 101-114.

DIXIÈME SÉANCE PUBLIQUE (18 IX 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à l'Attorney-General, conseil du Gouvernement du Royaume-Uni.

Sir Lionel HEALD termine l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h. 50, est reprise à 16 heures.)

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à M. G. G. Fitzmaurice.

M. FITZMAURICE commence l'exposé reproduit en annexe [2].

(L'audience est levée à 18 h. 05.)

[Signatures.]

ONZIÈME SÉANCE PUBLIQUE (19 IX 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite M. G. G. Fitzmaurice à continuer sa plaidoirie au nom du Gouvernement du Royaume-Uni.

M. FITZMAURICE continue l'exposé reproduit en annexe [3].

(L'audience est levée à 12 h. 55.)

[Signatures.]

DOUZIÈME SÉANCE PUBLIQUE (21 XI 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite M. G. G. Fitzmaurice, conseil du Gouvernement du Royaume-Uni, à continuer sa plaidoirie.

M. FITZMAURICE termine l'exposé reproduit en annexe [4].

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au professeur E. C. S. Wade.

Le professeur WADE commence l'exposé reproduit en annexe [5].

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

Le professeur WADE continue l'exposé reproduit en annexe [6].

(L'audience est levée à 18 h. 35.)

[Signatures.]

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[1] Voir pp. 46-60.
[2] » » 61-72.
[3] » » 72-85.
[4] » » 85-95.
[5] » » 96-101.
[6] » » 101-114.

THIRTEENTH PUBLIC SITTING (22 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Professor E. C. S. Wade, Counsel for the United Kingdom Government.

Professor WADE continued the statement reproduced in the annex [1].

(The Court adjourned from 12.50 p.m. to 4 p.m.)

Professor WADE continued the statement reproduced in the annex [2].

(The Court rose at 6.15 p.m.)

[Signatures.]

FOURTEENTH PUBLIC SITTING (23 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Professor E. C. S. Wade, Counsel for the United Kingdom Government, to continue his speech.

Professor WADE concluded the statement reproduced in the annex [3].

The VICE-PRESIDENT, Acting President, called upon Mr. C. S. Harrison, Attorney-General for the Island of Jersey.

Mr. HARRISON began the statement reproduced in the annex [4].

(The Court adjourned from 1.10 p.m. to 4 p.m.)

Mr. HARRISON continued the statement reproduced in the annex [5].

(The Court rose at 6.30 p.m.)

[Signatures.]

FIFTEENTH PUBLIC SITTING (24 IX 53, 10 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Mr. C. S. Harrison, Attorney-General for the Island of Jersey, Counsel for the United Kingdom Government, to continue his speech.

Mr. C. S. HARRISON continued the statement reproduced in the annex [6].

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[1] See pp. 114-126.
[2] " " 126-139.
[3] " " 139-145.
[4] " " 146-153.
[5] " " 153-166.
[6] " " 167-184.

TREIZIÈME SÉANCE PUBLIQUE (22 IX 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au professeur E. C. S. Wade, conseil du Gouvernement du Royaume-Uni.

Le professeur WADE continue l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h. 50, est reprise à 16 heures.)

Le professeur WADE continue l'exposé reproduit en annexe [2].

(L'audience est levée à 18 h. 15.)

[Signatures.]

QUATORZIÈME SÉANCE PUBLIQUE (23 IX 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite le professeur E. C. S. Wade, conseil du Gouvernement du Royaume-Uni, à continuer sa plaidoirie.

Le professeur WADE termine l'exposé reproduit en annexe [3].

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à M. C. S. Harrison, Attorney-General pour l'île de Jersey.

M. HARRISON commence l'exposé reproduit en annexe [4].

(L'audience, suspendue à 13 h. 10, est reprise à 16 heures.)

M. HARRISON continue l'exposé reproduit en annexe [5].

(L'audience est levée à 18 h. 30.)

[Signatures.]

QUINZIÈME SÉANCE PUBLIQUE (24 IX 53, 10 *h.*)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite M. C. S. Harrison, Attorney-General pour l'île de Jersey, conseil du Gouvernement du Royaume-Uni, à continuer sa plaidoirie.

M. HARRISON continue l'exposé reproduit en annexe [6].

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[1] Voir pp. 114-126.
[2] » » 126-139.
[3] » » 139-145.
[4] » » 146-153.
[5] » » 153-166.
[6] » » 167-184.

(The Court adjourned from 1 p.m. to 4 p.m.)

Mr. C. S. HARRISON concluded the statement reproduced in the annex [1].

(The Court rose at 5 p.m.)

[Signatures.]

SIXTEENTH PUBLIC SITTING (28 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Professor André Gros, Agent of the French Government, to begin his speech on behalf of his Government.

Professor André GROS began the statement reproduced in the annex [2].

(The Court adjourned from 12.55 p.m. to 4 p.m.)

Professor André GROS continued the statement reproduced in the annex [3].

(The Court rose at 6.25 p.m.)

[Signatures.]

SEVENTEENTH PUBLIC SITTING (29 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon the Agent of the French Government to continue his speech on behalf of his Government.

M. André GROS, Agent of the French Government, continued the statement reproduced in the annex [4].

(The Court adjourned from 1.10 p.m. to 4 p.m.)

M. André GROS, Agent of the French Government, continued the statement reproduced in the annex [5].

(The Court rose at 6 p.m.)

[Signatures.]

EIGHTEENTH PUBLIC SITTING (30 IX 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon the Agent of the French Government to continue his speech on behalf of his Government.

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[1] See pp. 184-189.
[2] „ „ 190-204.
[3] „ „ 204-219.
[4] „ „ 220-236.
[5] „ „ 236-248.

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

M. HARRISON termine l'exposé reproduit en annexe [1].

(L'audience est levée à 17 heures.)

[Signatures.]

SEIZIÈME SÉANCE PUBLIQUE (28 IX 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite le professeur André Gros, agent du Gouvernement français, à commencer sa plaidoirie au nom de son Gouvernement.

Le professeur GROS commence la plaidoirie reproduite en annexe [2].

(L'audience, suspendue à 12 h. 55, est reprise à 16 heures.)

Le professeur GROS continue la plaidoirie reproduite en annexe [3].

(L'audience est levée à 18 h. 25.)

[Signatures.]

DIX-SEPTIÈME SÉANCE PUBLIQUE (29 IX 35, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite l'agent du Gouvernement français à continuer sa plaidoirie au nom de son Gouvernement.

M. André GROS, agent du Gouvernement français, continue la plaidoirie reproduite en annexe [4].

(L'audience, suspendue à 13 h. 10, est reprise à 16 heures.)

M. André GROS, agent du Gouvernement français, continue la plaidoirie reproduite en annexe [5].

(L'audience est levée à 18 heures.)

[Signatures.]

DIX-HUITIÈME SÉANCE PUBLIQUE (30 IX 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président invite l'agent du Gouvernement français à continuer sa plaidoirie au nom de son Gouvernement.

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[1] Voir pp. 184-189.
[2] » » 190-204.
[3] » » 204-219.
[4] » » 220-236.
[5] » » 236-248.

M. André GROS, Agent of the French Government, continued the statement reproduced in the annex [1].

(The Court adjourned from 1 p.m. to 4 p.m.)

M. André GROS, Agent of the French Government, continued and concluded the statement reproduced in the annex [2].

The VICE-PRESIDENT, Acting President, asked the Agent of the United Kingdom if he intends to reply and, if so, when he will be ready.

The AGENT OF THE UNITED KINGDOM declared that he would be ready to reply on Friday, October 2nd.

The VICE-PRESIDENT, Acting President, announced that the next hearing would take place on Friday morning, October 2nd, at 10.30.

(The Court rose at 6 p.m.)

[Signatures.]

NINETEENTH PUBLIC SITTING (2 X 53, 10.30 *a.m.*)

Present: [See sitting of September 17th, with the exception of Sir Arnold McNair, President.]

The VICE-PRESIDENT, Acting President, opened the hearing and stated that the President of the Court, Sir Arnold McNair, was slightly indisposed and unable to sit.

The Vice-President, Acting President, requested the Agents of the Parties at the end of the oral reply and rejoinder, either to confirm the Submissions set out in the written Pleadings or to read the final Submissions of their Government. In the latter case, he requested them to hand to the Registry a written text of their final Submissions.

The Vice-President, Acting President, called upon the Agent of the United Kingdom Government, Mr. R. S. B. Best.

Mr. R. S. B. BEST stated that the oral reply of his Government would be opened by the Attorney-General.

Sir Lionel HEALD made the speech reproduced in the annex [3].

The VICE-PRESIDENT, Acting President, called upon Professor E. C. S. Wade.

Professor WADE began the speech reproduced in the annex [4].

(The Court adjourned from 1.10 to 4 p.m.)

Professor WADE continued the speech reproduced in the annex [5].

(The Court rose at 5.55 p.m.)

[Signatures.]

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[1] See pp. 248-263.
[2] „ „ 263-276.
[3] „ „ 277-288.
[4] „ „ 289-293.
[5] „ „ 293-304.

M. André GROS, agent du Gouvernement français, continue la plaidoirie reproduite en annexe [1].

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

M. André GROS, agent du Gouvernement français, continue et termine la plaidoirie reproduite en annexe [2].

Le VICE-PRÉSIDENT faisant fonction de Président demande à l'agent du Royaume-Uni s'il a l'intention de présenter une plaidoirie en réplique et quand celle-ci sera prête.

L'AGENT DU ROYAUME-UNI annonce que la plaidoirie en réplique de son Gouvernement sera prête vendredi 2 octobre.

Le VICE-PRÉSIDENT faisant fonction de Président annonce que la prochaine audience aura lieu vendredi matin, 2 octobre, à 10 heures 30.

(L'audience est levée à 18 heures.)

[Signatures.]

DIX-NEUVIÈME SÉANCE PUBLIQUE (2 X 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre, à l'exception de sir Arnold McNair, Président.]

En ouvrant la séance, le VICE-PRÉSIDENT faisant fonction de Président annonce que le Président de la Cour, sir Arnold NcNair, est retenu en chambre par une légère indisposition.

Le Vice-Président faisant fonction de Président prie les agents, quand ils finiront leur plaidoirie en réplique, soit de confirmer les conclusions énoncées au cours de la procédure écrite, soit de donner lecture des conclusions finales de leur Gouvernement. Dans ce dernier cas, il les prie de remettre au Greffe le texte écrit de ces conclusions finales.

Le Vice-Président faisant fonction de Président donne la parole à M. l'agent du Gouvernement du Royaume-Uni, M. R. S. B. Best.

M. R. S. B. BEST déclare que l'Attorney-General commencera la réplique orale au nom de son Gouvernement.

Sir Lionel HEALD prononce l'exposé reproduit en annexe [3].

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au professeur E. C. S. Wade.

Le professeur WADE commence l'exposé reproduit en annexe [4].

(L'audience, suspendue à 13.10, est reprise à 16 heures.)

Le professeur WADE continue l'exposé reproduit en annexe [5].

(L'audience est levée à 17 h. 55.)

[Signatures.]

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[1] Voir pp. 248-263.
[2] » » 263-276.
[3] » » 277-288.
[4] » » 289-293.
[5] » » 293-304.

TWENTIETH PUBLIC SITTING (3 X 53, 10.30 *a.m.*)

Present : [See sitting of October 2nd.]

The VICE-PRESIDENT, Acting President, called upon Professor E. C. S. Wade to continue his speech on behalf of the United Kingdom Government.

Professor WADE concluded the statement reproduced in the annex [1].

The VICE-PRESIDENT called upon Mr. C. S. Harrison.

Mr. HARRISON began the speech reproduced in the annex [2].

(The Court rose at 1 p.m.)

[Signatures.]

TWENTY-FIRST PUBLIC SITTING (5 X 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, opened the hearing and called upon the Attorney-General for the Island of Jersey to continue his speech on behalf of the Government of the United Kingdom.

Mr. C. S. HARRISON continued the statement reproduced in the annex [3].

Judge HSU MO put to Mr. Harrison two questions reproduced in the annex [4].

Mr. HARRISON gave the answers reproduced in the annex [4] and concluded his statement [5].

(The Court adjourned from 1 p.m. to 4 p.m.)

The VICE-PRESIDENT, Acting President, called upon Mr. G. G. Fitzmaurice, Counsel for the United Kingdom Government.

Mr. FITZMAURICE began the speech reproduced in the annex [6].

(The Court rose at 6.10 p.m.)

[Signatures.]

TWENTY-SECOND PUBLIC SITTING (6 X 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President, called upon Mr. G. G. Fitzmaurice, Counsel for the United Kingdom Government, to continue his speech.

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[1] See pp. 304-312.
[2] ,, ,, 327-332.
[3] ,, ,, 332-343.
[4] ,, p. 343.
[5] ,, pp. 343-346.
[6] ,, ,, 347-358.

VINGTIÈME SÉANCE PUBLIQUE (3 X 53, 10 *h.* 30)

Présents : [Voir séance du 2 octobre.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au professeur E. C. S. Wade pour la continuation de sa plaidoirie au nom du Gouvernement du Royaume-Uni.

Le professeur WADE termine l'exposé reproduit en annexe [1].

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à M. HARRISON.

M. HARRISON commence l'exposé reproduit en annexe [2].

(L'audience est levée à 13 heures.)

[Signatures.]

VINGT-ET-UNIÈME SÉANCE PUBLIQUE (5 X 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

En ouvrant la séance, le VICE-PRÉSIDENT faisant fonction de Président donne la parole à M. l'Attorney-General pour l'île de Jersey pour la suite de sa plaidoirie au nom du Gouvernement du Royaume-Uni.

M. C. S. HARRISON continue l'exposé reproduit en annexe [3].

M. HSU MO, juge, pose à M. Harrison les deux questions reproduites en annexe [4].

M. HARRISON donne à ces questions les réponses reproduites en annexe [4] et termine sa plaidoirie [5].

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à M. G. G. Fitzmaurice.

M. FITZMAURICE commence l'exposé reproduit en annexe [6].

(L'audience est levée à 18 h. 10.)

[Signatures.]

VINGT-DEUXIÈME SÉANCE PUBLIQUE (6 X 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à M. G. G. Fitzmaurice, conseil du Gouvernement du Royaume-Uni, pour la suite de sa plaidoirie.

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[1] Voir pp. 304-312.
[2] » » 327-332.
[3] » » 332-343.
[4] » p. 343.
[5] » pp. 343-346.
[6] » » 347-358.

Mr. G. G. FITZMAURICE concluded the speech reproduced in the annex [1]. At the end of his speech, he stated that he maintained the conclusions put forward in the Memorial but that he wished to make one or two small changes of wording and would therefore hand in a written version to the Registry.

(The Court rose at 12.40 p.m.)

[Signatures.]

TWENTY-THIRD PUBLIC SITTING (7 X 53, 4 *p.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President in this case, called upon the Agent of the French Government.

Professor André GROS, Agent of the French Republic, began the oral rejoinder reproduced in the annex [2].

(The Court rose at 6.30 p.m.)

[Signatures.]

TWENTY-FOURTH PUBLIC SITTING (8 X 53, 10.30 *a.m.*)

Present : [See sitting of September 17th.]

The VICE-PRESIDENT, Acting President in this case, called upon the Agent of the French Government.

Professor A. GROS continued the statement reproduced in the annex [3].

(The Court adjourned from 1.10 p.m. to 4 p.m.)

Professor A. GROS concluded the oral rejoinder reproduced in the annex [4]. At the end of his speech, he read the final Submissions of the Government of the French Republic [5], of which he handed the written text to the Registry.

The VICE-PRESIDENT, Acting President, asked both Agents to hold themselves at the disposal of the Court in order that they might furnish any further information which the Court might require from them and, subject to that reservation, he declared the hearing closed. The Court would now deliberate and in due course both Agents would be warned of the date on which Judgment would be delivered in public session.

(The Court rose at 6.35 p.m.)

[Signatures.]

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[1] See pp. 358-371.
[2] " " 372-386.
[3] " " 386-402.
[4] " " 403-412.
[5] " " 411-412.

M. G. G. FITZMAURICE termine l'exposé reproduit en annexe [1]. A la fin de son exposé, il annonce qu'il maintient les conclusions énoncées dans le mémoire, mais qu'il désire en modifier légèrement le texte. Il remettra ce texte final au Greffe.

(L'audience est levée à 12 h. 40)

[Signatures.]

VINGT-TROISIÈME SÉANCE PUBLIQUE (7 X 53, 16 *h.*)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à l'agent du Gouvernement français.

M. André GROS, agent du Gouvernement de la République française, commence la duplique orale reproduite en annexe [2].

(L'audience est levée à 18 h. 30)

[Signatures.]

VINGT-QUATRIÈME SÉANCE PUBLIQUE (8 X 53, 10 *h.* 30)

Présents : [Voir séance du 17 septembre.]

Le VICE-PRÉSIDENT faisant fonction de Président ouvre l'audience et donne la parole à l'agent du Gouvernement français.

M. le professeur A. GROS continue la plaidoirie reproduite en annexe [3].

(L'audience, interrompue à 13 h. 10, est reprise à 16 heures.)

M. le professeur A. GROS termine la duplique orale reproduite en annexe [4]. A la fin de son exposé il donne lecture des conclusions finales du Gouvernement de la République française [5], dont il a remis le texte au Greffe.

Le VICE-PRÉSIDENT faisant fonction de Président demande aux deux agents de se tenir à la disposition de la Cour afin d'être en mesure de lui fournir tous renseignements additionnels qu'elle pourrait leur demander et, sous cette réserve, il prononce la clôture des débats. La Cour va maintenant délibérer et les deux agents seront dûment avertis de la date à laquelle l'arrêt sera rendu en audience publique.

(L'audience est levée à 18 h. 35.)

[Signatures.]

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[1] Voir pp. 358-371.
[2] » » 372-386.
[3] » » 386-402.
[4] » » 403-412.
[5] » » 411-412.

TWENTY-SIXTH PUBLIC SITTING (17 XI 53, 4.30 *a.m.*)

Present: The *President* and the *Judges* present at the sitting of September 17th; M. GARNIER-COIGNET, *Deputy-Registrar;* Mr. G. G. FITZMAURICE, C.M.G., Legal Adviser of the Foreign Office, *as Agent;* Professor André GROS, Legal Adviser of the Ministry for Foreign Affairs, *as Agent.*

The VICE-PRESIDENT, Acting President, said that the Court was sitting to deliver its Judgment in the Minquiers and Ecrehos case between the French Republic and the United Kingdom of Great Britain and Northern Ireland, a case brought before the Court by means of a Special Agreement concluded by the two Governments.

In accordance with Article 58 of the Statute, the Agents of both Parties had been notified that the Judgment would be read at that sitting. The Acting President said that, upon receipt of the communication, the United Kingdom Government had announced that its Agent, Mr. R. S. B. Best, Third Legal Adviser of the Foreign Office, had died and that Mr. G. G. Fitzmaurice, Legal Adviser of the Foreign Office, had been appointed to replace him. The Acting President expressed to Mr. Fitzmaurice the condolences of the Court which he asked him to convey to his Government and to the bereaved family.

Professor GROS, Agent of the French Government, associated himself with the President's words of sympathy.

Mr. FITZMAURICE thanked the Court and the Agent of the French Government and said that he would transmit their condolences to his Government and to Mr. Best's family.

The ACTING PRESIDENT read the French text of the Judgment, of which the English text was to be considered authoritative [1].

The DEPUTY-REGISTRAR read the English text of the operative part of the Judgment.

The ACTING PRESIDENT read the Declaration of Judge Alvarez [2] annexed to the Judgment and stated that Judges Basdevant [3] and Levi Carneiro [4] had availed themselves of the right to append to the Judgment statements of their individual opinions. However, they did not propose to read them.

(The Court rose at 5.55 p.m.)

[Signatures.]

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[1] See Court's publications, *Reports of Judgments, Advisory Opinions and Orders 1953*, pp. 47-73.
[2] *Ibid.*, p. 73.
[3] " , pp. 74-84.
[4] " , " 85-109.

VINGT-SIXIÈME SÉANCE PUBLIQUE (17 XI 53, 16 *h.* 30.)

Présents: Le *Président* et les *Juges* présents à la séance du 17 septembre ; M. GARNIER-COIGNET, *Greffier adjoint ;* M. G. G. FITZMAURICE, C. M. G., jurisconsulte au Foreign Office, *en qualité d'agent ;* M. André GROS, jurisconsulte du ministère des Affaires étrangères, *en qualité d'agent.*

Le VICE-PRÉSIDENT faisant fonction de Président en cette affaire annonce que la Cour est réunie pour prononcer son arrêt en l'affaire des Minquiers et des Écréhous, entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, affaire portée devant la Cour en vertu d'un compromis conclu entre les deux Gouvernements.

Le Vice-Président faisant fonction de Président rappelle que, conformément à l'article 58 du Statut, les agents des Parties ont été prévenus qu'il serait donné lecture de cet arrêt au cours de l'audience. Il annonce qu'au reçu de cette communication, le Gouvernement du Royaume-Uni a fait connaître que son agent, M. R. S. B. Best, troisième jurisconsulte au Foreign Office, était décédé et que M. G. G. Fitzmaurice, jurisconsulte de ce ministère, avait été désigné pour le remplacer. Le Vice-Président faisant fonction de Président exprime à M. Fitzmaurice les condoléances de la Cour qu'il le prie de transmettre à son Gouvernement et à la famille du défunt.

M. GROS, agent du Gouvernement français, s'associe aux paroles de sympathie qui viennent d'être exprimées par le Président.

M. FITZMAURICE remercie la Cour et l'agent du Gouvernement français et transmettra leurs condoléances à son Gouvernement et à la famille de M. Best.

Le VICE-PRESIDENT faisant fonction de Président donne en français lecture de l'arrêt dont le texte faisant foi sera le texte anglais[1].

Le GREFFIER ADJOINT donne lecture du dispositif dans le texte anglais.

Le VICE-PRÉSIDENT faisant fonction de Président donne lecture de la déclaration annexée à l'arrêt par M. Alvarez [2] et annonce que MM. Basdevant[3] et Levi Carneiro[4] ont fait usage de leur droit de joindre à l'arrêt les exposés de leur opinion individuelle. Ils ne désirent cependant pas en donner lecture.

(L'audience est levée à 17 h. 55.)

[Signatures.]

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[1] Voir publications de la Cour, *Recueil des Arrêts, Avis consultatifs et Ordonnances 1953*, pp. 47-73.

[2] *Ibid.*, p. 73.

[3] » , pp. 74-84.

[4] » , » 85-109.

ANNEX TO THE MINUTES
ANNEXE AUX PROCÈS-VERBAUX

1. ORAL ARGUMENT OF SIR LIONEL HEALD

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF SEPTEMBER 17th AND 18th, 1953

[Public sitting of September 17th, 1953, morning]

Mr. President and Members of the Court :

In presenting to you the case of Her Majesty's Government upon the question of the title to the Minquiers and the Écréhous, I would like first to say how much I appreciate the privilege of appearing again before the International Court of Justice.

I need hardly tell you, Mr. President, that the present case differs greatly from that in which I had the honour of addressing you last year, both in subject-matter and in atmosphere—that was the Iranian case. To-day Great Britain and France come before you arm-in-arm, as it were, asking you to resolve our dispute. We are here, in fact, not in any spirit of bitterness or hostility, but as friends and good neighbours, both of us declared supporters of the principle of the international adjudication of disputes.

Before the case is over, I have no doubt that some shrewd blows will have been exchanged between the representative advocates, but the Court will not need to be assured that these will be taken in good part on both sides, and that, whatever your decision may be, it will be loyally accepted, and will not disturb the present excellent relations between our two Governments.

What a change, Mr. President, from the old days, when such a dispute as this, if carried to a conclusion, could only have been fought out on the spot and decided by force of arms, leading perhaps to a serious conflict. To-day a question of national sovereignty is by mutual consent the subject of fair legal argument and thereafter of mature adjudication by eminent jurists, as the result of the Special Agreement to which you have referred, dated 29th December 1950. Progress may be slow towards the attainment of the noble ideal which inspired the building of this place ; but the present reference must surely be acknowledged, even by the cynics, not only as a tribute to the Court itself but also as a practical contribution of lasting value to the cause of peace.

Apart from the symbolic aspect of the matter, to which I have already referred, I feel justified in asking the Court to regard this as an important case upon its own merits. It is true that the actual area of land in issue is not very great. But, as you will hear later, the population of Jersey attaches the deepest moral significance to the result of this case which, if the French claim were to succeed, would mean the loss of something much more precious than a mere group of islets—something which has come to be regarded by Jersey men and women with pride and affection as an integral part of their island heritage.

Mr. President, no advocate with any knowledge of the work of this Court could fail to recognize with real gratitude the care and impartiality with which its members study the written proceedings in advance of the

oral hearing. I shall not therefore occupy your time with detailed references to the pleadings, but, in view of the volume and complexity which they have inevitably assumed, I feel that it may be helpful to the Court if I make a general opening statement, summarizing the main points which seem to us to arise from the documents, together with a brief indication of how we propose to deal with them. I use the word "indication" deliberately, because I do not myself feel qualified, in this company, to discuss in detail many of the highly technical points that are in dispute. For that purpose I have armed myself with the assistance of a team of experts, who are—I have no doubt—well matched by those accompanying my learned friend Professor Gros—not that I suggest that he is nearly as much in need of expert assistance as I am. I will mention who my assistants are, and what they propose to deal with, in a few moments ; but first may I inform the Court of the presence at my side of my very good friend and learned colleague, Mr. Cecil Harrison, who is Her Majesty's Attorney-General for the island of Jersey, and himself a Jerseyman. Apart from the practical value of his collaboration, the nature and history of his office and the special and distinctive robe which he wears are in themselves significant. For they emphasize, as he himself can explain to you much better than I, that, although this case is brought before you by Her Majesty's Government in the United Kingdom, of which I have the honour to be a member, it is one particular part of Her Majesty's dominions that is directly affected—a small part perhaps, but one which is nevertheless largely self-governing. For Jersey enjoys almost complete autonomy, and it is from Jersey and not from London that administrative control has long been exercised over the very islets whose title is in issue. As proof of this, and of the reality of Jersey's independent status, I would like to refer you to the language of the official document which testified Jersey's agreement to the submission of the present dispute to the International Court : it was a Resolution of the States of Jersey on the 14th September of the year 1948, and it stated that the States, in the name of the Government of Jersey, had taken into consideration a Resolution adopted at a joint meeting of certain Committees, and it stated this, that :

> "The Committees of Finance and of Harbours and Airport have the honour to inform the States that His Majesty's Government, following consultation with the Lieutenant Governor, the Bailiff, the Law Officers of the Crown and the Committees concerned, has sought, by negotiations through diplomatic channels, to obtain from the French Government an unequivocal acknowledgement of His Majesty's sovereignty over the Minquiers and Écréhous Islands.
>
> The Committees regret to inform the States that these negotiations have not been productive of the results hoped for.
>
> Under these circumstances, His Majesty's Government recommends that the question of sovereignty should be referred to the International Court of Justice.
>
> The Committees are in agreement with this recommendation and ask the concurrence of the States therein.
>
> The States unanimously concurred in the recommendation of His Majesty's Government and requested their President to take the necessary action in the matter."
>
> Signed by the Greffier des États.

Mr. President, one can see at once from that document that the real issue in this case as a practical matter lies not so much between France and the United Kingdom, as between France and Jersey, who seeks to retain certain adjacent islets, which, as the evidence will really show, the inhabitants of Jersey have for many generations thought of and dealt with as part of themselves.

In view of the attitude taken up by our opponents in certain portions of their pleadings, I have felt it essential to leave no doubt on this point. I can testify from my own personal experience to the intensity of the local feeling. I have twice visited Jersey since I was last here, in order to qualify myself to present their case, and in particular to ensure that I should correctly interpret the views of the population. In September of last year I was fortunate in being able to sail round the Minquiers and the Écréhous in perfect weather and to land on both those groups. I only wish the members of the Court had been able to go there also, not only to enjoy the beautiful sunshine and scenery but also because an actual view of the *locus in quo* is always of such assistance, provided always of course that one is a good sailor. Last week I was in Jersey again, and on this occasion I had the great advantage and interesting experience of flying over the whole of this area and thus obtaining an intimate picture—more intimate perhaps than is available from maps or charts; I also had the opportunity of hearing the views of Jersey men and women in all walks of life on this subject, and I can assure you that they regard this matter before the Court with great seriousness and real emotion. They do not profess to understand the legal refinements of the pleadings: they look on the matter in a very simple way—which may perhaps appear to the Court as fundamentally sound. They base themselves in the first instance on the traditions handed down to them by their fathers and grandfathers, according to which these islets have been for all practical purposes part of Jersey for hundreds of years past. They also rely strongly on the fact that the Channel Islands themselves are unquestionably, and have been for nearly a thousand years, possessions of the British Crown. How, in these circumstances, Jersey men and women ask, can it be seriously suggested that the Minquiers and the Écréhous belong to France?

In connection with this point of view of the Jerseyman, the Court has no doubt examined with interest the French argument, and it may have occurred to you that this proves far too much. For you will remember that the French argument relies very strongly on such allegations as that King Henry III of England did homage to the French King in the year 1259 in respect of all the Channel Islands. Surely, if there really were any validity in that argument, it would follow that the rest of the Channel Islands—Jersey, Guernsey, Alderney, Sark and all the others—are all French to-day. Indeed I could not help wondering as I read the French Rejoinder whether, when we arrived before this Court, I should hear my learned friend, Professor Gros, make an application to amend his pleadings so as to include a final claim to French sovereignty over the whole of the Channel Islands.

This may be described as a *reductio ad absurdum*, but if the French argument does not have this effect, what does it really amount to?

It is no doubt a strange historical circumstance that, far from there being any question of the British title to the Channel Islands being

based upon any British act of aggression, it resulted in fact from the aggression which England suffered at the time of the Norman conquest of England. It is true that it was Normandy which was the aggressor—but the Court must remember that our opponents claim that the Duke of Normandy was a French baron. The fact remains—and its importance for present purposes is surely this—that, since one must accept as a legal *fait accompli* the British title to the Channel Islands, there is no validity at all in the comment which appears on page 687 of the French Rejoinder (I quote): "The most sober-minded person may view with astonishment the fate of these islands, lying in a French bay, which have become English because a French baron, a Duke of Normandy, conquered England in the year 1066." Indeed once it is conceded, as it must be, that the British title to the Channel Islands has to be accepted by everyone—whether sober-minded or otherwise—the French case becomes unarguable, *unless*, unless it can be shown that the title to the Minquiers and the Écréhous is governed by some entirely different and distinct consideration—a somewhat difficult proposition surely to establish.

Jerseymen contend, and we support them strongly in this, that when in the thirteenth century there was a division between continental Normandy and the Islands, and King John of England retained the Channel Islands, the Minquiers and the Écréhous were then, and remain to-day, part of the possessions of the Crown along with the island of Jersey. Unless that contention can be displaced, I think it must be agreed that most of the detailed discussion in the pleadings becomes irrelevant. And when this single historical argument is supplemented by the overwhelming evidence of continuous and effective possession, particularly over the last hundred years and more, it is not difficult to understand the impatience of the average Jersey man or woman with any lawyer who disputes their claim.

An interesting light on this aspect of the case is provided by the Chausey group of islets—which, as the Court will no doubt already be aware, is close to Granville on the French coast. The Chausey group, as everyone agrees, are French to-day, and it is therefore pertinent to ask oneself—why is that? It is certainly not as the result of anything done by King Henry III in the year 1259, and, in fact, as late as the reign of King Henry VII of England in the year 1500, we find the Chausey described in a Papal Bull, the Bull of Pope Alexander VI, as part of the Channel Islands, and unquestionably at that time, as British. I refer to page 532 of the United Kingdom Reply, where the details of that Bull will be found. The Chausey group became French much later, as the result of specific acts in the exercise of French sovereignty. And when you find, in the case of the Minquiers and the Écréhous, *not* this process of transfer to France, but, on the contrary, the intensification of acts and incidents of British sovereignty and character, precisely parallel to those exercised by France in the case of the Chausey, the admitted title of France to the Chausey becomes a very relevant point, not in favour of the French claim but against it.

The French legal advisers clearly appreciated the danger of this argument and with characteristic quickness of thought they adopted the offensive in their pleadings by asserting that the Minquiers are dependencies of the Chausey group. This, of course, would be an excellent point, if it could be established, but all the evidence is to the contrary

effect. It is summarized in the Reply of the United Kingdom Government at pages 531-532, to which I have already referred. Finally, upon this point, the actual behaviour of the French Government itself is surely quite inconsistent with any relation of dependence between the Chausey group and the Minquiers. In the case of the former, the Chausey, a number of administrative and protective acts are on record, and if one sees the Chausey from the air, one sees the concrete results in such things as jetties and buildings. The French have, in fact, done at the Chausey exactly the same as Jersey has done at the Minquiers and Écréhous: they have constructed slipways, landing stages and so on. They have also performed numerous other acts of sovereignty, no doubt. If the Minquiers really are a dependency of the Chausey, as is alleged, how is it that France has never extended to the Minquiers any of the administrative or governmental acts of which the Chausey provide such clear evidence? We see that where the French admittedly do possess the sovereignty, namely, at the Chausey, they behave accordingly. Then why not at the Minquiers and the Écréhous if France has the sovereignty? And if that were not enough, how can one reconcile with the French contention the fact that precisely those acts, which have been performed by France at the Chausey but not at the Minquiers or the Écréhous, *have* been performed at the latter by Jersey? So I maintain that the circumstances of the Chausey, far from assisting the French case, provide a strong inferential argument against it.

As regards both the Minquiers and the Écréhous, the Jerseyman says it is a strange thing that, if the French Government ever had a good title, it has done so little—in fact nothing—to assist or maintain that title. He finds such a claim put forward now, after all these years of neglect, contrary to all the realities as he knows them. This is surely also a perfectly sound objection in law. We are not concerned here to-day with what was the position seven hundred years or even one hundred years ago. What the Court has to decide, according to the Compromis, is the position to-day. The words are: "Whether the sovereignty *belongs*"—not whether the sovereignty "*belonged*" in the past. If we were to take the French argument literally and ignore everything that has happened "after the dispute was born", as they say, we might find ourselves arguing quite easily that, despite what happened in 1776, New York is still really a British colony. If one is to ignore everything which happens "after the dispute is born", as the French say, all the acts of the United States Congress, let alone those of Jefferson and Lafayette, must equally be ignored. We shall deal with this argument of "critical dates" in detail later, but it is, I think, relevant to mention it here, to show how manifestly absurd it would be to ignore the modern history of the Minquiers and the Écréhous. For, we contend, it is precisely by such evidence, and by no other, that the recent acts of peaceful and effective possession required by international tribunals can be established.

As regards the geographical aspect of the case, some members of the Court might possibly have been moved by the French plea that these two groups are situated very close to France. But all the Channel Islands are relatively close to France. The island of Alderney, for instance, is actually nearer to the French mainland than are the Minquiers. Moreover, the Minquiers are nearer to Jersey than they are to the mainland of France, and they are actually further away

from the mainland of France than Jersey itself is. If any member of the Court should feel sympathy with this particular French plea, however, I would ask him to remember what I said earlier, that the entity actually affected by these proceedings is Jersey. Now, all these islands are closer to Jersey than they are to the French mainland. This applies, of course, both to the Minquiers and to the Écréhous. It is certainly not our view that geographical propinquity is in itself a ground of title, and we should never think of putting forward a claim to the Minquiers and the Écréhous on that ground alone. All that we say, and this is what I want to draw to the attention of the Court, is that in so far as this consideration is at all relevant, it operates just as much in our favour as it does in that of France, if not more so.

To conclude these introductory remarks, I would like to say something about the actual facts as they exist to-day, in relation to the disputed groups. The claims of both the parties are alike in this, that they are founded on a claim of ancient right and title. But there the resemblance ends. The United Kingdom claim is also founded on long continued effective possession and control of the groups and on the actual and concrete exercise of sovereignty in respect of them. France's claim is not so founded, and it would be no exaggeration to say that the French claim is founded on an alleged original title and nothing else—for never at any time—at any time at all—has France, as France, ever possessed these groups or exercised the least control or authority over them except during certain temporary military occupations. Indeed, French acts of sovereignty in respect of them are virtually non-existent. You will hear in greater detail from Mr. Harrison later about the present-day situation, but to all outward appearance, these islands are purely British and nothing else. The groups, as the Court is well aware, do not consist of mere rocks and reefs, though our opponents have at times suggested that they do. A glance at the photographs comprising the Annex C series to our Memorial shows the fallacy of this—and I am sure the Court will carefully study these photographs, which, I venture to suggest, are of considerable interest. The two groups are administered as part of parishes situated in Jersey. The houses on them, owned by Jersey residents and others, are registered in Jersey. Rates and taxes in respect of them are paid to the Jersey authorities. The same authorities have carried out public works on the islands, such as the construction of slipways and landing stages, the establishment of custom-houses, and so on. All this has been in existence for a long time. With the single exception, to which Mr. Harrison will refer in due course, of a hut for the protection of mariners in stormy weather, the houses and buildings on both groups are all Jersey or English owned. They have been erected by Jerseymen or by the authorities of Jersey. There are no French residents there nor are there any French persons registered as owners of property on the groups. The law which is applied there is purely Jersey law. If the members could pay a visit to these islets, as I myself have done, they would find that such officials as they met would be Jersey officials; the residents they found there would be Jersey or English. It would be the arms of Jersey that they would find on the Custom-House, the British flag on the flagstaff, and so forth. If they asked any owner of property where his property was registered, they would be told "in Jersey". If they asked to whom he paid his rates and taxes in

respect of his property, they would be told "to the Jersey authorities, of course". If they asked when a French official had last visited either of the groups, a Jerseyman would certainly answer: "Not within living memory", or if he said "Never", it would probably not be very far from the actual truth. They would also find much evidence, both on the islets themselves and in Jersey, that this situation has been in existence for a great many years, that it has been in existence really for centuries, and that the direct evidence of it during the last century and a half, or even longer, was abundant.

What better example, Mr. President, could one have of the existence and exercise of sovereignty? The flagstaff, the execution of public works, the imposition of local taxation, custom-houses, registration of title to land, inquest on dead bodies, jurisdiction over criminal offences—all exercised in these islands by Jersey and never by France.

Those being the actual facts, the actual situation in and relating to these groups, the Court can well imagine the effect produced on the minds of the people of Jersey by this French claim, based as it is on nothing more tangible or concrete than the claim of ancient right—a highly technical claim, deriving from nothing more than an abstract feudal title.

There is in fact absolutely no reality about this claim; and that is so obvious to anyone who visits the islets that one cannot help asking perhaps—and I believe it has been asked—what it is that has caused this matter to be brought before the Court. Anyone who reads the diplomatic correspondence of the last 70 or 80 years cannot fail to be struck by the fact that the claims, which France has at certain times put forward, have remained paper claims, never followed up in any way. As regards the Écréhous, no interchanges at all took place between the parties after the year 1888, and very few about the Minquiers. Taken in relation to the history of the case in the Middle Ages and afterwards, and to the situation of fact in the islands which I have described, it seems clear that France, while not willing formally to abandon her claim, was not prepared to assert it, or to embark on any attempt actually to exercise sovereignty over the groups. We on the other hand in Jersey were exercising sovereignty, and we had no doubt at all about our right so to do.

In Jersey, as Mr. Harrison will tell you, it never occurred to anyone that these islands were other than dependencies of Jersey and in every respect British territory. Before the war there was no reason why the case should ever come before an international tribunal, because there was really no doubt about the position. It was really as an indirect result of the war that this case has now come before the Court. During the war, the Channel Islands were occupied by the Germans, and Jersey fishermen were forbidden to visit the Minquiers or the Écréhous. When the occupation ended, and natives of Jersey were for the first time in five years able to go to these islets, they found, especially at the Minquiers, that they were being fished by French fishermen in considerable numbers. As Mr. Harrison will tell you and as appears from certain of the affidavits of Jerseymen which have been reproduced in the annexes to the written pleadings, this was something new—for in fact there was very little French fishing at these islets before. I should perhaps have mentioned that the mainland of France was liberated in 1944, but the ejection of the Germans from the Channel Islands could not be effected

until May 1945. It was only then that this new state of affairs at the Minquiers and the Écréhous was discovered, and a difficult situation naturally arose, as the Jersey fishermen's livelihood was being seriously affected by this competition. The United Kingdom Government therefore asked the Government of the French Republic to recognize and admit the British title. But, as I said just now, the Government of the French Republic, while it had in practice, and indeed really for many centuries, acquiesced in the British possession of these islets—not on paper, of course, but in substance—the Government of the Republic was not willing formally to admit our claim, and therefore the upshot of the matter was the submission of the dispute to this Court.

It is not easy to understand the attitude of the French authorities in regard to these groups. For example, they have let pass not only without protest, but without the slightest comment, acts of the most public character—clear exercises of State authority—carried out by the Jersey authorities in the Minquiers and the Écréhous—acts of a kind such as—one would think—no country genuinely possessed of sovereignty over a territory could possibly pass over in silence if done by another country. The French explanation of this—that they could not be expected to know everything that was going on in the islets—is not very convincing. It is, in fact, significant, for surely a government does know what goes on in what it claims as its territory, so near its coasts.

Again, we shall show later how considerable is the extent to which there can be said to have been a *veritable British community* living, or owning property, on the Minquiers and the Écréhous, registering in Jersey the title to their property or dwellings on the islets, paying their rates and taxes for them to the Jersey authorities, and submitting themselves generally to Jersey law and jurisdiction: and, of course, no such French community at any time. I would ask the Court to consider how extraordinary has been the attitude of the Government of the French Republic to this community, if, as our opponents maintain, the Minquiers and the Écréhous are, and always have been, French. If this were correct, it would mean that this community has been living or owning property on French soil for one hundred years or more. Yet there is no evidence that any French official ever went near either group for any administrative purpose. There is no evidence of the application of French law, there is no judgment of any French courts in respect of them, or of anything occurring in them or in relation to them. If the houses and buildings concerned are on French soil, in what register of property is their ownership recorded? To what French authorities have their owners ever been responsible for them, or for any taxes or rates due in respect of them? If this is indeed French territory, how can it be explained that property has been bought and sold there in accordance with Jersey law, and registered in Jersey?

Mr. President, it is not sufficient to say that all this happened because the persons concerned were Jerseymen, that it was based on some personal consideration. We shall bring out this point very clearly later and we can show clearly that the basis of all these acts was not personal but territorial. But in any event, surely the mere fact that all those concerned were Jerseymen, or English, is significant. If this were French soil, dependent on the French mainland, as our opponents claim, why were they not Frenchmen? Why were not at least some

of them French, at any rate? Normally, if a country has sovereignty over a given piece of territory, the persons, or most of them, or some of them at least, in that territory or owning property in it, would be expected to be nationals of that country and not of some other.

We say, therefore, that all these things on the Minquiers and the Écréhous were carried out in accordance with Jersey law because this was the applicable law and no other law was applicable. I would invite the attention of the Court to the list of persons given in Annex A 98 to the United Kingdom Memorial as owning dwellings, buildings or other property on the Minquiers or the Écréhous. If the French claim were to be admitted, those persons would suddenly find that they were and always had been subject to French law, that their property was on French, not British, soil, that even to visit their own property they would require a passport and would have to conform to French immigration, customs, and other regulations. In other words, they would find themselves in a position totally at variance with fact and reality, and I submit that this is an aspect of the matter to which the Court cannot fail to give the most serious attention.

If I may give one concrete example, if the Court would look at the photograph Annex C 6, Part IV, Volume IV, of the Memorial, the Court will see there a picture of a two-storied house at Blanc Île, owned by Major R. J. B. Bolitho, a Jersey resident. Mr. President, Major Bolitho and his wife are here to-day in Court, having sailed here in their own boat from Jersey in order to attend this case to which they and the other inhabitants of Jersey attach so much importance. Major Bolitho's wife enjoys the name of Lemprière, one of the best-known names in Jersey, and her family have owned this land for many, many years past. So there we find a concrete example of someone, a man and his wife, the wife belonging to an ancient family of Jersey, who, if this Court were to decide in accordance with the French claim, will suddenly find that all this time, without knowing it, they have been really for all practical purposes living in France. Well, that seems to me a rather remarkable situation.

In the first instance, therefore, Mr. President, I maintain quite simply that, although France claims sovereignty and, by insisting on that claim in the face of all the realities, has compelled this dispute to be brought before the Court, she has not in fact conducted herself in relation to the islands as a country normally would do which possesses sovereignty. The Jersey authorities, on the other hand, have. If you ask, for instance, who constructed the necessary public works and facilities on the islands, again the answer is: the Jersey authorities. If you ask who has installed and who keeps up the buoys, beacons, marks and other aids to the navigation of the islands, the answer is the same. The French buoying of the Minquiers, on which they rely, as we shall show later, is outside the reef or plateau, at a distance of more than three miles from the main islands, directed towards facilitating the entry of ships into St. Malo and Granville, and, in fact, rather to keep shipping away from the Minquiers than to facilitate the approach to it. Again, when you come to ask who has exercised the necessary jurisdiction in respect of offences, who has held inquests and so on, the answer is equally: the authorities and courts of Jersey. There is no trace of any evidence of such things being done by any French authority. Equally one can say this of expenditure. Considerable sums have been expended by the Jersey authorities:

none, so far as we know, has ever been expended by France. Mr. Harrison will give the details of this in due course : I shall not delay the Court over them. It is, however, important to emphasize that claims to sovereignty cannot be divorced from responsibility for the territory claimed. An affirmation of sovereignty involves a duty to carry out its obligations. No one can doubt that it is by Jersey that these obligations and responsibilities have, in fact, been carried out and discharged. France has not been willing to make any formal admission of the British claim, but she has, nevertheless, been willing to allow the Jersey authorities to carry out the responsibilities and incur expenditure in connection with these groups. I venture to suggest that these are points of significance. Decisions of international tribunals, to which we shall later refer, show very clearly the importance that has always been attached to the question : which party has demonstrated by its conduct its belief in the validity of its claim, and has on that basis conducted itself after the manner of a responsible sovereign authority ?

Our opponents have, of course, naturally tried to discount and to minimize the significance of much that Jersey has done, principally, I think, upon the ground—as I have already mentioned in passing—that most of those acts are explicable on a basis of jurisdiction exercised *ratione personæ* over Jerseymen, not *ratione soli*. This argument, I submit, is misconceived. In the first place, it could not apply at all to many of the acts concerned, for example, the construction of public works and facilities on the islets, the opening of custom-houses, and so on. For these are clear acts of sovereignty in any event.

As regards police and the exercise of legal jurisdiction, there is no doubt at all—as we shall suggest to the Court—that the basis is territorial. This is so, not only under Jersey law, about which you will be hearing from Mr. Harrison in due course, but also, I suggest, as a matter of general legal principle. I will give the Court one example—the holding of inquests on deceased persons who might be found at the Minquiers and the Écréhous. The basis of this act *could* not be personal, for the following reasons. In the first place, the nationality of the deceased person is not officially established until the enquiry is held. Part of the object of the enquiry, in fact, would be to ascertain the identity of the dead person. Secondly, at the inquest no accused person is before the court, for the other object of the enquiry is to ascertain how the deceased met his death. It may have been accident, it may have been suicide : only if the facts pointed to a crime would the matter lead to a trial, and that would be quite a separate proceeding. Unquestionably, therefore, the holding of an inquest on the finding of a dead body is an act of territorial jurisdiction. It is an enquiry carried out by authorities of a territory with regard to something which has occurred in that territory, an administrative rather than a judicial act, carried out as a measure of good government. So far as I am aware, proceedings of this character are never held except in respect of bodies which are found within the territorial jurisdiction of the authority concerned. Can it be imagined that the Jersey authorities would hold an inquest on the death of a man in France ? And, in fact, some of the deceased persons who have been concerned in inquests in Jersey have, in fact, been Frenchmen whose bodies have been found there, but the nationality of the deceased is quite irrelevant.

Mr. President, a few moments ago, when I was referring to the actual list of residents in houses on these islets, I mentioned that one of those inhabitants and his wife were present here and had come here in order to act as representatives of all those who were interested in the matter, and I notice that the interpreter, who serves us so well and faithfully in these matters, did not mention that fact. I think that it is perhaps desirable that it should be made quite clear when people have taken the trouble to come here in order to show the great local interest in the matter.

I now wish to say one word with regard to this question of rating. Rating, as the Court will probably know, is an expression used particularly in English law in relation to the local taxation of property, as opposed to the word "taxes" which is used in relation to the national taxation. Towards the bottom of page 721 of the French Rejoinder, I find it stated (I quote) :

> "As regards the rating of houses, these measures were in Jersey and did not give rise to any important or overt act in the territory under dispute."

The implication here is that no act is an act of sovereignty in relation to given territory unless it takes place inside that territory. There is, so far as I am aware, no warrant for any such proposition. History abounds in examples of acts of sovereignty carried out by or from one territory in relation to another. Can one think of a clearer example of an assertion of sovereignty than the levying of taxes on houses and property ? In no country in the world, I believe, do the authorities levy taxes on houses and property which is not within their jurisdiction. For example, if an Englishman owns property in France, it is the French authorities who levy the rates and taxes on that property. It would be inconceivable that the United Kingdom authorities would think of doing so, and therefore surely such measures are the clearest possible evidence that the authorities concerned have, or at least claim to have, authority over the territory in question. The passage which I cited from the French Rejoinder continues as follows (I quote) :

> "Actually they [that is to say, the rating measures] only constitute evidence of the existence on those reefs of the houses on which the rates were levied."

But surely these measures are evidence of much more than that : they are evidence of sovereignty over the territory, otherwise the measures could never have been taken. For such rates are essentially a levy for services which the local authorities render in respect of the property concerned. The services are rendered in respect of houses and property situated in the rating authority's jurisdiction. The Jersey authorities would not be rendering any service if the house was in France, even if it belonged to a Jerseyman. They would leave that to the French authorities, who would also levy the rates. It is just because the Minquiers and the Écréhous are Jersey territory that such rates are levied. There is no other possible basis in law or principle that I can understand.

I think it is helpful if I invite the Court to consider a little more closely what are the implications of the French attitude in these sorts of matters. There is no attempt to show why, if the islets were French, and, as is maintained, dependencies of the French coast, there is no

attempt to show why the houses on them were not French, registered in France according to French law and with these rates levied upon them by the local authorities in return for services performed for the inhabitants by those authorities. There is no suggestion, that I am aware of, of any instance of the exercise of jurisdiction *ratione soli* on the basis of French law. It is merely denied that it has been so exercised on the basis of English or Jersey law. Now if this were to be correct it could surely only lead to the conclusion that there is or was no law territorially applicable to this land at all—that the land is land without a *jus soli*. Now is that a tenable proposition? In the first instance it implies that the groups are or were *res nullius*. That will be discussed later in more detail, but I shall suggest that clearly they are not. But next it fails to provide for something which with such islands as these is surely an absolute essential. It might not matter very much if some remote atoll in the Pacific, or rock in the Arctic sea, lacks any applicable *jus soli;* but such a situation cannot be admissible with regard to islands close to the mainland of Europe and close to important sea traffic routes. Suppose, for example, that someone who is neither French nor British were to commit a crime on these islands. Neither country could try him *ratione personæ*, and if, as is apparently contended, there is no applicable *jus soli*, there would be no power to arrest him and send him back to his own country. Obviously there must be a *jus soli:* it is required by reason and necessity. And if so, what is it? It must be English or Jersey. Further, we say that in fact and in history the sole evidence of the exercise of jurisdiction, of the application of law, is of the application of English or Jersey law, and for that, we suggest, there is a very good and sufficient reason which is this: that apart from visiting fishermen, all the residents on both groups and all the owners of property are and always have been Jerseymen or Englishmen and nearly all the habitations, practically all the habitations, have always been Jersey or English built and owned, with their title deeds registered in Jersey, and therefore naturally the law which is applied to them will be Jersey or English law. That really comes to the application of the old tag *res ipsa loquitur*, for it is just what one would expect, if the islands are British islands, dependencies of Jersey. In those circumstances there would be nothing surprising in finding that the residents and property owners are English or Jerseymen. It is what one would expect. What would be surprising would be to find this degree of English and Jersey residence and the absence of French residence, if the groups were French. That would indeed require some explanation. The obvious conclusion is surely the natural one. Jersey people live on the islets and own houses there, and Jersey law applies, because the islets are British, and because they are dependencies of Jersey.

Mr. President, I have now completed what I wish to say about what I might call the setting and context of this case, and I hope that I have not detained the Court too long with that part of my address. Next, I would like to tell the Court how we propose to present our argument. It seems to us that this case falls naturally into three different parts. There is first the older, more historical part, the events of the Middle Ages and of later years up to the eighteenth and nineteenth centuries—what I might call the "ancient times". Next there is the more modern part of the case, dealing with what I shall call "recent times", leading up to the very point where the dispute was

referred to the Court. But then there is a third and quite separate section of the case—in our view quite irrelevant and quite unnecessary —which arises entirely from the French contention that all the events which have occurred since a date in 1839, when a certain Fishery Convention was signed between the Parties, should be ignored and treated as if they never took place at all. This has always seemed to us to be a very extraordinary contention, especially when one remembers the slender foundation on which it is based—a simple provision about fishing for oysters—something that seems to have nothing to do with any question of sovereignty. We are not all of us assembled here today to decide to which country these islets belonged in 1839, but to decide to which country they belong *now*. That was the question put to the Court by the Special Agreement or Compromis which submitted this dispute to the Court. And it seems a strange thing that our French friends should now really seek, in effect, to put a severe limitation upon the competence of the Court to decide the very question which they have referred to it.

However, since our opponents have raised this curious issue, we shall be obliged to deal with it. Our scheme of presentation of the case will be this. My own remaining observations will be of a general character relating to the case as a whole, but in the course of them I shall try to bring out certain further points of particular interest and importance. But I shall also draw the attention of the Court to certain legal considerations, which arise out of past decisions of international tribunals on questions of territorial sovereignty, decisions which, in our view, are of special relevance to the present case. Mr. Fitzmaurice will then deal with the French contention about the year 1839—that is, what has been called the question of the "critical date". Here I ought to say at once that of course we in no way dispute that in this, as in every other case of a disputed claim to territory, there must be some date which can be described as the "critical date", subsequent to which no legal significance or effect would attach to acts which might otherwise be relevant from the point of view of title. We, however, differ from our opponents radically as to what that date should be in the present case. According to us, the proper date to take for that purpose is the date of the signature of the Compromis—December 29th, 1950. Obviously, anything which has happened since that date can be disregarded. But, according to our opponents, the critical date is August 2nd, 1839, the date of the signature of the 1839 Fishery Convention, and our opponents appear to have made this difference between the Parties a principal issue in the case. We do not so regard it, as I have already pointed out, and we say that, in effect, it is quite inconsistent with the very terms of the Compromis which has brought the matter before the Court. The Court does not need to be reminded that in that Compromis it is provided that the Court is to decide in whom the sovereignty at present rests. And it would be a strange thing if, at the same time, one has to read into that document some implication that there is some temporal bar to the Court considering, and that the Court must shut its eyes to, these most important events which have occurred during the last hundred years. But that issue, however irrelevant it may be, is certainly the first—as obviously, logically, it precedes all the others. We shall therefore deal with it first, for that reason only, not because of what we think of its intrinsic

importance—and, as I have said, Mr. Fitzmaurice will assume that task on our behalf. Then, Mr. President, next Professor Wade, who is Professor of the Laws of England in the University of Cambridge (and, I may say, one of the most distinguished living British authorities on constitutional law), will deal with the Middle Ages and the following period; and then Mr. Harrison, the Attorney-General for Jersey, as you know, will deal with more recent events. He will put the particular point of view of Jersey, and he will be able to deal with certain interesting and important legal points, and, as I have already said, he will be speaking on behalf of people whose own position will be directly affected by the outcome of the case.

It may be convenient if, at this point, I recall to the Court what the basis of the United Kingdom claim is, as pleaded and as maintained by us. In the first place, we argue that the United Kingdom is entitled to sovereignty over the groups—and I quote the actual words that have been used: "by reason of having established the existence of a root of title in ancient times, which is supported by effective possession in recent times to be found in acts which manifest continuous and peaceful display of sovereignty over the territories". Secondly, and in the alternative, we argue that the United Kingdom is entitled to sovereignty over the groups (I quote) "by reason of having established title by effective possession alone, such possession being found in acts which manifest a continuous and peaceful display of sovereignty over the territories".

Those are our claims. But there are certain points arising out of them which I must clarify beyond any possibility of misunderstanding. To begin with, the expressions "ancient" and "recent", which I used just now, were first used in the Memorial—they were used before there was any question of the raising of the date of 1839. And our expressions "ancient" and "recent" have no relation to the year 1839 at all. We regard 1839 as a date which has no significance at all in the dispute, and the use of those words "ancient" and "recent" arose from the consideration that this case was essentially one in which the claims of the respective Parties should be considered as a whole over the entire period. The division of the history into ancient and modern times is simply for the purpose of convenience in dealing with the matter, particularly having regard to the separation of the subject between two speakers. When we used the expressions in the Memorial, we had in mind certain famous words of Judge Huber in the *Island of Palmas* case, which I am sure are familiar to members of the Court. They are to be found on page 908 of the report in Volume 22 of the *American Journal of International Law*, and they are these (I quote):

> "It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period.... It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control."

Having that passage in mind, and having regard also to the fact that this case covers a period of over a thousand years, the expressions "ancient" and "recent"—however loose—seem to us to have the right significance and therefore to be suitable for use in stating the case.

The second point arising out of our basis of claim which I should like to make clear beyond any possibility of misunderstanding is this. I have already said that we are not interested in the date of 1839. I now wish to emphasize that, when in the second, or alternative, claim we refer to our title based on "effective possession alone", we are again not limiting ourselves in any way by reference to the year 1839. The second claim covers the entire period just as much as the first. It affirms that there are acts of effective possession, spread over the entire thousand years. In the second claim, therefore, we provide for the possibility—though of course we deny that it is so—that at some point in time the title to sovereignty may have been with France; but we contend that, even if that was so, the United Kingdom has exercised effective possession over the groups for a sufficiently long period to be entitled now to claim sovereignty over them. In that respect, and in that alone, does the second claim differ from the first, which asserts that the United Kingdom alone has been sovereign over the groups throughout the entire period.

The fact, therefore, Mr. President, that Professor Wade will deal with the period broadly up till the end of the eighteenth century and that Mr. Harrison will deal with the period broadly after 1800, does not in any way mean that Professor Wade is dealing with the first part of the claim and Mr. Harrison with the second. It will also be part of Professor Wade's task to show that the United Kingdom can invoke an ancient title and has supported that ancient title by effective possession, and the same story will be continued by Mr. Harrison. But it will also be part of Professor Wade's task—and this is what I am concerned to emphasize lest there should be any misunderstanding—it will also be part of Professor Wade's task to show that, even if we could not establish the existence of a root of title in ancient times, we could nevertheless prove that by the nineteenth century the United Kingdom *was* entitled to sovereignty over the groups by reason of effective possession alone. If that should be the case, Mr. Harrison will equally be able to show that the title has been effectively maintained ever since, just as he will also be able to show that the title which we claim as being rooted in ancient right has been effectively maintained.

[Public sitting of September 17th, 1953, afternoon]

Mr. President, when the Court adjourned I had just stated how we proposed to put our case before the Court and I had said that I myself intended to deal with one or two of the fundamental questions. I begin now with a rhetorical question: what does one do—what does a government ordinarily do—when it is called upon to prove or to make good a claim to possess, and be the sovereign over, certain territory? The answer, surely, is that you bring forward positive evidence of your sovereignty, by showing how, and in what way, you have exercised it, and still do exercise it. You may show how your title originated—but you would never normally stop at that. You would show that you not only had a title, but that you exercised it—and were exercising it now—at the very moment. That is how the existence of sovereignty is proved.

I hope I can claim that this is just what the United Kingdom Government has done in its written pleadings. We claim an original root of title in ancient times—but we have not rested on that. We have been at pains to show that we have exercised this sovereignty and have exercised it for a very long time. We have brought forward a great mass of carefully documented and fully authenticated evidence, which not only supports our claim to possess sovereignty, but also shows in very considerable detail how we have exercised this sovereignty in concrete fashion. In short, we have made a serious—and I hope not unsuccessful —attempt to *prove* our case.

To what extent then have our opponents demonstrated or tried to demonstrate *their* sovereignty ? To ascertain this, we must examine what exactly the French case consists of. And I am bound to suggest that it consists not of any real affirmative proof of French title, but much more of an attack on the United Kingdom evidence, with a view to weakening or destroying its value. It is in fact a negative case, and I shall show later that it depends almost exclusively on establishing and maintaining a *presumption* of an original French sovereignty, which, it is said, must be assumed still to exist. Yet, as the preamble of Article II of the Compromis clearly implies, it is for each party *affirmatively* to establish its title : the French Government pays lip service to this proposition, but then fails altogether to accept its implications. As we pointed out in paragraph 182 of our Memorial, the fact that the United Kingdom put in the first written pleading, and is opening the present oral hearing, in no way makes us plaintiff, or France defendant. It creates no presumption of French sovereignty to be displaced by us, nor does it relieve our opponents from the obligation to prove their own title. If indeed any presumption could be said to exist in the matter, it would surely be in favour of the United Kingdom, which is unquestionably actually exercising the sovereignty at the present time.

In any event, the fact that the French case takes the form essentially of an attack on the United Kingdom evidence, emphasizes that all the positive evidence of title which the Parties are able to adduce comes from the British side. The Court cannot ignore the fact that practically every original document, practically all the evidence of the concrete exercise of sovereignty, has been put in by us.

If the Court will look at the Annexes to the British Memorial, it will find no less than about 75 of such documents and pieces of evidence in the Annexes A 7-22 and A 79-140. In the French Counter-Memorial, where, if anywhere, one might have expected to find the positive evidence of the French title, there is hardly a single original document, and hardly any extracts from contemporary records, except such as had already been cited by us. The whole French Counter-Memorial on its historical side is simply an attempted refutation of the English case, not a statement of a French claim to the islets.

Similarly, the Court will find annexed to the United Kingdom Reply more original documents or pieces of concrete evidence, and still more are furnished in the volume of Additional Annexes ; whereas annexed to the French Rejoinder there is nothing except some material relating to a present-day French project to construct a hydro-electric dam in the Bay of Cotentin. This obviously can have no juridical relevance of any kind to the question of title, and indeed, if it were really material, would it surely not have made such a tardy appearance in the pleadings.

Now, as with the earlier periods, it is equally noticeable that virtually all the evidence of concrete exercise of sovereignty over the groups in the last 150 years comes from the United Kingdom's side. To set against this, the Government of the Republic can in the same period only invoke three acts, all of them incidentally relating to the Minquiers alone. As regards the Écréhous there are none. These three acts relative to the Minquiers are considered in detail in the United Kingdom Reply, paragraphs 233-239, where it is shown why we contend that they are quite insufficient to support the French claim. We shall go into this again later ; I merely summarize the facts now.

The French pleadings and their method of presentation of documents consist of the allegation that modern acts are all automatically and *ipso facto* without value because they occurred after 1839 (although, in fact, even if it could be accepted that 1839 were the critical date, some of the acts occurred before that date). Or else—this was an earlier argument—they are said to be valueless because they occurred previous to the period 1869-1876, when the dispute is said to have been "born" (though here again, even if that date could be accepted, many of the acts in question occurred before). Alternatively, the value of individual acts is attacked upon the basis that most of them can be explained as exercises of jurisdiction *ratione personæ* rather than *ratione soli*. In any case, the French position appears to be not only that the Government of the Republic need not show any manifestations of French sovereignty during this period, but that it is not even necessary seriously to consider the United Kingdom acts. The general line taken —I quote from page 399 of the Counter-Memorial—is that the Government of the Republic considers it (I quote) : ".... unnecessary to proceed to a detailed examination of the factual arguments brought forward in the British Memorial" in respect of the more recent periods. But whatever our opponents may say, we cannot believe that the Court will refuse to give this very important evidence the attention and consideration it obviously merits. We believe that no court would care to give a decision in a case of this kind that took no account of anything that had happened in the previous 114 years. We suggest, moreover, that when the Court finds that the whole case, broadly looked at, consists of a process whereby one side furnishes all or nearly all the positive evidence of title, and the other side produces practically no counter-evidence, but merely criticizes the value of the other's evidence, or seeks to write it off as being *a priori* irrelevant, there can only be one deduction. Even if it were considered that not all the evidence produced on the British side is conclusive, or even capable of being questioned, and even if there can be said to be certain gaps and lacunæ or unexplained factors, nevertheless, it is virtually the only positive evidence that exists : there is a considerable quantity of it and it all points one way.

If, therefore, the question which the Court has to determine is, as we believe, which of the two countries has the superior title, then we venture to think that, taking the weight of the evidence as a whole, there can only be one answer.

I would like to give just one example of the French technique of mere denial to which I have been referring ; others will emerge later. For this instance I go back to the Middle Ages. The Court will recollect that the Abbot of Val-Richer, through his Prior on the Écréhous,

was summoned to appear, and did appear, before the King's Justices in Jersey on a writ of *quo warranto*, to answer in respect of certain matters affecting his priory. We have claimed this as constituting a clear exercise of sovereign jurisdiction over the Écréhous, and as an acknowledgment of it on the part of the Prior, who was not an Englishman—so that there could be no question here of any exercise of jurisdiction *ratione personæ*. If, therefore, the Prior, or his superior the Abbot—equally not an Englishman—had considered the Écréhous to be French territory, they must surely have refused to appear before an English court and would have regarded themselves as answerable only to a French court. On this basis we have argued that the outcome of the proceedings was immaterial. What counted was the clear exercise and admission of territorial jurisdiction. That the jurisdiction was in fact territorial admits of no doubt, since the subject-matter of the proceedings was a right of property in land, and it is a universal principle of law, applicable then, as now, that jurisdiction in respect of territorial rights can only be exercised by the courts of the country in which the land is situated or under whose sovereignty it comes.

The point that I wish to make at this stage is that the French method of dealing with this particular matter is simply to deny that the appearance of the Prior before the King's courts in Jersey had any implication that the Écréhous was English. Our opponents furnish no counter-evidence of any exercise of jurisdiction over the Écréhous by *French* courts, or that French courts ever concerned themselves with the Écréhous at all. There is no evidence that the Prior or the Abbot ever appeared before any French court in respect of the Écréhous, as the Prior did before the English court. Thus, the only positive evidence of the exercise of jurisdiction by any courts over the Écréhous at that period is on the part of the English courts, and of this fact the Court cannot fail to take due account. Broadly, it is the same thing all along the line.

Mr. President, we naturally do not criticize our opponents for their failure to adduce positive evidence of any actual French exercise of sovereignty. They cannot make bricks without straw. But the significant fact remains that this negative presentation of their case is the best that they can do—the only thing they can do in the absence of any positive evidence. Even if our opponents succeeded in discounting the significance of the British evidences of title, they would still, we suggest, not have established the title of France, because they have shown no instance in which, in all the long history of these islands, France has ever actually *exercised* any sovereignty over, or in respect of, them. Yet the dispute has been submitted to the Court under the Compromis on the basis that in fact these islands must be under the sovereignty of one or other of the two countries. Can there then be any doubt that they must be under the sovereignty of that one of them which can produce the greatest weight of positive evidence in support of its claim? And can there be any doubt, if the evidence is looked at as a whole, that the country which can do this is the United Kingdom? We shall show that so far as any considerations based on history, geography, or contiguity are concerned, we can at least match any title France can put forward; while, on the other hand, we can put forward an incomparably greater weight of evidence of the actual exercise of sovereignty far exceeding, particularly (but by no means exclusively) during the last century or two, anything France can adduce.

I have insisted somewhat on this matter because, unless the evidence were looked at as a whole, it would be very easy to come to a conclusion which would not accord with the facts or the realities of the situation. The history of the case extends to over a thousand years if we take as the starting point the year 933, at about which time William Longsword, Duke of Normandy, extended his rule over the Channel Islands. It is now 1953—one thousand and twenty years on. Much that has happened in those thousand and twenty years may be obscure, there are certain gaps and silences, there is room for dispute and argument, and the medievalists may not always agree about the exact value or legal effect of this or that act or factor. But all doubt and uncertainty vanishes when we look at the case and the evidence as a whole, for then the picture is one of British sovereignty definitely and continuously exercised for many centuries and evidenced by numerous concrete acts.

May I now carry my analysis of the French case a stage further. Careful consideration will show not only that it is a negative case, offering practically no evidence of French exercise of sovereignty, but also that it is founded and depends on one single, simple and all-embracing proposition, which really constitutes the entire French case. This proposition is as follows. Our opponents say that France originally had the sovereignty, in the sense that it was vested in the Kings of France as feudal overlords of the Dukes of Normandy. (Whether that view is correct or not, I am not concerned at this moment to discuss, though, as we shall show later, it is in fact dubious. However, I will pass that over for the moment.) The next step in the French argument is that soon after 1200 the Channel Islands became separated from continental Normandy; but, according to the French thesis, the sovereignty of the Kings of France over the Channel Islands automatically continued except to the extent to which the English were or came to be in actual possession or control of any of the islands. The English, they say, can show that they were in actual possession and control of certain of the islands such as Jersey, Guernsey, Alderney and others, but, according to our opponents, we cannot show this with regard to the Minquiers and Écréhous. Consequently, they say, the original French sovereignty over these two groups automatically continued and still exists to-day.

Such is, fundamentally, the French argument, and on that basis our French friends, metaphorically speaking, sit back and say that there is no more for them to do. The ball is now in our court and it is for us to prove our effective possession and control of the two groups in dispute. If we cannot do this, they say, France must be adjudged sovereign, and therefore all that the Government of the Republic has to do is to show that the evidence we can adduce of having exercised, and of now exercising, the effective possession and control is, for one reason or other, dubious, or valueless for the purpose of establishing our sovereignty. If the Court will look at page 722 of the French Rejoinder, and at the conclusion which appears as the final paragraph of Sub-Section I, it will see that the French position is, in effect, precisely as I have suggested, namely, it is said that the United Kingdom is not entitled to invoke any acts performed subsequent to 1839, and France is not under any necessity to do so, but need only show that the United Kingdom acts are inadequate or invalid.

It is literally true, therefore, that the French case begins and ends with the Middle Ages. After that there is nothing. Even in the Middle Ages what was there? Nothing but an abstraction—nothing but a bare feudal right devoid of any content or substance.

Now, Mr. President, as I shall presently show, on the basis of previous decisions of international tribunals, the French attitude which I have described is unsound, and the whole French thesis is based upon a misconception. For international law requires something more than ancient titles or abstract right. It is not enough that titles once existed—even if in this case any such French title did exist. International law requires that titles should be effectively kept up—so that it would not be sufficient for France to rely upon a presumption that a once subsisting title still existed in the absence of positive proof of another country's better title. As we have seen, and as the authorities I shall cite show, even a perfect title could be lost by simple inactivity, particularly when there is a competing claim in the field.

Therefore we deny the validity of the French theory as to their basis of title. But may I say this at once that, even on the basis on which our opponents put their case, we submit that the sovereignty should unquestionably be adjudged to the United Kingdom, since we consider that we can in fact discharge the burden of proof which our opponents seek to put upon us. We can show effective exercise of sovereignty on our part over the Minquiers and Écréhous, both in ancient and in modern times, quite sufficient to displace any original French title there may have been.

There is a further reason why we believe the basis of the French case to be mistaken. It ignores realities, and relies entirely on a nominal title which, even if it existed originally, was never translated into actuality or corresponded with the true essence of the situation. It never included any actual sovereign powers, nor were such powers ever actually exercised by the French Crown in respect of the Channel Islands. It will be seen, therefore, that the French claim to the original title is of a shadowy and unsubstantial kind, based on a sort of abstract feudal right, and that it has never been anything else. This supposed title was never strictly *sovereignty* at all, but a species of *suzerainty*, deriving from the feudal overlordship of the Kings of France over the Dukes of Normandy. It was Duke William Longsword who actually extended his dominion over the Channel Islands, who actually appropriated and, so to speak, reduced them into possession; and he did this on his own account, not as agent or on behalf of the French King. Far from it, as Professor Wade will show you. There is also no proof, and good reason to doubt, that the Channel Islands were ever included in the territories for which the Dukes of Normandy did homage to the French Kings. In any case, the actual rule over the islands remained with the Dukes. It was never exercised by the Kings of France. Thus, even if a nominal suzerainty became vested in the Kings of France by virtue of their feudal overlordship over the Dukes of Normandy, this was no more than a formality. There was no effective exercise of sovereignty by the Kings of France over the islands. The real sovereignty lay with the Dukes of Normandy, who were to all intents and purposes independent princes ruling their own territory; and if they chose to do homage to the French Crown, it was as a matter of courtesy or policy and not of compulsion, which the Carolingian and

Capet Kings of the period would have been quite incapable of exercising in respect of their powerful neighbours on the coast. When Professor Wade addresses you on the medieval history of this case, he will show how extremely precarious was the situation of the Carolingian and Capet Kings after the breaking up of Charlemagne's Empire and how abstract and unreal were the rights which they professed to exercise over such independent principalities as Normandy, Brittany, Aquitaine and the rest.

Thus, from the point of view of realities, we feel justified in claiming that the real sovereignty over the islands lay from the start in the Dukes of Normandy in their own right, and later, through them, with the English Crown. What occurred after 1200 was not, as the French Rejoinder says, a dismemberment of *French* sovereignty. It was a dismemberment of *Norman* sovereignty, because King Philip II of France, using as a pretext a dubious judgment of his feudal court, pronounced against King John of England, and invaded and annexed continental Normandy. This was strictly an act of aggression or at any rate of spoliation, and the fact that it was not contrary to the morality of the period should not blind us to its true character. This act was one of the main causes of the constant conflicts between France and England in the next 250 years, during which Normandy repeatedly changed hands—for, even though they were Kings of England, the Dukes of Normandy did not readily accept the French appropriation of their ancient and historic principality. However, they still had the Channel Islands, for the only rights King Philip of France's action gave him were those he could assert by force of arms. He did not take the Channel Islands, and no more then than at any other time before or since did France exercise any sovereignty there.

Thus, what really occurred after 1200 was not a dismemberment of French sovereignty, which was indeed, if anything, expanded and added to by the French acquisition of control over *continental* Normandy. What really occurred was simply a separation of the effective possession and control of the islands from the effective possession and control of continental Normandy. The Kings of England as Dukes of Normandy then ceased to exercise the effective sovereignty in continental Normandy, and for the *first time*—and this we must insist on as a vital point—for the *first time*, the effective *exercise* of sovereignty over even continental Normandy passed to the Kings of France. But this did not occur in respect of the islands. There, the effective exercise of sovereignty continued as it always had done, in the Dukes of Normandy and Kings of England.

In short, Mr. President, it comes to this : even assuming that France can show an original *abstract* title going back to 936 when William Longsword is said to have done homage for the islands, we can show an original *effective* title through the Kings of England, as successors to the Dukes of Normandy, going back still earlier to the time when Longsword himself reduced insular Normandy into his own possession and effectively administered it. And the Dukes, or rather by then the Kings of England, were still effectively administering the islands as an undivided whole when the separation from continental Normandy took place. And in any event, Mr. President, I understand that the famous William Longsword was certainly not a Frenchman—I think he was a Norseman.

In these circumstances it is not for the United Kingdom to establish that England exercised, or rather continued to exercise, the possession and control over the Minquiers and the Écréhous (though in fact we can show that we did) : it is rather for France to show that we did not. We do not wish, and do not feel we need, to rely on presumptions, but, if any presumption is valid, it is surely this, that, as part of the Channel Islands over which the English Kings exercised effective possession and control before 1200, the Minquiers and the Écréhous continued to be in the same possession and control as they were in before the separation of the islands from continental Normandy. What our opponents have to establish, therefore, is that the effective control of *continental* Normandy which the Kings of France established for the first time after 1200, was extended to the Channel Islands, and in particular to the Minquiers and the Écréhous ; and except to the extent to which they can establish this, the presumption must be that the effective possession and control remained where they were before, namely, in the Kings of England. Now our opponents can show this with regard to only one part of the Channel Islands, namely, eventually, the Chausey islets—and we shall show that it was not until the eighteenth century that even this occurred and that the French title to-day to the Chausey can only be justified on precisely the same basis of effective possession which we can show in respect of the Minquiers and the Écréhous. But our opponents cannot show possession or control with regard to any other part of the Channel Islands, for there is no shred of evidence in the Middle Ages, or later, of any effective exercise of sovereignty by France over any part of the islands, except—after a long time—as I said, the Chausey. (We will deal later with the French contention that France exercised such sovereignty over the Écréhous through the Abbey of Val-Richer and show that that is wholly erroneous.)

I should like to make it clear that just now when I was referring to William Longsword, I said he was not a Frenchman, but a *Norseman*, not a Norman—a Viking, as I understand.

Now may I draw attention to a further point of great importance in this case. I think I have shown correctly that the French case is founded on the presumption of French sovereignty derived from the original overlordship of the French Kings in respect of the Dukes of Normandy. Now, even assuming that this overlordship could have survived in respect of the Channel Islands after the various things that occurred in the Middle Ages about which you will be hearing in due course from Professor Wade, it is nevertheless surely obvious that a feudal overlordship could not have survived the death of the feudal system itself, of which it was a part. At some date which can be placed between 1400 and 1500, or, in France, in the reign of King Louis XI (1461-1483), the feudal system began to come to an end. Rights derived from feudal overlordship then—or soon after—necessarily lapsed, because the overlordships themselves ceased to exist, presupposing as they did a system that no longer existed. These rights could not therefore continue unless they were placed on some new basis of title. This could be—could only be—the effective *exercise* of sovereignty. In short, the notional title of France based on feudal rights necessarily lapsed with the demise of the feudal system, if it had not already done so in other ways. From that time onwards French sovereignty could only be admitted, if based in the ordinary way on actual possession and control, and France must show

that she either had then exercised, or subsequently established, such possession and control. This she has never done, for, although possession was taken of continental Normandy after 1204, no similar possession was ever taken of the Channel Islands, apart from a few periods of temporary military occupation.

These considerations are, in our view, enough in themselves to destroy the validity of the French argument that there still exists to-day a presumption of French sovereignty arising from an original feudal overlordship, and that it is for us to displace this presumption. It is certainly for us to establish our own title by showing effective possession and control, and the exercise of State authority. But it is equally for our opponents to prove their title in the same way. There is no presumption of it—and this is what they have not done.

I hope now to have shown the Court that the French case depends almost wholly on the claim that France had an original title, and on the presumption of French sovereignty said to arise from that—since our opponents have introduced practically no evidence of the actual exercise of sovereignty. I hope, however, that I have also shown that this alleged original title was itself dubious, and at any rate is inoperative to-day to support the French claim. I maintain that for four distinct reasons, each of which can be stated in one phrase, namely, *first*, that this title, if it existed at all, consisted of no more than a nominal or abstract right ; *secondly*, that it was never translated into the effective exercise of sovereignty ; *thirdly*, that even the abstract right would have lapsed with the passing of the feudal system and was not replaced by anything else ; *finally*, that the title, even if it once existed, was not, and never has been, kept up as international law requires.

I come next to the question of the treatment of the Channel Islands as an entity, and the question how far a reference to one of these islands can be regarded as being also a reference to its dependent islands or islets. This is indeed a very important question because, as we have seen, the basic French theory involves denying to the Channel Islands the status of a unit, whereas in fact they did constitute, as we suggest, a single undivided entity. Consequently, throughout this case, our opponents have been very concerned to deny that the Channel Islands constituted or could constitute an entity, or that references to a main island must be deemed to include its dependencies. Furthermore, they have constantly sought to argue that when in the past, in connection with any act or holding by the English Crown, only certain parts of the Channel Islands were mentioned by name, this automatically involves an inference that all these parts not so named must have been French possessions.

In taking this line, our opponents have involved themselves in serious contradictions. It is very noticeable that, when it happens to suit the French argument to adopt the entity or dependency theory, they have no hesitation in doing so, while simultaneously denying its validity so far as any United Kingdom claim is concerned. I give an example. For instance, our opponents have argued in the French Rejoinder, and indeed also in the Counter-Memorial, that, because the Minquiers and the Écréhous are situated comparatively near the French mainland, they form a unit with that mainland, or are dependencies of it. (At another time, incidentally, they claim that the Minquiers are dependencies of the Chausey.) Consequently, our opponents claim, by

reason of this alleged unity with, or dependence on, the French mainland, that, when the Channel Islands became separated from continental Normandy after 1204, the Minquiers and the Écréhous remained, so to speak, attached to continental Normandy. Now, if this argument is valid, it is equally valid, for instance, as respects the Écréhous in relation to Jersey, since they are even closer to Jersey than they are to the French coast. That argument, moreover, overlooks the fact that Alderney, the British character of which has never been questioned, is much closer to the French coast than the Minquiers—it is, in fact, about the same distance from it as the Écréhous, and only a little further away than the Chausey. If therefore the French contention about the effects of proximity to the coast were correct, it ought to follow that Alderney is French, or at any rate remained French after the separation from continental Normandy. But of course such a claim would be manifestly incorrect. Again, to take another example of the inconsistency of our opponents, the French Rejoinder states that in the year 933, William Longsword received the Channel Islands as a fief, and that in 936 he rendered homage for them to the French King. We do not admit these statements to be strictly accurate, as Professor Wade will explain later. The point I want to make now is that our opponents say that it was as a fief that the Dukes of Normandy supposedly received, and held, and did homage for the Channel Islands. As I pointed out before, this is the very basis of their claim to the Minquiers and Écréhous. There is no suggestion that separate homage was done for these two groups. If France *was* overlord of the groups, it was because they were part of the Channel Islands that France had this position. If therefore it was as a single fief that the Channel Islands were held by the Dukes of Normandy, it was equally as a single undivided entity that they remained vested in the English Crown when continental Normandy was lost. But continental Normandy was all that was lost, so that the islands continued to be in the effective possession and control of the English Crown. There is consequently no ground whatever for saying that this unit became suddenly divided or broken up into several parts merely by reason of the separation from continental Normandy. All that happened after 1204 was that possession of continental Normandy was taken by the Kings of France, but this possession was not extended to the islands, which therefore, as a whole and as an undivided entity, remained in English possession and control. Only at a much later date did the Chausey pass into French hands.

Another example of the same inconsistency in argument occurs over the celebrated question of the grant by Piers des Préaux of the Écréhous to the Abbey of Val-Richer. Our opponents have no hesitation in pleading this grant in support of their claim, and indeed they make it one of the principal bastions of their claim, though, as usual, the evidence of this grant came from our side and was first produced in the United Kingdom Memorial. The case will, of course, be discussed in detail later by others. But the point I wish to draw attention to now is this: that, in relying on the grant made by Piers des Préaux to the Abbey of Val-Richer, our opponents conveniently ignore how it was that Piers des Préaux was in a position to make it. He was in that position because he had himself received a grant from his own overlord, who was King John of England, and you will find the grant

in Annex A 7 to the United Kingdom Memorial. It contains certain very significant words. The Charter of Piers des Préaux in 1203, Annex A 7 on page 155 of Volume I, reads as follows:

> ".... Know ye all that I, having regard to the mercy of God, have granted and given and by my present charter have confirmed to God and to the church of st. Mary of Val-Richer and to the monks there serving God, for the salvation of the soul of John, illustrious king of England, who gave me the islands *('qui insulas mihi dedit')*, and for the salvation of the souls of myself and of my father and mother and of all my ancestors, the island of 'Escrehou' in entirety, for the building there of a church....",

and so forth. The grant was the grant of the islands of Jersey, and Guernsey and Alderney, and therefore the words *qui insulas mihi dedit* are of the greatest importance, because it was, by reason of the grant to him of the islands of Jersey and Guernsey and Alderney, that the donor or the grantor, Piers des Préaux, was able to make the grant of "Escrehou" itself. It was by reason of his tenure of Jersey alone, which he had received, as he there states, that he was able to make a grant of the Écréhous. Could there possibly be clearer evidence that the Écréhous were a dependency of Jersey? Could there be clearer evidence that references to Jersey were automatically understood to include the Écréhous? This has to be admitted by our opponents, because it is solely on that basis that the grant to the Abbey of Val-Richer was a valid grant, and it is only if the grant was valid that our opponents can utilize it in support of their case, as they seek to do. Naturally we do not agree that this grant to Val-Richer caused the Écréhous to pass into French sovereignty, or that it was evidence of French sovereignty. That is, of course, an entirely different question. The grant to a French abbey, we say, could no more cause the Écréhous to become French than the purchase by me to-day of a French islet somewhere, to build a house on, could cause the islet to become British. But the point that I make now is this: that the grant to Val-Richer cannot be invoked at all, except upon the basis that the Écréhous were a dependency of Jersey which, however, our opponents simultaneously deny.

Further illustrations of the inconsistent character of our opponents' attitude on these matters were given in paragraphs 118 and paragraphs 136 to 138 of our Reply. I will only summarize them by saying: it was there pointed out that treaties and other international agreements which, in relation to England, only mentioned Jersey, Guernsey or Alderney by name, had been cited by the Government of the Republic in support of the view that, since the Écréhous and the Minquiers were not mentioned by name, this was evidence that they were French possessions. We have pointed out, however, that equally, in the very same instruments, islands such as Sark, Herm and Jethou were not mentioned by name, yet there has never been any question of these being anything but English. If the French contention were correct, there would also be an implication that these other islands, and not only the Minquiers and the Écréhous, were French possessions.

These examples show that the attempt to deny the basic unity of the Channel Islands can only lead to inconsistencies and contradictions. This basic unity is a fact, and, as we pointed out with examples in

paragraph 118 of our Reply, is constantly recognized by historians and in the medieval records. There is also abundant proof of the use of a variety of different terms for the purpose of denoting the Channel Islands, and also of a practice of referring by name to one or more particular islands in circumstances in which a reference to the whole group is clearly intended.

Now all this has a very decided bearing on the question of what was the juridical position in relation to the Channel Islands on the separation from continental Normandy, and on the French contention that it is for the United Kingdom to establish affirmatively its possession and control of each individual part of the Channel Islands.

Admittedly, mere geographical contiguity is not in itself a ground of title in the absence of effective possession and control. Yet, if it has any relevance, it assists our claim at least as much as it does the French, for both the Minquiers and the Écréhous are nearer to Jersey than the French mainland coast, and even the distance between the Minquiers and Jersey is scarcely greater than that between the Minquiers and the Chausey. We shall go more fully into geography later, and we shall show that physically the Channel Islands, including the Minquiers and the Écréhous, do constitute a genuine, self-contained and separate group. That is the physical side : politically it is the same. Where you have a set of islands constituting a single entity politically and juridically by reason of their having been an undivided fief, then possession and control of the group operates as a whole.

Now, Mr. President, apart from the general observations which I have made, I shall leave the development of the medieval part of our case to Professor Wade, because it would really be an impertinence for me to try and deal in advance with those matters which he is so very well qualified to explain to you. I would ask the Court to bear in mind in the meantime a point which Professor Wade will bring out more fully, namely, that the French handling of the medieval aspects exhibits the same fundamental tendency as their handling of the modern times—that is to say they seek to avoid the issue of effective possession and control—the actual exercise of sovereignty—State authority—by going progressively further and further back to some date at which it can be contended that France had sovereignty, and for all later periods either to contend that there is a presumption of continued French sovereignty, or else to rely on arguments designed to discredit or shut out evidence of concrete British acts of sovereignty, while adducing no corresponding French acts. Thus, faced with the evidence of the active exercise of United Kingdom sovereignty in modern times, our opponents sought to put the critical date at the period 1869-1876, when the dispute was said to have been born, and later at 1839, the date of the first fishery convention. Similarly, confronted with the fact that the United Kingdom exercised the effective sovereignty over the whole of the Channel Islands from 1066 and throughout the Middle Ages, our opponents have gone back to 936, when William Longsword of Normandy is said to have done homage for the fief of the islands to the French King. I hope I have shown that this is not enough, and that, if it ever was enough, it long ago ceased to be so. It is but a studied (but of course highly skilled) evasion, or avoidance, of the vital issue of effective possession, and of the actual exercise of State authority—which, in fact, the French Kings never did themselves exercise. As I said earlier, any title based on feudal

overlordship necessarily terminated with the demise of the feudal system. It was never replaced by any other basis of title—for such other basis could only be actual control, actual exercise of State authority, and no evidence of this has been produced : not a single act in all those centuries or up to to-day on the part of any French administrative authority or any French tribunal in relation to the Minquiers or the Écréhous. We can, and we have furnished the Court with all those evidences of the exercise of State authority in which the French case is so conspicuously lacking.

May I now, before leaving this part of the case, try to summarize our criticisms of the French claim in a few short propositions :

First—the French claim depends almost entirely upon an alleged root of title which was always shadowy and unsubstantial and which, if it ever existed, had long since lapsed. This root of title—if it existed—consisted of suzerainty rather than sovereignty as that concept is known to modern international law. This feudal suzerainty has never been replaced by any fresh basis of title.

Secondly—there can in these circumstances be no presumption of a fundamental or historic French right which must therefore be regarded as still subsisting.

Thirdly—the French title must accordingly be affirmatively established by the ordinary process, that is to say by showing that France has actually exercised sovereign rights over the disputed islands, and that State authority has been asserted sufficiently actively and sufficiently continuously to create and maintain title. This is what the French case has failed to do.

Fourthly—the French claim fails in the field both of activity and of continuity. This is its great deficiency, and no one who reads the pleadings can fail to be struck by the way the French case concerns itself with attempting to refute the British case, rather than with affirmatively showing concrete evidences of French title.

Fifthly—there has consequently been a complete failure to manifest that continuous display of State activity and authority which international law requires. No doubt the degree of activity and continuity required depends upon the circumstances of each case. But, granted that a slight degree might have sufficed if these islands had been unclaimed by any other country, this cannot be so where there is an active competing claim in the field.

Sixthly—and lastly—all this is in marked contrast to the United Kingdom claim, scarcely if at all less ancient (for we can trace the effective *exercise* of sovereignty back through the Kings of England, as successors of the Dukes of Normandy, to William Longsword himself) ; a claim no less compelling physically and geographically ; and incomparably superior as regards both the degree and continuity of the actual State authority manifested. In short, Mr. President, can it not fairly be said that it is only England that has ever actually ruled these islands ? Throughout history, even on her own showing, France has merely stood in the wings of the theatre holding in her hand, as it were, the script of a great piece that has never been acted. However great the actress—and there is no greater than France—it is still necessary for her to play the role ! This is what she has never done.

[Public sitting of September 18th, 1953, morning]

Mr. President and Members of the Court :

Against the general background of the case which I tried to sketch for you yesterday, I want this morning to highlight certain legal considerations and certain decisions of international tribunals. My colleagues and I shall, of course, where appropriate, cite authority on particular points as we go along. But the precedents I want to discuss now relate to the case as a whole and they cover two questions of major importance. These are : first, how should a tribunal called upon to decide between two competing claims to the same territory, or island, or group of islands —how should such a tribunal approach its task ? Secondly, what is it necessary to establish in order to prove sovereignty over territory, in a case where there is a competing claim in the field ?

First, as to the question of approach. I would like to make some very general preliminary remarks. Where a claim to territorial sovereignty is involved, there are obviously several possible ways of proceeding. One way, for instance—and this seems to be the way which appeals to the French Government—would be to determine that, at a certain date, the title lay with one of the parties, and then to decide in favour of that party, unless subsequently something positive has occurred to deprive that party of its title and vest it in the other party. I shall hope to show that this particular method would be neither correct nor scientific, because the doctrine now clearly established by international law is that a title which existed at some past time is not sufficient by itself to constitute title at a later date, unless it has in the meantime been supported and kept up by effective possession, and by actual exercise of the sovereignty claimed. A mere negative in the sense that there is no deprivation is not enough.

In our Memorial we adopted what was, I think, the natural method of presenting our case—at any rate, in an opening pleading—namely, the historical method. We tried in that Memorial to show two things : first, that we had an original title, deriving from the events of the Middle Ages, and secondly, that it had always been kept up by the exercise of effective possession and control, particularly during the last century or more. It does not, however, follow that the Court must necessarily consider the case period by period. Indeed, I shall show later that according to the authorities it would be unsound to embark on any historical comparison of the strength of the two countries' claims at successive periods of time, and that the right method is to take each country's claim as a whole and as it stands now, and then to decide which is the weightier. Given that what has been submitted to the Court by the Compromis is the question whether the sovereignty over the groups respectively *belongs* to-day to the United Kingdom or to the French Republic, the Court might begin by reviewing the case from the standpoint of to-day, and determine what the position appears to be *now*, and which of the two countries is at present exercising the effective sovereignty over the groups. If it appears that one of them is in fact doing so, and if it appears further that this exercise of sovereignty is not in violation of any clear right of the other Party, and that it has been going on for an appreciable period, then we believe that the Court could, on these grounds alone, declare the sovereignty to be vested in that

Party, and need not attempt the difficult task of piercing the mists of antiquity or delving into the mysteries of feudal tenures. This method of approach finds very strong support from certain passages in the famous *Eastern Greenland* case, decided by the Permanent Court of International Justice in 1933, from which it appears that the Court was prepared to uphold the Danish claim in that case on the basis of evidence that was very recent, and almost on the basis of such evidence alone. I quote from pages 63-64 of the Official Report :

> "Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark is confirmed and strengthened."

And then later :

> "It follows from the above that the Court is satisfied that Denmark has succeeded in establishing her contention that at the critical date, namely, July 10th, 1931, she possessed a valid title to the sovereignty over all Greenland."

There is also a passage in Judge Huber's judgment in the *Island of Palmas* case (to which I shall refer again in more detail later) attributing exactly the same kind of importance to the evidence of recent events.

If, however, the Court should consider it necessary to determine what was the position as it stood in the Middle Ages, there would seem to be two possibilities, although in practice they lead to very similar results. As I have said, we should deprecate an approach to this case based on a stage by stage historical comparison of the strength of the two countries' cases at successive periods. Nevertheless, it may be that the Court will wish to make that comparison, and in that case we certainly do not fear it. In that case, one possibility is that the Court will think that at the close of the Middle Ages—say, about the end of the fifteenth century—one of the Parties was definitely exercising the effective sovereignty over the groups, and appears to have been the sovereign. But whether that Party is still the sovereign now will depend on how far it has continued effectively to exercise sovereignty ; and, in order to determine this, the Court must look to more recent events.

The other possibility would be that the Court might consider the position at the close of the Middle Ages to have been so obscure and uncertain that it is unable to determine definitely which of the two countries was then the sovereign. The Court might also feel that, after that date and up to the nineteenth century, there occurred a long period the events of which throw relatively little new light on the title of either Party. If the Court should hold that this was the situation, then we suggest that no other course would be open to it than to have regard to the position as it has developed in more recent times, and in particular during the nineteenth and twentieth centuries, and to

decide the case by determining which of the two countries on the whole exercised effective sovereignty during that period.

We believe that there is in fact no doubt at all that the Middle Ages closed with the effective sovereignty over the groups lying with, and exercised by, the English Crown. We do submit, however, that if there is any doubt about the medieval position, or about where the title lay at the end of the Middle Ages, the Court can only have regard to more recent events, and on the basis of those events must award the sovereignty to the United Kingdom, which alone has exercised it effectively during the last century and more.

However, as I said earlier, our view is that the approach based on a stage by stage comparison of the position of the two countries at successive periods is not the best one, and I want to suggest to the Court another, and we think a better, method of approaching the case. This question is of such importance that we feel guidance on it should be sought from some of the previous decisions of international tribunals on title to territory. I propose therefore to examine—though quite shortly—the method adopted in one of the most celebrated and also, as it happens, one of the most recent of these cases : namely, the *Island of Palmas* case, decided in 1928 by Judge Huber, a former President of the Permanent Court of International Justice, sitting as arbitrator.

As the Court knows, the *Island of Palmas* case concerned a dispute between the United States and the Netherlands over the sovereignty of the Island of Palmas in the Pacific, and Judge Huber fixed the critical date at 1898, being the date of a treaty under which the United States succeeded to the rights of Spain in respect of the island—if, that is, Spain herself had any rights, which was the question in the case. By the term "critical date" is meant the date by reference to which—or rather, by reference to the legal and factual position existing at which—the respective rights of the parties are to be determined. In the *Palmas* case, as I say, this date was fixed at 1898, and each side claimed that it was entitled to sovereignty at that date. The Netherlands claimed sovereignty by virtue simply of a display of State authority, exercised since 1677. The United States, as successor to Spain, claimed sovereignty principally by virtue of the Spanish discovery of the island in the sixteenth century, and this discovery, it was argued, had created a title which was still intact and had not been lost by 1898. The United States also claimed sovereignty on the ground of the contiguity of the Island of Palmas to the Philippines, which had been transferred from Spain to the United States in 1898. The Court will readily perceive that the French basis of claim in the present case is not unlike what the United States basis was in the *Palmas* case, and exhibits many of the same features ; whereas the United Kingdom case here is more like that of the Netherlands in the *Palmas* case.

The first point I want to draw attention to in the *Palmas* case is Judge Huber's method of approach. He did not start by going back to the earliest date mentioned in the case, or by comparing the titles of the competing parties at that date, and then at each successive moment in the time since. Nor did he adopt the opposite course of working backwards from the critical date, again comparing the titles of the competing parties at different dates as he went further and

further back. At first sight, it might seem that either of these methods would have been the correct one to adopt. Historically, that might be so. But, on consideration, it appears that, legally, these methods would be stultifying. A true legal comparison of the respective titles as a whole would not be possible. That, no doubt, is why Judge Huber followed a method which, it would seem, is the only feasible legal method. Instead of working purely chronologically, either forwards or backwards, he studied and analyzed first the one title by itself, and the other by itself, then the first again, comparing the two titles not in terms of the moment, but in respect of their legal weight, taken as a whole over the whole period. Thus, he began by considering the United States title based on discovery. He found this title to have been good originally, but then he found that it had not been maintained in accordance with the requirements of international law as that had evolved in the intervening period. He then considered the United States arguments based on other grounds, such as the contiguity of the Island of Palmas to the Philippines, and he found them to be incorrect or insufficient. From this he passed to a consideration of the Netherlands title. This was based on the display of State authority since 1677, and he found that ground of title to be sufficient. Finally, he reverted to the United States claim again, saying (I quote from p. 910 of the report in Volume 22 of the *American Journal of International Law*):

> "The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative."

So, he concluded (and the reference is to the same page) (I quote):

> "The Netherlands title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good."

If, as I venture to hope, the Court adopts the same general method of approach as did Judge Huber in the *Palmas* case, it will obviously be simply a matter of convenience whether the Court examines the French claim first, or examines the United Kingdom claim first, so long as each is examined as a whole, and the results—again as a whole—are compared, and the decision given is in favour of whichever claim is the stronger. I would venture to submit, however, that the Court may find it simplest to examine the French case first, for reasons which will, I think, appear sufficiently clearly as we develop our case and which will be strongly reinforced by Mr. Fitzmaurice's address, and therefore I shall not enlarge upon that aspect of the matter now.

I have tried to show that our general method of approach has the support of a great judge in the person of Judge Huber.

I come now to the second broad question of law—what is it necessary to establish in order to prove sovereignty over territory in a case where there is a competing claim? Here again the *Palmas* case is relevant, and I shall begin with that and then go on to the *Eastern Greenland* case, to which I have already referred.

May I just recall the relevant facts in the *Palmas* case. The Netherlands, it will be remembered, claimed the island by virtue of having exercised authority from 1677 onwards. The United States, however, claimed title on the ground that Spain had ceded the island to the United States by the Treaty of Paris of 1898; and that Spain had title in 1898 and was, therefore, capable of ceding it to the United States. According to the United States, Spain was entitled to sovereignty over Palmas in 1898 because she had discovered it in the sixteenth century, and because—or so it was said—nothing had happened since then "of a nature, in international law, to cause the acquired title to disappear". Now it is not open to doubt that to-day, in the twentieth century, bare discovery does not in itself give an absolute and final right to sovereignty. It gives nothing more than what is called an "inchoate right", that is, it "acts", as Oppenheim says, "as a temporary bar to occupation by another State for such a period as is reasonably sufficient for effectively occupying the discovered territory". (I quote from Oppenheim's *International Law*, 7th Ed., Volume 1, p. 510.) Judge Huber, however, decided that he must estimate the effect of the Spanish discovery in the light of the law of the sixteenth century. At page 883 of the Report in Volume 22 of the *American Journal of International Law*, Judge Huber is reported as having said (I quote):

> "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."

Now the law of the sixteenth century was not clear, but an arguable hypothesis—and the one most favourable to the United States—was that in the sixteenth century mere discovery did give an absolute right to sovereignty. Judge Huber proceeded, therefore, to consider the case on the basis of that hypothesis. Assuming, he said in effect, that Spain was entitled to sovereignty over Palmas in the sixteenth century, nevertheless (I quote from the same page of the report) "the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris". It was here that he developed the principle usually known as the principle of the intertemporal law to the effect that (I again quote from the same page of the same report):

> "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."

Further expanding this principle, Judge Huber said that, if a dispute over sovereignty arises, and the other party contends that it has actually displayed sovereignty (p. 875 of the report):

> "it cannot be sufficient [i.e. for the first party] to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign."

He also said this, at the next page (p. 876 of the report) :

> "The growing insistence with which international law, ever since the middle of the eighteenth century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintainance of the right."

Finally, on the same page, he said :

> "International law, the structure of which is not based on any super-state organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations."

The Court will see how relevant all this is in view of our contention that France never had anything but an abstract right in the present case—if indeed she had even that—and, further, that this right is not now sufficient by itself, and that it has never been kept up by effective possession and control.

Judge Huber equally found that Spain's original right (if it ever existed) had not been the subject of any continued exercise in accordance with the conditions required by international law, as that had evolved during the succeeding century. He found that, from the middle of the eighteenth century onwards, whatever had been the situation previously, it was quite clear that bare discovery without effective occupation no longer gave an absolute right to sovereignty. (Here, I would interpolate, does an abstract feudal title give any better right to-day, if that is all that there is ?) Spain's title based on discovery, therefore, had not been followed up by the necessary exercise of sovereignty. There had not, in short, been the necessary display of authority : whereas, from 1677 onwards, the Netherlands East India Company had been in a contractual relationship with the native chiefs of Palmas. This relationship made the native chiefs the agents of the Company, whose acts (again having regard to the international law of that time) were to be assimilated to the acts of the Netherlands State itself. At the very time, therefore, when, above all, manifestations of Spain's right and a display of Spain's authority ought to have occurred, such manifestations and display were not forthcoming. For that reason, quite apart from any question of abandonment, Spain's rigth, if it ever had existed, had lapsed. Since Spain's title had lapsed through not having been continuously manifested, Spain was *eo ipso* no longer entitled to sovereignty; and, as Judge Huber proceeded to say, on page 884 of the report :

> "and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise".

In short, if a State does not, on the facts, possess sovereignty, there is no need to show that it abandoned it, for there was nothing to abandon. This is our answer to France's claim that France never abandoned her sovereignty. She simply lost it—that is to say, if she ever had it—and she lost it by failure to exercise it—while another country did exercise it. What concerns us here is the principle—applied in the *Palmas* case—

that, where you have a State claiming sovereignty to-day on the basis of a title that may have been valid several hundred years ago, it is not enough for that State simply to assert or invoke the original title and nothing else. That title is subject to the law of events, in other words to the inter-temporal law, with its requirement of continued manifestations of sovereignty. Now "continued manifestation" is admittedly a relative term. I am not suggesting that a title good in itself will necessarily and always lapse for want of outward manifestation. But I do suggest that when "continued manifestation" is actively called for, for example, when title is challenged through the display of State activities by another State, then there must either be "continued manifestation" or else the title will lapse. It is significant that Judge Huber never actually found that Spain had "abandoned" her title. "Abandonment" was in fact never proved. But this was not necessary. What Judge Huber found was not indeed that Spain had expressly "abandoned" her title but that she had in effect lost it because the Netherlands, the State relying on the display of State activities at the later date, had become sovereign over the island.

It is no less significant that Judge Huber did not find it necessary to say at what precise moment in time the title passed from Spain to the Netherlands—as it must, in his view, have done at *some* time. On page 908 of the report he said:

> "It is not necessary that the display of [Netherlands] sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control."

Now, if this is the test—the "progressive intensification of State control"—I would submit that it is precisely fulfilled by the United Kingdom in the present case, whose action in relation to the disputed groups is perfectly described by this phrase. So far as France is concerned, on the other hand, the story is one of the progressive *loss* of any control originally had, until finally none at all remains.

Judge Huber, therefore, looking at the *Palmas* case as a whole, found that, though Spain had title to the island in the sixteenth century, the Netherlands had title to it in the period immediately preceding the critical date. In adopting this approach, he clearly accepted the proposition which had been put forward by the Netherlands Government in their pleadings. I quote from page 21 of the Netherlands Counter-Memorial in the case, where it was said:

> "a title to territory is not a legal relation in international law whose existence and elements are a matter of one single moment .... the changed conceptions of law developing in later times cannot be ignored in judging the continued legal value of relations which, instead of being consummated and terminated at one single moment, are of a permanent character".

That is a proposition which seems to us singularly well put, and which we have no hesitation in endorsing and commending to the attention of the Court.

May I now summarize the basic legal principles which I suggest are to be derived from Judge Huber's award and apply them to the facts of this case.

The first principle which emerges is that to which I referred already, namely, that the Court will not attempt to make a stage by stage comparison of the strength of the titles of the two Parties at successive periods, but will rather submit each title to an independent examination covering the whole period, and then balance the legal weight of one title against the legal weight of the other.

The second principle which emerges from the *Palmas* case is the principle of the inter-temporal law. As applied to this case, the principle can be stated in this form : that, not only must claims to sovereignty based on medieval feudal law be examined in the light of that law, but also that any such claims, if put forward as still valid to-day, must be examined in the light of international law as it has developed during the intervening centuries and, in particular, in the light of what international law, as it now stands, requires in order to constitute a title to territory. Applying that principle to the present case, we say, quite simply, that the United Kingdom here had a good title under medieval law and has effectively maintained it ever since. We also say that, even if France had the original title under medieval law, this is not enough, unless France has effectively maintained it—particularly when even the original title is of a decidedly abstract character. It is not enough to show a title that existed—if it did—some seven or eight centuries ago, and thereafter simply to rely on a presumed continuance of the title, when France has not in the meantime maintained it by any concrete act or by any actual exercise of sovereignty.

The United Kingdom, on the other hand, has actively performed State functions—or, as Judge Huber described it, "State activities"—regarding the disputed groups continuously over a very long period, a period of centuries, including, of course, the later period, down to to-day, such as entitles it to be regarded as sovereign over them now. It is not necessary for the United Kingdom to prove either abandonment by France of her original title (if any), or the precise moment, or epoch, at which United Kingdom sovereignty began (if it was not originally with us) : it is sufficient that the exercise and display of concrete United Kingdom authority has long existed, and can be demonstrated during the critical later period, while France has never displayed any such authority at all. In these simple propositions is really contained the whole substance of the case—and all these propositions have, as I hope I have shown, an incontrovertible legal basis in the *Palmas* Award.

One consequence, at any rate, which does seem to emerge with great clarity from the *Palmas* case, is this—that the Court should not, I respectfully suggest, allow one of the Parties to assume a position in which it argues, or appears to argue, that, because of some particular event which occurred at some particular time in the past, it has finally discharged the burden of proof so far as it is concerned ; has established a *prima facie* title ; and can view the rest of the proceedings as a mere spectator criticizing the other Party's efforts to displace this alleged *prima facie* title ! If any Party were entitled to assume that position in this case, it would be the United Kingdom, as a result of the fact

—which is beyond dispute—that it was the United Kingdom which was actually exercising the rights, and indeed the duties, of a State in regard to both the Minquiers and the Écréhous at the time when the dispute was referred to this Court, and indeed is exercising them at the present moment. Nevertheless, the United Kingdom does not claim for itself any such position. As regards our opponents, on the other hand, they do seem to appear to claim for themselves just that position—for example on page 689 of the Rejoinder when they say (I quote) : "the United Kingdom has no title to the sovereignty of the Anglo-Norman islands save that of long possession, *which it must prove in each individual case*", and they underline the last phrase as if to imply that no such burden of proof can lie upon *them*. The implication of this is, of course, that the original title which our opponents claim for France, by virtue of the feudal overlordship of the French Kings, must be presumed automatically to have continued, and still to exist to-day, except to the extent that the United Kingdom can demonstrate actual and long-continued possession. But, as we have seen, and shall see again, as a matter of law there is no such presumption. It is not enough for such a title to have existed at one time ; it must also have been kept up by the necessary display of continuity. There is no presumption of continuity—at any rate none such as would suffice by itself to keep a title alive over several centuries—in the face of an actively competing claim.

Our opponents of course profess to admit this principle—for, after having cited the homage which the Duke of Normandy is supposed to have done to the French King in the year 936, covering the Channel Islands, and after stating that this constituted the "original legal link" between France and the disputed islets, the French Rejoinder went on to add (I quote from p. 689 of the Rejoinder) "a sufficient possession in conformity therewith has been established". But of this possession and of its continuity into modern times, no proof is given. Indeed no further single word is said about it. It is indeed a feature of the French case, as we have seen, that it presents practically no affirmative evidence of any actual use of, occupation of, or exercise of jurisdiction over, the islands by France. It relies almost exclusively on the play of supposed presumptions, said to arise from history and contiguity. If necessary, Mr. President, we can invoke history and contiguity too, but we certainly have no need to rely on those considerations alone—and we do not do so.

I now call the attention of the Court to the *Eastern Greenland* case, decided by the Permanent Court of International Justice in 1933. I hope it will not be considered impertinent if I say that, coming to this matter as a comparative stranger, I find that judgment one of particular logic and clarity. It began by laying down certain general principles, two of which were as follows (I quote from pp. 45-46 of the Official Report).

The first passage is as follows :

> "Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist ; the intention and will to act as sovereign, and some actual exercise or display of such authority."

The second passage is as follows :

> "Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger."

The facts of that case were that Norway, on July 10th, 1931, proclaimed sovereignty over Eastern Greenland. Although the sovereignty over this territory had been openly disputed between Norway and Denmark for a number of years, this was the event which actually focussed the dispute, thus making July 10th, 1931, the critical date. The question at issue was as follows : was Eastern Greenland *res nullius*, as Norway argued ? One of Denmark's arguments was that Norway had already recognized the Danish sovereignty over Greenland as a whole, by treaty. The other, and the principal, argument was that Denmark had exercised sovereign rights over Greenland as a whole (including Eastern Greenland) for a long time and had thereby obtained a valid title to sovereignty.

The Danish claim was supported by the following facts. Greenland was discovered and colonized by Norwegians in the tenth century. By the thirteenth century, the Norwegian colonists were paying tribute to the Kings of Norway. Originally, therefore, Greenland was a Norwegian possession. Between 1380 and 1814, however, the Kingdoms of Denmark and Norway were united under one Crown in a manner not unlike the union between the Duchy of Normandy and the Kingdom of England between 1066 and 1204. So that, just as between 1066 and 1204, the Channel Islands were a possession of the person who was King of England and also Duke of Normandy, so, between 1380 and 1814, Greenland was a possession of the person who was King of Denmark and also King of Norway.

During the period between the fifteenth and seventeenth centuries, there was no evidence of the actual exercise of any sovereignty over Greenland ; but from 1721 onwards there was evidence of a resumption of State activities. In the Treaty of Kiel of 1814, it was provided that the Kingdom of Norway should be ceded by Denmark to Sweden. Greenland, however, as well as Iceland and the Faroes, was excepted and remained with Denmark. Between 1814 and 1931 there had been a number of Danish acts relating to Eastern Greenland which, though not very extensive, were, it was argued—in the light of the nature of the territory and the absence of any competing activity by any other State, including Norway (a factor which was especially stressed)—sufficient to maintain the title which Denmark enjoyed as successor to Norway under the 1814 Treaty, or, if that claim were not upheld, sufficient to confer title on Denmark subsequent to 1814.

This, very briefly, was the Danish argument, though nowhere is that argument more succinctly stated than in the Court's judgment itself, which I quote from page 45 of the Official Report :

> "The first Danish argument is that the Norwegian occupation of part of the East coast of Greenland is invalid because Denmark

has claimed and exercised sovereign rights over Greenland as a whole for a long time and has obtained thereby a valid title to sovereignty. The date at which such Danish sovereignty must have existed in order to render the Norwegian occupation invalid is the date at which the occupation took place, viz. July 10th, 1931.

The Danish claim is not founded upon any particular act of occupation but it alleges—to use the phrase employed in the Palmas Island decision of the Permanent Court of Arbitration, April 4th, 1928—a title 'founded on the peaceful and continuous display of State authority over the island'. It is based upon the view that Denmark now enjoys all the rights which the King of Denmark and Norway enjoyed over Greenland up till 1814. Both the existence and the extent of these rights must therefore be considered, as well as the Danish claim to sovereignty since that date."

Essentially, therefore, the Danish claim rested upon a root of title established in ancient times—I refer to the ancient rights of the Norwegian Crown of which Denmark was the successor—supported by effective possession in recent times ; or alternatively upon the ground of effective possession alone. I need not pause here to remind the Court that it is precisely upon those two grounds that the United Kingdom puts forward its claim to-day. The French claim, on the other hand, appears to rest solely on an alleged root of title, not supported, or hardly supported, by any effective possession or control.

Mr. President, it is never sound jurisprudence to reason from the facts of one case to those of another, and I would particularly like to disclaim any attempt to discover any trivial or artificial analogy between the *Eastern Greenland* case and the present one. What matters, of course, are the principles which are laid down in the judgment to which I have referred. But it is interesting to note that the Danish claim there began, as does the United Kingdom claim to-day, with the feature of a root of title derived from a union of territories ; the Danish claim was subject to a gap in the evidence between ancient and modern times, just as ours is to some extent, though far less so than the French case ; and, finally, the Danish claim, like the United Kingdom claim to-day, although rooted in the past, was of a steadily growing strength, being particularly strong in the recent period immediately preceding the reference of the dispute to the Court. Now it is substantially this Danish claim in the *Eastern Greenland* case which we have to consider ; and this claim, as we have seen, rested at least in part upon a title many centuries old. But the Court was not ready to uphold Denmark's claim solely on the ground of the evidence of the thirteenth and fourteenth centuries, together with a presumption of non-abandonment. It required the mediaeval title to be supported by a continued manifestation of that title : in other words, by what was referred to as "the peaceful and continuous display of State authority", or, as we should say now, by "effective possession in recent times". This is the principle in the light of which the French claim, based on a presumption of the continuance of an ancient right, should, as I submit, be tested.

Having found that sovereignty existed during the thirteenth and the fourteenth centuries, the Court, in the *Eastern Greenland* case, went on to consider the position during the sixteenth and the seventeenth centuries, when the evidence of the actual exercise of sovereignty was

slightest. As to this period, the Court found that although, as they said, "the tradition of the King's rights lived on" and the Kings of Denmark and Norway enjoyed what they described as a "special position .... derived from the sovereign rights which accrued" during the earlier period, this was not really sovereignty, for during the period of the sixteenth and seventeenth centuries, "the King's claims amounted merely to pretensions .... for he had no permanent contact with the country, he was exercising no authority there....". This, we suggest, applying the Permanent Court's language to the present case, constitutes an almost exact description of France's position in regard to the Minquiers and the Écréhous for the last seven or eight centuries at least. France's claims amounted only to pretensions, for she had no permanent contact with the groups and exercised no authority there.

Now mark what followed in the *Eastern Greenland* case. The reason why the Court eventually found in favour of Denmark was that, despite this gap during the sixteenth and seventeenth centuries, State activities had been resumed in the eighteenth century, from 1721 onwards, and had been particularly evident in very recent times. This is precisely what we maintain has *not* occurred in the case of France with the Minquiers and Écréhous. On the other hand, and even assuming that there was a gap in the British exercise of State activity after the end of the Middle Ages, there was a clear resumption of that activity from the latter part of the eighteenth century onwards, which has continued with ever-increasing vigour and variety until to-day.

I would also draw the special attention of this Court to the fact that, although the Permanent Court stated that, in the case of thinly populated or unsettled territory, international tribunals had often been "satisfied with very little in the way of the actual exercise of sovereign rights", this was qualified by an important reservation: "provided that the other State could not make out a superior claim". This shows that the essential issue in this kind of case is not so much "What has each party done?", but "Which has done the most?" It is just conceivable that, supposing France to have had an original title to the Minquiers and Écréhous, this might have simply continued even without any concrete display of State authority, provided France had been alone in the field—although we believe that both the *Eastern Greenland* and the *Palmas* cases are against the view that, even in that case, these rights would have continued *indefinitely*. But with an actively competing claim in the field, over the whole period, any such original rights were bound to suffer extinction unless supported by effective possession and control, and by the active exercise of State authority. The fact that the disputed groups are so close to France only serves to emphasize this position; for this fact made it incumbent on France to assert her sovereignty, if she claimed it. That is what France has never done. Indeed, one really might say that it is fantastic to consider the extent to which, and the length of time during which, France has allowed England, and later the United Kingdom, to exercise the actual authority over these groups, if she herself was really claiming sovereignty over them.

I would like to draw attention to one further point in the *Eastern Greenland* case. It was there one of the pillars of the Norwegian argument that, although Denmark might have proved her title in regard to Western Greenland, she had not proved it in regard to Greenland

as a whole, or in particular to Eastern Greenland—and further that there was no formal proof of the acquisition of sovereignty by Denmark through any particular act at any particular time. Here I shall quote a passage from page 374 of the Norwegian Counter-Memorial, with which I shall compare in a moment some of the language used in the French pleadings. The French language of the Norwegian Counter-Memorial was as follows:

> "Il convient de souligner qu'il incombe au Gouvernement danois de prouver l'exactitude de son affirmation suivant laquelle le Danemark aurait acquis au XVIIIme siècle la souveraineté sur l'ensemble du Groënland. C'est également à lui de démontrer à quel moment précis et au moyen de quels actes définis ladite acquisition de souveraineté aurait lieu."

The Permanent Court rejected the entire Norwegian thesis, and, as regards the geographical point, it said (I quote from p. 49 of the *Official Report*):

> "This is a point as to which the burden of proof lies on Norway. The geographical meaning of the word 'Greenland', i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention. In the opinion of the Court, Norway has not succeeded in establishing her contention."

So one sees that the Court entirely rejected the Norwegian legal approach on that point.

I now quote the following passage from page 377 of the French Counter-Memorial in the present case (similar passages will be found in the Rejoinder):

> "Mais, comme on va le voir, la Grande-Bretagne n'a d'autre titre qu'une longue possession sur des îles qui traditionnellement faisaient partie du duché de Normandie : c'est à elle qu'il incombe de faire la preuve de sa possession pour chacune de ces îles."

We suggest, in the light of the *Eastern Greenland* case, that this passage from the French Counter-Memorial puts the matter exactly the wrong way round, and that they have in a surprising way ignored the very important and celebrated judgment to which I have referred in the *Eastern Greenland* case. In fact, in that case one would almost accuse them (it was said in a very different connection) of having learnt nothing and forgotten nothing. Once it is established that we were in possession of the whole of the Channel Islands before 1204, when Philip II of France annexed continental Normandy, the presumption is that we went on being in possession of it, unless the contrary can be shown. We do not have to *prove* a possession which we already had. Similarly, if it can be shown that we were in possession of the major Channel Islands (which our opponents do not deny), the natural presumption is that, *a fortiori*, we were in possession of the minor ones as well. If the French can show that they took from us by force some of these, our undoubted rightful possessions, or that they took them over in some other way, well and good. This *was* the eventual position as

regards the Chausey group. But our opponents have not shown, and they cannot show, any similar taking over of the Minquiers or the Écréhous. In so far as presumptions govern the matter, therefore, the presumption would be that these groups—unquestionably in our rightful possession prior to 1204—continued to be so afterwards.

I have gone into these points arising out of the *Eastern Greenland* case in some detail, in the hope of showing how similar some of the arguments we are now hearing from the French side are to those put forward by Norway, and rejected by the Permanent Court, twenty years ago.

Perhaps I might now briefly summarize the principal conclusions which can be drawn from this case. *First*, there was the reaffirmation by the Permanent Court of various principles adopted by Judge Huber, such as that of examining the competing titles, not piecemeal, but over the whole period, and of attributing especial weight to the later period; and, above all, there was the principle of the inter-temporal law, according to which, although "a juridical fact must be appreciated in the light of the law contemporary with it", it is also not sufficient for one party to establish the title by which territorial sovereignty was validly acquired at some past moment, but "it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be regarded as critical".

Secondly, there was the emphasis placed by the Permanent Court on the predominant Danish State activity during the later period, without which the medieval title would hardly have sufficed, in view of the gap during the sixteenth and seventeenth centuries; and it would certainly *not* have sufficed if there had been any competing claim. It will be recollected that the Norwegian proclamation of sovereignty was not made until 1931, and was based on the allegation that Eastern Greenland was then *res nullius*. Thus the Permanent Court in effect held that a medieval title, supported by effective possession in recent times, was a sufficient title under modern international law, but that, without the evidence of effective possession in recent times, such a title was insufficient.

Thirdly, there was the statement by the Permanent Court to the effect that it was not necessary for Denmark to prove the actual exercise of her sovereignty over the whole of Greenland, but that, if Denmark could prove the exercise of sovereignty over Greenland as a whole, it was for Norway to show that this sovereignty did not extend over any particular part of the territory.

Mr. President, I have now completed my survey of the two legal authorities which, as I suggest, will be helpful to the Court in consideration of this matter, and that brings me to the end of the remarks which I wish to make. I would only like to add this with regard to the law, that I would respectfully suggest that this is a case which we are always glad to find, in the application of legal principles, where those legal principles enable us to reach a result which is consistent with practical realities and common sense. I have emphasized to you in the earlier part of my remarks the importance which is attached by Jersey to what has actually happened during the last hundred years and more, and the authorities which I have referred to this morning and yesterday confirm me, I think, in the submission that, in the circumstances of this case,

it is quite wrong to say—as is said by my learned friend Professor Gros —that one must ignore what has been happening during the last hundred years : on the other hand, that is perhaps the most important and decisive feature in the whole case.

I do not think it would be right for me to recapitulate in any way what I have said. I pointed out to the Court at the start that I myself could not claim the qualifications which would justify me in going into any detail in technical arguments, and I have therefore refrained from doing so. But I am sure the Court would not draw from that the inference that I am not attaching importance to detailed technical questions. Far from it. I am leaving those to my excellent collaborators who will now proceed to address you, and I hope the Court will not think it out of place if I were to pay a tribute to those whose great industry and ability has resulted in the collection of the material in this case. Whatever our other disagreements may be, I am sure that Professor Gros will agree with me that this is a remarkably documented case. That result could not have been attained without great industry and great skill, and I hope that the Court will be as grateful as I certainly am to those who have so patiently assembled the material.

I will now ask my learned friend, Mr. Fitzmaurice, to address you, to be followed by Professor Wade and Mr. Harrison, and I am quite sure that they, in their respective spheres of the case, will give you a most valuable and interesting detailed statement of the case of the United Kingdom.

2. ORAL ARGUMENT OF Mr. FITZMAURICE

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF SEPTEMBER 18th TO 21st, 1953

[Public sitting of September 18th, 1953, afternoon]

Mr. President and Members of the Court :

It falls to me to carry out the least attractive part of the presentation of the United Kingdom case. For instance, the medieval part, which you will be told about later, contains details of great historic interest and is full of picturesque and even romantic incidents, for in a sense this whole case has sprung from a romantic incident—the fact that King John of England, in the year 1202, cast a covetous eye on Isabella of Angoulême, the betrothed of one of his vassals, and he married her. And this was the direct pretext for the *arrêt*, or judgment, that led to King Philip of France's appropriation of Normandy, and indirectly to our presence here to-day. However, much as I should like to do so, I cannot enlarge on any of that. The part allotted to me in this case is about nothing more exciting than fish, or, strictly speaking, oysters. Now oysters are good to eat, but not very inspiring material for legal argument. Nevertheless, it is on these oysters that a large part of the argument which I have to present to you turns. For it is my task to deal with the question of the critical date in this case, and that question depends largely on the construction of a provision about oysters in a Fishery Convention concluded between the United Kingdom and France in 1839. My task is to try and convince you that this Convention is irrelevant to the present proceedings, and that the critical date in this case—that is to say, the date in relation to which the question of sovereignty over the Minquiers and the Écréhous should be determined—is not the date of this Fishery Convention concluded now 114 years ago, but that it is, on the contrary, December 29th, 1950, the date on which the Special Agreement or Compromis submitting the present dispute to the Court was signed.

Well, now, the first thing I should perhaps do is to indicate what I mean by the idea of a critical date. I think it can be defined by saying that the critical date in a dispute about sovereignty over territory is the date by reference to which—by reference, that is to say, to the situation existing at which—the merits of the parties' claims should be adjudged. It is, in fact, the date on which the situation is deemed to have become crystallized or, as it were, in modern language, frozen. The acts of the parties after that date cannot alter the legal position, so as either to improve or prejudice the claim of either party. In the present case, therefore, unless I can convince the Court that the 1950 date is the correct one, the respective claims of the Parties will, subject to one point I shall mention much later, have to be evaluated on the basis of the position as it existed in 1839, and without reference to the events that have occurred since. The Court will have to ignore everything that took place between 1839 and 1950. We believe, and we hope the Court

will feel, that this would not be the right course, and that to acccept a date so remote as 1839 would involve a serious distortion of the main issue involved in this case, namely, to which of the two countries does the sovereignty belong now. I shall try to show that, if the date 1839 were to be accepted, it might become very difficult for the Court to give a definite answer to this question, which is the question put to the Court in the Compromis.

Now at this point, and before I start to develop my argument, I should like to recall how this contention that 1839 is the critical date has come to be put forward. It really started when our opponents, in their Counter-Memorial, suddenly suggested that, because of the Fishery Convention of 1839, both Parties were disqualified from claiming any exclusive sovereignty over the disputed groups. This seemed to us to be an astonishing contention, because it seemed so clearly contrary to the whole basis of the very Agreement—the Compromis—submitting the matter to the Court, and also to be inconsistent with the basis of the Fishery Agreement of 1951, which was drafted and ratified simultaneously with the Compromis as part of one final and definitive settlement of the whole question of the Minquiers and the Écréhous—both of which agreements the Parties had only just entered into.

I shall hope to show that the present French contention—that 1839 is the critical date—is no less contrary to the basis of the Compromis and of the 1951 Fishery Agreement than was their former contention about total disqualification. To begin with, we believe that the Compromis not only contemplates a definite finding on the question of sovereignty, but also contemplates that this finding will be arrived at on the basis of the position as it is to-day, and not of the position as it was or may have been in 1839. And here I think I must tell the Court frankly—and I must also tell our opponents—that we on the United Kingdom side would never have agreed to submit this dispute to the Court at all on the basis that all the evidence of the last 114 years was to be ignored, and that the matter was to be decided in the light of the position as it stood in 1839. Had such an idea been mentioned in the course of the negotiations, it would have brought them inevitably to an immediate stop. And not only the negotiations for the Compromis, but also those for the Fishery Agreement. Now it is no secret that it was the Fishery Agreement to which our opponents attached importance, and it is no secret that they would only agree to submit the question of sovereignty to the Court if the Fishery Agreement was simultaneously concluded. This Fishery Agreement finally settled the position of the old 1839 Fishery Convention because it provided that this 1839 Convention should be interpreted as conferring equal fishery rights at the Minquiers and the Écréhous. We—in our innocence if I may so put it—imagined that that was the end of the 1839 Fishery Convention. Had we had any inkling of the use which our opponents intended to make of this old Convention when it came to the question of *sovereignty*, we would not have ratified the Fishery Agreement and the Compromis without a clear understanding that the sovereignty issue was to be decided on the position as it stands now and not as it stood in 1839.

Now the Fishery Agreement of 1951 is in force to-day. The Court will remember what the effect of it is. Perhaps I might just recapitulate that. Whatever the outcome of the present proceedings, fishery at the Minquiers and the Écréhous is common except that in certain limited

zones, whichever country is found by the Court to have the sovereignty will be entitled to grant exclusive fishery rights to its own nationals. These zones are restricted to a belt of only one third or one half of a mile round some four main islets or rocks which are specified. And, moreover, the relevant provisions are so drawn as to allow for the possibility that the Court might find in favour of one Party as regards the Écréhous, and in favour of the other Party as regards the Minquiers—and they are even drawn in such a way as to provide, as far as the Minquiers is concerned, for the possibility that the Court might find that each Party has sovereignty over a different part of the group. Pending the decision of the Court, fishing is common over the whole area of the groups, and this is in force now. Furthermore, even when the Court has rendered its decision, fishing will *remain* common over all parts of the groups outside the limited specified zones. So it seems to us that our opponents have had full satisfaction on the fishery question, and therefore—if I may put it so—it seems to us that they should be prepared to allow the issue of sovereignty to be decided on its merits instead of on the unreal and artificial basis that would be involved by treating 1839 as the critical date.

Well, as I said just now, our opponents began by arguing that the effect of the 1839 Convention was to *disqualify* the Parties entirely from claiming any exclusive sovereignty. They appear now to have yielded to the view that this would make nonsense of the Compromis and the 1951 Fishery Agreement. But—and I would ask the Court to note this—they have re-introduced the same argument in another form. They agree that the Parties are not disqualified *now*, but they say that by reason of the 1839 Convention the Parties *were* disqualified between 1839 and 1950, because, by the Convention—according to our opponents—the Parties undertook, or must be deemed to have undertaken, not to assert any exclusive sovereignty. They have released themselves and each other from that particular restriction now, but, since—according to our opponents—the restriction still existed up to 1950, the Parties—or at any rate the United Kingdom—may not invoke in support of their claims anything that occurred during this rather lengthy period of 112 years. In short, 1839 is the critical date. Well, the Court will see at once, I am sure, how extremely convenient this theory is from the French point of view. It allows France to claim the exclusive sovereignty *now*, yet shuts out the whole of the evidence of the last century, during which —according to our contention—France can show practically no exercise of sovereignty over the disputed groups, whereas the United Kingdom can show a great deal.

A further point of some interest about the French theory, to which I draw attention, is that it apparently applies unilaterally—to the United Kingdom only, and not to France. We, it seems, may not support our claims by reference to anything which happened after 1839. But France, for some unexplained reason, is permitted to do so, if one may judge from the way our opponents put their final Conclusions on page 729 of the Rejoinder. The relevant parts—if I may read them—are as follows: first (I quote):

> "that .... the titles relied on by the United Kingdom Government are not valid; that the alleged acts of possession are devoid of value, and in particular that acts of possession undertaken since 1839 cannot be invoked against France";

secondly,

> "that the titles and acts relied on by France involve the recognition of her sovereignty over the Minquiers and the Ecrehos".

Well, the Court will note that it is apparently only acts of possession undertaken by the *United Kingdom* after 1839 that cannot be invoked; because the second of those two passages contains no corresponding limitation as regards post-1839 acts of France. Yet, of course, if the 1839 Convention excludes the post-1839 acts, it ought to do so equally for both Parties. And I would ask the Court to note here that our opponents do in fact invoke certain post-1839 acts in support of France's claim to the Minquiers. These acts are, in our view, inadequate to support France's claim, but the point I make now is that our opponents do invoke them, while simultaneously maintaining that nothing that occurred since 1839 can validly be put forward. And they even invoke such matters as the project for a hydro-electrical dam in the Bay of Cotentin, which can have nothing to do with the question of sovereignty—and, moreover, in so far as it has taken shape at all, it seems to have done so after the dispute was submitted to the Court, and therefore subsequent to the very latest point at which any act of the Parties could affect the legal situation.

But the difficulties in the French argument which I have discussed so far are as nothing compared to those we come to if we examine this argument a little more closely.

Let us begin, if the Court will, by recalling exactly what the theory of the critical date involves. It means that, whatever was the position at the date determined to be the critical date, such is still the position now. Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them then had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now. And if both did—that is to say, if there was some sort of joint régime, or condominium, then that régime is still deemed to exist and to govern the rights of the Parties to-day. The whole point, the whole *raison d'être*, of the critical date rule is, in effect, that time is deemed to stop at that date. Nothing that happens afterwards can operate to change the situation that then existed. Whatever that situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it.

Now bearing that in mind, it follows that if the Minquiers and the Écréhous are to be exclusively French now, as our opponents claim, then they must have been exclusively French in 1839; for only on that basis could they still be exclusively French to-day. The Court, I think, will see at once that that must be so, because, if 1839 is the critical date, then the groups cannot have *become* French *since 1839*; that is the whole point of the rule, so that if they are French now—as our opponents claim—then it must be because they were exclusively French in 1839.

So far so good. We start with the proposition that, according to our opponents, the groups were necessarily French in 1839; otherwise they cannot be so now. Our opponents cannot say that the groups were *res nullius* in 1839, or else were under the joint sovereignty of the two countries, for then they would be the same to-day—if 1839 is the critical date.

On the other hand, the French argument that 1839 *is* the critical date, depends entirely, as the Court knows, upon the alleged effect of Article 3 of the 1839 Fishery Convention. I shall try to show the Court that this Article 3 could not have had the effect our opponents say it did, if the disputed groups were at that time under the exclusive sovereignty of either of the two countries—whether France *or* the United Kingdom. I shall try to show that the French argument about the effect of Article 3 requires, or at any rate is only plausible on the basis, that the groups were not under the exclusive sovereignty of either Party in 1839, but were then either *res nullius* or under some sort of joint régime. And if I am right, that will place our opponents in a dilemma. Because, on the one hand—if 1839 is the critical date—the only basis on which the groups can be exclusively French still to-day is that they belonged exclusively to France in 1839. But, on the other hand, I shall hope to show that, if the groups did belong exclusively to France in 1839, Article 3 cannot have had the effect suggested and therefore 1839 cannot be the critical date, because it depends entirely on the supposed effect of Article 3 whether 1839 was the critical date. In short, one view as to the status of the groups in 1839 is required in order to establish the existence of exclusive French sovereignty to-day if 1839 really was the critical date; but another, and an opposite, view as to the status of the groups at that time is required in order to establish that 1839 *was* the critical date: and so there is an inherent contradiction at the very heart of the French thesis.

This essential contradiction is still more clearly seen if we ask what was the régime or status for the disputed groups set up by Article 3 of the 1839 Convention, *if that provision had the effect which our opponents suggest*. This is something our opponents have never really told us, but since the argument is that Article 3 precluded either Party from asserting any *exclusive* sovereignty, it seems to follow that the groups must have become *res nullius*, or else have passed under some form of joint régime, in consequence of the 1839 Convention, if the theory of our opponents is correct. But if so, and if 1839 is the critical date, well, then, the groups must in law still be in that situation to-day; for the whole theory of the critical date, as I was saying, operates to prevent, or to rule out consideration of, subsequent changes of status. So I think the Court will see that the French thesis about 1839 as the critical date tends inevitably towards a position in which the sovereignty could be adjudged to neither country exclusively. But that would be contrary to the whole basis of the Compromis and the 1951 Fishery Agreement. I do not need to recapitulate to the Court the provisions of those two agreements, which the Court is familiar with, and we discussed that matter fully in our Reply, in connection with the original French argument about disqualification: and the Court will remember, for instance, that in connection with the 1951 Fishery Agreement we pointed out how clearly many of its provisions contemplated quite definitely that there would be a finding on sovereignty in favour of one or the other country.

This leads me to draw attention to an ambiguity in the French critical date argument. When our opponents say that the critical date is the date of the 1839 Convention, do they refer to the moment immediately before the Convention took effect, or to the moment at

which it did take effect? I suspect that the moment, to which they are seeking to go back, is the moment before the Convention took effect—the *status quo ante*. But I would ask the Court: is that permissible? We think not, for the only basis for going back to 1839 at all is the supposed effect of this Convention. To go back to before the Convention would be to shut out and exclude the Convention itself—the very act which, according to the French theory, causes 1839 to *be* the critical date. It would be to revert to a moment at which the Convention itself did not exist, and at which, therefore, there existed no basis for taking 1839 as the critical date. The whole argument of our opponents is that the Convention shut out, or neutralized, the effect of all subsequent acts as supporting either Party's claim to exclusive sovereignty. But the Convention cannot have shut out or neutralized itself, and our opponents must be prepared to accept the logical consequences of their own argument. If 1839 is the critical date, it is because of the Convention. The critical moment, therefore, must be the moment of the Convention, for if that is excluded the Convention itself is excluded, and with it all basis for placing the critical date at 1839. The point of departure, therefore, must be the Convention and the situation it created. Now, what was that situation? According to our opponents, the effect of the Convention was to place the Parties in a position in which neither of them had, or could, assert or establish any exclusive sovereignty over the disputed groups. Whether these groups then became *res nullius*, or passed under some form of condominium (according to the French theory), we do not know, because this is one of several things about which our opponents have been careful never to commit themselves. But it must have been one or the other, because these are the only alternatives to the *exclusive* sovereignty of one of the Parties, which the French theory denies. Well, now, if the position is that in consequence of this Convention the groups became *res nullius*, or passed under some form of joint sovereignty, and if 1839 is the critical date, well, then, since no change of status can take place after the critical date, the groups must still be *res nullius*, or under the joint sovereignty of the Parties. Yet our opponents claim that the groups are exclusively French to-day.

So I think the Court will see from this that I am justified, not only in saying that the French theory about 1839 involves an inherent contradiction, but also that it does tend towards a position, if it was correct, in which the Court would not be able to do what the Compromis asks it to do and what the Fishery Agreement of 1951 clearly contemplates, namely, to say which of the two countries the sovereignty now belongs to, on the basis that it does belong to one or the other of them.

Now it is obviously impossible that the existence of the conflicts and uncertainties in the French thesis to which I have drawn attention can have escaped the notice of our opponents, who number amongst them some of the most intelligent minds, and some of the most acute jurists, to be found anywhere. We may be sure that they would never have put forward a theory so full of holes—if I may so put it—if they had not felt under some compelling necessity to do so, and we can hardly doubt that the reason why our opponents are so anxious to establish the period 1839 as that of the critical date lies in the very great disparity between the number and weight of the manifestations of United Kingdom

sovereignty over the disputed groups during the last century or so, as compared with the almost total absence of any such manifestations on the part of France. But I mention that not to reiterate an invidious comparison but simply to make a cautionary remark, because I do not want the Court to suppose for a moment that, because we contest 1839 as the critical date, this means that we base our claims solely, or in a sense even chiefly, on the events that occurred between 1839 and 1950. We do regard those events as very important, and we do not see how the Court could give a decision in this case without taking them into account. But it is as a culmination of a process that has been going on for centuries that we view these events, not as a sudden or isolated phenomenon. We rely on these events as evidencing and demonstrating our sovereign position. We do not think we need to rely on these recent events as *creating* that position, though, on the other hand, we think that these events are quite enough to give us the exclusive sovereignty to-day, even if for any reason we did not have it in 1839. I just wanted to make our position on that matter clear.

Now, reverting to the question of what is the critical date, I might perhaps at this point remind the Court that previously, in their Counter-Memorial, our opponents argued in favour of a different critical date, namely, the period 1869-1876, because the dispute was said to have had its birth then. In paragraphs 194-205 and 221-230 of our Reply, we examined this argument, and showed—I hope—that it would not be equitable, or even technically correct, to take this period of 1869-1876 as being the critical date. However, I shall not say any more about that just at present, since our opponents have now put forward 1839 as the critical date—and the scheme of the rest of my address will be as follows. I shall next offer the Court certain remarks about the theory of the critical date as a legal doctrine and I shall then try to show that, in the light of these doctrinal considerations, 1839 is not acceptable as the critical date in the present dispute—partly for reasons of an *a priori* character, and partly because the particular interpretation of the 1839 Convention on which the whole French argument depends is, in our view, erroneous. And that will, of course, be the main part of my speech. I shall then show—though I shall be very brief about that—that the period 1869-1876 is equally inacceptable as the critical date. Finally, I shall try to show that the acceptance of a certain date as the critical date, whatever it is, does not *ipso facto* rule out all consideration of subsequent events. It rules out, of course, as I have said, the possibility of any subsequent change of status. Subsequent events cannot operate to change or affect the position as it stood at the critical date. But they may nevertheless throw light on what that position in fact was. They may be evidence. The events of a subsequent period are often evidence of the state of affairs at an earlier period, and I shall conclude my observations with certain remarks on that topic.

Now, if the Court will bear with me while I offer certain theoretical considerations, which I put forward not by way of attempting to instruct the Court—which is far better instructed in these matters than I am—but because these considerations, theoretical though they are, are necessary to the presentation of our point of view. I should really like to make one or two remarks as to what the object of establishing a critical date in disputes over territory is. The fundamental object is, I think, to ensure that the dispute is determined on the basis that seems most just and

equitable, having regard to all the circumstances of the case. Now, generally speaking, that basis would be the position existing on the date on which the differences of opinion that have arisen between the Parties have crystallized into a concrete issue giving rise to a formal dispute. Most disputes are preceded by a period, which may be short or sometimes may be very long, according to the circumstances, in which there are diplomatic exchanges, protests, negotiations perhaps. Now, I suggest that this preliminary period does not give rise to a critical date—nor would it be equitable that it should—because the Parties have not taken up any final position. But, if the differences are not resolved, there eventually comes a moment when it can be said that a concrete issue in definite form has arisen. The Parties are no longer negotiating, or protesting, or attempting to persuade one another. They have taken up position, and are standing on their respective rights, and when that occurs, the claims of the Parties must obviously be adjudged according to the facts as they stand at that moment, neither earlier nor later.

This moment, however—which is the critical one—is clearly not that at which the dispute was born—even when the dispute can be said to have had its birth at any definite moment, which is seldom the case : the critical moment is, normally, not the date when the dispute was born, but that on which it crystallized into a concrete issue.

Pausing there, if we look at the year 1839, and if that year were the critical date, we should expect to find that there at least existed a concrete issue—or at any rate a dispute—between the Parties as to the sovereignty over the groups. But in fact, we find nothing of the kind. No such issue had arisen, or at any rate no record of it exists. The 1839 Convention makes no mention of any question of sovereignty, nor does such mention occur in the records of the negotiations that preceded it—and perhaps I might mention here that, since we are not quoting from those negotiations and therefore have not deposited these Minutes, a certified copy of them is with us here in case the Court, or our opponents, should wish to see it. As I say, our contention is that neither the Convention nor these Minutes contain any indication that there was any kind of dispute or difference of opinion in 1839 between the Parties on the question of sovereignty. In fact, one can say that the question of sovereignty did not arise at all until much later—until 1875 or 1880, or some date of that time. It was then discussed between the Parties on two or three different bases and hypotheses—sometimes the exchanges between the Parties were only about the fishery question ; sometimes they were about sovereignty ; sometimes they were a mixture of the two. And then, even these desultory conversations ceased for a prolonged period. The Écréhous, for instance—I think I am right in saying—were never mentioned again between the Parties after 1888 until after the recent war—a period of about sixty years. During that time, I think it is correct to say, not a single document or interchange between the Parties took place—at any rate, we have found none in our records. The Minquiers were not in effect discussed between the Parties after the early part of the present century until just before the war—a period of nearly forty years. And so it seems clear that no definite or concrete issue on the question of sovereignty crystallized until the period immediately preceding the submission of this case to the Court.

Taking the theory of the critical date a stage further, in the ordinary course of events and assuming that once a concrete issue has arisen.

between two countries, they decide to settle it by international adjudication, the critical date would in principle be the date on which they agreed to submit the dispute to a tribunal. However, there may be cases where the critical date should nevertheless be some other date, for the conception of a critical date is intended to do justice to the real merits of each country's case, and for that reason it must not be put too early or too late. Now one object of the critical date is to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined, but when the party in question is rejecting or evading a settlement, for instance, refusing to go to arbitration. Because unless that were so, a party might reject a proposal for arbitration or other means of settlement, and then, after taking various steps to improve its position, it might then express willingness to go to arbitration, and in that type of case, it would obviously be most unfair to the other party, which had all along been willing to accept arbitration, to make the critical date the date of eventual submission to a tribunal. And probably, in such a case, the date ought to be that on which arbitration was first proposed. Of course all these cases must necessarily depend on their own circumstances.

So much for not putting the critical date too late. But equally, if not more important, is it not to put the critical date too *early*, thereby shutting out acts of the parties that were carried out at a time when each of them was perfectly entitled to take any legitimate steps in the assertion or prosecution of its claim. Just as putting the critical date too late may favour the party which has rejected an earlier proposal for adjudication, by enabling it in the meantime unilaterally to improve its position ; so putting the critical date too early favours the party which has put forward a claim in a general way, but has not pursued it, or has only pursued it in a desultory or intermittent way, without attempting to bring the matter to a head, or to prosecute its claim by seeking international adjudication. To put the critical date too early would be to place a premium on the making of paper claims which the country concerned need not then follow up or insist upon, because it would be secure in the knowledge that the mere making of the claim would operate to freeze the legal position and to shut out or nullify the value of all subsequent acts of the other party.

Mr. President, I have made these various observations about the theory of the critical date in order to show how important the choice of that date is, and what serious injustice may result if it is not selected with the most careful regard to all the factors involved.

Now, as regards the suggestion that the critical date in the present case should be that of the 1839 Convention, may I observe in the first place that it would *prima facie* be a very unusual and remarkable thing to find this date set as early as over 100 years prior to the time at which the issue is submitted to an international court. There would, of course, be nothing theoretically impossible in that, but I do suggest that such a position would have to be established beyond the possibility of reasonable doubt, as being correct and necessary.

Now, how do our opponents try to establish this proposition ? As we know, they apparently suggest that, in the year 1839, the two countries—France and the United Kingdom—agreed, or in effect they agreed, that they would not claim any exclusive sovereignty over the Minquiers and the Écréhous and that this being so, then even if they

have subsequently changed their minds, and have now decided that they may put forward such claims and that they will take the matter before an international tribunal, nevertheless they cannot invoke in support of their respective claims anything which occurred between the date on which they are supposed to have agreed not to make any exclusive claim, and the date on which they subsequently rescinded this supposed agreement.

Even if one were prepared to admit the theoretical basis of this argument, it would at least be necessary to establish that an agreement having the effect suggested did exist between the two countries. The French argument is one which obviously could only be applied in a case where it was absolutely clear that there did exist between the Parties an agreement definitely involving or implying a mutual undertaking not to claim sovereignty. And it would have to be shown that, by this agreement, the Parties intended to deal with the question of sovereignty, and that they really intended to forego making any claim; or else it would have to be shown that such a renunciation was a necessary consequence and implication of the agreement. And it is precisely there that we have always experienced such difficulty in following the French argument, for we have never been able to see how our opponents derive an agreement about not claiming sovereignty from a provision about oyster fishery rights—nor, I think, have our opponents made any really serious attempt to explain how this comes about. In these circumstances, I do submit to the Court that, when a concrete issue about sovereignty arises in 1950, there would be an element of great unreality—of extreme artificiality—in going back more than a hundred years and determining the rights of the Parties as they may be held to have stood in 1839, even if that proposition were free from other objections, and I shall hope to show presently that it is not.

I now pass on to a number of serious objections of an *a priori* character to the French thesis. Certain of these we pointed out in our Reply, and I am sure the Court will appreciate that all, or nearly all, the arguments we advanced in our Reply against the French contention that the effect of the 1839 Convention was to disqualify the Parties from claiming any exclusive sovereignty at all, even to-day, are equally applicable to the French contention about the critical date, which is, as I have said, merely the same contention advanced for a different purpose and in another form. And indeed, as I hope I may have shown, it tends towards the same result—that the sovereignty could not definitely be adjudged to either Party.

Now the first objection of an *a priori* character to the French thesis is one to which we drew pointed attention in our Reply, but which our opponents have entirely ignored in their Rejoinder. This is the question of what is the legal régime that is supposed to have been brought into existence for the Minquiers and the Ecréhous by Article 3 of the 1839 Convention, assuming the Article has the meaning which our opponents contend for. That is something which they have never satisfactorily explained—or, indeed, explained at all. Some régime presumably came into being or existed between 1839 and 1950, according to their view: but what? There are statements in the French pleadings about the groups being placed (or left) by the Parties in the common sea (or in *their* common sea), but nowhere is it stated what was the

character of this "common sea"—whether it was high seas, or at any rate non-territorial sea, or something else. Nor is it explained what is the legal nature of the régime that the existence of this "common sea" entailed for the Minquiers and the Écréhous, or why groups of fairly substantial above-water islets, such as these, should be considered to be part of this "common sea" at all. It is indeed remarked at one place in the French Rejoinder, on page 727, that a sort of Anglo-French *mare nostrum* was established, but it is not explained what this really involved. And I think all these questions are really either studiously avoided in the French pleadings, or else they are circumvented by the use of general language. But unless a satisfactory answer can be given to them, I suggest to the Court that the French thesis based on Article 3 of the 1839 Convention should be rejected on that ground alone—because if, indeed, Article 3 did bring into existence some special régime for the areas it related to, this must nevertheless have been a régime known to international law, and capable of definition and classification according to ordinary international law concepts.

Well, then, we ask, what was this régime? In our Reply (I would refer the Court to paras. 26 to 34) we pointed out that it could only be one of two things, always assuming, of course, that the French interpretation of Article 3 was correct. We pointed out that either the groups must, during the period subsequent to 1839 and up to to-day, have been *res nullius*, or they must have been under some sort of condominium: that is to say, they must either have belonged to neither Party, or else to both jointly. And we pointed out that it must have been one or the other of these alternatives because, since the groups evidently did not belong to any third country, then unless they were either *res nullius* or under the joint sovereignty of both the Parties, they must have belonged exclusively to one Party: but that, of course, was exactly what Article 3 is supposed to exclude, according to the French contention. Perhaps I might mention that by *res nullius* I of course mean a position in which the groups, though capable of appropriation in sovereignty, were not so appropriated and were therefore legally open to appropriation by any country that might take the necessary steps to that end—except, of course, according to our opponents, France and the United Kingdom.

Well, then, in our Reply we examined these two hypotheses of *res nullius* and condominium (I would refer the Court again to paras. 26-34 and also to paras. 35-42 of the Reply), and we pointed out that each of these hypotheses involved almost insuperable difficulties or improbabilities. With regard to the *res nullius* hypothesis, we find it impossible to believe that our opponents would seriously suggest that the groups had this status between 1839 and 1950, any more than they had before 1839, if only because it would be in conflict with the whole basis of the present French claim to exclusive sovereignty.

In addition, the suggestion that these groups might have been *res nullius* in this period is, given their geographical situation, impractical and contrary to probability, if we consider what is involved. If an island is *res nullius*, as I said, this means that it is legally susceptible of occupation by any other country at any time. Well, no more in 1839 than now, or in the intervening period, could France or the United Kingdom have tolerated a situation in which these islands were—even if only theoretically—open to occupation by any third country which cared to take the

necessary steps to establish itself there. Can it be supposed that the Parties intended a régime in which they were precluded from asserting their sovereignty, but any other country could? It is impossible to suppose it: and, moreover, these groups, situated as they are, near to sea traffic routes and close to important fishing banks, and the exits and entries of bays and ports, they obviously must be susceptible to some form of definite legal régime and control; they cannot, they could not have been, during this period, *res nullius*.

[Public sitting of September 19th, 1953, morning]

Mr. President, it may assist the Court if I say that, although I shall not quite be able to finish my address this morning, I shall finish it during the first hour on Monday, including the translation, and Professor Wade will then be able to start his address.

Mr. President and Members of the Court, you will remember that when I broke off the last night I was dealing with certain what I called *a priori* difficulties in the French thesis concerning the year 1839 and I had posed the question what was the régime for the Minquiers and the Écréhous which was supposed to have come into being as the result of Article 3 of the Convention, if the French theory was correct, and I had pointed out that if you excluded, as that theory does exclude, the possibility that either country alone had the sovereignty, then there were only two possible hypotheses, one of them being that neither country had the sovereignty and that the groups were *res nullius*, or else the other possibility was that there was a joint sovereignty—a condominium, and I had dealt with the possibility of the groups being *res nullius* and I tried to show that that possibility ought to be excluded because it was such a very improbable one and not at all in accordance with the facts.

So then we turn to the other hypothesis—that of joint sovereignty—and since, as I suggested yesterday, it is impossible to suppose that our opponents would seriously maintain that the groups could have been *res nullius* during all the period between 1839 and 1950, one must assume that they regard, or would say that the groups were under some form of condominium; and on the whole that does seem to be the French view, in so far as our opponents deal with the matter at all. For instance, on page 726 of the Rejoinder, we find it stated (quotation): "It is not easy to say what ideas were actually held by either Party in regard to the legal status of this intermediate zone." Well, it certainly does not seem easy for our French friends to say, because they are really trying—as I shall hope to show—to maintain two statuses for these groups at that time; and on the same page the French Rejoinder goes on to suggest that the "men of 1839" recognized the true nature of the intermediate zone and defined its status realistically (then I quote again), "regarding it as interior waters of the Bay of Cotentin which were being fished jointly and hand in hand by both Parties, who regulated the fishing together". Well, they may have been regulating the *fishing* hand in hand, but were they regulating, or even purporting to regulate, the *sovereignty*? That is the whole question, and it is this question which seems to us to be begged—or assumed—by the entire French argument about the 1839 Convention.

Moreover, the suggestion in the passage I have just read is that the waters concerned were not even territorial waters, but interior waters; and in a further passage it is suggested by implication that they were not, and are not, high seas; and it is stated (I quote again): "The free sea, the truly free sea, only opens out to the North and West of the outer islands...." (that would be, of the outer Channel Islands). And similarly, on page 727, we have this passage: "In the present case it [that is to say, *mare commune*] must be understood as meaning '*mare nostrum*'."

Now, these are obviously suggestions that the waters concerned have, or had, the status of interior or national waters, under the joint sovereignty of the two Parties. But I would ask the Court to consider the difficulties of this thesis, and I shall hope to show that the whole idea of a joint sovereignty of this kind is every bit as difficult to accept, though for different reasons, as the theory of *res nullius*.

To begin with, Mr. President, the French suggestions turning on *mare nostrum* and the view that the waters concerned are internal or national must be rejected at once. Even if we confine ourselves to the region lying between the island of Jersey and the French coast to the South and East (though in reality the Convention as a whole applied to a much wider area—indeed, to the whole sea area between France and England—but even if we do confine ourselves to the narrower region), there is no doubt at all that a considerable part of it, according to the principles of international law recognized by both sides, consists of high seas, that is to say, of waters situated beyond the three-mile limit which both sides apply, drawn from the low-water mark along the coasts of the mainland and islands. If the French thesis were correct, France and the United Kingdom would be in the position of seeking to assert an exclusive sovereignty or jurisdiction over areas of the high seas from which they could, on that basis, exclude the fishing vessels of other countries, or in which they could exercise jurisdiction over those and other foreign vessels. Well, whether such an idea was ever in the mind of any French Government, I do not know, but I do know that it was not at that time, and is not now, in the mind of any United Kingdom Government. We would at all times have rejected the idea, both before and since 1839, that areas of the high seas outside territorial waters—that is, lying, for instance, between Jersey and the Minquiers, or elsewhere in the zone—are even partially under our sovereignty or jurisdiction, or are under any kind of Anglo-French condominium: and in support of what I say I would like to cite the letter dated February 28th, 1825, from Canning, as British Foreign Secretary, to the Prince de Polignac, which is given as Annex 1 to the French Counter-Memorial. And if the Court will look at the last part of that letter (which I will not read), starting at the bottom of page 407 and continuing on pages 408 and 409 of the French Counter-Memorial, it will see that Canning made precisely the points which I have been making; he drew attention to the fact that, while France and Great Britain could, in theory, make an arrangement *interse*, binding upon themselves, they could not thereby possibly bind or affect the position of third parties, who would certainly retain all their fishery rights in the areas, which, according to international law, did not consist either of interior or of territorial waters. Well, now, that shows what was the British view, at any rate, not very long before the period of the 1839 Convention; and this makes it

very improbable that any British negotiator in 1839 would have been intending to create a *mare nostrum* common to the two countries.

For these reasons, we think that the notion of interior waters and *mare nostrum* covering the whole of this area must necessarily be rejected. However, there could in theory be a condominium over any actual islands in the area and over the territorial sea round them. But the insuperable difficulty which this hypothesis encounters is that there is absolutely no evidence of the existence of any such condominium, or of it ever having existed, or of the exercise at any time of any joint sovereignty by the Parties over the Minquiers and the Écréhous. If such a thing existed, then there must also have existed, in however rudimentary a form, some elements of the machinery of a joint administration, but in fact there was and there is absolutely nothing of the kind, and there never has been. Yet it would be completely uncharacteristic of a condominium, as known to ordinary international practice, for one to exist without there being any arrangements between the co-domini for the method of its exercise. Certainly condominiums do exist in the world, and indeed there is actually an Anglo-French condominium in another part of the world—I think I am right in saying in the New Hebrides—and that condominium, which has existed for a considerable number of years, works very well, but it does so because there are definite and detailed arrangements and agreements for exercising it.

Nor is it possible, we think, seriously to contend, as I fancy the Government of the Republic has tended to do at times, that these groups are just desert islands in respect of which no administrative machinery is necessary: to quote a phrase from the French Rejoinder or Counter-Memorial which struck me very much—"an arm of the sea, sown with reefs". These groups are regularly visited by fishermen and other persons; there are houses and buildings on them—the Court has already heard about all that. But some kind of jurisdiction for them must exist. Suppose, for instance, that an offence of some sort is committed on the islands—as, indeed, has happened—who exercises jurisdiction over the accused? Well, doubtless our opponents would say that the principle *ratione personæ* must be applied, and if the accused is a Frenchman, he would be tried by a French court according to French law, and if an Englishman or a Jerseyman, according to English or Jersey law, by an English or Jersey court. But then, what happens if the accused is a Belgian or a Dutchman? There are many other possibilities. For instance, how is the sale and transfer of property on the islands to be effected: what law applies? It would not be sufficient to say that the law and the forms to be applied would be governed by the nationality of the owner, for this would mean that different pieces of ground on the same island, or even the very same pieces of ground or houses at different times, would be under different or more than one legal régime. And, again, it would leave undetermined the question of the position of nationals of third countries who might own, or come to own, property on the islands. The principle *ratione personæ* does not work really, and the truth is that matters of immovable property are never governed by personal law but by the territorial law of the place where the property is situated. And, in short, the Minquiers and the Écréhous, during this period between 1839 and 1950 which I am discussing, must have had a territorial law. Now what was that territorial law? We, of course, assert

that it was and is British or Jersey, and there is no doubt at all that the various persons, who have or have had dwellings or other buildings on the islands, have always regarded their property and their position with reference to it as being governed by English or Jersey law. But the point I want to make in the immediate context of this speech is that, whether it was British or French, it must have been one or the other : it could not have been Anglo-French, or at least, it could only be so if definite arrangements to that effect had been worked out and agreed upon, whereas in fact none exist or have existed.

Therefore it seems to us that the condominium theory must equally be rejected, as well as that of *res nullius*. We have a position in which it cannot be true to say that during this long period the islands were either ownerless or jointly owned. And so I come to the conclusion which I venture to submit to the Court must be drawn from all this : if Article 3 of the 1839 Convention had the effect in relation to the Minquiers and the Écréhous which our opponents contend it had, this must have resulted, as we have seen, in these two groups either being or becoming *res nullius*, or being under an Anglo-French condominium, for, according to the French thesis, the groups were not under any exclusive British régime, nor under an exclusive French régime. If, however, on examination, it proves, as we contend, that the groups could not have become or been either *res nullius* or a condominium, and quite obviously never were either of those things, then surely it must follow inescapably that the French contention about Article 3 of the Convention—which leads to these contradictory results—must itself be wrong.

All these difficulties, Mr. President, about what—according to the French thesis—was the legal régime of the groups in consequence of the 1839 Convention, apply with equal force to the possibility that in the period before 1839 these groups were either *res nullius* or jointly owned—and this leads me to the next objection of an *a priori* character to the French thesis about the critical date to which I would like to draw attention. The Court will not have failed to notice that our opponents are really trying simultaneously to ascribe two statuses to the groups in 1839. On the one hand the whole French *historical* case is that the groups were originally French ; that they remained so ; that they were so in 1839 ; and that they are so now. But, when it comes to the 1839 Convention, then we are told, on page 726 of the Rejoinder, that the status of the groups was indeterminate and that the men of 1839 were content to leave it so—which implies that they were not definitely under French sovereignty in 1839. Well, I ask, which was it ? The groups cannot both have been and not have been French in 1839. The matter is important, because really the whole French contention about Article 3 and the critical date leads to an impasse. In paragraphs 37-40 and 62 of our Reply, we gave what I think were cogent reasons for the view that it is not really credible that, if one of the Parties had the sovereignty over the islands at the time, this Party would have been ready to place the islands under Article 3, *if that Article had the meaning and effect which the Government of the Republic has said that it did have*. Now, it is perhaps conceivable that the country having sovereignty might have been willing to place these groups under the régime of Article 3, if that provision involved no more than a common oyster fishery right, which of course we contend is the only acceptable interpretation of the Article. But, according to the French contention, it involved far more than that.

It involved a common general right of fishery, and even a renunciation of the right of exclusive sovereignty. And, on that basis we say that it is not credible that a country possessing, or believing itself to possess, the exclusive sovereignty, would have been willing to part with or share its rights in that way.

Here we can perhaps usefully compare the case of the recent 1951 Fishery Agreement. Under this Agreement, the Parties did indeed agree on a common fishery régime in certain areas comprising the Minquiers and the Écréhous, and, indeed, expressly applying to those groups ; but they did so in the knowledge—and expressly in contemplation of the fact—that the question of sovereignty was reserved, and would be decided as a separate issue, and that the Fishery Agreement would in no way prejudice their claims to exclusive sovereignty. They had no intention in 1951, any more than we say they could have had in 1839, of committing themselves on the question of *sovereignty* by a mere fishery clause. Common fisheries are one thing : territorial sovereignty and its renunciation is quite another. And so, therefore, what happened in 1951 is the exact opposite of what our opponents say happened in 1839. In 1951 rights of sovereignty were clearly reserved, whereas in 1839, according to our opponents, they were renounced, or—what comes to the same thing—the right to assert the sovereignty was renounced. And I would like to stress that point because, as I have said, the French thesis that 1839 is the critical date requires that the groups should have been French in 1839 if they are to be held to be still French now. But equally the French thesis that 1839 is the critical date would involve that France must deliberately have renounced the exclusive sovereignty by placing the groups under a régime precluding the exclusive sovereignty of either Party. And that is what we say is scarcely credible and therefore that the French interpretation of this Article 3 leads to a complete impasse. As I say, it cannot be correct—or at any rate it is highly improbable—unless the groups were *res nullius* or jointly owned before the date of the 1839 Convention ; but it is equally improbable, and can hardly be true, that they were then *res nullius* or jointly owned —and in any case, if they were, then they would (if 1839 is still the critical date) have to be regarded as being still in that condition now. But our opponents claim that they are exclusively French now. It seems, therefore, to be a mass of contradictions! And I submit that reason and credibility can only be restored if the whole French contention about Article 3 and the critical date is not correct at all, and that seems to us to be the obvious conclusion, because this contention really destroys itself by the very process that has to be gone through in order, so to speak, to set it up.

Before I pass on, Mr. President, to another part of my argument, I would like to pursue just a little further the point I was making just now so that our position on it can be entirely clear to the Court, because I believe that our opponents are really trying to maintain two contrary propositions, both of which are nevertheless necessary to their position. I suggest that what my friend Professor Gros would really like to argue, if he could, would be something like this. Perceiving the difficulties of maintaining the French theory about the effect of Article 3, if in 1839 one of the Parties had the exclusive sovereignty, I think he would like to begin by saying that the groups were then under some rather vague indeterminate régime, and that the Parties in effect agreed to leave them

in that situation, and for that reason he would argue that 1839 is the critical date. That is more or less, as I understand it, the French argument. But then I think Professor Gros would perceive that he was in this dilemma, that if the status of the groups in 1839 was uncertain, and if they did not then belong exclusively to either country and if 1839 is the critical date, then they cannot be regarded as belonging exclusively to either country now, but in fact the French contention is that they *do* belong exclusively to France now. So on that point I feel that Professor Gros would like to reverse his argument and say that the groups were exclusively French in 1839 also. Well now, I feel that there must be something wrong with that double argument. It seems to me that our opponents cannot plead one status for the groups in 1839 in order to establish that 1839 is the critical date, but then plead another status for the groups in 1839 in order to establish that 1839, being the critical date, the groups must be regarded as French to-day.

Here I would again, and for the last time, make the point that, if 1839 *is* the critical date, it is solely on account of the 1839 Convention that it is so. Therefore it is the régime established by the Convention that governs the rights of the Parties to-day if 1839 is the critical date. Our opponents cannot, for the purpose of setting up that date as the critical one, invoke the régime which they say was established by the Convention, and then say that, when it comes to determining the rights of the Parties, that is not to be decided by reference to the conventional régime, but by reference to the pre-conventional position. For the moment the Convention is excluded, there is no longer any basis for regarding 1839 as the critical date at all, and even if one goes back to the pre-conventional régime, our opponents seem uncertain what it was. Moreover, again, their argument would require that this pre-conventional régime should both have been exclusively French, but should also have been some kind of indeterminate régime.

Well, I believe that the Court will feel that a theory which gives rise to so many contradictions should not be accepted, especially since, if it leads anywhere, it leads towards a position in which neither Party could be held to have the exclusive sovereignty at this present day. At least I can claim, I think, that the French theory is open to so many *a priori* objections that it should not be accepted, unless it could be shown quite conclusively to be based on a manifestly necessary interpretation of the relevant instruments. That, however, is far from being the case, and I propose next to pass on and make a few observations about the terms of the 1839 Convention itself.

The Court will remember that in our Reply we put forward two main points as to the interpretation of Article 3. In the first place, we maintained that the Article did not apply to the Minquiers and the Écréhous at all: either because, as dependencies of Jersey, these groups came under Article 2, or else because, as British possessions, it was Article 9 of the Convention that was applicable to them. Our second main contention was that, even if Article 3 did apply to the groups, it did so only in a purely fishery sense—an oyster fishery sense at that—and that it had none of the implications about sovereignty which our opponents suggested. Of these two arguments the second is, of course, incomparably the more important, and it is the one on which we chiefly rely. The 1839 Convention is admittedly very obscure, and, as our opponents themselves have stressed, not very

well drafted. Some of its provisions are in a sense conflicting. It may therefore be very difficult to say with any certainty exactly what the sphere of application of Article 3 was. Our principal contention is that, whatever territory or waters it did apply to, it meant no more than it actually said, and had no implications beyond such as would be the normal and necessary result of a provision for a common oyster fishery, which would certainly not include any renunciation of sovereign rights.

We have therefore been tempted not to go any further into the question of what territory or waters Article 3 actually did apply to. On the other hand, in re-reading the diplomatic correspondence, we have been struck at the insistence with which successive United Kingdom Governments denied that Article 3 had any application to the Minquiers and the Écréhous. The position of these United Kingdom Governments was in no sense one of a refusal to accord to France any fishery rights she had. It was a denial that France had any special fishery rights in these groups, and this denial was based precisely on the view that it was not Article 3 that applied to the groups, but Articles 2 or 9, because they were British possessions. Now, even making every allowance for the traditional conception of "perfidious Albion", it would be, I think, unlike the average United Kingdom Government to put forward emphatic and persistent denials of this kind unless they at least believed them to be correct, whether in fact they were so or not, and I think we must assume that the view in question was genuinely held. If so, there must have been some reason for it. It seems worth while considering, therefore, what the sphere of application of this provision really was. I shall, therefore, begin by going into that question a little, but I will ask the Court to bear in mind that, while we do not believe that Article 3 was ever really intended to apply to these groups as such, we equally say—and indeed it is our principal position—that it does not really matter very much for the present purposes whether Article 3 did or did not apply to them, since the provision in question cannot possibly have had the meaning which our opponents attributed to it.

The Court will remember what the general scheme of the 1839 Convention was. Article 1 established a line off the French coast within which oyster fishing was reserved to French fishermen. This line partly coincided with the French territorial water limit and it partly ran inside that limit and it partly ran outside—it was an *ad hoc* line. Article 2 gave an exclusive right of oyster fishery to British subjects in a zone of three miles radius round Jersey. Article 3 provided that the oyster fishery between these respective exclusive limits should be common and, subject to Article 1, Article 9 gave exclusive rights of fishing to each country within three miles of its own coasts or islands. And it will be one of my main contentions that our opponents have always failed to relate this Article 9 correctly to Article 3.

Now, the French argument in regard to the effect of the 1839 Convention is based on certain assumptions as to the localities to which Article 3 applied, which do not appear to be justified by the actual terms of the Convention, and, for this reason, the two countries have always been at cross purposes about the effect of this Convention. To put it shortly, our opponents in fact simply take a region on the map—the geographical area between Jersey and the French coast,

outside the limits laid down by Articles 1 and 2—and they say that everything, and any territory in that area, automatically comes under Article 3, irrespective of its status. But for that view there is no real warrant. It ignores the fact that if any territory in the area, such as an island, was in fact British or French in 1839, then, even though situated in this area, that particular island would, *prima facie*, have been subject to the régime of Article 9 of the Convention, not Article 3.

Now, to this our opponents may reply by pointing to the fact that, under Article 2 of the Convention, the waters round Jersey were separately specified as reserved exclusively to British fishermen. They may therefore say that, if it was intended to exclude the Minquiers and the Écréhous from the operation of Article 3, these would have been mentioned separately in the same way that Jersey was. Well, we appreciate this point, but we believe it to be based on a misconception as to the true purpose for the insertion of Article 2 relating to Jersey. Obviously this provision was in no way required in order to reserve the Jersey fisheries to Jersey fishermen—for that went without saying. Also, the Jersey fisheries would in any case have been so reserved by virtue of Article 9, because Jersey was unquestionably a British island. Article 2—as we explained in paragraph 51 and in footnote 1 on page 455 of our Reply—Article 2 was put in to balance Article 1 and to indicate the other end, so to speak, of the general area mentioned by Article 3. But it did not follow that the common oyster fishery régime of Article 3 automatically applied to every island situated between Jersey and the French coast, merely because the island was *in* the area covered by Article 3. It would of course apply to the non-territorial waters in the area, and to any unclaimed islets in it that were *res nullius* and belonged to neither country, and it would apply to any reefs, rocks or banks not physically capable of appropriation. That was, in fact, its true sphere of application. But *prima facie* such a provision would not apply to any islands in the area which definitely belonged to one of the two countries. In the case of islands in that position, the normal rule of international law would have operated to reserve the fisheries to the country having sovereignty, unless the contrary were specified, and that would require to be done in clear language, for the presumption would be against it, particularly in the present case, in view of Article 9, which in terms reserved to each Party the fisheries off its own coasts and islands.

Now—and this is an important point which I would like to emphasize—it is noticeable that Article 9 was expressly made subject to Article 1. Why? Why was that? Because Article 1 created certain areas *within* French waters where oyster fishing was to be common, and therefore France's exclusive rights off that part of her coast had to be read subject to that. Now, a similar reservation ought therefore to have been made in Article 9 in respect of Article 3, if that Article had also been intended to apply to any areas which were under the exclusive sovereignty of either country—because otherwise there would have been an obvious conflict between Articles 9 and 3. One provision would have made the oyster fishery common, but under the other it could have been claimed that oyster fishing was—as part of fishing in general—reserved exclusively to the territorial sovereign. Therefore there would have been this conflict if Article 3 had included any territory under the exclusive sovereignty of one of the Parties. So it seems to us that the fact that Article 9

made no reservation in favour of Article 3, which it did in favour of Article 1, that in our view suggests strongly that Article 3 was not intended to apply to any islands in the Article 3 area that belonged to either Party—the régime of Article 3 was not intended to apply even though the island might be in the Article 3 area, and this Article only applied to unclaimed islands or rocks, banks, reefs and the general sea situated in the area.

This, therefore, Mr. President, is why we have contended that to say that Article 3 applied to the Minquiers and the Écréhous *because* they were situated in this geographical area, is to put the cart before the horse. You must first determine the status of the groups before you can say whether the régime of Article 3 applied to them. You must first determine whether they belonged to one or other of the two countries, or not. It is therefore, we think, incorrect to say that it is Article 3 which regulates the status of these groups. The truth is the other way round. It is the status of the groups which regulates the application of the Article—which regulates the question whether Article 3 applies to them or not. In order to determine their status you must, of course, look outside the Convention. The Convention neither says nor implies what their status was—for it did not deal with any question of status. And you have to determine that status in the first place before you can really say whether it was Article 9 that applied to these groups, or Article 3. These are the reasons why we maintain that the régime of Article 3 would not have applied to the Minquiers and the Écréhous if they had belonged to one or other of the two Parties, as both countries now assert that they did. We say that they were British then, and the French say that they were French. In that case it is Article 9 that would have applied to them, and the Article 3 régime would only have applied if the groups had belonged to neither country or had been under some form of joint régime. Since, however, they clearly were not under any form of joint régime and—for reasons I have fully explained—cannot have been supposed to have been ownerless at this time, to have been *res nullius*, the simple, the obvious and—it seems to us—the inevitable conclusion is that Article 3 did not apply to them at all. And it is unquestionably for reasons of this order that successive United Kingdom Governments in the nineteenth century and later denied that the Article had any application to the groups.

In paragraphs 49-51 and in paragraph 62 *(a)* of our Reply, Mr. President, we drew attention to certain other considerations which supported this view, but as they are of a rather technical character I shall content myself with this reference, and shall not discuss them here. I do, however, want to say something more about the text of, and the negotiations for, the later 1867 Convention, which we believe to have great interpretative significance so far as the earlier 1839 text is concerned, although for certain special reasons not implying dissatisfaction by either Party with its text (as we explained in paragraph 54 of our Reply), the 1867 Convention was never actually brought into force.

The Court will recollect that in our Reply we suggested that the effect of Article 3 of the 1839 Convention was really probably declaratory rather than actually constitutive of rights, since, according to the view we had put forward, it applied to areas where both Parties would in any case have had the right to fish, because its true sphere of application was—for the various reasons I have given—fishery on the open seas

(that is, the non-territorial sea), or round unclaimed islets, or on unclaimable rocks, reefs or banks. And we also pointed out in our Reply that Article 3 was confined to the oyster fishery for the simple reason that the whole controversy that led to the 1839 Convention was about that fishery; this was what its Parties were interested in in that region. In support of this view—that the Article could be regarded as strictly superfluous, though it might have a declaratory or regulative value—we cited the text of this later 1867 Convention, from which this provision, this Article 3, was designedly omitted as superfluous; and we cited the records of the negotiations which led up to it. Our opponents have challenged this interpretation, but we have not found the attempt made in their Rejoinder to counter our argument based on the 1867 Convention to be at all convincing.

Now the Court requested us to furnish it with the minutes of these 1867 negotiations, and we have accordingly deposited with the Registrar a certified copy of all the minutes of the negotiations which we have in our archives, and there is a print of them numbered Annex A 172 in the volume of Additional Annexes. We think that anyone who reads these minutes cannot fail to be struck by the way in which the proposition that Article 3, and certain other provisions of the 1839 Convention, should be suppressed as superfluous, was accepted without the slightest demur by the Commissioners on both sides, who consisted of experts from the respective Foreign Offices and Ministries of Marine.

Now it appears that the matter was first referred to a sub-committee, which prepared a series of articles containing all that the sub-committee thought it desirable to retain of the 1839 Convention, and of the regulations of 1843, which had been made under Article 11 of the 1839 Convention. The report of this sub-committee, which was in French and is reproduced in the French text, will be found at page 647 of the volume of Additional Annexes, and this report seems to have come up at the meeting of the main Commission held on Friday, January 4th, 1867. And according to the minutes of this meeting (if the Court will look at p. 646 of the print), the suggestion that the articles drafted by the sub-committee should be adopted, came primarily from the *French* side. M. de Champeaux, on behalf of the French Commissioners, conducted the discussions, and in the minutes, after a statement that the sub-committee had proposed a new Article 1 founded on Articles 9 and 10 of the 1839 Convention, we find the following passages which I will read rapidly because Members of the Court will be able to read them in the volume of Annexes:

> "Mr. de Champeaux resumed the reading of the proposed Articles —No. 2 of the new set to be identical with Article 1 of the Convention settling the fishing limits in the Bay of Granville—
>
> The original chart signed in 1839 was produced and the Commissioners decided that it was not expedient to make any alteration in the boundaries—
>
> Article 2 of the Convention is no longer required being embodied in the new Article No. 1",

that is exactly our contention.: the original Article about fishery round Jersey was superfluous—

> "Article 3 for the same reason may be suppressed, being treated of more fully in Article 16 of the regulations—"

I shall come to Article 16 presently:

> "Article 4 should be done away with in consequence of the impossibility of carrying it out.
>
> Article 5 is treated of in Article 6 of the regulations, the word *marked* being inserted therein—
>
> Article 6 will be embodied in the above-mentioned Article—
>
> Article 7 may be abolished as useless—
>
> Article 8 may be dispensed with for the present, the question being treated of when Article 85 of the regulations is under consideration.
>
> Articles 9 and 10 have already been embodied in the new Article 1.
>
> Articles 11 and 12 are no longer required."

There is much more in the same vein, showing that the whole object of the Commissioners was simplification and the omission of superfluous provisions. It is therefore quite certain, I think, that this Article 3 would not have been dropped from the 1867 text, unless it had been regarded as either unnecessary or completely covered by other provisions.

In further support of this view, I would invite the attention of the Court to pages 651-656 of the 1867 minutes, as given in the volume of Additional Annexes. The discussion in these pages indicates two things, or even three: first, that when the negotiators spoke of the "common sea", they were referring not to a sort of *mare nostrum* but to the *high* seas, in the sense of the non-territorial sea; secondly, that the distinction which they constantly drew was between the *territorial* sea, in which each Party would regulate the fisheries in its own waters, and the *non-territorial* sea, or the seas outside territorial limits, in which fisheries would be regulated in accordance with the provisions of the Convention, and only in these non-territorial seas; and, thirdly, that, apart from these special oyster fishery limits off the French coast in the Bay of Cancale, established by Article 1 of the 1867 text, as of the 1839 text, what the Parties were interested in was not so much fishery limits as the regulation of the *conduct* of the fisheries, especially on the seas outside territorial waters. And that is evident from the great bulk of the articles of both Conventions, for most of them were concerned with regulation, not limits.

In these connections, I would invite the attention of the Court to paragraph 57 *(e)* on pages 459-460 of our Reply. We there made some observations on the significance of Article XVI of the 1843 Regulations (the text of those Regulations will be found in Annex A 145, on p. 579 of the United Kingdom Reply). This, the Court will remember, was the provision in the light of which, as I have just read out, the 1867 Commissioners thought Article 3 of the 1839 Convention to be superfluous. The Court will remember that M. de Champeaux, in reading out these Articles, or at any rate, the record of the minutes, says:

> "Article 3 may for the same reason be suppressed, being treated of more fully in Article 16 of the regulations—."

Therefore, it is obviously a matter of considerable interest to see what this Article XVI of the Regulations, in the light of which Article 3 was supposed to be superfluous, says. Well, what it says is:

> "Trawl fishing may be carried on during all seasons in the seas lying between the fishery limits which have been fixed for the two countries."

At first sight it would seem that that has little relationship to Article 3, but nevertheless I think that that provision is significant for two reasons. The first point is that, as we remarked in paragraph 57 *(e)* of our Reply, this provision (in the light of which Article 3 was considered superfluous) establishes no common fishery rights at all. It merely presumes the existence of common fisheries in certain seas which, I shall show in a moment, were high seas, not territorial seas; and, secondly, the whole emphasis of this Article XVI is on *regulation*. *Trawl* fishing may be carried on and during all seasons. Now that may be contrasted with another Article of the 1843 Regulations, Article XLV, which stipulated that the oyster fishery should only be open from September to April. And it seems that the combined effect of those two provisions was regarded as governing and completely covering the question of the oyster fishery and a common fishery in this area, and as rendering Article 3 superfluous; and therefore in effect it really takes Article 3 out of the 1839 Convention as a provision which establishes a common fishery in any limits, in any area or island, outside the high seas, or, as I have said, banks and rocks and so on which were not under the sovereignty of either Party.

Clearly no implications about sovereignty could be drawn from purely regulatory provisions of the kind such as Articles XVI or XLV of this 1843 text, and, as I say, the significance of all that is that it is these provisions which were in 1867 regarded as covering the whole ambit and scope of the famous Article 3. But even more significant is another point. Trawl fishing, as opposed to dredging or line fishing, the trawl fishing referred to in Article XVI, is something which is usually carried on at some distance from the shore. This suggests very strongly that the "Seas" referred to in Article XVI are high seas, not the territorial sea, and this view is proved almost conclusively by two passages from the minutes of the Commissioners' meeting. The first, which I will not read, is on page 647 of the print of Annex A 172, starting about half-way down with the words "Article 16 is reserved for future consideration", and continuing for about three paragraphs. But the second passage occurs in the minutes of the meeting held by the Commissioners on January 16th, 1867 (on p. 652 of the print), and this passage is so striking that I will read it.

It says:

> "The Convention [and it will be seen in a moment that they are talking of the 1839 Convention] was only binding on the two nations in the open sea *beyond the three-mile limit*, leaving it to each to make such regulations as might be considered desirable *within its own waters*.—The English and French Governments were therefore quite justified in making regulations within the three-mile limit which were *in opposition to the provisions of the Convention of 1839*.—Moreover, there was no difference of opinion as regards the small oysters.—But the question then under consideration was the sea common to both. [We shall see in a minute what that common sea was.]—The English Commissioners thought that the privilege of dredging all the year round, which is now granted *within the three-mile limit*, should be extended *to the common sea*." [Underlining added.]

Now, I ask the Court, could there be a clearer indication, first, that the common sea meant the non-territorial sea—that is, the sea outside the three-mile limit referred to in that quotation ; and, secondly, that it was only the position in this common—that is to say, non-territorial—sea that the Parties were discussing in relation to Article XVI of the 1843 Regulations, and therefore in relation to Article 3 of the 1839 Convention, which disappeared because it was covered by Article XVI of the Regulations ; and therefore, thirdly, that Article 3 itself did not apply to any areas that were not non-territorial, and consequently did not apply to the Minquiers and the Écréhous, which both Parties assert to have been under the exclusive sovereignty of one of them at that time, and the waters of which would consequently have been territorial, not non-territorial ?

This 1867 text, therefore, Mr. President, and the negotiations that led up to it in our view very much support the proposition that Article 3 of the 1839 Convention did not apply to the Minquiers or the Écréhous at all. Our opponents may, it is true, point to a still later convention—the 1951 Fishery Agreement—which expressly provides, in effect, that Article 3 of the 1839 Convention is to be interpreted as applying to the groups. They may say that this is evidence that it did originally apply to the groups in 1839 also. But it might equally be evidence of exactly the contrary. This old Convention was so obscure that it had to be re-interpreted in order to make sure that it applied to the Minquiers and the Écréhous, *even* for fishery purposes. But yet it is on the basis of this Convention that our opponents ask the Court to hold that on the question of sovereignty all the evidence of the last 114 years should be excluded. However, if our opponents do make use of the 1951 Agreement to show that Article 3 of the 1839 Convention applied to these groups, they must then concede the corollary of that argument—that the Convention only applied to the groups for purely fishery purposes, and in no way precluded claims to exclusive sovereignty by the Parties—for the 1951 Fishery Agreement is precisely to that effect : so far from precluding such claims, the common fishery régime of that Agreement is established expressly in contemplation of the fact that these claims exist and will be made, and that one or other of the Parties will be declared to have the exclusive sovereignty over the areas where fishing is to be common. (And the Court will remember that it is only within limited zones that the Party declared to have sovereignty can grant exclusive fishery concessions : elsewhere the common position continues.) If therefore the 1951 text can be used to show that, contrary to our view, Article 3 of the 1839 Convention did apply to the groups, it is equally valid as evidence that it applied to them in a purely fishery sense, and without any of the implications or effect as to sovereignty which our opponents pretend.

In their Rejoinder, our opponents constantly accuse us of seeking to deprive Article 3 of all meaning and effect. This is not so, as I hope the Court will have seen. We merely attribute to it a different meaning and effect from what our opponents do—and we equally regard them as giving it a greatly inflated meaning and effect, which its language cannot reasonably bear. We believe that our interpretation of Article 3 is quite adequate to give that provision a very definite and full significance and effect. It applied to a definite area of sea.

and to any unclaimed territory there might be in that area. The Article, moreover, provided for definite rights, namely, common oyster fishery rights, and this involved a definite obligation, namely, not to assert any exclusive oyster fishery right there. This being the position, what juridical basis can there be for going any further, and giving to this provision the far-reaching significance for which our opponents contend?

Here I would like to draw the attention of the Court to a cardinal principle of interpretation which, I submit, ought to be applied in the present case. The principle in question is this, that when sufficient and adequate effect can be given to a treaty provision by regarding it as implying rights A and B, so to speak, it should not be interpreted as also involving rights C and D, unless the language quite clearly requires or implies this. It is no doubt proper that, in the application of the principle *ut res magis valeat quam pereat*, all due effect should be given to treaty provisions, and that, other things being equal, they should be given that interpretation which will invest them with the fullest significance and effect. But this principle cannot properly be invoked so as to give a clause a greater significance and effect than it can reasonably bear according to the natural and ordinary meaning of its terms. This view was, I venture to suggest, affirmed by the Court itself in the second phase of the *Peace Treaties* case, in which, on page 229 of the Report, the Court discussed the scope of the *ut magis* principle.

Now, it is surely obvious—and here I finally leave the question of what territory Article 3 of the 1839 Convention applied to, and confine myself to the question of what rights and obligations it implied —it is surely obvious that Article 3 can be given a perfectly adequate and normal effect by reading it as involving what it actually specifies, namely, certain common fishery rights—strictly oyster fishery rights; and as implying an obligation not to assert any exclusive right in *that* respect. There is absolutely no need to go further than this in order to give this clause its due effect, and therefore we submit that it would not be justifiable to do so.

[Public sitting of September 21st, 1953, morning]

Mr. President, Members of the Court, before I resume my argument at the point where I left off the other day, I would like to add a footnote to something I was saying earlier. The Court will remember I argued it was most improbable that Article 3 of the 1839 Convention could have applied to the Minquiers and the Écréhous if these groups had been under the sovereignty of either of the Parties, as of course both Parties now claim that they were. I argued that, in these circumstances, it would have been Article 9 which was applicable, and I tried to show that, in a certain sense, Article 3 was strictly superfluous, since it applied to regions where the Parties would in any case both have had a right to fish. Our Agent in this case, Mr. Best, has reminded me of a feature which strongly supports this view and which also suggests what was almost certainly the true explanation of why the Parties included this apparently useless provision. This feature was the tendency of the fishermen on both sides to claim a *quasi*-proprietary right, a sort of right almost

of private property, in oyster banks which they had discovered or which they had cultivated, even though these banks lay outside the limit of territorial waters and therefore in parts of the sea where legally no exclusive right could be claimed. And here I would like to draw the attention of the Court to certain passages in the Counter-Memorial and in the United Kingdom Reply.

To take the United Kingdom Reply first, at the bottom of page 452 and the top of page 453 we drew attention to some correspondence which had been given in the French Counter-Memorial, correspondence between the Prince de Polignac and Mr. Canning, given as Annexes 1 and 3 to the Counter-Memorial, and also we referred there to a subsequent letter of December 24th, 1825, from Sir Robert Peel, as Home Secretary, to the Minister then responsible for fishing in the United Kingdom and the Channel Islands, and which was reproduced in Annex A 141. And then we went on like this: "A study of these documents makes it clear that there were three main difficulties, arising from the peculiar character of the oyster fishing industry." And the one I want to cite is the first:

> "The French fishermen regarded themselves as entitled to an exclusive right to fish certain oyster banks off the French coast outside the normal limits of French territorial waters. They considered that they had (as the French Counter-Memorial says, pp. 360-363) a quasi-proprietary right in these banks, or rather in the oyster beds on them, by reason of having cultivated them."

And I think perhaps it is worth looking at the French Counter-Memorial. Citing from page 359 of the French text but reading the English translation, there is this passage:

> "The French fishermen, at that time, regarded the oyster banks as the fruit of their labours, or those of their forefathers in the eighteenth century. They had cultivated the oysters and they expected to reap what they had sown...."

And then, on page 360 we have this:

> "During this first stage, each Party was defending a standpoint which was apparently simple. The British fishermen claimed the right to dredge oysters wherever they were to be found. The French fishermen resisted this claim, wherever they had oysters to defend, i.e. everywhere in the sea-area where they had cultivated oysters, in the belief that they had thereby acquired an exclusive right to the harvest."

Then finally, on page 364:

> "To realize this fact, it was only necessary to recall that most of the oyster-beds lying at a distance of two leagues from the French coast [that is, outside the normal limits of territorial waters], between the Senequet rocks and the Chausey Islands, had been discovered during the last war between France and England by Jersey fishermen, who had thus acquired an incontestable right to their possession."

So it seems that the fishermen on both sides were apt, when they discovered banks of oysters, to claim a sort of prior right to their use, wherever those banks might be situated; and therefore these passages

do suggest very strongly that, although Article 3 may have been superfluous in the sense that it only applied, in our view, to the non-territorial sea and to banks, reefs and rocks not capable of appropriation, it nevertheless had a definite use as emphasizing and marking the fact that no exclusive right could be claimed in these regions outside territorial waters. But of course if there were any islets in the region actually under the sovereignty of either Party, then the principle of exclusive fishery rights would apply by virtue of Article 9. And this interpretation also goes far, we think, to explain why Article 3 was dropped in the 1867 text. By 1867 the respective fishermen had given up trying to assert proprietary claims in banks outside territorial waters. The position had become stabilized, and Article 3 could be dropped. I just wanted to add what, it seems to me, is a very illuminating footnote to what I said on Saturday.

I now resume where I left off. The Court will remember I had pointed out that, according to the natural and normal meaning of its terms, there was no warrant for reading into Article 3 the implications about sovereignty involved by the French contention. I had equally tried to show that there was no ground for ascribing to the Parties any intention whatever of dealing with the question of sovereignty or of dealing with anything else but fisheries pure and simple, and in particular the oyster fishery. If these views are correct, it follows that there is one ground, and one ground only, on which the French contention could be justified, and that would be if it was in fact impossible, as a matter of practice, for two countries to share a common fishery in waters over which one of them had the exclusive sovereignty.

Mr. President, we, of course, can see no reason at all why the common fishery cannot be carried on in waters over which one of the Parties has exclusive sovereignty, and in paragraph 76 and Annexes A 148-150 of our Reply, we cited certain cases in which rights of fishery had been, or were now, shared between countries in certain areas which were under the exclusive sovereignty of only one of the Parties, showing that there is nothing unusual or impracticable in that situation. Our opponents have attempted to discount the value of these examples on the ground that, in the cases in question, there was no dispute about the sovereignty over the areas concerned. We fail to see the relevance of this, or in what way it makes any difference to our argument. May I re-state our argument because, in their Rejoinder, our opponents have subjected it to a certain amount of distortion. What we argued was that a provision about common fisheries is so far removed from anything to do with sovereignty or implications about sovereignty that it could only be regarded as having any bearing on that question if it could be shown that a common fishery right between two countries is *only* exercisable, as a practical matter, so long as neither of them possesses or claims any exclusive sovereignty over the area in question. If, therefore, it can be shown that the exercise of common fishery rights *is* perfectly compatible with the exercise by one of the Parties of an exclusive sovereignty over the area, then it must follow that no such implications can properly be read into a common fishery provision as our opponents seek to read into Article 3. The examples we gave demonstrated precisely that; and in our view the force of

these examples is not in any way weakened by the fact that in those cases there was no dispute about the territorial sovereignty.

But may I ask the Court to observe that there was equally no dispute about sovereignty over the Minquiers and the Écréhous in 1839—so that, if this question of whether the sovereignty was in dispute is material at all, and even if it were the fact that our examples would only be relevant to a case where there was no dispute about sovereignty, the Minquiers and the Écréhous in 1839 were just such a case. Consequently, the examples we gave are applicable to that case and to the question of what the Parties intended by Article 3 of the Convention.

But more than that. Even if the sovereignty over the Minquiers and the Écréhous had been in dispute in 1839, the result would be no different —for, if our opponents insist on being furnished with an example of a common fishery right exercisable in an area the sovereignty over which *is* in dispute, but without the right to claim exclusive territorial sovereignty being in any way barred, then the recent 1951 Fishery Agreement affords precisely such an example, and in respect of these very islands. Here is an actual case—and in relation to these very islands and as between these same Parties—in which, the sovereignty being in dispute, the Parties nevertheless agree on common fishery rights. Moreover, they do this knowing that exclusive sovereignty will be adjudged by the Court to one or other of them over areas in which fishing will all the same remain common. We submit, Mr. President, that this example is absolutely conclusive of our contention. How can it, in the face of the example of the recent 1951 Fishery Agreement, any longer be pretended that an agreement for common fisheries is incompatible with exclusive sovereignty, or precludes the assertion of it?

Equally misconceived, we think, is the French argument in their Rejoinder, on pages 715-716, directed to showing that Article 3 did not create a servitude, and that the existence of a servitude must be proved and cannot be presumed. It is immaterial, Mr. President, for present purposes, whether you call fishery rights exercised by one country in the waters of another country a "servitude" or not. We were not in our Reply, and we are not now, concerned to argue whether servitudes in the strict technical sense of the term, as they were originally known to Roman law, are also known to international law. There can be no doubt at all that something analogous to them is known to international law. In the celebrated case with which the Court is familiar, of the *North-Atlantic Coast Fisheries*, the tribunal declined to find that a United States right of fishery, existing in common with a British right of fishery in certain waters under exclusive British sovereignty, was in the nature of an actual servitude. But they did not on that account refuse to recognize the existence of those United States fishery rights. On the contrary, the whole arbitration took place on the basis that these rights existed: the only question at issue was what exactly did they amount to. There was no hint throughout the proceedings of any suggestion that the common fishery rights were in any way inconsistent with the exercise of the exclusive British sovereignty, or that the latter in any way prevented the due exercise of the common fishery rights. Sovereignty was never in question. This therefore was again a clear case of a common fishery right exercised in waters over which one of the Parties had the exclusive sovereignty.

And what is more, Mr. President, in its award, the tribunal made a very important pronouncement about the character of fishery rights. I quote from page 159 of the late James Brown Scott's *Hague Court Reports* (that is the reports of cases for the most part heard by the Permanent Court of Arbitration). Referring to the relevant Anglo-United States Treaty of 1818, under which the common fishery rights existed, the tribunal said this:

> "by the treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State."

That, we think, supports our contention that when two countries agree to exercise common fishery rights in certain waters, they are agreeing about primarily economic rights, and not about rights of sovereignty, and that such an agreement ought not to be read as carrying implications about sovereignty, either positive or negative. Mr. President, it is not difficult to think of other economic rights which two countries might share in a similar way, in some territory or island belonging to one of them. I will not trouble to give examples, but they are easily thought of and indeed such situations exist in the world at this time. Such an agreement about common economic rights of one form or another, for the use of a certain piece of territory or island would merely result in an agreed limitation on the sovereignty of the territorial sovereign, but not, of course, in any exclusion of it. Our opponents, we think, have yet to demonstrate in what way common fisheries are exceptional or must involve the implications about sovereignty which they suggest.

Now, of course, we pointed out a great deal of all this in our Reply, expecting—hoping—that in their Rejoinder our opponents would tell us why and how the exercise of common fishery rights prevents any exclusive territorial sovereignty. But we found in the Rejoinder only an attempt to refute our own arguments without any corresponding attempt to explain the basic French thesis, the validity of which again seemed to us simply to be assumed. And I think it fair to say that we find, in the Rejoinder, exactly the same unsupported assertions as we did in the Counter-Memorial. I may just cite a couple of them, for instance, on page 727 of the Rejoinder we find this remark:

> "Moreover, to enable effect to be given to that Article [that is, to Article 3], it is necessary, and it suffices, that the two Parties should refrain from asserting claims of sovereignty against one another."

But, Mr. President, I hope we have shown that, in order to give effect to the Article, this is not at all necessary: it is only necessary that the Parties should refrain from asserting exclusive *fishery* claims against each other.

Then there is a further passage on page 727 of the Rejoinder where, after alleging that after 1839 "French fishermen continued to fish these maritime areas jointly with the British fishermen", it is stated:

> "That is the situation which would be upset [prejudiced] by the establishment of the exclusive sovereignty of either nation."

But, if my argument is right, it would not be upset or prejudiced. If the right of common fishery in fact exists, then the country having or claiming the territorial sovereignty must give effect to the common fishery right. It must abide by the agreement and allow the fishermen of the other country to fish in its waters. But it is not on that account obliged to abdicate its sovereignty. In paragraph 78 of our Reply, to which I invite the attention of the Court, we discussed the mechanics of a common fishery in territory under the sovereignty of one of the Parties, and showed that no practical difficulty existed. We showed how it would and does work, and this is, we think, an important point. Moreover, again, this is the very position established by the recent 1951 Fishery Agreement.

This brings me, Mr. President, to the third main argument about Article 3 which we put forward in our Reply ; namely, that the subsequent conduct of the Parties had not been consistent with the French interpretation of this provision. And here I would like to invoke what I myself called "the principle of subsequent practice" in an article in which I ventured to analyze the jurisprudence of the Court on that subject in the *British Year Book of International Law* for 1951 : I mention it only because on pages 9 and 20-22 of that article in the volume, there will be found in convenient form a summary of it. The principle has been applied by the Court in a number of cases, and in Annex A 151 to our Reply we gave some examples of that. Now, when considering that principle of the light which the subsequent practice of the parties throws on the interpretation of a treaty provision, it is very material that previous French Governments have expressly recognized the perfect compatibility of exclusive sovereignty with the exercise of a common fishery. We referred to the relevant diplomatic notes in paragraphs 79 and 90 of our Reply. This occurred on five or six separate occasions, ranging from 1886 to 1938. These admissions—they are more than admissions, they are contentions adopted by France herself—are explicit and striking. I will not read them, as they are set out in our Reply, but in each case a definite assertion of French sovereignty was followed, either by a statement that French sovereignty would not prejudice British fishery rights, or by a claim that, even if the sovereignty lay with the United Kingdom, this could not prejudice French fishery rights. These statements seem to us to constitute a very clear recognition of two things on the part of previous French Governments : first, that Article 3 of the Convention did *not* prevent claims to exclusive sovereignty over the islands, since France was actually asserting such a claim ; and, secondly, that common fisheries could perfectly well be carried on despite the possession of exclusive sovereignty by one of the Parties, for France was actively maintaining that they should be, whichever side had the sovereignty.

This was equally the United Kingdom view, as expressed in the diplomatic correspondence, and I would refer for proof of this to paragraphs 79, 80 and 91 *(b)* of our Reply. Our opponents have cited in their Rejoinder (on p. 717) a passage from the opinion of the Jersey Law Officers of April 21st, 1887, which is given as Annex A 47 to the United Kingdom Memorial. Our opponents suggest that in this passage the Jersey Law Officers admitted and affirmed that the assertion of British sovereignty was incompatible with common fishery rights for French fishermen. Mr. President, a careful reading of the passage shows that

the view put forward by our opponents is a misinterpretation of what the Jersey Law Officers were saying on that occasion. It was not the *possibility* of the co-existence of exclusive sovereignty with common fishery rights that the Jersey Law Officers were denying. It was the existence of the common fishery rights themselves in the case of the Minquiers and the Écréhous that they denied, because, in their view, Article 3 of the 1839 Convention did not apply to the islands at all, since they were British, and therefore it was Articles 2 or 9, not 3, which applied to them. As the Court knows, throughout this period the Parties were at cross-purposes, because on the French side the view taken was that Article 3 caused the Minquiers and the Écréhous to be subject to a régime of common fishery, whereas on the United Kingdom side it was always denied that Article 3 applied to the Minquiers and the Écréhous and therefore, for that reason, it was denied that there were any common fishery rights there—but never at any time was there any denial that common fishery rights and exclusive sovereignty could co-exist. And, indeed, more than one United Kingdom Government clearly affirmed that there was no necessary incompatibility. This can be seen from the two United Kingdom notes given in Annexes A 40 and A 69 to our Memorial, and I would refer also to paragraphs 79 and 91 *(b)* of our Reply.

Well, equally explicit, as I have said, were the French admissions and affirmations of the same thing. How, then, can the Government of the Republic now revert once more to maintaining that, during this period, Article 3 of the Convention constituted a bar to claims to exclusive sovereignty ? It is all very well for our opponents to try and explain this matter, to explain their attitude—a little disingenuously, as we think—by means of such statements as that which appears, for instance, on page 719 of the Rejoinder. I quote :

> "The Government of the Republic does not deny that, in the course of the intermittent negotiations, the French diplomatists did not always base Article 3 on the same legal foundation" ;

and then again :

> "At different times they held different views as to the legal category to which the status of the intermediate zone most naturally belonged."

Then they go on :

> "But these are not matters of real importance."

For our part, Mr. President, we must insist that these *are* matters of real importance, and that the attitude adopted by previous French Governments during the period in question had a very definite legal significance and effect. It is a question of two mutually exclusive propositions. I believe it was the philosopher Spinoza who at one time said that one of the few certain things in this world is that a tree cannot both be and not be a tree. Equally, Article 3 of the 1839 Convention cannot both make claims to exclusive sovereignty incompatible with the exercise of a common fishery right, and yet at the same time permit of claims to exclusive sovereignty because there is in fact no such incompatibility, and both can be exercised simultaneously. The one

cannot both be and not be incompatible with the other; and if one of these positions is correct, the other cannot be, and *vice versa*.

Now in the notes to which I have been referring, and in other diplomatic notes, the Government of the Republic very definitely took its stand on the second meaning, that there was no incompatibility, and on that basis the Government of the Republic asserted France's claim to sovereignty while at the same time maintaining—quite correctly, of course—that, whichever side had the sovereignty, this was no impediment to the common fishery rights of both countries, which should continue.

Once this position had been taken up, it ceased—we think—to be any longer open to a Government of the Republic to revert, as our opponents are now seeking to do, to the earlier argument about the effect of Article 3. One does not, of course, want to tie down a government in respect of its past pronouncements in too literal a sense. That is in no way what I have in mind to do. But the present case is rather different, because what is involved is a question of *capacity*; and capacity either exists or it does not exist. Like Spinoza's tree, it cannot both be and not be. The present French argument is that, by reason of Article 3, the Parties were disqualified all this time from asserting any exclusive sovereignty. Therefore, according to this argument, they had no capacity at that time to assert their sovereignty or to make a claim. But putting forward a claim pre-supposes a capacity to do so, or, at any rate, a belief on the part of the country claiming that capacity duly exists. From the moment, therefore, that any French Government put forward a claim to sovereignty, it necessarily asserted its capacity to do so; and, correspondingly, it necessarily admitted the similar capacity of the United Kingdom. But if this capacity existed at that time, then it must always have existed, and must indeed exist now, for Article 3 had not, and has not, changed, and nothing had or has occurred, either previously or subsequently, to alter the situation, or to impose or re-impose on the Parties any incapacity that was not originally there. A French Government, having once admitted, and, indeed, based its claim on the view that Article 3 constituted no bar to a claim to sovereignty, our opponents cannot now say that such a bar existed after all during this period and, in consequence, that all the events of this period must be excluded from consideration of the present claims of the two countries to sovereignty.

France, in our view, has always been in this case more concerned to deny the British claim than to assert its own, and I believe that what really happened after the middle of the last century was that the Government of the Republic, being reluctant either to assert or abandon its claims, hoped, by using Article 3 as a basis, to have the question of sovereignty left in abeyance—perhaps quite a natural hope. But, nevertheless, this hope being disappointed, since the United Kingdom Government—quite legitimately, we think—took a different view of the effect of Article 3, this hope being disappointed, the Government of the Republic saw that it must either assert a definite claim or not do so, and it decided to do so—and of course it was perfectly within its rights in taking that decision. But, having done so, it could not subsequently say that Article 3 created for the Parties an obligation *not* to claim, and it cannot say so now. This, however, is what our opponents are saying in fact, for it is on the supposed inability to assert or exercise any exclusive sovereignty in the period

1839-1950 that their argument that 1839 is the critical date is founded.

We can only conclude, therefore, that the attitude and actions of neither Party subsequent to 1839 was consistent with the view of the 1839 Convention now put forward, and that for this reason also that view must be considered to be incorrect, or alternatively that it has long since been abandoned by the Parties and cannot now be revived.

Mr. President, this concludes our argument directed to showing that 1839 cannot be accepted as the critical date in the present case. I shall now say a very few words about the original suggestion of our opponents that the period round about 1870 or 1880 should be taken as the critical date, because the dispute is said to have been born then. In our Reply (in various passages between paragraphs 194 and 230), we tried to show why this period could equally not be regarded as the critical date. Applying the principles I discussed earlier in my present speech, the position is that, even if the dispute now before the Court could be said to have had its birth at that period (1870 or 1880) more than at any other particular time, it is not the date of birth, as such, that counts. It is always a matter of great difficulty to say exactly when a dispute is born. Disputes start with differences of view. And, as I was saying, it is only when these crystallize into a concrete issue that a dispute in the proper sense can be said to have arisen, and in turn to give rise to a critical date. It seems to us manifest that the desultory interchanges which took place between the Parties in the period 1870-1880 could not have given rise to a critical date, and in support of that view I would like to invoke the statement which our opponents have themselves made. I will simply take the two statements which I read a moment ago in another connection. I quote from page 719 of the Rejoinder:

> "The Government of the Republic does not deny that, in the course of the intermittent negotiations, the French diplomatists did not always base Article 3 on the same legal foundation."

According, then, to our opponents, at that time it was not so much a dispute but what might be called "*pourparlers*", negotiations, discussions, about the situation.

And then the other quotation from the same page:

> "At different times they [that would be the Parties or the French diplomatists] held different views as to the legal category to which the status of the intermediate zone most naturally belonged."

So we see, Mr. President, that these differences of view had not come to a head. They were not always even about the same things, for sometimes they were about sovereignty, sometimes about fisheries and sometimes about a sort of mixture of the two. Then, as I was pointing out the other day, there were very long gaps, which I will not recapitulate, but in the case of the Écréhous certainly lasting for a prolonged number of years until just before the date of the submission of this dispute to the Court. In the case of the Minquiers, the gaps were less long but nevertheless very considerable. And in all those circumstances, Mr. President, it does seem to us fair and right to say that this dispute did not crystallize—did not really take the form of an actual dispute—until three or four years ago when it was decided to submit the matter to the Court.

We pointed out in our Reply that merely putting forward a claim to territory could not by itself operate to freeze the whole legal situation into immobility for ever after, and automatically shut out the evidence, or destroy the value, of all subsequent events.

We suggest it was the same with the French protests of this period. They could not by themselves—not being accompanied or followed by proposals for arbitration or other means of settlement—give rise to a critical date. Mr. Harrison of Jersey, when he comes to address you, will show that the French protests of this period were scarcely effectual, in the circumstances, even to keep France's claim to sovereignty alive. But whether that was so or not, certainly these protests did no *more* than keep France's claim alive. They could not have given rise to a critical date, shutting out the evidence of all the events between about 1880 and the present time.

I now come to the final point I have to make on the subject of the critical date. It is this, that, even if some date such as 1839 or 1880 should be regarded as the critical date in this case, rather than 1950 or 1951, when the dispute crystallized and was submitted to the Court—and I hope I have convinced the Court that this is not so—but even if it were so, it would not mean that the events subsequent to these dates of 1839 or 1880, or whatever it might be, had no relevance to the issue at all. We referred to this matter in paragraphs 223 and 224 of our Reply, and we showed that, although evidence of acts occurring after the critical date cannot be adduced directly in proof of title, they may be receivable indirectly, because of the light they throw on events occurring before the critical date, or on the position as it stood at that date. We showed that in the *Island of Palmas* case, Judge Huber, while fixing 1898 as the critical date, admitted evidence of certain things occurring or existing between 1898 and 1906, not as direct evidence of title in themselves, but because of "the light they might throw on the period immediately preceding". The principle involved is analogous and very similar to "the principle of subsequent practice", to which I referred a moment ago in another connection. Just as the subsequent practice of parties to a treaty, in relation to it, cannot alter the meaning of the treaty, but may yet be evidence of what that meaning is, or of what the parties had in mind in concluding it, so equally events occurring after the critical date in a dispute about territory cannot operate to *alter* the position as it stood at that date, but may nevertheless be evidence of, and throw light on, what that position was.

This principle is of great importance, we think, because normally sovereignty over territory is not something that springs up overnight. It is a continuing process. At any given moment it has probably been going on for some time. If the critical date in a given case is determined to be the year X, and a number of years after X you find one of the contestants exercising a sovereignty which has all the signs of stability and continuity, that in itself gives rise to a strong presumption that this sovereignty has existed for some time and existed at the critical date also.

Applying these principles to the present case, we should contend that, even if the critical date were 1839 or 1880, the fact that, immediately subsequent to those dates, and right up to the present time, you find the United Kingdom in sole effective possession and invoking an ancient title and a long continuance of this possession; that all

the normal manifestations of sovereignty during that period are carried out from the British side, and none from the French; that residents and property owners on the islands act as if they were on British, not French territory; that Jersey law alone is applied—these and many other factors create a virtually irresistible presumption that the islands were also British at the earlier dates.

For these reasons, even if the Court should hold some date earlier than 1950 to be the critical date, we should contend that the later evidence cannot properly be excluded entirely and that it proves the existence of our title on the earlier date also, even if that title cannot be established by events occurring at or before that date, as Professor Wade, who will follow me, will show the Court that it can. But of course my submission to the Court is that there is only one correct critical date in this case, namely, December 29th, 1950, when the Parties signed the Compromis in virtue of which we are here to-day.

Mr. President; that concludes my address, and Professor Wade will follow me on the medieval history and later. I wonder, Mr. President, if I might mention one point of procedure before I leave the rostrum. We are very anxious to finish our presentation of the case if possible by Wednesday and at the latest on Thursday morning. It might assist us considerably to do that if the Court felt able to sit at 10 instead of 10.30 during the next two or three mornings. I merely make that suggestion, Mr. President, and naturally it is entirely for you to decide.

3. ORAL ARGUMENT OF PROFESSOR WADE

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF SEPTEMBER 21st TO 23rd, 1953

[Public sitting of September 21st, 1953, morning]

Mr. President and Members of the Court, it is my special task to address you on the origins of the United Kingdom title—or, if I may so put it—of the Jersey title to the Minquiers and the Écréhous; and to show how that title was asserted throughout the Middle Ages and thereafter. I shall take the matter up to about 1800—the end of the eighteenth century. Mr. Harrison of Jersey, who will follow me, will give an account of the many acts relevant to sovereignty which have occurred since 1800. I fear, Mr. President, that Mr. Fitzmaurice may have raised some expectations in the minds of some Members of the Court that I was to deliver a sparkling account of thrilling events through the ages. There is no doubt that, in reading the history books, the events are thrilling and at some times romantic, but I fear it would be impossible for me, in submitting those events to a somewhat close, critical historical analysis, to fulfil the rôle which Mr. Fitzmaurice predicted.

First (and this will indeed be one of my principal tasks), I shall try to show that France has failed to establish any original title to the Channel Islands, and that we have shown an original title in the English Crown which has continued for about a thousand years, certainly earlier than 1066—the date regarded as traditional in England, through, of course, the Duke of Normandy. But secondly I shall show—or hope to—that, even if some sort of abstract feudal title can be postulated in favour of France, France lost that title and a valid title on our part has replaced that of France. Now, before I go any further—because I fear that in the course of my remarks the international law aspect may recede somewhat, at all events when I am dealing with events of a thousand or more years ago—I want to place before the Court what I say against the background of the *Island of Palmas* and the *Eastern Greenland* cases, which Sir Lionel Heald gave the Court in his opening speech. I will not, of course, repeat that analysis, but I will just summarize in six short propositions the principles applied in those two cases that seem, to me and my colleagues, to be relevant to the present dispute.

First—that, in deciding between two competing claims to territory, each country's claim and grounds of claim should be considered as a whole, and the decision should be in favour of the country whose claim is the weightier. If I may, Mr. President, I pause there to stress that first proposition, because inevitably in the course of my speech I shall be examining a title by our two countries stage by stage rather than looking at is as a whole.

And the second proposition was that it is not enough to show that a title existed at some point in the past: it must be shown still to be in existence on whatever date is determined to be the critical one. The

Court is now well aware that our submission in that respect is the year 1950, the date of the Compromis.

Thirdly, that there is no presumption of continued sovereignty—it must be shown to have been actively kept up by a sufficient display of State authority: international law does not recognize abstract title to territory devoid of concrete manifestations. My period admittedly will be less full than that of Mr. Harrison with regard to acts of concrete manifestation. I think, however, that before I have finished, the Court will agree that I have put before them for their consideration a considerable volume of evidence.

Fourth—that the amount of State activity required for this purpose will depend on the circumstances, and that, while a comparatively slight display may suffice in some cases, this will only be so if the other claimant State cannot show a better title.

Fifth—that where a claim is based on long continued effective possession and control, it is not necessary to show that title was acquired at any particular moment of time or under any particular formal act, provided that it exists at the critical date.

Sixthly—that if one country is exercising or purporting to exercise sovereignty over a territory as a whole, and has manifested that intention by appropriate acts, it is for the other claimant to show that this sovereignty did not in fact extend to particular parts of the territory.

It is against the background of these principles that I now turn to history, and to the events and circumstances dating from the tenth century that have a bearing on this case.

I shall divide my observations on history, Mr. President, into sections. Later I shall deal with documents specifically evidencing title to the Minquiers and Écréhous. I shall begin on the history with the events previous to 1204, this being the date when continental Normandy first passed into French hands, and in connection with that period I shall particularly consider the question of original title to the Channel Islands as a whole. Next, I shall consider the period from 1204 to the end of the Middle Ages (and perhaps a little bit beyond the traditional date, 1485), as it affected the Channel Islands generally and with special reference to the diplomatic acts or treaty instruments of the period that are relevant to the legal position of the islands: the Treaty of Lambeth, in particular, in 1217, the Treaty of Paris or Abbeville (I shall be referring to it as the Treaty of Paris in the course of my speech—the place of ratification rather than the place of signature), the Treaty of Calais or Bretigny in 1360, and the Treaty of Troyes in 1420—the text of all those treaties is reproduced in the opening pages of the Appendix to our Memorial—and also certain subsequent minor instruments. I shall deal only with essentials. I shall here again be considering the Channel Islands as a whole, rather than the Minquiers and the Écréhous as individual groups; but I shall show that the presumption that they were part of the Channel Islands and under English rule during the Middle Ages is so overwhelmingly strong that no other hypothesis is plausible. At this point I shall state—it is at the end of the Middle Ages—what seems to me to be the general legal position, and I shall show that, apart from the specific evidence of English medieval rule over the Minquiers and the Écréhous, there can be little doubt that France did not possess sovereignty over them at the end of this period, and that England did.

After that, I shall consider specific evidence relating to the Minquiers and the Écréhous separately—as I have already said—and then I shall bring the history of the Minquiers and the Écréhous up to date, down to about 1800. In the last two parts of my speech I shall also deal with a third group of islands, which the Court will have noticed crop up from time to time in the written pleadings, the Îles Chausey. I shall show that the Chausey were unquestionably English in the Middle Ages and later (in particular I shall be talking about 1500), and that they did not become firmly French until the middle of the eighteenth century. I shall show how this creates a presumption that the Minquiers and the Écréhous were also English in the Middle Ages and after, and there was no change in their position—the Minquiers and the Écréhous—in the eighteenth century or later, in contrast, of course, to the Chausey.

In discussing the case under these various sections—principally, the situation before 1204, the effect of the treaty instruments, the specific facts relating to each group and to the Chausey up to the early nineteenth century—I shall try to establish three main propositions :

First—that the original root of title, based on actual possession—"seisin", to use the contemporary feudal term—was vested in England, not France ;

Second—that this title has always been maintained by the effective exercise of sovereignty ;

Third—that even if, in the early Middle Ages, the original root of title did lie with France, it was subsequently lost by various facts, such as the operation of treaties and in particular the passing of the feudal system which, as a matter of historical fact is well-known, did not survive the Middle Ages, and because it was never effectively exercised.

As regards the first proposition, which also depends very largely on the events before 1204—the vesting of the original title in England —we claimed in our Memorial that the original root of title of the English Crown to the whole of the Channel Islands can be traced back to 1066 when William, Duke of Normandy, became King of England. In their Counter-Memorial, our opponents relied principally on the contention that, by the *arrêt* or judgment of 1202, the rights and lands of the Duke of Normandy became forfeited to the Crown of France, and thus the Crown of England lost its original title. In our Reply, we showed that this *arrêt* or judgment of 1202 was of dubious validity—and we showed it on a number of grounds—and that fact is demonstrated by the controversy, the very considerable controversy, that it has given rise to among the historians of both countries, which appears never to have been resolved. We also pointed out in our Reply that the *arrêt* was never executed as regards the Channel Islands. In their Rejoinder, therefore, our opponents went still further back in time, and to our contention that the English Crown had an original title from 1066 on through the Dukes of Normandy, they replied that the Dukes themselves held from the French Crown. Therefore, they argue, the original title lay with France.

Now, obviously, this argument pre-supposes that the Channel Islands were a part of the territory that the Dukes held—the Dukes of Normandy held—at least nominally, of the French Crown, in the sense that any homage they may have done for continental Normandy *ipso facto* covered the Channel Islands as well. I shall try to show that the probabilities are against this, and that at all events it cannot be

assumed to be true. The French Rejoinder states it baldly as a fact, as if it were self-evident, but my submission is that it is not and that the French give little or indeed no evidence in support of that fact.

But next I shall hope to show that, even if it be assumed that the Channel Islands were comprised within the ambit of the French overlordship, the character of that relationship, overlordship, as it existed between the French Crown and the Duke of Normandy, was not really in the nature of sovereignty as we understand it to-day—certainly not as international law understands it. It was what historians call suzerainty, as is indeed admitted, if one turns to pages 691 and 692 of the French text of the Rejoinder: there you find the term "suzerain" is actually used to describe the position of the French Kings. Now this suzerainty was of a particularly tenuous and shadowy kind. It was, in fact, purely nominal, and particularly so at the time when the Channel Islands passed into Norman hands and even more so when William of Normandy conquered England. The Dukes were to all intents and purposes independent sovereigns themselves, and Normandy was a Kingdom in all but name—or at any rate a principality, and an independent one at that, in our view. A title arising from nothing but a relationship of that kind seems to us to be devoid of substance—and anyway, an insufficient foundation for a claim said to be based on ancient rights and, moreover, to be subsisting after more than a thousand years.

These are the points, Mr. President, that I shall try to establish. First, the Dukes of Normandy probably never owed allegiance for the Channel Islands and never intended to include them in the nominal and rare homage that they paid for their continental possessions to French Kings. Secondly, that any homage which they might have paid for these continental possessions and the Channel Islands was of a perfunctory nature, because they held and ruled those possessions as virtually independent kings (rulers).

I must apologize, if I seem to discuss this aspect of the case at some length, but I really have to do so because, in the Rejoinder, the Government of the Republic have raised for the first time this question of a title based on homage supposed to have been done by William Longsword to the French King in respect of the Channel Islands as far back as the year 936. Perhaps I should also apologize—and more particularly perhaps to my learned friend Professor Gros—if a professor of English law attempts to challenge the view put forward by the Government of the Republic concerning the history of France. To them I can only say that this view of our opponents is by no means universally shared, even by French historians. And, anyway, the immediate issue is not so much of French history as Norman history, a subject on which we in England regard ourselves as having some sort of equivalent right to speak, especially as regards the period under consideration. I need only mention a name that must be known to many Members of the Court, if not to all, Professor Powicke and his book on the "Loss of Normandy".

Now, what does the French Rejoinder say about the position prior to 1066 and about the origin of the supposed French title? I shall cite various sentences from the Rejoinder. They are all of them taken from page 686 of the French text—I shall read them in English, from page 2

of the English translation[1], and make various comments in the course of this citation. After that I shall give our own version of what probably happened before 1066.

Now the Rejoinder, after referring to the original title claimed by the United Kingdom, based on the events of 1066, proceeds (I am now citing the actual words) :

> "Against the title thus alleged by the United Kingdom Government, the Government of the Republic can set up one which is no less impressive and which is of greater weight."

The French text says "*non moins illustre et plus solide*". Now, "solid", I shall hope to show, is exactly what this French title is not. The Rejoinder goes on :

> "It is, in fact, acknowledged that the Channel Islands were part of the Kingdom of France in the eleventh century."

I need hardly tell the Court that we do not acknowledge that and, indeed, we do not know who does acknowledge it. Then, continuing the citation :

> "Before 1066, as afterwards, Normandy was a French province which the Duke held of the King of France, his lord, to whom his homage and fealty were due."

Now that seems to us to be an unrealistic description of the relationship between Normandy and France at that date ; but the real point, of course, is that it begs the question whether the Channel Islands were part of Normandy for the purpose of that relationship of homage and fealty. Normandy, as the name implies, was a Norse principality, conquered by the Vikings of Scandinavia ; they certainly owed no fealty to the French Kings, except such as they chose to acknowledge.

We then have in the Rejoinder :

> "The principle behind this situation is to be found in the agreement concluded at Saint-Clair-sur-Epte in 911 between Charles III and Rollon. Rollon, however, then received only the region of the Lower Seine, or Upper Normandy."

Now to say Rollon "received" these territories is surely somewhat of a fiction. He had already taken them ! What he agreed to do was to pay nominal homage for them. Here, however, we begin to see the basic idea behind the French thesis. Rollon only "received" Upper Normandy in 911. But because he had received *any* territory, or rather, acknowledged the French King as his overlord in respect of certain territories, it was to be presumed that France was also overlord in respect of other territories which he or his successors might subsequently acquire. Now that seems to me to be contrary to the whole theory of the feudal system. Just because a man held certain lands of one lord, it does not follow that he must hold all his lands of the same lord : he might hold other lands of another lord, or if he were a great magnate like the Duke of Normandy, he might hold lands of no one. Certainly nobody suggests that William the Conqueror, when he came over to my country and conquered it, held England of anybody but in his own right of conquest. The idea that because a man held certain lands of

[1] English text not reproduced.

a certain overlord, all subsequent acquisitions of his were automatically added to those lands in respect of which he did do fealty, and held of the same overlord, is, I venture to say, erroneous.

[Public sitting of September 21st, 1953, afternoon]

Mr. President, I now continue my analysis of the French Rejoinder on page 686 of the French text. The next observation is (I quote) :

> "It was his successor [that is, Rollo's successor], William Longsword, who at the time of his homage to the French King Raoul in 933 received the dioceses of Avranches and Coutances in fee as the price of his submission. At the same time he received the Channel Islands in fee."

I shall show presently that the statement that William Longsword received the Channel Islands from Raoul is open to doubt, and in my submission the probabilities are against it. But what is interesting in this particular statement is the suggestion that Longsword received the dioceses of Avranches and Coutances *as the price of his submission.* Longsword received Avranches and Coutances not as the price of his submission—it is my contention—but as the price of not making any further encroachments on Raoul's territory in the direction of Paris. In short, he was bought off. Any homage he did was purely nominal, and it is an interesting fact that the French Kings appear to have come to Rouen to receive this homage, the inference being that they could not have got the Dukes to go to Paris.

I shall also show, with reference to the last passage from the Rejoinder —the one I have just read—that Avranches and Coutances were not part of the possessions of Raoul at this time, but of those of the Dukes of Brittany. We find perhaps a better estimate of the position in the ordinary little history text books which are used in French schools. I have one here. It is used for intermediate courses : *Histoire de France* in the series *Cours Gauthier et Deschamps, Cours moyen et supérieur,* and it uses very different language from the Rejoinder. For instance, it says (at p. 23)—I shall translate as it is a very short passage :

> "To stop the ravages of the Normans, Charles the Simple yielded to them Normandy."

The Rejoinder continues :

> "In 936 William Longsword did homage for the whole of Normandy to the new King Louis IV d'Outremer."

Here the underlying assumption is that the Channel Islands were part of the "whole of Normandy", or at all events part of the territories in respect of which Longsword did homage. I will leave my answer to that until I can give the picture as we see it.

The Rejoinder then says (I quote again) :

> "The British Reply .... would therefore appear to be incorrect when it states that 'the Channel Islands themselves had been incorporated by the Dukes of Normandy within their possessions .... when they began to extend their conquests towards the West'."

This statement in the United Kingdom Reply is nevertheless literally correct. It was—it is our contention—the Dukes of Normandy and not the French Kings who annexed the Channel Islands. And to speak of an extension by the Dukes of their conquest is also correct, although the Rejoinder goes on (I quote again):

> "The word 'conquests' is legally inappropriate, and as to the word 'possessions', it is ambiguous. It would be clearer and more correct to say that the Channel Islands themselves became added to the other fiefs which the Dukes of Normandy *held* of the King...."

There is, Mr. President, an engaging vagueness about this phrase "the Channel Islands .... became added". Such things did not happen in those days. The islands did not become added—they were taken— taken by force, and by the Dukes. Moreover, it was almost certainly from other Norse chieftains that they were taken, Norse chieftains who had settled in the islands. They were quite literally "conquests". But the interesting feature of the passage from the Rejoinder which I have just read is that you see in it the fundamental error of the whole French theory—the assumptions that any further territories annexed or acquired by the Dukes automatically became part of the territories they held from the French King, the point I was trying to make to the Court before the adjournment. Our opponents do not deny that William's conquest of England was a "conquest". Why then was the conquest of the Channel Islands not a conquest? If the answer is that England was overseas, I reply that the Channel Islands were overseas. It may be interesting to the Court to hear—if not already within their knowledge—that it is less far (a shorter distance) from Calais to Dover than it is from the nearest point on the French coast to Guernsey, and that the distance between St. Malo and Jersey is as great as that between Boulogne and Folkestone. Thus, to conquer the Channel Islands, something like a major sea expedition was required, and can we not take it that at that date only Norsemen could have achieved it? In other words, this was an independent and personal conquest by the Dukes of Normandy, in respect of which they probably owed no allegiance to anyone at all. People like the Norman Dukes dit not—one may perhaps infer—go about acquiring territories for the benefit of other people. By their conquest of the Channel Islands, they and they alone became the supreme overlords of the islands which they held from no one else.

After this, the Rejoinder concludes as follows (I quote):

> "It is therefore not challenged (nor is it open to challenge) that in 1066, the year in which the United Kingdom Government seeks to found the basis of its claim, France was sovereign over the Channel Islands."

I hope that the Court will see that I have attempted successfully to challenge this.

I have analyzed this important passage in the French Rejoinder at some length, because really the whole French case depends upon it, and I want to show on what unstable foundations it is built.

Let me try, Mr. President, to put before the Court what we believe the facts to have been. For what follows, apart from what is to be found in standard histories, my authority is mainly Dupont, the French historian of the Cotentin, who relies amongst others on Wace—a Jersey

chronicler of the twelfth century, who, according to Dupont, gives in his book, *Roman de Rou* or *Chronicle of Rollo*, details unknown elsewhere. Dupont himself wrote in the second half of the last century.

Briefly, the French Rejoinder claims that the French King Raoul possessed the Channel Islands or was their overlord, and that he gave them in fee in 933 to the Norseman, William Longsword. This is doubtful, for they were not mentioned in any agreement between him and Longsword, and they appear to have been territories certainly outside the physical control of the French Kings, gained by Norman Dukes, as I have said, by force of arms from minor Norse leaders who had themselves wrested them from the Bretons. This, at all events, is our conception of what happened. I fear I may appear to be giving something rather like a lecture on history, but I find this method inevitable in the circumstances.

Now these islands would not, according to the ideas of those days, have been regarded by these Dukes as falling under the same head as continental Normandy, for which they did pay an occasional and very formal homage. They would have been regarded much more in the way that Duke William regarded his conquest of England—something falling altogether outside his relationship to the French Crown. Though the Channel Islands did remain attached by certain links to Normandy, they remained nevertheless an entity with many distinct characteristics, whose nature I shall discuss—just as later England was attached by certain links to Normandy. But this did not make her one with Normandy. The French view, on the other hand, in fact assumes as self-evident that the islands were or became politically part of Normandy; whereas in their political, religious and social ties in the earlier centuries of the Christian era they were, with the ancient confederations of petty states of Brittany, included in the Cotentin peninsula itself. Now it is true that Brittany itself became, but only very loosely, part of the empire of Charlemagne, who, during the latter half of the eighth century, secured control of most of central and western Europe. But we are talking about the tenth century, and on Charlemagne's death his Empire broke up into three parts, with a weak line of Kings in the West whose authority did not extend beyond a few provinces round Paris. Brittany resumed its former complete independence, and its rulers even extended their power eastward. Now, as authority for that I cite—I give my first reference to—Dupont, Volume 1, page 109, who tells us that the Bretons were in 847 masters of the country as far east as Bayeux, that is to say, well into the area of Normandy. (Even now, as the Court knows, the boundaries of Normandy and Brittany are not far from the Channel Islands.) The Bretons—again to cite Dupont—profited by the feebleness of the Frankish Kings who succeeded to Charlemagne's empire in the West, and re-established their domination over the Cotentin. In 867, some fifty years before the time we were discussing, Charles II, known as Charles the Bald, despairing of re-establishing his authority in this region, gave the county of Coutances, that is, the area of the Cotentin peninsula, to Salomon, a Breton King. (Again citations from the first volume of Dupont, references to the first volume of Dupont, at pp. 109 and 117.)

The truth seems to be that these Frankish Kings faced an even more dangerous threat than that from the Bretons, namely, from the Norsemen, who were invading Western Europe. One of those Norse chiefs,

the celebrated Rollo, who wrested lands in the Lower Seine or Upper Normandy from the next Charles—Charles the Simple—for which he agreed in 911 to give a nominal homage to the agreement of St. Clair-sur-Epte. These lands did not even include the Cotentin or the shores stretching west, much less the Channel Islands. In these latter areas other Nordic chiefs, independently of Rollo, had also carved out minor kingdoms at the expense of the Bretons. And it was from the Breton monarchs that the Norsemen won their possessions in the Channel Islands. Rollo himself did try to extend his newly won kingdom in eastern Normandy westward at the expense of his fellow invaders, but failed. His successor, William Longsword, inherited this ambition, and, in order to divert this Norseman from easterly incursions against his own kingdom, King Raoul of France in 933 is recorded as giving him the territory (as Dupont says) "situated on the maritime shores of the Bretons", and which in Dupont's opinion can only mean the Cotentin and the neighbourhood of Avranches. Raoul, as we have just seen, had but a doubtful theoretical right to do this, since Charles the Bald had already given the area to the King of Brittany. However, as Dupont remarks, Volume I, pages 118-119 (I cite here) :

> "It mattered little, henceforth, whether the nominal master was Frank or Breton ; the true master was the King of the Sea" [i.e. the Norsemen].

Thus, as far as any physical right to give the Channel Islands goes—or went—the King of France had none ; indeed, this King, himself regarded as a usurper, could scarcely retain his own throne, and he was prepared to promise anything to keep off the invading Norsemen. So much for the picture to be derived from a study of that well-known authority.

Now, Mr. President, it should I think be noted that there is no mention of the Channel Islands in this somewhat dubious cession of the dioceses of Avranches and Coutances by Raoul as King of France to William Longsword, as implied in the French Rejoinder. The land offered, as far as the records tell us (these words are from Wace's *Roman de Rou*) "lay in the Cotentin between Vire and the sea". Therefore, it is our contention that it is conjecture to allege, as the French Rejoinder does, that "at the same time he [William] received the Channel Islands in fee". Indeed, it seems intrinsically unlikely. The historical implications are clear : the Channel Islands stood in physical fact apart from the mainland ; in 933 they were still independent of Frankish or Breton Kings, or even at that date of William Longsword, who was still consolidating his hold on Normandy. They were at the date 933 independent little kingdoms of other individual Norsemen, whom Dupont picturesquely describes as "the Kings of the Sea".

From this historical account may I now make my first and one of my principal points : namely, that we do not admit, and regard it as unproved and as historically doubtful, that William Longsword received the islands from Raoul. And if he did not, he did not do homage for them. If Raoul, on the other hand, purported to give them, they were not his to give, and no legal effect was produced. It is in our view for the Government of the Republic to discharge the burden of proof in establishing their case on that.

In later years, indeed, the Norman Dukes, now consolidating their power over the mainland, and becoming there more powerful than the Kings of France themselves, did on their own initiative extend their dominions to the Channel Islands as Dukes of Normandy. But, as I have said, according to the prevailing ideas, they would have regarded these islands as conquests of their own and not in the same category as those mainland possessions conceded by Frankish Kings.

Now let us look at the physical situation as we see it as it stood at the Norman conquest in 1066, and it is important that it should be realized, for it is impossible otherwise correctly to estimate the political situation. The French Kings, whatever their pretensions may have been, only ruled (and even then ruled precariously) over a narrow strip of territory between the Seine and the Loire. A strong Norman Duke of Norse descent ruled over extensive possessions in continental Normandy and ruled them as a sovereign, even before he went over to conquer England. Neither he nor his predecessors ever properly speaking "received" any territories from the French King, since they won most of them by conquest. Such as were technically conferred by the Kings were conferred as the price of the Dukes refraining from extending their conquests in the direction of Paris, thereby menacing the French Kings. For these territories the Dukes no doubt paid a nominal homage which was no more than a formality. But the Dukes certainly did not receive in a physical sense the Channel Islands from the King. They took them from fellow Norsemen already in the islands. There is no evidence that they ever did homage to the French King for the islands, and therefore I suggest that I am entitled to ask: why should there be any presumption of it? Both the character of the feudal system and the historical facts point to the contrary. These Channel Islands became largely the Duke's own personal estates, or fiefs, held directly of him as supreme overlord by the descendants of the former Norse chiefs—the "Kings of the Sea", who were his own vassals—and some lands were later donated to the Church.

So much, Mr. President, for that point. I now come to my second main point. It is this: assuming, for the sake of argument, that the Channel Islands were comprised in the homage which the Dukes did to the French Kings (this is the point I say is dubious and there is no ground for assuming it), what was the real character of this relationship and what kind of "title" did it confer? We submit that it was a purely technical or abstract title, devoid of any real substance. I have already compared the relative degrees of power between the strong Dukes of Normandy and the weak Kings of France. The disparity, of course, became even more marked as far as Normandy was concerned when the Dukes became the Kings of England. In such circumstances any suzerainty the Kings of France may have had in respect of the Channel Islands was purely nominal. It involved no direct sovereign rights, nor were any ever exercised. The Dukes were to all intents and purposes independent sovereigns.

The position of the great principalities of France, such as the Duchies of Normandy, Brittany and Burgundy, the counties of Aquitaine and Toulouse, can best be understood by considering such matters as the control of foreign policy, the administration of justice, and so on. There is no doubt at all that the Dukes of Normandy and the other great French magnates conducted their own foreign policy in so far

as it arose ; at all events, they treated directly with foreign princes without any reference at all to the French Kings.

In the same principalities and elsewhere, the French Kings seem to have exercised no direct powers. There was no central government in Paris exercising authority outside the actual Royal domains, confined largely to what was known as the Île de France and the Orléanais. In the great principalities, everything—central government, taxation, and the administration of justice—was carried out locally, without any reference to Paris. It was not sovereignty the French Kings exercised over these great magnates and their territories, it was feudal overlordship, which is by no means the same thing, for hardly any political rights are involved where magnates are strong enough to establish their independence. As between Duke and King in France, it amounted—this feudal suzerainty—to little more than recognition of a superior in rank. The picture presented by the France of the day seems therefore to resemble a loose confederacy of independent principalities, united by ties of blood, geography, to some extent language, and by feudal tie which were often more social than political.

It might make a considerable practical difference how this feudal tie arose—and it will not have escaped the attention of the Court that in their pleadings the Government of the Republic have laid much stress on the Norman Dukes supposedly "receiving" certain territories of the French King. And here, Mr. President, I ought to say a brief word about how, under the feudal system, as we understand it, this relationship of lord and vassal might arise, because there were two distinct ways—I do not think this is controversial at all. Firstly, the lord might grant land and the grantee then became his vassal, but, of course, only in respect of that particular land. He might hold other territory of another lord—or some territory he might hold of no one, because he was the supreme overlord himself. And this was particularly the case on the Continent. Now in England, William the Conqueror did establish the position that all land not held of anyone else was deemed to be held of the King—but this was never the case in Europe. It was, so to speak, that William (if one may put it this way), having learned his lesson on the Continent, was determined to establish his central control when he came to England. Now it is doubtful whether the Channel Islands were ever even directly granted by the French Kings to the Dukes, because—as I have tried to show—they never had them to grant. So much for the feudal method of creating this tie by grant.

The second method, which is very relevant here, was known as "commendation". A man might "commend" himself to an overlord, acknowledge himself to be his vassal. And this is what seems to have happened between Normandy and France, though there is no evidence that the process covered the Channel Islands—and, indeed, there are a number of reasons for thinking it did not. But even if it did cover the Channel Islands, it meant no more than it did in Normandy. And perhaps I may be allowed to quote from an English history book this time : Maitland's *Constitutional History of England*, which is a standard work in our Universities and has been for many years. We find the following passage at page 154 : the actual print I have taken it from was made in 1920—it is the same in the original edition. This is what he says regarding the pre-1066 position (I quote) :

"Also it is to be remembered that this is the time when the Northmen subdued Normandy—the Norman Duke became the vassal of the King of the French .... by commendation—Duke Richard of Normandy commended himself to Hugh, Duke of the French, whose descendants became Kings. But the King's power in Normandy was hardly more than nominal."

That certainly seems to suggest a purely formal relationship between the Duke and the King. And on the same page he says (a little before the passage I have read—this is Maitland of whom I am speaking) :

"This, it is to be remembered, is the time when the great Frank Empire went to pieces—the central authority became little more than a name—the effective courts were the courts of the great proprietors."

And this seems equally to be orthodox according to French history books. I have another of these small books of a slightly less elementary character than the one I cited from earlier this afternoon by the same author, M. Aymard, a former Inspector of Schools of the French Ministry of Education. Of course, I do not claim any special authority for this work *(Histoire de France,* in the *Cours Gaulhier et Deschamps, Cours supérieur)*, but presumably French children, like English children, are taught primarily the orthodox view. On page 73 we find this (perhaps I may be allowed to translate into English) :

"The last Carolingian King was replaced in 987 by Hugh Capet, Duke of the Île-de France. The authority of the first Capet Kings was only recognized in the small Royal domain around Paris ; the remainder of the Kingdom belonged to the great vassals of the King."

And again, a page or two earlier, on page 70 :

"The Kingdom of the Capets extended over some sixty of our present-day departments. But Hugh Capet was only 'a *seigneur* among *seigneurs*' [perhaps I might put it, an equal among equals] and his authority was only real, effective, over the Royal estate —that is to say, the country included between Noyon and Orléans, as big as three departments, which came to him from his ancestors [three out of the whole sixty, that is]. The Kingdom was parcelled out into Duchies and Counties belonging to the *seigneurs* vassals of the King, but in reality independents."

Well, at all events, that seems to agree with our view that the suzerainty of the Capets—unquestionably only nominal at that time—cannot be a sufficient claim for France to be sovereign over the Channel Islands, or any part of them on the basis of an ancient right or original title—to say nothing of the fact that this purely feudal title, if it existed at all, carried with it no right to exercise sovereign rights in the Channel Islands and none have ever been exercised by France—leaving aside, of course, short periods of military occupation in time of war.

One might perhaps summarize the whole matter by saying that in the Middle Ages, and especially the early Middle Ages, there was a realm of France, in the sense of a country of France, but no real

Kingdom of France. Or else there were a number of kingdoms or principalities within a kingdom. The personal domain of the French King was in reality only one of several kingdoms. He was a *primus inter pares*, but he had none of the powers of a King outside his own somewhat narrow domain.

The next period—which we can examine very shortly—is that between 1066, the Norman conquest of England, and 1204, the loss by the King of England of continental Normandy. So fas as we know, in that period no one challenges the position of the Channel Islands. It so happens, however, that the dealings of King John of England with Piers des Préaux over the Channel Islands in 1200—that is four years before the loss of continental Normandy by the English Crown—afford a very good illustration of the shadowy, or may I say non-existent, character of the supposed overlordship of the French Crown over the Channel Islands. (This, may I make it clear, is not the matter of the Abbey of Val-Richer, which figures so prominently in the pleadings. I shall come to that presently.) The charters of King John which appear as Annexes A 8 and A 9 to the United Kingdom Memorial (pp. 156-157) show that the English Kings—in this case the particular king, King John—in making their grants in respect of the Channel Islands, acted as rulers independent of any overlordship claimed by the French Kings. That is to say, this charter of the 12th January 1200 and the Confirmation which is the second document of the two Annexes, show John to have been exercising the unfettered right to make the grant as part of his Royal dominions, or to use a more contemporary word, "demesnes", in England or overseas—in this case the Channel Islands, irrespective of any claim to homage (if such were ever claimed) by the French King. And this document produced here relevant to this dispute is not without its earlier precedents. For example, in connection with Channel Islands' matters, in 1134, King Henry I of England, in a charter to the Bishop of Rouen and others relating to the Channel Islands of Alderney, describes himself simply as King of England. In this document he describes himself "John, by the grace of God, etc."—a term used to-day, of course, by the Queens and Kings of my country. In regard to John's charter of 1200 to Piers des Préaux, I also would like to draw the attention of the Court that it was enrolled quite normally, not through the Norman Chancery but in the English King's Chancery in England.

The unreal character of any overlordship that might have been claimed by the French Kings over the Channel Islands is shown in 1204, when this same Piers made a recognition of the lord of whom he held his lands—"un aveu de ses fiefs". Piers had surrendered Rouen in 1204 to King Philip of France. It was by this surrender that Philip's conquest of continental Normandy was virtually completed. And for a short time Piers acknowledged himself to be a vassal of King Philip. But in the "aveu de ses fiefs", Piers does not make any mention of the Channel Islands. Now, must this not have been because Philip and Piers considered that Philip could only claim Piers as a vassal for the lands in the mainland of Normandy of which Philip had obtained physical possession as the result of conquest ?

Now, by 1206—two years later—Piers had reverted to the allegiance of King John, who in that year restored to him his land in England, lands in the County of Hampshire, but announced in the same document (the document will be found in Annex A 11—it is a very short document,

but a significant one, p. 158 of the text), he announced at the same time in the same document his intention of dealing with the Channel Islands at his own pleasure: "the lord King will restore to him his land in England and do his [that is, the lord King's] pleasure concerning the islands in accordance with the counsel" from two named persons. Thus again John was exercising rights over the Channel Islands two years after he had lost continental Normandy, which could only have been those within the power of a sovereign, who had physical control over them.

Here I think it is worth noticing, Mr. President—for it is symptomatic of this whole position—that after Piers des Préaux had forfeited his Channel Islands lands (finally, as far as he was concerned, in 1204), the fief of the islands was, with two exceptions, one of which is significant, retained by the King of England himself (John, Henry III and so forth), and the islands were governed, not as a result of their having been granted by feudal tenure to anybody, but by the appointment of an administrative officer or warden, an executive officer of the Crown without any of the proprietary rights in the land which would result from having a grant of a fief. And we have submitted a list of the wardens for a period of 175 years—they are to be found in Annex A 158 in the "Additional Annexes" at page 622 (it is a long list of the wardens and their dates). Now there can be no doubt, I think, looking at that list, that that was a matter of deliberate policy. It was intended to mark the determination of the English Kings to keep the islands directly attached to the Crown, and to emphasize their status as Royal dependencies. Now I said one of the two exceptions over that long series of wardenships was significant. Now that was the one when the grant of the fief of the islands was made by King Henry III of England in 1254 to his son, who in 1272 became King Edward I. This is mentioned by Dupont as another mark of the same intention. It is mentioned in Volume II, pages 141 and 142. I may give further instances of this later.

I submit, therefore, Mr. President, that the position of the Channel Islands at this time (that is, about the period of the quarrel between King Philip of France and King John—in the next part of my speech I shall deal with that quarrel) was as follows: the Channel Islands constituted an entity over which the English King exercised complete and independent control untrammelled by even the most tenuous overlordship of the French Kings. It is, however, on this—if I may be allowed to call it—"fiction" (that is the most appropriate word) of a supposed overlordship, the actual existence of which so far this Court has no evidence, that the whole of the French claim is founded.

Now I turn to the circumstances of the quarrel between King Philip and King John, with the object of trying to show that these in no way affected the independent status of the Channel Islands.

I will not trouble the Court with going over again the ground as regards the legal validity of the *arrêt* or judgment of 1202. The United Kingdom Reply, paragraphs 108-112, shows a number of grounds questioning the validity of the judgment, and we have cited there a number of well-known historians, French historians and others, who have expressed doubts about this judgment—and if I may get away from the realm of doubt, I think it seems fairly certain that the continuation of expressions of doubt about this judgment may well go on until

doomsday. And I will mention two points. The French Rejoinder correctly states that the immediate cause of the quarrel was the misbehaviour of King John of England towards the Lusignan family (books seem agreed on that). King John insisted on marrying Isabelle of Angoulême who was already betrothed to his vassal Hugh of Lusignan, Comte de la Marche. And no doubt that was a very bad thing, but it hardly seems a sufficient basis for the forfeiture of a whole duchy—indeed, more than a duchy, for the judgment purports to pronounce a forfeiture of all the territories of John in France. Is not the real answer to this more probably that it is the resort so frequent in legal history —I expect of all countries—the resort to a convenient legal pretext, in this case a legal pretext, to try and find a legal ground for ousting John from France entirely? I can indeed see many reasons why it was very natural for a French King to prefer that the English Kings should cease to possess any territory on the French side of the Channel. But for that very reason the whole thing looks suspiciously like what we would nowadays call a "put-up job", preparatory to an act of force. The fiction of legality was much prized in the Middle Ages. But that did not alter the intrinsic character of the act.

At all events, there does not seem to be any doubt at all about what a French historian of the eminence of Petit-Dutaillis thought about it, and I would like, if I may, to read to the Court a translation of an extract from an article by him in the *Revue historique* for 1924, Volume 147, page 164. The translation is:

> "The reasons for the quarrel between John and the Poitevins Lords do not concern us; but it is appropriate to note straight away that if the account is exact, Philip Augustus desired to extend the quarrel and took steps to lay hold of all the French fiefs of the Kings of England, including Normandy. Normandy was the chief object of his covetousness: this was the richest of his preys, and the Normand frontier was two days' march from Paris. He therefore began a long discussion with John, which allowed him to make his preparations and to await favourable political circumstances; when he had cited his adversary first of all as a Count of Aquitaine and not as Duke of Normandy, he changed his ground with the lack of scruple which was customary to him and obtained from his Court a general sentence which deprived John of all his French fiefs; a sentence based, not on the special events in Poitou, but on the refusals to pay homage by John and his ancestors [the date that Petit-Dutaillis gives is April 28th, 1202]. When the sentence had been passed, Philip began the war and invaded, not Aquitaine, but Normandy, and we know that in an initial overwhelming campaign he conquered all the north-east of this Duchy. He had played his game well. He had no longer any need henceforth to get entangled in judicial arguments, in summonses and meetings of his Court. The matter was in the hands of the soldiers and indeed, the war was not to come to an end until the Angevin Empire was destroyed: the business lasted four years."

All that is the text of the article in the *Revue historique*.

Another point about the *arrêt* of 1202 is that the matter did not arise with respect to Normandy at all. Neither the Lusignan nor the Angoulême domains were in Normandy—we have just seen from the extract

that the adversary was cited first as Count of Aquitaine. These domains were in Aquitaine, and it was as Count of that territory that John was their overlord and was summoned before King Philip's Court. That is a fact which can be taken from the French Rejoinder, page 695, also. Any forfeiture should therefore have been confined to Aquitaine. But that would not have suited Philip. For one thing, he could not have much hope of enforcing the judgment in Aquitaine, so far away, relatively, as compared with Normandy. And so he proceeded to attack Normandy.

What ensued seems to have been a piece of spoliation, based on an inadequate pretext. Now I have mentioned these points in connection with the judgment because I think they do help to bring out the extreme vulnerability of the claim made in the French Rejoinder that what occurred in relation to the Channel Islands was a dismemberment of French sovereignty. As Sir Lionel Heald said the other day, it was the possessions of the Dukes of Normandy and of the English Kings as Dukes of Normandy that were dismembered. But they were left with the Channel Islands because Philip of France was not physically able to take them.

Indeed, I must lay emphasis on this point, because it is relevant to one of the fundamental French contentions in this case. This is that there is a presumption of French sovereignty over the Channel Islands, and it is for us of the United Kingdom to establish our actual possession of each island separately. There is no doubt that we held and were in possession of *all* the islands, including, of course, the Minquiers and the Écréhous before 1202. That was a situation of fact, and a situation of fact is presumed to continue unless and until it is shown to have changed. Now, what was the only change? The only change that occurred after 1202 was that King Philip possessed himself of some of King John of England's territories. Not of England, of course. Not of Aquitaine (that was too far away), not of Poitou, not of Gascony.

Of what then? Simply of continental Normandy. It was quite sufficient, but it was all. Therefore we contend that our opponents must show that Philip or some subsequent French King took possession of any of the Channel Islands as well as continental Normandy, and in particular, they must show of course that Philip or some subsequent French King took possession of the Minquiers and the Écréhous.

The Kings of England being in possession of *all* the Channel Islands before 1202, which certainly then included the Minquiers and the Écréhous, it is for France to show that England subsequently lost possession of any of the islands—which can only be done as regards the Chausey, centuries later.

I will now conclude, Mr. President, what I have to say about the Judgment of 1202, and I would ask the Court to note that the Judgment, even if fully valid, could not have given King Philip any rights over the Channel Islands or any part of them—even theoretical rights—unless Philip was overlord of those islands. I have been trying to show that that is—to put it at its lowest—intrinsically improbable, and certainly not proved. Therefore, if that is correct, Philip had no rights in respect of the islands unless—according to the standard of those days—he had conquered them by force of arms. But he did not. In saying that, of course I do not overlook the fact that after 1204 there was a very temporary occupation. Even if I am wrong, and Philip was the ultimate overlord, the only thing that the Judgment of 1202 did was to entitle

Philip to possess himself of the Channel Islands if he could. And my reason for making that assertion is that feudal law required seisin, that is, possession firmly held. A judgment, a charter, a grant, might in those days give a man a right to possess himself of property or territory if he could, but he did not become the actual owner unless and until he did possess himself of it. According to feudal theory, the Judgment of 1202, even if valid, did not give Philip seisin unless and until, and except in so far as, it was actually executed by his going into feudal possession, taking firm possession and seisin of the islands.

This seems to be proved by the fact that, although it applied theoretically to *all* King John's possessions in France, the judgment remained a complete dead-letter as regards Aquitaine, which continued in English hands—though its precise extent varied with the fortunes of different wars. And at all events, Kings of England continued to be the rightful and acknowledged Counts and Dukes of Aquitaine until the final loss of Aquitaine by the English Crown in 1453.

Therefore, if the Judgment of 1202, although theoretically applicable to Aquitaine (if valid at all), had no legal effect on Aquitaine, because it was not executed there, equally it had no effect on the Channel Islands (even if valid and applicable to them—both points of course we deny)—unless it was executed. And we know it was not. There was no "holding firmly" these Channel Islands by the King of France.

Accordingly, I ask the Court to hold that it is not for the United Kingdom to show that the Kings of England retained possession of the Minquiers and the Écréhous as part of the Channel Islands (though presently I shall show, in fact, that we did). It is for the Government of the Republic to show that we did not—that France gained possession of them, possession, something more than the occupation in the troubled years of 1204 to 1206.

There is a further and most important effect of the Judgment to be noted, and that was that, according to feudal law, this forfeiture definitely broke any feudal link that up to that time might have existed between the French Kings and the Dukes of Normandy in respect of the Channel Islands. Now the link was broken by the combined effect of the Judgment and of the events which followed it, for these events amounted (and I am going to cite for this again Petit-Dutaillis' article to which I have already referred) to what in feudal law was known as a "défi"—a mutual defiance on the part of the two Kings. Now, this is what the process was; I read from page 178 of Petit-Dutaillis' article in the *Revue historique*:

> "To sum up, in the year 1202, before Arthur fell into his hands, John was sentenced by the court of Philip Augustus to lose all his French fiefs. By this Judgment, the defiance and acts of hostility that followed it, all feudal ties between them were broken. The Judgment was destined never to be completely carried out, and in spite of the conquests of Philip Augustus and Louis VIII, the Kings of England remaining at war with the Kings of France were to retain important domains on the Continent; but only by the Treaty of Peace of 1259 were they to become liegemen of the Kings of France. It was to the rupture of 1202 that St. Louis referred when he said that, in giving back certain territories to Henry III, he was acquiring a vassal, and the words imputed

to St. Louis by the historian are these: 'It seems to me that in so doing I shall do well if he renders me homage *since he was not one of my men.*' It is equally on account of the rupture of 1202 that Primat says in his article that before the Treaty of 1259 Gascony was not held of the King of France.

"We must conclude," says Petit-Dutaillis, "that in 1202 John ceased to be justiciable on the part of the French Court. From thenceforward there remained simply two Kings in confrontation with each other and disputing the domains of the Plantagenets, and Philip Augustus had not further hold on his rival than through war and the use of force."

So it will be seen from that extract that all feudal links between the French and English Kings were broken in 1202 in the period immediately following it, and were not re-established until the Treaty of Paris in 1259. I shall, however, show that this latter Treaty only re-established the link—the feudal link—in respect of the English King's possessions in Aquitaine, and that it did not in any way affect the position of the Channel Islands as possessions which the English Crown held free of all overlordship on the part of the French Crown.

And in conclusion may I refer to two brief points. First, Philip annexed continental Normandy in 1202 because of the weakness of King John in his French domains. But even that conquest proved precarious. Normandy was raided many times subsequently, and as late as the fifteenth century it was held by the English for over 30 years from 1419-1450. It was not until the Treaty of Picquigny in 1475—in the reign of King Louis XI of France—that the attempts of the English to recover their former French possessions finally ceased. But simultaneously, it seems, all French attempts to appropriate the Channel Islands also ceased. There was never even a temporary military occupation by France after that date, at all events until we get to a short episode—though a violent one—in the year 1781.

Secondly, there is a very good reason to account for the fact that the French Kings were never able to appropriate the Channel Islands, hard as they tried. It was not just a lucky chance. The English were as a rule stronger at sea. This in itself raises a strong presumption that, if they held the main islands (Jersey, Guernsey, Alderney), then they also held the lesser ones, including the Minquiers and the Écréhous. For is it, may I ask the Court with their knowledge of the geographical layout, a plausible supposition that the Power in possession of Jersey, if stronger at sea, would have allowed another Power to be in occupation of the Minquiers and particularly the Écréhous, on Jersey's doorstep? This factor of superior sea power is something that is insisted on time after time, curiously not so much by the English as by the *French* historians. For instance, Dupont, speaking of King John, says (p. 10 of the second volume) (this is the citation):

"He [John] had abandoned Normandy [that is the mainland] .... But he had the good fortune to maintain over his enemy an indisputable naval superiority."

Thus the same factor—sea power—which a little way back I tried to show originally won the islands for the Duke of Normandy (though not from the French who never had them)—this same factor which

originally won the islands, that is, of course, the prowess of the Norsemen, the Vikings at sea—was also the factor that kept them. And may I draw the Court's attention to the fact that at no time has an English foot as conqueror ever stepped on to any of the Channel Islands. English arms defended the Channel Islands; no English arms ever appropriated them (at all events until the British forces came back to free them in 1945). From Normandy they came to us, and as the last relic of the historic Duchy they remain to this day. In defending them against the French (I now go back to the thirteenth century), we were keeping them not *from*, but *for*, their rightful owners—the Norsemen who originally won them and their descendants in the islands who still inhabit them at this present time.

That, Mr. President, may perhaps be a convenient point for me to break off if the Court is agreeable, because the next part of my speech will deal with the diplomatic acts and treaties of the period.

[Public sitting of September 22nd, 1953, morning]

Mr. President, Members of the Court, I now pass to the diplomatic acts or treaties of the period from 1204 up to and a little beyond the Treaty of Troyes in 1420. I shall try to show that, by these treaties, not only was *de facto* English possession of the Channel Islands recognized, but that it was also confirmed *de jure*, and in circumstances such that the Minquiers and the Écréhous could not possibly have been excluded from the settlement. These treaties in effect caused the French Kings to lose any legal title to the Channel Islands (including the two groups in question) that they ever had—though, of course, it is our contention, as the Court is aware, that they never, in a real sense, did have a title to lose.

Now, leading up to the first of these treaties, that of Lambeth, the historical position (I think this is not contested) was that King Philip of France continued his attempts to wrest the Channel Islands from King John of England for some years after 1204, after the loss of continental Normandy, but following on the English naval victories at Damme in 1213, and again off Sandwich on the English coast, in 1217, those attempts came to an end and there was no renewal for 120 years: so there is a period long enough—quite long enough—to give us a title by long possession, if we needed one.

The French renunciation of their attempt on the Channel Islands was put on record by the Treaty of Lambeth of 1217; that was signed between Louis and King Henry III of England, who had just succeeded King John. That Treaty has been discussed both in our Memorial and our Reply, but our opponents do not refer to it in their pleadings. However, the position—perhaps this is the reason why there is no reference to the Treaty in the French pleadings—the position has been recognized by two French historians. Monsieur Havet, the well-known French historian of the islands, on the first page of his book *Les Cours royales des Îles normandes*, says this—I translate—:

> "He [Philip Augustus] could not conquer the islands of the Cotentin, which remained in the hands of the King of England and were thus separated in fact from Normandy."

Again, Monsieur Besnier, a former Professor of Law in the University of Caen, in an article in *Revue historique*, 13th volume in 1934, comments on this Treaty of Lambeth and observes—to quote his words in translation—that the islands were "detached from Normandy in fact in 1204, and in law by the Treaty of 1217". So much then for the Treaty of Lambeth. Before I pass to the Treaty of Paris or Abbeville in 1259, I would mention three significant acts by King Henry III of England, on succeeding to King John. In 1226, this King proclaimed the autonomous state of the Channel Islands within his realm. The Court will remember that Sir Lionel Heald placed considerable emphasis upon the autonomy which, to this day, Jersey and Guernsey enjoy under United Kingdom administration. Well, going back to 1226, this proclamation of autonomy was made when King Henry III ordered his lord warden of the islands, one of the administrative officers on the long list of wardens, to which I ventured to draw the Court's attention yesterday, to observe the special local and ancient liberties and customs. Then in 1254 was the significant exception to appointments of lord wardens, an exception taking the form of an actual grant by the King: this King granted the Channel Islands in fee to his son Edward, who continued to hold them until and, indeed, three years after, he himself became King Edward I of England. So, during this considerable period—because he came to the throne in 1272 and held the islands for three years longer—this considerable period of 21 years, the islands were held by a man who was a future king and subsequently King of England, combining the kingship during the early part of his reign with the holding of the islands under the grant from his father. He was, indeed, in the same position as King John put Piers by the grant of 1200. And then again, in 1258, King Henry III ordered the former warden of the islands (because Prince Edward was then in actual possession) to guard Guernsey and Jersey and "the King's other islands". I mention those three events in Henry III's reign to emphasize the status of the Channel Islands as an entity, and an entity which fell within the possession of the English King. One cannot consider the question of the Minquiers and the Écréhous apart from that of the Channel Islands, of which they formed a part.

I now come, Mr. President, to the Treaty of Paris, the text of which is to be found as Annex A 1 of the Annexes to the Memorial submitted by my Government. And there are two articles reproduced on page 142—the original text—and on page 142—the English translation—Article 4 and Article 6, which I would invite the Court to consider: and may I at the outset, Mr. President, because I think it will assist the Court to follow my argument, draw attention to a corrigendum which we have submitted to the Court in respect of the word of line 5 from the bottom of the translated text on page 142. The word in the Treaty has been translated as "beyond": we have corrected our translation to "on this side of", so the text now reads: "all the land which he holds on this side of the sea of England in fee", Louis being King of France, that, of course, means land on the French side of the English Channel. That is the correction to the translation of the words: "*e de tote la terre que il tient deça la mer dangl' en fiez*".

In their Counter-Memorial, at pages 379 and 380 of the French text, our opponents argue that Article 4 shows that the King of England owed homage in respect of all the islands belonging to the King of France.

No doubt that point is stressed because they are anxious to establish this because—and I refer to the citation I made earlier from Petit-Dutaillis—the judgment of 1202 had broken the link between King Philip and King John. This link, the Treaty of 1259, which we are now considering, re-established—but, Mr. President, it re-established it only in respect of Aquitaine and the islands off Aquitaine (islands which can only be, of course, there, to the West of the French coast)—*not* in respect of the Channel Islands.

As I said just now, our opponents argue that Article 4 of the Treaty provided that the King of England should do homage for all the islands he held belonging to the King of France. These—this is the French contention—comprise not only the oceanic islands off Aunis and Saintonge in the Bay of Biscay, but also those in the Channel. I have shown, I hope, in my speech yesterday, that it cannot plausibly be said that the Channel Islands at this stage—or, for that matter, ever—belonged to the King of France. But even if I am wrong in my contention, Article 4 does not help the French case, I submit, because Article 4 of this Treaty of Paris says this: first, the King of France will give to the King of England certain possessions in the Saintonge and Charente area in South-Western France. Secondly, the King of England is confirmed in his possession of Bordeaux, Bayonne, Gascony, and all the land which he (the King of England) holds on the French side of the English sea—hence the correction in our translation—and also the islands if there are any such, which the King of England holds and which belong to the realm of France. These lands he is to hold and the islands of the French King as a peer of France and Duke of Aquitaine.

But the islands here mentioned could not, we submit, include the Channel Islands, because the Article related only to Aquitaine, and the only islands which were of the realm of France in that area lie off Aunis and Saintonge—in other words, are islands in the Bay of Biscay, west of France, and not the Channel Islands to the North. And in support of that contention the King of England was to do homage for the islands as Duke of Aquitaine. It would have been a very different picture had he to do homage for these islands unnamed as Duke of Normandy. He was to do homage as Duke of Aquitaine. And I do not think, Mr. President, that it could be seriously contended that the Channel Islands were appurtenant to, much less part and parcel of, a Duchy which lay in South-West France.

I now turn to the second article, Article 6. This Article deals with what the King of England *renounced*, and for which naturally he was no longer to do homage. This included—as the text makes clear—Normandy, Anjou, Touraine, Maine, Poitou, and the islands if the King of France or his brothers hold any such. The actual translation from the original is: "or in the islands, if any are held by us or by our brother or by others in our or their behalf....". This Article—it is our view—reinforces our contention that the Channel Islands were recognized as English. Had it been intended to include the Channel Islands in this renunciation, it is almost certain they would have been specified by name. But in any case, they could only pass to France under the wording which I have just put before the Court, if they were actually held at the time by the King of France or his brothers. Yet we know that in 1217, under the Treaty of Lambeth, that was not so and they were acknowledged by the French King to be held by the English King.

Therefore it is not, Mr. President, in our submission, for us to prove that there was no change between 1217 and 1259. It is only if our opponents can show there has been a change which caused the King of France to get possession of the Channel Islands or some part of them, that they are entitled to rely on Article 6 to support their claim to these two contested islands. In the absence of such proof, the presumption, which I respectfully suggest the Court must draw from the Article, is that *all* the Channel Islands, including the Minquiers and the Écréhous, were in the same hands as they had been during the whole period since the Treaty of Lambeth, and therefore unaffected by Article 6, which only applied to islands held by King Louis of France or his brothers in 1259.

To support my point, I turn to what appears to be a concession to this point of view in the French Counter-Memorial itself, for it states on page 379 (of the French text) that the King of England owed homage in respect of those [the islands, that is] in the Channel situated "on *this* side of the English sea" (the French side of the English sea, that is). But the King of England certainly could not owe homage for the islands and at the same time relinquish them. We, of course, contend throughout that he did not even owe homage for them—both for the historical and legal reasons which I put before the Court yesterday, and because, as I have already said once this morning, they were not situated in the area covered by the Article, which provided that the King of England was to hold certain lands of the King of France in Aquitaine, as Duke of Aquitaine.

In short, any feudal link, which may have existed previously to 1202 between the French and the English Crowns in respect of the Channel Islands, and which was broken by the combined effect of the judgment of that year and the "défi", was never re-established—certainly not by the Treaty of Paris.

The confirmation of that view is given in Dupont, where he sums up the effect of the Treaty of 1259—I read from page 15 of the second volume :

> "The separation of the islands received a final and solemn consecration : they were no longer attached to the Cotentin [that is, the mainland peninsula] except by an ecclesiastical link."

And this same historian—considerably further on in that volume at page 164—confirms that he has no doubt that this Treaty settled the fate of all the Channel Islands. Referring to the appointment of a Lord of the Islands—Otes de Grandison—he refers to him as Lord of the "islands of Jersey and of Guernsey and of adjacent islands", and, still quoting his words, "that is of the whole archipelago without exception", including, of course, the Minquiers and the Écréhous—not to forget this time the Chausey as well.

From the Treaty of Paris of 1259 until the outbreak of the Hundred Years War in 1337, there were—so far as we have been able to find—no attempts by the French to attack the Channel Islands. There were, however, during this period several significant happenings which confirm the fact that the minor islands of the Channel Islands group, particularly the Écréhous and the Chausey—and because of the Chausey, *a fortiori* the Minquiers, as lying between Chausey and Jersey—were in English hands. I will postpone for the moment my examination of

the evidence of those happenings and come to the Hundred Years War.

Here, of course, there were French attacks directed towards the islands, but once more the English command of the seas—particularly the victory at Sluys in 1340 by the English fleet—prevailed—and the French were expelled from their foothold on the islands, retaining one garrison in Guernsey for a short period, and then that came to an end in 1345, quite at the beginning of that long war. The naval superiority of the English at this time seems clearly to have helped to preserve the Channel Islands from the French. Dupont (again at p. 403 of the second volume) writes:

> ".... The English flag, ruler of the seas, protected them [that is, the Channel Islands], and the misfortunes of France made their security certain."

Now, when one comes to 1360, there is the Treaty of Calais, or Bretigny. The English still held the mastery of the sea, and I think that any interpretation of this Treaty has to take this fact into account. Now the only relevant article here is given on page 144 of the Annexes to the United Kingdom Memorial, and is Article 6. And by this Article it was agreed that "the said King of England and his successors shall have and hold all the Islands adjacent to the lands, countries and places above named, together with all other Islands which the said King of England now holds". Now, although it is perhaps not clear from the reproduction of the text of Article 6 alone, it is not contested that Normandy was not one of the territories named in the Treaty. But the King of England was to have and to hold all the "other" islands which he held at the time of the Treaty, and my contention is that these islands undoubtedly included the Channel Islands.

I hope I have established that, a hundred years earlier, in 1259, undoubtedly the King of England held the Channel Islands, and I have just made the historical point that except very partially at the outset of the Hundred Years War, the French did not hold even a corner of the Channel Islands, and they lost that small foothold when they were expelled from Castle Cornet in Guernsey in 1345.

Now the French Reply challenges my Government to show that these latter islands—that is the islands which the King of England held at the time of the Treaty: "all other Islands which the said King of England now holds"—included the Minquiers and the Écréhous. But, Mr. President, is that a reasonable or a plausible challenge, I would ask the Court? There can be no doubt, and indeed it is not contested by the Government of the Republic, that the Channel Islands as a whole were then in English hands, fifteen years after the last French foothold had disappeared in 1345. And there is another act of the period to reinforce this if it be necessary: we cited in paragraph 131 of our Reply that a certain Edmund de Cheyne was confirmed as Keeper of the Islands of Guernsey, Jersey, Sark and Alderney "and the other islands adjacent thereto", including what we regard as an irresistible presumption: *all* the islands. And having succeeded in expelling the French from the major islands, is it conceivable that England, having the mastery of the seas, would have left minor islands in sight of Jersey—one literally at Jersey's doorstep, the Écréhous (the Minquiers are a little further off)—in the hands of the enemy?

Moreover, there are two periods, going back a bit; there is the period 1204 to 1217, and the period I have just been talking about: the opening years of the Hundred Years War (1337 to about 1345-1346), when the French had admittedly made strenuous and prolonged attempts to extend Philip's annexation of Normandy made in 1204 to the Channel Islands, to complete, so to speak, his conquest. Now, if anything more than these temporary occupations had been effected, is it conceivable that there would be no evidence of establishment on a permanent basis? But so far as I am aware, Mr. President, none has been put before the Court in the pleadings by my opponents, nor have we found any evidence of French permanent occupation, and from that I submit that the assumption is reinforced that the minor islands like the major islands remained in English hands.

This Treaty of 1360, the Treaty of Calais, came at the end of a period where France had suffered three defeats: the battles of Sluys, Crécy, Poitiers, and what is perhaps equally important, as a result of those defeats the French King, King John II, was a captive in English hands. But it does seem to me that the military situation does render it quite improbable—to put it even stronger than that an utter improbability—that the Minquiers and the Écréhous should have remained in French hands given that military situation, with Jersey and the rest of the islands in English hands. So I invoke the military situation in support of our interpretation of the Treaty of 1360 as confirming the English possession of *all* the islands, without exception. The truth is that the French case could be established—but could only be established—by showing that the fate of the Minquiers and the Écréhous in the Hundred Years War was different from that of all the other islands, and that, Mr. President, in our submission, is contrary to all reason and probability.

The next diplomatic instrument, Mr. President, is the Treaty of Troyes in 1420 (Annex A 3, pp. 144 onwards). The circumstances about the time of that Treaty were that in 1413 Henry V of England revived the pretensions of his great-grandfather, Edward III of England, to the Crown of France. In 1415 he made a landing in France, and won the victory of Agincourt. A more serious invasion took place in 1417, when his immediate objective was to secure continental Normandy. By 1419, the Duchy was firmly in English hands, and there it remained until the French victory at Formigny thirty years later. The French King, beset by the Burgundians as well as the English, concluded with Henry the Treaty of Troyes in 1420. Now the two relevant articles are Articles 28 and 22. By the Treaty, the King of France acknowledged the King of England as heir to the throne of France. By Article 28, the two realms, to be united under the King of England on the death of the French King, were to retain each their own laws and customs. Article 22 makes it clear that continental Normandy was in Henry's hands; it and the other French territories which he, Henry, himself had conquered, were to fall within the jurisdiction of France, when, under Article 28, he, Henry, or his successor, came to the throne of France. Now this did not include the Channel Islands, for the simple reason that Henry had not had to conquer the Channel Islands, and Article 22 only refers to the other French territories which Henry himself had conquered in addition to continental Normandy. They were in his hands, in other words, all the time. So there is nothing in the French point (the Counter-Memorial, pp. 381-382) that

the Channel Islands, by this Treaty, were to be attached to the realm of France. They were not part of Henry's conquests, for he already held them before he invaded continental Normandy. Nor can it be suggested that he intended to merge the Channel Islands with continental Normandy because, for a period continuously from 1415 until 1435, John, Duke of Bedford, the King's brother, was Lord of these islands. In 1435, on his death, they came back to the English Crown and were regranted to another member of the Royal Family by the next English King Henry VI ; and both these grants were made by Letters Patent issuing from the English Chancery. That is another example of the practice of the English Kings from 1204 onwards to retain the Channel Islands in their own possession, unless they granted them out to members of the English Royal Family.

I can deal, Mr. President, very briefly with the subsequent Anglo-French treaties and instruments, all of which left the status of the Channel Islands unchanged. All the treaties and instruments are considered fully in paragraphs 136-138 of our Reply, and their feature is that either they do not mention the Channel Islands at all, or where they do, they only name the principal islands. Two of them are commercial documents of the seventeenth century and only name Guernsey and Jersey, the principal centres of trade with France at that time. But the argument that certain instruments referred to the Channel Islands as English, but only named some of the islands, the major ones, is without bearing—in our view—on this dispute. It must be presumed that the minor islands—the Minquiers and the Écréhous—were regarded as English. We pointed out in our Reply that, apart from the fact that so often mention is made in general terms of "other islands", the French argument, if valid in its application to the Minquiers and the Écréhous, would be equally valid if applied to Sark, Herm, Jethou and other islets in the Channel Island group not actually named in these instruments, all of which have always been English, and that fact has not been questioned. So, no inference unfavourable to the English possession of the Minquiers and the Écréhous appears capable of being drawn from these later instruments.

Mr. President, I hope I have now shown not only that England emerged from the Middle Ages possessed of the Channel Islands *de facto*, but also that the English title was confirmed *de jure* by the relevant treaties. I rely in particular on the Treaty of Lambeth, the Treaty of Paris and the Treaty of Calais. If the French Crown ever had any original title to the islands, it was lost or renounced by these Treaties, though we deny that there was such a title at all. If I am right, it is a position from which our opponents can only escape by contending—more than contending, by showing—that these two quite small groups were in some way distinct from the other Channel Islands and were not covered by the Treaty demonstration. I hope that I have sufficiently shown the utter implausibility of any theory that would leave these two small groups outside the general situation governing the Channel Islands as a whole. But I shall, a little later, adduce some positive evidence to show that the Minquiers and the Écréhous were unquestionably a part of the islands and so a part of the realm of England.

It may be convenient, Mr. President, if at this point I summarize the legal position which up to now I have been trying to establish. I think the best and shortest way in which I can do that is to recite the

six main propositions regarding the medieval position. Those are set out in paragraph 106 of our Reply : to that I shall add a seventh further proposition. The substance of these propositions is as follows :

I. The original title of the English Crown to the whole of the Channel Islands can be traced back to 1066, when William, Duke of Normandy, became King of England.

II. The judgment of 1202, by which King John of England was condemned to forfeit all that he held of the French King, is an act the legality of which has and can be challenged and which is so dubious that it cannot be a satisfactory basis for the French claim.

And to that second proposition, I would add that, if ever there was a feudal link between the French Kings and the Dukes of Normandy in respect of the Channel Islands, it was broken by this judgment and the mutual defiance between Philip and John, and was never re-established.

III. The situation of fact after 1204 was that the King of France held continental Normandy and the King of England held the Channel Islands.

That was not altered, I mention in passing, by temporary changes of possession during the two periods of fighting that I was just dealing with.

IV. This situation of fact was confirmed *de jure* by the Treaties of Lambeth, 1217, and reconfirmed by the Treaties of 1259 and 1360, by which France lost any title she had.

V. The subsequent treaties and truces in no way affected the legal settlement made by the Treaties of 1259 and 1360.

VI. So it is for the Government of the French Republic to show that the Minquiers and the Écréhous were not included in the situation of fact or in the Treaty settlement.

Now the seventh proposition, I would add, is this :

VII. Even if France had an original title by right of feudal overlordship of the French Kings in respect of the Norman Dukes, and even if this title was not lost by the treaty settlements, it gradually passed away with the passing of the feudal system itself.

Now, no one denies that the original title which France claims was bound up with the existence of the feudal system and the feudal relationship of Duke and King. It could not have come from anything else, because the French Kings (going back to the beginning of my story) of the tenth, eleventh and twelfth centuries never personally possessed the islands—through their weakness. They never exercised any direct authority there—and indeed, the whole French case is that they need not have done so, because the feudal position and feudal bond was itself sufficient to give them the title. Well, then, what becomes of this feudal bond, this abstract title, when there passes away throughout Europe the feudal system itself, when the whole basis of the feudal relationship has gone ? One does not need to fix a definite date for that, but it is admittedly an event now some centuries old.

Now the reason why the French Kings, on the passing away of the feudal system, were nevertheless able to claim sovereignty over most of continental France, was because they *had* extended their direct

authority over a large part of continental France; direct authority and control of such parts as Burgundy, Brittany, Aquitaine, Toulouse —territories over which they formerly only had nominal feudal rights —so that the previous independence of the Dukes and Counts of those territories now become subject to the central authority of Paris. If one likes to put it this way, the territories of these Dukes became their private properties, but they ceased to be political units. There was, in fact, only France.

Now, it is precisely this extension of the authority of the French Kings, based on Paris, which never took place with regard to the Channel Islands. And at the risk of repetition, I again refer to the definite breaking of the feudal title of the French Crown to the Channel Islands by the failure to implement the judgment of 1202 and the subsequent *défi*, as well as the effect of the subsequent treaties. But even if it—the feudal link—survived all these acts, the title could not, purely as a *feudal* title, survive the feudal system itself, unless—and this never happened as regards the Channel Islands, on our reading of history, and I do not think it is contestable—it was replaced by a title based on effective possession and control of the Channel Islands by a central government authority, as happened on the mainland. Paris never controlled the Channel Islands; Paris controlled the rest of France.

So the feudal title, in our submission, must be considered to have died of inanition, unless France can show—as she can for the mainland, but not for the Channel Islands—that France had already extended her effective central control or (which is a question which does not arise here) has done so since to include the Channel Islands within the realm of France.

Now these propositions, Mr. President, must surely apply equally to any particular part of the Channel Islands, such as the Minquiers and the Écréhous, as to the islands as a whole. So why, I ask, is France now claiming title to these separate parts, the Minquiers and the Écréhous? France, in short, cannot still be the feudal overlord of these two little groups of islands, and what else does France claim to have but the feudal overlordship? And, even if she had that feudal overlordship, even that was not sovereignty, as understood in international law, and the feudal title, if it ever existed, was never converted into modern sovereignty.

I hope, Mr. President, that on the basis of these propositions and considerations, I can claim that I have now established the title of the English Crown to the Minquiers and the Écréhous at the end of the Middle Ages; established it as part of the Channel Islands, a single entity. I have tried so far to do this on the basis of historical reasoning, without dealing with the individual facts relating to each of these groups as a whole. It is now time for me to look at the evidence of title in documents naming the Minquiers and the Écréhous, but my final submission on this section of the story—up to the end of the Middle Ages and, indeed, beyond—is that the *a priori* case is so strong that even slight concrete evidence relative to each group as such (the Minquiers and the Écréhous) will suffice to confirm it.

For two reasons, Mr. President, I begin not with the Minquiers or the Écréhous but with the Îles Chausey. For one thing, our opponents have attempted to deny the conception of the entity of the Channel

Islands by alleging that we cannot prove that the Chausey were English in the Middle Ages, and asserting that they were in fact French towards the end of the fifteenth century. I propose to show that, in this medieval period, the Chausey were certainly English. Later, in discussing the claim made by our opponents that the Minquiers were a dependency of Chausey, I shall show that the Chausey only firmly and finally became French in the middle of the eighteenth century. Secondly, I shall contend that if the Chausey—and I draw the attention of the Court to their geographical position, the innermost group of islands practically at the base, the south-west base of the Cotentin peninsula and only about eight or nine miles from the French town of Granville—that if this group, if the Chausey, was English, then the inference that the more outlying groups—and the next one to them and further out to sea is the Minquiers—were also English, and, if that is so, then the inference that they were English, is irresistible. I say "if that is so", but the map shows that it is so. Or to put it this way, if we take the area between Chausey and Jersey, the Minquiers is roughly half way between. And is it likely, is it plausible, that Jersey and the Chausey should both be English, but not the Minquiers, lying in between ?

Now, there are two pieces of evidence in the Middle Ages which conclusively place the Chausey within the realm of England, and thereby demonstrate the entity of the Channel Islands as a whole, the point I have throughout been endeavouring to stress. In the first place, there is evidence of the records of an Assize Court of the English King held in Jersey in 1309, when the King's Justices were sent from England to hold the Court. From these proceedings (there is a reference to them in para. 183 of our Reply), we learn the following. The Abbot of Mont-Saint-Michel had put forward a plea, not in this Jersey Court but in the Court of the French King, that he could not be sued there in France in respect of the Chausey, because those islands (the Chausey) were in the fee of the King of England. This plea was upheld in the French King's Court, and the plaintiff was non-suited. Accordingly, the Court of the English King in Jersey placed the following on its records (and we reproduced what I am now going to read in footnote 1 on p. 532 of our Reply). This is the record of the English Court derived from a French source :

> "A memorandum is made concerning the Abbots Island of Chausey, as to which the Abbot cannot deny that it is of the fee of the lord the King [this is the English Court, and the lord the King, the King of England] and that this was allowed him in the court of the King of France at the suit of a certain merchant complaining of him."

Here then is evidence from a French source, and on the basis of a decision of a court of the King of France, that the Chausey were English in 1309. That leads, I suggest, to the inference that all the islands in the Bay of Cotentin were in the effective possession of the English Crown in the fourteenth century.

And the second piece of evidence : in the same century, 1337, the Abbot of Mont-Saint-Michel declared that the Îles Chausey were "*in Regno Anglie*" (in the Kingdom of England). And I give a translation (the text is in Latin) from *Cartulaire des Îles Normandes*, page 24. It is this :

"Item, in the diocese of Coutances there are five Priories [that is, belonging to his Abbey, the Coutances diocese being, of course, in Normandy], one of which is in the Kingdom of France, namely, the Priory of Saint-German-sur-Ay, and four in the Kingdom of England, which are in the Channel Islands (themselves in the diocese of Coutances), namely, the Priory of St. Clement, the Priory of Lecq, the Priory of Lihou, and the Priory of the Chausey." (That is reproduced in footnote 2, para. 183 of our Reply.)

This I contend, Mr. President, is a striking admission by the French Abbot of Mont-Saint-Michel, that all his four priories in the Channel Islands (which were attached to the diocese of Coutances) were in the realm or Kingdom of England. That, in my submission, disposes of the suggestion that the Îles Chausey were not in the fourteenth century part of the English possessions of the Channel Islands, all of which were one entity held by the English Crown.

But, if further proof be needed, I turn to what is a striking piece of evidence of international validity to support my argument. I refer to the Bull of Pope Alexander VI dated in the year 1500 (there is a full reference to that in para. 185 of our Reply). Now this is the instrument which transferred the Channel Islands from the diocese of Coutances in Normandy to that of Winchester in England—where they still remain. The Bull expressly states that these islands are under King Henry VII of England's temporal dominion—"*sub suo temporali dominio*" ; and as the islands had been part of the diocese of Coutances for some four or five centuries (that is not in dispute), it is obvious that this step can only have been prompted by the incongruity of having the islands under different spiritual and temporal rule—French spiritual rule, English temporal rule. Now the Bull lists the Channel Islands as follows: Jersey, Guernsey, Chausey (again), Alderney, Herm and Sark. The Minquiers and the Écréhous are not mentioned by name (in our view because they are to be taken, obviously, as we have always contended, as a dependency of Jersey, the first of the named islands). But in any case they must have been included, because, Mr. President, what would be the point in transferring all the other islands, including the Chausey, from the diocese of Coutances to the diocese of Winchester, and leaving the Minquiers and the Écréhous—further away than Chausey from France—as part of Coutances ?

There are two earlier papal documents—an injunction in a Monition of 1481 and a Bull of 1483, both for the suppression of piracy in the Channel Islands, from which one can draw a similar deduction. They were based on the petition by King Edward IV of England "and the inhabitants [I quote from our Memorial, para. 34] of Guernsey, Jersey and Alderney and the Islands adjacent thereto". It seems impossible to suppose that this petition pleaded for help in suppressing piracy in respect of Jersey, but not in respect of the other groups such as the Minquiers and the Écréhous quite close to it. Clearly the petition relates to the islands as a whole. And in my submission, we are entitled to ask this Court to take account of the reasonable probabilities of matters such as these.

I shall have to return a little later to the Chausey and show how they only passed firmly and finally into French hands in the eighteenth century. What I am concerned with now is to show that they were certainly English in the Middle Ages, certainly in the fourteenth

century—two concrete pieces of evidence—clearly so in 1500, when the Chausey were transferred to an English diocese by a document of international validity. That will cover the period of the treaty settlement of 1360, and in our view the same situation must prevail in the earlier treaty settlement of 1259. I hope the Court will grant me that, in these circumstances, the probability that the Minquiers (and indeed, the Écréhous, though I shall come to them later), as adjacent to the Chausey, were also English, and that this probability is so great that any other hypothesis lacks reasonable plausibility.

The reason for the absence of more specific evidence about the Minquiers (I come at last to the Minquiers) is not far to seek. We know there was a priory—we just heard about the Priory on Chausey. We know too there was a priory on the Écréhous. There was none on the Minquiers. But the inference of English possession during the Middle Ages of the Minquiers is none the less overwhelmingly strong, and I now come to clear evidence of the same thing two hundred and fifty years later.

I refer to the legal proceedings of a Manorial court held in Jersey regarding wreck found in the Minquiers in 1615, 1616 and 1617 and again in 1692 (the extracts with regard to the first three proceedings in the earlier part of the seventeenth century, are to be found in Annex A 20, pp. 169 and 170, to the Memorial). Our opponents tried very hard to prove that this evidence has no significance, but I shall hope to show that all their objections are misconceived. At the lowest, this evidence has value as showing a definite connection between Jersey and the Minquiers at this time. And it is countered by nothing that our opponents have produced of any record of a French court dealing with the Minquiers—and this particular matter the finding of wreck at the Minquiers.

Now, if I may take the 1615, 1616 and 1617 cases first—those heard in the Manorial court of the Seigneur of Noirmont in Jersey—the objections advanced in the Counter-Memorial (p. 398 of the French text) were that there was no evidence that the wreck was adjudged by the Court to the Seigneur, and that under Jersey law the Crown was not entitled to the particular kind of wreck concerned. Therefore, the proceedings, say our opponents, were no proof of the Crown's sovereignty. I ask the Court to say that both these objections are beside the point, because the object of citing this evidence is on the ground of the finding of the wreck at the Minquiers and the removal of it from the Minquiers, and I think that appears quite clearly in the extracts from the Court Rolls which we have given in this Annex. The finding of the wreck at the Minquiers is the point on which I desire to lay emphasis, and the removal of it from the Minquiers. In short, it was because the Minquiers were part of Jersey and part of the fief or Seigneurie of Noirmont, that the proceedings took place at all. It does not matter what the outcome of these proceedings was from that point of view, nor who was entitled to the wreck—the Crown or the Seigneur. In fact, as we pointed out in paragraph 187 of our Reply, the wreck was adjudged to the Seigneur—and it so happens that the Seigneur was at that time the King of England, because he held at that time and until 1646 that particular Manor in his own domain—in his own control. He then granted it out to

the Jersey family of de Carteret. So as it happened the King of England was awarded this wreck as Seigneur of Noirmont.

Accordingly, in their Rejoinder, our opponents advanced another objection, because we had pointed out in our Reply what I have just mentioned. They advanced a new objection, and one to which they have had constant and, I might say, habitual resort, in order to deny the significance of much of our evidence—not merely on this question. They advanced the theory that the proceedings about wreck was simply an exercise of jurisdiction *ratione personæ*. They say, contrary to what we say, that it was not the finding of the wreck at the Minquiers—it was the fact that the finder was a tenant of the Seigneur or his man that gave jurisdiction and gave the Seigneur a right to the share. There is no evidence given to show that this was the position under Jersey law at the time—which it was not—and incidentally there is no evidence given, and there is equally nothing in our Annex A 20 to show, that the finders of the wreck were in fact men owing allegiance to the Seigneur of Noirmont. This idea that the jurisdiction of a Manorial court was exercised *ratione personæ* is conclusively disproved by two considerations (again I refer to the Annex). The matter is not put on the basis that the finders of the wreck were Noirmont men—nothing is said about their status in this extract in Annex A 20. The Court will see that it merely gives the names of the men according to the evidence of the Provost : Grandin, Grandin, Christin, Dumaresq (it does not say where they come from) are alleged...., etc. It does not even give the place of residence, or their parish, a matter which is always of considerable importance in the island of Jersey : to which parish a man belongs. Furthermore, the references to the Minquiers are not merely descriptive. They are not simply recitations that the wreck was found at the Minquiers. The gravamen of the matter was that the wreck had been removed from the Minquiers, not only found there, but removed—the expressions used are "carried off", "taken away". These proceedings, in short, arose from the fact that someone had removed wreck found on property belonging to the Lord of the Manor—and that property was the Minquiers property of the Lord of the Manor.

[Public sitting of September 22nd, 1953, afternoon]

Mr. President, Members of the Court :

Before the adjournment, I was dealing with the three cases where the Noirmont Manorial Court exercised jurisdiction over wreck found at the Minquiers. I had disposed of one objection to the French theory that this jurisdiction was exercised *ratione personæ*. My second objection is this : it is totally contrary—this theory of *ratione personæ*—to all those feudal concepts that then seem to have regulated such matters in Jersey, it is contrary to English law, and it is contrary to Jersey law at the present time. It would also lead to impossible results in practice, as I shall hope to show in a moment.

May I first dispose of one point. It might perhaps be thought that the ground of these Noirmont proceedings was not so much that the wreck was *found* at the Minquiers, but that it was brought *into* Noirmont

territory on the island of Jersey itself. But this would not account for the third of the three cases, which, the Court will note, was one of an anchor found on the Minquiers in 1617 and taken to St. Malo in France, not brought into Jersey territory ; and the implication of this is inevitably that the Minquiers were Noirmont territory.

Now, according to feudal law, the lord of any land or territory was entitled, if not at once to ownership, at any rate to *custody* in the first place for a period, of any wreck washed up on his land, and his court had jurisdiction in this matter of custody, as well as of ownership. Of this there is no vestige of doubt ; it is obvious, for otherwise anyone could have taken wreck off another lord's land and taken it on to his own land, and the lord of the land would have had no redress. Now, feudal ideas being pre-eminently territorial, that state of affairs would not be tolerated, but if, however, in addition to his undoubted jurisdiction *ratione soli*, the lord had also had jurisdiction *ratione personæ*, impossible conflicts would have arisen. For instance, one lord's men might have found wreck on another lord's land. What would have happened then ? Or the finders might have been the men of different lords—as, for instance, in the very probable case of finding wreck by the crew of some vessel. Such a position, I suggest, could only be regulated by importing wholly modern ideas about conflicts of laws, at a time when nothing was known of them.

There can only be one conclusion : the basis of jurisdiction and of the claim was territorial, and only territorial. If a claim was made, or jurisdiction exercised, it could only be on the basis that the wreck had been washed up on the lord's shore.

Now, under Jersey law, the Crown only had a right to gold objects and such-like articles. Other things went to the owner if he—the owner —could be found. If, as was probable in the case of wreck, the articles were still unclaimed after a certain time, then they went to the lord of the fief on whose shore they had been washed up. Therefore the normal procedure was for the wreck to be kept in custody—to be impounded—in the first place, until the necessary interval of time had elapsed. Now if the Court will look at the second of these three cases (set out in Annex A 20 of the Annexes to our Memorial)—the case of 1616—the Court will note that it had precisely this character. The Sergeant of the Court is ordered to take charge of the articles "until other provision shall have been made". In the first case we do not know what happened : the record does not tell us.

But, in the third case, the anchor had already been taken from the Minquiers to St. Malo on the French coast. The finder is therefore adjudged to be "in default towards the Officers of the Seigneur for having taken away an anchor found on the Minquiers and carried it away to St. Malo". Surely, Mr. President, it is obvious that the whole basis of this judgment was the fact that the anchor was found at the Minquiers. Is it likely that Aurange—the man in question—would have been adjudged to be in default towards the Officers of the Seigneur if he had found the anchor at, say, Granville and carried it to St. Malo ? Surely not. Then his default would have been towards whoever it was in Granville who had rights in respect of the foreshore, as I think our opponents would be the first to contend had the matter occurred in that way.

In this case of the anchor, any suggestion that jurisdiction resulted from a landing of the wreck in Jersey is not only unconvincing ; it is

impossible. The anchor was not landed at Noirmont, and the Seigneur of Noirmont can therefore have had no interest in it on that account. I venture to suggest that it was to deal with this case that the Government of the Republic has invented its principle that a lord would be entitled, *ratione personæ*, to wreck found by his tenant. That principle—if it were held—would indeed provide an explanation of the case (the third case) which would in no way involve any inference about title to the Minquiers. But unfortunately for that argument, there is no evidence whatever that such a principle existed in the law of Jersey, and it would lead to impossible results, as we have seen. In short, the principle of *ratione personæ* does not exist and it never did. How, then, may one explain the concern of the Seigneur with an anchor found on the Minquiers and taken to St. Malo without ever having been brought to Noirmont? The simplest explanation is that the Minquiers was a part of the fief of Noirmont. If this were so, then the Seigneur would be entitled absolutely to the wreck found there. This explains not only the case of the anchor, but also the emphasis on the Minquiers as the place of finding in the other cases that I have been examining, and also the fact that in those cases no mention is made of wrecks being divisible.

The only concrete argument which our opponents advance is the fact that in 1692 (the case appears on the next two pages as Annex A 21, pp. 170 and 171) the claimant in respect of the wreck is the Lord of Samarès appearing through his mother, Deborah Dumaresq. But it is our contention that our opponents have misconceived the nature of these proceedings in the Royal Court of Jersey. It is quite clear from the record in that case that the basis of Deborah Dumaresq's claim was that the wreck originally cast on to the Minquiers had been brought to her son's fief of Samarès in Jersey. I say "brought". The word in the French text, the text of the actual record, is "apporté"—I think that is a better translation than "cast on". There is no suggestion at all that Deborah's claim in this case was based on a finding by Samarès men—men of her son's manor.

A further suggestion is that the 1692 case is to be regarded as an exercise of war rights. This explanation offered by our opponents does not stand up to examination, because there is not a vestige of a hint in the proceedings that this Court was acting as a Court of Prize or that any question of war rights was involved. The basis of the proceedings is purely and simply the finding of wreck. Had war rights been involved, the whole wording would have been quite different.

I contend, therefore, Mr. President, that if I have established that the Minquiers were in *Regno Anglie* in the Middle Ages, and at least up to and after the Papal Bull of 1500 which transferred Chausey and Jersey and all the other islands of the Channel to the See of Winchester, these cases of wreck show clearly that as late as 1700 approximately the Minquiers were still in *Regno Anglie*.

There I leave the Minquiers until I come back to the eighteenth century position.

If there is relatively little evidence about the Minquiers, as such, in the Middle Ages—though I hope I have shown no lack of presumptive evidence of the strongest kind—there is, on the other hand, a considerable amount of evidence relating to the Écréhous, while at the same time the presumption that they, like the Minquiers, were in *Regno*

Anglie through the Middle Ages is no less strong—particularly having regard to the special geographical relationships between Jersey and Écréhous which Mr. Harrison will demonstrate.

The first specific mention of the Écréhous islets by name is to be found in the Charter of 1203, given in Annex A 7, pages 155 and 156, same volume. By this Charter, Piers des Préaux granted the Écréhous to the Abbey of Val-Richer in Normandy. Now this clearly establishes that the Écréhous were an integral part of the Channel Islands at that time, and particularly a dependency of Jersey—for, three years earlier, in 1200 (this is the following document on the next page—Annex A 8), Piers des Préaux obtained his only right to make a grant of the Écréhous, and that was the grant to him by King John of England of the "Islands of Jersey, and Guernsey, and of Alderney". John granted Jersey, Guernsey and Alderney in the year 1200 to Piers des Préaux, and Piers des Préaux out of that granted the Écréhous—we say, as part of Jersey—three years later. And Piers could only have granted the Écréhous because they were a part of the Channel Islands as a part of Jersey, underneath whose shores they lie. Indeed, this is implicitly admitted by our opponents when they lay claim to the Écréhous through the Abbey of Val-Richer, for the only title that the Abbey of Val-Richer could have was through Piers, and Piers had no title unless King John's grant to him included the Écréhous. In another way, the French claim seems to admit the same point, for their argument is that by Piers' grant to the Abbey of the Écréhous, they were taken out of the whole fief of the Channel Islands and ceased to be part of it—that seems to me to be a clear admission of the unity of the fief of the Channel Islands standing as a whole.

We maintain that these two Charters of John to Piers and of Piers to Val-Richer, constitute a significant proof of our repeated contention—disputed by our opponents—though I maintain that they make use of it when it happens to suit them—our contention that the Channel Islands were an entity in these early centuries, and an entity which was often designated by such vague phrases as *"Les Îles"*, *"Insulæ de Gerneseye, Jerseye, Serk et Aurney"*, and so forth. Conversely, these Charters refute the argument of our opponents that there was a *caractère limitatif* in these designations. In actual fact, as Dupont points out, the chroniclers of the medieval period sometimes called the whole of the Channel Islands merely the "Island of Guernsey".

The grant of Piers to Val-Richer is significant in this respect in yet another way. Not only does it show—as I hope I have demonstrated—that the Écréhous were part and parcel of the Channel Islands as part of Jersey, but it shows that Piers himself intended that they should continue to be associated with the islands, because the grant in Annex A 7 shows that Piers contemplated his men in these islands would make endowments to the intended Priory on the Écréhous. "I have further granted [I am reading from the translation] to the afore-said monks whatever by my men of Jersey, and of Guernsey, and of Alderney, having regard to charity, shall be reasonably given to them." This is clear proof that the Écréhous were, and were meant to continue as part of the entity of the Channel Islands, and that its Priory could expect support from the islanders, which, as the history of Jersey shows, was the case, and endowments in Jersey and elsewhere.

This also has a bearing on the French argument (which I will deal with in a moment) that the effect of Piers' grant to Val-Richer was to take the Écréhous out of the fief and attach the whole Écréhous group to Val-Richer as part of continental Normandy, to change it from the Channel Islands and to make it part of Normandy; so that when, in the next year, 1204, Philip of France annexed Normandy (this is the argument of my opponents) and became the immediate overlord of the Abbey, he also became the overlord of the Écréhous and displaced King John, who nevertheless remained—so the argument must be assumed to run—King of the rest of the Channel Islands by virtue of being King of England.

Piers des Préaux' grant to the Abbey of Val-Richer was a grant in frankalmoin, a species of feudal tenure. The feudal system rested upon these tenures, that is the holding of land in return for services to be rendered to an overlord or seigneur. These services, it is well known, could be of various kinds—military, lay or ecclesiastical—frankalmoin being an ecclesiastical form. They were rendered in actual kind or commuted for a money payment. This system, once it was extended beyond a superior tenant—beyond the first tenant of the lord who held directly from the overlord—was known as sub-infeudation. The process may be likened to a series of links in a chain. There might intervene between the overlord who first granted the land, and the ultimate tenant in possession of the land, a number of intermediate tenants. Now three results follow from this species of relationship. Firstly, each tenant would be linked to a grantor immediately superior to himself. Secondly, no one grantor could grant greater rights to his tenant than he himself possessed against his superior. Perhaps the earliest manifestation of the well-known legal doctrine *nemo dat quod non habet*. Nor could a grantor by his grant destroy the rights of his superior from whom he held the land in return for services. These services then remained enforceable against the sub-tenant—the holder of the land—unless the superior, by his own express grant, gave them up—that superior there being the original grantor or overlord in the case in point.

Now, Mr. President, may I apply these rules to this grant of 1203 whereby Piers granted the Écréhous to the Abbey of Val-Richer. We are agreed that this referred to Maître Île by reason of the remains of the Priory on that islet of the Écréhous group. Now in 1200, John, whom I will describe as link 1 in the chain, as Duke of Normandy, granted the islands of Jersey, Guernsey and Alderney to Piers. His tenure was of the type requiring the rendering of military services. The services Piers owed to John—Piers becomes link 2 in the chain—were the services of three knights, that is, an obligation to provide arms. Piers (link 2) in his turn granted the Écréhous to the Abbey of Val-Richer in frankalmoin, or free alms—about that I shall speak later. So we have this short chain—John linked to Piers and Piers linked to the Abbey of Val-Richer. Now this grant to the Abbey of Val-Richer by Piers would not free the land from the service which Piers (link 2) owed to King John (link 1) in respect of his fief, of which the Écréhous were part. There may have been no apportionment of such services as Piers owed to John. There may indeed have been no enforcement. But nothing that Piers could do could free the land which he granted to the Abbey of Val-Richer from the dues which Piers owed in respect of it to his grantor. The chain of tenure was unbroken and John continued to be entitled

to the services burdening the land (not personal services) in whosoever hands it was.

Now it is to avoid this conclusion of the continuity of the services due to the overlord that the Government of the Republic has sought to establish that, because the grant was in frankalmoin, or free alms (an ecclesiastical grant), these general rules did not apply. Now frankalmoin admittedly differed from any other form of tenure for this reason : that in such a grant, the grantor, whether he was the first link in the chain, or the second link in the chain, reserved no temporal services to himself. The services rendered took the form of an obligation to pray for the persons named by the grantor. But, because those were the services named, the land was not thereby freed from all secular services. It owed no secular services to the actual grantor in frankalmoin (that is, the land owed no secular services), but it did owe, and continued to owe, services due to his superior. It owed no services in this case to Piers, but it did continue to owe services to his superior, John, King of England.

In support of this submission, I would refer the Court to paragraph 147 of our Reply, where there is reproduced the view of the foremost English legal historian, Maitland—a passage from Volume 1 of his well-known *History of English Law*, written in association with Sir Frederick Pollock (Vol. 1, p. 144). I cite the following extract :

> "Beside this, we constantly find religious houses taking land in socage or fee farms at rents, and at substantial rents, and although a gift in frankalmoin might proceed from the King, it could often proceed from a mesne lord." [That is our case here—Piers being the mesne lord.] Continuing the citation : "In this case the mere gift could not render the land free from all secular service ; in the donor's hand it was burdened with such service ; and so burdened it passed into the hands of the donee." [Or, if I may apply it to the present case, in Piers' hand it was burdened with such service ; and so burdened it passed into the hands of the Abbey of Val-Richer.]

In their Counter-Memorial, the French Government advanced the view that a gift in frankalmoin destroyed feudal tenure altogether. This, however, is contrary to the view of the well-known French historian, Blum, who categorically states that frankalmoin always remained a tenure. The point is admitted now by my opponents at the bottom of page 697 of the text of their Rejoinder, where we read: "in fact, the overlord retained his rights, for the grantor could not give greater rights than he himself possessed".

Mr. President, to sum up, we see that the chain linking the land from John to Piers and Piers to the Abbot remained unbroken. The Abbey held the Écréhous through Piers, who retained the rest of the fief in virtue of his holding from the King of England, who was the lord of the whole fief. The Écréhous did not become French because the tenant in possession was a French, or rather a Norman, subject.

I shall now demonstrate, if I have not already done it, that our opponents' proposition violates the feudal principles which I have been trying to expound. First, the French thesis necessarily involves that Piers, by granting the Écréhous to Val-Richer in frankalmoin, caused Val-Richer to hold direct of John, because they admit that Piers could not by any act of his deprive John of his right as supreme overlord—the passage which I read a few moments ago. John therefore remained

the overlord of the Écréhous. In that case, someone must have held them of John. But who ? Not Piers, say our opponents. By his act he had removed the Écréhous from the fief of the islands—they were no longer part of his—Piers'—holding. If not Piers, then it must have been Val-Richer. In short, Piers, by his act and without John's consent, had substituted a new tenant for himself in respect of the Écréhous and had created a new direct tenure between John and Val-Richer. That would have violated feudal law, both in Jersey and in England, at this date : substitution instead of sub-infeudation.

Next, it would also be contrary to feudal law because it would in effect mean that Piers, without the consent of John, his overlord, had freed the land from the burden of the services imposed on him—Piers —by John, by creating a new tenure between John and someone else free of those services as between John and the new tenant : that is all contrary, that is feudally an impossibility.

Our opponents can only escape from these difficulties by reverting to their original theory, from which they withdrew ultimately in their Rejoinder, that the grant in frankalmoin created what was known as an allod, so that Val-Richer itself became the overlord holding of no one—taking the land right out of the feudal system. But that would be impossible, because John, as supreme overlord, could not be deprived of his position and rights without his consent ; and manifestly on the documents that consent was not given. The present French theory leads to no less impossible a position.

Finally, and most important of all, the French theory seems impossible to reconcile with yet another feudal principle that a tenant could not, by any grant he himself made, deprive his superior lord of his rights. But they think they have met this point in two ways. First they say : Oh ! John remained the overlord ; but Val-Richer, the Abbey, held direct of him and not through Piers. Secondly, they say that although Val-Richer only did spiritual services, Piers went on being responsible to John for temporal services, such as the provision of knight's services. Therefore, they argue, all John's rights remained intact.

Now this theory conveniently ignores this fact : a superior lord's rights were by no means confined to the *particular* services reserved by the actual grant. There were other rights, attached as a matter of law to all grants, the value of which depended on the holding remaining intact and not being diminished by alienations : grants by the holder. These were the well-known feudal rights—just to catalogue them by name and give one illustration—aids, reliefs, primer seisin, wardship, marriage and escheat.

Take reliefs as an illustration. When the tenant died, his heir was entitled to inherit, if the estate was inheritable, but could be required to pay a sum in the nature of a sort of succession duty on taking up the fallen estate—hence the term "relief" or "*relevium*" *(relevat heridatem)*. Any diminution in the size of the holding by previous alienation would therefore have affected what the lord could hope to obtain by way of a relief on inheritance. Similarly, the right of primer seisin enabled the lord to keep an heir out of his land for a year, or, in lieu, receive a year's profit of the land—and that again depended on how much land there was in the holding. Now this applied to Piers' holding of the islands, for he held of King John, and the islands he held were a heritable estate.

Now questions of reliefs and primer seisin were especially important as regards an ecclesiastical foundation like an abbey, because an abbey never died—no questions of inheritance arise. Thus, any part alienated in the way the French theory suggests would never have fallen in by way of inheritance—there would have been no inheritance charge in respect of the Écréhous if this view were right—and reliefs in respect of this part of the fief would have been permanently lost to the lord, to King John. To take perhaps a somewhat extravagant illustration, suppose that Piers, instead of granting Val-Richer the Écréhous, had granted it the whole island of Jersey. Then, on Piers' death and that of his succeeding heirs, the English Crown could, according to the French theory (Jersey having ceased to be part of the fief of the islands), only collect reliefs on the value of the Channel Islands minus Jersey.

Now I think, Mr. President, the Court will see therefore that a grant of the Écréhous by Piers, which would have had the effect our opponents suggest—taking the Écréhous right out of the single fief of the islands—would in principle have involved a serious prejudice to John's feudal rights, even though he—John—remained overlord of the Écréhous in the hands of another tenant. The fact that the Écréhous were, and are, of comparatively little value, is beside the point for the purpose of this argument, for if the French theory is correct, then it would apply equally if Piers had granted a big unit like the whole of Jersey to Val-Richer in frankalmoin.

I hope, Mr. President, that I have shown that the French theory leads to hopeless contradictions and inconsistencies; that it is wholly at variance with feudal law and tenure and therefore unacceptable. It does not, indeed, even meet the point, which our opponents themselves concede, that John's rights must not be prejudiced. And may I draw the Court's attention in this connection to the first part of the opinion of Professor Plucknett of London University: we have submitted this as Annex A 157 in the volume of Additional Annexes—it is issued separately and not bound up in the volume. This opinion, by a scholar of international repute in law and history, is, as the Court will see from the language, quite objective and, indeed, is at pains to do full justice to the French argument. The Court will see, however, that it brings out the vital point that a tenant could only make a grant in frankalmoin by way of sub-infeudation, and not by way of novation or assignment—or alienation of part of his holding. Thus, when Piers made the grant to Val-Richer, he did not, and could not, alienate the Écréhous from the fief of the islands which he held from John, because without John's consent he could not alter the character and extent of his holding—the holding he held from John—or substitute for it a direct holding by the Abbey of Val-Richer from King John. It follows ineluctably that Val-Richer held under this grant, and could only hold, the Écréhous from and through Piers, and that Piers went on holding from John as before. In other words, Piers could not eliminate himself as the intermediate link in the chain of three links. The whole French theory that King Philip of France acquired any special rights over the Écréhous because Val-Richer was, or became, a French abbey therefore seems to fall to the ground.

Professor Plucknett points out in the ninth paragraph of his opinion how wrong this whole theory is. The fact that Val-Richer was a

Norman Abbey would not give any rights to King Philip of France, when he conquered Normandy, over the Abbey's foreign holdings, merely because Philip had possessed himself of Normandy. Val-Richer might hold lands in all sorts of countries, of all sorts of different lords and sovereigns, but Philip would have had no rights of any kind over those lands just because Val-Richer was Norman or French : nationality had nothing to do with it—the only question was of whom were the lands held. Philip could only claim rights over land which Val-Richer held directly or through an intermediary of himself, Philip—and that was certainly not the case with the Écréhous.

Our opponents seem really to be arguing that, because a French abbey was the immediate tenant of the Écréhous, therefore the Écréhous became French territory ; but, of course, on this basis, Mr. President, any lands Val-Richer might have held in England, or Germany, or Spain, or where you will, would have become French too—the argument ignores the distinction between private ownership of property and political sovereignty. French abbeys of that day, indeed, such as Cluny—Norman abbeys too—Le Bec—held large estates in England and elsewhere. It has never been suggested that this caused the political sovereignty over these estates to become vested in the sovereign of the abbey—the land where the abbey was situated—any more than if I bought a piece of land in France to-day, would it cease to be under French sovereignty because I happen to be a British subject.

In short, France can claim no sovereign rights over the Écréhous through the Abbey of Val-Richer, for the Abbey itself exercised no sovereign rights there. It had nothing to transmit except its ecclesiastical rights over the priory.

But I can offer the Court more definite—indeed, most definite—proof that the Écréhous remained English, and that is afforded by the proceedings known as the *quo warranto* proceedings in 1309 : we are now coming to a period a hundred years after Piers' grant. Now these were proceedings before a Royal Court sent from England and sitting in Jersey, as part of a general inquiry begun by Edward I and continued by his successors throughout his realms, and a well-known incident in English history. Subjects of the King who exercised any privileges which only the King could grant (franchises and so forth) were required to show by what authority (hence the term *quo warranto*) they had obtained these rights. And if the Court would be good enough to turn to the translation of the record of these proceedings—they will find it at pages 158 and 159, Annex A 12 to our Memorial—this shows quite clearly (the translation) that the Abbot of Val-Richer was summoned before the judges of King Edward II of England, sitting in Jersey to show by what authority he held the advowson of the Priory of Écréhous and a mill and certain endowments in Jersey. I dismiss for this purpose the endowments in Jersey, simply because they were in Jersey and this Court is not concerned with the title to Jersey. But I do rely on that part of the proceedings relating to the advowson of the Écréhous—that is, a right of landed property—the land being, in this case, the site of the Priory on the Écréhous.

And may I, Mr. President, say a word or two about this term "advowson". It is the right of presentation to an ecclesiastical office or benefice : in this case, of course, the right to present an ecclesiastic to the Priory on the Écréhous. But this right is not a personal one.

It is, on the contrary, a right of property, a right of property in the land it relates to : it is one of the curious features of our somewhat archaic system of land law in England that this is a species of landed property—so it was then and so it remains. It is a right of property, and only a court having territorial jurisdiction over that land is competent to hear and adjudicate about the ownership of an advowson. That court, as a matter of interest, was and still is the King's lay courts and not the ecclesiastical courts. It was therefore in the exercise of their ordinary jurisdiction that these English judges, sent by their King to Jersey in the early part of the fourteenth century—to put it in modern terms—heard the action relating to an advowson, along with the other causes that they heard in a temporal court. That is perfectly regular in so far as English and Jersey law at the time was concerned. Since, so far as the advowson was concerned, the inquiry related to a right of property in land, it was quite immaterial whether this right was held or claimed by an Englishman, a Jerseyman, or a foreigner. In this case it was actually held by a French subject, the Abbot of Val-Richer : that is to say, an alien who held landed property with the advowson attached to it on territory—the Écréhous—within the jurisdiction of the King's courts exercising jurisdiction in Jersey.

The normal position in feudal law was that the tenant of the land was also the owner of the advowson. But the King's advisers, who were making this claim, presumably had evidently forgotten, or overlooked, the grant of 106 years earlier by Piers to the Abbey of Val-Richer, and therefore they required the abbot to show how he came to hold the advowson. The Court may remember that Piers disappeared from the picture and forfeited his rights in the Channel Islands only one year after he made the original grant in 1203. What happened was that the King's advisers, finding the Priory on the Écréhous, which was part of the King's own lands, claimed the right to present to the ecclesiastical office, that is, the right to appoint the Prior.

Now, the proof that this property—that is to say the Écréhous, held by the abbot—fell in the King of England's domains is demonstrated by these facts. A challenge to the apparent owner of the advowson to prove his right is made against the abbot. The abbot is called upon to answer for the claim, and to justify his title in the normal court, the King's Justices sitting in Jersey. The abbot sends the Prior of the Écréhous to represent him as his attorney (the document Annex A 12 tells this story). In short, the French abbot admits the jurisdiction of the Court. If the abbot had considered the Écréhous were not English, that they were within the realm of a French, or any other, sovereign, surely he would have refused to appear, instead of which he makes arrangements for his representation there. He sent his attorney. He could have sent his attorney and instructed him to reply : "The Écréhous are French ; and if anyone wants to challenge my right of advowson there, I will answer him in the French King's Courts in Paris." We know that French abbots were quite capable of doing this, because the Court may remember the case I cited earlier in connection with the Chausey, that that very thing occurred in the course of these same proceedings in 1309 in another case, when the abbot of the Mont St. Michel is recorded as having successfully rejected the jurisdiction of a *French* Court in respect of his Priory on the Îles Chausey on the very ground that the Chausey were in *Regno Anglie.*

If, therefore, the Abbot of Val-Richer really thought his Priory of the Écréhous was in *Regno Francie*, surely he would have said so—or refused to be represented. But he did not refuse to be represented, and he did not give such an answer. The reason for that is surely obvious. Both the abbot and the prior knew perfectly well which King was sovereign over the Écréhous, so the abbot instructed his prior to appear on his behalf in the Court of the English King.

Now I think our opponents realize the force of this point, because they seek to argue that the abbot, through his prior, refrained from giving an answer. And on this slender, and as I shall hope to show, incorrect allegation—and on that alone—they would seek to maintain that the abbot and his prior did not, therefore, believe that the Écréhous fell under the King of England's jurisdiction. But the very fact that the prior was sent by the abbot to the Court and took part in the proceedings without protest was surely an admission that the abbot considered himself bound to answer—an admission of the jurisdiction of the King's Courts over the Écréhous. His explanations (and there is never a hint in them that he considered the Écréhous to be French) actually did constitute an answer. He describes his "certain small rock" (that is the site of his Priory); he speaks of his and his fellow priest's duties (I quote from the document) to "celebrate for the lord the King and his progenitors" (that is, Edward II), to maintain (as the document says) "a light burning in that chapel [of the Écréhous] so that mariners crossing the sea by night by that light may avoid the perils of the rocks contiguous to the Chapel".

Now our opponents say that the Court did not pursue the matter, and thereby seek to imply that the Court itself did not consider that it had jurisdiction. But it is my submission, Mr. President, that the Court did pursue the matter, and I would draw the attention of the Court to the last two sentences of the record in Annex A 12, which I will read if I may:

> "And because that Prior faithfully shows that the Abbot on account of the poverty of that tenure does not wish to Exert himself for the same. Therefore it is permitted to the said Prior to hold the premises as he holds them as long as it shall please the lord the King."

I invite the attention of the Court to that quotation. The Court is clearly exercising jurisdiction; it is, so to speak, giving judgment imposing a condition. It is obvious, when one goes into the story, that the meagre endowments of this Priory barely sufficed to maintain the Priory. The abbot declined to stir himself, as is stated. But the Court adjudged the advowson and the endowments to the prior representing the abbot, at the King's pleasure. But, for the purposes of my argument, the actual outcome of the proceedings is immaterial. What is relevant is the fact that the case was heard and decided at all where it was—for that was an assertion of jurisdiction in respect of land in territory under the King of England's jurisdiction.

Now these proceedings, apart from demonstrating that the abbot did answer to the King's Courts—if my contention is right—show that in a further way the prior—the spokesman of the abbot—himself believed that the Priory and the land on which it stood belonged to the English King. Now he stated (this again is in the proceedings) that he and his

fellow monks "always celebrate for the lord King and his progenitors". This offering of Masses for King Edward II of England and his ancestors cannot be dismissed (with all respect to the suggestion in the French Counter-Memorial) as a desire to pray for any Christian. It was in accordance with the original feudal obligation of the service of prayer on behalf of King John, which Piers had required 106 years earlier in his grant to the abbot (that appears from the Annex which has already been before the Court this afternoon—A 7, p. 155). Here we have then clear evidence that this spiritual service, which linked the Écréhous to the fief of the Channel Islands, continued for over a hundred years down to 1309, when the prior and his companions were still celebrating Masses for the reigning King of England, as well as for his ancestors.

Now all this evidence, derived from the Rolls of the King's Court in Jersey, in my submission conclusively supports the United Kingdom statement about the nature and effect of a grant in frankalmoin. It shows itself that the grant in frankalmoin did not remove the Écréhous from the possession of the Kings of England. Equally that the King of France did not obtain any right to them. And finally it shows conclusively, I venture to contend, that in 1309 the King of England was exercising sovereignty over the Écréhous in the most concrete manner. His judges were functioning in respect of a right to property in land situated there. And I would in this connection, again if I may, refer the Court to the second part of the opinion of Professor Plucknett.

I now pass to a further piece of evidence regarding the Écréhous, which contributes proof that these islets were among the possessions of the Kings of England. These are the Letters of Protection dated 1337 given in Annex A 17 of the Memorial. I want first, if I may, to clear away the misapprehension raised by two passages put forward by our opponents (the references being in the Counter-Memorial, p. 392, and the Rejoinder, page 699, French text)—misapprehension as to the intention of Letters of Protection. Letters of Protection were granted by English Kings both to denizens (that is to say, natives of English territory) as well as to foreigners "during the King's pleasure". That we have explained in paragraph 162 of our Reply. The original French contention in the Counter-Memorial was that Letters of Protection were only granted to foreigners, but they appear to have abandoned that view in their Rejoinder. But the Rejoinder does persist in attempting to translate in a different way from the United Kingdom Government these Letters of Protection and to reject the significance placed by us upon them. And there is a further point, the Rejoinder asserts on page 699 (I read from the English translation):

> "we have no knowledge of the precise terms of these letters. They are briefly mentioned in the Patent Roll of Edward II, which is merely a list of letters patent issued by the English Chancellery under this simple heading : 'Prior de Acrehow de insula de Jersey'."

May I first, Mr. President, dispose of this latter assertion. The precise terms of these Letters of Protection are those given to the Prior of Saint Clement's in Jersey, that is the document we reproduced on page 164 in the large type. But instead of the Chancery clerk repeating on the Patent Roll the same words which were in the individual Letters of Protection actually given to each prior, he merely, for the sake of brevity, and as was commonplace with such clerks, recorded

that "the persons underwritten have like royal letters of protection, namely....". Thus, if the statement that the clerk wrote is correct, we do know the precise terms of the Letters of Protection given to the Prior of the Écréhous. They are as printed in the document: "The Prior [of not in this case St. Clement of the island of Jersey, but of the Écréhous of the island of Jersey] has the King's Letters of Protection for as long as it shall please the King." Now I would invite the Court, if I may, to consider the question of the translation of these entries, a translation which is disputed by our opponents. I have already quoted the actual text of the translation, substituting the Prior of the Écréhous for the Prior of St. Clement. Now the nine other priors named (that is, the persons underwritten in the small print of A 17) included the Prior of the Écréhous of the island of Jersey. The Latin text (the Court will observe), on page 164, uses the word "de" for each of the words which, we have translated as "of", both in the case of the main bit of the actual text "Prior of St. Clement of the island of Jersey" and in each of the cases below—in particular the "Prior of the Écréhous of the island of Jersey". The contention of our opponents is that the second "de"—and only the second "de"—should be translated as *quant à* (in respect of) or *à cause de* (because of) or "touching" or "concerning". But if the medieval scribe was using "de" or "de" in the Latin, to translate "of" in respect of the first and third cases in these quotations, there appears to be no reason why he should not use it to translate the "of" in the second, despite the fact that this does not suit our opponents. But the translation of "de" (or "de" rather) by "of" is shown to be the correct one if we consider the other examples. Now if I may take first the case of St. Clement itself, this translation of "de" (the Latin "de") as the French Rejoinder asks us to do, "in respect of" makes nonsense—"The Prior of St. Clement in respect of the island of Jersey". But the fact is that St. Clement is situated in the island of Jersey itself, and the translation of "de" by "of" makes good sense and correctly interprets the "de". The same applies to the appellation "Priory of Blanche-lande of the island of Guernsey"—that Priory *is* in Guernsey. Several others of the nine are in this position. Equally, the same meaning of "of" must be attributed to the second use of the Latin word "de" in the description of the "Écréhous of [not 'as respects'] the island of Jersey". A further piece of evidence that this translation is right is to be found in the two descriptions in the small print—the "Prior of Herm of the island of Guernsey" and "Prior of Lihou of the island of Guernsey". Now these are a very close parallel to the case of the Écréhous, because the Court will probably have observed from looking at a map of this area that Lihou and Herm are both of them small islands close to—separated by a very narrow channel of sea from Guernsey—and each of them is undoubtedly a dependency of the island of Guernsey. As Herm and Lihou are rightly described as "*of* Guernsey" by this translation of "de" as "of", so are the Écréhous rightly described as "of Jersey".

In conclusion, Mr. President, I would submit that the evidence of English sovereignty over the Écréhous in the Middle Ages is overwhelmingly strong. What does the French claim rest on? Nothing more—I would ask the Court to agree—nothing more but a completely erroneous interpretation of the legal effect of a grant to a Norman

Abbey and an interpretation not supported by any evidence of French rule.

[Public sitting of September 23rd, 1953, morning]

I come back now, Mr. President and Members of the Court, to later evidence concerning the Minquiers and the Écréhous. But first I would return to the earlier part of my speech regarding the Îles Chausey. These islets are to-day French. But our opponents, — on no basis of established fact, we contend — claim that the Minquiers are a dependency of the Chausey and therefore French also. This alleged dependency of the Minquiers on the Îles Chausey will be discussed later this morning by Mr. Harrison. But I shall say something about the evidence of the late sixteenth and seventeenth centuries as to these islands, the Chausey, and the alleged dependency of the Minquiers group on them. I have already submitted to the Court the Papal Bull of 1500 which shows that at that time—that was the document which transferred the islands, along with the other Channel Islands, by name, from the diocese of Coutances to the diocese of Winchester in England—they were an English possession. The French Rejoinder appears to admit this by its failure to produce evidence to the contrary, and the statement (made on p. 701 of the French text) that—to quote from the translation: "It is quite certain that in 1692 the Chausey Islands were subject to the sovereignty of France...." Now, it is true that sometime during the latter half of the eighteenth century—I shall put the date later as 1764—the English Crown did allow the Chausey finally to pass into the hands of France. But it should be noted that, for a long period prior to this, they were regarded by the French themselves as a very dubious possession. I say "by the French themselves", and cite in authority for that a book, cited by my opponents, Comte de Gibon's book on *Les Îles Chausey et leur Histoire*, where one learns from page 109 that the islands of Chausey were *occupied* by the French in 1549 on the outbreak of war with England. The word "occupied" may be taken, I submit, to corroborate my contention that previous to this they were English. But this French occupation during the seventeenth and the first half of the eighteenth century seems to have been of a highly intermittent nature. After the British naval victory of La Hogue in May 1692, for example, the English again retook Chausey. That is the same year in which my opponents have stated that it is quite certain in 1692 the islands were subject to the sovereignty of France. After 1713, at the conclusion of the Treaty of Utrecht, the position of the islands was still open to doubt. On this, Gibon, writing of the mid-eighteenth century, says (I quote from pp. 178 and 179):

> "Abandoned during certain periods of war, placed in a kind of neutral position, which was equivocal and dangerous, they [the Îles Chausey] were finally attached to France by first of all a timid and then, by energetic action."

Thus, even in the mid-eighteenth century, according to Gibon, the Chausey were still not yet formally attached to France; their *de facto* and of course their *de jure* position was still doubtful. Now the treaty

which ended the Seven Years War (1756-1763) does not mention the Chausey. Gibon asks the question: what was to be their fate? when dealing with that treaty; to whom were they to go—to the French, or to the British? At that time the authorities of the island of Jersey, in 1762, sent representations to the British Secretary of State to the following effect, that: "on the conclusion of peace, the Îles Chausey should be declared as previously part of His Majesty's, the King of England's, domains". That is one of the documents which we have submitted, in the Additional Annexes, as number A 161. But the Jersey States, according to Gibon, went even further, and in the next year, 1763, so Gibon states on page 238 of his work, jurisdiction over the Chausey was being exercised by the States in taking cognizance of a crime committed there—in the Chausey. And, in a passage a little earlier in the book at page 235, Gibon writes that there was:

> "a veritable uncertainty [about the status of the islands] in the minds of the French Ministers. It was only by a hair's breadth that the islands were claimed by France. If Britain had spoken in a more decided manner in 1763, the islands would have been lost to France".

And then Gibon, on the next page, reproduces a letter of the French Minister, the Duc de Praslin, dated the 12th June 1763. (The Court will see that a good deal of evidence is all centered round this end of the Seven Years War.) And that letter from the French Minister states that the Chausey had been at all times:

> "somewhat neglected by France, that they had been frequented both by the French and by the British .... that they had become, so to speak, neutral".

But, as Gibon says a little further on, page 238, the English Court did not realize this hesitating attitude on the part of the French central authorities. It allowed a unique occasion to slip by—suggesting that England could have had them by more vigorous action.

Indeed, it appears to have been only under pressure from the local French authorities on the mainland that, on the 7th July 1764, the French Council of State issued a decision. This decision is mentioned by Gibon on page 242. The French Council of State issued a decision that the Îles Chausey should be treated as Normandy territory. Several years later, moreover, some Jersey inhabitants were still disputing this action of the French authorities in appropriating the islets. From all this, it can be taken as certain that the Minquiers, much nearer to Jersey than to France, did not pass into French hands with the Chausey in 1764.

I now turn to the claim in the French Rejoinder that the Minquiers were a dependency of the Chausey.

Now, eight years after the document, to which I have just referred, in 1772, the French King's Council, in an *arrêt* of the 28th July, designated by name the islets which were comprised in the Chausey group which France now exercised authority over. The group was stated to be fifty-three small islets, lying four leagues off the coasts of Brittany and Normandy, and near Granville. There was no collective mention of the Minquiers in this *arrêt*, the text of which can be found reproduced by Gibon at pages 294 and following. There was no collective mention

of the Minquiers, nor was there any mention of any one of the individual islets belonging to the Minquiers group. And yet, all fifty-three of the Chausey islets were mentioned by name. If we turn to contemporary maps, we find no indication that the Minquiers were attached to the Chausey, and much less that the Minquiers were French. A French map of 1757 by the Chevalier de Beaurain, Geographer in Ordinary to the French King, gives an inset of the Chausey within a larger map of the Channel. Presumably the Chausey are thus given because they were claimed by France. But the inset does not include the Minquiers.

Thus we can say that the Chausey became French in the latter part of the eighteenth century, but not then or later the Minquiers. But even in the case of the Chausey, during the Napoleonic Wars, they were abandoned by the French and occupied by the British. We have proposals of 1803 and 1807 that British military engineers should survey them with a view to fortifying them, and in 1810, General Don—the then Lieutenant-Governor of Jersey—stationed boats, not only at the Minquiers and the Écréhous, but at the Chausey, for observing the French coast. I have referred, Mr. President, to the map of 1757—we have a copy here in the Court and can of course make it available to the Court and Monsieur Gros, if requested to do so.

A significant event in this connection—I was just mentioning the position during the Napoleonic Wars—was that in 1802, when Napoleon incorporated the Chausey into the *Département de la Manche*, there is no mention of the Minquiers in the document of incorporation, according to Gibon.

I come now to the evidence as to the Minquiers and the Écréhous collectively during the seventeenth and eighteenth centuries. But first may I emphasize that since the fate of even the Chausey was dubious until the middle of the eighteenth century, and since England could occupy the Chausey because of her control of the sea as late as the Napoleonic Wars (and we know that she occupied them in 1810), there can be little doubt that she was in possession during these years of the Minquiers and—still closer to Jersey—the Écréhous. No other hypothesis seems plausible any more during these centuries than during the Middle Ages. And this presumption, during the period I am now discussing, is supported by a number of acts of jurisdiction exercised in regard both to the Minquiers and the Écréhous.

There are in the first place acts of the Jersey State (the term "acts" is not equivalent to "act of Parliament"—it is a term used in relation to administrative decrees). The acts or decrees of the Jersey State are designed (there are a number of them) to control exit from, and entry into, the islets. The French Rejoinder would see evidence in this merely (to cite from p. 701 of their text) : "these islands were not under English sovereignty", that they were "being put on the same footing as the Chausey Islands". Now the first part of this statement that these islands were not under English sovereignty is contradicted by one of these Jersey acts—that dated the 26th January 1754, that is, ten years before the islands passed finally to France—which is reproduced as number A 160 of our Additional Annexes, pages 627 and 628. The full text is given there, and it states in particular (I translate) :

> "That no vessel or boat coming from the Kingdom of France will be allowed to enter any harbour, nor to set ashore any passengers

> or merchandise in any place in this island [and that is Jersey]. A similar ban is placed in regard to the islands and rocks of the Chausey, the Minquiers and the Écréhous or adjacent rocks."

Here is an official decree which forbids French ships to come to the Chausey, Marqués (that is translated, Minquiers), Icrehots (Écréhous) or adjacent rocks because of the plague then raging on the Continent. This Act is particularly mentioned by Gibon in the book which I have already cited, on page 224, with the comment that this was an indication that in 1754 the Chausey, as well as the Minquiers, were among the isles and islets claimed by Jersey. Other acts also exist which impose control over boats coming from these islands—they had to be examined by the constable of the parish (the chief police officer of each parish in Jersey) in which they were landed. The reason again is obvious. French goods were being smuggled into these Jersey dependencies and then carried into Jersey itself. Thus, any boat travelling between Jersey and the islands (the Écréhous and the Minquiers and the Chausey) was subjected to examination in Jersey, where supervision could be far more easily exercised—though in succeeding centuries, as the Court may recall from the opening speech, custom-houses were established by Jersey, both in the Minquiers and on one of the islands in the Écréhous group, and are there to this day. I have indeed seen both of them myself.

Similarly, in times of war, boats travelling for fishing to the Minquiers and the Écréhous were subject to supervision in Jersey to make sure that no fugitives were using these islets as a stepping stone to the continent. There is an Act of 1692 (a decree of the Jersey States), which the French cite in their Counter-Memorial at page 396 and their Rejoinder at page 701, and we in our Reply at paragraph 179, showing that "those who go with the real intention at the present time to gather vraic and to man boats" (that is, Jerseymen pursuing legitimately their occupations in the dependencies), were not stopped from going to the islets. This Decree of 1692 was not an order forbidding English subjects—in particular, residents of Jersey—to go to these islands, as our opponents contend in those passages.

There is a second category of decrees of the Jersey States—or Parliament concerning defence of the islands—which demonstrate that both groups of islets were regarded as Jersey dependencies. These are naturally, in view of the events of that period, particularly common in the last years of the eighteenth century and the opening years of the nineteenth century. The authorities instituted patrols by Jerseymen of the Minquiers and of the Écréhous because at that time they were considered as dependencies of Jersey, and, therefore, a periodic supervision of them was considered necessary. And they were used—according to a dispatch from the Commanding Officer of His Majesty's Ship *Mercury* in August 1804—as look-out posts by the British in time of war.

A significant act of the Jersey States relating to the Minquiers was one that was passed in January 1779. About this time the Jersey authorities took steps to institute what would nowadays be called a lifeboat service. They decided to take steps to assist mariners shipwrecked on the Minquiers, which are a particularly dangerous group of rocks and reefs, in addition to the two or three inhabitable islets there. And the decree which we reproduce as Additional Annex A 162 (the administrative act of a Jersey Committee) shows the decision

to hire the services of a Jerseyman, his crew and boat as a form of lifeboat service to save people shipwrecked on the Minquiers. This was obviously done because Jersey considered that the Minquiers fell within its jurisdiction, and thus steps should be taken to assist persons in distress there.

I next draw the attention of the Court to a statement in *Gallia Christiana* (Vol. XI, column 446). This work, which was compiled by the French monks of St. Maurice, living in Normandy during the eighteenth century, and published in France by the Royal Press, states in this volume, which appeared in 1759, that the Écréhous belonged to the English : "Haec insula Anglorum nunc est sicut et illa." "This island [that is, Jersey] at the present time belongs to the English, just as does the other [that is, the Écréhous]." So wrote these French monks of the mid-eighteenth century.

I now select an illustration—and it is my last one—of the exercise of active jurisdiction as regards this particular Écréhous group. The document is Annex A 159 (the same Additional Annexes, pp. 625 and 626). The text and the translation is given. It is an examination before the lieutenant bailiff of a French national—a fugitive from French justice who sheltered at the Écréhous—who was taken to Jersey and examined there. The document shows that in 1706, a French citizen, Martin Deshuelles, and his companions fell foul of the French excise authorities at Cérences in lower Normandy. There was a struggle, and the three French excisemen were killed. Deshuelles, to escape from French jurisdiction, finally took a boat to the Écréhous, where he was found by Jersey fishermen visiting the island. The Jersey fishermen took him for examination before the bailiff of Jersey, presumably to explain his presence on the Écréhous. Deshuelles had, therefore, fled to territory outside France, to the Écréhous, to escape the consequences of the murder he had committed on French territory. He was examined by the Jersey authorities to explain his presence on the Écréhous and to satisfy them that he was intending no harm there. This, I contend, is an early exercise of modern jurisdiction by Jersey in respect of the Écréhous and an exercise of jurisdiction, not in this case over a Jerseyman, but over an alien. In some ways it can be taken as parallel to what I submit was a very clear and strong instance of jurisdiction in relation to the Écréhous—the old dealings in 1203 and 1309, with which I took up so much of the time of the Court yesterday.

I emphasize this case of Martin Deshuelles, Mr. President, for this particular purpose. There was, some years later, in 1826, a similar act of the exercise of jurisdiction, this time by a Jersey Court over a Jerseyman, in relation to events at the Écréhous. In that year George Romeril was prosecuted before the Royal Court of Jersey on a charge of attempted murder (the Court may recall that there are references to that in our Memorial—our original document—at paragraphs 136 and 202, and a record of the process is reproduced in the Annex to our Memorial—the big volume of the Annexes—as number A 80). Now, it has been contended by our opponents that this prosecution and similar acts of jurisdiction were exercised by Jersey as personal jurisdiction over Jersey subjects. Now I tried in another connection—in connection with the wreck of the Minquiers—to show and to expose (if I may so put it, Mr. President) the utter weakness

of this theory of jurisdiction being exercised *ratione personæ*. And Mr. Harrison, who will follow me in a few minutes, will illustrate from his own personal experience, as law officer of the Crown, how untenable such a conception is, that of the jurisdiction being exercised *ratione personæ*, in relation to the past and present powers of the Jersey Courts. I shall merely confine myself to refuting the conception by pointing out that, in the case of Martin Deshuelles, this act of jurisdiction was exercised over a Frenchman found at the Écréhous, and that, therefore, it was undoubtedly exercised *ratione soli* and not *ratione personæ*. Similarly, I contend that the prosecution for manslaughter of George Romeril was because of his act on the Écréhous and not because he was a Jerseyman—again an instance of exercise of jurisdiction *ratione soli*.

Mr. President, I have come to the end of my survey. I will sum up in a few brief sentences.

Looking back over the long centuries, we say that it is most doubtful if France can be said ever to have had the original title to the disputed islets—at any rate in the sense that a court administering international law can really regard as sovereignty. Only Normandy and England have ever exercised any sovereignty over these groups within the period which I have been dealing with. The true original title lay with them—lay with Normandy by a conquest of the islands that no French hand took any part in: with England by right of succession to what were essentially personal acquisitions of the Dukes of Normandy (subsequently Kings of England), and by right of England having defended and kept the islands for the islanders ever since.

If, however, France had the original title, it was soon lost—quite early in this long period—by the breaking of the feudal link in 1202—that is, the combined effect of the abortive *arrêt* of that year and the *défi* between Philip and John which resulted; by the operation of the subsequent treaties, or because, if there was anything left of it, being purely based on a feudal conception, it passed away with the passing of the feudal system, because it was never replaced by active possession.

The evidence of English possession and rule in the Middle Ages and after, both positive and presumptive, is very strong. French title in the Middle Ages depends on nothing but the abstract feudal conception. Evidence of French rule does not exist.

The positive evidence is particularly strong in the case of the Écréhous —and, I would add, the Chausey—by reason of the presence there of the Priory, which has given us the documents of legal title which I have discussed at considerable length. But that is not to be taken as any evidence that, had there been a Priory on the Minquiers, we should not have been able to produce similar documents, similar evidence. After 1500, evidence is relatively scarce. But there is some evidence relating to every century, right up to the end of the eighteenth century, after which, as the Court will hear directly, the evidence becomes abundant. All this evidence of the intermediate period, with which I have been dealing, shows that the English and Jersey connections were kept up. There is no French evidence at all relating specifically to the Écréhous and the Minquiers. Even the Chausey do not become finally French until 1764.

I can claim, therefore—I would respectfully submit to the Court—that I have made good my initial propositions, that England had the

title originally and has always kept up that title by a sufficient display of actual exercise of sovereignty—and that France has not. In the alternative, England acquired—has long since acquired—a title based on the long-continued exercise of sovereignty. That title, on one or other of these grounds, did exist in the Middle Ages : I have tried to show this morning that it existed right up to 1800, and Mr. Harrison will deal with from 1800 onwards ; and it does exist now.

In answer to this considerable and, I contend, weighty body of United Kingdom evidence, the Government of the Republic have brought forward practically nothing positive in reply. They have been chiefly content to place an unfavourable construction, sometimes plausibly, but always, I suggest erroneously, on evidence produced by the United Kingdom. On the positive side they have been content to rely on a dubious claim to an original title of a highly abstract feudal character, and on a presumption of an automatic continuance of that abstract title even in the absence of any concrete evidence that it has ever been exercised by possession, or by the exercise of authority.

Such an argument, I contend, is quite inadequate when weighed in the balance to disprove the far more considerable, more weighty and more concrete evidence which we have and which we shall place before the Court. The Court, moreover, may find that this evidence, which I have brought forward over the long stretch of the centuries, is further strengthened by what is now to be put before you ; that evidence which, the Court will see, continues with increasing tempo the same thread and pattern as that which the Court has heard from me up to now.

I have been examining the titles of the two countries at successive periods. This, Mr. President, I hope the Court will not take as indicating that I am in any way arguing against the principle applied in the case of the *Island of Palmas*. Indeed, I support with conviction that principle ; namely, that it is the function of a court of international law to submit each title to an independent examination covering the *whole* period of the case, and then balance the legal weight of one title against that of the other.

The Government of the United Kingdom and the States of Jersey have nothing, Mr. President, to fear from such an examination.

4. ORAL ARGUMENT OF Mr. HARRISON

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF SEPTEMBER 23rd AND 24th, 1953

[Public sitting of September 23rd, 1953, morning]

Mr. President and Members of the Court :

I venture to think that there is no need for me to introduce myself to you because I feel that that has already been done very kindly by Sir Lionel Heald, by Mr. Fitzmaurice and by Professor Wade—very kindly, and, if I may say so, not inadequately. It will by now be clear to the Court that I represent the island of Jersey, and that it is Jersey, which is immediately and directly affected by these proceedings. Although I am a member of the Bar of England, I enjoy the privilege of appearing here to-day, because I am a Jerseyman and because I have the honour to be the present holder of the office of Her Majesty's Attorney-General for the island of Jersey. I am to-day pleading a Jersey cause and I am therefore robed at this moment exactly as I am when I appear in the Royal Court of Jersey.

I have every reason to believe that this is the first occasion on which a Jersey lawyer has appeared in this Court, or indeed in any Court of international jurisdiction. I venture therefore to think that I am to-day creating a precedent which will be regarded as of very great significance and importance in the history of the island of Jersey. That thought, Mr. President, only serves to enhance the very high sense of honour which I derive from the fact of appearing in, and pleading before, this Court.

My task to-day is two-fold : first, to present to the Court the distinctively Jersey point of view, and to furnish it with a number of local facts such as would be particularly within the knowledge of a Jerseyman like myself ; and, secondly, to address the Court about the British administration of the Minquiers and the Écréhous in comparatively recent times—but by "recent" I do not mean just yesterday. "Recent" is a relative term. In relation to the whole history of this case, even 150 years ago is "recent". Yet it is also, in itself, a long period of time. It is about the events of this span of 150 years that I want to tell the Court.

I propose, Mr. President, to divide my speech into the following parts. First, I want to say a few words about the Channel Islands as a whole, and their relation to the English Crown. Secondly, I shall tell the Court something about the island of Jersey, in whose name and on whose behalf, as I have indicated, I have the honour to appear here to-day. Thirdly, I shall describe the geography of the Minquiers and the Écréhous, and show how directly related physically they are to Jersey. Fourthly, I shall describe the human links which exist, and which have for the past one hundred and fifty years existed, between Jersey and the Minquiers and the Écréhous ; and I shall endeavour to explain to the Court why this case is so important to us in Jersey. Fifthly, I shall consider the public acts of administration performed by the Jersey authorities and the French objections to the evidential value of those

acts, and I shall consider how far there are any similar French acts during the period with which I am dealing. Sixthly, and finally, I shall deal shortly with the hydro-electric projects referred to in the French Rejoinder for the installation of tidal power plants in the Bay of Mont St. Michel and in the region of the Minquiers archipelago.

I open the first part of my speech, Mr. President, by reminding the Court that we maintain that the origin of the title of the English Crown to the Channel Islands—of which we regard the Minquiers and the Écréhous as an integral part—lies in events as far back as 1066, when William, Duke of Normandy, became King of England. From that year right down to the present time, barring a few insignificant interruptions, the Channel Islands as a whole have been possessions of the English Crown, although to this day there are some Jerseymen who also think of our Sovereign as the Duke, or, as at present, the Duchess of Normandy.

I referred just now to "the Channel Islands as a whole". By that I meant to affirm a fact that our opponents seek to dispute, namely, the fact that the Channel Islands are now, as they were in the Middle Ages, a self-contained entity, physically distinct from continental Normandy. In seeking to cast doubt upon this fact, our opponents, on page 687 of their Rejoinder, twice refer to the Channel Islands as (I quote) "lying in a French bay". I should like to ask : what is this French bay—what are its limits ? Only in a very loose sense of the word "bay"—as for instance when one talks of a curvature in an extended coast line, such as the Bay of Biscay or the Bay of Bengal—do the Channel Islands lie within a bay at all. They do not, in the legal or juridical sense, lie within any bay, for they do not lie *inter fauces terrarum* in the proper sense of those words. They really lie in the English Channel *(la Manche)*, and that is why they are called the Channel Islands or, as sometimes in French, *les îles de la Manche*. A Bay of Vauville, yes. A Bay of Mont St. Michel, yes. A Bay of St. Brieuc, yes. All these are genuine bays along the French coast, and they are clearly to be seen on the chart which the Court will find at Annex B 1 to our Memorial. But, by contrast, if you stand on Pleinmont Point on the west coast of Guernsey, or at the Corbière on the west coast of Jersey, it is the full force of the Atlantic Ocean that meets you, it is not the waters of a bay, and the French coast is well and truly out of sight. Indeed, the nearest point on the mainland of Brittany (the Sillon de Talber, I believe) is as much as 36 miles from Pleinmont Point in Guernsey and 37 miles from La Corbière in Jersey. The only basis on which the Channel Islands as a whole could be said to lie within anything even approaching a bay, in the sense of *inter fauces terrarum*, would be if the extremities were Cap de la Hague at the northern tip of the Cotentin peninsula and the Porsal Rocks in Brittany. The line between these extremities would be as much as 130 miles long, and even then Alderney and the Casquets and part of Guernsey would still lie outside it. No line can be drawn from one headland (or island) to another in France which will include on the French side of the line all the Channel Islands. This goes to show how incorrect it is to speak of the Channel Islands as lying within a bay, be it French or Anglo-French.

I now return, Mr. President, to the point about the Channel Islands being an entity. They are certainly an entity geographically. If you stand on a high point on the island of Herm, which is roughly in the centre of the group, on a quite ordinary day, you can see clearly all the main islands of that group : Jethou just below you to the South-West,

Guernsey to the West, Sark and Jersey to the South-East, Alderney to the North-East. It is true that on a clear day you can see the French coast as well, but to the East, not to the South or West, and I do not think it can be disputed that, if you have a group of islands, and if, from the centre of that group on an ordinary day, you can see all the main islands of that group, that group of islands can fairly be called an entity.

The Channel Islands are also an entity politically, or if you like, historically. The French Rejoinder says, at page 687 (I quote), "the Anglo-Norman islands are Norman by nature and English merely as the result of the operation of history". It is, of course, true that the islands are Norman by *origin*, although it would be truer to say that they are *Norse* by origin. Certainly they are not French. But whatever their origin, it is a fact that history has performed its task of anglicization fully and completely.

The Court will no doubt have noticed that I pronounced the names of the reefs rather differently from Sir Lionel Heald, Mr. Fitzmaurice and Professor Wade. They spoke of them as the Minquiers [jié] and Écréhous [é-kré-ou]. I pronounce the names in the manner in which I have always heard them pronounced in Jersey: Minquiers [min-kiz] and Écréhous [ekre-hos]. I have known them to be pronounced thus all my life, and this, I think, affords a very clear example of the peculiarity that, in Jersey, many of the Norman place names and family names have become completely anglicized in their pronunciation.

No visitor to any of the islands to-day can doubt their thoroughly English character. It is true, Mr. President, that many of our customs and laws and institutions are of Norman origin, but the same is true of England itself. It is true also that many Channel Islanders still speak a dialect of French, and that French is still the official language, though it is fast yielding to English in everyday use; it is true that Jersey, in particular, has many close ties with France, though nowadays it is more with Brittany than with Normandy, because we are happy to employ many Breton labourers on our farms. But substantially our ties of sentiment, as well as of commerce, are with England. For us, France is, as it is for the English themselves, "the Continent", while England is for us the "mainland", indicating, I think, something that is spiritually and sentimentally nearer.

In this connection, I cannot, I think, do better than to quote the following figures relating to Jersey for the year 1952, which I have obtained from the competent local official. They are figures of imports:

Imports from the United Kingdom	205,784	tons
,, ,, France	1,467	,,
,, ,, other foreign countries	6,625	,,
Passenger arrivals from the United Kingdom	264,704	
,, ,, ,, France	33,865	

It is significant that there is a regular daily service by passenger steamer from Southampton or Weymouth to Guernsey and Jersey throughout the year, whereas the passenger service between Jersey and France, that is through the port of St. Malo, operates only once a week throughout the year. As regards scheduled services of aircraft, there are on an average throughout the year approximately three times as many daily services between Jersey and the United Kingdom

as there are between Jersey and France. In short, our main connections are with England.

During the German occupation of the Channel Islands from 1940 to 1945, we were, of course, very largely dependent upon France for our supplies of foodstuffs and other essentials of life; and we who were in the islands during that unhappy period will never cease to remember with gratitude the help we received from French sources in those dark days. But it cannot be disputed, Mr. President, that under normal conditions almost all the imports into the islands and a very high percentage indeed of the passenger traffic to the islands come from the United Kingdom.

Perhaps—although I have not yet come to the point of dealing with the Minquiers and the Écréhous as such—my reference to the German occupation makes this the convenient place to say that during the occupation all communication from Jersey with the Minquiers and the Écréhous was forbidden, but immediately after the liberation of the Channel Islands—which was not until May 1945—official visits to both the groups were made from Jersey. The Court will find the details in Annexes A 100 and A 131 to the United Kingdom Memorial. And there is also, in the book of Annexes C, a photo taken on that occasion—the occasion of the first official visit to the Minquiers after the liberation of Jersey in May 1945. I mentioned the fact that official visits were made to the two groups of islands very soon after the liberation, as showing that we, in Jersey, had no doubt at all that these groups were part of the Channel Islands and also administratively a part of Jersey.

Administratively, the Channel Islands, though a geographical entity, are to-day divided between the bailiwicks of Guernsey and Jersey. The bailiwick of Guernsey consists of the islands of Guernsey, Herm, Jethou, Sark and Alderney, as well as the islets that are dependencies of the above, such as Lihou off Guernsey, Brecquou off Sark and Burhou off Alderney. This goes to show, I think, that the term bailiwick is not necessarily confined to one single island, but is a term comprising a number of islands and islets spread over quite a considerable area. The other bailiwick, that of Jersey, consists not only of the island of Jersey itself, but also of the Minquiers and the Écréhous—at any rate Jerseymen have always thought so.

I now come, Mr. President, to the second part of my speech in which I wish to tell the Court something about the island of Jersey itself. There is no irrelevancy here, for, after all, as I indicated a few moments ago, it is our claim that the Minquiers and the Écréhous are administratively part of Jersey. First, then, as to its constitution. This is explained in some detail in paragraphs 59 to 66 of the United Kingdom Memorial, and there is therefore, I think, no need for me to say much about it. But I would like to say a few words about the States of Jersey.

The administrative authority of the States is exercised through Committees of its members elected by, and responsible to, the Assembly of the States. Two of these Committees, that is to say, the Harbours and Airport Committee as it is now known (it was formerly the Piers and Harbours Committee) and the Finance Committee are directly concerned with the Minquiers and the Écréhous, the former because it is responsible for fisheries, the establishment and maintenance of slipways, shore installations, buoys and beacons, and generally all matters

relating to shipping and navigation : the latter because it is the Customs Authority.

The island is subject to the legislative supremacy of the United Kingdom Parliament, but that supremacy is exercised only in relation to matters of imperial interest, such as defence or nationality. In all other matters, the States initiate and pass their own legislation, subject only to the approval of the Crown in Council. Jersey, therefore, as the Court will see, enjoys a large measure of autonomy. It is for that reason that we Jerseymen look upon this case as being primarily ours rather than that of the United Kingdom. It is true that the sovereignty of Her Majesty over the Minquiers and the Écréhous is at stake, but from our own local point of view the question before the Court is whether or not Jersey should lose some of her dependencies. For these reasons, Jersey has been closely associated with all the negotiations and other acts leading up to the present proceedings, and, as the Court heard from Sir Lionel Heald the other day, the States of Jersey gave their formal concurrence in the submission of this matter to the Court.

During the nineteenth century there was an important ship-building industry in the island, chiefly of ships for the Newfoundland fishing industry, in which vessels operating from Jersey used to play a considerable part. Side by side with this foreign trade was the local fishing industry, in which, of course, was included that carried on at the Minquiers and the Écréhous. There is already much material before the Court to show how important this industry was, but it may be of assistance to the Court to hear something about it from the lips of one who has lived very close to it, as I have done. It will, however, be more convenient to defer doing this until after I have said something about the geography of the groups, and shown their physical relationship to Jersey.

In the consideration of this matter of the geography of the groups, their physical relationship to Jersey, which, as I indicated earlier, will form the third part of my address, I will begin with the Minquiers. As shown in our Memorial (the relevant paragraphs are numbers 8-12), the Minquiers are a widely scattered group of islets and rocks lying on a sunken plateau or reef, of which the only two that are habitable are Maîtresse Île and Les Maisons. Maîtresse Île is 200 yards by 50 yards, and contains a slipway, a custom-house, a house known as the Bailiff's house, a first-aid building and a flagstaff, all constructed or adapted, and maintained, by the States of Jersey—clear acts, I submit, of administration, and therefore manifestations of sovereignty. I hope the Court will find it convenient to refer to the photographs given at Annexes C 7-10 to our Memorial. I have here, in addition, a composite photo of the Maîtresse Île, and I will hand in a copy of this, as of certain further exhibits which I shall mention presently, to the Registrar, so that it can be circulated to the Members of the Court when convenient. I shall also, of course, hand a copy of each exhibit to my friend Professor Gros.

On Maîtresse Île there are, in addition to the buildings that I have mentioned, and as this photograph shows, a number of huts and houses built by Jerseymen ; many of them are now, as the result of the German occupation—because the Germans occupied the Minquiers as well as other places—in some disrepair ; and this photograph, which was taken in 1945, shows clearly that state of disrepair. In addition

to the huts that I have mentioned, built by Jerseymen, there is also a hut specially built for Jersey fishermen by the States of Jersey. Maîtresse Île is 11.5 sea miles from La Rocque Point, the nearest point in Jersey; it is 17 sea miles from Pointe du Meinga, the nearest point on the mainland of France. It is true that the Chauseys are only 8.5 sea miles from Maitresse Île, but, if the Members of the Court will look at the chart which forms Annex B 1 to the United Kingdom Memorial, they will see, I think, that if one considers the Channel Islands as a whole, starting with the Casquets and Alderney at the top as it were, and coming down through Guernsey, Herm, Jethou and Sark to Jersey, it is the channel between the Minquiers and the Chausey (named the *Entrée de la Déroute*), rather than the channel between Jersey and the Minquiers, which forms the natural line of division between the Channel Islands and France. This no doubt partly accounts for the fact that the Chausey in the eighteenth century finally passed into the hands of the French. It cannot possibly be said of the Minquiers that they are dependencies of the French coast, situated as they are 19 miles from Granville and 19 miles from St. Malo. The distance between the Minquiers and Jersey (9.8 miles) is less than the distance between Jersey and Sark (which is ten and a half miles); it is less than that between Jersey and Guernsey (15 miles) and it is less than that between Guernsey and Alderney (which is 16 miles).

I am aware, Mr. President, that it is the French claim that the Minquiers are dependencies, not of the French coast as such, but of the Chausey. The Minquiers are, however, a very much larger group in total area than the Chausey, and I shall hope to show presently that there is no ground of any kind, historical or geographical, for the suggestion that they are dependencies of the Chausey. I must confess that the suggestion, made in the French Counter-Memorial, that the Minquiers were a dependency of the Îles Chausey came to me as something entirely new and certainly something very novel. To the best of my knowledge, Father de Gibon, the recognized modern authority on the subject of the Chausey islands, never advanced such a claim. Indeed, in his work, to which Professor Wade has already referred, *Les Îles Chausey et leur Histoire* (second edition, 1935, at p. 104), referring to the building of the fortress on the Îles Chausey by Henry II of France, which is mentioned on page 398 of the French Counter-Memorial, and again on page 701 of the Rejoinder, he says (I translate):

> "The Îles Chausey must not be allowed to suffer the same fate as the rest of the Anglo-Norman islands."
>
> "Il ne fallait pas laisser les îles Chausey suivre le sort du reste des îles anglo-normandes."

It seems to me that this can only be interpreted as meaning that Father de Gibon regarded the Chausey as being exceptional, in that they alone of the Channel Islands were not under British sovereignty.

It is, incidentally, rather curious that, on page 688, the French Rejoinder, dealing with the Chausey, uses language strongly reminiscent of that of Père de Gibon. I quote from the English translation, at the bottom of page 3[1] of the translation:

[1] English text not reproduced.

"In fact, the natural whole here in question was completely integrated in a legal whole only in the beginning, in ancient times, when a unified sovereignty applied to the Norman coast and to the archipelago in the Norman bay of the Cotentin. At the present time the Chausey islands do not form a part of the secondary whole and remain under the original sovereignty.

Their fate has been different from that of the remainder of the archipelago, except perhaps for a short period."

That last sentence, Mr. President, if I may quote it in French, reads as follows:

"Elles n'ont pas suivi le sort du reste de l'archipel, si ce n'est peut-être pour une courte période."

The words "le reste de l'archipel" must, I suggest, have the same meaning as the words "le reste des îles anglo-normandes" used by Père de Gibon. Clearly, our opponents, like Père de Gibon, regard the Chausey as being different from the rest of the archipelago. And they are indeed different in this: that they alone now belong to France.

It is interesting, too, to note that Père de Gibon is not the only French writer to take this view.

Camille Vallaux, then Professor of Geography at the Navy College in Paris, in his book *L'Archipel de la Manche* (1913), names the various islands of the Channel Islands, and mentions amongst them both the Minquiers and the Écréhous. He then proceeds (I quote from p. 5 of the book, which, of course, is at the disposition of the Court, and translate):

"These islands [that is, the Channel Islands], with the exception of the Chausey, belong to England. They have been English for more than 700 years. Their destinies separated them from France in 1204, when Philip Augustus, following the murder of Arthur of Brittany by John Lackland [that is to say, King John of England], confiscated the Duchy of Normandy and reunited it to his crown. The islands continued to acknowledge the authority of John Lackland and France forgot them. They remained subject to the English King."

And Maurice Perrot in his *Deux Expéditions insulaires françaises* (Paris, 1929)—a book in which he deals with two insular expeditions, one which he refers to as the *Surprise de Jersey en 1781* and the *Prise de Capri en 1808*. That book, which has a preface by Monsieur le Général Gouraud, contains the following passage at page 15 (I translate):

"In the same year [that is to say, in 1765] the Council [of the King of France] gave permission to the hospital of Saint-Helier to take from the island stone for the construction of its buildings. Finally, in 1766, they built a chapel there for the 200 workers working in the extraction of granite. This method, which did not affirm our rights with impressiveness, but which, however, marked well an effective taking of possession, had a happy result at the time and later, for our rights were not contested, and of all the group of anglo-norman islands the Chausey alone remained French."

"de tout le groupe des îles anglo-normandes, seules les îles Chausey sont restées françaises".

Maurice Perrot was writing of the year 1765 or 1766, that is to say after the year 1764 in which we admit, as Professor Wade showed this morning, that the Chausey passed firmly into the hands of the French. But although we have admitted that they then passed firmly into the hands of the French, it is noteworthy from the passage I have just quoted that the French themselves were by no means satisfied that they had passed firmly into their hands, and it is clear that their possession of the Chausey, they even then, in 1765, regarded as precarious. The writer concludes:

> "de tout le groupe des îles anglo-normandes, seules les îles Chausey sont restées françaises".

I said a few minutes ago that I had never previously heard of the French claim that the Minquiers were dependencies of the Chausey. I can, however, readily see, in the light of the statements of French historians that I have just quoted, why the Government of the Republic should wish to claim them as dependencies of the Chausey, for if the Chausey are—as these historians clearly say they are—exceptional in that they alone of the *îles anglo-normandes* belonged to France, then clearly the only basis on which France could be awarded sovereignty over the Minquiers would be if they were dependencies of the Îles Chausey. But that basis would not in any sense cover the Écréhous.

Another point, Mr. President, occurs to me in relation to the claim that the Minquiers are dependencies of the Chausey.

As the Court will remember, Article 1 of the Convention of 1839, of which much has already been said, laid down certain lines for the purpose of (I quote) "defining the limits between which and the French shore the oyster fishery shall be reserved exclusively to french *[sic]* subjects". Included within the limits thus defined were the Chausey, but not the Minquiers. I should have thought that if the French Government had regarded the Minquiers as dependencies of the Chausey, they would have been very careful to see that the Minquiers were included with the Chausey on the French side of the line. The same observation applies in respect of the 1867 negotiations, when an identical line was adopted—and also as regards the Agreement of 1928 referred to in paragraph 68 of our Memorial, again affirming the same line.

[Public sitting of September 23rd, 1953, afternoon]

I come now, Mr. President, to the geography of the Écréhous. The Court will find the physical and topographical details set out in paragraphs 5 to 7 of the United Kingdom Memorial, and they will also find some photographs in Annexes C 1-6 and C 12. In addition, I have here a surveyor's coloured drawing which may interest the Court. A copy of this I shall give to the Registry.

The Écréhous consist of three main islets and about twenty above water rocks. The group stretches for about four miles. Maître Île, the largest, is 300 yards by 150 yards [here and in the following passage Mr. Harrison accompanied his remarks by pointing to appropriate spots on the drawing and on the photographs which he displayed

to the Court]. On it stand the ruins of the old priory, and there is now a modern slipway and a beacon (both built by the States of Jersey), as well as a house. About 500 yards to the North of Maître Île, though almost joined to it at low water, there is Marmotière. Marmotière has on it a custom-house, a slipway, and a flagstaff, all erected or adapted and maintained by the States of Jersey, as well as fourteen huts, all owned by Jerseymen. Joined again to Marmotière at low tide is Blanc Île, on which the Court will see the house owned by Major Bolitho, to whom Sir Lionel Heald referred the other day (Major Bolitho, as I think Sir Lionel said, is the husband of a former Miss Lemprière, a member of one of Jersey's oldest and most distinguished families).

Now, of the rocks of the Écréhous group, the one which is nearest to Jersey is Grande Rousse, and this is 3.9 sea miles from La Coupe Point, the extreme north-east point of Jersey. The rock which is nearest to the mainland of France is Bouvet, which is 6.6 sea miles from Cap de Carteret. Maître Île, the largest islet—as I have said—is 4.95 sea miles from La Coupe Point in Jersey; it is 7.3 sea miles from Cap de Carteret in France. These figures show, I submit, that the Écréhous are substantially nearer to Jersey than they are to France. The figures are all the more striking if one considers the rocks that are furthest away respectively. Of the entire Écréhous group, the rock which is furthest from Jersey is Bouvet, and it is 5.6 sea miles from La Coupe Point. But the rock furthest away from the mainland of France, Grande Rousse, is as much as 8.6 sea miles from Cap de Carteret, the nearest point on the French coast. Not merely individual rocks, but the group as a whole is substantially nearer to Jersey than to France. In fact, if you walk along the north coast of Jersey you will find that this coast is protected and sheltered from the full force of the sea by a series of rocks, starting with Les Pierres des Lesq (the Paternosters) to the North-West, Les Dirouilles to the North, and the Écréhous to the North-East. Here I would ask the Court to look at the aerial photographs of Jersey and of the Écréhous which I have here.

There are four of these photographs. The first of them is a general view of the island of Jersey, which I trust the Court will find interesting. The second shows the Écréhous in relation to the nearest point in Jersey, La Coupe Point. The third shows the Écréhous in relation to the nearest point on the mainland of France, Cap de Carteret. And the fourth is a composite photograph showing the Écréhous in relation to La Coupe Point in Jersey and in relation to Cap de Carteret in France. I think I should perhaps tell the Court that—or rather draw the attention of the Court to certain white specks or flecks on this composite photograph. The really white specks which are to be seen near the Écréhous are other rocks of the group, but there are some very symmetrical white flecks which are to be seen on the French side of the Écréhous—those, I have to tell the Court, are not rocks, they are mere faults in the photograph, due to defects in the camera. The Members of the Court can, I think, confirm that this is so from the charts.

Only two miles of sea separate Grande Rousse in the Écréhous from Les Burons, the nearest above water rock in Les Dirouilles. Furthermore, Grande Rousse in the Écréhous is less than three miles from Joli, a drying rock in the Dirouilles, which is in turn less than three miles from the mainland of Jersey. The effect of this is that, even if one measures the

territorial waters of the mainland of Jersey according to the very strict principles followed by the United Kingdom, Grande Rousse in the Écréhous group is actually within the territorial waters of the mainland of Jersey. So that, if the Écréhous were awarded to France, it would not mean giving France a mere *res nullius* or no man's land ; it would mean actually detaching what is unquestionably a part of Jersey itself and giving it to France.

Taken together, Les Pierres des Lesq (the Paternosters), Les Dirouilles and the Écréhous form an almost continuous chain of rocks protecting the northern coast of Jersey. Physically and geographically, these rocks can be considered as one with the mainland of Jersey, so that it is they which really constitute the northern coastline of Jersey.

I now pass, Mr. President, to the fourth part of my speech—the human aspect of this matter. I shall start with fishing. At a very early age I went with my parents to live at La Rocque, a village at the south-eastern corner of the island. I have lived in that neighbourhood ever since. I remember well how, in the early days of my residence there, nearly every man in the village was a fisherman and how they used, *all* of them, to go regularly to the Minquiers to fish. They used to sail to the Minquiers every Monday morning during the season ; sometimes, because of lack of wind, having no engines in the boats in those days, they used to row. They used to stay there till the Friday, when they returned with their catch, for their wives to take it to the market in St. Helier on the Saturday morning. Many of them used to spend the Saturday evening in the local inn, and most of them went on the Sunday to the local chapel, which I myself used to attend. They were all, or nearly all, of them known to me personally, and they were, if I may say so, a fine breed of men. I can remember most vividly the gloom which was cast over the village in September 1916, when a boat returning from the Minquiers was lost in a storm.

I have known nearly all my life Philip John Le Clercq, Frank Gallichan and Ernest Gallichan, whose affidavit is set out in Annex A 139 to the United Kingdom Memorial, and in which reference is made to the tragedy of September 1916. Many of the other facts set out in this affidavit are within my own personal knowledge.

The Court will have observed that these three men state that they —each of them being now between 60 and 65 years of age—began to fish at the Minquiers with their fathers as soon as they left school. And the brothers Gallichan speak of their great-grandfather having fished there. They refer also to other men who were fishing there over a hundred years ago : and, on the basis of this evidence and of some further evidence to which I shall refer in a moment, all of which is amply confirmed by all that I myself have ever known or heard, I think it must be beyond dispute that the fishermen of La Rocque fished at the Minquiers regularly throughout the nineteenth century and right up to the fourth decade of the present century.

The further evidence of which I spoke a moment ago is to be found in a case which was heard in the Royal Court of Jersey on the 28th May 1811 ; it is recorded in Annex A 164 in the United Kingdom volume of Additional Annexes. It was an action brought by Édouard Le Rougetel, Nicolas De Ste. Croix, Jean Le Vesconte, Charles Le Vesconte, Jean Filleul, Thomas Touzel, Philip Mourant, Hugh Mallet, Jean Mourant and Philip Journeaux. (The Court may perhaps have noticed that I

pronounce some of those names in the French way and others in the English way: I pronounce them, in fact, Mr. President, in exactly the way in which we pronounce them in Jersey to-day.) In their statement of claim, the plaintiffs said that in the month of March 1810 they had gone *"avec des bateaux aux rochers appellés Marquais dans l'intention d'y faire la pêche"*—they had gone with boats to the rocks called the Marquais, with the intention of fishing there—and that they had found a ship wrecked there with no one aboard. Having proceeded, with the assistance of other men whom they had engaged for the purpose, to save the ship's gear and a part of the cargo, they claimed salvage from the owner of the ship and the owners of the cargo. I shall refer to this case again in another connection.

But the facts that I have stated show that at least ten Jerseymen went to fish at the Minquiers in the month of March of the year 1810. The surnames of these men are all names with which I have been familiar since my childhood: bearers of nearly all of them have been personally known to me as residents of La Rocque, and I think it reasonable to suggest that the ten plaintiffs in this case, heard in the Royal Court of Jersey in May 1811, were in fact all La Rocque fishermen.

The fact that among them was one Jean Le Vesconte is, I think, particularly interesting. The Court will remember that one of the Annexes (A 132) to the United Kingdom Memorial is the affidavit of Major Rybot, Vice-President of the *Société jersiaise*. In it he says that on the 7th July 1928, while engaged in archaeological researches at the Minquiers, he noted and sketched two sets of initials cut in the rock. The photographic reproduction of his sketch, which is given as Annex C 19 to the Memorial, shows that one of these sets of initials was "JLVC", with the date "1792". We have suggested, in paragraph 166 *(b)* of the Memorial, that these initials would be the normal Jersey abbreviation of "J. Le Vesconte" (spelled "VESCONTE"), and that this cutting was the work of a man of that name, a Jerseyman and a practised craftsman, who was engaged in the quarrying operations which are known to have been carried out on Maîtresse Île at the Minquiers in 1792. It now seems reasonable to suggest further that this man was of the same family as the Jean Le Vesconte who was one of the plaintiffs in the action heard by the Royal Court of Jersey on the 28th May 1811, and a forebear of Jerseymen who bear that name to-day. Perhaps, indeed, he was the same man.

The affidavit of Philip John Le Clercq, Frank Gallichan and Ernest Gallichan, to which I have referred, goes on to say that the deponents never heard from their fathers or from any of the other La Rocque fishermen that their fishing had been in any way interfered with by French fishermen, and that they (the deponents) never saw any serious fishing at the Minquiers by French fishermen until about 1930. It was only then, with the introduction of motor-engines for fishing boats, that the French began to do any serious fishing at the Minquiers.

This statement, I may add, is confirmed by the affidavit of Mr. William Smythe Le Masurier, a Solicitor of the Royal Court of Jersey, which is set out in Annex A 109 to the Memorial. In that affidavit he says that he first started visiting the Minquiers in 1917, and he goes on:

> "Up to the outbreak of war, we very seldom saw any French fishermen within the outer limits of the reef, and the first as far

as I am aware who regularly fished there and this for the purpose of line fishing for whiting only was a Mons. Viot from Cancale who began in 1937 or 1938."

The Court will also see in these affidavits references to the decline in Jersey fishing at the Minquiers brought about by recent French competition. The economic effect of this on the livelihood of Jerseymen would have been even more serious than it has, but for the considerable development of agriculture and market gardening that has taken place in Jersey since the first world war. Nevertheless, the fishing—particularly at the Minquiers—continues to be a most important potential factor in our economy.

Another reason for the present decrease of fishing at the Minquiers by Jerseymen lies in the fact that during the German occupation of the island from 1940 to 1945, Jersey fishermen were prohibited from going to the Minquiers. When, after the liberation of the island, they were able to take up fishing again, they found that fishermen from the Cotentin coast—and it will be remembered that that part of France was liberated in June or July 1944, that is to say, ten months or so before Jersey—those fishermen from the Cotentin coast were operating at the Minquiers in such a manner as to create competition which the Jersey fishermen, with their more limited resources, were unable to meet.

I turn now, Mr. President, to fishing at the Écréhous. In that connection we have referred, in paragraph 146 of our Memorial, to the work of Lieutenant Bailiff Jean Poingdestre, dated 1682, and entitled *Caesarea or a Discourse of the Island of Jersey*, in which there appears the following:

> "The small Islot of Ekerho [Écréhous] had anciently a small Priory belonging to Jersey, & endowed from thence; the Ruines whereof remaine to this day; which serue in rainy weather for a shelter to such as goe thither to fish or fetch Vraic...."

There is therefore evidence of fishing by Jerseymen at the Écréhous as far back as 1682.

I myself am unable to speak of fishing at the Écréhous with the same degree of personal knowledge as I can of the Minquiers. The Écréhous area has always been fished principally by men from Rozel—a village on the north-east coast of Jersey, that is to say at some distance—judged by Jersey standards—from where I live. I cannot claim to have known many Rozel fishermen as I have known La Rocque fishermen, but I do know, and have known for some years, Joe Thomas Becquet, whose affidavit is set out in Annex A 106 to our Memorial.

In that affidavit, he says that his father and his grandfather spent all their lives, as he himself has done—he is still fishing at the Écréhous—they spent all their lives, and he has spent all his life, as a fisherman at the Écréhous. His grandfather, he says, must have started fishing there before 1840, but he has always understood that there were Jerseymen fishing at the Écréhous before his grandfather's time. It is, in fact, more than probable that Jerseymen fished the Écréhous regularly at least from the beginning of the nineteenth century. Annex C 11 to our Memorial gives a photograph of the ruins of an old stone hut on which are to be seen the figures "1820". Those ruins

stand on that point of the surveyor's sketch. [Here Mr. Harrison pointed this out on the sketch displayed before the Court.] As I have said, they are clearly to be seen in the photograph reproduced as Annex C 11. And we have referred further to the letter from the Viscount of Jersey to the Lieutenant Governor of the island, dated the 14th May 1846, set out in Annex A 101, which speaks of a house being built at the Écréhous by a Jerseyman in about 1826, and to huts which Jersey people had there before the birth of the woman referred to in this letter, who must have been at least middle aged in 1846.

Becquet's affidavit also shows that not until recently was there any French fishing at the Écréhous.

Apart also from the question of fishing, the Minquiers and the Écréhous were of interest from the point of view of the gathering of seaweed for use as a fertilizer of the soil and as fuel.

We have referred, in paragraph 144 of the Memorial, to the survey of the islands of Jersey, Guernsey, Alderney, Sercq and coast of France, made by Capt. Martin White of the Royal Navy, some time between 1812 and 1828. On a chart of the Écréhous which he drew at some time before 1823, on which he showed huts on Blanc Île, Marmotière and Maître Île, he wrote:

> "There are 5 or 6 huts on the Maître Isle *[sic]*, & about twice that number on the Marmotier, belonging to Inhabitants of Jersey, who occasionally resort thereto during the Fishing & Vraching [gathering of seaweed] seasons. These 2 latter will also afford occasional shelter to small Boats & their crews, against the inclemency of the Weather, in which case they should be beached & hove up. There is however neither Fuel, sustenance or Fresh water (except rain water in $\frac{e}{y}$ cavities of $\frac{e}{y}$ rocks) on either."

Similarly, on a chart of the Minquiers which he drew at about the same time, he wrote—I refer to paragraph 169 of the United Kingdom Memorial:

> "there is a hut built on the Island for the occasional protection of the Fishermen and Vrachers [gatherers of seaweed] who frequent the place for the purpose of obtaining the Conger, Ormur (Oreille de Mer) Lobsters which here abound in great profusion".

The Court will find Captain White's chart, on which the Minquiers are clearly marked as British, as our Annex B 9. In Annex A 138 the Court will find a sketch by Captain White of the Maîtresse Île showing the existence of buildings as long ago as about 1815.

Further evidence of the fact that Jerseymen frequented the Minquiers in the early days of the nineteenth century for the purpose of gathering seaweed is to be found in the Rolls of the Royal Court of Jersey. A case regarding the salvage of a ship wrecked at the Minquiers was heard by that Court on the 3rd October 1817 (the details are given in Annex A 165 in the United Kingdom volume of Additional Annexes). The plaintiffs were Francis Laffoley, Jean Selous and Jean Jean, and they, in their statement of claim, stated that, on Monday, the 14th April 1817, they went to the Minquiers "couper du vraic"—to cut vrac.

I refer to this case here, Mr. President, for the purpose of showing that Jerseymen resorted to the Minquiers in the early years of the nineteenth century to cut seaweed—just as I referred earlier to the case heard by the Royal Court of Jersey on the 28th May 1811—with the object of showing that La Rocque fishermen were at that time fishing at the Minquiers. Now, whether or not the hearing of these cases by the Royal Court of Jersey constituted in itself an assertion of sovereignty, these cases have their place, in my submission, as part of the general picture of the relationship of Jersey to the Minquiers and the Écréhous. They are clear evidence that the authorities of the island thought their jurisdiction embraced the Minquiers. These cases are in fact analogous to the cases of wreck considered earlier—and referred to by Professor Wade—which occurred in 1615, 1616 and 1617, and in 1692. This seems also to have been the French view, if we may judge from the statement of the French Minister of Marine two years later than the case of 1817 to which I have just referred—that is to say in 1819—and which is given in Annex A 25 and in relation to which Annexes B 4 and B 5 are of importance. That statement of the French Minister of Marine, as I say, is given in Annex A 25, and in it he speaks of the Minquiers as British—"possédées par l'Angleterre". Since this statement was made in a letter written by the French Minister of Marine to the French Foreign Minister, subsequently officially communicated by the French Ambassador in London to Lord Castlereagh (see Annex A 24), we feel entitled to rely on it as a definite recognition of British sovereignty over the Minquiers.

May I also at this point draw the attention of the Court to the document filed as Annex A 166 in the volume of Additional Annexes—namely, the letter from the Lieutenant Bailiff of Jersey to the Lieutenant Governor of Jersey in 1821. Apart from throwing an interesting light on the contemporary situation in regard to the oyster fishery as a whole, this letter shows quite clearly that whereas Jerseymen had been accustomed to fish from time immemorial, and without any restriction in peace time, the general area between Jersey and the coast of France, the activities of the French fishermen had always been confined to the area inside—that is to say on the French side of—a line drawn between St. Malo and Granville ; that is to say, well away from, and much closer to, the mainland than the Minquiers.

I come next to the matter of the Jersey houses and hutments on the Minquiers and the Écréhous. It was, we contend, the Jerseymen, who went to the Minquiers and the Écréhous to fish and gather seaweed and who built the huts that are mentioned in various documents quoted in the United Kingdom Memorial. No such hut, apart from the hut of refuge erected by Marin Marie in 1939 (which is referred to in the affidavit of Mr. Le Masurier at Annex A 109), has ever been built by a Frenchman, and the only real attempt in that direction made by a Frenchman was that by M. Le Roux on Maîtresse Île at the Minquiers, in 1929, which was speedily abandoned on representations being made by the Government of the United Kingdom.

It will perhaps be argued by our opponents that the building of houses or huts on a piece of land does not constitute evidence of sovereignty. To that I would reply that it does at least imply a very strong belief on the part of the builders that sovereignty belongs to the Power of which they are subjects ; while the representations made by that

Power against the unauthorized attempt of a national of another Power to build on the island is quite definitely an assertion of sovereign rights.

I shall now try to explain to the Court the interest in this matter of the people who have inherited or acquired properties on the islets, and who have always believed in perfectly good faith that they had an absolute right, as Jerseymen and British subjects, to those properties—properties which they had acquired and which they held under Jersey law. Most of the details of what I have to say can be found in the United Kingdom Memorial, but it is my task, on behalf of the islanders of Jersey, to whom all this means so much, and whose case I am putting here, to emphasize the human aspects of the matter. Behind it all lies not merely an interesting legal or historical question. There is also the human question of people, actual people, who have properties on these islets—admittedly, for the most part, only small huts or cottages, but nevertheless properties—many of which they and their ancestors have held for very many years in the faith that they are part of Jersey. These people, who have spent money buying or constructing or reconstructing these cottages, have done so in the faith that the islets were possessions of the Crown of England, on which the subjects of the Crown could enjoy rights of ownership as full and complete as they could enjoy in Jersey. These people have fished there regularly over generations, and have sold their fish in Jersey, the natural market ; and even apart from that, there is the question of the rights which these people honestly believe themselves to have acquired.

Some of the properties have been in the hands of the same families for very many years. For example, one, at least, of those which are now owned by Lt. Col. R.C. Robin, at the Écréhous (the Court will find the reference to it in the affidavit of Mr. Furzer, Annex A 98), was formerly owned by Colonel Robin's maternal great-grandfather, the Rev. W. Lemprière, Seigneur of Rozel. The houses at the Écréhous, referred to in Mr. Furzer's affidavit as being owned by J. T. Becquet and J. C. Becquet, formerly belonged to the latter's grandfather, and, just as there are houses at the Minquiers to-day owned by the heirs of T. Gallichan, deceased, C. Marie and C. Hamon (I refer again to Annex A 98—the affidavit of Mr. Furzer), so there were in 1888 (Annex A 129) houses owned by Thomas Gallichan, Philippe Gallichan, Elias Gallichan, Elias Gallichan, Junr., Clement Gallichan, John Marie, Charles Hamon and Clément Hamon.

There is, therefore, Mr. President, a long history of ownership of properties, both at the Minquiers and at the Écréhous, by Jersey families.

Now here I would refer to the contention of the Government of the Republic (at p. 400 of the Counter-Memorial) that—I quote :

> ".... even if there were British houses on the disputed rocks, the existence of private property would not suffice to decide the question of the sovereignty of the disputed territories".

Now, even if this were wholly true, I would submit that the position is vastly different where the existence of such houses is coupled with a long continued exercise of administration by the country of which the owners of the houses are subjects. I shall deal with the various acts of administration in the next part of my speech, but I would wish to emphasize here that these people, who were eye-witnesses of acts of

administration on the part of their own authorities, never saw any comparable act on the part of the Government of the Republic, and therefore they never had any reason to suppose that the sovereignty was other than British, or that a possible French sovereignty could be in question.

May I, in this connection, cite the wording of one or two of the earlier contracts. For example, we find that on the 21st November 1863, there was passed in due form of law before the Royal Court of Jersey a contract whereby Clement Gallichan sold to Josué Le Bailly a certain house situate in the parish of Trinity, on the fief de Diélament and—I quote—"*généralement tout et autant comme audit Bailleur & Vendeur en appartient en ces lieux là ainsi qu'aux Écréos* [sic] *sans aucune réserve ni retenue quelconque*"—"generally all and as much as to the said lessor and vendor may belong in that area, as well as at the Écréhous, without any reserve or deduction whatsoever"—this is Annex A 91 to the Memorial. And on the 25th June 1881 (Annex A 92), there was similarly passed before the Royal Court of Jersey in due form of law a contract whereby Lerrier Godfray sold to Henry Charles Bertram "*certain édifice qu'il a fait ériger sur les rochers dit 'Écréos'* [sic] *attenant à et dépendant de la Paroisse de Saint Martin en cette île, sur le Fief de Sa Majesté ou autre Fief*"—"a certain building which he has caused to be erected on the rocks called 'Écréhous', belonging to and depending on the parish of St. Martin in this island, on the fief of Her Majesty or other fief". It was this same "*édifice*" which Mr. Bertram sold on the 22nd October 1884 (and I mention this incidentally) to the Assembly of the Governor, Bailiff and Jurats—the Customs Authority of Jersey; that contract is at Annex A 86. And I would ask the Court to note that these three contracts—the one of 1863, the one of 1881 and the one of 1884, the last the one of purchase of a house at the Écréhous by the Customs Authority of Jersey—were all made and registered at dates earlier than the first formal claim made by France to the Écréhous, that is to say, 1886—and I refer the Court to Annex A 41.

We submit, however, that the attempt made by the Government of the Republic to deny the evidential value of property ownership evades the real issue and expresses only a half truth. Naturally, we agree that if an Englishman owns property in France, that does not make his property English soil, any more than a private French property in England is French soil. But when you find houses on an island, all of which are owned by the subjects of a certain country, and there is no concrete evidence on the island of the sovereignty of, or of administration by, any other country, then a strong and almost irresistible presumption arises that the sovereignty is vested in the country whose nationals own those houses. In such circumstances the presence of the houses, while it might not be *per se* conclusive evidence of sovereignty, is, I submit, very forcible presumptive evidence of it.

But it is more than that, Mr. President. Except in the jungle, ownership is governed by law. When you say a man owns a house somewhere, you mean there is some applicable law that recognizes him as owner. Now, what is that law? Is it the personal law of the owner? The answer is clearly that it is not. When an Englishman owns property in France, does he own it under and in accordance with the forms and requirements of English law? No. He owns it under French law, and French law

governs, and indeed, constitutes, his ownership. It is by reason of French law that he owns his property. Without it he would not own it.

Now, let me, Mr. President, apply these principles to the Minquiers and the Écréhous. These Jerseymen are not just squatters, staking out claims in virgin territory. When we say that they own houses, we mean that they are owners according to law. What law? Is it French law? No. French law—like French administration—is unknown in these islands. It is under Jersey law that these persons own their property, under leases from the Crown or under contracts of sale, all duly registered with the title deeds, with the appropriate Jersey authority; and here I would refer the Court to Annexes A 89-93 and 116-122.

Again, when these properties change hands—that is to say, are bought and sold—it is Jersey law that applies, and the requirements of Jersey law that have to be complied with. Property law is essentially territorial and not personal. It is the law applicable in the territory and to all property in it, irrespective of the nationality of the interested parties. If, therefore, in a given territory, or on an island, you find a certain law regularly applied to property, and in respect of transactions relating to such property, and if you find that no other law is applied, it is, I submit, an inescapable conclusion that the law in question is the territorial law of the land, and therefore that the sovereignty is vested in the country whose law it is.

The nationality of the owner has nothing to do with the character of the land law of the country. For instance, it would be absurd to argue that the land law of France is only French because the people who own land in France are mostly French; that it is only their personal law that is being applied. The land law of France is French because France is French soil: and it is, I submit, because the Minquiers and the Écréhous are Jersey soil that the land law of Jersey is applicable to them.

Now all this is not only the position under general international law. It is also the position under Jersey law. We have adduced affidavit evidence from the appropriate authority in Jersey which proves that transactions respecting property and houses on the Minquiers and the Écréhous could not legally have been carried out under Jersey law, unless the position was—also under Jersey law—that the islets were part of the bailiwick of Jersey. I refer here to the affidavit (Annex 156 to the United Kingdom Reply) of Mr. Le Couteur, who is the Judicial Greffier (Registrar) of the Royal Court of Jersey. He says: "the title to *all real property situate within the limits of the jurisdiction of the Royal Court of the said island* passes by matter of record". Deeds relating to property so situate—and only to such property—must, in order to have validity, be passed before the Royal Court of the island of Jersey and subsequently registered and sealed with the official seal of the bailiwick. The Court will notice that the words *"dépendance de cette île"*—"dependency of this island"—or *"dépendant de la paroisse de St. Martin en cette île"*—"depending upon the parish of St. Martin in this island"—constantly recur in these deeds. This is as true of the earlier deeds as, for instance, a deed of 1884 relating to the Écréhous (again I refer the Court to Annex A 86), and a deed of 1896 relating to the Minquiers (Annex A 118): it is as true of those earlier deeds as it is of the later deeds, for example, one

of 1947 relating to the Écréhous (Annex A 93), or one of 1937 relating to the Minquiers (Annex A 122). The reason why these words recur, whether the deeds be old or recent, is that the deeds would not be legally registrable in the Registry of Deeds of the island of Jersey unless they related to "real property situate within the limits of the jurisdiction of the Royal Court of the said island".

The evidence of Mr. Le Couteur's affidavit and of these deeds is therefore, in my submission, decisive that, from the point of view of Jersey law, the islets are part of the bailiwick. We claim that when you have private parties acting and contracting in respect of their land and houses on the islets, over a period of more than eighty years, on the basis that the islets are part of the bailiwick of Jersey, and when you have, over the same period, public authorities registering title-deeds and validating such contracts on the same basis, which is necessarily a territorial, not a personal basis, you have evidence of the existence of sovereignty. You also have evidence of a constant tradition and a conviction on the part of the individuals concerned, to which the Court, as an international tribunal, will, I am convinced, attach very great weight. It is impossible to suppose that any of those concerned, whether private persons or the Jersey authorities, can have been doing these things—some of them earlier in time than the earliest formal French claim—expressly for the purpose of founding and providing evidence of some future British claim. Obviously they did them as an ordinary part of their daily lives and duties. Our people, Mr. President, are simple people, and the Court will, I am sure, acquit both them and our authorities of any Machiavellian intentions.

Perhaps before I pass on to the next part of my speech I might give a further illustration of the same thing, relating to a different type of property. If the Court will look at Annex A 87 to the Memorial, it will see that on the 23rd April 1872, Philippe Pinel ("Le Roi des Écréhous", to whom I shall refer again later), complying with the provisions of the Sea Fisheries Act, 1868—an Act of the Parliament of Westminster applying to Jersey—caused to be registered as a fishing boat the cutter *John* belonging to—I quote—"Rozel, Ecrehos Rocks". I ask, what had he, and what had the registering officer, in mind in doing this?

Philippe Pinel is dead. But others like him are alive to-day, owning boats, owning houses on the Minquiers and the Écréhous and fishing there. These are the people I have the honour to represent here. It is they who, from time immemorial, have held their property under Jersey law, on what they regard as the soil of their own country, who would be the most directly and immediately affected by any finding that the islets were other than British and part of the bailiwick of Jersey.

So far, Mr. President, I have mainly discussed the position as it exists to-day. I want now to glance back over the last one hundred and fifty years. I shall claim that the long standing connection between Jersey and the two disputed groups, of which there is such ample evidence, is also evidence of sovereignty, when coupled with two other factors—one negative, the other positive—the negative factor being the total absence of any corresponding evidence of French connection with or acts relating to the groups, the positive factor being the administrative, governmental and other acts of public authority carried out on our side.

I begin with the evidences of early activity on the Minquiers. Even before 1800, the British Government quarried large quantities of stone at the Maîtresse Île. This quarrying led to protests by Jersey fishermen, who complained that, if it were continued, it would leave unprotected the anchorage at the south-east of the islet, and any huts which had been built, or which might be in course of building, on it. As a result of these representations, the quarrying was stopped.

This information is contained in the record of a meeting of the Piers and Harbours Committee of the States of Jersey, held on Maîtresse Île at the Minquiers in August 1888. The text of the Act of the Committee is given as Annex 129 to the United Kingdom Memorial. Our opponents may say that the statements of fact contained in this Act of August 1888 regarding events which had taken place seventy or more years earlier should not be regarded as having much weight. I submit that this would not be a fair criticism. In a small community such as Jersey, much of the local history takes the form of oral tradition passed on from father to son. Many of the families, like the Gallichans, the Le Vescontes, the Labeys and the Cornishs, who owned property at the Minquiers in 1888, had made their living by fishing regularly there for years. Indeed, the fisherman named Hamon, who led the protests against the quarrying at the beginning of the century, was in virtual certainty an ancestor of the Charles Hamon or the Clement Hamon, fils Philippe, who owned property there in 1888 and as late as 1903, as will be seen from the list of property owners at the Minquiers given in Annex A 134. There is a Hamon still owning a hut on Maîtresse Île to this day, as is shown in paragraph III (16) of Mr. Furzer's affidavit (Annex A 98).

Mr. President, I have just referred you to Annexes A 98, A 129 and A 134. A comparison of these documents throws an interesting light on the permanence of the Jersey settlement of the Minquiers. It will be seen that some of the families, who have worked and owned property there, such as—to take three examples—the Gallichans, the Hamons and the Maries, have done so for at least a hundred years. There is, of course, further evidence of Jersey settlement at the Minquiers since the beginning of the nineteenth century, such as that contained in the survey of Captain Martin White, to which I have referred. There is also further evidence in the *Channel Pilot* of 1870, and in the *Pilote de la Manche* of 1875, particulars of both of which are given in paragraph 167 of our Memorial.

All this evidence goes to show quite conclusively, in my submission, that there has been what might well be described as a permanent Jersey settlement of the Minquiers for upwards of a hundred and fifty years.

Turning now to the evidence of early activity at the Écréhous, we find a substantially similar situation.

I have spoken, Mr. President, in referring to the Minquiers, of stone being quarried there for the purpose of building Fort Regent in Jersey. I should like now to deal with the probability that stone was quarried in the Écréhous for building houses in the parishes of Trinity and St. Martin which face the islets. May I draw the attention of the Court to Additional Annex A 177, which prints the affidavit of Dr. Mourant, an Oxford geologist—incidentally a schoolfellow of mine—who has made a particular study of the geology of the Channel Islands. Dr. Mourant's conclusions are, briefly, that the rock of the Écréhous reef (which is similar to that of the Paternosters and the Dirouilles) is of a character-

istic pale coloured granite-gneiss containing white mica, which is distinguishable from that of the rest of the Channel Islands and the Cotentin. Now, says Dr. Mourant, this particular form of stone is found in numerous buildings in the parishes of St. Martin and Trinity, though not anywhere else in Jersey. One of these, he says, has a gate post dated 1623 ; a second dates from 1731, and the wall of a third from 1715. There is therefore—it would appear—a virtual certainty that stone was quarried at the Écréhous by Jersey inhabitants from a very early time.

Then we have the evidence of Captain Martin White, who was at Maître Île in May 1813. His chart, completed between that year and 1823, shows huts or houses on all the three main islets—Blanc Île, Marmotière, and Maître Île—about eighteen in all. One of these, of which the ruins, bearing the date 1820, are still to be seen on Blanc Île (I have already referred to it), is said to be that in which Philippe Pinel, to whom I shall refer again, and his wife, lived continuously all the year round for several decades during the second half of the nineteenth century.

As at the Minquiers, certain families, for example the Becquets and the Blampieds, have, as will be seen from Mr. J. T. Becquet's affidavit (given as Annex A 106), lived at the Écréhous and gained their livelihood there for more than a hundred years. Philippe Pinel, as is shown in paragraph 150 of our Memorial, lived there continuously for forty years, and became popularly known as the King of the Écréhous. It is interesting, incidentally, to note that a Frenchman, Charles Frémine, considered Philippe Pinel to be a figure of sufficient importance to form the subject of the pamphlet entitled *Le Roi des Écrehous*.

If further evidence were needed to show that there was a Jersey settlement at the Écréhous during the nineteenth century, it may be found, as I have already reminded the Court, in the letter, dated 1846, of Mr. Le Couteur, the Viscount of Jersey, from which it appears that Jerseymen had houses at the Écréhous from the earliest years of the nineteenth century.

I do not think it necessary to describe in detail the continued existence of the Écréhous community during the nineteenth century. I would refer you again, Mr. President, to the conveyance of land at the Écréhous, given as Annex A 91, in 1863, by Mr. Gallichan to Mr. Le Bailly ; I would refer you to the statement made in 1876 by Mr. (afterwards Sir) Robert Pipon Marett, then Attorney-General, and later Bailiff, of Jersey, that Jerseymen had occupied the Écréhous from time immemorial (that is, Annex A 36) ; I would refer you also to the opinion of the Jersey Law Officers Mr. (later Sir) William Venables Vernon and Mr. (later Sir) Hilgrove Turner, rendered in 1887 and given as Annex A 47, in which they state (I quote from p. 257) :

> "From time immemorial, Jersey fishermen have obtained an abundant supply of fish from the Écréhos and Minquiers, and have made these localities their home during the fishing season ; and it is an undeniable fact that the French have never possessed any settlement on either group of islets."

During the present century, there have, naturally, been a number of transactions affecting property on the three principal islets, and particulars of those are given in paragraphs 140 and 141 of our Memorial.

Here then, Mr. President, we have ample evidence of a connection with the Écréhous, as with the Minquiers, on the part of a Jersey community for upwards of a century and a half. The Jerseymen who have lived and worked on both these groups have always done so on the basis that they were living on British territory and that they were subject to British—and in particular to Jersey—law, and I have already described how this operated.

[Public sitting of September 24th, 1953, morning]

I am grateful to the Court, Mr. President, for fixing this earlier hour of sitting this morning. The effect of that decision on the part of the Court will be that I shall certainly be able to finish my address to-day—I hope indeed that it may be possible for me to finish at a quite early hour this afternoon.

I was referring yesterday, Mr. President, to the question of the Jersey settlement of the Minquiers and the Écréhous, and I said that the question of those settlements had to be considered in relation to two other factors, one negative and one positive. The negative factor is the total absence of any interest manifested by the Government of the Republic in what was going on in these two groups. I shall only touch on this, as Sir Lionel Heald has already drawn attention to it. After all, those Gallichans, Hamons, Labeys, Pinels, Becquets, and so on, have, if the contention of the Government of the Republic is correct, been living on French territory for a hundred years or more. Nonetheless, they have, in fact, bought and sold property there in accordance with Jersey law, because they knew of no other law which applied there.

What then, Mr. President, was the attitude of the Government of the Republic to these trespassers on what they now claim to have been their territory? It was completely negative. There is not the least evidence of even the most trivial exercise of French governmental authority in or over either group. The Government of the Republic, I suggest, cannot even claim to have been *le roi Soliveau* of them.

Similarly, there is no evidence of the application of French laws to anything that occurred on or relative to the islands, or of any property tax levied by or paid to the French authorities, or of any exercise of jurisdiction respecting the groups on the part of the French Courts. On the contrary, it was Jersey law that was applied, Jersey taxes that were levied and paid, Jersey Courts (as I shall show more fully later) that exercised jurisdiction. In short, France simply did not behave as the sovereign Power. You do not simply ignore islands with settlements on them at this comparatively short distance from your own coast if you claim to be sovereign over them.

Our opponents have, of course, made some attempt to anticipate this criticism by suggesting, in a passage which I shall cite later, that they could not be expected to know everything that went on at the Minquiers and the Écréhous. But is this plea consistent with the claim to be the sovereign authority? Naturally they could not know, because French officials seldom, if ever, went near either of the groups. In any case this French plea does not answer the point I am endeavouring to make. It is not merely the absence of any adequate protests against what was happening. It is the absence of any governmental activity on the part of France—or even an attempt at it—which so strongly suggests the corresponding absence of any sovereign right.

All this, as Sir Lionel Heald pointed out, is in marked contrast with the French attitude and activity over the Chausey group.

Let me now compare this wholly negative French position and attitude with that manifested on the British side, and in particular by Jersey. As regards the Minquiers, I invite the Court to consider some of the salient facts detailed on pages 90-98 of the United Kingdom

Memorial. The Minquiers are and, according to local tradition, have always been, treated for administrative purposes as being within the Jersey parish of Grouville, and the constable of that parish is responsible for the maintenance of law and order there. This is Jersey law. Property at the Minquiers is assessed for rates in the same parish. Examples of rating schedules are given at Annexes A 110 to 113. The sole reason why these are for recent years only, is that the older records were destroyed in 1941.

As regards the Écréhous, I would refer the Court to pages 78 and 79 of our Memorial for similar evidence of parochial authority (the Écréhous are, according to Jersey law, part of the parish of St. Martin), and of the levying of rates and the holding of inquests, and I refer the Court to Annexes A 81-83, and A 84 and 85. We attach importance to this matter of rates and inquests. We have already pointed out that the authorities of a country do not normally levy property taxes on property outside their jurisdiction.

Then as regards inquests. As Sir Lionel Heald told the Court, an inquest under English and under Jersey law is essentially an act of territorial jurisdiction. It is the act whereby the authorities of a country enquire into the cause of a death occurring in their territory and within their jurisdiction. They do not conduct such an enquiry as regards deaths taking place in another country. Certainly the Jersey authorities do not, and here I would refer the Court to Annex A 155 to the United Kingdom Reply, in which is set out the affidavit of Mr. H. V. Benest, Sergent de Justice and acting Viscount of Jersey. He shows quite clearly that what confers jurisdiction to hold an inquest under Jersey law is simply the finding of a corpse within the territory of the bailiwick of Jersey. It is on that basis and that alone, that inquests have been held on deaths occurring on the Minquiers and/or the Écréhous.

The Court will find, in Annexes 168-171 of our additional Volume, four further cases of inquests held in Jersey on bodies found at the Minquiers or the Écréhous—the last case being apparently that of a French sailor found drowned near the Écréhous.

I now pass, Mr. President, to the fifth part of my speech, in which I shall deal with the public acts of administration performed on or relative to the Minquiers and the Écréhous during the last century and a half—which, in our view, constitute both clear exercises of sovereignty, and evidences of its existence. I shall consider the objections advanced by our opponents to the value of this evidence, and I shall then compare with it the acts which our opponents put forward as evidence of their own claim.

Now as regards the evidence of our own acts, this is fully set out and discussed in the United Kingdom Memorial and in the numerous annexes to it. I do not intend, therefore, to go over this evidence in detail. I will only say of the acts which we claim to be acts of territorial administration and therefore of sovereignty—such as the exercise of customs authority, the placing of buoys, the erection of beacons, the construction of slipways and other official buildings, official visits —and, in general, all the acts described in our written pleadings, which are, in my submission, quite definitely acts of government— I will only say that these acts (most of which passed without notice or comment from the French authorities, and nothing similar to which has come from the French side)—I will only say that they were all

done in the ordinary course of normal administration. They were nothing more than the acts which any government, believing itself to be sovereign over a certain territory, would carry out in the discharge of the usual governmental responsibilities. Such acts are therefore, I submit, clear evidence of the existence of sovereignty. These acts, I would ask the Court to note, are not spectacular. There is no flourish of trumpets, there are no ceremonies, proclamations or manifestos: just the little ordinary everyday routine acts of administration and government. But, Mr. President, it is precisely in their insignificance, in their very ordinariness, that their significance lies, when you come to ask—as the Court will ask—who is it, who is acting and has acted as sovereign and behaved as a sovereign would do?

Now we contend that these acts, which are stated in detail in paragraphs 138, 139, 142, 161, 162, 163 and 165 of our Memorial, supported by numerous annexes—and I cite in particular Annexes A 94 to 100 and A 123 to 131—these acts represent a very large body of evidence, not only of the administration of these groups on a basis of sovereignty, but also of State interest in and concern regarding them and the people using them—the provision of facilities at public expense and so on. Annexes A 99 and A 128, for instance, list some thirty occasions on which official visits were made to one or other of the groups in a period of 50 to 60 years —and this, of course, is in addition to visits of officials in the ordinary course of their duties; for instance, in connection with inquests, the exercise of customs authority, and, of course, the carrying out of the various works—the construction of slipways, the placing of beacons, and so on. Our opponents cannot deny the existence of this large volume of evidence, and they have been unable to produce any comparable evidence at all.

Now all that was going on in the groups in the way of the exercise of Jersey sovereignty was perfectly well-known to everyone: no attempt was made to conceal anything. The United Kingdom Government, of course, knew about it. The Government of the Republic, even if it did not react as any normal government possessing sovereignty over the area concerned would have done, certainly knew about it. Or, if it did not, it ought to have known about it, and it must have known about it if it had had the sovereignty over the region. Moreover, the governments of other countries knew about it. Most of the West European countries, for example, have a consular representative in Jersey, and no doubt these representatives report occasionally to their home governments about what goes on in Jersey and what we regard as its dependencies.

It was, no doubt, because all that was going on in the groups was generally well-known that they were shown on a number of atlases as British. I do not intend, of course, Mr. President, to refer to any British atlases, because the Court might not regard them as having any particular significance in the circumstances. But I do submit that it is rather significant that a neutral and impartial atlas of the high technical merit of Stieler's *Hand-Atlas*, published in Leipzig, shows both groups (along with the rest of the Channel Islands) as British. We have submitted as Additional Annexes B 10 and B 11 photostat enlargements of two maps from this atlas, both of which clearly indicate both groups as British. Moreover, I think it is rather significant that one of these maps is from the 1905 edition and the other is from the 1932/1934 edition. Thus the idea that the groups were British does not seem to have been one that occurred

to a single editor of Stieler as a mere guess. It is reasonable to assume, I think, that the editor of each edition must have satisfied himself that the indication of the groups as British corresponded with the facts. And I submit that this evidence of the general notoriety of the situation is evidence which the Court may, and indeed should, take into account.

Mr. President, I come now to the various grounds on which our opponents have sought to argue that the numerous facts submitted by the United Kingdom Government in these proceedings are not evidence of the exercise of sovereignty over the Minquiers and the Écréhous, and do not assist our claim. They put forward three main points: first, that, as regards the acts in question (and I quote now from p. 721 of the Rejoinder):

> "all that were of any real significance were the subject of protests by the Government of the Republic, and that those in regard to which no representations were made were matters of little consequence";

secondly, they say, the construction of slipways and the erection of beacons and placing of buoys can be explained in terms of the 1839 Convention (though if this is true it must apply equally to the French acts of buoying and beaconing which are invoked in support of the French title, without any suggestion that they are to be accounted for by the 1839 Convention); thirdly, they say, all the acts of jurisdiction carried out by Jersey Courts and authorities can be accounted for *ratione personæ* and not *ratione soli*.

I will deal with these in turn. As to the first, the question of French protests, and their legal effect, there are two implications in the sentences I have quoted from the French Rejoinder that we do not admit. This said that France had protested against all the United Kingdom acts that were of any real significance and that the rest were matters of little consequence. In the next sentence, after citing two alleged acts of legislative character against which France protested in 1876 and 1883, the Rejoinder continues:

> "These acts are the only acts of any real importance, as constituting an implied but sufficiently unmistakable assertion by the United Kingdom of its alleged sovereignty."

Now quite apart from the fact that the French protest against the two acts they mention were *not* made on the basis of any French claim to sovereignty, but only on a claim to fishery rights, we cannot agree that the other matters, against which there was no protest, were matters of little consequence. On the contrary, these were, as I said a while ago, precisely the ordinary, everyday routine acts of administration of which the exercise of sovereignty is made up. It is just because there is nothing spectacular about them that they are of such significance in the present connection. If the Court would wish to see in convenient form what is the character of these various acts supposedly of little consequence, may I refer it to paragraph 200 on page 538 of our Reply, where a long list is given of various acts or categories of acts which encountered no protest or comment from the Government of the Republic. The Court can judge for itself whether they are of little consequence or not. The Court will see incidentally that they include such public and obvious manifestations of sovereignty

as the construction of landing stages and slipways, beaconing, customhouses, a first aid building on the Minquiers, etc. Even on our opponents' own argument such acts as these should surely have called forth a protest if France considered herself to have sovereignty, for if these are not—to use the French phrase "sufficiently unmistakable assertions of sovereignty", I hardly know what are.

The Court will also recollect that originally, in their Counter-Memorial at page 399, our opponents stated (I quote):

> "The few acts belonging to the period before the birth of the dispute, and likewise those subsequent thereto, never failed to encounter protests by the French Government."

In reply to this, I would point out that since, according to our opponents, the dispute was born with the first French protests themselves, it cannot *ex hypothesi* be true that the Government of the Republic had protested at acts before this date, and we say that in fact there had been an appreciable number of such acts before the first French protests in the period 1870-1880. As regards the subsequent period up to to-day, we gave the long list, the long list contained in paragraph 200 of the Reply, of acts which had encountered no protest and no comment. Faced with the manifest inexactitude of their previous statement that they had never failed to protest, our opponents now seek to discount the acts themselves as being of little consequence.

The other implication which we cannot admit is that a protest, even if made, is sufficient *per se* to invalidate the act protested against. As Mr. Fitzmaurice explained earlier, the exact legal effect of a protest depends very much on circumstances, but in general all it does is to register or record the opinion of the protesting country that the act protested against is invalid and is not acquiesced in. But if the act concerned is in fact a valid act under international law, no protest can make it invalid—otherwise the United Kingdom Government could, for instance, by protesting against the trial of a British subject in some other country for an offence committed by him there, cause the whole proceedings to become invalid. The proceedings might indeed, possibly, for various reasons, *be* invalid, but it would not be the protest that made them so. The validity or invalidity of an act depends on considerations extraneous to any protest.

In the light of these considerations, we submit that the argument in the French Rejoinder is misconceived. Any French protests could not of themselves have invalidated the British acts, if these were otherwise valid. If effectual, the protests might keep France's claim alive in circumstances where it would otherwise have been irretrievably lost; but again the protests would not of themselves make France's claim a good one. Its worth would continue to depend solely on its intrinsic merits. Let us now consider what the French protests amounted to, both in themselves and having regard to the failure to protest in numerous other instances.

It will be convenient, Mr. President, to start with the Écréhous. The Government of the Republic have protested twice, and twice only regarding the Écréhous. The first protest was in 1876 (Annex A 31) against the United Kingdom Treasury Warrant of 1875 (Annex A 30), which declared that, for the purposes of the Customs Consolidation Act, 1853, of the United Kingdom, the limits of the port of Jersey included the Écréhous. The second protest was in 1883 (in two notes—Annexes A 38 and 39)

against a non-existent Jersey draft law which, it was said, would have the effect of prohibiting French fishermen from going to the Écréhous. Neither of these protests, I would ask the Court particularly to note, was based on a claim of French *sovereignty*, but rather on the supposed existence of French fishing rights at the Écréhous under the 1839 Convention, and it is clear from the letters that passed between French officials—between *French* officials—at this time, and which are set out in Annex A 46, that they knew quite well of the British claim to sovereignty.

The correspondence which resulted from these protests—protests about fisheries only—eventually led, in 1886, to the Government of the Republic putting forward, for the first time, a claim to sovereignty over the Écréhous (I refer to Annex A 41). This claim was answered on behalf of the United Kingdom Government by the then Foreign Secretary, Lord Salisbury, in a note dated the 27th October 1887 (which is Annex A 43). Lord Salisbury's note was answered by the French Ambassador, Monsieur Waddington, in a note dated the 26th January 1888 (Annex A 48), which re-affirmed the French claim in general terms. This note received only a formal acknowledgment, and thus the last word remained with the Government of the Republic. But, Mr. President, it was very literally the last word, for from that day until after the recent war—a period of 60 years—not another thing was said on either side about the Écréhous. Yet even a cursory reading of the United Kingdom Memorial and its Annexes will show the extent of the British manifestations of sovereignty over the Écréhous during this long period.

Therefore I ask the Court : were these French protests regarding the Écréhous effectual protests ? We submit that they were not, and that whatever value or effect they might have had has long since evaporated and been lost.

Now let us consider the French protests regarding the Minquiers. There were only three. The first was in 1888 and arose out of an official visit to the Minquiers of the Committee of Piers and Harbours of the States of Jersey. Lord Salisbury, then British Foreign Secretary, replied to this protest in a note (Annex A 54) in which the question of sovereignty was discussed and the British claim was asserted. No reply was received to this note, and no further protest was made against Jersey official visits to the Minquiers. Yet there were many visits. Not all of them have been recorded, but the certificate of Mr. Bois, the Greffier of the States of the island of Jersey (at Annex A 128), lists no less than seventeen such visits.

The second French protest (Annex A 55) occurred in 1902 and concerned the erection of a flagstaff at the Minquiers and the hoisting of the British flag. After an exchange of diplomatic correspondence which continued for two or three years, the United Kingdom Government finally sent the Government of the Republic a long memorandum, the text of which is at Annex A 69, asserting the British title to sovereignty, but offering certain fishery rights. No reply was received beyond a formal acknowledgment.

Finally, after a period of thirty years during which the British administration of the group continued undisturbed, the Government of the Republic sent a note to the United Kingdom Government in 1937 (Annex A 76). But an examination of this note shows that the Government of the Republic were again concerned primarily with the fishery question—though a very perfunctory reservation of French sovereignty

was made three months later (Annex A 77). Replying to these notes on July 18th, 1938 (Annex A 78), the United Kingdom Government gave assurances about the fisheries but re-affirmed British sovereignty in explicit terms. To this note no reply was received. Taking these three occasions, therefore, in 1888, 1902 and 1937, upon which the Government of the Republic protested about the Minquiers, one is again struck by their perfunctory character. In each case a detailed or explicit statement or affirmation of the United Kingdom claim met with no reply. France was unwilling to abandon her own claim, but was not willing effectively to assert it, or to refute the British claim. She was interested almost entirely in the fishery question, as the 1937 incident shows. In the immediately preceding year, 1936, the wreckage of a crashed aircraft, the "Cloud of Iona", was washed up at the Minquiers, but it was the Jersey authorities, in combination with the British Air Ministry, who investigated this accident on the spot—it was not the French authorities.

There are certain other features of the 1937 exchanges which are of particular interest. The main points to which the French note in Annex A 76 drew attention were, first, the fact that the British flag was hoisted on the Minquiers flag staff every time a French ship approached ; and secondly that a custom-house bearing the arms of Jersey had been constructed. The first of these objections, I suggest, was almost an admission that the Minquiers were under permanent British occupation on a basis of sovereignty. The United Kingdom Reply (Annex A 78) pointed out, however, that works in connection with buoying and beaconing, the enlargement of the landing stage, and so on, had been in progress for some time and that the workmen were in the habit of signalling to passing vessels messages for transmission to Jersey ; this, perhaps, it was suggested, accounted for any increased showing of flags. The episode demonstrates, however, how little the French authorities really knew of the situation on the Minquiers.

And the other point about the custom-house bearing the arms of Jersey indicates the same thing, for this building which, according to the French note in Annex A 76, had been recently built *(édifié récemment)*, had in fact been opened as far back as 1909. It was also not expressly built for that purpose. As Annex A *116* to our Memorial shows, it was acquired for the purpose by purchase from a Mr. Le Clercq by the Assembly of Governor, Bailiff and Jurats (the customs authorities) of Jersey. This was pointed out in the United Kingdom note in Annex A 78, and the Government of the Republic were reminded that there was nothing new about the position at the Minquiers.

But an even better illustration of the same want of vigilance on the part of the French authorities is to be found in the fact that a custom-house was opened on the Écréhous as far back as 1884 (Annex A 86 to the Memorial), but no French comment on that was, or ever has been, received.

In the light of these facts, I think the Court will know how to appreciate at its true value the rather naive remark that appears on page 722 of the French Rejoinder (I quote) :

> ".... in 1937 the Government of the Republic did in fact protest against the only acts which were of an unmistakable character : the custom which had grown up of hoisting the British flag on

> the Minquiers when a French ship was passing, and the erection of a customs 'station', bearing the arms of Jersey".

Of course, our opponents have an explanation of these inaccuracies and inadequacies. It is to be found on page 722 of the Rejoinder, and reads as follows :

> "It [the Government of the Republic, that is to say] could not be expected to keep the United Kingdom Government continually under surveillance and to multiply remonstrances in regard to acts which had already been contested in principle."

This is an understandable attitude, Mr. President, yet it amounts to a virtual admission that the French protests were no more than paper protests—that France was neither able herself to exercise sovereignty, nor in a position effectively to challenge the United Kingdom exercise of it. I think I can affirm that it would have been impossible that slipways could have been constructed, and customhouses established, on either the Minquiers or the Écréhous *by France*, without considerable comment from Jersey.

May I give some illustrations, on the other hand, of the vigilance of the Jersey authorities ? I refer then first to the Minutes of the meeting at the Minquiers of the Jersey Piers and Harbours Committee given at Annex A 129. The occasion of this meeting was an enquiry from the hydrographer of the British Admiralty whether the sailing directions in the *Channel Pilot* relating to the Minquiers were accurate. It so happened that, at the time of the meeting, two French hydrographers were at the Minquiers making observations on the tides and currents in the neighbourhood. It is interesting to note what is said about these two Frenchmen. It is stated in the Minutes that they had rented a house for several months, and this must have been from a Jersey man since there were no French houses on the island. Clearly the Jersey authorities knew all about this very minor incident.

Again, what happens when another Frenchman appeared, but not until some forty years later, that is to say in 1929 ? Monsieur Le Roux began to build a hut on Maîtresse Île. He had only built a low stone wall about eighteen inches high, when he desisted, as it would appear from the affidavit of Mr. Édouard de Laquaine, editor of *Les Chroniques de Jersey* (at Annex A 137), on the instructions of his own Government, following on the United Kingdom note of July 26th, 1929, given at Annex A 75. Then again in 1939, when the so-called Marin Marie began to erect a wooden hut of refuge on Maîtresse Île, the matter was at once reported to the Lieutenant Governor of Jersey (affidavit of Mr. W. S. Le Masurier, Annex A 109), and the only reason why the United Kingdom Government did not protest against this trespass by a French national was that it took place in the summer of 1939, the year in which war was declared, when our two Governments had more serious preoccupations.

The only other French acts that we know of are the hydrographic surveys of 1831 and 1888, and the buoying of the Channel to the South-West of the Minquiers—and in paragraphs 233-239 of our Reply we showed that these acts were either of such a character as not to affect or prejudice British sovereignty, or else that British rights in respect of them had been fully reserved in diplomatic notes addressed to the French Ambassador in London.

This vigilant attitude on the part of the British authorities, which was fully consonant with their claim to be the sovereign Power in the Minquiers and the Écréhous, should be contrasted with the lack of notice on the part of the French authorities of so many significant British acts which were clear assertions or exercises of sovereign rights. Yet France has for many years maintained a career consul in Jersey. It is difficult to believe that France can maintain a consul in Jersey, and yet not be well aware of the Jersey attitude and position regarding the Minquiers and the Écréhous and well aware of most of the salient facts.

To conclude on this matter of protests—or the lack of them—we are far from suggesting that the rights of a government are lost because it fails to protest at every single occurrence that might affect them. But it is a matter of circumstances and degree. In the present case we submit that, as regards the Écréhous, there was what amounted very nearly to acquiescence on the part of the Government of the Republic. Since the date of the last French communication about the Écréhous in 1888, a period of 65 years up to to-day, no single French visit, act of sovereignty or manifestation of right has been shown to have occurred in respect of the Écréhous, while British acts, as I have shown, have occurred continuously, and they were unmistakable assertions and exercises of sovereignty. As regards the Minquiers, there were three widely spaced assertions or reservations of the French claim. In each case a reply asserting the British claim was apparently accepted, and the matter was not pursued. Taken in relation to the absence of any French State activity at the Minquiers, coupled with the continuous British activities, we submit that there was virtual acquiescence by the Government of the Republic in regard to the Minquiers also.

If I may venture to say so without intending any offence, I suggest that during this period the Government of the Republic were adopting the very attitude of having it both ways, which in paragraph 35 *(d)* of our Reply we pointed out was inadmissible. They were unwilling to abandon their claim, but were equally unwilling effectively to assert it. Their main object was simply to deny the British claim. This is vividly illustrated, I think, by the incident discussed in paragraph 113 of our Memorial and in Annex A 71—when France offered to renounce any French claim to the Crozet islands if the United Kingdom would agree to treat the Minquiers as *res nullius*. But, while maintaining a nominal claim to the Minquiers and the Écréhous, the French authorities were content to allow the Jersey authorities to discharge all the responsibilities in connection with the administration of these groups, and to incur the expenses of the installation and upkeep of slipways, buoys, marks, beacons and other works from which navigation in general could benefit. This sort of attitude has been, I think, very aptly commented on by Professor Lauterpacht in the following passage from an article in the *British Year Book of International Law* for 1950, pages 395-396, which, though on the subject of the sovereignty over submarine areas (the continental shelf), is nevertheless perfectly applicable to the present point. I will read this passage, Mr. President:

> "..... the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents

> States from playing fast and loose with situations affecting others ; and it is in accordance with equity inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States."

I will now pass, Mr. President, to the next objection offered by the Government of the Republic to the evidential value of the British acts of sovereignty, which is intimately connected with what I have just been saying. On page 721 of the French Rejoinder there appear the following two passages.

The first :

> "The significance of the buoying and lighting of the Minquiers and the Écréhos equals, but does not exceed, that of similar work carried out by the French in those waters."

I would pause here to ask "what waters?" There is no French buoying or lighting at all in the waters of the Écréhous—there never has been ; and there is none within three miles of any main islet or permanently uncovered rock of the Minquiers, or within the reefs or plateau of the Minquiers itself—a matter I shall deal with more fully later. I pass on to the second passage. This reads :

> "The works undertaken to facilitate landing on some of the islets are sufficiently accounted for by the uncontested fact that, under the Convention of 1839, the fishermen of both nations had access to the islets in dispute, so the French Government had no reason to object to improvements of this kind which might assist the fishermen in their work and give them greater safety."

Really, Mr. President, this passage rather takes one's breath away. Not only is it a perfect illustration of the attitude I was referring to just now, by which France as it were sits back and allows Jersey to undertake all the responsibility and expense in relation to these islands, but the pretension that there was no need for any French protest in the circumstances is wholly misconceived. I submit that there was in fact every reason for France to object to these Jersey works *if France claimed sovereignty*—there lies the whole point. When the French position was that the groups were *French* territory, there was surely every reason to protest—or at least say something. Is it usual for one country to allow the authorities of another country to land on its territory, construct slipways, erect beacons and so forth without saying a word about it ?

The ground given in the Rejoinder for this strange view is (I quote) "the uncontested fact" of French fishery rights at the Minquiers and the Écréhous. But our opponents know perfectly well, and the Government of the Republic knew perfectly well then, that this fact was by no means uncontested. On the contrary, as the diplomatic correspondence from start to finish amply demonstrates, it was consistently maintained on the United Kingdom side that Article 3 of the 1839 Convention had no application to the Minquiers or the Écréhous.

But in any case, even assuming the existence of equal fishing rights, this would have no real bearing on the point. It is really somewhat

naive to suggest—and this is what the French contention comes to—that, even if the Jersey authorities believed—which in fact they never have done—that Frenchmen and Jerseymen had equal fishing rights in the territorial waters of the Minquiers, they would have been so altruistic as to carry out, entirely at their own cost, the work of all this construction and maintenance, for the benefit of French fishermen, as well as of Jersey fishermen. Mr. Ereaut, the treasurer of the States of Jersey, in his affidavit given at Annex A 124, states that during the period 1920-1950 the States of Jersey spent £15,660 on the construction of the slipway, the erection of a building and the establishment of beacons and buoys at the Minquiers, and that, during the same period, more than £18,000, that is to say, not less than 10 % of the total expenditure of the States of Jersey, on the maintenance of beacons, buoys and signals established around the coasts of Jersey, was expended on the maintenance of the beacons and buoys at the Minquiers. If the States of Jersey had ever had any reason to believe that the Minquiers and the Écréhous were under some form of joint Anglo-French régime, it is inconceivable—and I speak as a Jerseyman—it is inconceivable that they would have authorized or incurred all this expenditure without proposing that the Government of the Republic should participate in a joint venture. It is inconceivable that they should have incurred this expenditure, or carried out the work at all, except on a basis of sovereign right and that the groups were administratively part of Jersey.

The principles involved in all this have found a striking application in the well-known award in the *Grisbadarna* case. May I quote some of the considerations which influenced the tribunal in that case to assign the Grisbadarna fishing banks to Sweden—a decision in which the Norwegian member of the tribunal seems to have concurred, since the award was apparently unanimous. (I believe that Norway was, in the same case, awarded the Skjöttegrunde banks on similar principles.) I take the following passages from pages 130-131 of James Brown Scott's *Hague Court Reports* showing these considerations :

> "The circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish .... being acts which involved considerable expense and in doing which she not only thought she was exercising her right but even more that she was performing her duty ; whereas Norway .... showed much less solicitude in this region in these various regards....
>
> From these various circumstances it appears so probable as to be almost certain that the Swedes utilized the banks in question much earlier and much more effectively than the Norwegians....
>
> The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest .... and likewise a large number of beacons were established there....
>
> This light-boat and these beacons are always maintained by Sweden at her own expense" ; and
>
> "Norway has never taken any measures which are in any way equivalent except by placing a bell-buoy there .... it being impossible to even compare the expense of setting out and keeping up

this buoy with those connected with the beacons and the light-boat" ; and

"It is shown by the foregoing that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money."

Now, Mr. President, if, in these passages, you were to read Jersey for Sweden, and France for Norway, and if you added a reference to the Jersey construction of slipways and landing stages and other works, and to the fact that there has never been *any* French buoying or beaconing at the Écréhous at all, and that at the Minquiers all the buoying and beaconing within the reef is done by Jersey—the French installations being outside in the approaches to St. Malo and Granville—then I submit to the Court that you would have an exact parallel with the Grisbadarna case, the principles of which are in all respects applicable.

I pass on next to the third and last main objection advanced by our opponents for the purpose of denying that the various acts of the Jersey authorities constitute an assertion and exercise of sovereign rights in respect of the Minquiers and the Écréhous. This objection is stated on page 402 of the Counter-Memorial as follows:

"... In all these matters [that is to say, the holding of inquests, the exercise of penal jurisdiction, etc.], the Jersey authorities were exercising a personal jurisdiction over their own subjects who had sailed to the Minquiers or the Écréhous, just as they would have done had they returned from a voyage on the open sea. The British Memorial does not adduce any act of jurisdiction performed at the actual places in question which would have involved territorial jurisdiction."

In short, the allegation is that Jersey jurisdiction has been exercised *ratione personæ* and not *ratione soli*. Our answer to this contention is set out in paragraphs 208 to 213 of the United Kingdom Reply, and in the affidavits of Mr. Duret Aubin, former Attorney-General for Jersey, of Mr. Benest, Sergent de Justice and Acting Viscount of Jersey, and of Mr. Le Couteur, the Judicial Greffier of Jersey, which are given respectively as Annexes A 153, 155 and 156 to the Reply. These affidavits show, I submit, decisively, as a matter of Jersey law, that the Minquiers, and equally the Écréhous, are within the bailiwick of Jersey, and that the holding of inquests, the exercise of criminal jurisdiction and similar matters, are carried out on that basis and that basis alone—for Jersey law permits no other. They are therefore unquestionably exercises of territorial and not personal jurisdiction. I submit that, in these circumstances, the fact that some of these acts *could*, under certain legal systems, or as a matter of general international law, be carried out *ratione personæ*, is irrelevant, for the Jersey jurisdiction was in fact exercised on a territorial basis. I believe, for instance, that, under the French system, jurisdiction can often be exercised over persons of French nationality in respect of things done by them while abroad. But in Jersey the basis of jurisdiction is purely territorial : there is no personal element.

This, I submit, disposes of our opponents' argument. But I must also ask what it is they mean to suggest by the phrase in the passage from

their Counter-Memorial which I read just now, in which they say that we have not adduced "any act of jurisdiction performed at the actual places in question which would have involved territorial jurisdiction". Do our opponents mean by this that we could only be said to exercise a territorial jurisdiction over the Minquiers and the Écréhous if we established courts *on* the Minquiers and the Écréhous themselves? Do the French maintain a set of civil and criminal courts on the Chausey, and on every little islet off the French coast? I should be very surprised to find that they did. The venue of courts is a matter of administrative convenience; but the character of the jurisdiction exercised by those courts does not depend on the location of the court itself, but on the nature of the proceedings.

I would now like to consider a little more closely some of the cases in which criminal jurisdiction, which we say was an assertion of territorial jurisdiction, has been exercised in respect of these groups. The first case I take is that of the prosecution of George Romeril in 1826, to which we attach considerable importance.

There are set out in Annex A 80 two extracts from the Rolls of the Royal Court of Jersey showing that Romeril was charged by His Majesty's Attorney-General with having, at the Écréhous, on the 26th May 1826, made an attempt on the life of John McGras by shooting at him with a firearm loaded with powder and shot. The date was, as I have said, the 26th May 1826, and the Government of the Republic are unable to counter this by invoking the alleged critical date of 1839. All that they can say by way of reply, therefore, is (p. 399 of their Counter-Memorial):

> "But if the Court of Jersey dealt with acts committed on the reefs of the Écréhous, it could only do so because the parties concerned were British. On the other hand, the French Government knows of no case in which that court has dealt with disputes between the numerous French fishermen who have always frequented the islands."

These two statements, I think, call for comment, because they reveal in a striking manner the weakness of the French position. It must surely be a matter of considerable significance that the Royal Court of Jersey was, in 1826, exercising criminal jurisdiction in respect of acts taking place on the Écréhous, when this is coupled with the fact that under Jersey law this jurisdiction could *not* have been exercised, even though the parties before the Court were Jerseymen, unless the act had occurred on, so to speak, Jersey territory. This is the point which the French objection in no way disposes of.

As regards the statement that the French Government knows of no case in which the Court of Jersey has dealt with disputes between the numerous French fishermen who have always frequented the islands, the assumptions of fact here made represent a considerable exaggeration. Where is the evidence of these numerous disputes—and, if there were disputes, as the French statement implies, how were they in fact dealt with? Were they brought before French courts? And where is the evidence of that? This method of attacking the significance of the evidence in support of our claim that we produce is inadequate, because our opponents produce no evidence of their own. They produce no evidence to show that *any* French court has ever dealt with *any* case arising at the Écréhous or the Minquiers. We at least can show that the

Jersey courts have dealt with such cases—and that they have been doing so for a long time.

This position under Jersey law is very ancient, and to me, as Her Majesty's Officer in Jersey charged with the prosecution of offenders, the French statement regarding the *Romeril* case, that if the Court of Jersey dealt with acts committed on the reefs of the Écréhous, it could only do so because the parties concerned were British, is astonishing.

I have already mentioned the affidavit of Mr. C. W. Duret Aubin, my immediate predecessor in office. In that affidavit (Annex A 153), he refers to the Constitutions of King John, which themselves are set out *in extenso* in Annex A 154. It is true that the original of these Constitutions has been lost, but they are extant in an Inquest of his son, Henry III, which recites and confirms them. They are, moreover, regarded by all true Jerseymen as sacred. By these Constitutions, King John constituted twelve coroners sworn *(Juratos)* to keep the pleas and rights pertaining to the Crown. These twelve—I am quoting from the text submitted on page 603 of volume I:

> ".... are to judge touching all cases in the said Island, howsoever arising, except Cases that are too difficult, as when any shall be lawfully convicted, as a Traitor, of having departed from his Loyalty to the Lord the King, or of having laid violent hands upon the Ministers of the Lord the King when exercising their Office in a lawful manner".

The jurisdiction thus conferred upon the Court does not, says Mr. Duret Aubin, extend to causes arising outside the bailiwick, and therefore the Royal Court of Jersey has no jurisdiction in the matter of a criminal offence committed outside the bailiwick, even though that offence be committed by a British subject domiciled or ordinarily resident within the bailiwick. I have myself, Mr. President, been a Law Officer of the Crown in Jersey for 17 years. I was previously, for eleven years, a member of the Jersey Bar, practising in the Royal Court of Jersey. I may perhaps, therefore, be permitted to say that I am in complete agreement with Mr. Duret Aubin as to the extent and limits of the jurisdiction of the Royal Court of Jersey. As the Officer of the Crown charged with the prosecution of offenders, it is to me quite unthinkable that I should institute criminal proceedings against anybody for an offence committed outside the bailiwick or, indeed, that any of my predecessors in office could ever have done so.

Now, it so happens, Mr. President, that evidence is available as to the opinion on this matter of the man who, in 1826, was Attorney-General of Jersey, and responsible for the prosecution of George Romeril. That man was Mr. (later Sir) Thomas Le Breton, who, having practised as an Advocate in the Royal Court of Jersey from the year 1812, was appointed Attorney-General in 1823 and held that office until 1848, when he was appointed Bailiff of Jersey.

Commissioners were appointed by Her Late Majesty Queen Victoria, in 1846, to enquire into the state of the criminal law in the Channel Islands, and among those who were in due course examined by the Commissioners was Mr. Le Breton. The Report of the Commissioners was published in 1847, and the following is an extract from the Minutes of Evidence taken before the Commissioners (p. 221), being one of the questions put to and the answer given by Mr. Thomas Le Breton on the 17th September 1846:

> "Question 2535. What do you consider to be the usual jurisdiction of the Island? Answer: I should think, if a crime were committed in the bays or creeks of the Island, or upon any small rock or island which had always been considered as forming part of this Island, such as the Écrého."

Mr. Le Breton was not the only Jersey lawyer of standing of that period to hold the same opinion. A further Commission was appointed by Her Late Majesty Queen Victoria in 1859, its mission being "to inquire into the civil, municipal and ecclesiastical laws of the island of Jersey". The Report of the Commissioners, together with the Minutes of the evidence taken before them, was published in 1861, and included in the evidence, on pages 65 to 70, was that of Mr. Hugh Godfray, the senior solicitor *(écrivain)* of the Royal Court of Jersey. The following is an extract from the Minutes of Evidence. Mr. Godfray was asked by Sir John Awdry, the Chairman of the Commissioners, how far and in what directions Jersey jurisdiction extended. Mr. Godfray's answer was:

> ".... all round. It is generally understood that the islands called the Minquais, the Écréhos, the Dirouilles, and the Paternosters are dependencies of Jersey, and, therefore, that the jurisdiction of the court extends to those limits. I have known cases arising at places within the limits I have described, brought before the court as Admiralty cases."

The next question and answer was:

> "1607. Are any of those islands inhabited, or did those cases arise from a merely accidental landing there by fishermen or other persons? Answer: Upon the Minquais and the Écréhos there are several houses which belong to some of the inhabitants of this island, where they resort to fish and for vraic."

Here, then, Mr. President, is evidence to show that, in 1846 and 1859, eminent Jersey lawyers were giving it as their opinion to Commissions appointed by their Sovereign that the Minquiers and the Écréhous were dependencies of Jersey.

The case of George Romeril is not the only one of a prosecution in Jersey for an offence committed on the Écréhous. Philippe Pinel himself, in spite of his exalted title, *Le Roi des Écréhous*, was, as Annex A 173 in our additional volume shows, presented before the Jersey Police Court *(Cour pour la répression des moindres délits)* on the 23rd July 1881, by the constable of the parish of St. Martin, on a charge of having, on the 23rd June 1881, "grossièrement insulté, sans la moindre provocation, Henry Charles Bertram, Ecr., sous-agent des Impots *[sic]*, celui-ci étant sur les devoirs de sa charge au Blancq Île, un des ilots des Écréhos appartenant et dépendant de la paroisse de St. Martin" —i.e. "of having, on the 23rd June 1881, grossly insulted, without the slightest provocation, Henry Charles Bertram, the Sub-Agent of the Impôts [that is to say, the Customs Officer], whilst the latter was in the discharge of his duties, at Blancq Île, one of the islets of the Écréhous, belonging to and dependent on the Parish of St. Martin". He was fined one pound sterling, with the alternative of four days' imprisonment.

Again, on the 22nd February 1913, Frank Billot (as will be seen from Annex A 175) was presented before the Royal Court of Jersey on an indictment charging him with having, during the month of January 1913, broken into the house occupied by Reginald Raoul Lemprière, the Seigneur of Rozel. He was charged with larceny from that house of a quantity of foodstuffs, linen and other effects; he pleaded "Not Guilty"; he was committed for trial at the Criminal Assize, where he was found guilty and was sentenced to six months' imprisonment with hard labour.

Again, on the 8th October 1921 (Annex A 176), two men, George Francis Levée, alias George Huelin, and Charles Henry Miller, were presented before the Royal Court of Jersey on an indictment charging them with having, during the night of the 8th/9th September, 1921, stolen a boat from its moorings in Bouley Bay—which is one of the bays on the north coast of the island of Jersey—and with having, on the following night, broken into the house at the Écréhous belonging to the Customs Authority, and with having stolen certain provisions from that house. They pleaded "Guilty", and they were respectively sentenced to nine months' and five months' imprisonment with hard labour.

In addition to these cases, Mr. President, there are two others which have recently been brought to my notice and which I think will be of interest to the Court. The first of these was the case in which Charles Blampied, who was almost certainly a Rozel fisherman and one of those referred to in the affidavit of Mr. J. T. Becquet (reproduced as Annex A 106), was presented before the Police Court on the 15th December 1883, charged with having, on the 16th November 1883, being then at the Écréhous, insulted Henry C. Bertram—by calling him a "damned liar" and a "bloody liar". The Court will remember, incidentally, that it was this same Mr. Bertram, Sub-Agent of the Impôts, who had aroused the ire of Philippe Pinel (roi des Écréhous) in 1881. We do not of course know what it was that thus provoked them to wrath, but it is not difficult to think of a reason. It is at any rate clear that there was a degree of vigilance over the Écréhous in those days in relation to customs, and I would remind the Court that "those days" were 1881 and 1883, before the date on which the French first made a formal claim to sovereignty over the Écréhous. Apart from its bearing on the question of jurisdiction, this case is, I think, interesting in that the language attributed to the accused was, if I may say so, good honest English and not quite the language that one would expect from a Frenchman.

The other case is one of 1891. On the 12th August of that year four men, Jean Léon Besnard, son of Joseph, Auguste Louis De Caux, Alfred Francis Gibaut and Jean Pierre Désiré Buhot, were charged by the constable of St. Martin with having, on the 22nd and 23rd July 1891, "au Maître Île des Ecrehos appartenant et dependant *[sic]* de la paroisse de St. Martin", committed offences against the Game Laws. One of them, Besnard, was found guilty and a small fine was imposed. The others were discharged for lack of proof. But the particularly interesting point about this case is the fact that one of the persons charged, Buhot, was a native of Portbail, France. In this case, therefore, Mr. President, we find one of the Jersey courts exercising jurisdiction over a Frenchman in respect of offences against the laws of Jersey alleged to have been committed on territory which the Govern-

ment of the Republic say was at that time—and in fact always has been—French. If the other cases to which I have referred were not sufficient to dispose of the French argument that the Jersey authorities exercised jurisdiction in respect of offences committed at the Écréhous *ratione personæ*, this last case must surely do so.

I have with me here, Mr. President, photostat copies of the relevant Jersey records, and I will hand them to the Registry. I will also, of course, hand copies to my friend M. Gros.

I submit that the exercise of jurisdiction by the Courts of Jersey in these cases, necessarily on a territorial basis as I have described, was a clear and unequivocal act of sovereignty, or, to use the words of the Government of the Republic on page 721 of their Rejoinder, a "sufficiently unmistakable assertion" of sovereignty.

So far as the Minquiers are concerned, our records do not show evidence of any offence having been committed there, but we can provide evidence of another type of case occurring within the period with which I am dealing, another type of case in which the Royal Court of Jersey exercised jurisdiction in respect of something taking place at the Minquiers. I refer once again to the two salvage cases that were heard in 1811 and 1817, which figure as Annexes A 164 and A 165 in the Additional Volume. Of course, our opponents will point out that, again, the parties were all Jerseymen. Nevertheless, it remains the fact that in Jersey the basis of salvage jurisdiction is territorial. If the wreck had not been found at the Minquiers—that is to say at a place regarded as Jersey territory, so to speak—the Court would not have taken cognizance of these cases.

I have now terminated my review of the British acts in the exercise of sovereignty, and of the long standing Jersey connection with the Minquiers and the Écréhous during the period I am dealing with. Before I pass on to compare the French acts, I would ask the Court, in the light of all the evidence of the British acts which we have given and which I have reviewed, what value can be attached to the conclusion that appears on page 722 of the French Rejoinder, and which I will read:

> ".... the Government of the Republic concludes that the said acts were either devoid of significance or were too infrequent and too intermittent to entitle the United Kingdom Government to claim continuous possession, exempt from any legal defect".

The only comment I will make on that—certainly very courageous—statement is that, suppose it to be true, what becomes of the *French* claim? For if our acts are devoid of significance, infrequent and intermittent, what of the French acts? The Court will be told in a moment what they amount to. I suggest that we see here that element of the French case to which Sir Lionel Heald drew such pointed attention—namely, the pretension that it is not necessary for France to show any specific exercise of sovereignty over the groups, because a French King was once the feudal overlord of a Duke of Normandy, and therefore France has been sovereign ever since! Our answer to this is that if France is sovereign to-day, there must be some evidence of the exercise of French sovereignty. But what evidence of it is there? Let us see what concrete acts France can in fact put forward.

As regards the Écréhous, the answer is very simple. It can be given in one word. None. Not one single act whatsoever is put forward by France

in the period I am dealing with. There is really, I think, no more to be said about the Écréhous.

As regards the Minquiers, the position is substantially the same, but the Government of the Republic do advance three acts, or considerations rather—they can scarcely be called acts—as manifestations of sovereignty. These, as stated on page 401 of the Counter-Memorial, are :

First—the supposed indisputable fact that she (France) assumed the sole charge of the lighting and buoying of the islands (Minquiers) for more than seventy-five years without having encountered any objection on the part of the British Government ;

Secondly—the claim that it was a Frenchman, M. Beautemps-Beaupré, and not Captain Martin White, who made the first hydrographic survey of the Minquiers group in 1831 ; and

Thirdly—the claim that a French mission appointed to make a hydrographic survey of the Minquiers in 1888 erected provisional beacons on them to facilitate the survey.

Now, as to the first of these claims, there may be some question as to whether any of the buoys placed by the French authorities in the vicinity of the Minquiers are within the territorial waters of the Minquiers. What is certain—in fact "indisputable"—is that not one of them is within three miles of any of the main islets or of any of the main rocks, that is to say, rocks which are never entirely covered by the sea. The way in which these buoys are placed makes it quite clear that the principal object of putting them there was to ensure that shipping should be warned to keep *away from* the Minquiers ! The buoys were, in fact, designed to aid navigation into and out of the French ports—principally of St. Malo and Granville.

No buoys or beacons of any kind have ever been placed within the Minquiers reef itself (that is to say, on the plateau) by the French authorities. Every buoy and beacon within that reef—and there are a considerable number of them—was placed there by the Jersey authorities—and it is these buoys and beacons, not the French ones, which constitute the real aids to the navigation of the Minquiers reef itself.

[Public sitting of September 24th, 1953, afternoon]

I come now, Mr. President, to the second claim advanced by the Government of the Republic, namely that it was a Frenchman, M. Beautemps-Beaupré, and not Captain Martin White, who made the first hydrographic survey of the Minquiers group in 1831, and as to that claim, I would only point out that, having originally asserted that it was M. Beautemps-Beaupré who made the first hydrographic survey in 1831, and finding themselves faced with the fact that Captain Martin White made his survey in 1813 to 1815, all that our opponents are now able to say is that the fact that White's survey was of earlier date is without significance. (I refer the Court to p. 724 of the French Rejoinder.) But if so, then surely so also is the fact that M. Beautemps-Beaupré's survey was carried out some 15 years later. Why greater significance should be attributed to the later of two events so near the time, I do not know. I would venture to observe, however, that Captain White's survey has at least this significance—that it shows that the categorical statement made in the French Counter-Memorial,

denying our claim that it was Captain Martin White who made the first hydrographic survey of the Minquiers, is incorrect. Moreover, as I have said, if the fact that Captain Martin White was the first to make a survey of that area is without significance, then one of the only three "faits de possession", acts of possession, advanced by the Government of the Republic, must itself be "without significance". We for our part do not claim any special significance for Captain White's survey, standing by itself. It is as part of a general picture that it has significance; and it is precisely this general picture which is lacking on the French side.

As to the fact that a French mission was charged to make a hydrographic survey of the Minquiers in 1888, and that this constituted "un fait de possession", I do not think that I need do more than say that, in August of this very same year, 1888, in the spring of which the French party had been to the Minquiers, an official visit to the group was made by the Jersey Piers and Harbours Committee, who, as I showed in my earlier reference to this incident, were well aware of the French visit. It was this visit by the Piers and Harbours Committee that drew forth for the first time the assertion of French sovereignty made in Mr. Waddington's note to Lord Salisbury of August 27th, 1888, which appears as Annex A 53 to the Memorial. Lord Salisbury's reply of November 21st is given as Annex A 54, and its salient features are described in paragraphs 101-103 of the Memorial, and in paragraph 238 of the Reply. It asserted British sovereignty, and it contained a full statement of the British grounds of title, both factual and historical. It took no formal objection to the French survey, but it made it quite clear that, in the circumstances, it could not be cited as proof of French sovereignty.

No reply was received to this note.

We claim, therefore, that these isolated acts relative to the Minquiers were neither properly in the nature of exercises of sovereignty, nor evidence of its existence on the part of France. In any case, we claim that they are in no way comparable, either in bulk or in character, with the numerous British acts, most of them involving actual administration and the exercise of jurisdiction. And I would remind the Court once more that, as regards the Écréhous, no French acts at all are advanced.

I hope I have succeeded in demonstrating the enormous difference between the French and the British—that is to say in effect the Jersey —positions, and I venture to conclude my comparison as follows. If the test of sovereignty is the will and intention to act as sovereign, coupled with a display of sovereign authority, such will and intention has clearly been exhibited by Jersey and carried fully into effect—not with any view to *establishing* sovereignty *de novo*, but in the routine exercise of a sovereignty always regarded as ours. It is also the Jersey authorities who have assumed and discharged the responsibilities of a sovereign and have incurred *and* discharged the resulting financial liabilities.

Of France it can only be said, I think, that whether she had in fact the will and intention to act as sovereign, she has not evidenced that will and intention by any actual—certainly not by any sufficient—exercise or display of sovereign right. France may have had the will and intention to contest the *British* claim to sovereignty so far as she

could. She has not evidenced the will and intention to exercise sovereignty herself, or to discharge the responsibilities of sovereignty. Again, I would draw attention to the marked contrast between the French actions in relation to the Chausey, and their actions—or rather lack of actions—in relation to the Minquiers and the Écréhous. The Government of the Republic may from time to time have made a formal diplomatic protest about the Minquiers and the Écréhous, but in practice it has undoubtedly left them to us, just as we have left the Chausey to them.

I come now, Mr. President, to the sixth and final part of my speech—that in which I will deal with the French project "for the installation of tidal power plants in the Bay of Mont St. Michel and in the region of the Minquiers Archipelago" (*p. 731*).

The Court will no doubt have studied the broad outlines of this project, as set out in Annexes I and II to the French Rejoinder, and the Court will have observed that the plan appears to comprise three separate projects. The first is for the construction of a barrage on the river Rance, upstream of St. Servan and Dinard; the second is for the construction of a dam joining Cancale to Granville via the Chausey; the third is for the construction of a dam connecting Cap Fréhel with the Minquiers.

We have consulted expert opinion concerning these projects, and we are advised that it is perfectly true, as the French Rejoinder says, that they are not engineer's dreams, but practical projects. Even the most ambitious of the three projects, we are told, is technically feasible, although a number of practical difficulties would have to be solved; but we are informed that the cost would be so enormous as to make it highly debatable whether the project would be a financial possibility, at any rate in the foreseeable future. I mention these points in order simply to show that we have given this matter serious and objective consideration. But having done so, I must ask—and I feel I am entitled to put the question bluntly—*what*, as a matter of law, has this to do with the issue which is now before the Court? I submit that the considerations raised by these projects are not legal considerations, such as alone this Court is able to deal with or take into account: they are matters which might properly form the subject of negotiations between the two countries, or be taken into account by a Commission of Conciliation or Enquiry—but they are not, I submit, matters for a Court of Law. I will just observe in passing that, although these projects must evidently have been under contemplation for some time on the French side, no mention of them was made in the negotiations leading up to the Compromis, or even in the French Counter-Memorial. The matter was introduced for the first time in the Rejoinder, evidently as an attempt to give some much-needed substance to the French claim.

It is therefore difficult to regard the matter of these hydro-electric projects in any other light than as an attempt to confuse the issue before the Court, by importing into it at the last moment considerations of an obviously extra-legal character, and we may be fairly sure that the distinguished jurists whom our opponents number amongst their advisers are not happy at this importation and heartily wish that the French claim were strong enough, on the legal side, to enable them to dispense with it.

Let me now consider, Mr. President, how this French point is put. I cite two paragraphs from page 728 of the Rejoinder. They read as follows :

> "It has already been represented that the dismemberment of French sovereignty resulting from the transfer of the outer Anglo-Norman islands to a foreign sovereignty ought not to be extended any further without absolute necessity and without consideration of the practical consequences. The Bay of Cotentin is, as everyone knows, one of the maritime areas in which the tides attain their greatest development."

Pausing there, I am sure the Court will not be deceived by this reference to the dismemberment of French sovereignty. The connection both in time and in character between this and these hydro-electric projects is, to say the least of it, remote. In any case, as we have pointed out earlier, there has been no dismemberment of French sovereignty. The boot is rather on the other foot.

The second passage, on page 728 of the Rejoinder, after describing the projects, continues :

> "This fact affords clear evidence that the link with the Continent exists ; that it is not a link resulting simply from position or contiguity, without practical effect. The geographical dependency, in the present case, is not confined in its effects to a mere possibility, open to both Parties, of instituting a local fishing industry, however useful that might be. When considered in relation to the Continent the geographical dependency opens the door to possibilities infinitely greater than could be offered by any association with the islands."

The Court will have no difficulty in seeing that this contention, especially the last phrase of it, amounts to a plea, not that the Minquiers are French in law, but that as a matter of political equity they *ought* to be—but this is a purely political plea. The Court is being asked to lend itself to bringing about what would, in effect, be a cession or transfer of territory under the guise of a judicial decision as to title. Furthermore, by means of this plea, the Government of the Republic is really asking the Court to award France the Minquiers because the realization of these hydro-electric projects would be for the benefit of France, and—this is the implication—unless the Minquiers are awarded to France, the Government of the Republic may not be able to carry these projects out. I am sorry to put it so bluntly, but the matter of these projects is so irrelevant juridically, that I can see no other way in which it could affect the issue. Alternatively, the suggestion is that France should be awarded the Minquiers because France can make a better use of them than will be the case if they remain part of or associated with the Channel Islands. But, of course, this amounts to asking the Court to act as an arbitrator or assessor, or as a Commission of Adjustment—not as a Court of Law. Such arguments, I suggest, are a measure of the weakness of the French position, and virtually an admission that France has not got the sovereignty, coupled with a plea that France ought to have it. I am therefore authorized, Mr. President, on behalf of the United Kingdom Government and the States of Jersey, to tell the Court two things.

The first is that, in our view, these projects—in the realization of which, subject to suitable safeguards and arrangements, both the United Kingdom and Jersey would gladly co-operate—would not in any case—that is to say, even if the Minquiers belonged to France—be such as the Government of the Republic could carry out entirely as of right, and without reference to the position of other countries. In the first place they, or at any rate the second and third of them, could not fail to involve interference with fishing at the Minquiers—and the Court will remember that both Parties now have certain fishery rights there, irrespective of the decision on sovereignty. In addition, as the Court will see from the sketch plan on page 730 of the French text of the Rejoinder, these projects involve the construction of dams across areas of high seas, of the breadth of ten or twenty miles, so that the possibility of interference with navigation, passage and other matters must arise, which would give other countries a right to be consulted. And it might well be that these projects would need a considerable measure of international agreement before they could validly be put into effect. Equally, the interference with the free flow of the tides, which of course is the whole purpose of these projects, might create other problems. For instance we are advised by our technical experts that the projects might well intensify our problems in Jersey by causing the increased silting up of our harbours—already a problem. It might also cause other difficulties such as would involve us in a very great deal of expense.

The Court will therefore see that, even if the Minquiers belonged to France now, or were awarded to France by the Court, it would in no way follow that these projects could be carried out by France without the consent and co-operation of other countries. But this being said, may I impart my second piece of information, which is this: that, subject to the necessary safeguards, we would not dream of using our sovereignty over the Minquiers to impede or obstruct the realization of hydro-electric projects that might be to the benefit of France. I am authorized to declare on behalf of Her Majesty's Government that any approach on this matter would receive sympathetic and interested consideration, and, subject to suitable arrangements, our fullest co-operation.

In short, Mr. President, there is no need to award the Minquiers to France in order to render these projects possible of realization, if this is what our opponents are trying to suggest to the Court; but I am confident that the Court would in any case refuse to act on such a basis.

I now come, Mr. President, to the final passage of my statement. If our opponents are entitled to ask the Court to award the Minquiers to France because of the supposed effect that not doing so might have on future French hydro-electric projects, perhaps I might be allowed to remind the Court of the effect that an award, whether of the Minquiers or the Écréhous, in *favour* of France would have, not on future and possibly hypothetical projects, but now and to-day; not on dams and installations and electrical machinery, but on men and their livelihood and habitations. Of course, I know that, in form, an award in favour of France would be a finding that France was the rightful sovereign: nevertheless, the practical effect in the present case would be indistinguishable from a cession of territory—a partition of the bailiwick of Jersey and a transfer of a portion of it to France. Indeed,

it would have to be followed by arrangements between the two countries about the buildings and constructions on the islands and about other matters, very similar to those which are normally made or provided by treaty when an actual cession of territory takes place. For this is not a case of virgin territory where no man lives and no law runs. No one can doubt, on the evidence we have given, that the existing law of the groups is Jersey law. French law and jurisdiction would have to *replace* an existing Jersey law and jurisdiction. As Sir Lionel Heald pointed out in his speech, all the Jerseymen whose names and properties are listed in the affidavit of Mr. Furzer (to which I have several times referred) would find that in respect of their holdings on the groups and contrary to what they have always believed, they were subject to French law; that their property was on French and not British soil; that their existing title deeds were invalid; that they could only go to their property as to a foreign country; and that they would be subject there to the criminal, fiscal and other laws of France.

But I find it hard to believe that the Court will at all readily reach a conclusion which must result in the artificial consequence of awarding to France territory on which no Frenchman has ever lived, over which no French authority has ever been exercised, and in which French law, whether public or private, has never been applied: and in this connection, Mr. President, I would ask the Court to bear in mind the following passage from the award in the *Grisbadarna* case (James Brown Scott's *Reports of Hague Court Cases*, at p. 130):

> "... it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible",

and

> "This rule is specially applicable in a case of private interests which, if once neglected, can not be effectively safeguarded by any manner of sacrifice on the part of the government of which the interested parties are subjects...."

May I be permitted, Mr. President, to conclude my address by paying, on behalf of the island which I have the honour to represent, a tribute to Sir Lionel Heald, Mr. Fitzmaurice, Mr. Best—the Agent—and the other members of the United Kingdom delegation. Regarding this case as we do, as primarily *ours*, we appreciate most warmly the very keen interest that they have displayed in this case and the great energy and, if I may say so, skill, which they have devoted to its preparation and presentation: and may my last word be, speaking for myself, that I count myself very highly privileged in having been associated with them.

5. PLAIDOIRIE DE M. LE PROFESSEUR GROS

(AGENT DU GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE)
AUX SÉANCES PUBLIQUES DU 28 AU 30 SEPTEMBRE 1953

[Séance publique du 28 septembre 1953, matin]

Monsieur le Président, Messieurs de la Cour,

La Cour est la seule institution internationale devant laquelle les États saisissent véritablement le sens du pouvoir de la communauté internationale, car le juge est le seul organe de cette communauté internationale dont les décisions ne peuvent pas être contestées par les États, puisque ses décisions sont fondées sur le droit, puisqu'elles sont le droit. C'est toujours dans un sentiment de confiance et de respect profond que les États qui croient en la justice se présentent devant la Cour.

Dans la présente affaire, le Gouvernement de la République éprouve encore un autre sentiment, celui de rencontrer non pas un adversaire, mais un ami. La Cour me permettra de m'associer à M. l'Attorney-General lorsqu'il constate les progrès accomplis dans les relations internationales entre l'époque — encore si proche de nous — où les conflits de souveraineté territoriale se réglaient par les armes et le moment où deux États viennent prier la Cour de leur dire à qui appartient la souveraineté sur deux groupes d'îlots dont chacun, en toute bonne foi, se croit investi.

Le délai même qui sépare le début de l'histoire du différend franco-anglais sur les îlots de la Manche du point final que sera la décision de la Cour, nous montre combien cependant les progrès de la justice internationale furent lents. Jamais, au cours d'une correspondance diplomatique qui fut abondante entre 1876 et 1914, l'un ou l'autre des gouvernements ne proposa l'arbitrage. Il aura fallu deux guerres faites côte à côte pour apaiser la crainte que l'amour-propre national ne puisse supporter une décision contraire. Mais, malgré cet heureux changement dans les rapports des peuples de nos deux pays, la Cour aura noté, dans les paroles inaugurales de M. l'Attorney-General, comme dans l'exposé de M. l'Attorney-General de Jersey, que les sentiments étaient encore vifs, et on ne nous a pas caché « l'impatience » des Jersiais à voir contester leur prétention.

Du côté français il en est de même, et si nos pêcheurs sont moins favorisés que les pêcheurs jersiais qui ont trouvé pour les représenter les plus grands talents du Royaume-Uni, c'est en leur nom, c'est pour eux, les pêcheurs de Saint-Malo, de Granville, de Carteret, de Camaret et de Chausey, que le Gouvernement de la République a saisi la Cour afin de faire reconnaître qu'ils ont raison lorsqu'ils disent : « ces rochers sont à nous ».

Différend sur de petits îlots mais pas sur de petits sentiments.

Il m'est donc agréable de remercier les avocats du Royaume-Uni de la mesure de leurs exposés et de l'amitié qu'ils ont témoignée vis-à-vis de l'autre Partie.

Sans doute, selon les mots de l'Attorney-General, ils n'ont pas épargné les coups, mais l'attaque était loyale ; assiégé de quatre côtés par des adversaires aussi éminents, la tâche du représentant du Gouvernement de la République peut apparaître lourde. Elle le serait si la cause de la France n'était pas bonne ; or *elle l'est.*

Lorsque nous entendons l'autre Partie exposer nos thèses, nous sommes toujours tentés de penser qu'une soudaine incompréhension la saisit et que, selon le vieil adage, cette traduction de nos idées est en même temps une trahison.

Mes collègues britanniques ont représenté la thèse française telle qu'ils la voient ; la Cour me permettra de l'exposer telle qu'elle est.

* * *

Et avant tout, j'aimerais dissiper certains malentendus et réduire à néant certaines légendes que mes collègues — en toute bonne foi, cela va sans dire — ont créés et entretenus.

Dans la présentation même de notre thèse — qu'ils ont qualifiée à plusieurs reprises de « négative » —, ils nous ont reproché de n'avoir produit presque aucun document et de nous être contentés de contester la valeur des documents produits par le Gouvernement du Royaume-Uni. Singulier reproche en vérité !

Fallait-il réimprimer deux fois le texte de chartes, de traités anciens ou modernes, de lettres diplomatiques échangées entre les représentants de nos deux pays qui forment l'essentiel des annexes au mémoire du Royaume-Uni ? Celui qui remettait le premier mémoire avait publié les textes. Quel curieux reproche de nous dire : ces textes ne sont pas de vous. Pas de nous.... ! Ils sont à nous autant qu'à vous : à nous l'acte de 1202 punissant votre roi par le nôtre ; à nous la « Gallia Christiana », la « Gaule chrétienne ». Et je dirai plus : si ces textes sont reproduits par le mémoire britannique en 1952, n'oublions pas que tous les documents essentiels ont été invoqués pour la première fois en 1886 et par la France ! Dans le rapport des juristes français (annexe 42 au mémoire du Royaume-Uni), au nombre desquels se trouvait un homme dont la Cour n'a pas oublié le nom : M. Louis Renault. Et ces trois juristes français connaissaient et utilisaient la charte de Pierre des Préaux, l'arrêt de 1202, tous les actes anciens utilisés aujourd'hui dans l'affaire.

Ces pièces ont été mises dans le dossier par la France en 1886, le Royaume-Uni le reconnaît dans sa propre réponse (annexe A 47 au mémoire du Royaume-Uni). Ceci, joint à la destruction de maintes archives normandes au cours des guerres qui dévastèrent cette province, sans parler de la dernière guerre mondiale, explique la disproportion entre les pièces écrites des deux Parties et renvoie à sa place ce qui n'était sans doute qu'un argument de plaidoirie. Après avoir cru que tout océan était britannique, faut-il que le Royaume-Uni imagine aussi que toutes archives sont britanniques !

On nous a parlé avec émotion des pêcheurs de Jersey qui attendent anxieusement la décision de la Cour et ne peuvent imaginer qu'elle puisse leur être défavorable. On nous a dit que ces pêcheurs tirent des îles litigieuses l'essentiel de leur subsistance et que les en priver serait les condamner à mourir de faim ; on nous a décrit les abris construits par ces pêcheurs aux Minquiers et aux Écréhous et que les Français

veulent maintenant leur ravir ; on nous a montré comment les pêcheurs français, qui n'allaient jamais dans ces parages avant 1940, s'y seraient installés, en somme, à la faveur de l'occupation allemande ; on nous a raconté qu'avant 1939 aucun doute n'était possible sur le statut juridique des îles et que sans la guerre le problème n'aurait même pas pu se poser devant le juge international ; on nous a dit enfin qu'à l'intérêt moral et humain de Jersey la France n'opposait rien, si ce n'est une prétention vide et un projet d'usine hydro-électrique brandi à la dernière minute comme un instrument de pression sur la Cour.

Je dois dire avec regret que tout cela n'est pas conforme aux faits. Pour l'affirmation que les pêcheurs français ne fréquentent les îles que depuis la guerre, nos amis britanniques auraient-ils vraiment oublié les nombreux documents qu'ils ont eux-mêmes produits dans leurs annexes au mémoire et qui relatent des incidents survenus entre les pêcheurs des deux pays il y a déjà des dizaines d'années (annexes A 50, A 51, pp. 262-263) ? Pour l'affirmation qu'avant la guerre il n'y avait guère de doute sur la situation juridique des îlots et que, né après la guerre, le conflit venait pour cette raison aujourd'hui devant la Cour, nos collègues ne se souviendraient-ils plus de l'énorme correspondance diplomatique dans laquelle les deux Gouvernements affirment, depuis plus de quatre-vingts ans, leurs prétentions opposées en ce qui concerne ces îles ? Pour l'affirmation de l'intérêt vital des pêcheurs de Jersey dans cette affaire, le Gouvernement du Royaume-Uni n'a-t-il pas écrit en toutes lettres dans son mémoire, paragraphe 178, et annexe A 139, page 346, particulièrement paragraphe 15, que, depuis la fin de la guerre, les pêcheurs professionnels de Jersey ne viennent plus pêcher aux Minquiers où la pêche ne leur semble plus assez rémunératrice ? Le Gouvernement du Royaume-Uni ignore-t-il que les maisons de deux îles sur trois aux Écréhous appartiennent aujourd'hui à deux riches estivants et non pas à de pauvres pêcheurs ? Simple affirmation gratuite que les pêcheurs français qui, eux, continuent à fréquenter les îlots n'ont guère d'intérêt moral ou matériel à sauvegarder. Enfin, peut-on vraiment comparer l'importance de l'intérêt de l'île de Jersey vis-à-vis de ces deux groupes d'îlots et celui de la France : la Cour croira-t-elle vraiment que des villas d'estivants et quelques maisons de pêcheurs représentent un intérêt plus fondamental qu'un projet qui doublerait la production d'électricité actuelle de la France ?

Mais il y a plus. Nos collègues britanniques ont essayé, tout au long de leurs plaidoiries, de faire prévaloir l'idée que, du moyen âge à nos jours, la France n'a exercé aucune souveraineté effective sur les îles. Toutes les preuves de souveraineté pour le Royaume-Uni, aucune pour la France : ainsi pourrait-on résumer l'argumentation de mes collègues.

« Toutes les preuves de souveraineté pour le Royaume-Uni » ! De fait, M. l'Attorney-General a affirmé l'existence d'une « véritable communauté britannique vivant ou possédant des biens aux Minquiers et aux Écréhous », et M. Harrison a, de son côté, insisté sur les faits de possession les plus variés, qui vont de l'inscription d'initiales sur un rocher des Minquiers, qu'une science plus proche à la fois de la divination et de la graphologie attribue à un habitant de Jersey — à ce compte-là le Château de Versailles n'est plus français —, jusqu'aux actes publics d'administration, en passant par le fait que des maisons

construites à Jersey aux XVIIme et XVIIIme siècles l'ont été en pierres analogues à celles que l'on trouve aux Écréhous !

Si l'on essaie de se dégager de l'impression de « masse » créée par les conseils du Royaume-Uni, les choses prennent un aspect sensiblement différent. Prenons d'abord la période ancienne, jusqu'à la fin du XVIIIme siècle.

Quels faits de possession trouvons-nous du côté britannique ? Rien — je souligne : rien — en ce qui concerne les Minquiers ; quelques documents assez obscurs pour les Écréhous, documents qui, nous le montrerons, n'ont absolument pas la portée qu'on leur prête. Dans ces conditions, où donc est, pendant la période ancienne, cette possession *effective* qui conférerait la souveraineté à l'Angleterre, soit en vertu du traité de 1259, soit en vertu des principes généraux du droit international ? Nos adversaires ont *affirmé* cette possession ; ils ne l'ont pas le moins du monde démontrée. En ce qui concerne la période récente, nous verrons que ces faits de possession si souvent cités n'ont absolument pas la valeur probante que mes collègues leur prêtent : souvent insignifiants, contestés par la France, ces faits ne peuvent être appréciés qu'à la lumière de la convention du 2 août 1839 et des controverses auxquelles elle a donné lieu. C'est justement sur la validité de ces faits, au regard du droit international — validité que nous avons toujours contestée —, que la Cour est appelée à statuer.

Quant à l'affirmation de M. l'Attorney-General qu'il y a une « communauté britannique » aux Minquiers et aux Écréhous, elle est tellement plaisante, surtout en ce qui concerne les Minquiers, que les photographies soumises à la Cour par le Gouvernement britannique et auxquelles, si la Cour le permet, j'en ajouterai quelques-unes très récentes, feront elles-mêmes justice de cette affirmation.

Mais la Cour se demandera peut-être pour quelles raisons les cabanes de pêcheurs — abris occasionnels ou devenues, pour une bonne part, résidences d'été — ont été édifiées par des pêcheurs jersiais, et non pas par des pêcheurs français. L'explication est très simple : du temps de la navigation à voile, le régime des vents et des courants permettait aux pêcheurs français de regagner très facilement leurs ports par tous temps, alors que les pêcheurs de Jersey, dans l'impossibilité de rentrer chez eux par mauvais vent, étaient obligés de se construire de petits abris pour y attendre le moment du retour.

« Aucune preuve de souveraineté pour la France. » Sans doute, comme je l'ai déjà dit, la destruction d'une bonne partie des archives normandes pendant des siècles ne permet-elle pas de produire des documents nombreux sur la période du moyen âge : mais la Cour constatera que ce que nous pouvons invoquer est encore supérieur à ce qu'invoque le Royaume-Uni.

Quant à la période récente, les conseils du Royaume-Uni nous ont mis au défi de produire des preuves effectives de notre souveraineté. Ce défi, nous le relevons. Pour avoir été ignorés de nos amis britanniques, nos faits de possession n'en sont pas moins nombreux et importants pour des rochers qui forment, selon le mot de Victor Hugo, une « nudité dans une solitude ». Nos pêcheurs sont venus aux îles depuis un temps immémorial, notre administration s'en est occupée, nos services en assurent le balisage depuis 1865 pour les Minquiers, notre Président du Conseil les a visités avant la guerre — et bien d'autres faits encore, sur lesquels je reviendrai en détail ultérieurement. Mais il faut insister

quelques instants sur un point essentiel. De 1820 à 1950, la France a manifesté un esprit de conciliation qu'on serait vraiment mal venu de lui reprocher aujourd'hui : sachant sa souveraineté contestée, elle n'a pas voulu appliquer la politique du fait accompli et a maintenu la controverse sur le plan des relations normales entre les États. En 1929, par exemple, l'Administration française a annulé le bail consenti sur les Minquiers à un ressortissant français (annexe A 137) ; à plusieurs reprises, le ministère français de la Marine a demandé à nos pêcheurs de ne pas créer d'incident avec les pêcheurs anglais. Respectueux de la convention de 1839, le Gouvernement de la République n'a jamais voulu que ses ressortissants créent, aux îles, une situation contraire à ce traité : va-t-on aujourd'hui nous en faire grief ? Les tentatives de nos pêcheurs se sont d'ailleurs heurtées plus d'une fois à des réactions violentes de la part des Jersiais : molestations, destruction d'édifices, abattage de mâts de pavillons, etc. Fallait-il recourir, de notre côté, à la force et à la guerre ? Car — ceci est un point à ne pas négliger — aux environs de 1875 jusqu'à 1904 — et j'aurais préféré qu'on ne me forçât pas à le rappeler — les rapports entre nos deux pays n'étaient pas ce qu'ils sont aujourd'hui. La correspondance de Paul Cambon, l'artisan de l'entente cordiale (publiée chez Grasset, Paris, 3 volumes) est on ne peut plus éloquente. On y trouverait, en la lisant, qu'en 1898 sir Edmond Manson, ambassadeur d'Angleterre à Paris, avait, à Paris, fait un discours où il faisait le procès de la politique extérieure de la France et de ses coups d'épingles *(pin pricks)* à l'Angleterre : ces « coups d'épingles », tout réciproques d'ailleurs, avaient pour noms : Fachoda, Madagascar, Terre-Neuve, Extrême-Orient. La crainte d'événements graves ne cesse d'obséder Paul Cambon (correspondance, tome II, pp. 31 à 34 notamment). Fallait-il donc exiger plus, défier et provoquer une rupture pour les Minquiers et les Écréhous ? Il suffisait de protester, sur le papier, contre les empiétements les plus importants, pour montrer que le Gouvernement français ne perdait pas de vue ses droits de souveraineté, sans créer d'incidents pour des faits de moindre gravité. Entre les deux pays, les relations diplomatiques connaissaient assez de problèmes autrement importants que celui des Minquiers et des Écréhous. Jersey pouvait consacrer toute son attention sur son unique problème de politique étrangère. Les deux Gouvernements en avaient d'autres. Ce n'est pas une preuve de faiblesse, mais de sagesse, que de mesurer sa diplomatie à l'importance des questions. Entre les négociations nécessitées par l'apaisement de 800 ans de guerre et la querelle des Minquiers et des Écréhous, nos ambassadeurs à Londres et nos ministres des Affaires étrangères ont su, Dieu merci, voir quelles étaient les plus nécessaires. Ils ont fait, pour réserver les droits de la France sur les Minquiers et les Écréhous, ce qu'il fallait, avec mesure : il serait grave de leur reprocher cette mesure. Seul un Attorney-General de Jersey pouvait dire que la France n'avait jamais été en mesure de contester l'exercice de la souveraineté par le Royaume-Uni sur les Minquiers et les Écréhous (jeudi, 24 septembre, p. 174). Devant une vue aussi « paroissiale » des événements, il aura suffi de ces quelques mots pour remettre les choses à leur place.

De quoi s'agit-il au fond ? La question doit être posée, car mes collègues britanniques ont singulièrement élargi le débat. Il ne s'agit ni des îles de la Manche en général, ni de Jersey, ni des Chausey, mais tout simplement des Minquiers et des Écréhous, qui sont marqués sur la carte. La Cour voudra donc bien me permettre, avant d'approcher

le problème juridique, de me livrer à un rapide examen des données géographiques. Certes, la géographie n'est pas le droit, et l'œuvre des hommes a maintes fois contredit celle de la nature. Le Gouvernement de la République ne l'ignore pas, et c'est sur des actes et des faits juridiques qu'il va appuyer la revendication de sa souveraineté sur les îlots litigieux. Mais l'analyse juridique à laquelle le juge doit se livrer comporte toujours, dans les affaires mettant en cause la compétence territoriale, l'examen préalable des données géographiques. Le droit international attache à ces facteurs une importance bien marquée dans l'arrêt de la Cour sur les pêcheries norvégiennes de 1951, et les développements récents de la pratique internationale sur la question du plateau continental sont les illustrations les plus éclatantes, mais non les seuls exemples, de l'importance des données géographiques dans le droit.

* * *

Si nous essayons de placer les Écréhous et les Minquiers sur la carte par rapport à la côte et à Jersey, nous voyons que les deux groupes sont situés approximativement à mi-chemin entre la côte de l'île de Jersey et la côte continentale française. Le groupe des Écréhous, plus compact que celui des Minquiers, est situé entre l'île de Jersey et la côte du Cotentin. Le point le plus rapproché de Jersey se trouve à 3,9 milles de cette île, le point le plus proche du continent à 6,6 milles du cap Carteret. Quant au groupe des Minquiers, plus dispersé que celui des Écréhous, il est situé entre l'île de Jersey et la côte nord de la Bretagne. Le point le plus proche de Jersey est à 11,5 milles de l'île ; le point le plus proche du continent à 17 milles de la pointe du Menga ; enfin, 8 milles environ séparent ce groupe de celui des Chausey, qui est français sans contestation aucune de la part du Royaume-Uni, du moins dans son statut depuis 1764.

Le rocher le plus important des Minquiers n'atteint pas 150 mètres de longueur sur 30 mètres de largeur à marée haute, c'est un cargo, il ne s'élève qu'à quelques mètres au-dessus des flots ; pas le moindre brin d'herbe n'y pousse ; la superficie totale de quelque vingt-cinq autres rochers du groupe ne dépasse guère celle de cet îlot, de sorte que l'ensemble des « terres émergées » des Minquiers couvre à peine un hectare. Les Écréhous ne sont pas plus importants d'ailleurs : l'îlot principal a 300 mètres de long, et la superficie totale des rochers qui émergent trois hectares ; là encore aucune culture n'est possible et l'habitation y est fort difficile. Personne n'a mieux dépeint ces parages que Victor Hugo, qui aimait à y situer les naufrages de son œuvre, soit aux Casquets, soit aux Minquiers, que son exil lui avait rendus familiers. Parlant de ce genre d'écueils, il écrivait (je cite) : « Qu'irait-on y chercher, ce n'est pas une île. Point de ravitaillement à espérer, ni arbres à fruits, ni pâturage, ni bestiaux, ni sources d'eau potable. C'est une nudité dans une solitude .... rien à trouver là que le naufrage.... » (*Travailleurs de la Mer*, p. 262.)

Certaines photos aériennes ont été prises le 21 août 1953 par l'amiral Durand de Saint Front que je me permettrai de déposer devant la Cour et dont mes collègues britanniques ont actuellement les reproductions. Je ne cherche à en tirer aucune conclusion, mais simplement à mettre devant la Cour la reproduction fidèle du paysage. Les photos 1,

2 et 3 montrent l'ensemble de cet archipel des Minquiers — des écueils des Minquiers —, la photo 4 représente la Maîtresse Île — ce navire que j'ai imaginé sur les flots —, les photos 5 et 6, de même, sont des photos aériennes de l'ensemble des Écréhous, la photo 7 représente les Roches Douvres. Par contre, les photographies 8, 9 et 10[1] représentent Chausey, et la Cour constatera la différence qui existe dans ces parages entre des écueils et une île habitable.

Au paragraphe 5 de son mémoire, le Gouvernement du Royaume-Uni dit que les deux groupes font partie de l'archipel connu sous le nom d'« Îles de la Manche » (je cite) « situé dans la baie rectangulaire formée par la côte ouest du département de la Manche (le Cotentin) et la côte nord des départements d'Ille-et-Vilaine et des Côtes-du-Nord ». N'en déplaise au dernier avocat qui parla pour le Royaume-Uni et dont les idées personnelles sur les baies contredisent celles de son Gouvernement, c'est bien le Royaume-Uni qui admet le caractère de baie des lieux géographiques où se trouvent les îles de la Manche. Cette définition, acceptée par les deux Gouvernements, rend compte des deux traits caractéristiques des Minquiers et des Écréhous : ce sont des îles qui font partie d'un archipel, ce sont des îles situées dans une baie. L'examen attentif de ces caractères physiques permettra de tracer devant la Cour le tableau exact des éléments de fait du différend et d'évoquer les principes du droit des gens qui ont été appliqués dans des affaires semblables.

Premièrement, ce sont des îles : Minquiers et Écréhous sont des îles qui font partie d'un *archipel*, celui des îles de la Manche, qui comprend, en dehors des îles les plus importantes de Jersey, Guernesey et Aurigny, toute une poussière d'îles, îlots et rochers.

Examinons successivement le lien entre ces îles et le lien entre les îles et le continent, et tout d'abord le lien entre les îles.

Essayons tout d'abord de faire abstraction de la côte française et de n'envisager Minquiers et Écréhous que par rapport aux autres îles de la Manche. Nous sommes alors en présence d'un groupe d'îles qui semble présenter une certaine unité naturelle, et l'on pourrait dire que l'État auquel appartiennent les îles principales doit également avoir la souveraineté sur les îles dont le statut territorial est douteux. La Cour aura reconnu l'argument qui est au cœur même de la thèse soutenue par le Gouvernement du Royaume-Uni : le Royaume-Uni ayant la souveraineté sur Jersey, Guernesey, Aurigny, Sercq, Herm et Jethou doit, par là même, avoir la souveraineté sur les Minquiers et les Écréhous, ces derniers étant une « dépendance » de Jersey, principale île de l'archipel. Cet argument revient tout au long des plaidoiries comme de la procédure écrite. Ainsi, nous a-t-on dit, lorsque, au moyen âge, Jersey tombe ou demeure sous la domination du roi d'Angleterre, les Minquiers et les Écréhous tombent ou demeurent, *ipso facto*, sous la domination du roi d'Angleterre. Lorsque, dans un document médiéval, on parle de Jersey ou des « isles », il n'y a pas de doute : on a voulu inclure les Minquiers et les Écréhous. Lorsque l'article 2 de la convention du 2 août 1839 parle d'une ligne située à 3 milles de la laisse de basse mer de l'île de Jersey, aucune hésitation n'est possible : il s'agit de la ligne située à 3 milles des Minquiers et des Écréhous. Lorsque l'article 2 de la convention du 2 janvier 1839 et l'article 38 de la convention du 11 novembre 1867 parlent des îles anglaises de

[1] Non reproduit.

Jersey, Guernesey, Aurigny, Sercq et de leurs « dépendances », il saute aux yeux que ces dépendances ne peuvent être que les Minquiers et les Écréhous.

Tel est, au fond, l'argument essentiel du Gouvernement du Royaume-Uni. Il se heurte à deux objections également décisives.

Un coup d'œil sur la carte suffit à montrer l'inanité de tout argument juridique fondé sur une unité naturelle de l'archipel formé par les îles de la Manche. Un très grand nombre de ces îles relèvent en effet, incontestablement, de la souveraineté française : le groupe des Chausey, le Mont St-Michel, Tombelaine, l'île Bréhat, pour ne citer que quelques-unes. Comme nous le verrons ultérieurement, l'unité naturelle de l'archipel, s'il y en eut une, a précisément été détruite au cours du moyen âge. Elle existait avant le XIIIme siècle, mais, à cette époque-là, le hasard des armes et la volonté des rois ont brisé ce que la nature avait uni. A partir de ce moment-là, on ne peut plus parler de l'unité des îles : une partie de l'archipel a été attribuée au roi de France, une autre partie au roi d'Angleterre, et tout le problème est précisément de savoir si les Minquiers et les Écréhous ont figuré dans le premier groupe ou dans le second. Parler de « dépendance » des Minquiers et des Écréhous par rapport à Jersey est donc un non-sens ; pourquoi ne parlerait-on pas de la dépendance des Minquiers par rapport à Chausey comme le fait au mot « Minquiers » le *Nouveau Dictionnaire de Géographie universelle*, publié en 1887 par Vivien de Saint-Martin, avant que le Gouvernement français ne le dise officiellement dans la note du 27 août 1888 de l'ambassade de France au marquis de Salisbury (annexe A 53 du mémoire du Royaume-Uni qui semble avoir échappé à M. Harrison lorsqu'il nous a dit que cette dépendance des Minquiers vis-à-vis des Chausey était pour lui une chose aussi nouvelle que stupéfiante) ! Ou mieux encore, pourquoi ne pas s'attacher à la dépendance de l'*ensemble* de l'archipel par rapport au continent ?

En effet — et c'est la seconde objection que suscite la thèse britannique —, la prétention à l'unité naturelle de l'archipel ne prend tout son sens que si l'on tient compte de la proximité de la côte continentale. Il ne s'agit pas d'un archipel perdu au milieu de l'Océan, mais d'un groupe d'îles situé dans une baie française, à quelques lieues seulement de la côte française. Pour avoir une vue plus juste de la matière, il faut donc élargir le problème et examiner non seulement les rapports entre Minquiers, Écréhous et Jersey, mais aussi leurs rapports avec le continent tout proche.

Les Minquiers et les Écréhous sont des îles proches du continent. Il existe un lien très étroit entre les Minquiers et les Écréhous et le continent. Ce lien géographique ne peut pas demeurer sans conséquences juridiques. Tout d'abord, il y a lien géologique, et il est apparent. Dès le XIXme siècle, le grand géologue anglais Lyell a montré, dans ses *Principes de Géologie*, que les océans accomplissent depuis des siècles, et continuent d'ailleurs à accomplir, un travail de sape et de destruction sur les continents qui les bordent, et que ce travail a tendance à aller de l'ouest à l'est. Cette théorie reçoit une illustration remarquable dans la baie de Granville, où les vieilles légendes confirment d'ailleurs les enseignements de la géologie et les rares documents que l'histoire nous a laissés. L'insularisation du Mont-Saint-Michel par suite de l'engloutissement de la forêt de Scissy par la mer est, à cet égard, l'épisode le plus célèbre.

Jersey, Guernesey, Aurigny ont été séparées du continent à une date qu'il est évidemment impossible de déterminer avec précision. Dans son *Histoire des Îles de la Manche* (1881), Pégot-Ogier avance l'année 709 comme la date de la séparation de Jersey du continent. Il s'agit là très certainement d'une erreur, car, cinquante années *avant* l'ère chrétienne, l'historien grec Diodore de Sicile signale déjà l'existence de l'île de Jersey, tout en ajoutant qu'à marée basse elle est pratiquement réunie à la terre. Pendant un certain temps, Jersey ne fut donc séparée du continent que par un bras de mer formé par l'embouchure de la rivière Ay, laquelle se jette aujourd'hui à la mer au havre de Saint-Germain. Quant aux Écréhous, ils n'existaient tout simplement pas à l'époque et ne furent séparés du continent que bien plus tard ; d'autres îles formaient une partie de la commune de Carteret, dont la section la plus peuplée porte aujourd'hui encore le nom d'Écréhou. Au début, il n'y avait d'ailleurs qu'*une seule* île d'Écréhou, et, il y a quelques siècles, la mer continuant ses ravages, cette île a été submergée en partie et transformée en une multitude d'îlots et de rochers, dont certains ne découvrent plus qu'à marée basse.

Ainsi donc, l'ensemble de l'archipel est un démembrement du continent, comme le sera peut-être un jour l'actuelle presqu'île du Cotentin tout entière si la mer en sape la base. Quant aux Écréhous proprement dits, ils se rattachent davantage au continent qu'à Jersey, car ils ont été séparés du *continent* bien après l'insularisation de Jersey. Le chenal entre les Écréhous et le continent atteint à peine 30 pieds de profondeur, alors qu'il atteint de 124 à 147 pieds entre les Écréhous et Jersey.

Quant aux effets juridiques du lien géographique entre les Minquiers et les Écréhous et le continent, le Gouvernement de la République les invoque simplement pour montrer qu'à moins de preuve contraire vraiment péremptoire, ces îles ne doivent pas être arrachées au continent dont elles font partie géographiquement. Dès 1805, sir William Scott (plus tard lord Stowell) parlait, dans l'affaire de l'*Anna*, en des termes devenus célèbres, des îles formant « une sorte de portique devant le continent », et plus loin « des dépendances naturelles de la côte qu'elles bordent et dont, en fait, elles sont constituées ». Les termes de ce jugement si souvent cité ne pourraient-ils s'appliquer, presque mot pour mot, aux Minquiers et aux Écréhous ? A supposer même que l'on ne puisse pas considérer l'ensemble des îles de la Manche comme faisant partie du continent, il est vrai, en tout cas, que les Minquiers et les Écréhous, situés tout près de la côte française, constituent bien « une sorte de portique devant le continent » et sont des « dépendances naturelles de la côte qu'elles bordent et dont, en fait, elles sont constituées ».

Ce rattachement des îles proches du continent au continent lui-même a été marqué avec plus de force encore dans l'affaire anglo-norvégienne des pêcheries. Parlant du « skjærgaard », la Cour dit dans son arrêt du 18 décembre 1951 (*Recueil*, pp. 127-128) : « les îles grandes et petites, toujours montagneuses, les îlots, les rochers et les récifs, les uns à découvert en permanence, les autres ne découvrant qu'à marée basse, ne sont en réalité que la *continuation du continent* norvégien ». Et ce passage se termine par cette phrase : « *Les réalités géographiques dictent cette solution.* »

Au même titre que le « skjærgaard » norvégien, les îlots et rochers qui bordent la côte française « constituent un tout avec la terre ferme ».

Ils ne sont que « la continuation du continent », dont la mer les a séparés à une époque relativement récente et avec lequel ils n'ont pas cessé d'avoir les relations que permettait leur caractère désolé et inhospitalier. Comme dans le cas de la Norvège, les « réalités géographiques » sont apparentes.

Allant aussi loin que possible dans cette assimilation des îles proches de la côte au continent, la Cour a, dans ce même arrêt, permis de tracer les lignes de base entre les îles, îlots et rochers, alors même qu'il ne s'agit pas d'une baie et quelle que soit la longueur de ces lignes. C'est ainsi que, dans le cas du Lopphavet, qui est constitué (je cite) « par une vaste étendue d'eau parsemée de grandes îles, séparées entre elles par des bras de mer qui se terminent en divers fjords » (p. 141 de l'arrêt) et auquel la Cour a refusé le caractère de baie, les lignes de bases rejoignant les diverses îles mesurent 44 milles, 18 milles et 3,5 milles (Waldock, *The Anglo-Norwegian Fisheries Case*, dans le *British Year Book of International Law*, 1951, p. 146). La Cour a ainsi consacré ce que M. Gidel a appelé la pratique scandinave dans laquelle « la notion juridique de groupe insulaire est écartée au profit de la notion de groupe insulo-continental ». (Gidel, *Le Droit international public de la Mer*, tome III, p. 722.) De ces règles, la Cour a tiré la conséquence que les eaux situées *entre* le continent et les îles qui s'y rattachent ont la qualité d'eaux intérieures. Cette tendance à rapprocher les îles du continent se manifeste enfin par la transformation, généralement admise, en mer territoriale de la portion de mer libre située entre la mer territoriale d'une île et la mer territoriale de la terre principale (l'ouvrage de M. Gidel, p. 687).

Le caractère insulaire des Minquiers et des Écréhous, leur proximité de la côte française, leur appartenance à un archipel que seuls les accidents de l'histoire ont détaché en partie de la France, telles sont les premières données géographiques dont nous devrons tenir compte dans le présent litige.

Un second facteur géographique qu'il faut prendre en considération est le fait que les Minquiers et les Écréhous sont situés, comme le dit le mémoire du Royaume-Uni, dans une baie, une baie rectangulaire formée par les côtes de Normandie et de Bretagne, baie dont les deux extrémités relèvent donc de la souveraineté française. Si la totalité des îles de la Manche était restée française, le Gouvernement français pourrait revendiquer l'ensemble de cette baie à titre d'eaux intérieures et calculer la mer territoriale à partir de lignes de base appuyées sur les îlots et rochers extérieurs. C'est le travail qui a été porté sur la carte n° 1 remise à la Cour. Si le Gouvernement français raisonne ainsi, ce n'est, faut-il le dire, évidemment pas pour remettre en question les droits du Royaume-Uni sur Jersey, Guernesey et les autres îles, mais pour montrer à quel point l'ensemble de cette baie est lié à la France, et combien devraient être *fortes* les preuves fournies par le Royaume-Uni pour se voir attribuer la souveraineté sur les Minquiers et les Écréhous.

Que les eaux en question constituent une baie ne saurait être mis en doute. Une ligne de base tracée directement du cap de la Hague aux eaux de Bréhat mesurerait, certes, environ 68 milles. Mais comme il faut tenir compte des îles, îlots et rochers émergeant à marée basse, les lignes de base sont sur la carte n° 1 mesurées respectivement par secteur, dont les distances se trouvent portées sur la feuille jointe à

la carte. Or, la Cour a accepté de considérer comme une baie le Sværholthavet, délimité par une ligne de base de 38,6 milles de longueur, la Cour ayant estimé que le bassin en question devait être envisagé dans sa réalité géographique globale « et que le rapport entre la largeur d'entrée et la profondeur de pénétration était suffisant pour lui conférer le caractère d'une baie » (arrêt des Pêcheries, p. 141).

La Cour ayant estimé que « la règle des dix milles n'a pas acquis l'autorité d'une règle générale de droit international » (p. 131), il en résulte qu'une baie est essentiellement une donnée géographique, non définie restrictivement par le droit, à travers laquelle on peut toujours tracer une ligne de base en deçà de laquelle la mer a le statut d'eaux intérieures (article cité du professeur Waldock).

Ainsi apparaissent les effets juridiques que du point de vue géographique on peut tirer du lien entre le continent et les îles, et notamment pour des îles aussi proches que les Minquiers et les Écréhous.

Si l'on va au cœur des thèses qui s'opposent devant la Cour, la revendication britannique rappelle au fond la doctrine de Selden, selon laquelle toute la mer qui borde l'Angleterre au sud, jusque sur les côtes mêmes de France, faisait partie du domaine de l'Angleterre. Toute cette mer étant anglaise, il serait normal que les îlots et rochers qui s'y trouvent soient également, sauf preuve contraire, sous la souveraineté anglaise. Pour justifier les prétentions de l'Angleterre au domaine exclusif de l'océan britannique, Selden utilise, on le sait, force arguments. Il est intéressant de trouver parmi eux ceci : « lorsque les rois Jean et Henri III perdirent la Normandie, les îles de Jersey, de Guernesey et les autres îles adjacentes continuèrent de demeurer sous la souveraineté anglaise, *comme preuve et gage de la propriété de cette mer*, comme patrimoine du Royaume » (cité par Calvo, *Le droit international*, édition 1870, tome I, p. 325). Nous savons qu'aucun traité n'a jamais institué ou confirmé cette prétention britannique à la domanialité de la mer et que Louis XIV montrait à l'époque même de Selden que la France n'acceptait pas la prétention lorsqu'il s'opposait à ce que le canal de la Manche fût appelé le canal britannique (Calvo, p. 322). Il n'est pas indifférent de noter la filiation entre la présentation actuelle de la thèse du Royaume-Uni et le *mare clausum* de 1635 en ce qui concerne l'appartenance *globale* de Jersey et des îles adjacentes au patrimoine britannique. Le Gouvernement du Royaume-Uni va-t-il donc refuser de faire sienne la déclaration du Gouvernement espagnol du 4 juin 1790, aux termes de laquelle (je cite) : « Sa Majesté n'a à aucun moment prétendu à des droits sur des ports, mers ou endroits autres que ceux qui appartiennent à sa couronne par les *traités* les plus solennels, reconnus par toutes les nations et, en ce qui concerne plus particulièrement la Grande-Bretagne, par un droit fondé sur les traités, par le consentement *uniforme* des deux nations et par une possession immémoriale, régulière et établie.... »? (*The Annual Register*, 1790, p. 292.)

La revendication du Gouvernement de la République est au contraire fondée sur la prédominance de la terre sur la mer : reprenant les termes de l'arrêt des pêcheries, le Gouvernement de la République croit devoir insister sur « l'étroite dépendance de la mer territoriale à l'égard du domaine terrestre » et rappeler que « c'est la terre qui confère à l'État riverain un droit sur les eaux qui baignent ses côtes » (*C. I. J. Recueil 1951*, p. 133). Les Minquiers et les Écréhous font partie d'une zone maritime qui dépend *étroitement* du continent, du

triple point de vue géologique, géographique et historique, ce qui, en l'absence de tout titre international contraire de la part du Royaume-Uni, ajoute une justification supplémentaire au titre de la France.

Un dernier mot sur la géographie : le Royaume-Uni a remis à la Cour, le 8 septembre 1953, deux cartes allemandes[1], l'une de 1905, l'autre de 1932. Dans une affaire où l'on plaiderait l'acquisition de la souveraineté territoriale par occupation d'un territoire sans maître, des cartes géographiques pourraient être utiles. Tel n'est pas le différend actuel. Cependant, il nous faut répondre d'un mot aux allégations du Royaume-Uni. M. l'Attorney-General a invoqué ces cartes de Stieler, qui englobent les îlots litigieux dans le territoire britannique des îles de la Manche. Il relève que cette attribution, qui apparaît déjà dans l'édition de 1905, se retrouve dans celle de 1932, de telle sorte que l'on peut dire à bon droit qu'il ne s'agit pas d'une attribution faite à la légère. Les auteurs très savants du Stieler, d'ailleurs désintéressés, n'auraient pas dessiné leurs cartes sans avoir mûrement réfléchi. A cela, il est facile de répondre que, si grande que soit l'autorité de Stieler, d'autres atlas neutres et techniquement très remarquables et très sérieux montrent que l'opinion de Stieler n'est pas celle de tous les cartographes. L'atlas du Touring Club italien (Milan, 1929, planches 32, 33, 34 France Nord, et 25, 26 Royaume-Uni) — je donnerai les références, pour épargner le temps de la Cour, sur la ronéotypie de ma plaidoirie — atlas qui passe pour un chef-d'œuvre, englobe bien les Écréhous dans la zone britannique, mais il en exclut les Minquiers. L'atlas suédois *Bonniers Stora Världatlas* (Stockholm 1951, planches 33, 34, 35 France Nord, et 26, 27 U. K. Sud), reproduit exactement la même délimitation. L'atlas hongrois, *Kisatlasz Maggyar Kiralya Allami* (Budapest, 1939), planches 13 (France) et 18 (Royaume-Uni), ignore les Minquiers, mais la limite des eaux territoriales des îles de la Manche les laisserait nettement en dehors ; il ignore aussi les Écréhous, et la limite passe par-dessus leur emplacement. L'atlas allemand *Schul-Atlas* de Sydows Wagner, Justus Perthes, à Gotha, 1941, planches 41 (France) et 42 (Royaume-Uni), est identique. Un autre atlas italien, le *Grande Atlante Geografico*, 4me édition, 1940, Istituto Geografico de Agostini (Novara, Italia), de Maico Baratto, Fraccaro et Visintio, ignore aussi les Écréhous, mais est très net pour les Minquiers, qui sont nettement *en dehors* de la limite des eaux britanniques. L'Atlas Bartholomew *(The Times—Survey Atlas of the World)*, édition 1920 — Royaume-Uni, planche 18 —, s'arrête juste en-dessous de Jersey et n'englobe donc pas les Minquiers. Ces diverses délimitations montrent que pour les cartographes de nombreux pays, celles de Stieler — que de toute évidence ils connaissent bien — ne prévalaient pas.

Concluons simplement que le Royaume-Uni pourrait d'ailleurs difficilement dire à la fois qu'une même carte lui donne les Écréhous, parce que la délimitation les englobe, et les Minquiers, parce qu'elle ne les englobe pas.

Mais les données géographiques du litige, pour n'être pas déterminantes, n'en sont pas moins intéressantes à connaître.

* * *

Il reste maintenant à résumer en quelques phrases cette « approche juridique » dont a parlé M. l'Attorney-General du Royaume-Uni. Nous

[1] Non reproduit.

nous placerons, pour ce faire, sur le même plan que lui, c'est-à-dire que le mérite de chacune des prétentions sera examiné dans son ensemble.

La thèse du Gouvernement du Royaume-Uni est fondée en réalité sur deux postulats. Le premier de ces postulats, c'est qu'il faut comparer exclusivement les faits de possession sans même avoir à tenir compte des traités intervenus entre les deux Parties et qui peuvent être susceptibles d'apporter des éléments de solution. De là, cette accumulation de faits destinée à impressionner par leur masse. Mais si l'on y regarde de près, on se rend compte que presque tous ces faits sont postérieurs à 1876, c'est-à-dire relativement ou très récents : on a l'impression que, dans la thèse de nos collègues britanniques, le poids des quatre-vingts dernières années doit compenser le vide des huit siècles précédents.

Le second postulat du Gouvernement du Royaume-Uni, c'est l'unité totale et absolue, non seulement géographique, mais aussi juridique, de l'archipel. Ce postulat, dont nous avons déjà démontré la fausseté du point de vue géographique, est évidemment fort commode juridiquement, car si toutes les îles de la Manche à l'exception des Chausey sont britanniques, toute démonstration devient superflue en ce qui concerne les Minquiers et les Écréhous. Lorsque nous aurons réfuté ces deux postulats d'un point de vue juridique, il ne restera rien des prétentions anglaises, et il n'y aura plus qu'à examiner si les faits invoqués par le Royaume-Uni depuis 1876 ont été juridiquement valables contre le titre de la France, sa possession ancienne, ses réclamations diplomatiques et ses propres relations avec les îlots contestés.

Quant à la prétention française, elle est fondée sur l'idée que chaque affaire a ses caractéristiques propres et que, loin de partir de postulats indéfendables, il convient d'examiner le litige dans les éléments juridiques qu'il contient. Et, à cet égard, il me paraît nécessaire de faire deux observations.

Première observation. Deux traités dominent la matière : un traité ancien, un traité moderne.

Pour le Gouvernement de la République, la période ancienne est *dominée* par le traité de 1259 : d'après ce traité, ce n'est que dans la mesure où sa possession des îles en 1259 est certaine et prouvée que l'Angleterre peut les revendiquer ; certaine et prouvée, cette possession l'est pour Jersey et Guernesey ; mais elle ne l'est justement pas pour les Minquiers et les Écréhous. Nos adversaires ne vont tout de même pas soutenir que le traité de 1259 est un document féodal devenu caduc avec la fin de la féodalité : quelle thèse révolutionnaire que de prétendre considérer comme caducs des traités *de limites* conclus dans un autre système social ! Le Royaume-Uni devrait prouver sa possession en 1259 ou lors des traités subséquents qui ont repris à peu près à cet égard la formule du traité de Paris ; or cela il ne l'a pas fait. Un autre traité domine la période récente : la convention du 2 août 1839 ; le Gouvernement français a toujours agi en conformité de cette convention ; son interprétation a été contestée par le Gouvernement du Royaume-Uni, mais cette contestation même prouve que le traité est au cœur du débat.

La seconde observation est la suivante :

A lire et entendre le Gouvernement du Royaume-Uni accumuler les interprétations historiques les plus sérieuses mêlées aux pamphlets d'auteurs de province ou de journalistes, on pourrait se croire à une

de ces séances de sociétés locales d'érudits où l'avocat, le notaire ou le simple notable de la petite ville, à l'instar des plus célèbres académies, croient augmenter les mérites de leurs petites patries en en faisant le centre, sinon du monde, mais d'un monde.

C'est là une atmosphère que le Gouvernement de la République ne se laissera pas entraîner à créer. Nous sommes devant une cour de justice, devant la Cour internationale de Justice, pour lui demander le droit et non pas l'histoire du droit. Le principe qui a orienté le Gouvernement de la République dès les débuts de la procédure écrite est de ne rechercher que l'*état du droit*, du droit ancien comme du droit actuel ; les sources historiques peuvent être nécessaires, mais seulement pour éclairer le droit ; les auteurs ne sont pas le droit, et, particulièrement dans la période ancienne du différend, il faut se garder de confondre la description historique, qui borde le conte, avec le droit.

La question de droit est simple dans son exposé, délicate dans sa preuve : qui a un titre de souveraineté sur les Minquiers et les Écréhous ? Résoudre ce problème juridique de souveraineté, tel doit être le seul objet du débat.

Ces observations générales faites, nous voudrions ajouter que la prétention française est beaucoup moins négative que nos amis ont essayé de le faire croire. Pour la période ancienne, nous montrerons que le titre originel — car il y a un titre originel français — non seulement n'a pas été perdu en vertu d'on ne sait quelle clause *rebus sic stantibus*, mais a été conservé d'une manière positive, et nous tiendrons compte de l'importance primordiale qu'a pour toute cette période le traité de Paris de 1259. Pour la période récente, nous nous attacherons à une analyse approfondie de la convention de 1839, à la lumière de laquelle nous interpréterons les faits de possession les plus récents. Nous verrons alors que l'opposition dans la présente affaire n'est pas entre un titre nu d'un côté et une possession effective de l'autre — dans ce cas la possession effective l'emporterait —, mais l'absence de titre et de possession valable en droit international du côté britannique, et l'existence d'un titre et d'une possession valables du côté français.

C'est à la démonstration de cette thèse que seront consacrées nos observations, selon un plan très simple. La première partie sera consacrée à la période ancienne : nous examinerons la question du titre originel, pour montrer que ce titre n'a été perdu, ni par non usage, ni par possession effective de l'Angleterre. La conclusion de cette première partie sera qu'au début du XIX^me^ siècle la souveraineté sur les deux groupes d'îlots appartenait à la France. Dans une seconde partie consacrée aux temps modernes, c'est-à-dire aux XIX^me^ et XX^me^ siècles, nous étudierons deux questions différentes. En premier lieu, nous démontrerons que la convention de 1839 constitue bien la date critique et que, par conséquent, la souveraineté sur les îlots litigieux appartient aujourd'hui à celle des Parties à qui elle appartenait la veille de la conclusion de cette convention. En second lieu, nous établirons que, même si 1839 ne constituait pas la date critique, les faits de possession invoqués par le Royaume-Uni ne sont pas susceptibles, en vertu des règles du droit international et en tenant compte des faits de possession invoqués par la France, d'avoir arraché à la France la souveraineté existant encore au début du XIX^me^ siècle sur ces îlots. La conclusion de nos observations sera que la souveraineté sur les îles litigieuses appartient aujourd'hui à la France, soit que l'on prenne en considération

l'état de droit existant en 1839, soit que, écartant cette date comme date critique, on examine les dates de faits de possession récents à la lumière des règles du droit international général.

[Séance publique du 28 septembre 1953, après-midi]

Monsieur le Président, Messieurs de la Cour, nous allions aborder l'étude de la période féodale, mais avant de commencer il me faut faire une remarque de méthode.

Le Royaume-Uni a fait entendre à la Cour quatre conseils, dont les exposés portaient chacun les marques de leur science et de leur talent personnel. L'agent du Gouvernement de la République française présente seul les thèses de son Gouvernement, mais il n'est pas devenu médiéviste, feudiste, marin et normand pour cela. Que la Cour lui permette de remercier les collaborateurs dévoués et compétents qui ont contribué à la présentation de la thèse française dans cette partie féodale : le professeur Dumas, de l'Université d'Aix ; le professeur Lemarignier, de l'Université de Lille, et M. Pierre Duparc, archiviste paléographe, conservateur des archives du ministère des Affaires étrangères.

Période féodale. Mon éminent collègue, le professeur Wade, s'est défendu de traiter les aspects romantiques de la période féodale, et pourtant quel roman ne nous a-t-il pas conté ! Les roitelets normands installés aux Minquiers qui, à l'époque, avaient toujours 150 mètres de long sur 30 mètres de large et pas de source d'eau potable, d'où sortent-ils, de quelle merveilleuse saga, sinon de l'imagination de mon éminent collègue ? Autre image admirable mais où je soupçonne l'humour britannique : les vaillants soldats anglo-saxons de l'époque féodale uniquement dévoués à la défense des îles normandes pour les garder contre les attaques des Français et les maintenir entre les mains de leurs possesseurs originaires. Les Normands, possesseurs originaires ? Et alors ces Bretons dont on nous a parlé qui étaient dans les îles avant les Normands, sans parler de la Gaule ? Quant au dévouement des Anglais de l'époque à la défense des biens de leurs récents possesseurs, pour utiliser le léger anachronisme de M. l'Attorney-General, c'est aussi une touchante image mais qui ne correspond pas aux explications des historiens sur la rivalité séculaire des Saxons conquis et des Normands victorieux.

Malgré l'érudition considérable déployée, nous décelons donc immédiatement le mythe : le Normand des îles constitue un peuple à part. Et le professeur de Cambridge s'est joint à la vaillante cohorte des historiens locaux pour la construction de ce mythe. Mais la Cour ne retiendra sans doute que le pittoresque aspect de cette défense du peuple conquérant de 1066, car ce qu'il importe de prouver est plus simple et plus restreint : quel est le titre sur les Minquiers et les Écréhous avant, pendant et après le premier acte juridique incontesté des deux Parties, le traité de 1259 ? En traitant ce problème juridique, la Cour me permettra de relever au passage certaines interprétations trop normandes de l'histoire de France.

La question à résoudre dans cette première partie féodale est la suivante. Lorsque se produisent, au début du XIX^me^ siècle, les premiers incidents entre pêcheurs anglais et français, entre la côte française

et celle de l'île de Jersey — incidents qui donneront naissance, après de longues négociations, à la convention de 1839 —, quels sont les droits respectifs de la France et de l'Angleterre sur les Minquiers et les Écréhous ? La souveraineté de ces îles appartient-elle, aux environs de 1800, à la France ou à la Grande-Bretagne ?

Pour résoudre ce problème, il faut remonter à des textes et à des événements très anciens.

Dans son premier mémoire, le Gouvernement du Royaume-Uni conclut que la souveraineté du Royaume-Uni sur les Minquiers et les Écréhous est fondée sur un titre originel suivi, comme l'exige le droit international, d'une possession effective, continue et paisible, et en tout cas, en l'absence même d'un titre originel sur une telle possession effective, continue et paisible (par. 184 du mémoire).

Le Gouvernement de la République est d'accord avec le Gouvernement du Royaume-Uni pour reconnaître qu'en principe la souveraineté sur un territoire peut s'acquérir soit par un titre originel suivi d'une possession effective continue et paisible, soit, en l'absence de tout titre originel, par la seule possession. Il faudra cependant tenir compte du fait que dans le présent litige le problème des rapports entre le titre originel et la possession effective se pose à la suite des traités ayant régi la matière, dans des conditions assez différentes de celles du droit international général.

Le Gouvernement de la République établira successivement :

En ce qui concerne le titre, que ce n'est pas la Grande-Bretagne mais la France qui possède un titre originel sur les îlots litigieux.

En ce qui concerne la possession, que le Royaume-Uni n'a pas établi l'existence de faits de possession certains de sa part et que, tout au contraire, la France peut invoquer en sa faveur des faits de possession au moins aussi probants, sinon davantage.

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Nous étudierons d'abord l'établissement du titre originel selon le droit féodal. Nous examinerons ensuite l'application des principes du droit féodal à la situation des Écréhous, des Minquiers et de Chausey.

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ÉTABLISSEMENT DU TITRE ORIGINEL

La première période que nous nous proposons d'étudier va depuis l'époque carolingienne jusqu'à 1204 : elle vit l'installation des Normands dans une partie du « regnum Francorum », c'est-à-dire le royaume occidental de l'empire de Charlemagne, et l'établissement du lien de vassalité soumettant le duc de Normandie au roi de France.

Pour cette période assez éloignée, nous pensons qu'il est possible d'établir un certain nombre de faits historiques précis, en ayant recours aux travaux d'érudits et d'historiens sérieux. A ce propos, nous sommes surpris que le professeur Wade considère comme autorité principale, et presque suffisante, l'ouvrage assez ancien et sans aucune prétention de Dupont, juge du tribunal de Valognes, rédigé, comme l'auteur l'indique dans sa préface, au cours des loisirs que lui laissait un tribunal

de première instance traditionnellement peu occupé. Cet ouvrage, comme le reconnaît le professeur Wade, repose essentiellement sur Wace, un historiographe normand du XIIme siècle. Or la partialité et l'inexactitude de ce chroniqueur, qui écrivait pendant les guerres entre le roi de France et le roi d'Angleterre, et qui écrivait officiellement pour le roi d'Angleterre, sont bien connues : des historiens que la Partie adverse ne récusera pas puisqu'elle les a invoqués : MM. Powick (*The Loss of Normandy*, pp. 439-440) et Petit-Dutaillis (*La Monarchie*, p. 184) l'ont constaté. Il est vrai qu'on est encore plus surpris d'entendre le professeur de Cambridge citer, sur un point d'histoire, comme un aveu officiel de la France, des textes tirés de manuels dont le moins qu'on puisse dire est qu'ils sont assez élémentaires, étant destinés à des enfants dont l'éducation se termine à 14 ans ! Au surplus, la France n'est pas plus que l'Angleterre habituée à imposer un enseignement orthodoxe à ses savants, à ses professeurs et même à ses inspecteurs de l'enseignement.

Une observation préliminaire s'impose sur la thèse britannique. En ce qui concerne les débuts de la période envisagée, cette thèse peut se résumer ainsi. En 1066, Guillaume, duc de Normandie, conquit l'Angleterre, réunissant ainsi sous sa couronne la Normandie continentale, l'Angleterre et les diverses îles de la Manche. En 1204, le roi de France, Philippe-Auguste, arracha la Normandie continentale, et elle seule, au roi d'Angleterre, lequel conserva ainsi l'Angleterre et les îles de la Manche. La conquête de l'Angleterre par le duc de Normandie en 1066 constitue ainsi le titre originel du Royaume-Uni sur l'ensemble des îles de la Manche, y compris les Minquiers et les Écréhous. Le traité de Paris, de 1259, n'a fait que confirmer cette situation : la Normandie continentale à la France, l'ensemble des îles à l'Angleterre.

Cette thèse est sans doute simple et claire, mais c'est un exposé moderne d'une situation féodale, exposé qui ne rend pas compte de la réalité assez complexe dans laquelle se sont insérés les événements invoqués, notamment la réunion puis la séparation de la Normandie continentale et des îles de la Manche. Elle néglige les données du droit féodal qui, seules, permettent de saisir la portée exacte des faits et des textes invoqués. Or, comme l'ont déjà dit mes collègues britanniques, un titre doit être apprécié selon les conceptions et les règles en vigueur à l'époque où il est né (sentence de Palmas). J'ajouterai l'affaire de la détermination de la frontière maritime entre la Norvège et la Suède, et même l'arrêt de la Cour dans l'affaire des droits des ressortissants américains au Maroc (27 août 1952, pp. 184-185).

Il convient donc de déterminer avec précision la portée juridique, en *droit féodal*, de la réunion puis de la séparation de la Normandie continentale et des îles.

Plaçons-nous à la date de 1066, date essentielle dans la thèse britannique. Il est exact qu'à cette époque Guillaume le Conquérant réunit sous une même tête la Normandie continentale, l'Angleterre et les îles de la Manche.

Mais une observation fondamentale s'impose à cet égard. Dire que la conquête de 1066 a placé les îles de la Manche et la Normandie continentale sous la « souveraineté » du roi d'Angleterre est un véritable anachronisme, comme nous l'a exposé le professeur Wade en critiquant l'emploi du mot « souveraineté ». Le roi d'Angleterre était, à la vérité, après 1066, un personnage double : en tant que roi d'Angleterre propre-

ment dit, il était sans doute le suzerain le plus élevé en *Angleterre* et ne devait l'hommage à personne ; mais en tant que duc de Normandie, il était le vassal du roi de France. Souverain ici, vassal là : cette situation, qui peut choquer aujourd'hui quelque peu, était courante en droit féodal. Aujourd'hui encore, il y a au moins un exemple de cette sorte de dédoublement d'une même personne. En 1278, le territoire d'Andorre, à la frontière franco-espagnole, fut soumis à la co-suzeraineté de l'évêque d'Urgel et du comte de Foix. A l'heure actuelle, Andorre demeure un fief féodal soumis à la co-suzeraineté du Président de la République française et de l'évêque d'Urgel, le Président de la République française étant le successeur du comte de Foix. Le Président de la République agit ainsi *en France*, en sa qualité de chef de l'État français, et en Andorre en sa qualité de co-suzerain féodal d'un territoire étranger à la France ; et les tribunaux français se déclarent incompétents pour connaître des actes qu'il accomplit en cette dernière qualité. Cette survivance d'un régime établi au XIIIme siècle montre ce que vaut la thèse des avocats britanniques sur la disparition des traités et des liens féodaux en l'an de grâce 1485.

Lorsqu'en 1066 le duc de Normandie devint roi d'Angleterre, il continua d'exercer ses droits sur la Normandie continentale et les îles de la Manche, non pas en tant que roi d'Angleterre, mais en tant que duc de Normandie, vassal du roi de France. Cette conquête de l'Angleterre ne modifia en rien ses droits sur la Normandie, ni dans leur étendue ni dans leur qualité. Il résulte de ces constatations que la conquête de 1066 ne peut en rien constituer un titre de souveraineté du Royaume-Uni sur les îles de la Manche.

Cette observation préliminaire était nécessaire pour nous permettre d'examiner en toute objectivité le déroulement des faits.

Dans quelles circonstances et de quelle manière les Normands s'établirent-ils dans la province qui allait porter leur nom ?

Dans l'été de 911, un chef normand nommé Rollon, qui avait ravagé le Dunois, mit le siège devant Chartres. Mais l'évêque avait organisé la défense, et une armée de secours accourut sous le commandement de Robert, comte de Paris, futur roi de France, du duc de Bourgogne et du comte de Poitou. Le 20 juillet, Rollon fut vaincu dans une sanglante bataille où ses troupes auraient perdu près de 7.000 hommes. Les Normands durent battre en retraite (Prentout, p. 122). Ces événements sont ainsi résumés en une phrase par le *Shorter Cambridge Medieval History* qui est de 1952 : « le roi Charles le Simple opposa une solide résistance » (I, p. 367). A ce moment, une certaine lassitude commençait à se manifester des deux côtés ; les circonstances étaient favorables à une négociation : au mois d'octobre 911 fut conclu l'accord de St-Clair-sur-Epte, qui céda la Normandie à Rollon.

La chronologie des événements ainsi établie donne au traité de 911 sa vraie signification. On ne peut raisonnablement soutenir que Rollon s'est emparé de la Normandie par la force ; tout au plus aurait-il pu la piller au passage — si toutefois sa défaite ne l'avait pas trop affaibli ; et en faisant ainsi il aurait agi comme bien d'autres chefs normands qui, avant lui, ne réussirent pas à s'installer à demeure dans une province du royaume de France.

Rollon reçut donc la Normandie de Charles le Simple. Il la reçut en fief. Les anciens chroniqueurs français ne semblent même pas envisager qu'il pût en être autrement. Flodoard utilise plusieurs fois à cette

occasion le verbe « concedere », dont le sens usuel, et bien établi par l'historien Lot dans *Fidèles et Vassaux* (p. 180), est : concéder en fief. Richer donne même la précision très significative que la Normandie a été donnée à Rollon à charge de services militaires : « ita ut .... regibus Galliarum terra marique fideliter militaret ». Seul le chroniqueur normand Dudon, dont Prentout a d'ailleurs montré la fantaisie, essaie de soutenir que la terre a été donnée en alleu ; il doit cependant reconnaître que Rollon a promis au roi de se lier à lui par un « pactum servitii ». Wace, qui ne peut être suspect de partialité vis-à-vis du roi de France, comme nous l'avons dit, déclare : « Rollon devint l'homme du roi et ses mains lui livra. » On peut se représenter la scène : Rollon a mis ses deux mains jointes dans celles de Charles le Simple, en signe de dépendance, de vassalité.

Cet hommage du duc de Normandie n'est que le premier d'une longue série qui se poursuivra jusqu'à Jean sans Terre. En 939, Guillaume Longue Épée, fils de Rollon, prêta hommage au roi Louis IV dans la région d'Amiens (Flodoard, *Annales*). Trois ans plus tard, Guillaume Longue Épée mourut assassiné. Le défunt n'avait qu'un fils naturel, Richard, âgé d'une dizaine d'années, et le duché risquait fort, en ces tragiques circonstances, d'être déchiré par des luttes intérieures. C'est alors que le roi Louis IV accourut à Rouen, et « donna » la Normandie au jeune Richard ; telle est l'expression employée par les anciens chroniqueurs, qui sont unanimes sur ce point. Flodoard écrit : « terra Nortmannorum dedit » ; Richer : « provinciam a patre pridem possessam ei largiens » ; Hugue de Flavigny : « Richardus Normanniam dono regis Ludovici obtinuit ». Nous sommes en présence d'un cas d'investiture féodale incontestable (Lauer, *Le règne de Louis IV*, pp. 89-93). Combien paraît inexacte, dans ces conditions, l'opinion de la Partie adverse qui voit dans cette venue du roi de France à Rouen un signe de faiblesse ; la faiblesse n'était pas de ce côté, mais du côté de l'enfant de dix ans : Louis IV est allé à Rouen en 942 pour maintenir l'ordre dans son royaume.

Citons encore les hommages prêtés à Louis VI en 1120 par Guillaume, fils de Henri I, et en 1137 par Eustache, fils d'Étienne de Blois, qui reçurent chacun expressément la Normandie en fief (Luchaire, *Louis VI*) ; les hommages prêtés à Louis VII en 1140 par Eustache, en 1151 par Henri II qui vint à Paris (Lot, *Fidèles et Vassaux*), en 1160 par Henri le Jeune ; les hommages prêtés à Philippe-Auguste en 1183 par Henri II, en 1189 par Richard Cœur de Lion, en 1200 par Jean sans Terre.

Les îles de la Manche étaient-elles comprises dans l'hommage fait par les ducs normands ? Certainement non, en ce qui concerne l'hommage de 911, car Charles le Simple n'avait cédé que la basse Normandie à Rollon.

La Normandie occidentale était alors détenue pour les Carolingiens par les Bretons. Mais en 933 le roi Raoul compléta la cession de 911 et donna à Guillaume Longue Épée le Cotentin et l'Avranchin, c'est-à-dire les diocèses d'Avranches et de Coutances. Les auteurs les plus sérieux, comme Lot (p. 134) et Prentout (pp. 285-291), sont d'accord sur ce point. Le Gouvernement du Royaume-Uni l'était aussi d'ailleurs, dans son mémoire, paragraphe 22, jusqu'à ce que le professeur Wade nous ait apporté la théorie des roitelets de la mer. Flodoard écrit à ce sujet que le roi a donné au duc « terram Brittonam in ora maritima

sitam ». En vertu de quel texte, en conséquence de quel fait précis la Partie adverse prétend-elle que les îles de la Manche étaient exclues de cette « terre maritime des Bretons » ? Une description pittoresque de roitelets nordiques, installés dans les îles, ne peut tenir lieu de référence. Les ducs normands dans leurs hommages successifs, à partir de 939, reconnaissent tenir des rois de France la Normandie, *toute* la Normandie, telle qu'elle leur avait été concédée, et aucun texte, aucun document ancien ne permet, même à un historien normand, de prétendre qu'avant 1200 les îles dites anglo-normandes n'ont pas fait partie du fief de Normandie.

Ne pouvant contester entièrement l'existence de ces faits — vassalité du duc de Normandie, hommage au roi de France pour le fief de Normandie —, mes collègues britanniques se sont attachés surtout à en diminuer la portée. Dans ce but ils ont décrit le roi de France du Xme au XIIme siècle comme un personnage privé de tout pouvoir effectif, un seigneur parmi les seigneurs : à ce pauvre homme le duc de Normandie ne pouvait véritablement faire un hommage sérieux ; l'hommage qu'il faisait — et je reprends les expressions de M. l'Attorney-General et du professeur Wade — était « simple affaire de courtoisie », « purement nominal ».

Mais dans ces conditions, le puissant duc de Normandie aurait-il continué pendant *des siècles*, comme nous l'avons montré, à prêter cet hommage, à se résigner à subir cette cérémonie humiliante ? Si le roi de France était si faible, si l'hommage était si vain, pourquoi cette répétition à chaque changement de règne ? Pour nous, nous croyons que si le duc de Normandie a prêté souvent l'hommage, la rage au cœur, il n'a cependant pas pu s'y soustraire pour deux raisons : premièrement, le roi de France n'était pas si faible qu'on nous l'a décrit ; deuxièmement, le lien juridique établi par l'hommage était particulièrement fort. Il convient de préciser ces deux points.

Le roi de France, même à l'époque des grands troubles successoraux, de la rivalité entre Carolingiens et Capétiens, à la fin du Xme siècle, n'était pas seulement un seigneur parmi les seigneurs. Malgré la rareté des textes qui nous sont parvenus, nous voyons que le roi Louis IV, par exemple, a été formellement reconnu comme suzerain par les comtes de Toulouse, de Poitiers, de Roussillon, de Mâcon, par les ducs de Bretagne et de Bourgogne ; il gagna même l'hommage d'un seigneur situé en terre d'Empire, le comte de Viennois. Aussi l'historien Philippe Lauer se croit-il le droit de conclure (*Louis IV*, p. 252) : « On voit par cette énumération que Louis était reconnu comme suzerain depuis les bouches de l'Escaut jusqu'à celles de l'Èbre. »

D'autre part, le lien juridique créé par l'hommage était très fort. Il n'est peut-être pas inutile de développer ce point, car l'argumentation de la Partie adverse, bien déconcertante pour des médiévistes ou des feudistes, a consisté à ne voir dans l'hommage qu'une formalité vide de sens.

Nous parlons aujourd'hui d'État, de souveraineté, de compétence territoriale. Mais à l'époque où se sont déroulés les événements décisifs pour la solution du présent litige, ces termes ne signifient rien. Et ce n'est pas l'aspect le moins curieux de ce litige que la nécessité où l'on se trouve de quitter un instant les concepts les plus familiers, les notions juridiques les plus courantes, pour se plonger dans un milieu social et juridique sans parenté avec le nôtre. Nous sommes

au XIme et au XIIme siècles, dans une société sans État et sans citoyens. C'est une société où il n'existe que deux choses : le lien personnel et le lien de la terre, superposés d'ailleurs l'un à l'autre. Un homme, qui prend le nom de seigneur, concède une terre à un autre homme qui prend le nom de vassal. Mais le vassal ne paie pas cette terre en argent ou en nature. Il la paie par une fidélité absolue à son seigneur, lequel, en revanche, doit protéger le vassal. Toute la société est fondée sur ce contrat entre le seigneur et le vassal ; le vassal doit la foi et l'hommage, le seigneur la justice et la protection. Le serment de vassalité accompagne la concession de terre et en est la condition nécessaire et préalable. Le lien personnel entre seigneur et vassal est ainsi le centre même de la société féodale. Lorsque le vassal brise sa foi, il perd son fief, c'est la « commise », véritable saisie pour rupture de serment. Lorsque le seigneur omet d'apporter justice et protection, le vassal est délié de son hommage envers lui. Mais il garde son fief. Seulement, ce fief, il le tient du suzerain immédiatement supérieur dans la hiérarchie féodale.

Car ce lien de la vassalité se retrouve du haut en bas de la société, c'est une pyramide sociale qui constitue la féodalité. Le seigneur, dont nous parlions à l'instant, est lui-même le vassal d'un autre seigneur, auquel il est lié par un serment de vassalité, et le vassal dont nous parlions à l'instant est lui-même le seigneur d'un autre vassal qui lui doit foi et hommage. Ainsi s'établit une cascade de liens féodaux, dans laquelle chaque seigneur est le vassal d'un autre seigneur, à l'exception du suzerain supérieur, le roi de France, et où chaque vassal peut être lui-même le suzerain d'autres vassaux. Il n'y a donc pas de souveraineté unique, mais une souveraineté morcelée et dispersée entre les divers seigneurs. Chacun de ces seigneurs n'a de relations qu'avec son propre suzerain et son propre vassal, mais au-dessus de lui il y a toute une hiérarchie d'autres suzerains et au-dessous de lui toute une hiérarchie de vassaux.

Pour terminer sur ce point, nous nous permettrons simplement de citer deux pages d'un ouvrage qui fait autorité en Angleterre, et que la Partie adverse a déjà invoqué, l'ouvrage de Pollock et Maitland. Voici le premier passage (t. I, 2me éd., pp. 66-67) (notre traduction) :

> « Dire que la loi de la Normandie était principalement française, c'est dire qu'elle était féodale. Mais féodalité est un mot malheureux. D'abord il n'attire notre attention que sur un élément d'un état complexe de la société et cet élément n'est pas le plus caractéristique ; il attire notre attention uniquement sur la prédominance de tenures de terres en dépendance. Ceci toutefois pourrait bien exister dans une époque qui ne pourrait être appelée féodale au vrai sens de terre. Les caractéristiques de la période féodale ne se trouvent pas dans les relations entre loueur et locataire, entre prêteur et emprunteur de terre, mais dans les relations entre seigneur et vassal, ou plutôt elles se trouvent dans la réunion de ces deux relations. »

Et voici l'application de cette théorie à la Normandie. Je cite de nouveau (p. 71) :

> « Quels qu'aient été les termes dans lesquels Rollon reçut la Normandie de Charles le Simple — et la légende normande était

qu'il la reçut comme un alleu —, ses successeurs furent considérés comme tenant un fief des rois de France et leur devant en retour hommage et service. »

« *Hrolf received Normandy* », tels sont les propres termes de Pollock et Maitland ; la duplique française s'était bornée à les reprendre (p. 686). Et lorsque le professeur Wade les reprend à son tour de la duplique française pour les qualifier de pure fiction, nous ne pouvons être de son avis, et nous croyons que Pollock et Maitland ont donné une bonne analyse de la situation.

La deuxième période que nous allons examiner va de 1204 à la fin du XVme siècle ; elle est caractérisée par la perte par les rois d'Angleterre de la plus grande partie de la Normandie, et par l'élaboration d'un nouveau statut entre roi de France et roi d'Angleterre.

Après la confiscation de la Normandie en 1204, le traité de Paris de 1259 rétablit l'allégeance qui avait été rompue. Nous prétendons que le titre primitif de la France sur les Minquiers et les Écréhous, qui se trouvait inclus dans l'inféodation de 933 et dans les hommages postérieurs, a été renouvelé et accru par le traité de 1259. Les traités postérieurs de Brétigny, de Troyes, de Picquigny ne modifièrent pas la situation.

A propos de la saisie de la Normandie, mes collègues britanniques ont de nouveau mis en doute la validité de la sentence qui aurait été prononcée pour des motifs d'opportunité politique. Remarquez que qualifier la sentence de « prétexte légal », c'est déjà reconnaître le caractère légal de la saisie. Il est certain que cette saisie de la Normandie fut un succès politique pour Philippe-Auguste, en écartant un vassal puissant. Mais les motifs d'une action ne modifient pas son fondement juridique. Le roi d'Angleterre ayant enlevé Isabelle d'Angoulême et refusé de comparaître devant la Cour des Pairs de France, fut légitimement condamné à perdre ses fiefs. C'est la procédure féodale qui s'appelle la commise, et dont on connaît bien d'autres cas. Le chroniqueur anglais contemporain, Raoul de Coggeshall, dont on ne peut guère suspecter le témoignage, a donné un récit très précis de cette affaire qui se trouve dans la duplique française (p. 692).

Le pape Innocent III, dans une lettre adressée au roi Jean sans Terre, le 31 octobre 1203, nous en a donné un autre récit, de forme moins juridique peut-être, mais qui concorde parfaitement avec le précédent et qui est cité dans la duplique française (p. 694).

Il est exact de dire, et nous le reconnaissons bien volontiers avec le professeur Wade, que la sentence de 1202 a rompu le lien féodal qui unissait le duc au roi de France. Mais uniquement dans ce sens qu'elle entraînait le retour au roi de France de l'ensemble des fiefs tenus par le duc de Normandie dans le Royaume de France. Les guerres qui suivirent pendant une cinquantaine d'années eurent pour but l'exécution de la commise, qui fut portée beaucoup plus loin que la Normandie. De 1202 à 1259 l'action des rois de France n'est que l'exécution de la commise.

Philippe-Auguste réussit assez facilement à occuper la Normandie, en 1204, à l'exception de certaines îles. Son fils Louis, en 1217, débarqua même en Angleterre, pénétra dans Londres et faillit renouveler l'exploit de Guillaume le Conquérant. Devenu roi de France, sous le nom de

Louis VIII, il poursuivit l'exécution de la commise et s'empara en 1226 du Poitou et de la Saintonge. Enfin, son successeur, saint Louis, repoussa et battit à Saintes en 1242 le roi d'Angleterre Henri III, qui envisageait de reprendre ces provinces. Quelques années après ces événements, le traité de Paris rétablissait la paix et les rois d'Angleterre prêtaient de nouveau hommage aux rois de France.

Mais avant d'aborder les clauses de ce traité, il convient de revenir un instant en arrière et d'examiner un acte que la Partie adverse a cru pouvoir employer. Il s'agit d'un accord, ou plus exactement d'un projet d'accord, appelé traité de Lambeth, conclu en 1217 entre le roi d'Angleterre, Henri III, et Louis, fils de Philippe-Auguste.

Remarquons d'abord que ce traité stipule une *restitution* des îles au roi d'Angleterre, ce qui implique nettement qu'elles n'étaient pas *alors* en sa possession. Le traité envisage même le cas où le prince Louis, qui ordonne cette restitution, ne serait pas obéi : dans ce cas les îles resteraient en dehors du traité de paix. Le traité de Lambeth indique donc *explicitement* que les îles avaient *échappé* au roi d'Angleterre, et il pourrait être invoqué à l'appui de la thèse française. Cependant, nous ne retiendrons pas cet acte, car il ne mettait pas en cause le roi de France : il était passé simplement avec Louis, agissant en son nom personnel et n'ayant reçu aucune délégation de pouvoir de la part de son père, le roi Philippe-Auguste.

Le Gouvernement français reconnaît au contraire, comme le Gouvernement britannique, l'importance du traité de paix, dit de Paris, conclu le 28 mai 1258 et ratifié par saint Louis et Henri III d'Angleterre, en octobre 1259. Ce traité *consacrait* la reconnaissance définitive de la commise par le roi d'Angleterre ; il attribuait au roi de France la Normandie, l'Anjou, la Touraine et le Poitou, et apportait des précisions intéressantes en ce qui concerne les îles. Nous nous permettrons de reprendre attentivement certains de ces articles, en donnant tous les commentaires nécessaires.

L'article 4 contient les dispositions suivantes : « Et de ce que le roi de France donnera au roi d'Angleterre et à ses héritiers en fiefs et en domaines, le roi d'Angleterre et ses héritiers feront hommage lige au roi de France et à ses héritiers les rois de France ; et aussi (le roi d'Angleterre fera hommage) de Bordeaux, de Bayonne et de Gascogne, et de toute la terre qu'il tient deça la mer d'Angleterre en fiefs et en domaines ; *et des îles, s'il y en a quelques-unes que le roi d'Angleterre tienne en fief, qui soient du royaume de France ;* et tiendra de lui comme pair de France et duc d'Aquitaine. »

Par cet article, le roi d'Angleterre recevait en fief le duché de Gascogne et les îles tenues par lui dans le royaume de France. Qu'il s'agisse de certaines îles de l'Atlantique — peu nombreuses à vrai dire, car la plupart, comme Ré, Oléron ou Noirmoutiers dépendaient de l'apanage d'Alphonse de Poitiers, ainsi que nous le verrons à propos de l'article 6 — ou qu'il s'agisse de Jersey et de Guernesey, comme l'affirme la réplique britannique, ces îles devaient répondre à une double condition : être situées dans le royaume de France, et être tenues par le roi d'Angleterre à charge d'hommage.

L'article 6 ajoutait : « En faisant cette paix, le roi d'Angleterre abandonnera au roi de France, à ses successeurs, à ses hoirs et à son frère tous ses droits, si le roi d'Angleterre ou ses prédécesseurs en possèdent, sur les choses tenues par le roi de France, par ses prédéces-

seurs ou par son frère. » Les droits abandonnés par le roi d'Angleterre se trouvant (je continue la citation) « dans tout le duché et toute la terre de Normandie, dans les comtés et toute la terre d'Anjou, de Touraine, de Maine et de Poitou, et ailleurs, et dans les îles si quelques-unes en tient le roi de France ou son frère, ou un de leurs vassaux ».

Dans cet article, le roi d'Angleterre cédait au roi de France tous les droits qu'il pouvait avoir sur la Normandie, l'Anjou, la Touraine, le Maine, le Poitou et les îles tenues dans le royaume de France soit par le roi de France, soit par son frère. Les îles visées dans le deuxième cas, c'est-à-dire tenues par le frère de saint Louis, étaient des îles de la côte atlantique relevant de l'apanage d'Alphonse de Poitiers ; elles correspondent d'ailleurs à la province citée en dernier dans l'énumération : le Poitou. Ce sont en particulier Ré, Noirmoutiers, Oléron. Les îles comprises dans le premier cas, c'est-à-dire tenues par le roi lui-même, ne pouvaient être que des îles rattachées directement au royaume de France ; les seules répondant à ce critère sont les îles qui ont suivi le sort de la Normandie, citées en tête de l'énumération des provinces, dans le même article, et distinctes des îles de la Manche tenues par les Anglais qui sont, elles, citées dans l'article 4 : il ne peut s'agir que des îles Chausey, Minquiers et Écréhous. L'article 6 du traité de Paris est une consécration de la commise de 1202.

Remarquons, d'ailleurs, pour en terminer avec l'interprétation de ce texte, que si « toutes » les îles de la Manche avaient alors été tenues par les Anglais, comme l'a soutenu le professeur Wade, le texte du traité l'aurait certainement explicitement mentionné. Nous ne voyons rien de tel. Bien au contraire, deux articles très précis opposent les unes aux autres les différentes catégories d'îles que la Partie adverse essaie de décrire comme une unité.

Le second traité qui mentionne les îles est le traité de Brétigny de 1360. Après l'énumération très détaillée des provinces et des villes cédées au roi d'Angleterre en toute souveraineté, comme Calais, le Ponthieu, le Poitou, la Saintonge, la Guyenne, le traité déclare, dans son article 6 : « Le roi d'Angleterre et ses héritiers auront et tiendront toutes les îles adjacentes aux terres, pays et lieux avant nommés, avec toutes les autres îles que le roi d'Angleterre tient à présent. » Les îles adjacentes aux territoires cédés sont évidemment des îles de l'Océan comme Noirmoutiers, Ré, Oléron, Yeu ; nulle contestation ne paraît possible à ce sujet. Mais il n'en est pas de même pour « les autres îles tenues par le roi d'Angleterre ». Dire que le roi d'Angleterre « tiendra toutes les îles qu'il tient » est une formule à peu près vide de sens. On peut d'ailleurs s'étonner de la grande imprécision de cette désignation, alors que tous les autres articles du traité sont très détaillés et excluent le moindre doute ; il est même proprement incompréhensible que les îles de la Manche, ou certaines d'entre elles — si c'est d'elles qu'il s'agit —, n'aient pas été nommées et énumérées. A cela nous pensons qu'il y a une raison bien simple : le roi d'Angleterre voulait se réserver la possibilité de revendiquer des îles où il n'était pas encore installé, et qui pouvaient lui échapper. N'oublions pas, en effet, que l'année précédente le roi de France Jean, prisonnier à Londres, avait conclu un accord qui ne fut pas ratifié et qui cédait la Normandie aux Anglais, la Normandie avec ses îles naturellement, Chausey, les Minquiers, les Écréhous. Par le traité de Brétigny, au contraire, la Normandie restait à la France. On comprend que le roi

d'Angleterre ait essayé de reprendre au moins les îles qui dépendaient de la Normandie depuis le traité de 1259, c'est-à-dire les Chausey, Minquiers et Écréhous.

Quoi qu'il en soit, on ne peut prétendre que le traité de Brétigny ait modifié la situation établie par le traité de Paris. D'abord parce que le texte en est véritablement trop incertain ; ensuite, parce que les renonciations qui devaient transférer la souveraineté ne furent jamais échangées. Dès 1369, la non-exécution du traité de Brétigny entraînait une reprise des hostilités.

Aucun autre traité postérieur ne contient de disposition réglant le statut des îles situées au large de la côte normande. On ne trouve ensuite qu'un accord mentionnant les possessions insulaires anglaises. La trêve de 1471, entre Louis XI et Henri VI, contient la promesse du roi de France de ne faire aucune agression contre le royaume d'Angleterre, la seigneurie d'Irlande, la ville et marche de Calais, Guines et Ham, les îles de Guernesey, Jersey et Aurigny et autres pays, îles, terres et seigneuries tenues par le roi d'Angleterre. Aucune mention dans cette trêve n'est faite de Chausey, des Minquiers et des Écréhous qui, si elles avaient alors été anglaises, auraient eu besoin, plus que les autres encore, d'être protégées contre une attaque venant de la côte française, puisqu'elles en sont les plus proches. On ne peut raisonnablement supposer que ces îles, si elles avaient été anglaises alors, eussent été impliquées dans la trêve par la simple formule : « et autres pays, îles, terres et seigneuries ». L'expression « et autres îles » pourrait signifier à la rigueur les îles de la côte anglaise, comme Wight.

J'aurais arrêté là mon exposé sur le titre ancien de la France, puisque les îles ne sont plus citées dans aucun traité de limites avec l'Angleterre, si je n'avais à faire encore quelques réflexions sur les événements de 1483-1485.

A vrai dire, ces événements de 1483-1485 je les ignorais. C'est la Partie adverse qui nous les a révélés, et nous ne sommes pas encore persuadés de leur existence.

M. l'Attorney-General a déclaré qu'en France le système féodal avait pris fin sous le règne de Louis XI, c'est-à-dire entre 1461 et 1483. Et il a ajouté que, tous les droits dérivant du système féodal étant alors tombés, la France n'avait plus de titre ancien à produire au sujet des Minquiers et des Écréhous. Le professeur Wade, après quelques hésitations sur la date, a proposé cependant 1485, avec les mêmes effets destructeurs.

Certes, on enseignait autrefois dans les écoles, et on y enseigne peut-être encore, que le moyen âge finissait exactement en 1453, à la prise de Constantinople par les Turcs. C'était un peu simplifier les choses, mais, très approximativement, cela approchait de la vérité.

Par contre, dire que le règne de Louis XI a vu la disparition des droits féodaux, et probablement aussi de toutes les dispositions établies par les traités antérieurs, c'est une affirmation qui est sans fondement.

La France a connu jusqu'à la fin de l'ancien régime des fiefs, de grands fiefs, comme la Lorraine, le Nivernais, les Dombes. Et en cette matière les événements de 1789 paraissent tout de même avoir été décisifs, en particulier une certaine nuit du 4 août.

De ces observations sur le problème du titre originel, nous sommes fondés à déduire que la France possédait ce titre bien avant le XIme siècle, car pour donner les diocèses d'Avranches et de Coutances

au duc de Normandie en 933, le roi de France devait bien les avoir en sa propriété. L'arrêt de 1202 et le traité de Paris de 1259 n'ont fait que confirmer ce titre originel, que les faits invoqués pour la période ancienne par le Royaume-Uni n'ont jamais détruit.

Nous en venons au titre II de cette deuxième partie féodale : l'application des principes du droit féodal à la situation des Minquiers, des Écréhous et des Chausey.

Il convient d'insister avant tout sur l'aspect particulier que présente la question de la possession dans le présent litige. Il ne s'agit pas ici, comme dans la plupart des affaires dont a eu à connaître la juridiction internationale, de comparer ou d'opposer le titre imparfait *(inchoate title)*, né de la découverte, et le titre définitif, né d'un « exercice continu et pacifique de l'autorité étatique », pour employer les termes de l'arbitre dans l'affaire de l'île de Palmas. Le problème se pose, en effet, de la manière suivante. La France possède un titre originel sur l'ensemble des îles de la Manche ; le traité de 1259, ainsi que tous autres traités ultérieurs qu'on pourrait invoquer jusqu'au XVII^me^ siècle, ne placent sous la souveraineté anglaise que celles des îles pour lesquelles le Royaume-Uni peut prouver la possession à la date de la conclusion de ces divers traités. Pour simplifier, on peut dire que la souveraineté anglaise ne peut être retenue aujourd'hui, en ce qui concerne les Minquiers et les Écréhous, que si le Gouvernement du Royaume-Uni apporte la preuve d'une possession suffisante, sinon avant 1259, du moins pendant l'ensemble de la période ancienne, depuis cette date jusqu'à la fin du XVIII^me^ siècle.

En droit strict, le Gouvernement de la République française pourrait donc se contenter de contester la valeur probatoire des faits de possession invoqués par le Gouvernement du Royaume-Uni sur les îlots litigieux, l'absence de preuve de possession effective de la part du Royaume-Uni entraînant *ipso facto* l'attribution des îlots à la France.

Si le Gouvernement de la République parvient à établir l'absence de possession de l'Angleterre sur les îlots, le titre originel français (incorporation aux origines des îles de la Manche dans leur ensemble dans le duché de Normandie, arrêt de 1202, traité de Paris) suffirait à lui seul à faire attribuer la souveraineté sur ces îlots à la France, et cela même si la France n'avait pas accompli d'actes positifs de possession sur eux. A cet égard, on pourrait rappeler la sentence arbitrale du roi d'Italie dans l'affaire de l'île de Clipperton, en date du 28 janvier 1931 : « .... l'île de Clipperton a été légitimement acquise par la France.... Il n'y a aucun motif d'estimer que la France ait ultérieurement perdu son droit par derelictio, puisqu'elle n'a jamais eu l'animus d'abandonner l'île, et le fait de n'y avoir pas exercé son autorité d'une manière positive n'implique pas la déchéance d'une acquisition déjà définitivement faite. »

En fait, le Gouvernement français ne se contentera pas de nier l'existence de faits de possession anglaise sur les Minquiers et les Écréhous. Il s'attachera à démontrer, dans la mesure où les documents relatifs à une période aussi éloignée de notre histoire le permettent, qu'au moment de la conclusion du traité de Paris et de tout traité ultérieur, les îlots étaient dans la possession effective du roi de France et que cette possession effective n'a fait que confirmer le titre originel. Nous le ferons d'abord pour les Écréhous, ensuite pour les Minquiers, et enfin

pour les Chausey, puisque, contrairement à toute attente, la France doit justifier une possession ancienne des Chausey....

LES ÉCRÉHOUS

Depuis la mainmise de Philippe-Auguste sur la Normandie, en 1204, les Écréhous ont constamment relevé de la couronne de France par l'intermédiaire de l'abbaye de Val Richer, située en Normandie continentale, près de Lisieux. Le Gouvernement de la République française a établi dans son contre-mémoire (pp. 384 et s.) et dans sa duplique (pp. 697 et s.) le caractère indiscutable de cette possession, et il a montré que les actes isolés de possession invoqués par le Royaume-Uni étaient dénués de pertinence. Sans revenir sur le détail même des événements, nous nous contenterons d'en retracer brièvement les éléments essentiels pour la solution du litige.

1° La charte de 1203 et la fondation de l'église Notre-Dame d'Écréhou.

Par une charte du 14 janvier 1200 (annexe A 8 au mémoire), confirmée par des chartes données à Angers le 21 juin suivant (annexes A 9 et A 10), le roi Jean d'Angleterre avait concédé à Pierre des Préaux les îles de Jersey, Guernesey et Aurigny, ainsi que certaines terres en Angleterre et près de Rouen, moyennant le service de trois chevaliers et à condition que Pierre fît un mariage qui satisfasse le roi.

En 1203, Pierre des Préaux donna, par une charte (annexe A 7 du mémoire), l'île d'Écréhou à l'abbaye de Val Richer « en libre, pure et perpétuelle aumône » et à charge, pour les moines de Val Richer, de construire dans l'île une basilique en l'honneur de Dieu et de Ste-Marie où seraient célébrés chaque jour les saints mystères.

Le passage essentiel de cette charte se trouve au contre-mémoire, page 384.

De la mention « *qui mihi insulas dedit* » (qui m'a donné les îles) le mémoire du Gouvernement du Royaume-Uni (par. 126) tire la preuve que la donation de Jersey, par la charte de 1200, comportait *ipso facto*, à titre de dépendances, celle des Écréhous.

Ceci peut être discuté. L'expression : « qui mihi insulas dedit », si elle devait désigner toutes les îles au large de la côte normande, comme le pense la Partie adverse, serait bien peu conforme aux habitudes et au style du temps. On devrait avoir dans ce cas soit : « qui mihi omnes insulas dedit », soit plutôt une énumération desdites îles. En l'absence de toute autre indication dans la teneur même de l'acte, le mot « insulas » renverrait plutôt à Écréhou même, cité aussitôt après. La seule objection serait alors l'emploi du pluriel puis du singulier pour désigner l'île d'Écréhou. Mais il convient de remarquer que nous n'avons pas l'acte original de 1203, nous ne le connaissons que par une édition ancienne du XVIIIme siècle, celle de la Gallia Christiana, qui ne peut être considérée comme une édition critique. Et tous les médiévistes savent que les erreurs de transcription sont particulièrement nombreuses en ce qui concerne les terminaisons *am* ou *as*. Quoi qu'il en soit, admettons même que l'expression « qui mihi insulas dedit » renvoie à la charte de 1200. Il n'en reste pas moins que les deux chartes, celle de 1200 comme celle de 1203, se placent à un moment où les îles de la Manche forment encore un tout complet avec la Normandie continentale sous la couronne du duc de Normandie, roi d'Angleterre, et ce n'est qu'à la suite des guerres qui allaient suivre

que les îles allaient être scindées en deux groupes, les unes étant occupées par le roi d'Angleterre, les autres l'étant par le roi de France. N'oublions pas que l'éclatement des îles au point de vue de leur statut territorial ne prend place qu'en 1259, lorsque le traité de Paris établit une différence entre les îles tenues par le roi d'Angleterre et les îles non tenues par ce dernier.

Reste à savoir quel a été l'effet juridique, sous l'empire du droit féodal, de la charte de 1203.

La thèse du professeur Plucknett, dans la consultation remise par le Gouvernement du Royaume-Uni, est que la franche aumône diffère de l'alleu et s'apparente au fief, et qu'une tenure en aumône se crée donc par sous-inféodation. Il en conclut qu'en 1203, Pierre des Préaux, concédant l'île d'Écréhou en franche aumône à l'abbaye de Val Richer, a sous-inféodé cette île à l'abbaye ; il a créé un degré supplémentaire dans cette « hiérarchie des pouvoirs » que j'ai décrite dans la féodalité, pouvoirs s'exerçant « sur les Écréhous » ; c'est ce qui est dit très clairement au début au paragraphe 9 qui résume les conclusions du professeur Plucknett.

Cette vue des choses prête à la critique. Certes, on concédera volontiers à l'historien du droit britannique que l'alleu et la franche aumône offrent bien des différences, que ce sont seulement des auteurs tardifs, tels Boutillier ou Loisel, qui ont exprimé clairement l'idée qu'on pouvait les rapprocher l'un de l'autre ; qu'on ne saurait faire état de l'opinion de ces auteurs pour interpréter un texte normand de 1203. Il serait sans doute erroné de dire qu'en 1203 Écréhou est devenu un alleu. Mais là n'est pas la question, et la duplique française, ainsi que le rappelle M. Plucknett lui-même (p. 613), ne le prétend pas. Si nous restons dans le sujet précis, il s'agit seulement de savoir si, en 1203, Pierre des Préaux s'est maintenu dans la hiérarchie relative à Écréhou, ou s'il s'est effacé.

Il y a tout lieu de penser qu'il s'est effacé. Une probabilité en faveur de cette opinion résulterait déjà de l'examen des coutumiers normands ; une quasi-certitude se dégage de l'étude des termes de l'acte lui-même.

Le très ancien coutumier normand, antérieur de peu d'années à 1203, oppose l'aumône au fief, et l'on ne peut s'empêcher de penser, à le lire, que le professeur Plucknett, dans son désir de démontrer la sous-inféodation, a été trop porté à les rapprocher l'un de l'autre. Ce coutumier leur consacre deux chapitres différents ; il traite de la première, l'aumône, au chapitre XVIII, du second, le fief, au chapitre XIX (éd. Tardif, pp. 19 et ss.). Y a-t-il contestation sur la nature d'un bien : il précise la procédure qu'il faudra suivre pour déterminer « si c'est une aumône ecclésiastique ou un fief laïque », *Utrum fuerit elemosina ecclesie .... vel feodum laici* (ch. XVIII) ; il affirme que la justice laïque est incompétente en matière d'aumône, elle ne peut « étendre sa main sur l'aumône du prêtre ni sur les biens ecclésiastiques lui appartenant », *laica justicia non extendit manum suam in elemosinam presbyteri nec in res ipsius ecclesiasticas*. Au chapitre LVII, où il est encore question « d'almone », des règles analogues sont réitérées ; il est précisé (par. 6) que la terre tenue en aumône par une église ne saurait être grevée de *servitium*, qui est de l'essence du fief ; il est impliqué (par. 8) que c'est un bien d'église. Voilà qui nous écarte de la notion de fief, et par conséquent de la sous-inféodation.

Seconde observation, toujours tirée des coutumiers normands. S'il y avait sous-inféodation, il faudrait nécessairement que certains droits

du concédant soient réservés à son profit, ne fût-ce que ceux du domaine éminent. La *Summa de Legibus Normannie*, rédigée vers le milieu du XIII^me^ siècle, insiste sur ces réserves de droits. Elle fonde sur elles une classification des aumônes (ch. CXV, éd. Tardif, t. II, p. 298). Il peut y avoir, dit-elle, aumône parfaite, *elemosina pura*, au cas où le prince territorial, c'est-à-dire le duc de Normandie, « ne retient aucune juridiction temporelle, aucune dignité », *elemosina autem pura est in qua princeps nihil sibi terre ne retinet jurisdictionis seu dignitatis* (par. 9), et dans ce cas-là le bien tombe sous la seule juridiction ecclésiastique (par. 9 *bis*). Il peut y avoir au contraire réserve de juridiction du prince, et c'est le cas visé par Blum, *Les origines du bref de fief lai et d'aumône* (1923, p. 371), je cite : « Ici le seigneur donateur abandonne tous ses droits sauf celui du *dominus capitalis* ou du duc. » Enfin, il pourrait aussi y avoir (et c'est à cela que pense M. Plucknett) réserve au profit, non seulement du duc, mais aussi du concédant. Dans ce cas-là, la *Summa* est très nette, il faut une réserve formelle ; « nul ne peut réclamer un droit quelconque de juridiction sur un fief qu'il a aumôné s'il ne l'a retenu sur ce fief », *nullus autem in feodo quod elemosinaverit potest aliquam jurisdictionem reclamare, nisi eam specialiter retinuerit in eodem* (par. 8, *ibid.*, p. 298). Or l'acte de 1203 ne formule pas de réserve au profit de Pierre des Préaux. Ce passage de la *Summa* suffirait à suggérer qu'il ne s'est rien réservé, qu'il a abandonné tous ses droits.

Cette impression est confirmée par les termes mêmes de l'acte de 1203. Il y a, en réalité, dans cet acte et par cet acte, non pas une, mais deux donations, plus exactement deux concessions faites par Pierre des Préaux aux moines de Val Richer. En premier lieu, il leur donne l'île d'Écréhou. En second lieu, il leur confirme une donation qui leur avait été faite par ses vassaux de Jersey, Guernesey et Aurigny, *Item concessi praedictis monachis quidquid ab hominibus meis de Gersy et de Gernesé et de Aurene, eis caritatis intuitu rationabiliter datum fuerit....* (*Gallia Christiana*, t. XI, instr., C. 94), je concède aux susdits moines tout ce qui leur a été donné dans une intention charitable par mes vassaux de Jersey, de Guernesey et d'Aurigny, et il ajoute : « *Salvo jure meo* », réserve faite de mon droit. La clause *Salvo jure* est la clause-type de réserve de droits ; on la trouve notamment dans une charte de 1237 du cartulaire de Saint-Michel du Tréport (cité par Blum, p. 371) : *elemosinant salvo jure capitalium dominorum*. Il faut interpréter ces trois mots de notre acte de la façon suivante. Les vassaux de Pierre des Préaux dans les trois îles n'avaient pu donner aux moines que ce qu'ils possédaient sur les terres aumônées, conformément au principe qu'énonce la *Summa* dans le passage cité par Plucknett (p. 614, n° 8) : que nul ne peut aumôner d'une terre que ce qui lui appartient sur cette terre, *nullus autem elemosynare potest ex aliqua terra, nisi hoc solum quod suum est in eadem*. Ils avaient donc fait une réserve des droits de Pierre ; c'est à cette réserve que Pierre fait allusion lorsqu'il dit que les moines ont reçu leur donation *salvo jure meo ;* et ce sont en réalité ces droits réservés qui constituent l'objet de la concession de Pierre sur Jersey, Guernesey, Aurigny. Pierre, sur ces trois îles, renonce donc à tous ses droits, c'est clair ; il s'efface devant Val Richer.

En ce qui concerne la donation d'Écréhou, sa volonté est la même ; elle résulte non moins clairement du fait qu'il n'y a pas de clause *salvo jure*, et aussi dans les mots *habendam et possidendam libere et quiete*,

plenarie et honorifice, in liberam et puram et perpetuam elemosynam, qui impliquent une donation sans nulle réserve.

Écréhou, en 1203, est donc rattaché directement à Val Richer, soustrait au droit de Pierre des Préaux. Certes la franche aumône, qui ne pouvait être faite que par le duc, ou par un seigneur ayant toute juridiction, supposait dans ce dernier cas le consentement du duc (*Summa de Legibus*, CXV, par. 7). Mais ce consentement pouvait être tacite, et résultait de la prescription trentenaire, comme l'indique la *Summa* : « Tout fief possédé d'une manière paisible et évidente, pendant 30 ans, sous le nom d'aumône ou à titre d'aumône, devra être tenu et reconnu comme une aumône. » (Voir sur ce point Blum, ouvrage cité.) Le contre-mémoire français a donc dit à juste titre qu'en 1203 « Jean était seigneur supérieur des Écréhous parce qu'en sa qualité de duc il était suzerain supérieur de Val Richer.... L'île d'Écréhou dépendait de lui par l'intermédiaire de l'abbaye au lieu d'en relever par l'intermédiaire du fief des îles. »

Ce qu'il est important de souligner, c'est que c'est par l'intermédiaire direct de Val Richer, abbaye continentale, qu'en 1203 Écréhou dépend du duc de Normandie, et non pas par l'intermédiaire du fief des îles. En 1204, Jean sans Terre, condamné par la cour de France pour manquement à ses obligations de vassal, perd la Normandie continentale ; Philippe-Auguste est alors substitué à lui pour tous les droits du duc de Normandie, concernant la Normandie continentale, et notamment les droits relatifs à Val Richer, donc à Écréhou. Les contemporains l'ont parfaitement saisi, un texte de 1209 en fait foi. Cette année-là un seigneur de Normandie continentale, Guillaume d'Argences (je cite), « donna sa terre de Surtenville pour faire subsister deux religieux prophès de l'abbaye de Valricher dans l'isle d'Escrehout, ce qui fut confirmé par Hugues de Morville évêque de Coutance ». Ce fait nous est rapporté par une histoire du diocèse de Bayeux, rédigée en 1701 par Hermant (bibliothèque municipale de Caen, ms 297, p. 204). Il est corroboré par un rentier du XVIIIe siècle (publ. dans le *Cartulaire des îles normandes*, Jersey, 1924, n° 329, p. 421) (je cite) : « Du Don Guillaume d'Argences : I moulin à vent à la pièce de terre sus quoy il siet en la terre Rogier Poutrel. Sus le moulin à bley dudit, XX boisseaulx de fourment mesure de Barneville. » Barneville-sur-mer (Manche, arr. de Valognes) est une localité située à une dizaine de kilomètres au sud de Surtrainville, un peu à l'ouest de Carteret. Quant à Guillaume d'Argences, c'est un seigneur de la Normandie continentale, cité par Gilles-André de la Rocque, *Histoire de la famille d'Harcourt*, 1662, tome II, page 1174.

Ainsi, en 1209, cinq ans après la séparation de la Normandie continentale et des îles anglo-normandes actuelles, une donation est faite pour deux religieux d'Écréhou dépendant de Val Richer. C'est la donation d'une terre du continent. Écréhou est, en quelque sorte, considéré comme rattaché au continent non pas seulement du point de vue juridique, mais du point de vue économique.

[Séance publique du 29 septembre 1953, matin]

Monsieur le Président, Messieurs de la Cour :

Hier j'ai démontré que la France avait un titre originel, général, sur toutes les îles du fief de Normandie jusqu'au jour où les îles ont cessé de constituer un ensemble et où certaines sont devenues possession britannique, d'autres possession française. Le problème est depuis lors de savoir si les Minquiers et les Écréhous sont dans le groupe « tenu » par l'Angleterre ou dans le groupe « tenu » par la France. En ce qui concerne les Écréhous, le point capital est celui de savoir quels sont les effets de la franche aumône. En effet, ou bien Pierre des Préaux a perdu tous droits sur les Écréhous par la donation de 1203, et l'abbaye de Val Richer est, depuis 1203, le seul titulaire de droits sur Écréhou, et, par l'intermédiaire de l'abbaye de Val Richer, le Royaume de France. Dans cette hypothèse, qui a Val Richer, a Écréhou. Or, Val Richer est en Normandie continentale ; Val Richer est au roi de France ; donc Écréhou aussi. Ou bien la franche aumône n'a pas fait disparaître ce lien entre Écréhou et des Préaux et, par lui, avec le duc de Normandie, roi d'Angleterre. Et alors, à moins que la France ne prouve avoir occupé Écréhou après 1202, en exécution de la commise prévue par l'arrêt de la Cour de France, Écréhou est anglais.

Voilà donc le fait capital dans cette affaire, parfaitement perçu par le Royaume-Uni, qui l'a démontré en produisant l'intéressante consultation du professeur Plucknett. Tout tourne à cet égard autour des effets de la franche aumône. De l'avis du Gouvernement français, la franche aumône, formellement concédée dans l'acte de 1203 comme étant pure, libre et perpétuelle, a brisé tous liens entre Pierre des Préaux et l'île, donc entre l'Angleterre et l'île, pour ne laisser subsister, par l'intermédiaire de l'abbaye de Val Richer, qu'un lien avec le roi de France.

Il nous reste à examiner, en ce qui concerne Écréhou, divers arguments moins importants, car la question de la franche aumône décide du sort d'Écréhou, mais qui ont été avancés par mes collègues britanniques.

Tout d'abord, la procédure de *quo warranto* de 1309. Comme nous l'avons expliqué dans le contre-mémoire, cette procédure consiste en un procès porté devant les assises, que le roi d'Angleterre avait instituées, dans les pays soumis à sa domination pour la recherche de ses propres droits. Chaque possesseur de biens, sur lesquels les représentants du roi d'Angleterre estimaient ou prétendaient que leur maître avait des droits, était cité devant des justiciers itinérants venus sur les lieux. Il était sommé de produire ses titres, de dire de quel garant *(de quo warranto)* il se réclamait pour justifier sa possession. Un procès-verbal, établi pour chaque plaid, indiquait la décision prise.

En l'espèce, l'abbé de Val Richer, représenté par le prieur d'Écréhou, était cité devant les assises de Jersey au sujet d'un moulin situé sur cette île, au sujet de l'« advocatio » du prieuré d'Écréhou, enfin au sujet d'un revenu de vingt sous qu'il percevait sur les revenus royaux de Jersey. L'existence même de ce revenu montre bien que le roi d'Angleterre avait aidé à la donation d'Écréhou à Val Richer. Le procès-verbal (annexe A 12) traite longuement de la première et de

la troisième question : du moulin et de la rente, rente qui est versée — notons-le — en monnaie française, non pas en shillings. Les explications du prieur d'Écréhou, représentant l'abbé de Val Richer, durent paraître suffisantes, puisqu'il lui fut « permis », dit le procès-verbal, de tenir lesdites choses, comme il les a tenues jusqu'à présent, « aussi longtemps qu'il plaira au seigneur roi ». Cette dernière proposition : « aussi longtemps qu'il plaira au seigneur roi », ne signifie évidemment pas que le prieuré lui-même appartient au roi d'Angleterre, comme le suggère le mémoire britannique (par. 130) ; elle signifie simplement que pour le moment le roi ne met aucun obstacle au paiement d'une redevance, d'une rente annuelle sur le Trésor royal, et il ne met aucun obstacle à ce qu'un moulin jersiais et cette redevance royale soient conservés par un prieuré qui ne relève pas de lui. C'est parce que le prieur avait pu démontrer que l'abbaye de Val Richer continuait à fournir des moines à Écréhou, pour dire les prières qui avaient été imposées dans la fameuse donation pour l'âme de Pierre des Préaux ou l'âme du roi Jean, que le tribunal accepta de conserver au prieuré, aussi longtemps qu'il plaira au seigneur roi, les modestes revenus de ce prieuré à Jersey.

Mais incidemment, une autre demande avait été faite à l'abbé : les juges voulaient savoir pourquoi il tenait l'« advocatio » du prieuré d'Écréhou. Remarquons le caractère accessoire, secondaire, de cette demande, qui est insérée entre un moulin et une rente de vingt sous. Elle était faite discrètement, mais le prieur ne daigna même pas y répondre. Examinons cette question de plus près.

Dans le français du moyen âge, « advocatio » se traduisait par « avouerie ». C'est une institution qui a évolué au cours des temps, et suivant les pays ; elle comportait des prérogatives différentes impliquant souvent un droit de patronage *(jus patronatus)*, qui permettait au seigneur de présenter un candidat pour la direction d'un établissement ecclésiastique. M. Plucknett (par. 13) préfère traduire par « adwoson », bien qu'on ne parlât pas encore anglais dans les îles normandes. Pour éviter toute chicane, nous garderons le mot *advocatio.*

On admettra sans difficulté que la demande concernant l'*advocatio* avait, comme le dit M. Plucknett, le caractère d'une action en revendication. L'essentiel est de savoir si la cour des juges itinérants a jugé que le roi d'Angleterre avait droit à l'*advocatio* du prieuré d'Écréhou. C'est un point que M. Plucknett n'a pas examiné.

Le procès-verbal relaté au rôle d'assise fait bien mention de la demande formulée par Guillaume de Maresk au nom du roi concernant l'*advocatio prioratus.* Mais il n'indique pas que le prieur d'Écréhou, procureur de l'abbé de Val Richer, si prolixe sur les autres chefs, ait répondu à cette demande. Vraisemblablement, le prieur s'en est abstenu, parce qu'il considérait que la prétention du roi d'Angleterre n'était pas fondée en droit, et qu'une cour tenue dans l'île de Jersey n'était pas compétente pour juger la question. Et la Cour n'a pas insisté. Elle n'a pas appliqué la procédure décrite dans la *Summa de legibus,* dont parle M. Plucknett au paragraphe 14, et son jugement ne dit rien de l'*advocatio.*

Il n'a donc pas été *jugé* en 1309 que le prieuré d'Écréhou fût sous l'*advocatio* du roi d'Angleterre. La demande faite en son nom par Guillaume de Maresk n'a pas autorité de chose jugée. Une prétention n'est pas un droit.

C'est ce qu'avaient déjà fait remarquer les pièces françaises de la procédure écrite. M. Plucknett n'en conclut pas moins (par. 14) que la minute du rôle d'assise « atteste l'exercice public et solennel de la souveraineté sur l'île » du roi d'Angleterre. Certes, les juges du roi ont bien « entendu une action pétitoire concernant un droit de présentation inhérent au roi d'Angleterre », mais ils ne se sont pas *prononcés* sur cette action. Depuis quand un tribunal, dont on conteste la compétence, devient-il, par ce fait même, compétent ?

Au surplus, rien n'établit que le roi d'Angleterre ait jamais présenté à l'abbé de Val Richer un candidat pour tenir le prieuré d'Écréhou. L'abbé choisissait librement le prieur parmi ses moines. Ainsi, le jeudi avant les Rameaux de l'année 1338 (nouveau style), alors que la France et l'Angleterre étaient en guerre, Gabriel, abbé de Val Richer, envoya deux moines pour garder et régir la chapelle de Notre-Dame d'Écréhou. Il n'est pas indiqué que cet envoi ait été autorisé par le roi d'Angleterre en raison d'un prétendu *jus patronatus*.

Loin d'indiquer une quelconque mainmise anglaise sur Écréhou, la procédure *de quo warranto* de 1309 ne fait donc que confirmer le rattachement étroit de l'île à l'abbaye normande de Val Richer, c'est-à-dire à la couronne de France.

L'examen des autres faits invoqués nous permettra d'aboutir à des conclusions analogues.

Les lettres de protection de 1337 : En 1337, la France et l'Angleterre étaient en guerre. Cependant le roi d'Angleterre Édouard III accorda des lettres de protection, révocables à volonté d'ailleurs, à divers prieurs dépendant d'abbayes françaises. En vérité, on ne connaît que l'existence de ces lettres, mais non pas leur contenu exact (cf. annexe A 17 au mémoire britannique). Quoi qu'il en soit, le document indique, parmi les bénéficiaires de ces lettres, le « *Prior de Acrehow de insula de Jersey* ». Le Gouvernement du Royaume-Uni en tire la preuve qu'Écréhou faisait partie de Jersey (mémoire, par. 48 et 131 ; réplique, par. 169). Le Gouvernement de la République a montré qu'il fallait traduire : « prieur d'Écréhou *au sujet* de l'île de Jersey » (contre-mémoire, p. 392 ; duplique, p. 699) et non pas : « prieur d'Écréhou *de* l'île de Jersey ». Il s'agissait vraisemblablement de permettre au prieur d'aller, en temps de guerre, librement à Jersey, pour y percevoir les rentes du prieuré : des lettres de protection spéciales étaient évidemment nécessaires à cet effet. La traduction de la particule latine *de* par « au sujet de » a été contestée par le professeur Wade. Nous maintenons cependant que c'est le sens le plus usuel, comme les dictionnaires l'indiquent, et, dans le même acte de 1339, nous trouvons deux autres cas où cette traduction s'impose, deux autres cas tout à fait semblables à celui d'Écréhou : il s'agit du prieur d'Herm et du prieur de Lithou *de*, c'est-à-dire « au sujet de » Guernesey.

Le rentier du XVme siècle : Ce rentier, qui est reproduit en annexe A 18 du mémoire britannique, mentionne certaines redevances dues à Écréhou par des habitants de Jersey. Le Gouvernement du Royaume-Uni a pris la peine de démontrer que l'existence de ces redevances ne prouvait rien quant à la suzeraineté de l'île. Le Gouvernement de la République n'a jamais dit autre chose (cf. le contre-mémoire, p. 387). Prenons donc acte de l'accord du Royaume-Uni sur le principe d'inopposabilité de tels arguments.

Les procédures judiciaires de Jersey dans lesquelles fut impliqué le prieur d'Écréhou au cours du XIVme siècle (cf. mémoire, par. 47 et 131, et annexes A 13, A 14, A 16 et A 79 ; contre-mémoire, pp. 391 et 395 ; réplique, par. 168 et 177 ; duplique, p. 700) :

Le Gouvernement du Royaume-Uni a reconnu lui-même que ces diverses procédures ne prouvaient en rien que le prieur d'Écréhou ait été anglais, et que la juridiction des tribunaux jersiais pouvait très bien s'expliquer, les faits litigieux s'étant déroulés à Jersey même (réplique, par. 168 et 177).

La confiscation des prieurés étrangers, l'extente de 1528 et la destruction de l'église de Notre-Dame d'Écréhou :

En 1414 fut ordonnée la confiscation de tous les biens que les églises de France possédaient en territoire britannique. D'après la réplique anglaise (par. 170), les mesures contre les prieurés étrangers visaient avant tout un « prieuré ou filiale, établi en Angleterre, dont la maison mère était située à l'étranger ». Dans ce cas, on ne comprend vraiment pas pourquoi le prieuré d'Écréhou n'aurait pas aussi été confisqué, car l'abbaye de Val Richer, la « maison mère », était vraiment à l'étranger. Or, il n'existe aucune preuve d'une telle confiscation : le Gouvernement du Royaume-Uni le reconnaît (réplique, par. 177) ; l'église ne fut détruite que bien plus tard. Cela montre bien que l'Angleterre n'avait aucun droit territorial sur l'île d'Écréhou. Tout ce que put faire le roi d'Angleterre fut de confisquer les rentes payées sur son propre trésor à Écréhou, ou les rentes, versées à Écréhou, par des habitants de Jersey sous sa juridiction. Effectivement, l'abbaye de Val Richer perdit tous les biens qui, à Jersey, étaient affectés au prieuré d'Écréhou. On connaît notamment une « extente », c'est-à-dire un état des biens appartenant au roi d'Angleterre, daté de 1528, dans lequel sont mentionnés comme biens de la couronne diverses rentes dues à cause d'Écréhou *(by cause of Ecrehou)* par divers habitants de Jersey (document reproduit en annexe A 19 au mémoire britannique). On y retrouve exactement le montant des redevances, mentionnées dans le rentier du XVme siècle, qui étaient alors versées au prieuré lui-même. Des extentes de 1607, 1668, 1749 contiennent les mêmes indications, les noms des tenanciers ayant seuls changés.

En tout cas, aucun de ces documents ne mentionne la confiscation de l'église d'Écréhou elle-même, confiscation qui serait sûrement intervenue si elle avait été anglaise, si l'île avait vraiment été anglaise. L'église fut détruite au cours des guerres de religion qui sévissaient en France. La reine Élizabeth envoya à ce moment-là en France des gens destinés à soutenir les protestants. Ces soldats détruisirent maintes églises sur le territoire français, et l'historien Hermant rapporte, au XVIIme siècle, que la chapelle de Notre-Dame d'Écréhou fut détruite dans de pareilles conditions (références dans contre-mémoire, p. 394, et duplique, p. 700). L'abbaye de Val Richer ne fit pas reconstruire l'église, probablement du fait de la suppression des revenus qu'elle tenait de Jersey, vraisemblablement aussi parce que la mer commençait à envahir l'île.

Le mémoire du Royaume-Uni avait invoqué (par. 49) un passage de l'ouvrage de Philippe Le Geyt, écrit en 1682, dans lequel l'auteur indiquait que la dîme de poisson était due au recteur de la paroisse sur toutes les pêches effectuées, soit sur la côte de Jersey même, soit « aux enclaves, savoir : Roques Doe, Minquais, Chausé, Ecreho » (cf.

annexe A 69 au mémoire anglais). Le Gouvernement de la République a *montré que le mot « enclaves » ne signifiait pas* « dépendances », mais une « terre complètement indépendante au milieu d'une autre » (contre-mémoire, p. 395). Comme les Chausey, les Écréhous étaient des terres françaises situées dans la mer de Jersey. Dans sa réplique, le Gouvernement du Royaume-Uni a d'ailleurs renoncé à invoquer en sa faveur le passage de Le Geyt (par. 178).

Interdiction aux Jersiais de se rendre à Écréhou : A deux reprises, au cours du XVIIme siècle, en 1646 puis en 1692, les autorités de Jersey interdirent, sauf dérogation, aux habitants de Jersey de se rendre aux Écréhous. Le Royaume-Uni explique ces mesures en disant que c'étaient des « mesures extraordinaires (prises en temps de guerre) pour empêcher les Écréhous de servir d'étape vers la France, et elles avaient pour objet particulier d'empêcher le transport des personnes suspectes en route pour le continent » (réplique, par. 179). Cela est l'évidence même. Mais ces mesures seraient incompréhensibles s'il s'agissait d'un territoire anglais. Elles deviennent, au contraire, parfaitement claires si les Écréhous étaient françaises : il s'agissait simplement d'interdire à des sujets britanniques de se rendre sur un territoire ennemi. Cette interprétation est confirmée par le fait que l'ordonnance de 1646 assimilait à cet égard les Chausey aux Écréhous.

De toutes ces constatations la conclusion est évidente : le Gouvernement du Royaume-Uni ne peut, en ce qui concerne les Écréhous, invoquer aucun fait certain de possession dans toute la période allant jusqu'à la fin du XVIIIme siècle. Les documents manquent sans doute pour le XVIIIme siècle proprement dit et sont déjà rares au XVIIme siècle : cela s'explique par la destruction de l'église et par l'absence d'importance véritable de ces îles ; l'intérêt ne se réveillera qu'au début du XIXme siècle avec la question de la pêche. Mais, pendant tout le cours de cette période ancienne, nous n'avons trouvé aucun fait certain de possession de la part du roi d'Angleterre. Tout se ramène donc aux effets de la franche aumône, et la France prétend avoir possession continue et incontestée des Écréhous, donnés irrévocablement à l'abbaye de Val Richer.

MINQUIERS

Examinons maintenant la situation des Minquiers :

Les seuls documents que nous possédions en ce qui concerne les Minquiers datent du XVIIme et du XVIIIme siècles, et ils sont, on le verra, de peu de secours dans le présent litige. La rareté des documents s'explique probablement, comme l'indique le mémoire britannique (par. 205), par l'absence d'intérêt présenté par ces rochers et îlots : cet intérêt n'apparaissant guère qu'au début du XIXme siècle avec l'exploitation des pêcheries dans les eaux avoisinantes.

Le Gouvernement du Royaume-Uni, tout en reconnaissant l'absence de preuves certaines, indique cependant qu'il est raisonnable de supposer « que les Minquiers sont restés en la possession du roi d'Angleterre » (mémoire, par. 204). Or, une telle « présomption » n'est pas précisément suffisante pour faire reconnaître la souveraineté du Royaume-Uni sur ces îles.

Le Gouvernement du Royaume-Uni a cependant invoqué divers documents pour établir le rattachement effectif de ces îles à Jersey. A cet effet, il cite d'abord le passage de Le Geyt sur la dîme de poisson,

qui était due au recteur de la paroisse sur les pêches pratiquées le long des côtes jersiaises et « dans les enclaves ». Nous avons vu ce que l'argument valait en ce qui concerne les Écréhous, et le Gouvernement du Royaume-Uni avait accepté ces vues, c'est-à-dire que le versement de la dîme de poisson était sans rapport aucun avec la question territoriale. Quant aux autres faits invoqués, ils concernent les épaves ramassées aux abords des Minquiers, à diverses reprises au cours du XVIIIme siècle, et que réclamaient les autorités de Jersey ; la Cour seigneuriale de Noirmont à Jersey s'est notamment occupée plusieurs fois de ce problème (annexes A 20, A 21, A 22 au mémoire). En réalité, tout cela ne prouve absolument rien quant à la possession effective des Minquiers par les Anglais.

Que prouvent les documents anglais ? Que des pêcheurs de Jersey, ayant ramené des épaves des Minquiers, avaient à en rendre compte et voyaient leur seigneur réclamer sa « part », comme, par la suite, les administrations de tous les pays du monde (ainsi que pour les « trésors » découverts). Ce prélèvement eût été identique si les épaves avaient été trouvées en pleine mer ou sur la côte de France, ce qui arriva sans doute. Ces documents ne prouvent donc rien quant à l'appartenance des Minquiers : il s'agit d'une juridiction seigneuriale qui exerce sa compétence sur des gens de mer à Jersey. On ne peut en tirer que les Minquiers étaient une terre de Noirmont.

Il est d'ailleurs hors de doute que les Jersiais n'étaient pas les seuls à « récolter » des épaves aux Minquiers (où les naufrages ont été innombrables). Le bon sens l'indique, mais, en outre, dans un document analogue d'une époque postérieure (annexe A 164 du mémoire britannique), nous voyons indiquer formellement la présence d'inconnus sur l'épave aux Minquiers, qui empêchent les Jersiais d'y aborder. Qui étaient ces inconnus ? Tout porte à croire que c'étaient des Français, car autrement il y aurait eu arrangement ou plainte contre les Jersiais. Ces Français, bien entendu, devaient, eux aussi (autrefois comme de nos jours), une « part d'épave » à leur administration, quelle qu'elle fût.

Le texte même de l'annexe 164 du mémoire britannique montre que les deux pays sont à égalité pour ce point de juridiction seigneuriale sur les gens de mer.

Le Gouvernement de la République française ne peut pas d'ailleurs davantage invoquer des faits de possession certains de la part de la France pendant la période qui nous occupe. La vérité est que nous ne possédons aucune preuve que l'une ou l'autre des Parties ait véritablement accompli des actes de possession sur les Minquiers. Le Gouvernement français pourrait cependant citer deux actes des États de Jersey de 1720 et de 1754, qui reconnaissent que Chausey, Minquiers et Écréhous font partie du Royaume de France. Mais nous parlerons de ces actes à propos de Chausey. Il faut y ajouter une correspondance relative aux Minquiers et qui date de 1784, qui est reproduite dans « Le Pays de Granville », 1951, pièce déposée devant la Cour. Un sieur Quinette de Cloizel demandait une concession sur les Minquiers à l'administration française. Cette dernière hésita à la lui accorder, en dépit de la redevance qu'elle aurait pu obtenir en contrepartie ; le requérant lui semblait, en effet, peu intéressant, et elle craignait, d'autre part, des difficultés de la part de l'Angleterre. Dans une lettre adressée le 24 août 1784 par le subdélégué de Granville à l'intendant de Caen, on lit ces phrases fort intéressantes : « .... Ces pêcheurs des côtes de Granville ou de Jersey qui se hazardent

sur cette isle, s'ils sont surpris par un vent frais n'ont d'autre ressource que de couler leurs bateaux.... Ils retrouvent leurs bateaux entiers à la marée basse.... Les François et les Jersiais s'y rencontrent sans se troubler, ceux-ci plus voisins, y récoltent du varech pour fumer leurs terres. Les droits du Domaine du roi sur ces affreux rochers souffriraient peut-être quelque difficulté des Anglois s'ils y voyoient tenter un établissement ; ils auroient la protection de leurs pêcheurs à alléguer ; mais aucun François ne pourroit y prétendre, il est de principe que les isles appartiennent au Roy et qu'on ne peut les posséder sans aucun titre de concession de Sa Majesté. Or le sieur Quinette de Cloizel se présente pour obtenir ce titre de concession. Assurément il est le premier qui y ait jamais songé. Mais sur quel espoir peut-il se fonder ? » Le signataire de la lettre poursuit en examinant les diverses entreprises auxquelles pourrait se livrer le requérant, et il fait un tableau effrayant des Minquiers, en disant « que des criminels dévoués à la mort préféreraient le supplice à un pareil exil ». Il conclut au rejet de la demande, le sieur Quinette étant un individu douteux. La question fut soumise par l'intendant royal au maréchal de Castries, ministre de la Marine, qui rejeta la demande. Aucun des deux Gouvernements n'a donc pu apporter à la Cour des faits de possession probants sur les Minquiers dans la période qui va des origines jusqu'au début du XIX^me^ siècle.

CHAUSEY

Monsieur le Président, je dois parler des Chausey — non pas que ce soit l'objet du litige —, mais parce que Chausey est devenu une pièce essentielle de l'argumentation britannique, argumentation sur l'unité des îles de la Manche, *toutes* tenues par le roi d'Angleterre depuis 1202. Pour confirmer ce postulat, *il faut* que Chausey ne soit devenu français qu'à une date tardive, sinon toute la thèse britannique tombe, d'où la date de 1764, fixée par mes collègues britanniques. Or, si Chausey est français depuis le XIII^me^ ou le XIV^me^ siècle, c'est-à-dire au moment précis où la distinction entre les îles tenues par chacun des deux rois est faite, cela prouve bien que cette distinction des traités a une signification dans les faits, qu'il y a des îles tenues par le roi d'Angleterre, et qu'il y a d'autres îles tenues par le roi de France, que l'unité de toutes les îles entre les mains du roi d'Angleterre est un mythe.

Voyons donc l'histoire des Chausey.

S'il est un territoire français, depuis longtemps français, dès le moyen âge, avec seulement de très courtes interruptions, c'est bien l'île de Chausey. Aussi est-il véritablement surprenant que l'on ait cru devoir jeter un doute sur ce fait, et nous expliquer que les Chausey n'étaient françaises que depuis 1764.

Nous ne récuserons pas l'ouvrage de Gibon, pris par la Partie adverse comme source essentielle, et nous demanderons à la Cour l'autorisation non pas d'y faire quelques références isolées, mais de l'utiliser abondamment.

C'est en 1022 que le duc de Normandie Richard donna Chausey à l'abbaye du Mont-Saint-Michel, située sur la côte normande ; dans l'île un prieuré fut installé, qui dépendit, jusqu'à sa suppression au XVII^me^ siècle, de la puissante abbaye normande (Gibon, p. 37). L'abbaye possédait tous les droits de l'île (p. 78).

En 1343, selon un historien jersiais, Poingdestre, peu suspect de partialité envers les Français (je cite) :

« en 1343 les Français, voyant ces îles négligées et vacantes, commencèrent à les usurper, car le roi Philippe les donna aux Frères Mineurs » (p. 74).

Les revers de la guerre de Cent Ans amenèrent une occupation anglaise. Mais n'oublions pas que l'abbaye du Mont-Saint-Michel, après le traité de Troyes, resta seule à tenir contre les Anglais installés en Normandie : son siège dura vingt-quatre années, sans succès pour les assiégeants, jusqu'à la reprise de la Normandie par la France. Certes, les îles Chausey furent alors occupées par les Anglais, mais d'une manière discontinue. Entre le Mont-Saint-Michel et Saint-Malo qui résistait également, la flotte anglaise ne régnait pas toujours en maîtresse des mers, et elle fut battue, en particulier, en 1425 et 1427 (Gibon, pp. 81-85).

La Partie adverse a cité à l'appui de sa thèse sur Chausey le texte d'une bulle que le pape Alexandre VI aurait accordée en 1500, et qui aurait enlevé Jersey, Guernesey, Chausey et d'autres îles au diocèse de Coutances, pour les attribuer au diocèse de Salisbury, puis à celui de Winchester. Notons d'abord que ce transfert ne prouverait rien quant à la souveraineté. Mais, surtout, cette bulle est d'une authenticité douteuse. Connue par la publication qu'en fit Rymer au XVII^me^ siècle, elle n'a pas été notifiée à l'évêque de Coutances et elle n'a jamais été transcrite sur le Bullarium de Rome, ce qui était pourtant une formalité indispensable. En tout cas, et même si le pape Alexandre VI l'avait réellement accordée, elle ne fut jamais exécutée en ce qui concerne Chausey, et ce point est directement en contradiction avec la thèse adverse. Tous ces détails sont dans Gibon, pages 96-97.

Au XVI^me^ siècle, des documents plus abondants nous montrent une occupation permanente de Chausey et son gouvernement par *la France*. Des forces assez considérables s'installèrent dans l'île à la fin de 1548, et la construction d'une forteresse était achevée sur la Grande Île avant 1558 (pp. 107-109). Les troupes françaises, venant en partie de Chausey, devaient s'emparer de Jersey en 1549 et la garder jusqu'en 1553 ; de même, des débarquements français devaient avoir lieu à Aurigny (pp. 110-111).

Chausey eut dès lors, sans interruption, des capitaines ou des gouverneurs français, et à diverses reprises, pendant de longues années, une garnison française. On retrouve des nominations de 1548 à 1576, en 1628, 1651, 1677, 1713, 1725, 1749.

Le chancelier Séguier écrivait en 1640 : « La petite île de Chausey appartenant au Roy » (Gibon, p. 146).

Au XVII^me^ siècle, les Anglais n'apparurent que deux fois à Chausey : en avril 1694 et en avril 1695. En ces deux occasions, ils n'occupèrent pas l'île, mais se contentèrent de la ravager et se retirèrent (p. 157).

Au début du XVIII^me^ siècle, des habitants de Jersey et de Guernesey étant venus à plusieurs reprises prendre des pierres, ces fameuses pierres à Chausey pour leurs constructions à Jersey et à Guernesey, le ministre français de la Marine interdit, le 17 juin 1731, cette pratique (Gibon, p. 167). La défense fut renouvelée d'une manière plus impérative, par un arrêt du conseil des Dépêches du 4 septembre 1736 (p. 187).

Pendant la guerre de Succession, en 1744, Chausey fut ravagé par les Anglais. Mais une fois la paix signée, à Aix-la-Chapelle, en 1748, les Français s'y installèrent de nouveau (Gibon, pp. 215-217). Aussitôt

après, le ministre français de la Guerre ordonne d'y élever un petit fort. Celui-ci n'était pas terminé quand la guerre de Sept Ans éclate. Les Anglais ravagèrent de nouveau l'île en 1756. Il est certain, comme l'a dit le professeur Wade, qu'à la fin de cette guerre, au traité de paix de 1763, le Gouvernement anglais aurait pu réclamer avec quelque chance de succès les îles Chausey. Il l'aurait certainement fait, comme le dit Gibon (p. 238) et comme le répète le professeur Wade après lui, s'il avait pu penser que les Français étaient disposés à céder sur ce point. Le Gouvernement britannique avait déjà bien réclamé et obtenu la plupart des colonies françaises. Mais nous ne croyons pas que cette abstention involontaire et cette modération toute relative du Gouvernement anglais de l'époque tiennent lieu de titre.

Et après toutes ces dates, qui sont dans Gibon, que j'ai citées, pourquoi ne retenir que la dernière, 1764 ?

De tout ce qui précède, il semble bien qu'il soit difficile de contester que les Chausey étaient françaises dès le siècle qui suivit la confiscation de la Normandie. Avant 1764, les *seules exceptions*, et par là même les titres de l'Angleterre en quelque sorte, ne sont que ces incursions et ces dévastations de 1694-1695, de 1744 et de 1756. On comprend cependant pourquoi la Partie adverse *essaie* de retarder la date de la prise de possession de Chausey par la France : il lui importe de démontrer que les îles normandes forment une entité absolue, que cette entité n'a subi qu'un seul démembrement, et tellement tardif, en 1764, celui de Chausey.

Nous croyons, au contraire, que la théorie de l'entité des îles de la Manche — un postulat plutôt qu'une théorie — n'est pas conforme aux faits. Ceci nous montre qu'il n'y a pas *une* entité, mais une opposition entre deux groupes d'îles. Il y a les îles les plus importantes : Jersey, Guernesey, Aurigny, avec quelques autres plus petites, qui *ont* été enlevées par les Anglais à la Normandie. Et il y a un autre groupe d'îles, généralement petites, sans importance, proches du littoral français : les Chausey, les Minquiers, les Écréhous, qui ont suivi le sort de la Normandie continentale.

L'existence de ce second groupe, sa cohésion aux yeux des Jersiais d'autrefois, le fait qu'il constituait une entité dès le XVIII^me^ siècle — notre entité à nous — sont prouvés en particulier par un acte, un acte qu'a cité le professeur Wade et que je reprendrai.

Cet acte se trouve dans les annexes additionnelles du Gouvernement du Royaume-Uni, page 627, annexe 160. Il est vrai que le professeur Wade l'a interprété dans un sens qui me paraît étranger à celui du texte.

L'acte du 26 janvier 1754 apparaît sous le titre qui ne me paraît pas être celui de l'acte lui-même, car il est en anglais, alors que l'acte est en français, et que j'imagine être une analyse. Je traduis le titre, ou l'analyse :

> « Acte des États de Jersey interdisant, à cause de l'apparition de la peste à Rouen, toute relation commerciale avec la France, et de plus interdisant l'entrée de tout navire français dans les ports de Jersey, ou dans les îles et rochers de Chausey, Minquiers et Écréhous. »

Assimilation des îles Chausey, Minquiers et Écréhous à Jersey, exercise de l'autorité de Jersey sur toutes ces îles, telles sont les conclusions immédiates que la Partie adverse estime tirer de cette analyse.

Malheureusement pour la thèse du Gouvernement du Royaume-Uni, il me semble que l'analyse est inexacte, et le texte de l'acte publié (pp. 627 et 628) me paraît venir entièrement à l'appui de la thèse du Gouvernement français. Voici le passage contesté : « Qu'aucun Vaisseau ou Bateau venant du Royaume de France ne sera souffert à entrer dans aucun Havre, ni mettre à Terre aucuns Passagers ou Marchandises en aucun Endroit de cette Isle ; pareille Deffence étant faite à l'égard des Îles et Rochers de Chauzé, Marqués & Icrehots, ou Rochers adjacents. » Il y a donc deux parties : la première s'arrête à « aucun Endroit de cette Isle », la deuxième étant le dernier membre de la phrase. La « pareille deffence », dont il est question dans la dernière partie, c'est celle qui est faite aux bateaux *venant* des Chausey, des Minquiers et des Écréhous, d'aborder à Jersey. L'interdiction est faite à tous les bateaux venant du Royaume de France, y compris ceux venant des îles Chausey, des Minquiers et des Écréhous.

S'il subsistait quelque doute au sujet de cette interprétation — et il s'agit simplement de lire correctement un texte en français —, il suffirait de se reporter à un autre acte de ces mêmes États de Jersey, concernant la même situation, et antérieur seulement de 34 années. En 1720, redoutant une fois de plus que le continent transmît la peste à Jersey, les États de Jersey prenaient un édit déclarant (je cite) : « Qu'aucun vaisseau ou bateau venant de quelque port de France ou lieux adjacents, comme sont Chausey, Ecreho et autres isles et rochers, ne mettront ni gens ni marchandises à terre en cette isle. »

Ce texte de 1720, qui aurait pu faire l'objet d'une annexe additionnelle de la part du Gouvernement de la République, a été publié, comme celui de 1754 d'ailleurs, par la *Société jersiaise* (19me publication, 1701-1730, Jersey, 1905, p. 71).

* * *

La *conclusion* de ces premières observations s'impose : au moment où le statut territorial des Minquiers et des Écréhous bénéficie d'un regain d'actualité, c'est-à-dire au début du XIXme siècle, à la veille des conversations franco-britanniques sur des questions qui conduisirent à la convention de 1839, aussi bien les Minquiers que les Écréhous sont sous la souveraineté française. Pour les deux groupes, la France possède un titre originel. Pour les deux groupes, la souveraineté du Royaume-Uni est exclue du seul fait que le Gouvernement du Royaume-Uni n'est pas arrivé à prouver la possession du roi d'Angleterre sur les îlots *après* le traité de Paris, ni à prouver que les îles de la Manche formaient une unité politique dont le statut juridique ne pourrait être qu'unique.

En ce qui concerne les Minquiers, la France ne peut sans doute pas établir que, avant le XIXme siècle, son titre originel ait été corroboré par une possession effective, mais cela est sans importance pour des îlots difficilement habitables en toute saison et en l'absence de toute prétention supérieure du Royaume-Uni. Comme l'a déclaré la Cour permanente de Justice internationale dans l'affaire du statut juridique du Groënland oriental : « Il est impossible d'examiner les décisions rendues dans les affaires visant la souveraineté territoriale sans observer que, dans beaucoup de cas, le tribunal n'a pas exigé de nombreuses manifestations d'un exercice de droits souverains *pourvu que l'autre*

État ne pût faire valoir une prétention supérieure. » Cela est particulièrement vrai des revendications de souveraineté sur des territoires situés dans des pays faiblement peuplés ou non occupés par des habitants à demeure (Série A/B, n° 53, p. 46).

En ce qui concerne les Écréhous, au contraire, la France a vu son titre originel confirmé par une longue possession, grâce à l'église d'Écréhou, dépendance de l'abbaye française de Val Richer. Le fait que cette possession a été interrompue pendant un siècle ou deux, après la destruction de l'église, n'a évidemment pas supprimé la souveraineté française. Dans l'arrêt que nous venons de citer, la Cour permanente a de même estimé que le Groënland n'avait pas cessé d'être une possession norvégienne du seul fait de la disparition des colonies nordiques (p. 27), et que seule une renonciation précise aurait pu faire cesser la souveraineté primitivement acquise (je cite) : « Quant à l'abandon volontaire, rien ne témoigne d'une renonciation précise de la part des rois de Norvège et de Danemark. Durant les deux premiers siècles environ qui suivirent la ruine des établissements, il semble qu'il n'y ait pas eu de relations avec le Groënland, et la connaissance de ce pays diminua, mais la tradition des droits du roi survécut.... » (*ibid.*, p. 47).

De même, dans l'affaire de l'île de Palmas, la souveraineté des Pays-Bas ne fut pas considérée par l'arbitre comme compromise par le fait que pendant près d'un siècle — de 1726 à 1825 — (je cite) : « les rapports directs entre l'île et l'administration coloniale furent des plus relâchés » (N. U., *Rec. des sentences arb.*, II).

Au début du XIX^me^ siècle, la solution est donc claire : les Minquiers comme les Écréhous sont sous la souveraineté de la France.

Nous allons voir maintenant, dans une seconde partie, l'influence exercée sur cette situation par le problème des pêcheries, la convention de 1839 et les événements qui s'ensuivirent jusqu'en 1950.

Je demande à la Cour de me permettre de tenter de résumer d'abord, en quelques brèves propositions, le résultat de nos développements sur la période féodale.

Première proposition : Dans le *regnum Francorum*, il y avait un ensemble : îles et continent.

Deuxième proposition : Le fief de Normandie, tenu par des ducs normands, comprenait de 933 à 1202 *toutes* les îles, par la donation des diocèses de Coutances et d'Avranches.

Troisième proposition : L'arrêt de 1202, juridiquement, reprend l'ensemble : Normandie continentale et les îles. Mais, en fait, il y a éclatement de l'unité des îles avec le continent, certaines étant reprises par le roi de France, d'autres non. L'idée de la tenure effective, comme distinction entre les deux rois, est née.

Quatrième proposition : Les traités de 1259 et de Brétigny confirment cette distinction. Il n'y aura plus jamais unité des îles, et le cas de Chausey le prouve.

Alors, les Minquiers et les Écréhous sont-ils dans le groupe tenu par les Anglais, comme Jersey, ou sont-ils dans le groupe tenu par les Français, comme les Chausey ? Nous espérons avoir établi : pour les Minquiers, qu'ils étaient dans le fief originaire, et que rien ne prouve une possession anglaise depuis 1202 ; pour les Écréhous, que si la franche aumône a bien les effets que nous avons décrits, c'est

l'abbaye de Val Richer qui a tenu les Écréhous depuis 1203 pour la France.

Monsieur le Président, il existe deux raisons sérieuses d'examiner comme formant une deuxième partie du problème les textes et les faits du XIX^me^ et du XX^me^ siècles.

D'une part, la convention du 2 août 1839 apporte à coup sûr quelque chose de nouveau dans l'histoire juridique des Minquiers et des Écréhous : mon ami M. Fitzmaurice aurait-il passé tant d'heures à démontrer l'absence totale d'intérêt de cette convention si ce texte n'avait véritablement aucune importance pour le règlement de la présente affaire ? Quelle que soit l'interprétation que la Cour retiendra de cette convention, le moins qu'on puisse dire, c'est que, après 1839, le problème des Minquiers et des Écréhous ne se pose plus de la même manière qu'avant la fin du XVIII^me^ siècle. En effet, et c'est la raison de la division historique, l'accomplissement d'actes de possession du XIX^me^ et du XX^me^ siècles a été accompagné de protestations et de contestations de part et d'autre, protestations et contestations qui ont tourné précisément autour de l'interprétation de la convention du 2 août 1839. Dans le cours de la contestation diplomatique par la France des divers faits de possession invoqués par le Royaume-Uni, on a constamment, depuis 80 ans, invoqué, dans un sens ou dans un autre, la convention de 1839.

C'est en effet surtout le Gouvernement du Royaume-Uni qui veut trouver dans les faits de possession du XIX^me^ et du XX^me^ siècles un soutien à sa prétention à la souveraineté sur les îlots. Il le fait en soutenant, soit que ces faits de possession ont confirmé son titre originel, soit qu'ils lui ont permis d'acquérir la souveraineté en l'absence de titre originel, par la prescription acquisitive ou l'occupation fondées sur un exercice continu et paisible de l'autorité étatique. Il est d'ailleurs malaisé de savoir laquelle de ces deux thèses, prescription acquisitive ou occupation, dont l'une suppose l'existence d'un titre et l'autre l'absence d'un titre, constitue l'argumentation principale du Gouvernement du Royaume-Uni. Quoi qu'il en soit de cette contradiction, nous avons montré que, dans la période dite féodale, c'est la France, et non le Royaume-Uni, qui détient un titre originel sur les Minquiers et les Écréhous, et que seule la France peut, pendant plusieurs siècles, démontrer une possession effective sur les Écréhous, le silence en ce qui concerne les Minquiers ne pouvant affecter le titre originel. Dans ces conditions, les faits de possession des cent dernières années, invoqués par le Royaume-Uni, ne pourront jouer en sa faveur qu'à titre de prescription acquisitive à l'égard de la France. Il faut remarquer tout de suite que, pour être valable, cette prescription doit se fonder véritablement et incontestablement sur un exercice continu et paisible de l'autorité étatique. Les faits invoqués ne concernent pas une île déserte, une lointaine île du Pacifique, sur laquelle aucun État n'aurait jamais élevé la moindre revendication. Ils concernent, tout au contraire, des îles de la Manche qui étaient à l'origine, de façon certaine, sous la souveraineté effective de la France. Sans doute, comme nous l'avons déjà indiqué, les faits de possession effective avaient-ils cessé, probablement depuis la destruction de l'église en ce qui concerne les Écréhous, encore que nous ayons vu pour les Minquiers qu'en 1784 l'administration française se préoccupait encore du problème d'une concession aux Minquiers. Mais une souveraineté sur un territoire difficilement habitable ne disparaît pas par le non-usage temporaire ; il faudrait, en plus, une renonciation précise

et non équivoque. J'ai déjà rappelé sur ce point l'arrêt relatif au *statut juridique du Groënland oriental* (p. 47). Citons aussi la sentence dans l'affaire de l'*île de Clipperton*, *Recueil des Sentences arbitrales*, tome II, page 1110, 1111. De même, dans l'affaire de l'*île de Palmas*, tome II, page 865. Dans l'affaire de la *Baie de Delagoa*, l'arbitre a aussi estimé que (je cite) : « l'affaiblissement accidentel de l'autorité portugaise dans ces parages » n'avait pas porté atteinte aux droits du Portugal sur la baie litigieuse. Nous lisons de même dans le *Digest of International Law*, tome I, page 442, que l'abandon d'un territoire implique un « délaissement volontaire » et que les hypothèses en sont « extrêmement rares » dans les temps modernes. Tel est l'avis de l'ensemble de la doctrine, par exemple, Oppenheim, *ibid.*, I, page 247 ; Hyde, *ibid.*, I, page 392, etc.

Les faits de possession invoqués par le Royaume-Uni au XIXme et au XXme siècles doivent donc être appréciés en fonction de leur contexte historique et juridique. Il faut donc tenir compte notamment, d'une part de la convention du 2 août 1839, d'autre part de ce que ces faits de possession ne concernent pas une *res nullius*, mais un territoire placé déjà sous la souveraineté d'un autre État. Si nous ajoutons à cela que ces faits ont, à maintes reprises, soulevé des protestations du Gouvernement français et que celui-ci peut, de son côté, invoquer des faits de possession sur ces îlots, nous serons en droit, d'ores et déjà, de dire que les faits de possession invoqués par le Royaume-Uni au XIXme et au XXme siècles sont bien moins concluants que nos adversaires ne le disent. Ils le sont encore moins si la Cour veut bien prendre note d'un fait, auquel nous avons déjà fait allusion : les actes de possession de ces cent dernières années sont presque tous postérieurs à 1876, postérieurs donc à l'ouverture des controverses diplomatiques qui sont à l'origine du litige. On ne peut se défendre de l'impression que ces actes si souvent cités par mes collègues britanniques dans leurs plaidoiries ont été accomplis systématiquement en vue d'appuyer de preuves abondantes le Gouvernement du Royaume-Uni au cours des négociations et des contestations déjà en cours. Tout se passe comme si le Royaume-Uni, ou peut-être plus exactement Jersey, avait voulu, au cours même du débat, par la modification d'une situation de fait, convaincre l'adversaire et plus tard le juge de son bon droit. Entre ce machiavélisme dont Jersey craint d'être soupçonné et la naïveté invoquée par le Royaume-Uni, il y a place pour le raisonnement fondé sur une excellente connaissance de la pratique et du droit international. Il n'y a rien de machiavélique à s'établir un titre, pour reprendre le terme de lord Stowell, mais cela ne veut pas dire que ce titre sera reconnu comme valable. Le Gouvernement du Royaume-Uni a soumis à la Cour un document qui figure aux annexes additionnelles, page 662 ; il s'agit d'un article publié le 24 janvier 1886 dans le Journal *La Justice* et dans lequel un journaliste écrivait ceci : « Si les Anglais n'ont pas affirmé très hautement leurs prétentions sur les Écréhous, ils cherchent à s'en emparer sournoisement, sans bruit. Des Jersiais y ont édifié des maisonnettes très habitables ; il y a de la place pour d'autres, et un beau jour, ils pourraient dire : ceci est terre anglaise et nous appartient en vertu du droit de premier occupant » ; ce journaliste, cité non pas par le Gouvernement de la République, mais par le Royaume-Uni, s'est-il tellement trompé ? Le débat date de la seconde moitié du siècle dernier, et non pas, comme l'a dit M. l'Attorney-General, de la fin de la deuxième guerre mondiale. Comment, dans ces conditions, reconnaître comme valables des faits que le Royaume-

Uni a accomplis en plein cœur du débat ? Le Président Poincaré écrivait déjà, dans le mémoire remis par le Gouvernement français dans l'affaire de l'*île de Clipperton* (je cite) : « On ne voit pas en quoi l'acte par lequel, *au cours d'un débat*, l'une des parties dispose d'un des éléments, peut-être constitutifs, de l'objet litigieux, pourrait améliorer sa situation de droit vis-à-vis de l'autre partie. » (*Imprimerie nationale*, 1912, p. 249.)

L'agent du Gouvernement du Royaume-Uni a beaucoup insisté sur les faits de possession des cent dernières années dans la procédure écrite, et les conseils du Royaume-Uni l'ont suivi dans les plaidoiries. Mais tout le problème disputé depuis cent ans et que la Cour doit résoudre aujourd'hui est justement de savoir si ces faits sont licites au regard du droit international comme ayant été accomplis sur un territoire britannique. Le Gouvernement de la République pense — et nous reviendrons sur ce point essentiel ultérieurement — que certains de ces faits étaient parfaitement licites au regard du droit international, la convention de 1839 ayant mis en commun entre les deux pays l'usage des Minquiers et des Écréhous ainsi que celui de leurs eaux, mais que d'autres faits (construction d'une maison douanière, érection d'un pavillon aux couleurs britanniques, éviction des pêcheurs français, etc.) étaient illicites et justifiaient les nombreuses protestations du Gouvernement français. Mais, en tout cas, les faits invoqués avec une telle insistance par le Gouvernement du Royaume-Uni n'ont pas l'importance, tant s'en faut, que ce dernier lui prête : ce sont, en quelque sorte, des preuves accumulées pour les besoins du dossier en vue d'obtenir une solution favorable à un conflit déjà né et qui ne saurait en aucune façon servir à établir l'existence d'une possession effective, paisible et continue sur les îles litigieuses.

Quant à ce que l'on qualifierait plus justement d'actes de force que de faits de possession — intimidation de pêcheurs français, destruction de mâts de pavillon français —, on ne peut vraiment en tirer aucune preuve, si ce n'est de la volonté délibérée du Royaume-Uni d'imposer ses propres vues. Comme le disait encore le Président Raymond Poincaré à propos d'expulsion d'étrangers de l'île de Clipperton par le Gouvernement mexicain, de tels actes sont (je cite) : « une manifestation du *jus abutendi*, c'est-à-dire d'un attribut d'une souveraineté acquise ; ce n'est pas, en droit des gens, un des moyens d'arriver à cette souveraineté » (mémoire de réplique, *Imprimerie nationale*, 1913, p. 119). Le Gouvernement du Royaume-Uni reprocherait-il à la France de ne pas avoir fait usage, elle aussi, de la force et de la violence à l'égard des ressortissants britanniques ?

Ce sont là des considérations dictées par le simple bon sens. Il nous faut maintenant envisager la question d'un point de vue rigoureusement juridique.

Je me propose, au cours de cette deuxième partie de nos observations, de démontrer les deux points suivants :

Premier point : Les actes de possession postérieurs à 1839 ne peuvent être opposés à l'autre Partie en tant qu'actes de souveraineté ; autrement dit, la convention du 2 août 1839 constitue la « date critique ». On remarquera que le Gouvernement de la République ne dit pas que cette convention a disqualifié les Parties de revendiquer leur souveraineté, mais que la revendication ne peut pas se fonder sur les actes postérieurs à 1839. Il nous faudra donc étudier le sens et la portée de cette convention de 1839, c'est-à-dire l'effet qu'elle a eu

sur le règlement du différend des Minquiers et des Écréhous en établissant entre les Parties un statut d'après lequel les tentatives de possession d'une Partie ne sont pas opposables à l'autre.

Deuxième point : Même si l'on faisait abstraction de la convention du 2 août 1839 et de l'inopposabilité qui, selon nous, frappe les faits de possession postérieurs à 1839, les faits de possession invoqués par le Royaume-Uni pendant la période récente ne réunissent pas les conditions fixées par le droit international pour servir de fondement à une revendication de souveraineté territoriale, alors surtout que la France peut, de son côté, faire état de faits de possession suffisants sur les îles.

De la sorte, quel que soit le point de vue adopté — convention de 1839 ou règles du droit international sur l'exercice effectif de la souveraineté —, l'examen de la période récente nous conduira à la même conclusion : la France a conservé aujourd'hui la souveraineté qu'elle avait déjà pendant la période ancienne.

Premier point : Les actes de possession postérieurs à 1839 sont inopposables à l'autre Partie en tant qu'actes de souveraineté : la convention du 2 août 1839 établit entre les Parties un statut qui fait de cette convention la « date critique ».

Dans sa réplique (par. 202), le Gouvernement du Royaume-Uni a fort bien défini la date critique (je cite) : « Toutes les fois qu'un différend sur la souveraineté est mentionné par le juge ou l'arbitre international, il existe une date après laquelle les droits juridiques d'une des parties ne peuvent plus être affectés par les actes de l'autre. En conséquence, il ne sert à rien pour la première d'invoquer en preuve devant le tribunal des actes postérieurs à cette date, qui est généralement désignée sous le nom de « date critique ». » Le Gouvernement du Royaume-Uni cite, à titre d'exemple, l'affaire du statut juridique du *Groënland oriental*, dans laquelle la Cour permanente a estimé que la date critique était celle de la proclamation royale norvégienne du 10 juillet 1931, proclamant la souveraineté norvégienne sur le Groënland oriental : c'est à cette date que devait être appréciée l'existence d'une souveraineté danoise sur le territoire litigieux. De même, dans l'arbitrage de l'*île de Palmas*, l'arbitre s'est référé à une date critique : pour déterminer les droits respectifs des États-Unis et des Pays-Bas en 1925, date du compromis, l'arbitre s'est en effet demandé quels étaient les droits de l'Espagne et des Pays-Bas en 1898, date du traité hispano-américain.

Ce second exemple est particulièrement intéressant dans le présent litige et confirme le Gouvernement de la République dans l'idée que la date critique dans la présente affaire est celle de 1839. Selon le Gouvernement du Royaume-Uni, la rédaction même du compromis du 29 décembre 1950 montrerait que la date critique est celle de la signature de ce compromis. Pour lui, l'événement précis qui a cristallisé le présent différend est la décision prise par les deux Gouvernements le 29 décembre 1950 de le déférer à la Cour pour déterminer « si la souveraineté sur les îlots et rochers *appartient* au Royaume-Uni ou à la République française ». *Appartient actuellement*, en 1950, dit le Royaume-Uni. Tels sont bien les termes du compromis. Mais le Gouvernement du Royaume-Uni ne reconnaît-il pas lui-même (mémoire, par. 204) que le compromis dans l'affaire de Palmas indiquait lui aussi, en 1925, que « l'unique mission de l'arbitre sera de déterminer si l'île de Palmas (ou Miangas) *fait* partie » — au présent, en 1925 — « dans sa totalité, du territoire

appartenant aux États-Unis ou du territoire appartenant aux Pays-Bas » ? Et pourtant l'arbitre a fixé à 1898 la date critique, le traité de Paris ayant cristallisé et centralisé le différend à cette date. Le Gouvernement du Royaume-Uni croit cependant (par. 224 de la réplique) (je cite) que, « dans le cas présent, en l'absence d'un traité (comme le traité de Paris de 1898), ou de tout autre instrument international ou acte constituant évidemment la base ou le centre du différend, la Cour n'a pas le choix, mais doit considérer le compromis lui-même comme le centre du différend et, par conséquent, la source de la date critique ». Mais le Gouvernement de la République croit précisément qu'il existe ici, comme dans l'affaire de Palmas, « un traité international constituant la base ou le centre du différend et, par conséquent, la source de la date critique ». Cet acte international, c'est la convention du 2 août 1839. L'inopposabilité des actes accomplis postérieurement à 1839 n'est d'ailleurs pas seulement, comme dans les autres hypothèses de « date critique », un effet exigé *a posteriori* par l'existence d'une procédure judiciaire ou arbitrale. Elle est inscrite entre les lignes mêmes de la convention ; toute atteinte au statut établi par les Parties est une modification de la convention, et c'est bien ainsi que le Gouvernement de la République a interprété dès le début les tentatives du Royaume-Uni pour établir sa souveraineté sur les îles. (Les documents reproduits aux annexes A 31, A 38, A 39 et A 42 *in fine*, A 61 *in fine*, du mémoire britannique, sont caractéristiques à cet égard.)

Si la convention de 1839 constitue la date critique, ce n'est donc pas, comme dans d'autres affaires, parce que le différend se serait cristallisé à cette date. Ce que nous avons toujours affirmé — et ce que nous continuons à affirmer —, c'est qu'en 1839 est intervenu un traité, instrument international essentiel s'il en est, dont les effets sont tels que, pour décider à qui appartient aujourd'hui la souveraineté sur les îlots des Minquiers et des Écréhous, la Cour ne peut que rechercher à qui elle appartenait à la veille de la convention. C'est bien en 1839 que la situation des Parties a pris corps, qu'elle s'est fixée. Depuis près de cent ans que dure la controverse entre les deux États, les documents produits par les deux Parties montrent bien que c'est la portée de cette convention qui est le centre du débat.

Je tiens en effet à souligner que cette utilisation, par le Gouvernement de la République, de la convention de 1839, n'est nullement une invention sortie de notre imagination après la signature du compromis de 1950. Pris par l'écrasante difficulté d'une tâche peut-être impossible, mon ami M. Fitzmaurice m'a placé dans une situation un peu délicate en me reprochant d'avoir, d'une manière imprévue, tiré argument de la convention de 1839 après la signature du compromis et de l'accord de pêche de 1951. Pour dissiper tout malentendu, je tiens à dire ici que, en premier lieu, l'accord de pêche de 1951, que M. Fitzmaurice a invoqué — malgré l'engagement pris au moment du compromis par les deux Parties de ne pas l'invoquer dans la Cour (mémoire britannique, par. 69 ; réplique, par. 2) — ne concerne que l'interprétation des dispositions relatives à la pêche aux Minquiers et aux Écréhous dans la convention de 1839. La portée territoriale de cette convention demeure donc entière. En second lieu, et surtout, au moment de la négociation du compromis, les autorités britanniques connaissaient l'importance attachée par le Gouvernement de la République à la convention de 1839 : par la correspondance échangée depuis près de

cent ans, d'abord, mais aussi parce que les procès-verbaux des négociations de la convention de pêche de 1951 montrent combien les représentants de la France — dont deux sont présents ici — ont souligné le sens de la convention de 1839 et insisté pour qu'elle fût mentionnée dans l'accord de pêche comme en étant la base. Si le Gouvernement du Royaume-Uni avait voulu exclure la convention de 1839 du débat actuel devant la Cour, il aurait pu le demander, et cela n'aurait pas été plus difficile que d'exclure du débat toute preuve tirée de l'accord de pêche de 1951, ce qui, comme la Cour le sait, a été convenu. Rien de tel n'a été demandé par le Gouvernement du Royaume-Uni en ce qui concerne la convention de 1839, et le compromis du 29 décembre 1950 n'exclut aucun titre, aucune preuve, aucune date. Dans ces conditions, la Cour me permettra d'exprimer à mon tour ma surprise devant l'étonnement manifesté par mes collègues britanniques en présence de notre argumentation fondée sur la convention de 1839 — argumentation qu'ils connaissent depuis de nombreuses années, depuis des dizaines d'années, et que le Gouvernement de la République n'a fait que poursuivre devant la Cour. Il serait agréable au Gouvernement de la République de penser que la formule tout à fait courtoise de M. Fitzmaurice a cependant dépassé sa pensée, car rien, dans la conduite du Gouvernement de la République, ne peut prêter au soupçon d'avoir abusé le Gouvernement du Royaume-Uni dans sa bonne foi, terme que je préfère à celui de naïveté.

[Séance publique du 29 septembre 1953, après-midi]

Monsieur le Président, Messieurs de la Cour, avant de reprendre mes observations, je voudrais faire une remarque relative à la dernière partie de mes observations de ce matin.

Mon excellent collègue et ami, M. Fitzmaurice, m'a fait observer qu'il semblait résulter de mes observations que nous considérions que le Royaume-Uni n'avait pas respecté l'accord entre les deux Parties, selon lequel l'accord de pêche de 1951 ne serait pas invoqué à l'appui de nos revendications de souveraineté. Je déplore d'avoir pu donner cette impression, et je désire rectifier mes remarques sur ce point. Les conseils du Royaume-Uni n'ont pas utilisé l'accord de pêche de 1951 pour appuyer leurs revendications de souveraineté, et je regrette vivement d'avoir pu donner une autre impression.

Je maintiens simplement ce que j'ai dit ensuite sur les négociations du compromis de 1950, pour répondre à ce qui se trouve dans la plaidoirie de mon ami, M. Fitzmaurice, page 62, depuis la 28me ligne jusqu'à la fin du paragraphe.

Si l'une des Parties avait voulu exclure la convention de 1839 du débat actuel devant la Cour, je maintiens qu'elle pouvait le demander et qu'un accord, du genre de celui qui a été conclu pour l'accord de pêche de 1951, aurait pu être proposé, je ne dis pas accepté.

Les conseils du Royaume-Uni nous reprochent d'écarter du débat, en fixant la date critique en 1839, les événements les plus récents, c'est-à-dire les plus intéressants pour le juge. Ce reproche ne nous semble pas fondé, car, s'il était justifié, il aboutirait à éliminer la notion même de date critique. Dans l'*affaire de Palmas*, l'arbitre n'a-t-il pas fixé la

date critique à 1898 et éliminé, ce faisant, les faits de la période la plus récente, antérieure à 1925 ?

Je me propose de montrer maintenant — et c'est là le point essentiel — comment, de l'avis du Gouvernement de la République, la convention de 1839 a établi entre les Parties un règlement applicable aux espaces litigieux qui interdit par son existence même à chacune d'elles d'invoquer *en tant qu'actes* impliquant la souveraineté territoriale, les actes de possession postérieurs à 1839. Nous montrerons donc avant tout, par une analyse détaillée de la convention de 1839, pourquoi, à nos yeux, elle constitue la date critique dans la présente affaire, puis nous verrons pourquoi l'inopposabilité des actes postérieurs à 1839 subsisterait, quelle que soit l'interprétation qu'on donne à la convention de 1839.

Notre plan sera le suivant :

En premier lieu, l'interprétation française de la convention de 1839 entraîne *ipso facto* l'inopposabilité, par une Partie à l'autre, des actes de possession postérieurs à 1839 comme manifestation de la souveraineté territoriale.

Pour ce faire, nous aurons trois problèmes à étudier :

— la réfutation de la thèse du Royaume-Uni ;

— l'exposé de la thèse française, et

— les conséquences de la thèse française sur la fixation de la date critique.

En second lieu, quelle que soit l'interprétation de la convention de 1839, nous montrerons que les faits postérieurs à cette convention n'en sont pas moins *inopposables* par une Partie à l'autre en tant que manifestations de la souveraineté territoriale.

* * *

I. L'interprétation française de la convention du 2 août 1839 entraîne *ipso facto* l'inopposabilité par une Partie à l'autre des actes de possession postérieurs à 1839 comme manifestation de la souveraineté territoriale.

Il est exact — et le Gouvernement de la République en donne volontiers acte au Gouvernement du Royaume-Uni — qu'en signant le compromis du 29 décembre 1950, les deux Parties ont, par là même, mis de côté, par voie de traité, toute interdiction qui aurait éventuellement résulté entre elles d'un traité antérieur de se prévaloir de la souveraineté exclusive sur les Minquiers et les Écréhous. Dans la mesure où la convention du 2 août 1839 entraînait ou interdisait une telle revendication, elle n'est donc pas actuellement applicable dans le débat devant la Cour et, comme le disent les deux Parties, il ne saurait être question d'une incapacité juridique à revendiquer la souveraineté sur les îles. Mais cela ne nous dispense absolument pas d'examiner la convention de 1839, car de son interprétation dépend aujourd'hui, dans le présent litige, la pertinence des faits de possession allégués de part et d'autre, survenus entre le 2 août 1839 et le 29 décembre 1950.

Essayons donc, avant tout, de relire cette convention sans préjugé, sans opinion préconçue, en ne faisant usage que du bon sens.

L'article premier définit le tracé d'une ligne A B C D E F G H I K le long de la côte normande, entre le cap Carteret et la pointe du Meuga. C'est la ligne qui se trouve marquée en rouge sur cette carte qui illustre, je m'empresse de le dire, la thèse française et qui n'est pas une carte ayant une valeur authentique entre les deux Parties. Cette carte a été

réduite sous le format qui a été présenté à la Cour, et c'est la carte qui porte le n° 3. Entre cette ligne et la côte française, « la pêche des huîtres sera exclusivement réservée aux sujets français ». Cette carte et cette ligne présentent ceci de particulier que la ligne est située tantôt à plus, tantôt à moins de la limite de trois milles par rapport à la côte de France. Signalons enfin que si elle englobe l'ensemble des Chausey dans la zone de pêche réservée à la France, elle laisse en dehors de cette zone les Minquiers aussi bien que les Écréhous.

L'article 2 dispose que « la pêche des huîtres au dedans de trois milles, calculés de la laisse de basse mer, de l'île de *Jersey* (Jersey souligné dans le texte français original) sera exclusivement réservée aux sujets britanniques ».

L'article 3 indique que « sera commune aux sujets des deux pays la pêche des huîtres entre les limites ci-dessus désignées, et en dedans desquelles cette pêche est exclusivement réservée, soit aux pêcheurs français, soit aux sujets britanniques ».

L'article 9, lui, ne concerne plus exclusivement la pêche des huîtres, contrairement aux articles 1 à 3, mais vise la pêche en général. Il dispose que « Les sujets de Sa Majesté le roi des Français jouiront du droit exclusif de pêche dans le rayon de trois milles à partir de la laisse de basse mer, le long de toute l'étendue des côtes de France, et les sujets de Sa Majesté britannique jouiront du droit exclusif de pêche dans un rayon de trois milles de la laisse de basse mer le long de toute l'étendue des îles britanniques », et je dois dire que dans le texte français qui se trouve dans les archives, il y a un grand i à Îles britanniques, ce qui correspond à *British Islands* dans le texte anglais. « Bien entendu », dit l'alinéa 2, « que sur cette partie des côtes de la France qui se trouve entre le cap Carteret et la pointe du Menga, le droit exclusif de toute espèce de pêche n'appartiendra qu'aux sujets français en dedans des limites mentionnées à l'article 1er de la présente convention. »

Tel est cet accord si controversé. Il a sans doute le défaut de mêler le spécial au général, l'exception au principe : il parle en effet à la fois de la pêche des huîtres, de la pêche générale, et avant même de poser, dans l'article 9, le principe de la pêche réservée dans un rayon de trois milles le long de toutes les côtes françaises et anglaises, il prévoit d'abord une exception à ce principe pour une section de la côte française, définie à l'article premier pour la pêche aux huîtres et reprise à l'article 9, alinéa 2, pour la pêche générale. Ce caractère un peu hétéroclite est dû aux circonstances de la rédaction du texte, rédaction qui, nous le verrons, a été longue et pénible, faite, si la Cour me permet l'expression, de pièces et de morceaux.

Mais ce défaut de rédaction une fois constaté, il reste que l'objet de la convention est fort clair. La Cour me permettra de lire le titre exact de la convention de 1839 tel qu'il se trouve dans l'exemplaire du Gouvernement français, signé et scellé par le duc de Dalmatie et lord Granville, le 2 août 1839 à Paris. Ce titre est le suivant : « Convention conclue entre la France et la Grande-Bretagne pour la délimitation des pêcheries d'huîtres entre la côte de France et l'île de Jersey avoisinante, ainsi que pour la détermination des limites en dedans desquelles le droit général de pêche sur toutes les autres parties des côtes des deux pays séra exclusivement réservé aux sujets respectifs de la France et de la Grande-Bretagne. » Comme ce titre l'indique, l'objet de la convention est en effet double : il s'agit à la fois de réglementer la pêche des huîtres entre

Jersey et la côte normande, et de définir l'étendue de la mer territoriale en général, en vue d'établir le principe de la pêche reservée aux seuls nationaux. Autrement dit, c'est un *règlement territorial à fin de pêche*. Les deux questions, celle de la mer territoriale et celle de la pêche — pêche générale comme pêche des huîtres —, sont intimement liées tout au long de la convention. Il ne saurait faire le moindre doute que, dans l'esprit des commissaires des deux Parties, les zones de pêche avaient un caractère territorial. Nous voyons les commissaires anglais demander à plusieurs reprises (procès-verbaux de la négociation de 1839, pp. 252 et ss.) une application indulgente des sanctions dans les eaux réservées à la France et les commissaires français faire des réserves en indiquant que (je cite) « le Gouvernement français est seul juge en dernier ressort des infractions commises en dedans des limites fixées ». Le pouvoir de police, dans la zone de compétence territoriale de l'État, était ainsi étroitement lié, dans l'esprit des auteurs de la convention, à l'exercice du droit de pêche.

Cette liaison entre les questions de pêche et les questions territoriales est extrêmement importante ; elle résulte non seulement du texte de la convention, mais aussi de son histoire, et remonte même aux négociations de 1824, comme nous le verrons par la suite. On peut consulter sur ce point d'ailleurs un ouvrage anglais, du professeur Smith, *Great Britain and the Law of Nations* (Londres, 1935, vol. II, pp. 144 et ss.).

Ce lien est d'ailleurs très naturel. Il se retrouve en bien d'autres occasions. C'est ainsi que la convention franco-espagnole du 18 février 1826, relative à la pêche dans la baie du Figuier, prévoit trois zones de pêches, l'une exclusivement française, l'autre exclusivement espagnole, la troisième neutre, et ces zones correspondent exactement aux zones de « juridiction », c'est-à-dire de souveraineté, prévues par la convention franco-espagnole du 30 mars 1879. La même liaison entre les questions territoriales et celles de pêche a été relevée, en ce qui concerne la convention de 1882 sur la pêche en mer du Nord, par sir Cecil Hurst, dans son article *The Territoriality of Bays* dans le « British Yearbook », 1922-1923, page 42, et disons, en hommage à la mémoire des négociateurs de 1839, que l'article 2 de cette convention de 1882 est aussi mal rédigé que l'article 9 de celle de 1839.

Plus récemment est intervenu l'arrêt rendu dans l'*affaire des Pêcheries*, entre le Royaume-Uni et la Norvège, dont on peut citer un passage :

> « Bien que le décret du 12 juillet 1935 se réfère à la zone de pêche norvégienne, et ne parle pas nommément de la mer territoriale, il est hors de doute que la zone délimitée par ce décret n'est autre que l'étendue de mer que la Norvège considère comme sa mer territoriale. » (*C. I. J. Recueil 1951*, p. 125.)

Selon le Gouvernement de la République, la convention de 1839 a cependant une signification supplémentaire en dehors du double objet que nous venons d'indiquer. Sans doute ne parle-t-elle ni des Minquiers ni des Écréhous ; sans doute ces îlots n'ont-ils pas davantage été mentionnés au cours de la longue négociation dont est issue la convention. Mais ce silence n'a pas pour effet magique de faire disparaître les îlots de la carte ; les Minquiers et les Écréhous se trouvent au milieu même de la région que la convention régit. Or, à moins de dire que ce silence a aboli l'existence même de ces îlots, il est certain que la réglementation de pêche établie par la convention de 1839

s'applique inévitablement à des Minquiers et des Écréhous qui relèvent d'un certain statut territorial. A supposer même qu'il soit impossible de dégager sur ce point l'intention des Parties, il faudrait encore rechercher *avec* quel statut territorial le régime de pêche institué par la convention serait seul compatible et donc reconnaître qu'il y a là une implication nécessaire.

Nous allons voir d'abord pourquoi l'interprétation donnée à la convention par le Gouvernement du Royaume-Uni ne saurait être retenue, ensuite l'interprétation proposée par le Gouvernement français, pour conclure enfin sur la question de la détermination de la date critique en 1839.

Rejet de l'interprétation proposée par le Gouvernement du Royaume-Uni.

L'idée essentielle de cette interprétation est qu'il ne faut pas chercher à utiliser la convention de 1839 en vue de déterminer le statut territorial des Minquiers et des Écréhous. La convention ne disant mot de ce statut, on ne peut rien en tirer en ce qui le concerne. Il faut, tout au contraire, appliquer la convention en fonction d'un statut préalablement déterminé. Autrement dit : il faut tenir pour acquis que la souveraineté sur ces îles a toujours appartenu au Royaume-Uni et que la convention n'a pas voulu porter atteinte à cette souveraineté.

L'interprétation du Royaume-Uni vise, tout entière, à démontrer que l'article 3 relatif à la pêche commune ne saurait s'appliquer aux eaux situées dans un rayon de trois milles autour des Minquiers et des Écréhous. L'article 3 ne signifie pas que ces îles n'engendrent pas leurs propres eaux territoriales, ni, dès lors, que la pêche dans ces eaux n'est pas exclusivement réservée aux sujets britanniques (carte 2, où est trouvée la limite de 3 milles autour des Minquiers et des Écréhous). L'objet essentiel de cette interprétation est d'exclure les pêcheurs français des Minquiers et des Écréhous et d'expliquer qu'une telle exclusion n'est pas contraire à l'article 3, selon lequel la pêche est commune aux pêcheurs des deux pays entre la ligne *ad hoc* définie à l'article premier et la ligne située à trois milles de l'île de Jersey fixée à l'article 2.

On peut d'ailleurs s'étonner que nos collègues britanniques, après s'être acharnés à démontrer que la zone commune de l'article 3 n'englobait que des zones de haute mer ou des territoires sans maître et ne comprenait donc pas les eaux territoriales des Minquiers et des Écréhous, aient jugé utile de démontrer d'abord que la pêche commune des huîtres n'entraînait pas la pêche commune de toute espèce de poissons, ensuite que la pêche générale commune était parfaitement compatible avec une souveraineté unique. Ne seraient-ils pas absolument sûrs que l'article 3 ne crée pas une zone de pêche commune sur les plateaux litigieux ? Quoi qu'il en soit, le Gouvernement de la République ne conteste pas le principe que les droits de pêche commune sont parfaitement compatibles avec une souveraineté unique : la thèse française est justement que la convention de 1839 a créé un usage commun à des fins de pêche sur un territoire exclusivement de souveraineté française.

L'interprétation britannique — pas de pêche commune dans les eaux territoriales des Minquiers et Écréhous — soulève essentiellement deux objections. En premier lieu, elle repose sur une série de pétitions de principe. En second lieu, elle aboutit à détruire les dispositions essentielles de la convention.

a) En premier lieu, l'interprétation du Royaume-Uni repose tout entière sur une *pétition de principe*. Elle suppose acquis que Minquiers et Écréhous ont toujours relevé de la souveraineté britannique, et c'est en fonction de ce postulat que le Gouvernement du Royaume-Uni interprète les divers articles de la convention.

L'interprétation donnée à la convention de 1839 par le Royaume-Uni peut se résumer de la manière suivante, que j'emprunte à la réplique, paragraphes 48 et suivants :

Lorsque nous lisons, dans l'article 2, que « la pêche des huîtres en dedans des trois milles .... de l'île de Jersey sera exclusivement réservée aux sujets britanniques », nous devons lire : « Jersey et ses dépendances », c'est-à-dire « Jersey, les Minquiers et les Écréhous ». L'article 9 pose le principe de la pêche générale exclusive dans un rayon de trois milles de la laisse de basse mer « le long de toute l'étendue des Îles britanniques ». Or la convention du 11 novembre 1867 dispose dans son article 38 que « les termes : « Îles britanniques » et « « Royaume-Uni » » employés dans cette convention de 1867 comprennent « les îles de Jersey, Guernesey, Alderney, Sark, l'île de Man et leurs dépendances ». Le Royaume-Uni continue : les Minquiers et les Écréhous étant une dépendance de Jersey, il en découle que ces îles engendrent leur propre mer territoriale comme n'importe quel autre territoire britannique. Enfin, disent mes collègues, étant donné qu'on ne peut raisonnablement admettre que l'État détenant la souveraineté territoriale sur les îlots ait renoncé sans contrepartie, et sans le dire, à la pêche exclusive dans leur mer territoriale, on peut en déduire que l'article 3 relatif à la pêche commune ne peut s'appliquer qu'aux espaces de haute mer ou ceux qui sont *res nullius*, ce qui exclut *ipso facto* son application aux Minquiers et aux Écréhous, qui sont par définition territoires britanniques.

Aucun de ces raisonnements n'est, à la vérité, admissible. Reprenons-les un par un.

Premier argument. Lorsque l'article 2 parle de l'île de Jersey, il vise du même coup les Minquiers et les Écréhous, dépendances de Jersey, et c'est à trois milles des Minquiers et des Écréhous qu'il faut donc porter la mer territoriale et la pêche exclusive du Royaume-Uni. Il y a là deux pétitions de principes : d'une part que « île de Jersey » signifie « Jersey et ses dépendances » ; d'autre part que les Minquiers et les Écréhous sont des dépendances de Jersey. Nous examinerons cette dernière question avec le second argument du Royaume-Uni. En ce qui concerne la première allégation, elle est absolument incompréhensible : comment imaginer que, lorsque, dans une convention aussi longuement étudiée, les Parties écrivent : « l'île de Jersey » (et, notons-le, en soulignant le mot Jersey dans le texte français), il faille entendre par là « Jersey, les Minquiers et les Écréhous », et cela alors que l'un des deux commissaires anglais de la négociation, M. Sparks, était inspecteur des huîtrières à Jersey et qu'on ne peut pas supposer qu'il ait oublié l'existence des Minquiers et des Écréhous ?

La convention du 9 septembre 1824 (annexe A 26 au mémoire), ancêtre direct de la convention de 1839, et qui, bien que non signée, a été appliquée pendant quinze ans, ne stipulait-elle pas dans son article 3 que « les limites des pêcheries anglaises d'huîtres, moules et autres coquillages de même nature sont fixées à une lieue marine autour des îles de Guernesey, Alderney et Sark, et à deux lieues marines

autour de l'île de Jersey » ? Faut-il croire que cette énumération si précise couvrait autre chose que les seules îles citées de Guernesey, Aurigny, Sercq et Jersey ? Une extension de l'article 2 de la convention de 1839 est d'autant moins justifiée que l'on a généralement vu à cet égard une différence entre la convention de 1839 et la fameuse *convention de 1882 sur la pêche dans la mer du Nord* : la convention de 1882 a, en effet, ajouté au texte de l'article 9 de la convention de 1839, qu'elle reprend textuellement, les mots « et les îles et bancs qui en dépendent ». Ces termes « îles et bancs qui en dépendent », qui pourraient poser un problème d'interprétation s'ils se trouvaient dans le texte de 1839, ne peuvent recevoir application lorsqu'il s'agit non pas de la convention de 1882 — où les mots se trouvent —, mais de celle de 1839 — où ils ne se trouvent pas. Sinon, il est vain d'écrire avec précision. Si une convention disant « l'île de Jersey », une autre « les îles et bancs qui en dépendent », une troisième « Guernesey, Alderney, Sark et Jersey » désignent le même objet, à savoir Jersey et ses prétendues dépendances, c'est à n'y plus rien comprendre. Que dire d'ailleurs du titre même de la convention de 1839 que j'ai rappelé déjà « .... entre la côte de France et l'île de Jersey avoisinante ».

Deuxième argument du Royaume-Uni : les Minquiers et les Écréhous sont des « îles britanniques » au sens de l'article 9 de la convention, et à ce titre ils engendrent leurs propres eaux territoriales. Présenté sous cette forme, l'argument est évidemment un sophisme, parce que la question est précisément de savoir si les Minquiers et les Écréhous *sont* des « îles britanniques ». Aussi, le Gouvernement du Royaume-Uni s'appuie-t-il sur l'article 38 de la convention de 1867, selon lequel, par « îles britanniques », il faut entendre aussi Jersey, Alderney, Guernesey, Sercq, l'île de Man et leurs dépendances.

Le Gouvernement de la République pense, à vrai dire, qu'on ne saurait interpréter une convention quelconque à l'aide d'un texte qui a été élaboré près de trente ans plus tard et qui n'a jamais été mis en vigueur. Mais, puisque le Gouvernement du Royaume-Uni invoque la convention de 1867, le Gouvernement de la République ne laissera pas l'argument sans réponse. Le Royaume-Uni soutient que, par la convention de 1867, les Parties n'entendaient pas modifier celle de 1839 ; il s'agissait simplement, selon les termes mêmes de son préambule, d'établir « certains arrangements dont l'expérience a démontré l'utilité et qui ont paru pouvoir modifier et compléter avantageusement les dispositions antérieures dans l'intérêt commun des pêcheurs des deux pays ». Autrement dit : la convention de 1867 peut servir à éclairer rétroactivement le sens des dispositions de la convention de 1839.

Pour que ce raisonnement fût admissible, il faudrait que l'article 38 de la convention de 1867 se contentât d'éclairer, de paraphraser, *en un* mot « d'interpréter » l'article 9 de la convention de 1839. Or, il n'en est rien, et je me permets d'insister sur ce point essentiel. Dans sa plaidoirie du samedi 19 septembre, M. Fitzmaurice a cité (p. 81 du compte rendu) certains extraits des procès-verbaux de la commission de 1867, qui se trouvent à la page 646 des annexes additionnelles du Royaume-Uni. Il a commencé à la trentième ligne seulement. Or, voici ce que nous lisons aux deux précédentes lignes de la même page (je traduis) : « M. Cave [commissaire britannique] suggéra qu'une clause fût insérée pour inclure les îles de la Manche dans l'expression « Îles britanniques » [avec un grand i]. » Qu'est-ce à dire, sinon que l'expression « Îles britanniques »,

contenue dans l'article 9 de la convention de 1839, ne concernait pas, de l'avis même du commissaire britannique, les îles de la Manche ? L'île de Jersey était régie par l'article 2, qui était ainsi loin d'être superflu dans la convention de 1839, les « Îles britanniques » proprement dites par l'article 9. Quant aux autres îles de la Manche — notamment les Minquiers et les Écréhous —, la convention de 1839 ne créait pas de zone territoriale de trois milles autour d'elles ; et une telle zone ne pouvait se présumer à l'époque, la convention de 1839 étant précisément, de l'avis unanime de la doctrine, l'un des premiers documents de ce que certains ont appelé depuis la « règle » des trois milles. Peu importe donc ce que le mot « dépendances » signifie : pour nos adversaires, il vise les Minquiers et les Écréhous ; selon nous, il s'agit des nombreux îlots, rochers et écueils qui bordent à courte distance le continent, d'une part, et les principales îles du Royaume-Uni, d'autre part, et qui font juridiquement partie de la terre ferme à laquelle ils se rattachent. Mais, je le répète, peu importe la signification de ce terme « dépendances » : une chose est certaine, c'est que l'article 38 de la convention de 1867 modifiait, d'après la déclaration de M. Cave, l'article 9 de la convention de 1839 ; par conséquent, il ne peut pas servir pour l'interpréter.

Bien que la signification du terme « dépendances » dans l'article 38 de la convention de 1867 soit étrangère au débat, je voudrais cependant dire, pour ne laisser aucun doute sur le caractère de l'interprétation du Gouvernement du Royaume-Uni, pourquoi cette expression ne saurait en aucun cas viser les Minquiers et les Écréhous. Si les Écréhous sont considérés comme une dépendance de Jersey, il serait normal de considérer les Basses de Taillepied et les Bancs fêlés comme une dépendance des Écréhous, dans les eaux territoriales desquels ils se trouvent, et alors, de calculer la mer territoriale de Jersey, en application de l'article 2 de la convention de 1839, à partir de la seule Basse de Taillepied qui découvre toujours, ou bien encore du seul banc découvrant des Bancs fêlés. Si le Gouvernement du Royaume-Uni n'a pas émis cette prétention, c'est vraisemblablement parce que la mer territoriale ainsi définie autour de Jersey viendrait alors mordre sur la ligne de la zone française délimitée à l'article premier — ce qui achèverait de démontrer combien est insoutenable un argument fondé sur la notion de « dépendances ». D'autre part, l'origine de l'article 38 est britannique, comme le montrent non seulement le document cité, mais encore la dénomination anglaise dans le texte de l'article 38 : Alderney, Sark : si les commissaires anglais avaient voulu éclairer, comme on nous dit, le texte de l'article 9 de la convention de 1839, croit-on vraiment qu'ils auraient laissé passer l'occasion de citer les Minquiers et les Écréhous ? Croit-on vraiment que les commissaires français auraient accepté sans discussion un texte portant une atteinte aussi grave aux droits des pêcheurs français, lesquels fréquentaient les parages sans incident, sur le même pied que les pêcheurs anglais, depuis près de trente ans, et qui étaient convaincus que la convention de 1839 avait confirmé leurs habitudes et leurs droits anciens ?

On peut donc rejeter sans hésiter l'argument selon lequel l'article 9 de la convention de 1839, interprété par l'article 38 de la convention de 1867, a pour effet de créer une zone de mer territoriale à pêche exclusive autour des Minquiers et des Écréhous : l'article 9 de la convention de 1839 ne dit rien de tel ; l'article 38 de la convention de 1867 ne sert pas à l'interprétation de la convention de 1839 : non seulement il n'est

jamais entré en vigueur, mais, de toute façon, il n'avait pas l'effet que lui ont prêté mes collègues britanniques.

Troisième argument du Royaume-Uni. L'article 3 relatif à la pêche commune ne peut s'appliquer qu'à des espaces de haute mer, *donc* il est inapplicable aux eaux baignant les Minquiers et Écréhous, ces eaux étant par définition des eaux territoriales britanniques. Là encore, il y a une pétition de principe, et on ne peut rien déduire d'un pareil raisonnement. Mon collègue, M. Fitzmaurice, a ajouté, le 19 septembre, que l'article 3 pouvait aussi s'appliquer à des territoires non réclamés qui pouvaient se trouver dans cette zone. Il me permettra de lui opposer l'arbre de Spinoza dont il nous a si spirituellement parlé ; ou bien il y avait, en 1839, des territoires non réclamés, mais alors où est l'unité des îles de la Manche dont on nous a tant parlé ? Ou bien toutes les îles de la Manche sont supposées, par la théorie des dépendances, être sous la souveraineté britannique, mais alors on ne voit pas à quel territoire non réclamé l'article 3 pourrait bien s'appliquer.

Mais ce ne sont encore là que des griefs mineurs que nous avons adressés à l'interprétation britannique. Les pétitions de principe que nous avons signalées sont, en effet, un vice inhérent de la thèse britannique ; d'après cette thèse, la convention de 1839 n'est d'aucun secours pour la solution du présent litige puisque, loin d'aider à résoudre le problème posé, elle le suppose tout entier résolu d'avance. Qui plus est, cette interprétation a une conséquence inadmissible, qui est de vider la convention de 1839 de tout son contenu. Or, une interprétation destructrice du texte à interpréter ne saurait être retenue ; c'est là un principe général de droit que la Cour permanente a appliqué dans l'affaire des *Emprunts serbes* (série A, nos 20/21, p. 32).

b) C'est effectivement une interprétation qui détruit la convention que propose le Gouvernement du Royaume-Uni. Dans la réplique et la plaidoirie, le Royaume-Uni insiste très longuement sur le caractère inutile et superflu des articles 2 et 3 de la convention de 1839 qui, selon lui, n'ajoutent rien à cette dernière.

Est-il vraiment admissible de réputer non écrit un texte qui est pourtant écrit et qu'on peut même considérer comme une pièce essentielle de la convention de 1839 ? Comment soutenir, avec une apparence de vraisemblance, qu'est inutile et négligeable une disposition comme celle-ci : « Sera commune aux pêcheurs des deux pays la pêche des huîtres entre les limites ci-dessus désignées » ? N'est-ce pas au contraire un texte essentiel dans une convention destinée à concilier des revendications de pêche contradictoires dans une zone où des incidents, parfois violents, venaient de se produire ? Entre 1815 et 1839, 223 bateaux de pêche britanniques avaient été saisis par la croisière française, et certains détenus en France plus de six mois. Les incidents firent même des blessés et un mort. La convention de 1839 ne devait pas seulement, dans l'esprit de ses auteurs, régler la question de la pêche des huîtres le long de la côte du Cotentin ; elle devait encore, et surtout, comme l'a indiqué lord Granville lui-même, dans une lettre adressée à M. Thiers le 2 avril 1836, établir la paix « dans cette partie de la Manche qui se trouve entre Jersey et la côte de France ». (Archives du ministère des Affaires étrangères, *Pêcheries de la Manche*, p. 275, pièce déposée.)

Comme l'écrivaient très justement les jurisconsultes français dans leur rapport de 1886 (annexe au mémoire du Royaume-Uni, p. 108),

le système institué en 1839 était (je cite) « un système de compensation qui a pour but de placer sur un pied d'égalité absolue les pêcheurs des deux nations, de prévenir toute contestation sur les limites respectives de leur souveraineté dans ce coin de l'océan ». Les négociateurs de la convention de 1839 ont eu pour but, conformément à la mission qui leur était imposée par les deux Gouvernements et qui est rappelée dans le préambule de la convention de 1839, de mettre un terme définitif à toutes les contestations. La zone commune de l'article 3 devait-elle en effet comprendre tous les bancs et rochers susceptibles de créer des incidents : Écréhous, Basses de Taillepied, Bancs fêlés, Minquiers, etc., ou non ? Comment soutenir que l'article 3 est inutile, alors que, comme l'ont montré déjà les auteurs de ce rapport et comme nous avons essayé de le faire après eux, « les articles 1, 2 et 3 forment un tout indivisible, un ensemble applicable au calcul de la mer territoriale dans la baie du Cotentin, dont on ne peut distraire une partie sans détruire l'économie équitable et rationnelle du système entier » ? (Je cite le rapport, p. 239, des annexes britanniques.)

La Cour a récemment rappelé que « le premier devoir d'un tribunal, appelé à interpréter et à appliquer les dispositions d'un traité, est de s'efforcer de donner effet, *selon leur sens naturel et ordinaire, à ces dispositions prises dans leur contexte* » (avis consultatif sur la compétence de l'Assemblée générale pour l'admission d'un État aux Nations Unies, *Recueil* 1950, p. 8). Or, n'est-ce pas aller directement à l'encontre du sens naturel et ordinaire de la convention de 1839 que de soutenir que son article 3 est superflu et de prétendre à une zone de pêche exclusive autour des Minquiers et des Écréhous, alors que la convention institue en toutes lettres un droit de pêche commun entre la ligne A à K et la ligne située à trois milles de *Jersey*, et de Jersey souligné dans le texte français ?

Ayant mutilé et défiguré la convention de 1839, l'interprétation du Gouvernement du Royaume-Uni aboutit à des résultats pratiques stupéfiants. Au lieu de supposer chez les négociateurs de 1839 l'intention de réglementer d'une manière claire et simple la pêche dans cette région, le Gouvernement du Royaume-Uni leur prête un esprit singulièrement compliqué. Au lieu des trois zones de pêche bien délimitées (française, anglaise, commune), il y aurait une multitude de zones : celle délimitée par la ligne *ad hoc* A à K (carte 2) ; celle délimitée par la ligne située à trois milles de Jersey ; celle délimitée par la ligne située à trois milles des Écréhous (même carte) ; celle délimitée par la ligne située à trois milles des Minquiers ; celle, enfin, de forme tourmentée, située entre les autres.

Lorsqu'on se rappelle que lord Palmerston avait insisté, dans ses instructions (*Travaux préparatoires de la convention de 1839*, lettre du 20 octobre 1837, tome I, pièce 2), sur la nécessité d'obtenir des limites sans équivoque et très apparentes pour les bateaux, et que l'on imagine ce découpage que nous avons présenté sur la carte 2, découpage subtil, préconisé par nos adversaires et absolument inutilisable pour des pêcheurs dépourvus de carte, on voit combien l'interprétation britannique est inadmissible. Croit-on vraiment que des années de négociations ardues aient pu aboutir à créer une zone commune qui, entre les Écréhous et la ligne de zone française, aurait en tout et pour tout une largeur de 0,6 mille, et qui entre les Minquiers et la zone de Chausey se réduirait également à un étroit couloir dont les pêcheurs seraient bien incapables

d'apprécier l'emplacement exact ? En fait, l'interprétation du Gouvernement du Royaume-Uni aboutit à absorber purement et simplement la zone commune dans les limites de la pêche anglaise. Rien n'est alors plus simple que de déclarer que l'article 3 est inutile.

Aussi bien le système préconisé par le Gouvernement du Royaume-Uni n'a-t-il jamais été transposé dans les faits. Pendant les premières quarante années de l'application du régime de 1839, pêcheurs anglais et français fréquentèrent *en commun et paisiblement* les Minquiers et les Écréhous, sans que le Gouvernement du Royaume-Uni se soit jamais avisé de réclamer un droit exclusif de pêche pour ses propres ressortissants. Au lendemain de la conclusion de la convention de 1839, il ne lui était pas venu à l'esprit que l'article 3 était inutile et ne devait pas s'appliquer aux Minquiers et aux Écréhous. Lors des longues négociations qui devaient aboutir au règlement d'application du 23 juin 1843, les commissaires anglais ne soulevèrent jamais la question des Minquiers et des Écréhous, alors qu'on discuta abondamment du droit de mouillage des bateaux anglais à Chausey. Et lorsque lord Palmerston attaqua, en 1843, devant la Chambre des Communes, le traité comme trop avantageux *pour la France, il ne songea pas davantage* à mettre en cause la communauté de pêche autour de ces îlots.

Et croit-on que si les eaux territoriales des Minquiers et des Écréhous avaient été réservées aux pêcheurs britanniques, la croisière britannique n'aurait pas reçu des instructions après la convention de 1839 et qu'elle n'aurait pas chassé de ces eaux territoriales britanniques les pêcheurs français qui y allaient ? Et qu'il n'y aurait aucune trace de ces incidents ?

Dans sa note du 25 avril 1883, M. Tissot, ambassadeur de France, faisait allusion à l'« usage constant » que constituait la pêche en commun dans ces parages, et il ajoutait (en *1883*) que « le Gouvernement de la République n'avait pas voulu entamer à ce sujet une véritable discussion avec le Gouvernement britannique, d'autant plus volontiers qu'en fait nos pêcheurs ont continué à exercer leur industrie le long des Écréhous sans rencontrer d'opposition de la part de l'autorité britannique, ce qui permet de supposer que les arguments présentés dans le mémorandum de 1876 pour revendiquer la propriété exclusive de ce groupe de rochers ne lui [c'est-à-dire au Gouvernement britannique] ne lui paraissaient pas absolument péremptoires » (annexe A 38 du mémoire britannique). Bien plus tard, le 5 octobre 1937, M. Corbin écrira de son côté : « Au moment où fut négociée la convention du 2 août 1839, qui avait pour objet de délimiter les pêcheries sur les côtes respectives de France et d'Angleterre, aucun des deux Gouvernements intéressés n'émit de prétention sur les îles Minquiers qui demeurèrent livrées, suivant la tradition, à la libre exploitation des pêcheurs des deux nations. En vertu d'une sorte d'accord tacite, les pêcheurs français et anglais n'ont jamais cessé de disposer, en droit et en fait, d'avantages identiques » (annexe A 76, p. 292, du mémoire britannique).

Des documents d'origine britannique confirment ce point de vue, dont le Gouvernement du Royaume-Uni reconnaît d'ailleurs l'exactitude dans le mémoire (par. 89, note 2). Dans sa note du 12 novembre 1869 au Gouvernement français, l'ambassadeur anglais se plaint de ce que certains équipements, déposés par des pêcheurs de Jersey aux Minquiers, aient été volés par des pêcheurs français venus de Granville et de Cancale. L'ambassadeur se plaint uniquement du vol, mais pas de la présence des Français aux Minquiers. Il ne l'estime donc en rien surprenante

(annexe A 51). Dans sa réponse à cette note, en date du 11 mars 1870, le ministre français des Affaires étrangères indique que l'enquête effectuée n'a pu établir la culpabilité des pêcheurs français, mais que des avertissements ont été adressés aux pêcheurs français (je cite) « qui préviendraient au besoin le renouvellement des dépradations dont se sont plaints les pêcheurs de Jersey » (annexe A 52). En 1870 encore, on tient pour normal que la pêche soit commune aux Minquiers et aux Écréhous. Il faut donc arriver à la note britannique du 3 février 1888 (annexe A 42) pour trouver la prétention du Gouvernement du Royaume-Uni à réserver à ses propres ressortissants la pêche aux Minquiers. Quant aux Écréhous, cette même prétention venait d'être formulée parallèlement dans des notes reproduites aux annexes A 32, A 33, A 40.

Il est donc constant que pendant une trentaine, voire une quarantaine d'années au moins, le Gouvernement du Royaume-Uni a laissé les pêcheurs français voisiner dans ces parages avec les pêcheurs anglais sans élever la moindre protestation. Les archives françaises contiennent un certain nombre de documents concernant des difficultés d'application de la convention de 1839 pendant cette période: pas un seul ne concerne les Minquiers et les Écréhous. C'est là la meilleure preuve que les deux Gouvernements estimaient que l'article 3 autorisait la pêche commune dans les eaux des Minquiers et des Écréhous, et on peut alors rappeler ici ce que le Gouvernement du Royaume-Uni a dit dans sa réplique (par. 86) de la « valeur probatoire considérable que la Cour a attachée, dans diverses affaires, à la pratique et à la conduite ultérieure des parties à un traité, comme apportant la preuve de la manière correcte de l'interpréter et du sens que les parties elles-mêmes entendaient lui attribuer ». Les extraits de la jurisprudence de la Cour, que le Gouvernement du Royaume-Uni a reproduits en annexe A 151 à sa réplique, peuvent être appliqués ici pour établir que, par leur attitude, postérieurement à la convention de 1839, les Parties ont montré qu'elles avaient bien voulu inclure les Minquiers et les Écréhous dans la zone commune visée à l'article 3 de la convention. Bien mieux, au moment même où il soutenait sa curieuse interprétation de la convention de 1839, le Gouvernement du Royaume-Uni, sachant très bien qu'elle était inapplicable, proposait à la France un arrangement qui aurait permis aux pêcheurs français de continuer à pêcher dans certaines de ces eaux territoriales des Minquiers et des Écréhous. (Note du 18 juillet 1938, annexe A 78, p. 295, reprenant des propositions plus anciennes du 17 août 1905, annexe A 69, p. 282.)

Tout cela montre que l'article 3 avait un sens bien précis, et qu'il devait s'appliquer, dans l'esprit de ses auteurs, à toute la zone intermédiaire comprise entre la ligne *ad hoc* A — K et la ligne des 3 milles de Jersey, et de Jersey seul (la carte n° 3). C'est cette convention de 1839, avec son article 3, qui a régi les rapports des Parties pendant plus de cent ans. Si les commissaires français ont accepté, en 1867, de supprimer l'article 3 du projet de nouvelle convention, c'était parce qu'ils pensaient que la pêche commune dans la zone intermédiaire était une chose acquise. Cela est clairement indiqué dans une note de l'ambassadeur de France, en date du 25 avril 1883. Dans cette note (annexe A 38), M. Tissot relève en effet qu'au cours de la négociation de la convention de 1867 (je cite) « les commissaires français et anglais ont déclaré .... qu'il n'y avait pas lieu de faire le moindre changement à la carte signée en 1839 par les Parties contractantes ».

Ce point est confirmé par les minutes de la commission (annexes additionnelles du Gouvernement du Royaume-Uni, p. 647). « Or » — poursuit M. Tissot — « cette carte reproduit, d'une manière aussi précise que possible, les limites de chacune des zones et notamment de la zone neutre. Il en résulte donc que les Écréhous, qui figurent dans la carte de 1839 comme étant compris dans la mer commune, doivent, encore aujourd'hui, être considérés comme situés dans cette mer.... » (Mémoire britannique, annexe A 38, vol. I, pp. 223-226.) Les procès-verbaux de la commission britannique de 1866-1867, dont les travaux ont abouti à la convention de 1867 (pp. 644 à 658 des annexes additionnelles), confirment ce point de vue. A plusieurs reprises, les commissaires parlent, reprenant les termes mêmes de la convention de 1839, de la *mer commune aux deux pays ;* cette expression se trouve notamment page 649 (« la mer commune aux deux pays »), et page 654 (*« the sea common to both »)* : il ne s'agit donc pas là d'une invention tardive du Gouvernement français, mais bien d'une notion essentielle dans l'esprit des auteurs des deux conventions de 1839 et de 1867.

Ainsi, l'interprétation proposée par le Gouvernement du Royaume-Uni ne résiste pas à l'examen des conséquences mêmes auxquelles elle aboutit. C'est, au contraire, à des conséquences satisfaisantes en pratique et conformes au sens naturel et ordinaire des termes de la convention qu'aboutit l'interprétation du Gouvernement de la République française.

[Séance publique du 30 septembre 1953, matin]

Monsieur le Président, Messieurs de la Cour, nous allons exposer l'interprétation de la convention du 2 août 1839 proposée par le Gouvernement de la République.

Cette interprétation concerne deux points différents. Ces points sont cependant intimement unis. La détermination des droits de pêche des ressortissants des deux pays, d'une part, le statut des Minquiers et des Écréhous, d'autre part. Mais avant d'exposer cette interprétation, il me paraît nécessaire de rappeler brièvement les faits essentiels de la longue négociation dont est issu ce texte. Pour les détails, la Cour me permettra de rappeler qu'ils se trouvent dans le contre-mémoire français, pages 359 et suivantes.

I. Et tout d'abord, l'histoire de cette convention.

Au début du XIXme siècle, des incidents parfois violents opposent les pêcheurs des deux pays au large des côtes du Cotentin. Il s'agissait de bancs d'huîtres que les pêcheurs français prétendaient avoir cultivés et dont les pêcheurs anglais entendaient profiter en arguant de leur éloignement de la côte française et de leur situation hors des eaux françaises. Ceci est indiqué dans l'une des annexes additionnelles britanniques, A 166. C'est surtout à partir de 1810 que commence l'exploitation intensive du côté anglais des bancs d'huîtres. Dès le début, la discussion portait donc à la fois sur une question de pêche et sur une question territoriale.

Le 20 août 1820, le comte de Caraman, ambassadeur de France à Londres, transmit au Gouvernement britannique des propositions aux termes desquelles la souveraineté de l'État adjacent s'étendrait dans cette zone jusqu'à six milles des côtes (annexe A 24) ; il joignait à sa

lettre une lettre adressée au ministre français des Affaires étrangères par son collègue de la Marine, le 14 septembre 1819 (annexe A 25), et on y trouve ces mots : « Votre Excellence trouvera ci-joint des copies de ces tracés ; la couleur bleue indique l'étendue de la mer territoriale pour la France, et la couleur rouge l'étendue de cette mer pour les îles d'Aurigny, de Cers, de Jersey et des Minquiers possédées par l'Angleterre. » De cette lettre le Gouvernement du Royaume-Uni entend tirer des conséquences qu'elle n'implique évidemment pas. D'une part, cette proposition n'eut jamais de suite, on n'y répondit même pas ; or le Gouvernement de la République a rappelé dans sa duplique (p. 711) que selon la jurisprudence de la Cour permanente comme celle de la Cour internationale de Justice, on ne saurait faire état de déclarations, admissions ou propositions faites au cours de négociations directes entre les Parties, lorsque ces négociations n'ont pas abouti à un accord. D'autre part, et surtout, les négociations ultérieures annulèrent la proposition de 1820. Alors qu'en 1820 le comte de Caraman parle des Minquiers et laisse les Écréhous dans l'ombre, on va dorénavant passer sous silence les uns aussi bien que les autres. De 1820 à 1839, il ne sera plus une seule fois question des Minquiers et des Écréhous. Nous pourrions d'ailleurs invoquer, en sens contraire, un aveu caractéristique du côté britannique. C'est la pétition des États de Jersey au roi d'Angleterre en date du 18 avril 1822, document déposé par le Gouvernement de la République comme document nouveau n° 2. Dans ce document contemporain de la lettre du comte de Caraman, il est bien signalé que des pêcheurs de Jersey ont découvert des bancs d'huîtres bien pourvus, situés « entre ces côtes [c'est-à-dire celles de Jersey] et la côte de France qui est opposée s'étendant depuis le cap Rozel aux rochers appelés les Minquiers à peu de milles au N.-O. des petites îles Chausey, entre une et trois lieues des côtes de France ». Les gens de Jersey étaient donc loin, en 1822, de considérer les Minquiers comme une dépendance de leur île et les tenaient bien davantage comme faisant partie des dépendances de Chausey.

Quelques années plus tard, les négociations furent reprises : elles aboutirent à un projet de convention du 7 septembre 1824 (annexe A 26 au mémoire britannique). Ce projet est fondé sur deux principes : celui de la réciprocité et celui de la distinction entre, d'une part, la pêche générale, d'autre part, la pêche aux huîtres, aux moules et aux coquillages.

Le régime institué peut être résumé ainsi : droit exclusif de pêche dans les trois milles ; limite portée à six milles pour la pêche des huîtres, moules et coquillages entre le havre de Carteret et le village de Lingreville du côté français, au large de l'île de Jersey du côté anglais. Cette convention est l'ancêtre direct de celle de 1839, et elle confirme d'une manière explicite ce lien, que nous croyons essentiel, entre les questions de pêche et les questions de souveraineté territoriale. Certes, nous n'entendons pas conférer à la convention de 1824 un effet interprétatif que nous avons refusé à celle de 1867, bien que la convention de 1824 ait été appliquée pendant quinze ans, mais il est néanmoins intéressant de savoir que son article premier dispose expressément (je traduis de l'annexe A 26 au mémoire) : « Les Hautes Parties contractantes reconnaissent mutuellement, comme inhérent à la souveraineté territoriale de chaque État, le droit exclusif de pêcher dans la distance d'une lieue marine.... » Pouvait-on affirmer plus clairement que la division en

zones de pêche était également, voire surtout, une division en zones territoriales ?

La convention de 1839 a été faite par des *hommes qui connaissaient* à fond la convention de 1824, et elle s'est bornée à modifier les limites prévues à la convention de 1824 sans toucher aux principes.

Le Gouvernement du Royaume-Uni a produit, en annexe B 6 [1], une carte indiquant les limites prévues par le projet de 1824. Elle permet de constater que ni les Minquiers ni les Écréhous n'ont engendré, dans ce projet de 1824 appliqué pendant quinze ans, une ceinture particulière de mer territoriale. Le Gouvernement du Royaume-Uni en déduit qu'en 1824 le Gouvernement français n'a pas réclamé la souveraineté ni sur les Minquiers ni sur les Écréhous. S'il avait considéré ces îles comme françaises, il l'aurait dit, car cela lui aurait permis de faire établir à son profit un droit de pêche exclusif dans un rayon de trois milles de leurs côtes (mémoire, par. 215). Ne peut-on pas renverser le raisonnement et dire que, si le Gouvernement du Royaume-Uni avait voulu faire admettre que les îles étaient britanniques, il l'aurait dit en vue de faire accorder à ses ressortissants un droit de pêche exclusif à trois milles autour de ces îles ? Et cela est d'autant plus plausible que, de cette manière, les pêcheurs anglais auraient eu accès à des bancs d'huîtres situés fort près de la côte française, les Écréhous, comme les cartes le montrent, n'étant séparés que d'un peu plus de six milles de cette côte. Croit-on vraiment que les négociateurs anglais auraient laissé passer cette occasion d'avoir gain de cause pour une bonne partie des bancs litigieux ? Quoi qu'il en soit, une chose est certaine : dès 1824, les Parties ont passé les Minquiers et les Écréhous sous silence. Pour le moment, enregistrons le fait, sans chercher encore à l'expliquer. Voyons d'abord la suite des événements.

Le 15 septembre 1824, l'ambassadeur de France se rendit à la conférence de signature de la convention. Ses collègues britanniques lui demandèrent alors si la convention était applicable à toutes les pêcheries, le long de toutes les côtes françaises et anglaises. L'ambassadeur les renvoya au texte de la convention, qu'il estimait parfaitement clair. Sur quoi les commissaires anglais lui déclarèrent qu'il était nécessaire d'examiner jusqu'à quel point la convention pourrait affecter les pêcheries anglaises de hareng le long des côtes de Norfolk et, en même temps, ils produisirent une pétition adressée en 1819 — c'est-à-dire cinq ans avant — par les pêcheurs des côtes de Norfolk, dans laquelle ils réclamaient le privilège exclusif de pêcher le hareng jusqu'à 14 milles en mer. Le lendemain de cette réunion, l'ambassadeur de France eut beau adresser à M. Canning une longue lettre (jointe en annexe III au contre-mémoire français) exprimant son étonnement de voir remise en question une négociation serrée qui avait duré plusieurs mois, par des revendications vieilles de cinq années et dont la convention devait justement faire justice. Rien n'y fit ; la convention était mort-née.

Le 28 février suivant, M. Canning essaya cependant d'expliquer au prince de Polignac les motifs de l'attitude de son Gouvernement (annexe I, contre-mémoire français). Ses explications sont fort intéressantes. Il indique : en premier lieu que le Royaume-Uni aurait fait une concession gratuite à la France en lui accordant une limite spéciale de pêche au large de la côte de Granville ; sans doute, la même faveur était appliquée aux pêcheurs de Jersey, mais elle était purement théorique, la plupart

[1] Voir p. 350 du volume I.

des bancs d'huîtres jersiais étant situés à moins de 3 milles de la côte. Il n'est donc plus question des pêcheurs de hareng de Norfolk, mais d'une concession accordée sans contrepartie. En quelques jours la situation a changé !

Second argument de Canning : il serait pratiquement impossible d'appliquer la convention. Comment, en effet, faire respecter cette limite exorbitante de 6 milles le long de la côte de Granville ? La loi anglaise ne permet pas d'interdire aux pêcheurs anglais de s'approcher à moins de 6 milles des côtes étrangères, et, de toute façon, l'accord prévu n'aurait pas pu être opposé aux États tiers. Cet argument est évidemment dénué de toute valeur intrinsèque si l'on songe que par le Herring Fishery Act de 1808, le Royaume-Uni lui-même avait déjà étendu sa juridiction jusqu'à 10 milles des côtes ! (Fulton, *The Sovereignty of the Sea*, p. 698.) Nous aurons d'ailleurs à revenir sur cette question un peu plus tard. Ce que nous voulons relever ici, c'est simplement ceci : si M. Canning avait pensé que les Minquiers et les Écréhous engendraient une mer territoriale propre, qu'ils pouvaient être revendiqués soit par le Royaume-Uni soit par la France, il n'avait pas besoin d'insister sur ce second argument, car l'État qui aurait eu la souveraineté sur les îlots aurait *ipso facto* détenu le pouvoir de faire appliquer, dans la limite de leurs eaux territoriales, la réglementation prévue. L'existence d'une telle zone aurait enlevé à l'argument de M. Canning toute valeur et toute force pratique. Là encore, nous ne pouvons que constater que les Parties ont traité Minquiers et Écréhous comme protégés de toute revendication de souveraineté. Nouveau silence, nouveau point d'interrogation.

Le projet de 1824 a été mis provisoirement en vigueur, par une entente que lord Palmerston devait appeler plus tard « purement temporaire et officieuse », (annexe addit. britannique A 167, p. 640). Mais les incidents n'avaient pas cessé pour autant entre les pêcheurs des deux pays ; ils avaient même tendance à s'aggraver, par suite de la distinction, dans la convention de 1824, entre la limite pour la pêche générale et la limite de la pêche des huîtres. J'ai déjà indiqué à la Cour que, de 1820 à 1839, plus de 200 bateaux de pêche anglais furent saisis et internés dans le port de Granville, parfois pour une durée de six mois. En 1834, un incident violent : un mort, plusieurs blessés. Aussi, l'un des buts de la commission réunie à Granville, pour faire cesser ces incidents, fut-il précisément de faire coïncider les deux limites, le contrôle n'étant pas possible autrement. Les commissaires français, reprenant une idée émise par le prince de Polignac, en 1824, suggérèrent d'étendre la convention à l'ensemble des côtes des deux pays ; les commissaires anglais élevèrent une « protestation verbale » (*Travaux préparat. de la convention de 1839*, vol. II, p. 110), protestation contre cette extension qui, disaient-ils, soulevait des questions de principe et qui n'était pas prévue dans leurs instructions. Pas davantage. Cependant, le Gouvernement britannique, en transmettant au Gouvernement français, en 1839, le projet élaboré à Granville, ajouta un article 9 qui constitue précisément un tel texte de principe. Ainsi, l'article 9 est une addition introduite par le Gouvernement britannique au projet élaboré à Granville, addition qui fut naturellement accueillie avec faveur par le Gouvernement français, puisqu'il en était l'auteur primitif. Les articles 1 à 8 constituent ainsi une « petite convention » relative à la pêche dans la région de Granville ; l'article 9 forme une « grande conven-

tion » ajoutée à la dernière minute par le Gouvernement britannique et acceptée par le Gouvernement français.

Cette circonstance suffit à expliquer certaines maladresses dans la rédaction de la convention de 1839. Quoi qu'il en soit, les négociateurs anglais, cette fois, purent signer, car la nouvelle convention donnait au Royaume-Uni cette fameuse contrepartie qui faisait défaut dans le projet de 1824 : premier argument de M. Canning. La ligne A — K, prévue à l'article premier, si elle passait parfois à plus de trois milles de la côte française, passait ailleurs à une distance bien inférieure à la limite de trois milles, ce qui donnait accès, aux pêcheurs anglais, à ces fameux bancs d'huîtres les plus fertiles situés à l'intérieur des eaux territoriales françaises ; la largeur de la zone, à certains endroits, est compensée par son exiguïté à d'autres.

Tels sont, très rapidement résumés, les antécédents de la convention de 1839. Comment alors l'interpréter en tenant compte à la fois de son texte et des circonstances assez particulières de son élaboration ? C'est ce que nous allons voir maintenant.

II. Quelle est la portée et la signification de la convention de 1839 ? Pour plus de clarté, nous séparerons le problème des droits de pêche et la question proprement dite des Minquiers et des Écréhous.

1. En ce qui concerne, en premier lieu, la question de la pêche, le Gouvernement de la République pense, et a toujours pensé, que la signification de la convention était absolument claire, en dépit de sa rédaction assez maladroite.

Les articles 1, 2 et 3 forment l'essentiel de ce que j'ai appelé la « petite convention », c'est-à-dire la convention relative, dans le premier état des négociations, à la seule pêche des huîtres dans la seule région du Cotentin. Leur sens naturel et ordinaire saute aux yeux : entre la côte française et la fameuse ligne *ad hoc* A à K, la pêche des huîtres est exclusivement française ; entre la côte de l'*île* de Jersey et la ligne située à 3 milles de cette côte, la pêche des huîtres est exclusivement anglaise ; entre ces deux limites, la pêche des huîtres est commune aux sujets des deux nations. Ce découpage en trois zones, qui se retrouve, nous l'avons dit, dans la baie du Figuier, entre la France et l'Espagne, résulte des termes mêmes de la convention, et on peut s'étonner qu'il ait été contesté et qu'on ait seulement pu imaginer dans cette zone intermédiaire et commune certains îlots et rochers engendrant leur propre mer territoriale à pêche exclusive, surtout, si la Cour veut bien se reporter à la carte n° 2, que cette mer territoriale serait bien plus vaste que toute la zone de Jersey. Il faut noter d'ailleurs que le Gouvernement du Royaume-Uni a lui-même reconnu jadis l'exactitude de cette interprétation. Dans l'aide-mémoire des magistrats de Jersey, communiqué au Gouvernement français par le marquis de Salisbury, le 27 octobre 1877 (annexes au mémoire, p. 256), on trouve ceci : « Tout en admettant que le texte de la convention, *dans une interprétation littérale*, pourrait dans une certaine mesure venir à l'appui de la revendication des pêcheurs français tendant à pratiquer la pêche des huîtres dans un rayon de 3 milles des Écréhous, considéré comme se trouvant dans les eaux intermédiaires, on ne saurait toutefois considérer cette revendication comme conciliable avec l'esprit de la convention » (c'est nous qui soulignons). Faut-il rappeler ici les déclarations de la Cour permanente de Justice internationale dans l'affaire relative au *Service postal polonais à Dantzig* (C. P. J. I., série

B, n° 11, p. 39), rappelées par la Cour internationale de Justice dans l'avis consultatif du 3 mars 1950, sur la question de la *compétence de l'Assemblée générale pour l'admission d'un État aux Nations Unies* (*C. I. J. Recueil 1950*, p. 8) : « C'est un principe fondamental, disait la Cour, que les mots doivent être interprétés selon le sens qu'ils auraient normalement dans leur contexte, à moins que l'interprétation ainsi donnée ne conduise à des résultats déraisonnables et absurdes. » L'interprétation française de la convention de 1839 que les magistrats de Jersey qualifiaient de « littérale », est bien tout le contraire de « déraisonnable et absurde ».

Mais à ces articles 1, 2 et 3 a été superposé ce que j'ai appelé la « grande convention », l'article 9 ; c'est cet article qui définit la mer territoriale le long de toute l'étendue des côtes françaises et anglaises et y crée, au profit des nationaux de chacun des deux pays, un droit de pêche exclusif en ce qui concerne n'importe quelle pêche, en dehors même de celle des huîtres.

Le Gouvernement de la République pense qu'il n'est pas difficile de combiner l'article 9 avec les articles 1, 2 et 3. Selon lui, l'article 9 a pour effet de faire coïncider la limite de la pêche générale avec la limite de la pêche aux huîtres. En ce qui concerne la côte française du Cotentin, cette assimilation des deux limites est écrite en toutes lettres dans l'alinéa 2 de l'article 9 : « Bien entendu que sur cette partie des côtes de France qui se trouve entre le cap Carteret et la pointe du Menga, le droit exclusif de toute espèce de pêche n'appartiendra qu'aux sujets français en dedans des limites mentionnées en l'article 1er de la présente convention. »

En ce qui concerne, d'autre part, la côte de l'île de Jersey, la limite de trois milles posée par l'article 9 pour la pêche générale coïncide avec la limite spéciale des huîtres posée par l'article 2. Les limites des deux zones, française et anglaise, de pêche exclusive étant les mêmes pour la pêche générale et pour la pêche aux huîtres, il en résulte tout naturellement que la zone commune, qui se trouve entre ces deux limites, prévue à l'article 3 pour la seule pêche aux huîtres, sera également commune pour les pêcheurs qui se consacrent à la pêche générale. Au cours de la négociation, les commissaires français avaient précisé que les limites créées devaient s'appliquer « aux huîtres et au poisson frais » (*Travaux préparatoires de 1839*, tome I, p. 34). Cette observation n'avait soulevé aucune objection de la part des commissaires anglais.

Cette interprétation est d'ailleurs confirmée par le fait que la convention de 1839 devait précisément mettre fin à des difficultés créées, depuis la mise en vigueur provisoire de la convention de 1824, par cette distinction entre les limites de pêche, l'une de pêche exclusive de trois milles pour la pêche générale, l'autre de six milles pour la pêche aux huîtres, moules et coquillages. La coïncidence de ces deux limites était une condition essentielle du contrôle efficace et la seule garantie contre de nouveaux incidents.

Telle est l'interprétation que donne — et a toujours donnée — le Gouvernement français de la convention de 1839 en ce qui concerne les droits respectifs des ressortissants des deux pays.

A cette interprétation, le Gouvernement du Royaume-Uni a opposé essentiellement deux objections qui tiennent surtout à la manière dont le Gouvernement français interprète et combine l'article 9 avec les articles 1, 2 et 3. L'une de ces objections, qui est de moindre impor-

tance, concerne la question de la confusion des deux limites de pêches ; l'autre, plus sérieuse, consiste à mettre en doute la possibilité, pour les deux États, d'avoir déclaré « commune aux sujets des deux pays » la pêche (surtout la pêche générale) dans des sections appartenant à la haute mer.

Nous allons faire justice de ces deux objections, avant d'en terminer avec ces questions de la pêche.

En ce qui concerne la confusion des deux limites de pêche, le Gouvernement du Royaume-Uni pense qu'elle ne résulte pas de la convention de 1839 et qu'elle n'a d'ailleurs rien d'indispensable, les techniques de pêche étant différentes pour la pêche générale et la pêche aux huîtres. S'il faut, pour le Gouvernement du Royaume-Uni, absolument interpréter l'article 3 de la convention de 1839 comme s'appliquant à la mer autour des Minquiers et des Écréhous, il ne saurait s'agir en tout cas que de la pêche aux huîtres.

Ces arguments sont longuement développés notamment dans la réplique (par. 62, 68, 69, et annexe A 147 également).

Pour le Gouvernement français, au contraire, la convention de 1839 a bien eu pour but, entre autres, la confusion des deux limites de pêche. Il est reconnu aujourd'hui que l'exploitation exclusive, en haute mer, des pêcheries dites sédentaires par l'État adjacent est incompatible avec la liberté de la haute mer et donc avec la pêche générale libre. Je cite l'ouvrage de M. Gidel (tome I, p. 500) : « C'est poursuivre la quadrature du cercle que de prétendre concilier la légitimité des pêcheries sédentaires en dehors de la limite des eaux territoriales avec la notion de la liberté de la haute mer », et ce point de vue est développé par le Secrétaire général des Nations Unies dans le mémorandum présenté par lui à la deuxième session de la commission de droit international (A/C.N. 4/32, pp. 82-83). Il est donc conforme aux exigences du droit international général d'interpréter la convention de 1839 comme confondant la limite de la pêche générale avec la limite de la pêche aux huîtres.

Quant à la deuxième objection qui consiste à dire que les deux États n'ont pas pu, par la convention, mettre en commun et réserver à leurs seuls ressortissants la pêche générale comme la pêche des huîtres, dans des espaces qui sont la haute mer, c'est l'objection de M. Canning en 1824, et elle n'est pas meilleure aujourd'hui. Tout d'abord, certaines parties de la zone commune de l'article 3 ne sont pas des sections de haute mer mais constituent les eaux territoriales de l'État qui a la souveraineté sur les Minquiers et les Écréhous ; nous sommes entièrement d'accord sur ce point avec le Gouvernement britannique : des droits de pêche communs ont parfaitement pu être établis dans les eaux faisant partie du territoire d'un seul État — en l'occurrence la France. Il est d'ailleurs assez piquant (j'ajoute ceci entre parenthèses) de voir nos adversaires démontrer que la pêche commune est possible dans les eaux territoriales relevant de la souveraineté d'un seul État, alors qu'ils refusent précisément à nos pêcheurs d'aller dans les eaux territoriales des Minquiers et des Écréhous sous prétexte que l'article 3 qui prévoit formellement cette pêche commune ne s'y applique pas ! Cela nous rappelle également l'arbre de Spinoza....

D'autre part, l'article 3 de la convention déclare bien, en toutes lettres : « sera commune aux sujets des deux pays la pêche des huîtres entre les limites ci-dessus désignées », et le Gouvernement du Royaume-Uni est mal venu à déclarer illicite une stipulation qu'il a acceptée et

ratifiée. La pêche des huîtres fait d'ailleurs partie de cette catégorie très spéciale de pêches « les pêcheries sédentaires », qui comprend également la pêche des éponges, des perles et d'autres animaux fixés au sol. De tout temps, ces pêcheries ont été soumises à des réglementations très particulières, alors même qu'elles se trouveraient en haute mer, l'État adjacent entendant généralement se réserver une sorte de droit de propriété sur les bancs cultivés par ses ressortissants et situés même au delà de sa mer territoriale. Au lendemain de la convention de 1839, un *Order in Council* fut émis, le 23 août 1843, pour suspendre la convention de 1839 en ce qui concerne les pêches irlandaises d'huîtres, ces dernières s'étendant bien au delà de la mer territoriale et étant revendiquées par l'État adjacent. De même, le *Sea Fisheries Act* de 1868 étendit la juridiction de l'État pour la pêche aux huîtres jusqu'à vingt milles de la côte. Cet empiétement sur la haute mer se retrouve en ce qui concerne la pêche des éponges au large de la Tunisie et pour la pêche des perles au large de Ceylan et de l'Australie (dans ce dernier cas, les prétentions britanniques sont allées jusqu'à cent milles, d'après les indications de M. Jessup dans son ouvrage : *The law of territorial waters and maritime jurisdiction*, 1927, p. 17, note 47). L'ensemble de la question a été étudié dans le second rapport sur la haute mer présenté par M. François devant la Commission de droit international en 1951 (A/C.N. 4/42, pp. 51 et s.), ainsi que dans Mouton, *The Continental Shelf*, La Haye, 1952, pages 138 et suivantes.

M. Fitzmaurice, dans ce qu'il a appelé une note marginale, a accepté lui-même l'idée que l'article 3 avait eu pour effet d'éliminer toutes les difficultés relatives à la pêche aux huîtres qui résultaient des prétentions anciennes de la France réclamant, en 1824, la propriété privative des bancs d'huîtres semés et cultivés par ses pêcheurs dans la zone que devait définir l'article 3. N'est-ce pas dire que l'article 3 avait un double effet dans les rapports entre les Parties ? Les deux États ont bien convenu de ne pas s'opposer mutuellement des revendications fondées sur des droits de propriété privative. Mais en second lieu, à l'égard des tiers, les Parties continuaient à pouvoir exciper de leurs droits privatifs de propriété. C'est nécessairement ainsi que doit s'entendre la note marginale de M. Fitzmaurice. Dès lors, l'article 3 de la convention de 1839 contient bien l'idée d'un espace maritime commun aux deux pays, et la même observation vaut pour la pêche générale.

Il est reconnu depuis longtemps d'ailleurs que la règle des trois milles est tout à fait inappropriée en matière de pêcheries. Westlake la qualifiait déjà de « désuète et inappropriée ». Fulton a intitulé un chapitre de son ouvrage « Le caractère inadéquat de la limite de trois milles pour la réglementation des pêcheries » (pp. 693 et ss.). De nombreux États ont réclamé un droit exclusif pour la pêche au delà de la mer territoriale, ou bien ils ont étendu les limites de cette dernière en matière de pêcheries, et j'ai déjà cité la loi anglaise sur la pêche des harengs de 1808.

On peut donc aller aussi loin et dire que le Royaume-Uni et la France ont très bien pu en 1839 se réserver le droit de pêche dans cette baie de Granville dont eux seuls sont riverains. C'est pratiquement une mer franco-britannique, et ne pourrait-on pas dire de cette baie de Granville ce que la Cour de Justice centre-américaine a dit du golfe de Fonseca, à savoir que cette baie est « une baie historique possédant les caractéristiques d'une mer fermée », dont les riverains ont pu

légitimement exclure, comme dans le cas du golfe de Fonseca, les autres États. (*American Journal of International Law*, 1917, pp. 181 à 229.) Un exemple récent est encore plus frappant : le 26 février 1942, le Royaume-Uni a conclu un accord avec le Venezuela, par lequel les deux États se réservent l'exploitation d'une section de la haute mer et en excluent les autres États (Vallat, *British Yearbook*, 1946, p. 334). Parlant de cet accord entre le Royaume-Uni et le Venezuela qui a abouti à une pure et simple annexion de la haute mer par les deux États, le Secrétaire général des Nations Unies a déclaré, dans un mémorandum sur le régime de la haute mer présenté à la deuxième session de la Commission de droit international : « Les eaux dont il s'agit, resserrées entre le continent et une île, présentent des caractères assez spéciaux pour que les États riverains puissent revendiquer pour elles un régime dérogatoire à celui des espaces normaux de la haute mer » (A/CN/4/32, p. 65). Ces termes ne peuvent-ils être transposés tels quels au cas qui nous occupe ?

* * *

Nous en avons ainsi terminé avec l'interprétation de la convention de 1839 en ce qui concerne la pêche. Comme on le voit, l'interprétation française, avec ses trois zones, dont l'une est commune aux pêcheurs des deux pays, paraît conforme à la fois au texte même de la convention, à ce que nous enseigne son histoire et, enfin, à la pratique bien établie des États en cette matière. Il s'agit maintenant de tirer de cette convention les enseignements qu'elle comporte pour le présent litige, non pas pour les questions de pêche, mais pour le statut territorial des Minquiers et des Écréhous, car nous savons que les Parties ont lié étroitement en 1839 les questions de pêche et les questions territoriales. La convention de 1824, qui est, je l'ai dit, l'ancêtre de la convention de 1839 et l'ancêtre immédiat, avait dit en toutes lettres dans son article premier : « les Hautes Parties contractantes reconnaissent mutuellement comme inhérent à la souveraineté territoriale de chaque État le droit exclusif de pêche.... ». Et les commissaires anglais de Granville ont eux aussi (nous avons cité les passages) établi un lien étroit entre le droit de pêche et l'exercice du pouvoir de police. La convention de 1867 a d'ailleurs été invoquée par le Royaume-Uni lui-même comme conférant, par voie d'interprétation de la convention de 1839, un caractère territorial à cette dernière. Quelle est donc dans ces conditions la portée de la convention de 1839 en ce qui concerne le statut territorial des îlots litigieux ?

2. Il faut partir d'une constatation fondamentale : pas plus dans la négociation de 1824 que dans celle de 1837-1839, il n'a été question des Minquiers et des Écréhous, et il n'en est pas davantage question dans la convention du 2 août elle-même.

Il est toujours difficile d'interpréter le silence absolu des Parties sans se livrer à des conjectures arbitraires. Ici, cependant, ce silence a au moins *une* signification certaine : il signifie qu'aucune des deux Parties n'a songé que les Minquiers et les Écréhous engendraient une limite d'eau territoriale à pêche exclusive. Aucune des deux Parties n'aurait en effet accepté que l'on parlât de « pêche commune » entre la ligne *ad hoc* A à K et la ligne de 3 milles de Jersey, si elle avait voulu se réserver deux zones de pêche exclusive : l'une autour des Minquiers,

l'autre autour des Écréhous, en plein milieu de cette zone commune. Ce premier point est donc clair : les Parties n'ont pas entendu créer une zone de mer territoriale à pêche exclusive autour des Minquiers et des Écréhous.

Mais pourquoi ? Une première hypothèse est à rejeter d'emblée, comme trop invraisemblable, c'est celle de l'oubli pur et simple des îlots. Il est inconcevable que les négociateurs qui ont étudié la question, cartes sous les yeux, pendant des années, aient simplement oublié les Minquiers et les Écréhous. C'est une explication qui serait trop fantaisiste.

La véritable explication, que mes collègues britanniques nous ont demandée, non sans insistance, est la suivante. Le but essentiel des Parties était de réglementer la pêche. C'est en fonction de la pêche qu'on traitait la mer territoriale. Or, on était d'accord, nous l'avons vu, pour permettre la pêche en commun sur le plateau des Minquiers et le groupe des Écréhous. En fait, il n'y avait là que le maintien d'une pratique très ancienne. Depuis bien longtemps, les pêcheurs des deux pays venaient sur ces deux plateaux et pêchaient ensemble. Les graves incidents du début du siècle n'ont pas eu lieu aux Minquiers ou aux Écréhous, mais sur la côte du Cotentin. C'est ainsi que, plus d'un demi siècle avant la conclusion de la convention, en 1784, lors de la concession Quinette, le subdélégué de Granville écrivait à l'intendant de Caen, en parlant des Minquiers : « les Français et les Jersiais s'y rencontrent sans s'y troubler ». Cette pratique devait continuer après la signature de la convention. Dans ces conditions, on comprend très bien que les négociateurs n'aient pas éprouvé le besoin de parler des Minquiers et des Écréhous, puisqu'ils étaient en train de conclure une convention sur la pêche en commun autour de ces îles et sur la possibilité pour les pêcheurs de débarquer sur les îlots pour y trouver un abri ou y construire quelques abris et y apporter même des aménagements propres à faciliter leur pêche. Il fallait bien que ces pêcheurs puissent débarquer et s'installer, au moins provisoirement, sur les îlots. Cela aurait pu avoir quelque inconvénient s'il s'était agi d'un territoire habité, car la présence de pêcheurs étrangers pouvait troubler la population sédentaire ; mais cela ne pouvait soulever aucune objection pour des îles qui, en dehors de la pêche, ne pouvaient servir à rien. Pourquoi le maître des îles aurait-il fait des objections ? Pourquoi aurait-il empêché cette utilisation de pêche ? Quel intérêt y aurait-il trouvé, puisqu'il était convenu que la pêche serait commune dans les eaux des Minquiers et des Écréhous ? Et cet accord figure dans l'article 3 de la convention. Ni le Royaume-Uni ni la France n'avaient plus intérêt à faire mention de la souveraineté proprement dite sur les îlots. Les Minquiers, en tout cas, et les Écréhous, très probablement, n'étaient pas habités de façon permanente, et sans grand intérêt d'ailleurs, si j'en crois l'appréciation de l'ambassadeur à Paris, dans sa lettre adressée au prince de la Tour d'Auvergne sur les Minquiers en 1869 (je cite) : « îlots inhospitaliers et presque inhabitables où de pauvres pêcheurs ont construit des huttes pour s'abriter lorsqu'ils ne peuvent pas retourner chez eux ». (Mémoire, annexe A 51, p. 263.) C'est notre explication sur la nature et le caractère des abris qui se trouvent dans les îlots. La seule conséquence d'une mention de la souveraineté eût été la création d'une zone de pêche exclusive à 3 milles autour de ces îles. Mais une fois qu'on avait décidé d'écarter cette conséquence, il n'y avait plus de

raison de parler de la souveraineté proprement dite. Seule comptait, en 1839, comme intérêt public, la pêche. Celle-ci mise en commun, tous les autres aspects de la souveraineté territoriale qui, alors, étaient purement théoriques, passaient à l'arrière-plan. Il est évidemment impossible aujourd'hui de savoir si chacune des Parties considérait alors comme acquise sa propre souveraineté et pensait que l'autre Partie ne la lui contesterait pas, ou, au contraire, si chaque Partie savait contestée sa souveraineté par l'autre et préférait ne pas soulever un problème qu'il était inutile de trancher à ce moment-là. Signalons seulement, encore une fois, qu'en 1822 les États de Jersey, s'adressant au roi d'Angleterre, ne prétendent pas à un autre droit que celui de pêcher. Les deux hypothèses sont défendables, et aucune ne peut être soutenue sans risque d'erreur. Le choix est d'ailleurs inutile, car, dans l'une comme dans l'autre, une chose reste certaine : *les Parties ont entendu mettre l'usage des îles et de leurs eaux en commun, sans toucher — pour une raison ou une autre, peu importe — à la question de souveraineté.* En termes plus conformes au vocabulaire juridique moderne, on pourrait dire que la compétence étatique de réglementation de la pêche, la seule compétence intéressant les deux Parties en 1839, s'est effacée pour faire place à des droits communs sur ces espaces en faveur des ressortissants des deux États. Cette interprétation, qui, on le verra, a toujours été celle du Gouvernement français, tient compte à la fois du fait que la convention de 1839 est principalement une convention de pêche, et du caractère arbitraire qu'aurait forcément la supposition d'une intention des Parties dont rien ne permettrait de vérifier l'exactitude. Elle répond ainsi à la préoccupation du juge international.

Dans l'avis consultatif sur la compétence de l'Organisation internationale du Travail, la Cour permanente de Justice internationale a dit : « En déterminant l'étendue et la nature d'une disposition, la Cour doit envisager ses effets pratiques plutôt que le motif prédominant par lequel on la suppose avoir été inspirée. » (Série B, n° 13, p. 19.) Notre interprétation se fonde sur un élément certain : la pêche en commun aux Écréhous et aux Minquiers, et refuse de déduire du silence des Parties — qu'il est difficile d'expliquer aujourd'hui avec une certitude absolue — un changement dans la souveraineté territoriale de ces îles.

La convention de 1839 entraîne ainsi une double conséquence : premièrement, l'État qui possédait la souveraineté avant 1839 la conserve, il peut la revendiquer à l'égard des États tiers. Ce qu'il ne peut pas, au contraire, c'est invoquer sa souveraineté pour exclure des îlots les pêcheurs de l'autre Partie, car il violerait en cela l'article 3 de la convention de 1839, qui a institué une communauté de pêche autour des Minquiers et des Écréhous et *sur* les Minquiers et les Écréhous. La souveraineté existant avant 1839 demeure, mais elle est limitée par la mise en commun des îlots et de leurs eaux à des fins de pêche.

Deuxième conséquence : l'État dont les ressortissants utilisent les îles pour pêcher en conformité avec l'article 3 ne peut faire état de cette utilisation en tant que manifestation de sa propre souveraineté à l'encontre du véritable souverain. Il en est de même pour les travaux destinés directement à la pêche : construction de jetées ou abris pour pêcheurs. Il ne peut surtout pas abuser de cette utilisation commune pour accomplir de véritables actes de souveraineté — construction d'édifices publics non destinés à la pêche, déploiement du drapeau national, etc.

Ces actes seraient *ipso facto* illicites au regard du droit international, parce que contraires à la convention du 2 août 1839, qui n'autorise pas à procéder à des changements de souveraineté, fût-ce sous le prétexte de pêche commune.

La Cour aura remarqué que notre interprétation de la convention de 1839 rend sans objet la plupart des objections qui ont été soulevées par le Gouvernement du Royaume-Uni. Le dilemme dans lequel il cherche à enfermer la France en disant que la mise en commun des Minquiers et des Écréhous signifie forcément, ou bien que les îles deviennent l'objet d'un *condominium*, ou bien qu'elles deviennent une *res nullius*, est évidemment un faux dilemme. La mise en commun qu'implique l'article 3 de la convention est une mise en commun de l'usage des îles à des fins de pêche ; ce n'est pas une mise en commun de la souveraineté territoriale, car, comme le dit très justement le conseil du Gouvernement du Royaume-Uni, il serait déraisonnable de penser qu'un tel changement dans la souveraineté sur un territoire ait pu être effectué par voie implicite.

On ne peut nous reprocher de lire dans l'article 3 ce qui n'y est pas écrit. Nous disons au contraire que, la convention ayant été muette — peu importe la raison — sur la souveraineté des Minquiers et des Écréhous, cette souveraineté demeure après 1839 ce qu'elle était avant 1839. Ce n'est pas parce qu'elle altère la souveraineté existante que la convention de 1839 constitue la date critique : c'est uniquement parce qu'elle permet l'usage commun *en dépit* de la souveraineté unique, laquelle demeure inchangée.

M. Fitzmaurice nous a demandé quelle était la loi applicable aux îles entre 1839 et 1950. Nous répondrons à cela que c'est précisément la question posée à la Cour. Nous prétendons que c'est la loi française, le Royaume-Uni dit que c'est la loi britannique. C'est la Cour qui va trancher ce différend.

De même est un faux problème celui que soulève le Royaume-Uni en disant que la France a adopté dans le passé une attitude paradoxale en invoquant le caractère commun des îles litigieuses en même temps qu'il revendiquait sa propre souveraineté sur ce territoire. Et le Gouvernement du Royaume-Uni d'ajouter que « si la convention de 1839 faisait obstacle à une prétention du Royaume-Uni à la souveraineté, comment pouvait-elle ne pas faire également obstacle à une prétention française ? » En réalité, il n'y a rien d'incompatible entre l'affirmation que ces îles sont françaises et le fait que la France, pour se conformer à la convention de 1839, accepte de ne pas se prévaloir de sa souveraineté pour exclure des îles les ressortissants du Royaume-Uni. Le Gouvernement du Royaume-Uni, au contraire, prétendait non seulement avoir été de tous temps le souverain sur les îles, mais encore avoir le droit, en dépit de la convention de 1839, d'exclure les pêcheurs français des îlots. Le Gouvernement du Royaume-Uni, dans son interprétation, viole la convention de 1839 en invoquant sa propre souveraineté ; le Gouvernement français, dans son interprétation, respecte toujours le principe de l'usage commun des îles. On ne voit vraiment pas ce qu'il y a d'illogique à mettre en commun l'usage d'une chose en continuant d'affirmer qu'on en reste le seul propriétaire.

Et nous en arrivons ainsi au problème essentiel : celui de la détermination de la date critique par la convention de 1839.

* * *

Conséquences de l'interprétation proposée par le Gouvernement français sur la détermination de la date critique. — L'article 3 de la convention de 1839, tel que le Gouvernement français l'a toujours interprété, entraîne une double conséquence. D'une part, les faits de possession accomplis par chaque Partie postérieurement à 1839 s'expliquent tout naturellement par la mise en commun des îlots et ne peuvent être invoqués à titre de manifestation de la souveraineté territoriale : ils sont inopposables par une Partie à l'autre Partie en tant qu'actes devant servir de fondement à une revendication de souveraineté. Si j'accepte de partager l'usage de mon champ avec mon voisin, ce dernier pourra-t-il invoquer cet usage comme preuve qu'il serait, lui, le véritable propriétaire ?

D'autre part, la Cour, chargée par les Parties de déterminer à qui appartient aujourd'hui la souveraineté sur les Minquiers et les Écréhous, ne peut pas s'appuyer sur les actes postérieurs à 1839, puisque le problème décisif est justement de savoir à qui appartenait cette souveraineté au moment où la convention a été signée, puisqu'elle n'a rien changé dans le régime de souveraineté. Il y a là une situation analogue à celle qui se présentait dans l'affaire de l'*île de Palmas*, où, pour trancher la question de souveraineté sur l'île en 1925, l'arbitre a dû se demander à qui appartenait cette souveraineté en 1898, date du traité de Paris, l'Espagne ne pouvant pas avoir transféré plus de droits qu'elle n'en avait. C'est la convention de 1839 elle-même qui permettait aux ressortissants des deux pays de pêcher en commun et sur un pied d'égalité aux Minquiers et aux Écréhous et dès lors de s'y installer comme s'ils étaient chez eux. La plupart des actes de souveraineté invoqués par le Royaume-Uni comme preuve de sa souveraineté, construction de maisons, fréquentation assidue des pêcheurs de Jersey, aménagements divers, n'ont constitué que la pure et simple exécution de la convention de 1839 et ne prouvent rien en ce qui concerne la souveraineté territoriale sur les Minquiers et les Écréhous. Si 1839 constitue la date critique, ce n'est donc pas — et je m'excuse d'insister sur ce point essentiel — parce que le différend se serait cristallisé à cette date au sens où l'entendent mes collègues britanniques, ni parce que la convention aurait « disqualifié » les Parties de revendiquer la souveraineté territoriale, mais parce que la convention a institué un régime tel que les actes qui lui sont postérieurs ne peuvent être invoqués par une Partie à l'encontre de l'autre en tant que manifestations de la souveraineté territoriale. C'est à la Partie qui avait la souveraineté en 1839 que la Cour doit attribuer la souveraineté aujourd'hui.

Ce n'est point que les faits postérieurs à 1839 doivent être laissés entièrement de côté ; et M. Fitzmaurice a pleinement raison lorsqu'il parle de l'utilité d'examiner les faits postérieurs à la date critique. Selon la sentence de M. Huber dans l'affaire de l'*île de Palmas*, « les faits postérieurs à la date critique, s'ils ne peuvent pas par eux-mêmes servir à éclairer la situation juridique de l'île au moment décisif .... présentent cependant indirectement un certain intérêt, grâce à la lumière qu'ils peuvent projeter sur la période immédiatement antérieure » (N. U., *Rec. des Sentences arbitrales*, vol. II, p. 866).

Or, les événements postérieurs à 1839 sont précisément très instructifs.

Le Gouvernement du Royaume-Uni indique (réplique, par. 89) qu'il a accompli de nombreux actes de possession sur les îles entre 1839 et 1870, sans que le Gouvernement français ait jamais protesté. Il est exact que les premières protestations françaises datent de 1876 pour les Écréhous et 1888 pour les Minquiers. Mais tout cela est parfaitement normal et plaide même contre les prétentions du Royaume-Uni. Il est normal que le Gouvernement français n'ait pas protesté contre l'usage des Minquiers et des Écréhous par les Britanniques, alors que cet usage découlait directement de la convention signée par les deux Parties en 1839. Il est normal aussi, contrairement à ce que pense le Gouvernement du Royaume-Uni (mémoire, par. 228), que le Gouvernement français, en 1870, ait décidé par contre d'adresser des avertissements aux pêcheurs français fréquentant les Minquiers, à la suite de vols qu'ils auraient commis au détriment de pêcheurs anglais (annexe A 52 du mémoire britannique) : ces vols étaient directement contraires à l'usage commun des îles, prévu par l'article 3 de la convention de 1839. Il est normal enfin que la France n'ait protesté que lorsque les actes du Royaume-Uni impliquaient plus qu'un usage commun et qu'ils signifiaient une prétention de souveraineté. C'est ainsi que le Gouvernement français a protesté en 1876 contre l'ordonnance du Trésor de 1875 qui englobait les Écréhous dans les limites du port de Jersey (annexe A 31) ; deux fois en 1883 contre un projet de loi tendant à interdire aux pêcheurs français l'accès des Écréhous (annexes A 38 et A 39) ; en 1888 contre la visite officielle du comité des Havres et Chaussées des États de Jersey aux Minquiers (A 131) ; en 1902, 1903 et 1904 contre le déploiement du pavillon britannique aux Minquiers (annexes A 55, A 65 et A 67) ; en 1937 et 1938 contre l'édification aux Minquiers d'une maison douanière munie d'un panonceau aux armes de Jersey (annexes A 76 et A 77).

Cette énumération montre bien que les protestations françaises ont eu lieu chaque fois que les actes accomplis par le Gouvernement du Royaume-Uni ou ses ressortissants ne pouvaient plus s'expliquer par l'application de la convention de 1839, mais impliquaient au contraire une revendication de souveraineté se traduisant par une véritable annexion et, par conséquent, par une violation de la convention de 1839.

Le Gouvernement du Royaume-Uni reproche, il est vrai, à la France d'avoir elle-même revendiqué à maintes reprises la souveraineté sur les Minquiers et les Écréhous. Mais on remarquera que le Gouvernement français ne l'a fait que le plus tard possible, et pour se défendre contre des empiétements de plus en plus audacieux du côté anglais. En 1884, le Gouvernement français était allé jusqu'à interdire à ses pêcheurs d'aller aux Écréhous, en vue de prévenir tout incident avec les Anglais (annexe A 116). Cela ne montre-t-il pas l'esprit de conciliation de la France dans ce différend ?

Nous avons dès le début rappelé d'un mot que les vœux de la France d'arriver à une entente avec l'Angleterre mirent, au XIXme siècle, un certain temps à se réaliser et que dans les perspectives de cette politique générale, le souci de ne pas laisser la question des Minquiers et des Écréhous envenimer les rapports entre les deux pays et se transformer

en un objet de conflit sérieux ne devrait pas aujourd'hui être invoqué à notre encontre dans cette querelle des protestations. C'est en conservant en mémoire cet aspect historique des relations franco-britanniques que bien des détails prennent leur sens.

En ce qui concerne les Écréhous, la première revendication française date de la note du 15 décembre 1886 (annexe A 41). Cette revendication était absente de la correspondance antérieure relative aux Écréhous ; on ne la trouve ni dans la protestation française de 1876 contre l'incorporation des Écréhous dans la limite du port de Jersey (annexe A 31) ni dans la note de 1883 protestant contre un projet de loi tendant à interdire l'accès des Écréhous aux pêcheurs français (annexe A 38). Cette dernière note refusait même de déplacer la question : « qu'il importe de maintenir sur le terrain de la convention de 1839 ». La même observation vaut pour les Minquiers : ce n'est que le 27 août 1888 que le Gouvernement français s'est prévalu pour la première fois de sa souveraineté, cela après la visite officielle du comité des Havres et Chaussées de Jersey (annexe A 53). Il s'était abstenu d'une telle revendication dans sa note de 1870 relative au prétendu vol d'objets appartenant à des pêcheurs anglais sur les Minquiers (annexe A 52). De ce retard le Gouvernement du Royaume-Uni déduit évidemment que la prétention française était mal fondée et arbitraire. Il reproche ainsi à la France à la fois d'avoir revendiqué sa souveraineté, contrairement à sa propre interprétation de la convention de 1839, et de l'avoir fait trop tard pour lui conserver quelque valeur.

Pourtant, l'attitude française est logique et cohérente. La France a laissé les pêcheurs britanniques fréquenter tranquillement les Minquiers et les Écréhous après 1839. Elle a protesté lorsque le Royaume-Uni a accompli des actes impliquant la souveraineté britannique ; elle ne s'est prévalue de sa propre souveraineté que le plus tard possible, au moment où les empiétements britanniques devenaient véritablement menaçants pour le droit de la France. Et même alors, nous insistons sur ce point, la France, fidèle à l'engagement qu'elle avait pris en 1839, ne prétendit jamais tirer de sa propre souveraineté les conséquences qu'elle aurait pu comporter, à savoir l'attribution d'un droit de pêche exclusif à ses ressortissants dans les eaux territoriales des deux groupes d'îlots. Même obligée de rappeler que la souveraineté lui appartenait, elle n'en restait pas moins fidèle à la convention de 1839. Non seulement elle n'a jamais, contrairement au Royaume-Uni, soutenu aucune thèse de nature à exclure les ressortissants de l'autre Partie de ces parages, mais elle a insisté, au contraire, à plusieurs reprises, sur la neutralité qu'elle entendait conserver aux îlots et sur le caractère commun de la pêche dans leurs eaux. Le terme même de neutralité se retrouve à plusieurs reprises dans la correspondance diplomatique : par exemple, dans les notes du 26 mai 1883 (annexe A 39) et du 29 novembre 1905 (annexe A 71). Dans la note du 15 décembre 1886 (annexe A 41), dans laquelle il réclame pour la première fois sa souveraineté sur les Écréhous, le Gouvernement de la République propose une neutralisation des îlots au point de vue militaire et indique que « le libre exercice du droit de pêche en faveur des sujets anglais ne pourrait, en tout état de cause, être contesté, en présence de l'interprétation que le Gouvernement français croit devoir donner aux conventions existantes sur la pêche dans ces parages, et particulièrement à la convention de 1839 ».

L'attitude française a donc toujours été parfaitement logique et conforme à l'interprétation que le Gouvernement français a donnée, dès l'origine, pour les raisons que nous avons vues, à la convention de 1839. Fidèle à cette convention, il a continué à insister sur la nécessité d'un arrangement pratique et sur la vanité du problème de la souveraineté. Dans un aide-mémoire du 15 juillet 1903, l'ambassadeur de France à Londres indique que le Gouvernement français « désirerait seulement arriver à un arrangement pratique qui permît, sans trancher en faveur de l'un ou de l'autre des deux pays la question de souveraineté, de régler amicalement une question qui, malgré le peu d'importance qui s'y attache, pourrait devenir une cause de froissement et d'irritation parmi les populations intéressées ». (Annexe A 64, mémoire britannique.) Cette proposition fut reprise le 18 janvier 1904 (annexe A 67). Aussi serait-ce plutôt l'attitude britannique qui reste incompréhensible. Si le Gouvernement du Royaume-Uni n'a vraiment jamais été d'accord avec le Gouvernement français sur le sens de la convention de 1839, pourquoi donc a-t-il attendu trente ans avant de faire connaître son sentiment et d'essayer de réserver à ses propres ressortissants la pêche exclusive aux Minquiers et aux Écréhous ?

Il nous faut maintenant conclure quant à la détermination de la date critique. Si la Cour admet l'interprétation qui a toujours été celle de la France et que le Royaume-Uni n'a commencé à contester que trente ans après la conclusion de l'acte conventionnel, interprétation fondée à la fois sur l'examen littéral du texte et sur les travaux préparatoires, la Cour devra écarter *ipso facto* les faits postérieurs à 1839. C'est avant 1839 qu'elle devra se placer pour trancher le présent différend. En effet, les faits postérieurs à 1839 sont soit conformes, soit contraires à la convention. S'ils lui sont conformes, on ne peut en tirer aucune preuve, étant donné que les Parties ont précisément voulu une possession commune en dépit de la souveraineté préexistante. Tout simplement la souveraineté ne devait pas être affirmée au préjudice de la communauté d'usage créée par l'article 3 de la convention. Les faits qui sont, au contraire, en contradiction avec la convention de 1839 peuvent encore moins servir de preuve ; ce n'est pas parce que le Royaume-Uni aurait, disons, unilatéralement annexé en fait les Écréhous et les Minquiers à Jersey, en abusant des droits que lui conférait la convention de 1839, qu'il pourrait aujourd'hui se prévaloir de cet acte internationalement illicite pour affirmer son propre droit ; ces faits sont donc inopposables à la France, et cela sans même parler des protestations qu'ils ont constamment soulevées de la part de cette dernière. Le 2 août 1839 constitue donc bien la date critique.

1839 constituerait encore la date critique si la Cour considérait l'interprétation française comme inexacte. Et c'est ce que je me proposerai de démontrer maintenant très brièvement.

[Séance publique du 30 septembre 1953, après-midi]

Monsieur le Président, Messieurs de la Cour, à supposer même que l'interprétation française de la convention de 1839 soit inexacte, les actes de possession postérieurs à cette date n'en resteraient pas moins inopposables par une Partie à l'autre, en tant que manifestations de la souveraineté territoriale.

La France a, d'une manière constante, défendu l'interprétation que j'ai eu l'honneur d'exposer ce matin. Non seulement elle l'a défendue, mais elle s'y est conformée dans les faits. Quant au Royaume-Uni, il a donné à croire pendant une trentaine d'années qu'il était d'accord avec la France sur cette interprétation, et puis brusquement a éclaté ce que la réplique britannique appelle, d'un terme expressif, un « malentendu » (par. 91). Ceci est si vrai que, lors de la négociation de la convention de 1867, les commissaires anglais n'ont même pas pris la peine de faire inclure les Minquiers et les Écréhous dans l'énumération des « îles britanniques » qu'ils ont fait insérer dans le projet. S'ils avaient pensé, à ce moment-là, que l'interprétation française de la convention était erronée, ils auraient certainement profité de l'occasion pour faire lever l'équivoque et préciser les droits du Royaume-Uni sur ces îlots et sur leurs eaux ; s'ils ne l'ont pas fait, c'est que la pratique constante suivie jusque-là, c'est-à-dire jusqu'en 1867 — la pratique de la pêche commune — ne leur semblait en rien contraire à la convention de 1839.

Mais voici qu'un jour le Gouvernement du Royaume-Uni, non seulement conteste le bien-fondé de l'interprétation jusqu'alors admise par les deux Parties, mais continue d'user des droits que lui confère la convention de 1839 sur les Minquiers et les Écréhous dans l'interprétation du Gouvernement français, ce dernier protestant uniquement lorsqu'il y a abus, pour invoquer ensuite l'exercice de ces mêmes droits comme preuve que c'est le Royaume-Uni qui détient la souveraineté sur les deux groupes d'îlots. Le Gouvernement du Royaume-Uni savait quelle était l'interprétation que le Gouvernement français donnait à la convention de 1839 ; il reconnaît même ne pas l'avoir réfutée directement (réplique, par. 91) ; il savait que le Gouvernement français, en dépit du caractère aigu que prenait peu à peu le différend à partir de 1885 environ, continuait et continuerait à appliquer la convention selon sa propre interprétation, c'est-à-dire à faire bénéficier les ressortissants britanniques de ce que le Gouvernement français pensait, lui, être la correcte interprétation de la convention de 1839. Mais alors, n'est-il pas évident que, quel que soit le sens vrai de la convention de 1839, quel que soit le caractère peut-être erroné de l'interprétation que le Gouvernement français lui a donné, les actes accomplis par le Gouvernement du Royaume-Uni après 1839 ne peuvent pas être opposés à la France en tant que manifestation de la souveraineté, sans même qu'il soit besoin de rappeler qu'il y a eu des protestations de la part du Gouvernement français dès que les actes du Royaume-Uni lui semblaient être au delà de la portée exacte de la convention de 1839 ? Sur ce point, nous ne pouvons mieux faire que reprendre les termes du rapport des experts français, dont M. Louis Renault, communiqué en décembre 1886 au Gouvernement du Royaume-Uni (annexes A 41 et A 42 au mémoire britannique, pp. 231 et ss.) :

> « L'interprétation qui a prévalu pendant une longue période d'années ne peut être modifiée au gré de l'une des deux nations par un simple acte d'autorité de sa part. Dans l'exécution d'un pacte transactionnel, l'un des contractants ne peut s'ériger en juge des termes du pacte, et le seul fait par lui d'avoir accepté sans protestation l'exécution du contrat par l'autre partie dans un sens, le rend non recevable à imposer à son « co-contractant » une interprétation contraire. »

Nous pensons avoir établi que 1839 constitue en tout cas la date critique dans le présent litige.

Quelle que soit l'interprétation que la Cour estimera devoir donner à cette convention, ce texte a imprégné en quelque sorte tous les événements et toutes les discussions de ce dernier siècle en ce qui concerne le statut des Minquiers et des Écréhous. Dans la correspondance diplomatique des quatre-vingts dernières années, la convention a été mise par les Parties au centre même du débat séculaire que la Cour va trancher. Selon le Gouvernement français — il a constamment maintenu cette attitude depuis 1839 —, la convention a institué par elle-même un règlement tel que les faits qui lui sont postérieurs ne peuvent plus servir, selon l'expression de M. Huber, « à éclaircir la situation juridique de l'île ». Pour cette double raison, centralisation de la discussion autour de la convention de 1839, signification de la convention elle-même, le Gouvernement de la République demande à la Cour de considérer la date de 1839 comme la « date critique » après laquelle les droits de chacune des Parties n'ont plus pu être affectés par les actes de l'autre.

J'ai terminé ainsi avec le premier point de cette deuxième partie de mes observations consacrée aux actes et faits du XIXme et du XXme siècles.

* * *

Il me reste à traiter le deuxième et dernier point. En faisant totale abstraction de la convention de 1839, en considérant qu'elle n'existe pas, les faits de possession invoqués par le Royaume-Uni ne sont pas conformes aux règles générales du droit international sur l'acquisition de la souveraineté territoriale.

Pour l'étude de cette question, je ferai porter mes observations sur trois propositions :

1° Les faits de possession du Royaume-Uni ne peuvent lui faire acquérir la souveraineté par prescription acquisitive.

2° Ces faits ne peuvent faire acquérir la souveraineté au Royaume-Uni par l'occupation.

3° Étude de certains faits de possession de la France.

1. — *Les faits de possession invoqués par le Royaume-Uni ne peuvent* lui faire acquérir la souveraineté sur les Minquiers et les Écréhous par voie de prescription acquisitive.

Les faits de possession postérieurs à 1839, invoqués par le Gouvernement du Royaume-Uni, ne peuvent en eux-mêmes servir en aucune manière de fondement à une revendication de souveraineté territoriale. Pour en faire la démonstration, nous supposons donc que la convention de 1839 n'est pas mise en cause et que seuls comptent le titre originel et la possession ultérieure.

Le Gouvernement du Royaume-Uni soutient que sa souveraineté sur les Minquiers et les Écréhous est fondée soit sur un titre originel confirmé par une possession effective, soit sur une possession effective seule, une telle possession se traduisant par des actes qui manifestent un exercice continu et paisible de la souveraineté sur ces territoires.

Nous pensons avoir démontré, dans la première partie de ces observations, que le Royaume-Uni ne possède pas de titre originel sur les Minquiers et les Écréhous et qu'il n'a pas fait la preuve d'une possession durable, compte tenu même du caractère désolé des îlots en question, au cours de la période allant jusqu'au début du XIXme siècle.

Nous pensons avoir également établi que la France possède un titre originel sur ces îles, confirmé par des actes de possession au cours de la période ancienne.

Cela étant, il est certain que le Royaume-Uni aurait cependant pu acquérir la souveraineté sur ces territoires par une prescription fondée sur une possession continue, paisible et ininterrompue pendant le XIXme et le XXme siècles. Le droit international reconnaît en effet la possibilité d'acquérir la souveraineté territoriale sur un espace relevant antérieurement d'une autre souveraineté par une possession réunissant un certain nombre de conditions : cette prescription acquisitive peut alors être opposée au souverain antérieur qui a négligé, pendant une période suffisamment longue, d'exercer son propre droit. Comme l'a déclaré la Cour permanente d'arbitrage, en 1909, dans l'affaire de *Grisbadarna*, relative à la délimitation des frontières maritimes entre la Norvège et la Suède : « c'est un principe bien établi dans le droit des gens qu'il faut s'abstenir autant que possible de modifier l'état de choses existant de fait et depuis longtemps » (Scott, *Hague Court Reports*, p. 122).

Mais pour que la possession d'un territoire permette ainsi d'acquérir la souveraineté contre une souveraineté antérieurement établie, il faut que cette possession remplisse certaines conditions fixées par le droit international. Or, ces conditions ne sont pas réunies en l'espèce. C'est ce que nous verrons maintenant.

Selon le Gouvernement de la République, la prescription acquisitive serait le seul mode par lequel le Royaume-Uni aurait pu, depuis le XIXme siècle, acquérir la souveraineté sur les Minquiers et les Écréhous. Ces îles relevaient antérieurement de la souveraineté française, et seule la prescription a pu les faire passer depuis sous la souveraineté britannique.

La première question qui se pose est celle du temps nécessaire pour l'acquisition de la souveraineté par voie de prescription. Grotius exigeait une possession immémoriale (« possessio memoria excedens » — *De jure belli ac pacis*, lib. II, cap. IV, par. 9). Dans l'affaire du Meeraugé opposant l'Autriche et la Hongrie, l'arbitre estimait, en 1902, que « La possession immémoriale est celle qui dure depuis si longtemps qu'il est impossible de fournir la preuve d'une situation différente et qu'aucune personne ne se souvient d'en avoir entendu parler. » (*Revue de Droit international et de Législation comparée*, 2me série, vol. 8, 1906, p. 207.) En réalité, il nous semble qu'aucune période déterminée n'est fixée par le droit international ; c'est une question d'espèce, et, selon les cas, les périodes les plus diverses ont été retenues. (Cf. Hyde, *International Law*, tome I, pp. 388-389.) Le Gouvernement de la République n'entend pas contester qu'un siècle de possession suffirait, s'il était établi, à faire acquérir la souveraineté sur les Minquiers et les Écréhous par le Royaume-Uni par voie de prescription.

Mais les faits invoqués doivent, en second lieu, être de nature à impliquer une prétention à la souveraineté et ne pas constituer une simple utilisation des richesses du territoire. Dans le mémoire soumis à l'arbitre dans l'affaire de l'*île de Clipperton*, le Gouvernement de la République insistait déjà sur ce point : « la question d'utilisation d'un territoire est absolument distincte et indépendante de la question de souveraineté et de possession ». (*Imprimerie nationale*, 1912,

p. 218.) Dans le mémoire en réplique dans la même affaire, le Gouvernement de la République mettait à nouveau en garde contre la confusion de deux concepts très distincts, la souveraineté et la propriété. « Le Gouvernement français — lit-on dans ce mémoire — n'a, quant à lui, jamais compris qu'il fût tenu pour conserver sa souveraineté de concéder ou d'exploiter les gisements .... qui pourraient se trouver à l'intérieur de ce territoire. Ce sont des questions purement internes et qui relèvent des solutions que, dans sa pleine indépendance, l'État souverain juge à propos d'y donner » (mémoire en réplique, *Imprimerie nationale*, 1913, p. 119). Ce point de vue est d'ailleurs confirmé par la jurisprudence internationale : ainsi, la sentence arbitrale rendue en 1865 par la reine d'Espagne dans l'affaire opposant les Pays-Bas et le Venezuela relativement à l'*île d'Avès*, indique que le fait de pêcher sur l'île, invoqué par les Pays-Bas, ne pouvait fonder la souveraineté et ne signifiait qu'« une occupation temporaire et précaire de l'île, étant donné qu'il n'est pas, en l'espèce, la manifestation d'un droit exclusif, mais la conséquence de l'abandon de la pêche par les habitants des contrées voisines ou par son maître légitime » (La Pradelle et Politis, *Rec. des arbitrages internationaux*, t. II, p. 414).

Dans ces conditions, le Gouvernement du Royaume-Uni ne saurait invoquer, à titre de manifestation de souveraineté, le seul fait que des Jersiais venaient jadis pêcher souvent aux Minquiers et aux Écréhous. Quant au fait que des habitants de Jersey ont seuls construit des abris ou des maisons sur les îles litigieuses, non seulement la véritable explication a été donnée par la lecture ce matin de la lettre de l'ambassadeur d'Angleterre (annexe A 51), mais ce fait est sans pertinence aucune dans la présente affaire. Il s'agit là de propriétés privées, par conséquent, comme le disait le mémoire en réplique français dans l'affaire de l'*île de Clipperton*, d'une question entièrement étrangère au problème de souveraineté.

Mais pour être valable, la prescription doit réunir d'autres conditions plus importantes encore. Dans ses commentaires sur le droit international, sir Robert Phillimore (3me édit., vol. I, par. 260) disait déjà : « La prescription doit être caractérisée par la publicité, l'occupation continue, l'absence d'interruption et aidée par l'absence de toute tentative d'exercice de ses droits de propriété par le possesseur antérieur. » C'est dans le célèbre arbitrage dans l'affaire de *Chamizal* que les principes sont posés de la manière la plus claire, et c'est sur cette sentence, rendue le 15 juin 1911 entre les États-Unis et le Mexique, que l'on se fonde presque toujours pour décrire les conditions de la prescription. (Texte dans *American Journal of International Law*, 1911, pp. 805-807.) L'arbitre s'est exprimé en ces termes :

> « D'après les preuves produites, il est impossible de considérer que la possession d'El Chamizal par les États-Unis a été non troublée, ininterrompue et incontestée (undisturbed, uninterrupted and unchallenged) depuis la date du traité de Guadalupe Hidalgo en 1848 jusqu'à l'année 1895, lorsque, en conséquence de la création d'un tribunal compétent pour trancher la question, l'affaire de Chamizal lui a été présentée pour la première fois. Au contraire, on peut dire que la prise de possession physique par des citoyens des États-Unis et le contrôle politique exercé par le Gouvernement local et fédéral ont été constamment contestés et discutés (challenged

and questioned) par la République de Mexico, par l'intermédiaire de ses agents diplomatiques accrédités.

En droit privé, l'interruption de la prescription se fait par une action en justice ; mais dans les relations entre nations, cela est évidemment impossible, à moins que — et jusqu'à ce que — un tribunal international soit établi à cet effet. Dans la présente affaire, la réclamation mexicaine a été présentée devant la Commission internationale des frontières dans un délai raisonnable après le début de son fonctionnement, et avant cette date le Gouvernement mexicain avait fait tout ce qu'on pouvait raisonnablement exiger de lui — par voie de protestation contre l'empiétement allégué.

Dans ces conditions, les commissaires arrivent sans peine à la conclusion que le moyen tiré de la prescription doit être rejeté. »

Si je me suis permis de citer d'aussi larges extraits de cette sentence, c'est non seulement parce qu'elle pourrait s'appliquer, presque *in terminis*, à la présente affaire, mais parce qu'elle résume d'une manière parfaitement claire ce qu'ont dit bien d'autres sentences arbitrales. Les auteurs se prononcent d'ailleurs exactement dans le même sens (Oppenheim, *Int. Law*, tome I, par. 243 ; Hyde, *op. cit.*, p. 388). Au surplus, le Gouvernement du Royaume-Uni lui-même a insisté, lors de l'affaire des *frontières de l'Alaska*, sur la nécessité que la partie à l'encontre de qui la prescription est invoquée soit demeurée « un spectateur silencieux ». (*Proceedings*, Alaska Boundary Tribunal, V, 203.)

Or, la possession invoquée par le Royaume-Uni dans la présente affaire ne réunit aucune des conditions exigées par le droit international. Elle ne constitue en rien cet « usage fort ancien et paisible » relevé par la Cour dans l'affaire anglo-norvégienne des pêcheries. (*C. I. J. Recueil 1951*, p. 142.) Elle ne correspond à aucune des conditions qui sont si fortement marquées dans l'arbitrage dont je viens de lire un passage.

En premier lieu, rappelons que la France a elle-même procédé à toute époque à des actes de possession sur les îlots litigieux depuis la fin du XIXme siècle. Ces actes constituent par eux-mêmes une protestation contre les prétentions britanniques et sont la preuve la plus éclatante que la France n'est pas restée un « spectateur silencieux ».

En second lieu et surtout, le Gouvernement français a protesté régulièrement contre les actes du Royaume-Uni qu'il pouvait interpréter comme une prétention britannique à la souveraineté sur les Minquiers et les Écréhous. Je ne reviendrai pas sur l'énumération de ces actes, que la Cour connaît bien. J'ajouterai simplement aux pièces déjà citées les instructions du 17 février 1876, adressées au marquis d'Harcourt, ambassadeur de France à Londres, et qui ont amené cet ambassadeur à faire la démarche auprès du Foreign Office qui se trouve en annexe A 31 au mémoire britannique, page 213. Ces instructions sont déposées comme document nouveau, pièce n° 3 [1]. Elles sont beaucoup plus complètes que la note remise par l'ambassadeur et montrent bien l'interprétation française de la convention de 1839 telle que je l'ai exposée ce matin devant la Cour.

L'existence de ces protestations marque toute la différence entre l'affaire présente et l'affaire de l'île de Palmas. La souveraineté des Pays-Bas a été reconnue par l'arbitre parce que ce pays avait exercé

[1] Voir p. 423 du présent volume.

une possession effective, continue, paisible et incontestée de 1677 à la date critique, c'est-à-dire 1898 ; de même dans l'affaire du *Groënland oriental*, la souveraineté danoise était incontestée lorsque la Norvège la revendiqua pour la première fois, le 10 juillet 1931. Dans l'affaire présente, au contraire, la prétendue possession anglaise a fait l'objet de contestations fréquentes depuis le jour où elle s'est véritablement affirmée, c'est-à-dire depuis la fin du siècle dernier. Quant à certains actes qui n'ont pas suscité de protestations de la part du Gouvernement français, nous avons déjà vu plus longuement qu'ils semblaient à ce Gouvernement être conformes à l'interprétation qu'il donnait à la convention de 1839. D'autres actes, tels que l'enquête sur les cas de décès ou la taxation des maisons appartenant à des Jersiais, s'expliquaient *ratione personæ* et n'appelaient aucune protestation par la voie diplomatique. De toute façon, il est évident que le Gouvernement de la République française ne pouvait pas envoyer une note chaque fois qu'un écriteau était planté sur les Minquiers interdisant de déposer des ordures, chaque fois qu'un fonctionnaire jersiais débarquait sur l'un des îlots ou chaque fois que l'on déployait le drapeau britannique. Il ne nous est pas apparu de notre côté que le Gouvernement du Royaume-Uni ait protesté auprès du Gouvernement de la République lorsque le pavillon français a été hissé aux Minquiers, à diverses reprises à la fin du siècle dernier et au début de ce siècle, ou qu'il ait protesté après la visite du Président du Conseil français M. Daladier, en 1938 (document nouveau n° 13 [1]).

Depuis 1870 environ, il y a en vérité une sorte d'état de protestation permanente ; les notes abondent dans un sens comme dans l'autre, on échange des rapports d'experts, on se conteste mutuellement ses droits. Ce qui importe c'est que le Gouvernement de la République n'a jamais laissé se développer paisiblement et d'une manière ininterrompue la possession britannique. Il a protesté contre les actes du Royaume-Uni et de ses ressortissants, il a contesté le bien-fondé des revendications du Royaume-Uni dans un grand nombre de notes diplomatiques, il a accompli lui-même divers actes de possession. On peut véritablement appliquer ici ce qu'a dit l'arbitre dans l'affaire de Chamizal : « la prise de possession physique et le contrôle politique exercés par le Gouvernement local et fédéral ont été constamment contestés et discutés par la République de Mexico, par l'intermédiaire de ses agents diplomatiques accrédités ». C'est précisément sur la validité des actes du Royaume-Uni au regard du droit international que la Cour aura à statuer.

Le Gouvernement du Royaume-Uni prétend, il est vrai, que les protestations françaises, dont il ne nie pas l'existence, n'ont pu interrompre la prescription et que seul aurait eu cet effet le renvoi du différend à un tribunal international ou, tout au moins, des propositions en ce sens (réplique, par. 230). C'est là une prétention inacceptable, car elle est contraire à la jurisprudence internationale que nous avons citée et que la doctrine a adoptée d'une manière quasi unanime, selon laquelle les protestations diplomatiques enlèvent à la prescription son caractère ininterrompu et paisible. Sans doute une protestation isolée, non reprise pendant de très longues années, ne signifierait-elle pas grand'chose ; le silence prolongé après une telle protestation pourrait même être considéré comme un abandon par l'État en cause de sa revendication. Mais dans notre affaire, la France a maintenu ses protestations présentes

[1] Voir p. 451 du présent volume.

à la mémoire du Gouvernement du Royaume-Uni sans interruption. Le Gouvernement du Royaume-Uni n'a jamais pu croire que nos prétentions étaient abandonnées. La France n'avait aucune raison de soumettre l'affaire à un tribunal international avant que les négociations soient épuisées ; or elles se prolongeaient, des propositions nouvelles étaient faites de temps à autre, et l'on pouvait toujours espérer un règlement amiable de ce différend qui durait depuis si longtemps et qui, à dire vrai, apparaissait comme un grain de sable dans l'océan des difficultés mondiales intéressant les deux États. Ce n'est que lorsqu'une telle solution apparut impossible et que les assurances auxquelles nos pêcheurs tenaient avant tout furent liées à l'arbitrage sur la souveraineté que le Gouvernement français accepta de soumettre l'affaire à la Cour en accord avec celui du Royaume-Uni.

Il est donc certain que le Royaume-Uni n'a pu acquérir, par voie de prescription acquisitive, la souveraineté sur les Minquiers et les Écréhous. Les actes de possession qu'il a accomplis sur ces îles depuis le milieu de XIXme siècle ne valent pas titre de prescription à l'encontre de la France.

Seraient-ils alors suffisants pour valoir au Royaume-Uni titre par voie d'occupation ? La réponse, ici encore, sera négative.

* * *

2. — Faisons maintenant la concession la plus large à la thèse du Gouvernement du Royaume-Uni et examinons si les faits de possession, invoqués depuis 1870 environ, auraient pu faire acquérir au Royaume-Uni la souveraineté sur ces îlots, en supposant qu'ils aient été à ce moment-là *terra nullius*, ce qui est l'une des conditions pour qu'une occupation puisse faire acquérir la souveraineté, ainsi que l'a souligné le Gouvernement français dans le mémoire défensif dans l'affaire de Clipperton (p. 207) ; ou bien admettons même que le Royaume-Uni ait prouvé un commencement de titre *(root of title)*, et nous verrons que même dans ces hypothèses les faits invoqués par le Royaume-Uni ne seraient pas suffisants, si l'on pense aux nombreuses protestations du côté français et aux actes de possession accomplis par la France.

Dans sa sentence rendue en 1904 dans le litige de frontières entre la Guyane britannique et le Brésil, l'arbitre a estimé que l'occupation devait être « effective, non interrompue et permanente (R. G. D. I. P., 1904, doc. p. 19 ; *British and Foreign State Papers*, vol. 99, p. 930). Les conditions de l'occupation sont ainsi les mêmes que celles de la prescription. C'est aussi l'opinion de Lindley, dans son ouvrage *The acquisition and Government of backward Territory in International Law*, 1926, page 179. Il est vrai que, dans l'affaire du statut juridique du Groënland oriental, la Cour permanente a considérablement assoupli les conditions de l'occupation dans les cas de territoires peu peuplés et inhospitaliers, mais elle s'est fondée essentiellement sur le fait qu'aucune autre prétention sur le Groënland ne s'était manifestée en dehors de celle du Danemark : « Une autre circonstance, a dit la Cour, dont doit tenir compte tout tribunal ayant à trancher une question de souveraineté sur un territoire particulier, est la mesure dans laquelle la souveraineté est également revendiquée par une autre Puissance.... Une des caractéristiques de la présente affaire est que, jusqu'en 1931, aucune autre Puissance que le Danemark n'a revendiqué la souveraineté sur le Groënland. » (Série A/B, n° 53, p. 46.)

Or, dans la présente affaire, la France a affirmé sa propre souveraineté dès qu'elle s'est rendu compte que le Royaume-Uni invoquait la sienne. Les mêmes observations peuvent donc être faites que pour la prescription : les faits invoqués par le Royaume-Uni ne peuvent pas lui conférer la souveraineté sur les Minquiers et les Écréhous par voie d'occupation, pas plus que par la voie de la prescription.

Ces conclusions de rejet des thèses britanniques sont d'autant plus solides que le Gouvernement de la République, si l'on se place dans l'hypothèse que j'étudie actuellement, peut de son côté invoquer de nombreux faits de possession qui contrebattent la prétention britannique.

* * *

3. — *Les faits de possession de la France :*

Ce point est très important, car ces faits enlèvent précisément aux faits de possession invoqués par le Royaume-Uni leur caractère incontesté et paisible. Nous avons vu, il y a un instant, l'importance attachée par la Cour permanente à la présence ou à l'absence de prétentions contraires. Faut-il rappeler également que dans l'affaire de l'île de Palmas l'arbitre avait, lui aussi, relevé qu'en dehors des Pays-Bas aucune Puissance n'avait établi un exercice effectif de la souveraineté « qui pourrait contrebalancer ou annihiler les manifestations de la souveraineté des Pays-Bas ». (*Rec. sent. arb.*, vol. II, p. 868.)

Si nous avions assez peu insisté jusqu'à aujourd'hui sur le nombre et l'importance de nos faits de possession, c'est parce que nous ne les considérions pas comme opposables à nos adversaires, de même que le Royaume-Uni n'est pas recevable à nous opposer les siens. Nous nous conformions donc simplement à ce que nous croyons encore aujourd'hui être la bonne interprétation de la convention de 1839.

Mais on nous a presque mis au défi de prouver que nous nous sommes occupés des îlots litigieux. De sorte que nous avons dû, à la dernière heure — et je m'en excuse devant la Cour —, faire venir des documents sur des actes de possession concernant les îlots durant ces cent dernières années, alors que, en ce qui nous concerne, nous n'invoquons pas ces actes comme preuve de notre souveraineté. Certains de ces documents sont cependant parvenus à temps pour pouvoir être déposés devant la Cour en temps utile : ce sont nos annexes nouvelles.

En ce qui concerne notre activité maritime et notamment notre activité de pêche, nous avons toujours pensé qu'elle est aussi peu probante que celle du Royaume-Uni, car elle n'est que l'exécution de la convention de 1839. Mais mes collègues se sont tellement étendus sur l'activité des pêcheurs jersiais et le caractère très récent de la présence des pêcheurs français qu'il me faut tout de même rappeler que ces derniers fréquentent les îles depuis un temps immémorial.

Au XVII^me^ et au XVIII^me^ siècles, nous en voyons la preuve dans les interdictions qui sont faites à quatre reprises : 1646, 1692, 1720 et 1754, aux pêcheurs de Jersey de se rendre dans ces archipels, soit par crainte d'intelligence avec l'ennemi, soit par crainte de la peste. Quel sens y aurait-il à cela s'il n'y avait pas des Français qui se rendaient dans ces îlots ? Et pourquoi faire sinon pour pêcher ? En 1784, c'est le texte, déjà plusieurs fois cité à propos de la concession Quinette, qui parle de nos pêcheurs français coulant leurs bateaux aux Minquiers en cas de mauvais temps. (*Le Pays de Granville*, 1951.)

Puis ce sont les plaintes des pêcheurs jersiais eux-mêmes (correspondance publiée par le Royaume-Uni dans les annexes) qui s'élèvent contre la concurrence qui leur est faite depuis longtemps ou contre des vols — prétendus vols — par des pêcheurs français aux Minquiers en 1869 (annexe A 51). Les témoignages abondent. Nous avons cité, document nouveau n° 4[1], une lettre adressée le 3 août 1897 par un officier de marine anglais au commandant de la station de Granville pour une autre affaire de dépradations commises aux Minquiers par des pêcheurs français. 1869, 1897, il y a beaucoup plus d'un demi siècle que les pêcheurs français allaient donc aux Minquiers. Je serais en mesure, si la Cour l'estimait utile, de citer d'après des attestations le nombre et les noms des bateaux et de leurs patrons qui exerçaient leur métier en grande partie sur les Minquiers vers 1910. Si à Jersey les pêcheurs d'un village, le village de La Rocque, dont M. Harrison nous a fait une description empreinte de tant de charme, fréquentaient ces rochers, il s'agit pour la France de toute une côte qui comporte non pas un village de pêcheurs, mais trois ports de pêche importants : Granville, Cancale et Saint-Malo. Il n'est pas jusqu'au port breton de Camaret qui n'ait envoyé certaines années jusqu'à dix-sept bateaux. Quant au petit archipel de Chausey, il arme, à lui seul, sept fortes barques à moteur diesel montées par une vingtaine d'hommes. Et si les photographies de marins prouvent quelque chose, j'ai, comme mes collègues britanniques, à la disposition de la Cour les photographies de ces marins. Nous avons produit en document nouveau n° 7 deux lettres émanant d'organisations syndicales de pêcheurs qui font état de l'inquiétude des pêcheurs français devant les empiétements de plus en plus audacieux de la part des Jersiais et de l'angoisse qu'ils éprouvaient, en 1937, quant à leur avenir. Nombreux, en effet, sont les pêcheurs français qui travaillent à la périphérie et à l'intérieur des rochers des Minquiers.

En ce qui concerne les actes de l'administration française, ils ne sont pas moins nombreux. Sans doute avons-nous peu de documents à citer dans le domaine foncier. Cela est dû, la Cour s'en souviendra, à l'état des vents et des courants dominants, question vraiment indépendante du problème de souveraineté. Mais lisons les documents apportés par nos contradicteurs et cette petite plaquette que son auteur n'aurait certainement jamais cru vouée à l'honneur de paraître devant la Cour, la plaquette de Charles Frémine, qui, en France, a probablement passé à l'époque pour une charmante plaisanterie, et non pas pour un document très sérieux : *Le Roi des Écréhous*. L'auteur fut conduit aux îlots par une barque française dont le conducteur l'introduit dans une maison dont il avait la clef : il y avait donc au moins une maison française aux Écréhous à ce moment-là.

Aux Minquiers, l'administration française eut à intervenir au moins trois fois. D'abord en 1784 la demande de concession du chevalier Quinette. La deuxième fois en 1929 pour accorder un bail en bonne et due forme à M. Leroux ; on sait que c'est le Gouvernement français lui-même, devant l'attitude des Jersiais, qui annula ce bail pour ne pas créer d'incidents, mais en protestant de ses droits. Je tiens à souligner que M. Leroux n'était pas un pêcheur et que c'est là la raison pour laquelle le Gouvernement français n'a pas estimé pouvoir invoquer l'interprétation de la convention de 1839 en sa faveur.

La troisième intervention dans le domaine foncier s'est produite lorsqu'« un certain Marin Marie » est allé, en 1939, avec dix-sept

[1] Voir p. 426 du présent volume.

bateaux, construire un refuge-abri aux Minquiers (document nouveau n° 9[1]). Cette entreprise était subventionnée, comme cette pièce le prouve, par les communes de Cancale et de Granville, approuvée par le préfet maritime de Cherbourg, les ministères de la Marine nationale et de la Marine marchande. Elle revêtait ainsi un caractère semi-officiel. Puis-je indiquer ici que le « *so called* » Marin Marie, comme l'a appelé M. Harrison, a non seulement deux prénoms mais aussi un nom : il s'appelle Marin Marie Durand de St-Front. Peintre de la marine nationale française, il a traversé deux fois l'Atlantique en navigateur solitaire sur un petit cotre ; son nom est bien connu des yachtmen des Écréhous — s'il ne l'est pas de M. l'Attorney-General de Jersey.

L'administration française des douanes s'est, elle aussi, occupée des îlots. L'extrait de presse reproduit en annexe du mémoire britannique (A 174, ann. add., p. 662) signale en effet que les « patâches » des douanes de Carteret effectuaient des visites hebdomadaires aux Écréhous. C'étaient des visites de service.

La France entretient depuis longtemps des vedettes garde-pêche dans la région, une à Cancale et une à Saint-Malo, et ces vedettes ont dans leur circuit de surveillance normal les Minquiers et les Écréhous.

On nous a dit que les autorités françaises n'avaient jamais manifesté un intérêt quelconque pour les Minquiers et les Écréhous et qu'elles n'avaient jamais pris la peine de les visiter.

Il semble cependant, d'après les témoignages que j'ai reçus, qui sont déposés comme document nouveau n° 21[2], qu'en 1938, M. Édouard Daladier, alors Président du Conseil, accompagné du ministre de l'Air, M. Guy La Chambre, qui est actuellement maire de Saint-Malo, vint aux Minquiers sur un bâtiment de l'État français. M. Guy La Chambre y vint également une autre fois. L'amiral Darlan et plusieurs autres ministres semblent s'y être aussi rendus. En 1939, lors de la mise en place du refuge « Marin Marie », le maire de Granville en fonction, M. Goval, était présent. Il était venu veiller à l'exécution des délibérations du Conseil municipal et de la Chambre de commerce dont il était le président, relatives à ce refuge. La presse des deux côtés de la Manche a d'ailleurs relaté l'incident auquel cette affaire a donné lieu.

J'aurais souhaité ne citer que pour mémoire les missions hydrographiques qui, dans notre esprit, pas plus que les autres faits que je viens de citer, n'ont de valeur probante entre les deux Parties pour l'acquisition de la souveraineté. L'argumentation britannique me contraint à quelques explications sur ce point.

Le Gouvernement du Royaume-Uni oppose aux travaux français, selon lui postérieurs, ceux du capitaine de vaisseau White. Les cartes annexes B 4 et B 5[3], qui sont des cartes françaises, d'ailleurs inexactes, du XVIIIme siècle, démontrent que le capitaine de vaisseau White avait des prédécesseurs français. Sans doute, les travaux de cet officier de marine anglais commencèrent en 1812, mais il y a lieu de remarquer que son œuvre consiste essentiellement en croquis fragmentaires, établis selon des méthodes anciennes. Le titre même de son ouvrage : *Brief Remarks* (p. 110), justifie ces affirmations.

Les travaux de Beautemps-Beaupré étaient d'une autre importance. Ses *Mémoires d'Hydrographie* sont remarquables par la nouveauté des méthodes et l'étendue des travaux accomplis.

[1] Voir p. 447 du présent volume.
[2] » » 459 » » » .
[3] » » 350 » volume I.

Il est donc incontestable que Beautemps-Beaupré fit les premiers relevés complets et exacts de ces parages, usant de méthodes modernes dont il était l'initiateur. Un des premiers exemplaires de sa carte servit précisément à enregistrer les limites de la convention de 1839. (Voir annexe B 7 [1], en tenant compte de ce que la photocopie n'a pas la précision de trait de l'original.)

Quant à la mission hydrographique de 1888-1889, elle dut séjourner longtemps aux Minquiers, avec son navire hydrographique bien entendu. Deux de ses membres logèrent sur l'îlot. Elle ne rencontra aucune opposition sur place ; le pavillon anglais n'était jamais hissé lorsque le navire était au mouillage avec le sien en poupe. Les signaux temporaires mis sur certains rochers furent respectés. Les travaux de la mission hydrographique française furent achevés sans difficulté, et ils durent être bons, car la carte de l'amirauté anglaise, que j'ai ici, la carte de la région qui porte le numéro 2100, « Plateau des Minquiers » (en français, sur une carte de l'amirauté britannique), porte cette seule mention : « From the French Government Chart of 1891-1908. » Je laisserai cette carte à la disposition de la Cour.

Venons-en maintenant à l'importante question du balisage. Il faut rappeler, en effet, que la Cour permanente d'arbitrage a relevé dans l'affaire de *Grisbadarna* « la circonstance que la Suède a effectué dans les parages, surtout dans les derniers temps, des actes multiples émanés de la conviction que ces parages étaient suédois, comme par exemple le balisage, le mesurage de la mer et l'installation d'un bateau phare, lesquels actes entraînaient des frais considérables, et par lesquels elle ne croyait pas seulement exercer un droit, mais accomplir un devoir ». (R. G. D. I. P., 1910, p. 186.) Le Royaume-Uni a d'ailleurs invoqué le même arrêt pour souligner la valeur de *son propre* balisage. Cependant les travaux accomplis par les deux pays ne sont vraiment pas comparables.

D'une part, le balisage français a été mis en place progressivement à partir de 1865, avant l'échange des toutes premières correspondances. En 1903, le mémoire britannique fait état (annexes A 57, 58 et 59) d'un projet d'établissement d'un phare français aux Minquiers. Des naufrages retentissants comme celui du vapeur anglais *Superb* en 1850 (annexes A 168, A 170) et du brick français *Marie*, en 1861, où il y eut 51 disparus, avaient provoqué d'abord la mise en place par la France d'un bateau-feu qui fut doublé, puis remplacé, par un ensemble de bouées (document nouveau n° 8 [2]). En 1937, il fut même question d'installer sur les Minquiers un magasin destiné à abriter le matériel utilisé pour l'entretien de ces bouées, et une proposition fut faite en ce sens au Gouvernement du Royaume-Uni afin de rechercher, en commun, un emplacement approprié à ce dépôt de matériel. La Cour trouvera tout un dossier relatif à ce projet dans notre document nouveau n° 8 [2].

Le balisage britannique au contraire, ou devrais-je dire le balisage jersiais, a été fait pendant les étés de 1936 et 1937, c'est-à-dire très récemment.

D'autre part, on a parlé des dépenses du balisage jersiais ; les dépenses entraînées par le balisage français sont infiniment supérieures, car le bateau-feu initial (un fort bateau surmonté d'un phare et doté d'un équipage) a cédé la place à une véritable ceinture de bouées entourant toute la partie occidentale du plateau. Il y en a présentement neuf,

[1] Voir p. 350 du volume I.
[2] » » 436 du présent volume.

dont cinq lumineuses ou sonores ; elles sont portées sur toutes les cartes. L'entretien de ces énormes flotteurs, hauts comme une maison, ancrés par grand fond et dans des parages à tempête, qu'il faut fréquemment relever et ravitailler en combustible, est une lourde charge. Contrairement à cet important balisage français, le balisage jersiais ne consiste qu'en assemblages de fer et de pierres cimentés et scellés sur le sommet de certains rochers. Très peu de ces repères sont lumineux, c'est dire que leur entretien n'est pas comparable à celui de nos propres bouées.

M. Harrison nous dit que le balisage français ne sert qu'à écarter les navires de ce plateau dangereux, au lieu de leur en faciliter la pénétration. Vraiment, ignore-t-on qu'aucun navire n'a envie d'entrer dans le plateau des Minquiers et aussi que c'est le devoir d'une nation de baliser et d'éclairer ses côtes vers le large, mais qu'elle est parfaitement libre de ne pas baliser l'intérieur de ses rivières ou de ses ports ?

Les seuls bateaux qui peuvent s'aventurer sur le plateau, à l'intérieur du plateau (voir annexe A 168 *in fine*, avec l'appréciation sur la culpabilité du capitaine du *Superb*) sont des barques, conduites par des « pratiques » de l'endroit — et encore s'en perd-il. Ces pratiques n'ont nullement besoin de signaux pour se reconnaître sur les écueils, pas plus qu'un cultivateur n'a besoin de bornes pour retrouver ses champs. Toutefois, comme il n'y a, à vrai dire, presque plus de pêcheurs professionnels de Jersey allant aux Minquiers mais seulement des amateurs, ces amateurs peuvent en effet trouver là une aide. Telle est une des raisons d'être de ce balisage mineur qui ne répond à aucune règle internationale et qui n'a jamais été signalé depuis qu'il existe « par aucun avis aux navigateurs », ni porté, sauf erreur, sur aucune carte.

Mes collègues britanniques prétendent toutefois que notre balisage ne sert qu'à faciliter l'accès du port français de Saint-Malo et ne concerne en rien les Minquiers. En fait, il se trouve que les Minquiers, comme la carte le montre, sont situés entre Saint-Malo et le port de Saint-Hélier (Jersey). Tout bateau se rendant de l'un à l'autre doit contourner les Minquiers par l'ouest, car il n'y a pas de passage du côté des Chausey. Leur balisage est donc aussi nécessaire pour l'accès du port de Saint-Hélier (Jersey) que pour nos ports. Or, la seule ligne de navigation régulière qui existe dans les parages est le service hebdomadaire Saint-Malo — Saint-Hélier — Southampton, et cette ligne, extension des Southern Railways, est entièrement britannique. Le fait que le balisage est une obligation incombant internationalement à la France a d'ailleurs été reconnu par le Gouvernement du Royaume-Uni. Dans une lettre du 18 septembre 1952, l'attaché naval à l'ambassade de Grande-Bretagne à Paris (document nouveau n° 11 [1]), s'adressant au ministre français de la Marine, s'exprimait ainsi : « Le navire britannique *Falaise* a fait savoir le 9 septembre dernier que le feu de la balise du sud-ouest des Minquiers était éteint. J'ai l'honneur de vous prier de me faire connaître s'il en est toujours ainsi et, dans l'affirmative, quand ce feu sera allumé à nouveau. »

A cette lettre, le ministre français de la Marine répondit, le 29 septembre 1952, dans les termes suivants :

> « En réponse à votre lettre de référence, j'ai l'honneur de vous faire connaître que le feu de la balise sud-ouest des Minquiers a été effectivement éteint pendant trois jours, mais qu'il a été rallumé le 15 septembre 1952, et que le service local (français) des phares et balises a fait un avis de rallumage à cette date. »

[1] Voir p. 449 du présent volume.

Nous pourrions encore accumuler des preuves du même genre sur l'exercice de la souveraineté française aux Minquiers et aux Écréhous : telles que des visites aux Minquiers, en 1903, d'un officier de marine, membre du cabinet du ministre de la Marine, des visites, en 1939, d'officiers de marine et de matelots en uniforme, de la visite, le 10 juillet 1945, du chasseur 14 de la marine de Guerre française.

Mais, nous l'avons dit à la Cour, il n'est pas conforme à la position de la France dans le présent litige d'accumuler des faits qui, selon nous, ne sont pas opposables au Royaume-Uni ; ils n'établissent pas la souveraineté française sur les Minquiers et les Écréhous, pas plus que les faits du même genre invoqués par le Royaume-Uni ne nous sont opposables. Nous n'avons cité de tels faits que dans le cadre de notre hypothèse actuelle de démonstration contre la thèse britannique, pour établir que les faits de possession existent des deux côtés dans notre litige, mais ils doivent être également écartés, des deux côtés, depuis 1839.

Monsieur le Président, Messieurs de la Cour, arrivé au terme de mes observations sur l'histoire juridique des Minquiers et des Écréhous, il me paraît qu'une double conclusion s'impose.

Tout d'abord, cette histoire est dominée par la convention du 2 août 1839, dont l'article 3 déclare commune la pêche dans les eaux des Minquiers et des Écréhous. Le Gouvernement français a toujours vu dans cette disposition le fondement d'un usage en commun, par les pêcheurs de ces deux pays, des îles des Minquiers et des Écréhous. C'est pour cela qu'il demande à la Cour de déclarer les faits de possession que chacune des deux Parties a pu accomplir sur les îles, postérieurement à 1839, inopposables à l'autre Partie en tant que manifestation de la souveraineté.

En second lieu, les faits de possession que le Royaume-Uni a accomplis, en grand nombre, depuis moins de cent ans, ne peuvent lui faire acquérir la souveraineté sur les Minquiers et sur les Écréhous. A partir du moment où le Gouvernement français s'est rendu compte que ces actes étaient plus qu'une simple application de l'article 3 de la convention de 1839 et que le Gouvernement du Royaume-Uni, interprétant cette convention d'une manière différente, entendait revendiquer une souveraineté exclusive et privative sur les îles, le Gouvernement français a constamment protesté contre les agissements et contre les intentions du Gouvernement du Royaume-Uni.

De cela il résulte que la Cour, pour répondre à la question qui lui est posée par le compromis, devra se demander à qui appartenait la souveraineté sur les Minquiers et sur les Écréhous au moment où la convention de 1839 a été conclue.

Or, nous avons montré qu'en 1839 la souveraineté sur ces îles appartenait à la France, en vertu de son titre originel et de sa possession ultérieure.

Ainsi, pour les Minquiers et les Écréhous, les enseignements du droit coïncideront avec ceux de la nature. Le droit est une œuvre essentiellement humaine qui adapte les exigences de la nature à celles de la société des hommes. Comme l'a dit le grand juriste français, le doyen François Gény, le droit, c'est du « construit » sur du « donné ». Souvent le « construit » modifie le « donné ». Ici, au contraire, l'œuvre du droit a confirmé celle de la nature. Et cela est bien ainsi.

6. REPLY OF SIR LIONEL HEALD

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTING OF OCTOBER 2nd, 1953

[Public sitting of October 2nd, 1953, morning]

Mr. President and Members of the Court :

When I addressed the Court at the opening session of these proceedings, I stated my intention to present the case of Her Majesty's Government in moderate and reasonable terms, bearing in mind that the Government of the Republic of France and ourselves come before the Court as friends and good neighbours seeking only an honorable settlement of their dispute and fully prepared loyally to accept your judgment, whichever side it might favour. I would like to reaffirm that intention and to assure you that both I and my colleagues will do our utmost to observe it faithfully. We therefore believe that we shall have the approval of the Court if we refrain from any comment on some of the language which my learned friend, Professor Gros, has thought fit to introduce into his speech. For example, we shall make no reply to his remarks about the "parochial" outlook of Jersey and her "amateur yachtsmen". Nor shall we notice any further his accusation that the British Government has tried to produce a *fait accompli* "by acts of force and violence" and that "the so-called acts of sovereignty" were done with the intention of prejudicing in advance the argument before the Court. The question before the Court is not as to the personal merits or deserving qualities of the Parties, but as to their respective legal rights in international law, and it is to that and that alone that our arguments have been and will be directed.

With your permission, therefore, I shall open the Reply on behalf of the United Kingdom with some general observations, following the lines of my previous speech—I hope without any mere repetition—and designed to assist the Court in focussing the real issues which seem to me to emerge from the debate. My colleagues will then follow as before, with their comments on the argument of Professor Gros, so far as it bears on their particular sections of the case.

Mr. President, my colleagues and I will all be quite brief in our speeches, but perhaps I might be allowed to explain why it is necessary for us to go into rather more detail on certain aspects of this case than is usually necessary in a reply. At that stage of the proceedings, after full oral argument, one normally expects the area of discussion, even in the most complicated cases, to have been reduced to a comparatively small compass. In the present case, however, the issues seem to be still largely undefined, and this is partly due, I am bound to say with great respect, to the method of argument which has been adopted by my learned friend, Professor Gros, for he has dealt at considerable length with several minor or subsidiary points to which he evidently considers he has a strong answer, while as regards some

of the main points of our argument, if he has not actually ignored them, he has dealt with them—as it seems to us—quite casually and in such a manner as to leave it doubtful how far he disputes them and upon what grounds. A striking example of this is the handling of the 1839 Fishery Convention. Professor Gros spent several hours on the question of its precise geographical sphere of application, apparently pretending that this was one of the main planks of our argument, but in so doing he ignored my colleague Mr. Fitzmaurice's very clear statement of our attitude to this Convention as set out on pages 77 and 78 of this Volume, which I must now quote. Mr. Fitzmaurice said :

> "The Court will remember that in our Reply we put forward two main points as to the interpretation of Article 3. In the first place, we maintained that the Article did not apply to the Minquiers and the Écréhous at all", and he then gave a reason for that. Mr. Fitzmaurice went on to say : "Our second main contention was that, even if Article 3 did apply to the groups, it did so only in a purely fishery sense—an oyster fishery sense at that—and that it had none of the implications about sovereignty which our opponents had suggested. *Of these two arguments the second is, of course, incomparably the more important, and it is the one on which we chiefly rely.* The 1839 Convention is admittedly very obscure, and, as our opponents themselves have stressed, not very well drafted. Some of its provisions being in a sense conflicting. It may therefore be very difficult to say with any certainty exactly what the sphere of application of Article 3 was. *Our principal contention is* that, whatever territory or waters it did apply to, it meant no more than it actually said, and had no implications beyond such as would be the normal and necessary result of a provision for a common oyster fishery, which would certainly not include any renunciation of sovereign rights."

As the Court will see, what is clearly put forward as our main contention there has hardly been seriously dealt with by Professor Gros at all. I ask the question : does he accept our argument or not ? If not, upon what grounds ? As I understood him, he did admit that the question of sovereignty was not in the contemplation of either Party to the Convention at the time when it was signed. Mr. President, how can an agreement have any legal effect in relation to something which was not within the contemplation of the signatories ? The Agreement, as Professor Gros himself now appears to admit, was a Fishery Agreement, and nothing else. It was the *fishing* that was to be in common, not the islands. Let us suppose that at some later date one Party or the other maintained that, as sovereign, it had the right to erect a wireless station on the islands. What possible bearing could an agreement, admittedly limited to fishery rights, have on any such dispute ? And, Mr. President, I would like to ask another pertinent question, to which the Court, I am sure, will be interested to hear Professor Gros's answer. If the 1839 Convention still stands on the basis he alleges and the 1951 Agreements have not affected it, how does the Government of the French Republic, in its scrupulous regard for the sacred terms of that Convention, justify its avowed intention—if it is successful in these proceedings—to erect a monster dam and to appropriate for itself all the waters of the bay up

to and including the Minquiers ? Is not the truth of the matter that the attempt to use the 1839 Convention as a factor in the argument on sovereignty has broken down, and that Professor Gros's own admission on Wednesday morning shows its introduction to be little more than a smokescreen—a red herring—diverting attention from the main issue?

Mr. Fitzmaurice will deal in more detail with Professor Gros's argument upon the Convention, but I feel bound for the assistance of the Court to make one comment—severe perhaps, but I hope not unfair—on the use which the legal advisers of the French Government have sought to make of this 1839 Convention. If the Court will refer to the Counter-Memorial at page 371 (French text), it will see what we must presume to have been the result of the mature consideration of the effect of the Convention by the best legal minds in France. Their conclusion was—and it was at least a logical one—that *if* one were to leave out of account the effects of the Compromis and the accompanying Fishery Agreement of 1951, *and* if, further, one assumed that the 1839 Convention was intended to deal with sovereignty, the effect would be to render the whole of the reference to the Court abortive, since the Court could only then decide that the islands were *res nullius*, the Parties having renounced all claim to sovereignty on both sides. And I quote the words on page 371 of that Counter-Memorial, in which it was said that there were consequences and the first was in these words: "que le statut actuel des espaces litigieux résulte d'un titre nouveau qui a pris naissance par l'accord des Parties en 1839 et non pas d'un titre quelconque antérieur". When it came to the Rejoinder, Professor Gros had obviously realized that such a conclusion as this could not be acceptable to the Court, and his ground was completely changed, it now being argued that the Convention is consistent with French sovereignty—pre-existing, contrary to what I have just read to the Court—and was not consistent with English sovereignty. Mr. President, I feel I am entitled to ask, not forensically, but as a matter of real substance—how does Professor Gros account for such a radical change in the argument on this document? Is it really treating the Court seriously to ask it now to accept that the same agreement means precisely the opposite of what the French Government solemnly stated in its carefully considered formal pleadings?

Another example of what I would respectfully describe as Professor Gros's failure to "grasp the nettle" is his treatment of my argument based upon the Chausey Islands. He tried to pretend that we had attacked the French claim to sovereignty over them and that he had to defend it. This was, as I believe the Court will agree, a mere travesty of my argument, but perhaps I might be allowed to recall what I said at pages 22 and 23 of the printed Record. Mr. President, I said this:

> "An interesting light on this aspect of the case is provided by the Chausey group of islets—which, as the Court will no doubt already be aware, is close to Granville on the French coast. The Chausey group, as everyone agrees, are French to-day, and it is therefore pertinent to ask oneself—why is that?"

And then, after a reference to the document, I continued:

> "The Chausey group became French much later, as the result of specific acts in the exercise of French sovereignty. And when you find, in the case of the Minquiers and the Écréhous, *not* this process

of transfer to France, but, on the contrary, the intensification of acts and incidents of British sovereignty and character, precisely parallel to those exercised by France in the case of the Chausey, the admitted title of France to the Chausey becomes a very relevant point, not in favour of the French claim but against it."

Professor Gros has again avoided here giving any direct answer to an argument which perhaps he finds embarrassing, but he does at any rate give us *his* explanation as to how the Chausey came to be French. And when we see that explanation, Mr. President, what is it ? Does he base his title on the same foundation as the French claim to the Minquiers and Écréhous—on the Peace of Calais and all the rest of it ? Nothing of the kind. He starts in the year 1343, nearly 100 years after 1259, and then he finds the beginning of what he calls the permanent French occupation in the sixteenth century. Professor Wade prefers to place that in the eighteenth century, but this difference is for present purposes immaterial. The point is that Chausey became French by exactly the same process as that by which we seek to *confirm* our ancient title to the Minquiers and Écréhous, namely effective possession. Mr. President, I continue in my argument upon the Chausey by saying this. The French legal advisers clearly appreciated the danger of this argument, and with characteristic quickness of thought they adopted the offensive in their pleading by asserting that the Minquiers are dependencies of the Chausey group. This, of course, would be an excellent point if it could be established, but all the evidence is to the contrary effect. Mr. President, I listened in vain during Professor Gros's argument to see whether he would produce the evidence. The only evidence that he produced was a reference to some French geographical work between, I think, 1880 and 1890, which was of course dealing purely with the geographical aspect of the matter. And no real attempt has been made to justify the suggestion that the Chausey was a dependency of the Minquiers.

Before I come to deal with some of the main issues, I would like to dispose of a comparatively small point—a question of documentation. Professor Gros misunderstood me if he thought I was making any point of the fact that the relevant documents appeared in our Annexes rather than his. As the Court will see if it turns to my first speech, pages 35-36 of the Print, what I there drew attention to was the comparative lack of positive evidence supporting the French claim to possess the sovereignty over the Minquiers and the Écréhous. I was not there referring to the diplomatic correspondence, or to the treaties, all of which, as Professor Gros said, are evidently common to both sides ; nor to such works as the *Gallia Christiana*. I was referring to such things as charters, grants, court rolls, the affidavits of witnesses and officials, records of judicial proceedings and so forth, showing actual administration and the exercise of jurisdiction, and the fact that France, on her side, had been able to produce so little material which helped to prove her case. Despite the destruction of archives—a matter on which we very sincerely sympathize with our French friends—we feel that this disparity in the weight of the pieces of documentary evidence which can be relied on by them, as compared with us, does reflect a real difference in the character of our respective claims.

Coming now to some of the main legal issues of the case, the Court may remember that I emphasized the importance of the right approach and I submitted, as a cardinal point, that we must examine the respective titles as a whole over the entire period and not attempt any division into separate compartments. For this purpose, I cited the great authority of Judge Huber (p. 33, Vol. 1, printed Record). In his address Professor Gros paid lip service to this principle, as may be seen from the *Compte rendu* of the 28th September, page 232, but he soon abandoned it, and of course his whole attitude to the year 1839 is a negation of this principle. For the attempt is made to say that the years subsequent to 1839 must bear the whole burden not only of proving the British title but actually of displacing the French sovereignty which is said to exist on that date. I do not intend to repeat my argument on this point: I merely wish to add that once again here Professor Gros does not attempt to meet our argument but simply evades it—and the Court is entitled, I suggest, to draw the appropriate inference.

The next point I made was the unreality of any kind of suggestion that the British case depended in some way on acts of aggression, as if we had forced our way into French territory and were seeking to take it. But again, in his oral argument, Professor Gros in effect said that France must be presumed to be the rightful sovereign and the United Kingdom an interloper. All that France need do (he says) is to establish that the United Kingdom acts are invalid or insufficient to give us the sovereignty. Perhaps I might recall here what I said in my previous speech, that the French case proves altogether too much, for if it were sound it would establish a French title not merely to the Minquiers and to the Écréhous but to the whole of the Channel Islands. The Court will judge, for they have heard Professor Gros, whether this is not a perfectly fair comment on the main theme of his argument. At any rate, I submit to the Court that the French case ought to be rejected on its own thesis unless our opponents can give a satisfactory explanation of how the Minquiers and the Écréhous are in some way to be distinguished and separated from the rest of the islands.

Professor Gros advanced a number of geographical considerations, directed to showing that the Minquiers and Écréhous were dependencies of the mainland and ought to be French, but, of course, all this applies equally, if it were valid, to the other islands, and we have already pointed out that Alderney, for example, is as near to France as the Écréhous and much nearer than the Minquiers. Professor Gros's argument appears to be that, while it must be admitted that the larger islands are now definitely British, yet this is all so wrong *in principle* that even though it has to be accepted for the major islands, the process must not be extended any further than it must, and unless the United Kingdom can bring forward the strongest proofs of actual possession of the Minquiers and Écréhous, the sovereignty must be adjudged to France. Well, Mr. President, I would have thought that, even on that basis, we *had* in fact brought forward the strongest proofs of actual possession of the groups, and of having been in that position for a long time. There is no need to discuss how long, since on any view it is a long period.

But I submit to the Court that here once more Professor Gros is not meeting the real argument. Indeed, he is making another appeal to sentiment or prejudice rather than to law, for it is quite wrong to

regard the United Kingdom as an interloper or usurper in the matter of the Channel Islands. The Court knows that these islands originally came to us by reason of the Norman conquest. Even if, for a while after that time, they were held by the Kings of England as Dukes of Normandy rather than as English Kings, they certainly *were* held by them as English Kings from the year 1204 onwards. The major islands have unquestionably been in English hands ever since. It is not therefore possible or right to look at this case as one in which the United Kingdom has, so to speak, crossed the Channel and possessed itself of something that rightfully belonged to France. I ask the Court to reject entirely the implications of the language used by Professor Gros on page 228 of the *Compte Rendu* of Tuesday 29th, that the islands were, in his words, "taken away from Normandy by the English". This is incorrect. Continental Normandy was taken away by Philip of France—the islands remained. The only correct view is the purely objective view that the major islands do in fact belong to the United Kingdom, whose right to them is not and can not be challenged. If this is so, ought not the Minquiers and the Écréhous equally to be regarded in a purely objective way, as one would any other islands or any other piece of territory situated between the possessions of two different Powers? Why, in the circumstances, should the Minquiers and Écréhous be any more dependent on, or rightfully belong to, the mainland, rather than to the rest of the islands of which they form a natural part? If, indeed, distance and geography come into the matter at all, then, as we have pointed out, these groups are nearer and more closely related to Jersey than they are to France. I submit, therefore, that there is absolutely no valid ground for the presumption which Professor Gros seeks to establish, that "*in principle*" these groups should be French. Only if he is prepared to argue that in principle *all* the Channel Islands should be French would a similar argument about the Minquiers and the Écréhous be tenable.

We come back to the same point, therefore. How does Professor Gros really distinguish the case of these two groups from the rest of the islands? He admits (and I refer to p. 206 of the *Compte Rendu* of Monday 28th) that before the thirteenth century the Minquiers and Écréhous were held, together with the rest of the islands, by the English Kings, whether as Dukes of Normandy or not. We have therefore a situation of fact in 1204—one which is apparently admitted by Professor Gros—that all these islands, including the Minquiers and the Écréhous, were then in the same hands. Then, he says, after 1204 the islands became separated from continental Normandy but, for some magical reason, this only applied to the major islands. They alone remained in English hands, whereas—hey presto!—the Minquiers, the Écréhous and the Chausey have suddenly become French. By what extraordinary process of reasoning does Professor Gros produce this strange result? Surely the normal presumption is that a known state of fact continues until a change in it can be shown to have occurred. If, as is admitted, the Minquiers and Écréhous were in the same hands as the rest of the islands in 1204, then what caused them suddenly to cease to be in those hands and pass into French hands? Obviously nothing, unless the French took them, as they took continental Normandy, and it is for our opponents to establish that France did take them, which they have not done.

The presumption that the Minquiers and Écréhous remained where they were with the rest of the islands is, moreover, greatly strengthened by the known attempts of the French to obtain possession of all the Channel Islands, principally during the two periods from 1204 to 1217, and from 1337 to 1345. During these attempts the French admittedly temporarily occupied some of the islands, but they were eventually expelled. Would it not be for our opponents (if they could) to show that, in the course of one of these attempts, France actually occupied the Minquiers and Écréhous, and not only occupied them but remained there permanently? We have evidence of temporary French occupations of Jersey, Guernsey, etc., but we have no actual evidence of any French occupation of the Minquiers and the Écréhous. They may have been occupied, but there is no evidence of it, and I merely say that, if France had possessed herself of the islands and remained there at some point after 1204, there must have been some evidence of it. Given the known situation of fact before 1204, therefore, which is admitted by our opponents, a situation of fact which included the Minquiers and the Écréhous as being in English hands, I ask the Court to find that this situation of fact cannot be assumed suddenly to have ceased, and must be assumed to have continued unless and until the contrary is shown.

In all this, of course, I have been assuming, for the purpose of the argument, that the original title did lie with France. In this connection, Professor Gros poured a great deal of scorn on our history, as being based on the writings of local Norman historians. But I would ask, what reason is there for regarding a French historian writing in Paris as being necessarily more reliable or more impartial than a Norman historian writing at Caen or elsewhere in Normandy? Is not the one concerned to maintain the French point of view just as much as the other may have been to maintain the Norman point of view? Or is there something in the air and atmosphere of Paris which causes its residents to have an impartiality which no one else possesses? In point of fact, it is precisely to local historians that one would turn for details of local events, which often are not sufficiently dealt with in the more general histories. However, we shall show you presently that our historical case is not based only on the authorities or works we cited in the original statement. We shall show that it can be supported by general historians of great repute, including even a number of those cited by our opponents in support of their case, such as Prentout, Fliche and Lauer.

I said in opening the case that France's claim is a claim to be entitled by virtue of ancient right and little more. This has been virtually conceded by Professor Gros, for he said (I translate): "the original French title .... would suffice in itself to vest the sovereignty over these islets in France, and this would be so even if France had not performed any positive acts in respect of them". And he later emphatically stated that he was *not* relying on any of the so-called acts of possession in this or the last century to justify his claim. Yet in another part of his speech, Professor Gros agreed that if the issue lay between a bare right on the one side and effective possession on the other, the latter must prevail—and there is in fact no doubt of course that international law requires a title, however ancient, and even if of unquestioned original validity, to have been kept up by an adequate degree of effective exercise. What

degree will be adequate must, of course, as I said before, depend on circumstances. No doubt where a piece of territory or an island is apparently under the sovereignty of a country, and its title is not challenged, and no other country claims the sovereignty, very little in the way of actual exercise of jurisdiction will be necessary. But this cannot be so when another country is known to claim sovereignty and even to be exercising jurisdiction itself, so that there is an actively competing claim in the field. In such circumstances, the original title, however good it may once have been, will inevitably be lost by non-use, and title will be acquired by that country which exercises it.

Professor Gros has cited in support of his argument the *Clipperton Island* case. The Court will remember that, in that case, a period of only 30 or 40 years had elapsed since the date when France had originally taken possession, and during that time no acts of sovereignty had been carried out by any other country. In those circumstances it was quite natural to hold that France's title still subsisted, but obviously the facts of the present case are completely different. The present case, indeed, as I pointed out before, is much more akin to that of the *Island of Palmas*, in which an original title vested in Spain by right of discovery was held to have been lost by non-exercise, and to have been superseded by a Netherlands title based on long continued occupation and control. One might indeed take the matter a step further, for there is a considerable analogy between a claim of ancient right which has not been followed up by any effective exercise of sovereignty, and a title based on discovery which, as the Court knows, only gives an inchoate right which will necessarily lapse after a certain time if not followed by the effective exercise of sovereignty. I do not of course say for a moment that the two cases (this and that of the island of Palmas) are identical, but merely say that the principles applicable to them are very similar.

It is at any rate clear that the *Clipperton Island* case not only does not support Professor Gros, but is actually contrary to his argument. For the Court will remember that in that case Mexico put forward a claim of so called "historic right" based on an alleged ancient title. I will not go into the details, but the Arbitrator expressly found that this was not sufficient unless supported by some concrete manifestation of sovereignty. This is shown in the following passage, which I take from page 393 of a Verbatim Report of the Judgment as given in the *American Journal of International Law* for the year 1932 (I quote):

> "Moreover, the proof of an historic right of Mexico's is not supported by any manifestation of her sovereignty over the island, a sovereignty never exercised until the expedition of 1897; and the mere conviction that this was territory belonging to Mexico, although general and of long standing, cannot be retained."

That, I submit, would not be an unfair description of France's position in the present case.

May I here interpose an observation with regard to the question of maps. Professor Gros was at pains to show that, although the work of Stieler (to which I referred) marks both the Minquiers and the Écréhous as British, other, so to speak neutral maps do not. But even so, he was obliged to admit that a number of them do mark the Écréhous as British. Surely the real significance of these maps is this: that we have produced at least one neutral map-maker of great reputation and

authority who marks both groups as British. Our opponents have referred to a number of maps which do not mark one or both of the groups as British, but they have not produced any map, other than a French one, which marks either of the groups—let alone both—as French. Here again I must draw attention to the technique employed by our opponents in other instances in this case, and no doubt forced upon them by the circumstances, of merely criticizing the evidence we produce without producing any positive evidence in support of their own case. Here, it is not a large and important point, but it is a significant fact that we can point to at least one neutral atlas which marks both groups as British, and thereby affords positive evidence of some notoriety for the fact that they *are* British. Our opponents have not produced any evidence which would go to show that any neutral map-maker ever regarded either of the groups as French.

I now wish to refer, Mr. President, to the attempt made by Professor Gros to argue that the finding of this Court in the Norwegian Fisheries case had some bearing on the present matter. I wish very respectfully to enter a strong protest against the introduction of this case. It is, I suggest, completely irrelevant, and I submit that the Court should exclude from its mind any considerations based on the finding in the Fisheries case, because of the completely different nature of the issues which are involved. In the Fisheries case, there was *ex hypothesi* no question of sovereignty. All the islands and rocks concerned were Norwegian. It was simply a question of how Norwegian territorial waters were to be drawn. Here again Professor Gros, by implication, lays a claim not merely to the Minquiers and Écréhous, but to the whole of the Channel Islands, for his suggestion is, that if the islands all belonged to France, France would, applying the base-line principles sanctioned by the Court in the Norwegian case, be able to draw base-lines along the outermost fringe of the islands which would enclose them and all their waters right up to the French mainland coast as interior waters. Surely this hypothetical proposition has absolutely nothing to do with the issue of sovereignty before the Court. Yet it is apparent what Professor Gros is seeking to do when he produces that chart with red lines enclosing the whole of the Channel Islands. How can we possibly apply the principles of the Norwegian case to such a situation ?

One might just as well suggest that the United Kingdom, being in fact sovereign over the Channel Islands, would be entitled to draw base-lines round them which would enclose the whole of their waters, and draw some inference from these. But, of course, we have no intention of doing any such thing.

Mr. President, it has often been pointed out by eminent judges of many countries that there is nothing more dangerous or unscientific than to attempt to reason from the facts of one case to those of another : precedents and authorities are of value only in so far as they establish principles. I emphasized this in the reference I made to the *Palmas* and *Greenland* cases, and I was careful to limit myself to the use of statements of principle. In his attempt to influence the Court by reference to the Norwegian case, Professor Gros has not even pretended to show that some principle can be extracted from it which will help the Court to decide this case. This renders the Norwegian case wholly irrelevant, apart from any other distinction, and invites the Court to decide this

case against the United Kingdom on prejudice—an invitation which I believe this Court will reject with indignation.

Here I might also perhaps refer to Professor Gros's attempt to invoke Selden's doctrine of *mare clausum* against us. Surely everyone knows by now that this doctrine has been abandoned for centuries by the United Kingdom and that, so far from being advocates of any principle of *mare clausum*, our whole doctrine and policy is exactly the reverse. Surely, if anyone is attempting to apply a doctrine of *mare clausum* in this case, it must be France, for it is France who has so persistently claimed that the waters between Jersey and the French coast are "a sort of Anglo-French Mediterranean", a *mare nostrum*, a *mare commune*. It is we who have declined to subscribe to that idea.

But here again, Mr. President, surely such considerations are utterly and completely irrelevant to the question of sovereignty. Professor Gros said a great deal about the dominance of the land over the sea, but if such a principle was applied by the Court in the Norwegian Fisheries case, it was there applied for one purpose and for one purpose only, the *delimitation of territorial waters*. It has absolutely nothing to do with the question of *sovereignty over land*. Those are two entirely different things, and it is thoroughly bad law—I suggest—to compare them. Professor Gros's claim is not a claim that the land should dominate the sea, but that one piece of land should dominate another piece of land. For after all, the Minquiers and the Écréhous are land and not sea. Much of the difficulty in this case has arisen from the persistence with which France has sought to treat the disputed groups as if they were areas of sea and not pieces of land. I can only repeat that such considerations are not considerations of a legal character, such as ought to be taken into account by the Court. Alternatively, as I have said, if they have any relevance at all, there is no reason why they should operate any more in favour of France than in favour of Jersey.

May I say a final word about the position of Jersey in this matter. As I said earlier, on the United Kingdom side, this dispute, as a practical matter, interests principally the largely autonomous island of Jersey. We fully and entirely support Jersey, but it is a fact that the dispute has never been allowed to affect Anglo-French relations in their wider aspect. That this has been so has, of course, been due to the good sense over a long period of successive French and United Kingdom Governments. I would venture respectfully to differ from Professor Gros in this by suggesting that both Governments are entitled to the credit for this and not only (as he appears to suggest) France. The fact that the Parties have previously refrained from bringing their dispute to a head does not justify, however, what has actually been happening. And I must say here that, while fully appreciating that the reasons given by Professor Gros may have accounted for the failure of successive French Governments in the period between 1820 and 1950 to take any effective steps to pursue or prosecute the French claim, I cannot for a moment admit the validity of the implications which he sought to draw from that fact. For those considerations do no more than establish the *motives* which France may have had. Any government may have many motives for what it does or does not do. The assertion of a claim to territory has, after all, always been inclined to be somewhat disturbing to good relations between the countries concerned. If this were admitted as a valid reason for not asserting a claim, then surely governments

could always, on the plea of not wanting to prejudice good relations, let such matters go by default or assert their claims in a perfunctory and formal way, and then, years afterwards, say that the claim was still alive and they had in no way acquiesced in the situation. Now, of course, I am not suggesting that France has never made any protest. But we have suggested, and I maintain, that France's protests and assertions have been inadequate in the circumstances, given the nature and number of the United Kingdom acts. To a large extent, as we pointed out, Jersey has been allowed by France to go ahead, to undertake responsibilities, and to incur expenses in respect of these groups. Whatever the motives may have been which caused France not to assert her claim more insistently during this period, and however estimable those motives may have been, this fact surely cannot now be used to prejudice and defeat the perfectly just claim of Jersey. If any attempt is to be persisted in by Professor Gros to rely on such motives, it is legitimate to point out that if, as he has suggested, France was not anxious to give any cause for a possible rupture in the time of Fashoda, Madagascar and the rest, her reluctance to raise the question of the Écréhous and the Minquiers may well have been explained by the fact that France recognized that these were for all practical purposes a part of Jersey, and that, if she attempted to claim them, she would expose herself to the very charge of aggression which she was so very properly anxious to avoid.

Although I have been anxious to emphasize that this dispute is, as a practical matter, one primarily between France and Jersey, one which cannot by the wildest stretch of imagination be described as an attempt to extend the United Kingdom, I must repeat—what of course is already clear from the documents—that the United Kingdom Government has throughout supported, and now supports, the attitude adopted by the Jersey authorities in this matter, believing it to be right in law as well as just. Indeed, it is the view of the United Kingdom Government that it would be absurd to charge the island authorities with any intention of aggression vis-à-vis their larger neighbour, and that Jersey has throughout been concerned to do no more than preserve and maintain her own island heritage. If the Court declares (as we shall ask it to do) that (I quote from the final paragraph of our written Reply):

> "the United Kingdom is entitled, under international law, to full and undivided sovereignty over all those islets and rocks of the Minquiers and Écréhous groups which are physically capable of appropriation—"

if the Court makes that declaration—then, although, "as a matter of international law", the United Kingdom would have the sovereignty, in practice of course, and as a matter of domestic law, the groups would continue to be administered—as they always have been—by the insular authorities of Jersey, as dependencies of Jersey, and therefore would enjoy the same high degree of autonomy as Jersey herself. An award of these islands to the United Kingdom would therefore in no sense mean that the London Government would be exercising authority within a few miles of the French coast. Indeed, many of the anomalies to which our French friends have referred, in regard to this whole question of the Channel Islands lying on the French

rather than on the British side of the Channel, find their natural solution—as well as to some extent their historical justification—in the large measure of autonomy which is, and, throughout the centuries, has always been, enjoyed by the respective bailiwicks of Guernsey and Jersey.

Mr. President, France has nothing to fear or lose from any award of these groups to Jersey. We have shown that, even from the point of view of fisheries, which is the matter which has always been of most concern to successive French Governments, French interests will be adequately catered for, regardless of where the Court decides that the sovereignty lies. The Government of the Republic always made it perfectly clear that they would not agree to submit the sovereignty question to the Court without the prior, or, at any rate, the simultaneous, conclusion of an agreement on fisheries. The fact that they ratified the Fishery Agreement of 1951, and did so simultaneously with the Compromis, must prove beyond doubt that they have satisfied themselves on the fishery question. The fishermen of St. Malo, Granville, Carteret, Cameret and Chausey, to whom Professor Gros referred, have in fact no ground for any concern except in his fertile imagination. I can give the Court the fullest assurance that Jersey will faithfully honour all her obligations under the 1951 Agreement and that the French fishermen will be treated with scrupulous fairness, whatever the result of these proceedings may be.

Mr. President, I have made my own contributions to the discussion as brief as possible and limited them mainly to broad considerations, in order to avoid overlapping with my colleagues, who will be taking up Professor Gros on the points which particularly concern them. I now propose to leave the case in their hands, asking Professor Wade to follow me immediately, and I hope you and your colleagues will not consider it discourteous of me if I ask your permission to withdraw in order to attend to other official duties. But before I leave the Court, may I offer to all its members on behalf of my colleagues and myself our most respectful thanks for the patience and close attention with which you have listened to the arguments in this long and complicated case. As I believe the Court will appreciate, we considered long and anxiously whether it would be possible in some way to limit the material to be included in our pleadings and Annexes, so as to lessen the burden on the Court and narrow the areas of controversy. But we came to the conclusion that, in view particularly of the principle enunciated by Judge Huber, to which I have already referred, that the title must be considered as a whole over the entire relevant period, we had no alternative but to produce all the relevant material, however voluminous. This has inevitably complicated the proceedings, but we hope it has enabled the Court to approach the decision of this matter with full confidence that it is possessed of all the relevant material and therefore in a position to give judgment in accordance with the established principles of international law.

7. REPLY OF PROFESSOR WADE

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF OCTOBER 2nd AND 3rd, 1953

[Public sitting of October 2nd, 1953, morning]

Mr. President and Members of the Court, I start my reply by reminding the Court that our claim to original ancient title is a positive one based on uncontested historical facts, whereas that of our opponents is at least highly contestable. Our claim is that when William, Duke of Normandy, conquered England in 1066 and became King of England, his ancestors had already been established both in Normandy and in the Channel Islands for 150 years. This situation of fact the Government of the Republic does not deny, but it seeks to show that the Dukes of Normandy were always vassals of the King of France, bound to the King of France by ties of suzerainty. We contend that the Dukes held Normandy and conquered the Channel Islands as independent rulers.

Now in face of the factual situation, that is the possession by King John of the whole of the Channel Islands in 1202—England held them in 1202—which my opponent acknowledges, he still relies on the suzerainty of the French Kings. He says this must be presumed to be operative right down to the present time, even without any attempt by France throughout the centuries to support it by actual possession or even by administration from a relatively distant capital—Paris. This claim apparently only applies to the Minquiers and the Écréhous. It obviously cannot apply to the rest of the Channel Islands. The whole question is, Mr. President, in my submission, in what way do our opponents distinguish the Minquiers and the Écréhous from the rest of the Channel Islands?

Professor Gros has left the Court in no doubt as to the character of the original ancient title claimed by France. It is based exclusively on the feudal relationship between the French Kings and the Dukes of Normandy. The existence of this relationship we do not deny, but the question is what did it amount to, and did it involve sovereignty as we understand that concept to-day? Here may I say that I entirely agree with Professor Gros that we must interpret feudalism in terms of itself and according to the ideas of the period when it prevailed, but for that very reason, I submit, that we must not read modern concepts of sovereignty into a feudal relationship—suzerainty—which had no direct connection with any question of sovereignty as we know it in the nineteenth and twentieth centuries. On this point I would like to cite, and if I may adopt, Professor Gros's actual words which I take from the top of page 39 of the English translation [1] (p. 209 in the French text). Professor Gros said:

> "To-day we speak of State, sovereignty and territorial jurisdiction. At the time, however, when the events which are decisive for the determination of the present dispute occurred, these terms meant nothing. Not the least remarkable part of this dispute is

[1] English text not reproduced.

> the need to leave for a moment the more familiar notions and the more current legal terms and to try in some way to go back to a social and legal setting which has nothing in common with our present one."

In my original speech, I presented a certain view as to the character of the feudal relationship between the French Kings and the Norman rulers, particularly with reference to the period before 1066, before the date when William became King of England as well as Duke of Normandy. I now propose to reinforce that view by ample references and citations from standard French historians—or so I and my colleagues believe them to be—including authorities on whom my opponent, at all events, has relied. These authorities show that suzerainty in the tenth, eleventh and twelfth centuries was a very different thing from the conception of sovereignty known to international law. In fact those who owed suzerainty were as often as not entirely independent of their overlords, and in the case of the Dukes of Normandy usually so. Indeed, it was actually possible for a king to hold lands of his own subjects. This created a feudal relationship, but it obviously did not make the subject the sovereign of the king, but only his feudal seigneur in respect of those particular lands.

Professor Gros has attacked my exposition of Norman-French history with vigour. Of course the brunt of his attack had to be directed against the view I put forward that feudal suzerainty was not a link comparable with sovereignty. He even chided me with neglecting the views of that great English scholar Maitland on the reception of Normandy by Rollo in 911. This is indeed a dangerous allegation to make against any historian or lawyer from my University of Cambridge, particularly one who holds, however unworthily, the Chair which Maitland adorned with such distinction—as I have the honour to do. It will be within the recollection of the Court that I also cited the *History of English Law* by Sir Frederick Pollock and Frederick Maitland, on the nature of frankalmoin—another point. But I also cited Maitland's own work—his *Constitutional History*—on this very issue of the nature of the feudal tie. Like my opponent, I claim no omniscience in medieval history, and I, like he, have had much expert help from medievalists of distinction—not only a colleague at Cambridge, but in the Universities of London and Leeds, in particular Professor Plucknett, whose opinion on two important legal points is before the Court, and from Professor Le Patourel—while Oxford has made its conspicuous contribution through one of my colleagues on this delegation, namely Mr. Lambert, who is now a senior research officer at our Foreign Office.

In passing, may I say that we, for our part, do not share our opponent's disdain for Norman historians. I need not amplify that point which the Attorney-General has already made. We were aware, Mr. President, of the passage from Pollock and Maitland's book about the terms on which Rollo is said to have received Normandy from Charles the Simple—the passage which Professor Gros cited. But, after consideration, we preferred the passage which I cited to the Court from Maitland's *Constitutional History*. Actually there were two passages, and they will be found on page 107 of the printed Oral Arguments, so I need not read them. The reason for our preference was because the passages seemed to give a more realistic picture of the relationship of the Frankish Kings

to the Norman Dukes in the light of the views of French historians of the first rank. What I now want to do is to draw the attention of the Court to the impressive volume of authority, not merely from local, but from standard French historians, including a number cited by Professor Gros and the medieval experts who have helped him.

In order to save the time of the Court, I shall only give a limited number of citations from these historians—the remainder I have embodied in a separate note, and in order to avoid citing them all here and now, I shall hand copies of this note to the Registrar and ask that it may be appended as an annex [1] to my present speech, if the Court will allow me so to do. The historians concerned, from whom citations will be made, are, amongst others, the following: Michelet, Prentout, Luchaire, Bayet, Fliche, Lauer, Besnier, Halphen, Petit-Dutaillis.

I shall first give some extracts showing the general character of feudal suzerainty: the first from a work relied upon for one point by Professor Gros himself, namely, Petit-Dutaillis's (the famous French medievalist who died recently) *La Monarchie féodale en France et en Angleterre*. I begin with a citation from the introduction by Henri Berr, page X, summarizing the general character of the author's views. This says—I translate:

> "At the outset of the period covered by this book, one only finds seignories but not a State. The conception of a subject has become lost, the King is no more than a 'superior suzerain' at the summit of the 'feudal pyramid'. The kingship symbolizes a title rather than a power; it does not imply a kingdom: the individual power of the King at the beginning is ill-assorted, dispersed and incoherent. The kingdom will only come into being together with French unity little by little, particularly after the victory over the English and the Albigenses."

Then turning to the text itself, M. Petit-Dutaillis expressed the following views on pages 10 and 11:

> "The thing to do was to question the people of the country and, for example, to ask them what jurisdictions were exercised in their neighbourhoods. But the discussion was about justice and overlordship, not about sovereignty, and the disputes were inspired by feudal and not by national considerations. The feudal idea was relatively clear, but the idea of the State, of the frontiers of a State, of nationality, was shrouded in mist."

This last passage which I have just read to the Court shows the way in which feudal relationships cut entirely across what we should nowadays call national boundaries and had no direct connection with sovereignty as we understand it to-day. They created an order of a completely different kind. To such an extent was this true that, as I said, it was even possible for kings to hold of their own subjects. A striking example of this—which seems to us very pertinent in the present connection—is to be found in the fact that the Oriflamme, which became the standard of the Kings of France, was only the banner of a barony—a feudal barony—in respect of which those Kings of France were actually the vassals of the Abbey of St. Denis.

[1] See pp. 313-326.

A similar description is given by Augustin Fliche, another historian whom our opponents have cited in support of their view. In his *Histoire du moyen âge, 888-1125*, he says—and I read from pages 165 and 166:

> "In France, as in Italy, the Royal prerogatives had almost completely disappeared; an Otto the Great was not to be found who could restore monarchical authority. On the contrary, this did not cease to weaken as a result of a long period of dynastic struggles and the need, which the Carolingians and the Robertian Kings found to alienate the few rights which they had been able to retail in order to buy the support which was necessary to them. On the other hand, there was nothing in France which resembled the German Duchies: the kingdom was divided into twelve or fifteen principalities, without any well-defined ethnic character, whose chiefs, having assumed the titles of Dukes, Marquises or Counts, had very often gathered several Carolingian counties under their domination. These were veritable States, governed by hereditary dynasties and exercised the full powers of monarchs, less those which they had granted to seigneurs of lesser importance. In any case the King lost all power of control over them: indeed, only a few of these kings were able to preserve for themselves the right of nominating to a rare Bishopric. No one even thought of asking from the King a Charter and his suzerainty [and I would ask the Court to note these words particularly], though purely theoretical, was not able to exact from these vassals, though they were descendants of former Carolingian officials, any of the duties which came under the heading of fidelity [the essence of the feudal tie]. The seignorial régime had attained the height of its power: it was a long time before monarchy could re-conquer the rights which it had successively abandoned."

I now turn to Professor Gros's assertion that the Frankish Kings exercised real power. I take say three historians (all of national repute) at different periods of time, in reference to what they say about the days of Charles the Simple and Louis IV d'Outre-Mer.

Michelet, in his first volume, at page 409, *Histoire de France*, dealing with the alleged strength of Charles the Simple, who was finally deposed and imprisoned by his rivals, says:

> "Charles the Simple, recognized King in 899, by a large section of those who had tried to exclude him, reigned first of all for twenty-two years without opposition. It was during this space of time that he abandoned [the French word is *abandonné*] to the Norseman chief Rollo all his rights over the territory neighbouring the mouth of the Seine."

It may be said by Professor Gros that Michelet, though a national and not a mere provincial historian, was writing some time ago. What, therefore, does Lavisse's history—in which an imposing array of French professors collaborated—say? I read a short extract from Volume 2 at page 401:

> "The King [that is, Charles the Simple] abandoned a territory which the barbarians *occupied* in actual fact for a long time."

Here, too, the professors seem at variance with the contention of Professor Gros that

> "one cannot reasonably sustain that Rollo seized Normandy by force".

Perhaps I may be permitted to remark how this French point of view seems to have persisted until it was abandoned in this Court a few days ago. For, to take the evidence of a still more recent source (published just before the last war), Professor Louis Halphen in his *Peuples et Civilisations*, Volume V, page 301, says this :

> "Then [in 885] began a long series of operations which only ended in 911 by their [the Norsemen's] permanent installation officially recognized on the two banks of the Lower Seine.... The King of France, Charles the Simple, gave up trying to prevent the inevitable and Normandy was already to a large part occupied in 911, when a treaty concluded at Saint-Clair-sur-Epte between the Carolingians [that is, Charles the Simple] and the Scandinavian chief Rollo transformed into a legal state the factual state which, thanks to circumstances, the settlers from the North had been able to create in the country which still bears their name."

And one final short extract on this point. Professor Gros made a further point that Louis IV "gave" to the infant Duke Richard (that is, the son of William Longsword) once more the Duchy. It would seem to be more correct to say that he tried to take it away from him. For, to cite an authority submitted by my opponents themselves, Philippe Lauer, in his *Le Règne de Louis IV d'Outre-Mer*, wrote :

> "Normandy was from 943 to 945 the chief preoccupation of Louis. The situation of the country gave him the opportunity of developing the same activity he had already shown in regard to the events in Lorraine in 939. The result was no more fortunate, for after his captivity [Louis was defeated and captured by the Norsemen] his action in this country was neutralized, and his son Lothaire never received even the homage of Duke Richard."

And Lauer gives as his authority for this statement *Les derniers Carolingiens*, whose author, Lot, Professor Gros recognizes as a serious historian.

Mr. President, if you will allow me to do so, I should like to stop my argument until this afternoon at that point.

[Public sitting of October 2nd, 1953, afternoon]

Mr. President, Members of the Court, the Government of the Republic has founded its contention that the original title to the Channel Islands lies with France largely on the allegation that successive Dukes of Normandy did homage to the French Kings, and it has been suggested —indeed, rather more than suggested—that, if this was so, these Kings cannot have been so weak as we have argued that they were. I hope the Court will have seen from the passages which I have cited, and will also see from the further passages which will be found in the note which has now been deposited with the Court, that this view

represents a distortion of the position created by any homage which the Dukes may have rendered to the French Kings. We do not seek to deny that, from time to time, such homage was in fact rendered, but we do say that it was rendered largely as a matter of policy and convenience and that the recognition involved by the rendering of homage was that of a superior in rank rather than of a sovereign in a strict sense of the term. If I may give one more citation from Lauer's *Le Règne de Louis IV*, page 93; he is dealing with the position that William Longsword had been assassinated and was succeeded by Richard, who was a minor. In these circumstances, according to Lauer, it was the Norman Lords who did homage to the French King on behalf of the minor Duke Richard. Speaking of this, he says that some of the Lords paid homage to Louis himself and some to Hughes le Grand, Duke of France. The author continues (and I now cite):

> "The homage which they rendered was in any case only a provisional measure. It was to be anticipated that, as soon as their young Duke had attained his majority, they would throw off all foreign intervention and would exercise their autonomy as in the past."

Similarly, Pégot-Ogier, another historian who has been cited on behalf of the French Government, shows quite clearly that Richard and William's ancestor, Rollo, did homage purely as a matter of policy. In *Histoire des îles de la Manche*, at page 70, Pégot-Ogier writes:

> "When he was the victor, Rollo did homage and the King ceded territories to him."

The truth was that the Dukes of Normandy and later the Kings of England paid the French Kings homage when it suited them or when it was politic so to do. I give one or two examples of homage being rendered by English Kings. Thus Eustache, son of Stephen (whose title to the throne of England was doubtful), paid homage for Normandy when it was in possession of his rival, Mathilda, the daughter of Henry I of England, and her husband, the Count of Anjou.

Richard I of England paid homage when it suited him, and he did not hesitate to refuse to do it. John did homage for Normandy when his brother King Richard was captured (i.e. before he came to the throne), and he was conspiring with Philip Augustus against him.

Thus, even in relation to continental Normandy, the title based on suzerainty remained highly dubious, until Philip subdued that territory by force of arms after the *arrêt* and *défi* of 1202, which—and I think both sides are agreed as to this—broke the feudal link.

Subsequently, so far as the Kings of England were concerned and their other lands in France—there was no longer, of course, any question of Normandy—Edward II paid no homage whatsoever. Edward III paid homage only twice before he himself claimed the throne of France. And after Edward III no King of England paid homage for the holding of land in France at all.

I come now to two questions: where is the evidence of any homage or services being rendered by a Duke of Normandy to the French King in respect of the Channel Islands, as distinct from Normandy itself? And secondly, when did a King of France enforce his rights in these islands, either by conquest or by the normal feudal method of distraint,

if his dues were not paid to him ? I suggest that there is no evidence of this before the Court because these matters never happened, apart of course, from the very temporary occupation by force of arms in the years immediately succeeding the loss of the mainland by John and for a very few years at the beginning of the Hundred Years War. Those two occupations we have always, of course, admitted.

Now it is clear, even on the basis of a feudal tie—this tie of suzerainty —that feudal law requires this : the conception of seisin. It required actual physical rendering of homage and services for the enforcement of feudal obligations which were owed by a tenant to his overlord, just as actual physical possession by a tenant was always necessary to perfect his own right against his lord under a grant. Those applications of the feudal doctrine of seisin are, of course, a matter of law about which I do not think there is any dispute among the authorities, and Professor Plucknett in his book *The Legislation of Edward I*, at page 55, accepts that view and emphasizes it as being orthodox feudal law. If no French King, then, can be shown to have conquered the islands, apart from those two temporary phases of occupation, equally no Duke rendered homage or services to a King of France in respect of his ancestors' conquest and continued possession of those islands. The islands, in other words, were never French, but from the ninth and tenth centuries they represented conquests of Norsemen made by Dukes of Normandy, as independent rulers.

Now I was challenged to produce some evidence for the Norse character of the occupation of the Channel Islands, and that Norsemen—and I am prepared to concede Bretons as well—had conquered these islands. I can offer some evidence from the earliest island place names for the Norse character of the occupation of the Channel Islands, including an explanation of the name of the Écréhous themselves. There was very recently published (within the last year or two) by a contemporary historian, Balleine—I concede that he is a Jersey historian, a resident in Jersey—a history of the island of Jersey and, at page 26, we find this reference to place names :

> "Now we begin to find our earliest place names [this is Jersey], Norse names, given by the pirates as they sailed round the coasts. L'Etac, for example, which in old documents is always spelt 'L'Estak', is the Norse word "*stakh*", which means "a high rock". It is repeated again and again on the coast [says the author]— L'Etaquerel at St. Martin's, Etaquerel at St. Ouen's, the North and South Etacs off Grouville and the Gros Etacs off La Rocque. Etoc is one of the Écréhous."

I will not trouble the Court with more of that passage, but two more examples follow, a series of places connected with two Norse words— Holm and Gorroic. Now in addition to that interesting citation, the editor of the publications of the English Place Names Society has informed us that the derivation of the word "Écréhous" is indeed Scandinavian, the term "*ecre*" meaning a small ploughed field and the "*hos*" or "*hou*" being derived from the term "*haugre*", meaning a hillock. (A small ploughed island or hillock in the sea, I suppose, is the idea.) This seems to indicate that at any rate at one time the Écréhous did not consist of mere barren rocks : though I take this opportunity of removing one misconception which I have created in the minds of my

opponents—I never said in my opening speech that petty Norse Kings set up courts on these barren rocks. If I said it, I made a mistake; what I intended to say was that the Norse chieftains occupied the Channel Islands as a whole.

Now the only concrete argument which has been advanced in support of the view that the Dukes did homage of the Channel Islands is that given on page 208 of the transcript of Professor Gros's speech, where he quotes the chronicler Flodoard as stating that the French King gave the Duke (I quote Latin words now) : "*terram Brittonam in ora maritima sitam*". He deduces that what he calls this maritime territory of the Bretons (the translation that Professor Gros gives to that Latin phrase) must have comprised the Channel Islands. There is, however, I suggest, no particular reason for interpreting the phrase "*terram Brittonam in ora maritima sitam*" as covering an archipelago of islands in respect of which one would have supposed a different Latin phrase. The natural translation of "*ora maritima*", I suggest, would be "the shore" of "the coast", and it would primarily apply to the coastal districts or the mainland. My own translation would be "Breton territory sited along the coast".

Obviously, Mr. President, a great deal of obscurity surrounds and must surround questions of this sort at this distance of time. We would not presume to say that our view is necessarily unassailable. We can only say that it obviously has a considerable amount of reputable authority to support it. And I submit to the Court in the first place that, in the circumstances, our thesis of title acquired by conquest of the Channel Islands is quite as likely to be true as that of our opponents. And I make a second submission : that the Court can hardly regard as satisfactory a claim to ancient title to the Channel Islands, and in consequence to the Minquiers and the Écréhous ; one that is based on such considerable uncertainties, particularly when it is an ancient title of this kind, unsupported by hardly any other subsequent acts, which is put forward as virtually the sole foundation of the whole French claim to sovereignty.

I pass next to the consequences of the Judgment of 1202. Every argument that the Government of the Republic has put forward presupposes that the Channel Islands were a feudal entity under the suzerainty of the French King, and remained in that condition unless detached in some way. In particular, since John held all the islands in 1200—and this is not questioned—our opponents would argue that they all passed to Philip in 1202 under the alleged forfeiture, the date when Normandy did pass to him. Our opponents' arguments therefore, if valid, would enable them under an original title based on suzerainty to claim Jersey, Guernsey, Alderney and all the other islands, and we ask ourselves and we ask the Court, why is it that they do not claim them—why are the Minquiers and the Écréhous treated differently from the larger islands ? Now Professor Gros said—and I think I understood his answer aright—because there was a dismemberment after the Judgment of 1202. As a result of this dismemberment, he says, a distinction was established. Some of the islands—the major islands—remained English, and as regards them no more, of course, is heard of the plea of suzerainty. Some of the lesser islands, however, the argument runs, are said to have become French, but I am entitled to ask : where is the evidence of this split in the islands ? It is admitted as a fact by the

Government of the Republic that the Minquiers and the Écréhous, and indeed the Chausey, were in English hands before 1202—equally with Jersey, Guernsey and Alderney. By what process, then, does the position become reversed as regards these three groups of islands and these three groups of islands only? In my submission it is clearly for the Government of the Republic and not for the Government of the United Kingdom to show how this came about. The Government of the Republic have shown it in the case of Chausey. They have not shown it in the case of the Minquiers and the Écréhous. We need not, for present purposes, argue at exactly what date the Chausey passed finally into French hands. We know that it did so, and in the reply a considerable time was spent in this Court the other day in describing to the Court the process by which this transfer of the Chausey took place. If then a similar transfer took place in the case of the Minquiers and the Écréhous, why is it that the Government of the Republic is unable to tell the Court by what events that transfer of the Minquiers and the Écréhous took place?

Surely, Mr. President, the simple and obvious answer is that the transfer never did take place, for there would certainly be some evidence of it, as there is plenty of evidence of it in the case of the Chausey.

Perhaps the argument of our opponents could be put in another way. Since, as they allege, a dismemberment of French suzerainty alone gave the English Crown Jersey, we must show that a dismemberment in our favour also took place as regards Jersey's dependencies of the Minquiers and the Écréhous. The object of this line of argument is to escape from the dilemma which the suzerainty basis of title forces on our opponents when seeking to establish title to the minor islands, the Minquiers and Écréhous group alone. The Government of the Republic has got to show why it is that, although it cannot, on the basis of original French suzerainty, claim Jersey, Guernsey and Alderney, and the other islands to-day, yet they can nevertheless claim the Minquiers and the Écréhous. In fact, there could only be one valid basis for such a claim, and that would be if it could be shown that the Minquiers and the Écréhous, unlike all the other Channel Islands, all the major islands, had not remained in English hands, but like the Chausey, had passed into French hands. Now obviously this has not been proved in the proceedings before this Court, and it is surely for the Government of the Republic to prove it, and not for us. If I may repeat, there was a situation of fact before 1202—a situation that included the Minquiers and the Écréhous. That situation of fact, in our contention, exists to-day except as regards the Chausey. When and how did it cease to exist as regards the Minquiers and the Écréhous?

Now, Mr. President, not only is there no concrete evidence of such a change, but I contend that all the probabilities are against it. I have already drawn attention in my previous speech to the prevailing naval and military situation after the troubled time of 1202 onwards. I should like now to give some citations from French historians which very strongly reinforce the view that no dismemberment of the entity of the islands occurred after 1202. Indeed, the Government of the Republic does not claim this, except eventually in respect of Chausey. One point which all these historians stress is the determination of the

Channel Islanders themselves to remain independent subject to their attachment to the *English* Crown. It was this determination above all which ensured the non-success of the various French attempts after 1204, and again at the beginning of the Hundred Years War, to take the islands. I begin with a citation from Gibon, taken from an article in *Le Pays de Grapville* for January, 1910, and I have a little more confidence in putting forward *Le Pays de Granville* because it was put forward by Professor Gros in another context. On page 255 we find the following :

> "Above all [I now cite] the reason was, as in other ages unfortunately, the insufficiency of our Navy which prevented Philip Augustus from profiting by circumstances in order to keep in the same hand as Normandy all this archipelago which was in the nature of its natural extension. Successors of Philip Augustus did not trouble themselves sufficiently about the Channel Islands. Before as well as after the Hundred Years War the attempts they made (and there were a certain number) were never sustained as was necessary. Finally, we must take into account the feeling of attachment for the English King-Dukes which was deeply rooted in the hearts of the Islanders ; and their individuality, founded on a basis of independence, discovered moreover the greatest advantage in such a position."

In my opening speech I cited Besnier, Professor of History at Caen, as saying that the islands were detached from Normandy in fact in 1204 and in law by the Treaty of 1217, but I did not continue that passage, and I now do so. It is taken from page 736 of his article in Volume 58 of *Revue historique* in 1934. The passage continues :

> "They [that is, the Channel Islanders] struggled to assert their traditional privileges. First of all they succeeded in being treated as remnants of the vanished Duchy, linked to the King of England in his capacity as Duke of Normandy and not in his capacity as the English sovereign. The legal proceedings [that is, the *quo warranto* proceedings] of 1248, 1308 and 1331 show that the Islanders in the end attained moreover a really administrative, financial, judicial and even military autonomy. However, they did not succeed in gaining the legislative power which was less necessary at a time when disputes were settled on the basis of custom and equity."

And finally a third short passage from Perrot, a work entitled *Deux expéditions insulaires françaises* (p. 16) :

> "What emerges from a study of this history of the islands throughout the whole period is the desperate and fine energy with which the inhabitants defended their independence. They were, it is true, under the protection of England, but the latter had given a kind of autonomy and did not interfere in their internal affairs but contented herself with regarding them as free islands, which she was obliged to defend by her arms against any action undertaken by their neighbours."

I now pass to the question of the treaties, which, we claim in our opening speech, confirmed *de facto* and *de jure* our title to the Channel

Islands. The Government of the Republic admits that the effect of the Judgment of 1202 was to break the feudal link between the French King and the English King, though it is contended, of course, by them that it only did so in the sense of the return to the King of France of all the fiefs held of the Kingdom of France by the Duke of Normandy. In fact, however, we know that this return only took place in so far as Philip was able to enforce the Judgment by actually taking possession by force of arms, if need be. The feudal link itself was not re-established until the Treaty of 1259, and then only in respect of certain territories which in our contention quite clearly, on the true construction of the Treaty of 1259 (the Treaty of Paris), did not include any of the Channel Islands.

But before I come to the Treaty of Paris, to which I entirely agree great importance is rightly attached in this controversy, I must say something about the Treaty of Lambeth of 1217. The suggestion made by Professor Gros was that this Treaty can be disregarded because it was signed by Louis, son of the French King, and not by the King himself, and that it therefore lacked validity. I find it difficult, Mr President, to take that suggestion at all seriously, because, as I said before, this Treaty has to be read in the light of the political and military situation which existed at the time it was made. And what was that situation ? It followed upon the English naval victories of Damme and Sandwich and on a period of some twelve years, during which the French had made strenuous attempts to obtain possession of the Channel Islands. The real point of the Treaty was this : some of the Channel Islands in 1217 were still in the hands of the brothers or followers of a man called Eustace the Monk ; he was formerly in the service of the King of England, but he had deserted to the French in the course of the fighting for the islands. The Treaty involved a definite undertaking, which I shall show in a moment was carried out, that these followers of Eustace would be withdrawn by the French. The Treaty contains a condition for the restoration of the islands on the part of the followers of Eustace under pain of outlawry if they failed to do so—if they failed to restore the islands to the English King. Now Professor Gros said—and it is my contention that he was not correct in saying this—that in the event of disobedience to this order of restoring the islands to the French King, the islands were to remain outside the provisions of the Peace Treaty, which meant that they would remain with France. Now the words used—and I quote from the printed text given in Rymer's *Foedera* (the words are of course in Latin) : "*sint extra pacem istam*", i.e. outside this peace, i.e. the peace of Louis who made the Treaty, if the followers of Eustace disobeyed this condition. Those words are words which I understand are commonly used for the imposition of outlawry. In no sense is it true, then, as has been suggested to the Court, that the Treaty of Lambeth states explicitly that the islands had eluded the King of England. The only basis for that suggestion is the interpretation of those words "outside this peace" as meaning that —as Professor Gros said—the islands were to be outside the provisions of the Peace Treaty. But my contention is that those words mean, and can only mean, "outside this [the Dauphin of France's] peace", that the followers of Eustace would be outlawed by their King if they did not carry out the condition which he had imposed in the Treaty. There is a passage from Pégot-Ogier, one of the works which has been cited

to the Court on behalf of the Government of the Republic, on page 189 of *Histoire des îles de la Manche*. The Philippe d'Aubigny, who is mentioned in the extract, I should explain, was an English Admiral. He had commanded the English fleet which won the battle of Sandwich shortly before the Treaty of Lambeth, and at the time of the Treaty of Lambeth he had been appointed by the King as Warden of the Channel Islands. He was the King of England's Warden of the Channel Islands. Now the passage is this :

> "The archipelago was to be evacuated by the French in virtue of the Treaty signed by Louis of France. Philippe d'Aubigny assumed charge of the execution of this provision in the name of Henry III, who was a minor. By the 24th January 1218 he had retaken Jersey ; by the 13th February Guernsey, Alderney and Sark. Two instruments prove this officially. Nothing is known as to what became of the young Eustace. It is certain that there was no resistance, for the least actions of the Admiral were reported with care, and Eustace had probably abandoned the islands which it was no longer possible to defend contrary to the wishes of their inhabitants.
>
> The effective taking of possession of the islands [that is, by the English] resulted from an act of February 1219 ordering levy of the half tax, which was due to the Dukes of Normandy every three years....
>
> In 1219 Philippe, nephew of the Admiral, is made Warden of the archipelago, his uncle leaving for the Holy Land. On the 18th February 1220, a contribution towards his pilgrimage is demanded on the request of the King from the worthies of the islands."

It seems inconceivable in the circumstances that this expulsion of the followers of Eustace from the islands should not have extended to, and have included, the Minquiers and the Écréhous. I have mentioned in some little detail this matter of the Treaty of 1217 because it is only in the light of the situation created by that Treaty that the Treaty of Paris of 1259 must be appreciated. Taken in conjunction with the various acts relative to the Channel Islands which were referred to in my previous speech, where I selected three events in this intervening period between 1217 and 1259 as emphasizing the English King's position in the islands, and other acts which are mentioned in our pleadings, there can, in my submission, be no doubt at all that at the date of the Treaty of 1259 all the Channel Islands had been fully restored to English hands for over forty years.

The Treaty of Paris is the first full treaty after the unchallenged possession of the Channel Islands had been secured by the English Kings. Not unnaturally, Professor Gros attaches importance to this document. If he can establish the interpretation which he offered to the Court the other day, it would then become unnecessary for him, as I see it, to rely on the dubious feudal suzerainty to establish the French original title.

Mr. President, I took up a good deal of the time of the Court on the previous occasion in submitting my views as to the interpretation of the relevant Articles, 4 and 6, and the Court will find my argument reproduced at pages 115 and 116 of the printed proceedings. And I do

not venture to-day to repeat that argument ; I am quite content, if I may say so, for the Court to weigh the construction of Articles 4 and 6 which I offered there, against the reading of the text which Professor Gros has since offered : and I am hopeful that the comparison will show that my interpretation is not merely far simpler but is more probable. Perhaps I might be allowed to recall to the Court that my argument was based on the following points : I will do so, if I may, quite briefly. The text of the Treaty is to be found as Annex A 1 of the United Kingdom Memorial, pages 142 and 143. The Court will remember that the first point I made was this : the Channel Islands, despite strenuous attempts by the French Kings, were definitely not conquered and held by the French after 1202. All the evidence is that after a temporary period of occupation, they reverted to and remained possessions of the Kings of England. Secondly, that although Article 4 of the Treaty relates to islands, if any there be, which the King of England holds which are of the realm of France, it is clear from the context of Article 4 that these islands refer only to islands in the Bay of Biscay—to the West of France, and not islands to the North of France. That, in very summary form, was my interpretation of Article 4.

I hope I am not doing Professor Gros any injustice if I say that he seems to brush aside the geographical factor which points to the islands referred to as being off the West coast of France : islands held by the English King as Peer of France and Duke of Aquitaine. And reading his argument in the transcript, I should like to suggest to him that he has stated incorrectly that we contended in our Reply that Article 4 was concerned with the Channel Islands. I have studied our Reply very carefully in the light of what Professor Gros said, and I can only arrive at the conclusion that we said precisely the opposite in paragraphs 123-125 in the Reply of the United Kingdom Government in the written pleadings.

Now turning to Article 6, that Article, as the Court knows, dealt only with what the King of England renounced, as distinct from Article 4, which dealt with what the King of England was to hold. Now so far as it related to islands, the King of England gave up only the islands "if any are held by us or by our brother, or by others in our or their behalf and all arrears"—in other words, the King of England only gave up the islands if any there were which were held by the French King or by his brother or by persons on the French King's behalf. That the Channel Islands were not so held is, in my submission, perfectly clear, even if we were to accept the view that there was some doubt about the Treaty of Lambeth, because there is no doubt that the attempts to wrest the Channel Islands from King John ceased by 1218 and were not renewed for 120 years. Now if my opponent could show that the Minquiers and the Écréhous were in a different situation from that and that they were held by the French King at any time during that period, then he would admittedly be in a strong position, but I say again, there is no evidence before the Court to show that the Minquiers and the Écréhous were excepted from this situation. So even apart from the confirmation by this Treaty, this long possession was sufficient to confer title, as we know it did, in the case of the larger Channel Islands.

Therefore, during this period continuous and effective possession by the English Kings extends from 1217, interrupted for a few years at the beginning of the Hundred Years War, resumed again in 1345, and

it has continued right down to the present day. And in that period there is this confirmation to be deduced from what I submit is the correct reading of the Treaty of Paris, that the Channel Islands must have been part of the possessions of the King of England. By the standards of modern international law, this, surely, should be conclusive, unless—and I apologize for keeping harping back to this point, but I do think that it is vital to the case—unless the Government of the Republic can show that this continuous and effective possession for some reason still unexplained did not apply to the Minquiers and the Écréhous. If, as the result of the attempts by the French on the Channel Islands at the beginning of the thirteenth century and again at the beginning of the Hundred Years War, the Minquiers and the Écréhous *had* remained in French hands, we contend that there must have been some evidence of this, whereas in fact there is absolutely none.

The next treaty about which I must say a word, Mr. President, is the Treaty of Brétigny (Calais) of 1360 (we have printed it under the title of the Treaty of Calais as Annex 2, or rather we have printed the vital article, the only one that Professor Gros and I have discussed before the Court). The vital phrase is the one in Article 6, which provides that the King of England and his successors shall have and hold all the "islands adjacent to the lands, the countries and places above named, together with *all other islands which the King of England now holds*". Now the obvious meaning of that phraseology, in my submission, is that it is confirming the title of the English King to all the islands then held by him. Against that, Professor Gros says that to say that the King of England *shall hold* all the islands which he *does hold* would be a formula entirely devoid of meaning. But, I ask the Court, is that so ? The meaning seems clear—the King of England was confirmed by this formal document—was confirmed in the possession of what he actually held. Provisions of this kind were common form in treaties of peace, and that is really all that I have to say about the matter. Here is a common formula in a treaty of peace, confirming existing holdings. The other explanation which was offered to the Court by my opponent was why the Channel Islands were not mentioned by name. Well now, that explanation was not supported by any reference to authority and again, looking at the political background, I find it so improbable that I cannot accept it. Given the recent defeats of the French and the fact that the King of France was, at this time, actually a prisoner in English hands, it really cannot be supposed that the King of England wanted to reserve the right to claim islands on which he had not yet established himself and which might elude him. But that was the explanation that Professor Gros offered. The King of England wanted to reserve the right to claim the islands on which he had not yet established himself and which might elude him. Surely, Mr. President, the simple reason why the islands were not mentioned by name was, as I have been trying to show throughout this afternoon, that they were held by England. Not only at this time was the King of France a prisoner of the King of England ; Normandy was virtually in his hands, and even Reims was being besieged by the forces of the English King. Now I will refrain at this point from quoting any French historians on the state of France at this time because they are all agreed that the state of France was desperate. So far as the Channel Islands were concerned, all of them at this time were in the English King's possession.

The next point upon which Professor Gros and I differ was with regard to the passing of the feudal system. I was particularly careful in my original speech (I refer to p. 121) not to give any particular date for this event—the passing of the feudal system—for it was obviously a gradual process. I did give a date, I said that the traditional date from the point of view of prescribing periods of study of history at the end of the Middle Ages was 1485, but I did not say, or I certainly did not intend to convey, that I was pin-pointing to 1485 as being the end of the feudal system. But obviously the end of the feudal system was a gradual process, and what we do know is that at some point the system did pass away and with it necessarily all rights which had a purely feudal basis. And so I repeat our contention that, with the passing of the feudal system, unless the original French title, based on nothing but feudal suzerainty, had, at the time of the passing of the feudal system, been superseded by some other basis of title—such as a treaty, or cession, or effective possession and control—conquest—then this original title, the suzerainty title, the title that depended entirely on feudal considerations, must have lapsed. Now the answer offered on behalf of the Government of the Republic was to mention, in particular, the example of the Republic of Andorra. We were told, and I have no reason to question it, that the Presidents of the French Republic have succeeded to the ancient rights of the Counts of Foix. But if the Presidents of the French Republic, succeeding to the rights of the French Kings, who in turn succeeded to the ancient rights of the Counts of Foix—if they have succeeded to those ancient rights, surely it is precisely because the French Kings, and now, in succession, the French Presidents, became sovereign and directly sovereign—not on a feudal basis, but on the basis of central administration from Paris—over the territory that was formerly within the jurisdiction of the Counts of Foix. Now that is precisely what has never happened in the case of the Channel Islands. There are now—and this has been a state extending over many hundreds of years now—there are now no feudal rights, and therefore, unless the alleged French title to the Channel Islands can be shown to have some other basis to-day than that of a purely feudal right, then, in my submission, it cannot possibly exist.

I now turn to another matter. I noted that Professor Gros did not offer the Court an alternative explanation to the admission that was made by the Abbot of Mont-St.-Michel, and secondly—this was not an admission—to an actual ruling of the Court of the French King —both of which stated that the Chausey were in *regno anglie*. Those were the matters in the first half of the fourteenth century. In dealing with this question of Chausey, Professor Gros concentrated on the question of the validity of the Papal Bull of Alexander VI, very much later, 1500. Now, it is my contention that the validity of the Bull—and if I understand him aright he questioned both its authenticity and its validity—surely those matters, particularly the validity of the Bull, is not the point. Whether the Papal Bull was technically valid or not, and whether the transfer of the Channel Islands which that Bull decreed from the diocese of Coutances to the diocese of Winchester, whether it actually took place and, if so, when, are not so important as the fact that here is this document offering evidence of the fact that all the Channel Islands, including Chausey, and there-

fore *a fortiori* groups much closer to Jersey—the Minquiers and the Écréhous—were placed on record in 1500, as they had been both by the French Abbot and by the decree of the Court 170 years earlier, as being in English hands, and the phraseology was *sub suo temporali dominio* of King Henry VII of England—under the temporal rule of King Henry VII of England. So it seems to me that this disposes of the point that the sovereignty of the King of England cannot be deduced from the terms of the Bull, unless, of course, Professor Gros —and I do not think he intended to—wanted to suggest this to the Court, unless he was going to say the whole document was a fake—but here is a document of an official character which states that this area, the Chausey, are under the temporal dominion of the King of England. And if temporal dominion is not equivalent to sovereignty, I do not know what is. Now on the question of validity, even if the Bull was never acted upon as regards the Chausey—as Professor Gros states—there is no doubt whatever that it was operative some years later in the case of all the other Channel Islands named in it, Jersey, Guernsey, Alderney, Herm and Sark, the five others named along with Chausey in the document. And this transfer to the diocese of Winchester of these five named Channel Islands is actually in operation now, in 1953—they remain attached to the English diocese presided over by the Bishop of Winchester. Although I think the historians are agreed that the Bull was not put into operation immediately, its terms were put into operation eventually by the intervention of Elizabeth I of England, and that was done by a document referred to in this short extract from Sélosse's book *L'Île de Serk* (I translate from p. 28). Dealing with this ecclesiastical situation created by the Bull and its non-fulfilment in certain areas, he says :

> "The situation was too paradoxical to be allowed to be continued any longer ; a letter of Queen Elizabeth, dated 15th March 1568, put an end to it by declaring the islands to be for ever separated from the bishopric of Coutances and attached to the bishopric of Winchester."

Mr. President, my next section is rather longer—considerably longer than most of the sections with which I have been dealing this afternoon because I shall there be dealing with the interpretation by the French experts of the grant in frankalmoin—I leave myself in the hands of the Court as to whether I should start that this evening or whether they would prefer me to resume there to-morrow morning.

[Public sitting of October 3rd, 1953, morning]

Mr. President, in my speech yesterday, I dealt mainly with the oral arguments of the Government of the Republic relating to suzerainty, to the alleged dismemberment of the Channel Islands, and commented on the failure to separate the Minquiers and the Écréhous from the Channel Islands, and finally with the treaties and their application to the Channel Islands.

This morning I start an argument on a point of law which relates specifically to title to the Écréhous. I will examine the interpretation by the French experts of the grant in frankalmoin by Piers to the

Abbey of Val Richer in 1203. That is the document which has been referred to so often in these proceedings, reproduced on pages 155 and 156 of the Annex to our Memorial—Annex 7—and I shall refer as I go along to the text.

Professor Gros contended that the grant was of such a nature that Piers ceased to have any interest in the land, and that the result of this was to leave the grantee—that is, the Abbey of Val Richer—in direct feudal relationship with King John as Duke of Normandy. He argued that when, in 1204, John, in the capacity of Duke of Normandy, lost continental Normandy, where Val Richer was situated, the Abbey thenceforth held the Écréhous directly of the French King, who had succeeded by conquest to the Duke of Normandy with regard to Normandy itself. This argument, to a lawyer trained in property law, seems untenable, because it involves substitution, whereas such a grant at this date had to be by way of sub-infeudation. The argument depends on two points. The first point which Professor Gros took was the alleged failure by the grantor of this Charter of 1203, Piers de Préaux, to reserve in the Charter any interest for himself in making the grant in frankalmoin. If the Court will be good enough to refer again to the Charter, and particularly to the passage beginning at line 6 of the printed text (the translation on p. 155), it will see that Piers expressly reserved the following services: namely, in order that divine mysteries be daily celebrated there in the Priory on the Écréhous, for the salvation of the soul of John, *but also for the souls of himself [Piers] and of his father and mother and all his ancestors*. Now those, Mr. President, were the only services which Piers could have reserved in a grant in frankalmoin; yet the Court is asked by the Government of the Republic to say that Piers, the grantor, reserved no rights for himself, whereas the true position, I submit, is that he reserved for himself and in respect of his relatives the *only* services which he could have reserved in a grant of this character. If I am right in that contention, the whole foundation for the claim that the Abbey of Val Richer held the land free from services owed to Piers falls to the ground. There is, I contend, no reason whatever for interpreting this particular grant as anything more than an ordinary grant in frankalmoin by sub-infeudation, whereby services were reserved for John, the overlord of the grantor—prayers for the salvation of the soul of John, illustrious King of England—and also for the grantor, Piers himself—prayers for him and his father and mother and his ancestors; the ordinary formula in such cases. There was then no break in the three links of the feudal chain which bound, first, the Abbey of Val Richer to Piers, and then Piers to King John of England. There is another point which has not so far been mentioned in these proceedings: Piers could himself have claimed enforcement in an ecclesiastical court if the Abbot had failed in performing the divine mysteries to pray for the salvation, first, of the King, and secondly, of the grantor. I support that proposition by citing once more from Maitland—page 25 of his *Constitutional History*, where he begins his description of the various feudal tenures by dealing first with frankalmoin. I now read the text:

> "I mention frankalmoign first; it can be very briefly dismissed, but is instructive as showing how far the theory of tenure has been pressed. Sometimes religious bodies and religious persons,

> monasteries, bishops, parsons, hold land for which they do no earthly service to the lord. They are said to hold by way of free alms, free charity, *per liberam elemosynam,* in frankalmoign. The theory of tenure, however, is saved by the doctrine that they owe spiritual service, that they are bound to pray for the soul of the donor who has given them this land, and this duty can be enforced by spiritual censures in the ecclesiastical courts."

My second point is this. Professor Gros cited Tardif *(The Custom of Normandy)* for the proposition that land held in alms by a church cannot be burdened with service *(servitium)* which is of the essence of a fief. His comment was that this is in sharp contradistinction to the notion of a fee and therefore to sub-infeudation. Now it was of the essence of a fief held of spiritual tenures that ecclesiastical, but not lay services, were rendered—as the passage which I have just read to the Court confirms. Now the Government of the Republic has admitted that this grant to Piers by the Abbey of Val Richer did create a feudal tenure. That was denied in the Counter-Memorial in the written pleadings but conceded in the Reply. But there could not, in fact, be such a thing as a feudal tenure which was not the tenure of a fief, whether the services were lay or spiritual. It must then be deduced that, in the passage to which Professor Gros referred, Tardif was referring only to lay services and did not include spiritual services when he said that land held in alms by a church could not be burdened by services. It follows that as in the case of all other feudal tenures, tenure in frankalmoin could only be created by way of sub-infeudation and that necessarily left the grantor —in this case, Piers—as the intermediate link in the feudal chain. The link was Piers, in the middle of the three links of the chain, who remained bound to John who had granted him the land by the Charter of 1200, and by the Charter of 1203, he himself (Piers) was linked to the Abbey of Val Richer. Correspondingly, the Abbey of Val Richer owed him (Piers) services.

Now when the French argument says that *servitium* (service) is of the essence of a fief, I must point out that this was not necessarily so. The essence of a fief in the feudal system was the personal relationship between lord and tenant, and a fief existed even if the services were purely nominal. And if any confirmation of that be needed, the Court can find it in the contentions which my opponents have put forward with regard to the rendering of homage.

So far was the Norman custom from being in any way contrary to the position which I have just described that—and I now cite from paragraph 7 on page 615 of the printed opinion of Professor Plucknett :

> "Indeed, the Norman conception of alms passed to England where it became a rule of law that a tenure in alms can only be created by subinfeudation."

Professor Plucknett goes on, in the Opinion, to support this by quoting two of the most famous old law books in English legal literature —Littleton on *Tenures*, and Coke's *First Institutes*. He makes the further striking point that, in England, gifts in alms, that is, gifts in frankalmoin, became impossible after the year 1290—over 80 years later than the date of the document we are now discussing—because in 1290 the statute known as the statute *Quia Emptores* was passed, forbidding

grants by way of sub-infeudation and, since tenure in frankalmoin could be created in no other way than by sub-infeudation, no tenures of that kind could thereafter be granted. And every English real property lawyer knows that there was no grant in frankalmoin valid in England after 1290.

Professor Gros has also argued that the second grant in the Charter of 1203—the one that begins just over halfway down the text : "I have further granted to the aforesaid monks whatever by my men of Jersey, and of Guernsey, and of Alderney, having regard to charity, shall be reasonably given to them, saving my right." He has argued that that second grant was evidence that Piers renounced all his rights in the Écréhous. But the words "saving my right" (in the original text, *salvo meo jure*) were a phrase commonly used, and most certainly meant that the confirmation by Piers of the grants which his men made to the monks on the Écréhous was made subject to the reservation that his own rights—Piers's own rights—should not thereby be prejudiced. These gifts on the part of Piers's own tenants must not diminish the services in respect of those tenants' holdings in the islands of Jersey, Guernsey and Alderney which they owed to Piers, lord of all the islands. In my view, Mr. President, no other construction of that second gift is plausible.

At the end of the first day of his speech, Professor Gros laid considerable stress on the fact that a Frenchman, Guillaume d'Argences, made a grant in 1209 to the Priory of the Écréhous. The United Kingdom Government pointed out in their Reply (paras. 164 and 165) that national consciousness was not at this date so strong as to override a spiritual desire to make gifts to religious foundations with which a man might have some connection, irrespective of the territory on which they stood.

If any significance is to be attached to this donation by Guillaume, the Frenchman, to the Priory of the Écréhous, we must take into consideration the following facts. Firstly, this gift was made in 1209 when the French may well have been in temporary occupation of some of the Channel Islands. In the second place, we have evidence from the early fifteenth century Rental which is reproduced at Annex A 18, the Rental showing the endowments of the Priory at the Écréhous in Jersey, Guernsey and France—a long list occupying the whole page in small print—that more than thirty Jerseymen had made gifts to the Priory, some probably over a long period of years after 1203—one date mentioned in the document is the year 1235. It is at all events unlikely that all this long list of gifts would have been made at this date, but the real significance of the document is that it shows that some thirty Jerseymen had made gifts to the Priory and the incident discussed by my opponent refers to one gift by a Frenchman. Now, assuming that local considerations were a factor in inspiring gifts, surely the fact that some thirty Jerseymen made gifts to the daughter house of a French Abbey would indicate that such daughter house stood on Jersey—that is local—soil. They might have been expected to demand this territorial link to prompt their gifts. On the other hand, the one Frenchman, Guillaume, had at least the link that the Priory, though standing on Jersey soil, English soil, was controlled by a mother house on French soil.

If any evidence of the reliability of this gift is to be found in these donations, it tells more weightily in favour of the United Kingdom. I might put it on the basis of 30 : 1.

I now turn to the *quo warranto* proceedings of 1309, which the Court will remember also related to the Priory on the Écréhous ; the proceedings which dealt with the advowson of the Écréhous itself and two of its endowments—a mill and rents—on the island of Jersey. In the first place, so far as the title to the advowson is concerned, these proceedings could never have been entertained at all by a Court of the King of England sitting in Jersey or anywhere else on English territory unless the advowson was within its jurisdiction. I made that point before, Mr. President, and I assert it again with some confidence, because I happen to have made, independently of this case, a considerable study of this type of proceeding. An advowson is a right of property in land, a right relating to immovable property, and the only basis of jurisdiction in respect of it was and is that the right is situated within the King's territories—the right is attached to land, that means that the land must be situated in the King's territories. This, moreover, confirms the contention which I have just put before the Court that the grant in frankalmoin of 1203 was simply an ordinary grant in frankalmoin by sub-infeudation and therefore left the Écréhous within that part of the Kingdom of England—the Channel Islands—which had come to the Kingdom through the Duke of Normandy. If, as was contended by my opponent, the Écréhous became part of the territories of the King of France, his Norman territories after 1204, the claim in 1309 could never have been entertained in an English Court.

Professor Gros attempted to dismiss that part of the proceedings (translated on p. 158 of the Annexes) which related to the advowson as being of an ancillary character, but I rely on the text itself as showing that the plea relating to the mill in Jersey and the advowson of the Écréhous puts both those property rights on an equal footing. If there is a secondary summons, the text shows that it related to the other endowment, the 20/— rental in Jersey. Further, it is argued against my view that the judgment of the Court did not refer to the advowson and the justification for that it is sought by the French experts in the concluding sentence of the Plea Roll: "Therefore it is permitted to the said Prior to hold the *premises*"—that is the relevant word—"as he holds them as long as it shall please the lord the King." Now Professor Gros denies that that is an adjudication by the Court, but what meaning can be attached to this concluding sentence except that it is a decision of the Court that the Prior shall hold the premises subject to the pleasure of the King on the same basis as he held them before his summons to the King's court ? The word "premises" in this connection can only mean all the disputed rights which had been detailed above in the Court Roll extract, that is the advowson of the Écréhous, the mill in Jersey, and the rent of 20/—.

Right down to the present day, transfers of land, transfers of immovables, under English law, use the expression "premises" to cover comprehensively all that has been earlier on detailed in the transfer, and no English lawyer at all events would have any shadow of doubt as to the meaning of the word "premises" in a document of this description. Finally, on these proceedings before the King's Justices in 1309, the French case, both in the written pleadings and in the speech to the Court, has misunderstood the importance of the Court proceedings and the reason why they are relied upon by the United Kingdom. We rely on these proceedings simply and solely to indicate that the Court was

exercising jurisdiction over a right of property within the King's territory, this being, as I have said, the only possible basis for the jurisdiction of the Court. It is quite immaterial for this purpose whether the King or the Abbot was entitled to the ownership of the advowson. The proceedings show that English jurisdiction was being exercised over the Écréhous more than a hundred years after the separation of the Channel Islands from continental Normandy.

I pass now, Mr. President, to the Letters of Protection. As a preliminary point I would draw the attention of the Court and of my opponent to the fact that I carefully answered the statement, which was made in the French Rejoinder and was repeated earlier this week by Professor Gros, that we had not shown the precise wording of the Letters of Protection. We printed the wording of the Letters of Protection, as I explained to the Court on page 137 of the printed transcript, as Annex 17 of the Memorial: there has never been any attempt to withhold the actual wording of the Letters of Protection, and I explained the passage to which I refer in my previous speech—the reason why the Letters are not reproduced verbatim in the case of every Prior to whom they were addressed. The wording of the Letters was identical in each case.

Nor does Professor Gros's speech explain the point which I elaborated in the same passage, and on the following page 138, why the Latin word *de* means *of* on the first and third occasions when it is used to describe the Prior of the Écréhous of the island of Jersey, and yet means *touching* or *concerning* or *as to* on the second occasion when it is used in this phrase, and in the identical description of all the other Priors who received these identical Royal Letters of Protection. I say, as I said on the previous occasion, that to argue that the second time of its use in each phrase *de* means *touching*, *concerning* or *as to* not only distorts the sense of the phrase but also makes nonsense of it in relation to the several other Priors names, whose priories were physically of Jersey, being situated on the island itself. I will not trouble the Court with my full argument on that, because it is there in the passage to which I have referred: but I do appeal to a rule of interpretation which I believe to be universally accepted by courts of law that the natural meaning should be attributed to a word unless the context compels otherwise. In this case there is no such compulsion, and the phrase "Prior of the Écréhous of the island of Jersey" means what it says, namely, that the Écréhous is part of the island of Jersey just as much as the other priories mentioned in the Royal Letters of Protection, such as the Priory of Bonne Nuit, which is in Jersey itself, and the Priory of St. Peter, which is equally on the main island.

I was referring, Mr. President, a few minutes ago to the matter of the Rentals (the next annex, Annex 18) when I was dealing with the gift of Guillaume d'Argences in 1209, and I pointed out that any significance these Rentals may have is weighted heavily in favour of the United Kingdom by reason of the numerous gifts made by Jerseymen to their Priory on the Écréhous, as against the single gift made by the Frenchmen living in France. With regard to subsequent proceedings which affected the Priory on the Écréhous, Professor Gros and I are mainly in agreement, except on the question of the confiscation of the Priory. Here it is the French case that we have offered no evidence of the confiscation of this Priory. The Court is therefore asked to deduce that the Priory was not confiscated because it was not on English soil.

The evidence offered to support this argument was that Hermant, a local historian of a later date, alleged that the Priory was destroyed by English soldiers as an act of war carried out on foreign territory in the reign of Queen Elizabeth. A far more plausible explanation—or explanations, rather—is either the Priory had fallen into disuse because of the poverty of its endowments and the lack of interest on the part of the mother house of Val Richer, partly because of this same poverty and partly because of the fact that the Priory was on English soil. Or its disappearance may have been the result of the confiscation of its endowments. Priories themselves, as is well-known, were not always confiscated; the confiscation of their endowments was sometimes considered sufficient and, of course, because of such confiscation the priories inevitably ceased to function.

When we turned to the Minquiers, Professor Gros did not repeat the explanation of the Dumaresq case, 1692, which was given in the French Rejoinder, as possibly arising out of a state of war between England and France. I am therefore entitled to assume that he accepted my argument on that point. But he did lightly dismiss the proceedings in the Noirmont Court—the earlier proceedings of 1615 to 1617—as having no bearing on sovereignty because, he said, the Court was simply a manorial court and this was an instance of seignorial jurisdiction and nothing more. He did not, however, deny my statement that in 1615 and, indeed, right on until 1646, the Kings of England held this particular manor of Noirmont in their own hands. It was in 1646 that King Charles I granted this manor to one de Carteret, whose family is still a prominent family of landowners in the island. But Professor Gros asserted, as the French printed case has asserted more than once, that the wreck cases are to be explained as examples of seignorial jurisdiction over wreck in Jersey exercised *ratione personæ*. I agree that in his speech he did not use the words *ratione personæ* again, but he dismissed the proceedings as being the exercise of jurisdiction by a lord of the manor over his men. I hope, Mr. President, that I have convinced the Court in my earlier speech that such jurisdiction would be contrary to Jersey and English law and to feudal principles. Jersey and English law on this subject are based on territorial jurisdiction alone, as, of course, was feudal law, depending as it did on the tenure of land: and I repeat that it is only by treating the Minquiers as part of this Jersey manor of Noirmont that the case of the anchor found at the Minquiers and taken to St.-Malo is explicable. The explanation also fits the other cases: the court had jurisdiction because the anchor and the other articles were found on Noirmont territory in the Minquiers.

Professor Gros concluded that neither side has any proof to offer as to possession of the Minquiers. We, for our part, gladly accept that view as regards the Government of the Republic. But these proceedings in wreck, put at their lowest, do enforce the strong presumption that the possession of all the Channel Islands in the English King established not later than 1217, as we are agreed, still remained undisturbed as regards the Minquiers centuries later.

I return last to Chausey. The Court may recollect that my statement was that it was not until 1764 that Chausey finally and firmly became French. Not till rather later were the 53 islets which formed the Chausey group formally incorporated into the appropriate Department of the mainland of France, omitting significantly all mention

(collectively or individually) of the Minquiers, which my opponent has alleged were dependencies of Chausey. I am quite prepared to accept Professor Gros's statement that in the seventeenth century (very troublous days in England on account of the Civil War), England may only have occupied Chausey on two occasions. But in the eighteenth century Gibon, at all events, leaves his reader in no doubt that the islands were still the subject of intermittent possession, first by one country and then by the other, and often in a kind of neutral position.

I conclude, as did Professor Gros, by relating this enquiry into the thousand-year title to the doctrine accepted in the *Eastern Greenland* case, that relatively few acts of sovereignty need be proved in cases where the other claimant cannot make out superior acts. In the present dispute I might claim to rely on only one or two acts, since the Government of the Republic has still not established a single effective act of possession or assertion of title before 1800, with the exception of the incident where a French official rejected the claim of a man of dubious character to a concession on one of the islets in the eighteenth century.

But we, Mr. President, have been able to show some evidence in every century relating to both or one or other of the groups. Is it not then established that the English Crown was sovereign in these groups, the Minquiers and the Écréhous, in 1800, and *a fortiori* in 1839? It is true that Professor Gros has challenged much of the historical account by which, in my first speech, I tried to unravel the title to these islets. But I hope that yesterday and to-day I may have shown how unjustified that challenge has been. In particular, it seems to me to lose much of its force for three reasons. At the outset, my opponent's speech threw over the views of the great majority of French medieval historians as to the real character of suzerainty, and that on an issue which is vital to the whole French claim to original title. The challenge is further weakened by the interpretation which was sought to be put upon the Treaty of Paris, the mis-reading of our contention in the Reply (paras. 123 *ff*) and, moreover, the confusion about our arguments relating to categories of islands off Aquitaine and Normandy with the point made by my opponent about the dismemberment of the Channel Islands after 1204, matters which emerged from studying his speech at pages 44 and 45 of the typed version[1]. Finally, on the issue of title to the Écréhous, that of frankalmoin, the Court has been asked by my colleague to reject the grant of 1203 as being an ordinary grant in frankalmoin (as I have shown it to be) in favour of a form of grant in which the grantor deliberately deprived himself of all his existing rights in the land, without the consent of his overlord—which, I submit, is a highly improbable explanation, but significantly the only one which fits the French case. In short, the case of the Government of the Republic is altogether too insubstantial to prevail over a competing claim of the weight and character of that of the United Kingdom.

Mr. President, some licence may be permissible in an advocate. Professors like myself are naturally suspicious of such licence. I have tried to avoid it and to give the Court a fair account of the long history of the sovereignty of Her Majesty's predecessors over these

[1] See pp. 212-213 of this volume.

islands. I respectfully ask the Court to compare the exposition which I gave the Court in my opening speech, reinforced as it was on the issues of frankalmoin and the *quo warranto* proceedings by the opinion of so high an authority as Professor Plucknett, with the alternatives offered to the Court by the Government of the Republic in the address which Professor Gros delivered, alternatives which are weakened by the features to which I have referred. And I ask the question, does not that comparison show the strength of the United Kingdom's case—a thousand years of uninterrupted possession of the Channel Islands unshaken by any proof that these two dependencies of Jersey, the Minquiers and the Écréhous, have ever had any political history apart from that of Jersey itself?

Mr. Harrison, Mr. President, is ready to proceed and continue the story of the title from the end of the eighteenth century.

ANNEX OF HISTORICAL QUOTATIONS FROM STANDARD FRENCH AUTHORITIES

The present Annex supplies specimen quotations from *French* authorities in order to illustrate : *(a)* the nature of suzerainty in the Middle Ages ; *(b)* the weakness of later Frankish and earlier Capetian Kings ; *(c)* the relations between the French monarchs and Norman Dukes with particular reference to their relative strength and to the fate of the Channel Islands.

These quotations are taken from standard French authorities ranging over the last hundred years, and from works cited and submitted by the Government of the Republic itself.

The list of authorities quoted is :

(i) Petit-Dutaillis, C. *La Monarchie féodale en France et en Angleterre*, 1933.
(ii) Lauer, P. *Robert Ier et Raoul De Bourgogne — Rois de France*, 1910.
(iii) Fliche, A. *L'Europe occidentale de 888 à 1125*, 1930.
(iv) Giry, A. *Manuel de diplomatique*, 1894.
(v) Sismondi, C. L. *France under the Feudal System*, 1851.
(vi) Halphen, L. *L'Essor de l'Europe (XIme-XIIIme siècles)*, 1948.
(vii) Michelet, J. *Histoire de France jusqu'au XVIme siècle*, 1852.
(viii) Luchaire, A. *Les premiers Capétiens (987-1137)*, 1901.
(ix) Halphen, L. *L'Essor de l'Europe (XIme-XIIIme siècles)*, 1948.
(x) Lauer, P. *Le Règne de Louis IV d'Outre-Mer*, 1900.
(xi) Prentout, H. *Essai sur les Origines et la Fondation du Duché de Normandie*, 1911.
(xii) Bayet, C., Pfister, C., and Kleinchausz, A. *Le Christianisme, les Barbares, Mérovingiens et Carolingiens*, 1903.
(xiii) Besnier, R. *La Coutume de Normandie*, etc., 1935.
(xiv) Gibon, P. de. *Les Îles Chausey*, in *Le Pays de Granville*, janvier, 1910.
(xv) Pégot-Ogier, *Histoire des îles de la Manche*, 1881.
(xvi) Besnier, R. *Compte rendu. Le Statut juridique des îles Anglo-Normandes*, etc. *Revue historique de Droit français et étranger*, XIII, 1934.
(xvii) Perrot, M. *Deux expéditions insulaires françaises*, 1929.
(xviii) Halphen, L. *Les Barbares*, 1926.

I. The Nature of Suzerainty in the Middle Ages

(a) Petit-Dutaillis, C. *La Monarchie féodale en France et en Angleterre*, 1933.

(i) [From Introduction by Henri Berr, p. x]

"Au début de la période que couvre ce livre, on trouve des seigneuries, mais pas d'État. La conception de sujet s'est perdue (pp. 10, 338, 347). Le roi n'est qu'un « suzerain supérieur » au sommet de la « pyramide féodale » (p. 2). La royauté représente un titre plutôt qu'un pouvoir ; elle n'implique pas un royaume : le domaine propre du roi, au début, est « disparate, dispersé, incohérent » (p. 16). Le royaume ne se constituera, avec l'unité française, que peu à peu, surtout par la victoire sur les Anglais et les Albigeois. La « civilisation » est alors sans lien avec les progrès de la royauté, qui, longtemps, ne joua aucun rôle intellectuel et moral (pp. 107, 424)."

(ii) [From text, pp. 10-11]

"Le mieux était d'interroger les gens du pays : on leur demandait par exemple quelles étaient les juridictions qui s'exerçaient chez eux. Mais on parlait de justice et de seigneurie, non de souveraineté, et les arguments étaient d'ordre féodal, non d'ordre national. L'idée féodale était relativement claire, mais l'idée d'État, de frontières d'État, de nationalité, s'était couverte de brume.

Était-il légitime d'user des lumières que fournissait celle-là pour dissiper l'obscurité qui entourait celle-ci ? Nullement. Seigneurie et souveraineté ne se confondaient pas toujours. On pouvait être vassal d'un roi sans être son sujet, et l'on ne s'en inquiétait pas : on ne cherchait pas à éclaircir la notion de sujet. Il y avait des seigneurs possessionnés des deux côtés de la frontière, comme le comte de Flandre, le comte de Chalon, le comte de Valentinois, etc., et même le comte de Toulouse, qui faisait hommage à l'empereur pour le comté de Provence ; mais ce qui est plus significatif, il y avait des seigneurs d'Empire qui étaient vassaux d'autres seigneurs d'Empire pour des terres sises dans le royaume de France et qui n'étaient pas des enclaves : le comte de Bar tenait le fief de Hans, près de Sainte-Menehould, de l'évêque de Verdun ; et, d'autre part, il y avait des seigneurs français vassaux de l'empereur pour des terres sises dans le royaume de France : pendant un siècle, les comtes de Champagne furent vassaux des Hohenstaufen pour trois terres françaises ; le roi de France, depuis l'hommage prêté par le comte Henri à Frédéric Barberousse pour ces trois fiefs, n'y avait plus aucun droit féodal, mais il y restait le roi. Ailleurs, en « Barrois mouvant », à partir de 1301, il sera le seigneur, mais il ne sera pas encore le roi, et Jeanne d'Arc naîtra en Barrais mouvant dans un quartier de Domrémy qui dépendait, comme mouvant de Charles VII, d'un bailliage champenois, et, comme terre d'Empire, d'un bailliage barrois."

le comte de Mâcon, le seigneur de Beaujeu, l'abbé de Beaulieu

(b) Lauer, P. *Robert Ier et Raoul de Bourgogne — Rois de France*, 1910.

[From p. 84]

"C'était la troisième fois qu'un roi désigné par une élection véritable parvenait au trône de France. Cette royauté féodale naissante nous est en somme très mal connue, faute de documents. Il semble qu'elle puisse

être ainsi définie : un suzerain choisi par l'élection des grands et consacré par l'onction religieuse, qui est le seigneur des seigneurs et dont tous les sujets sont considérés commes les vassaux. Elle paraît dépouillée de presque toutes les prérogatives de la souveraineté."

(c) Fliche, A. *L'Europe occidentale de 888 à 1125*, 1930.

[In *Histoire du moyen âge*, vol. II, éd. Glotz]

[From pp. 165-166]

"En France, comme en Italie, les prérogatives royales ont à peu près complètement disparu. Il ne s'est pas trouvé un Otton le Grand pour restaurer l'autorité monarchique ; tout au contraire, celle-ci n'a cessé de s'affaiblir par suite de la très longue durée des luttes dynastiques et de la nécessité où se sont trouvés les rois, Carolingiens ou Robertiens, d'aliéner les quelques droits qu'ils avaient pu garder pour acheter les concours qui leur étaient nécessaires. D'autre part, il n'y a rien en France qui ressemble aux duchés allemands. Le royaume est partagé en douze ou quinze principautés sans caractère ethnique bien accusé et dont les chefs, parés du titre de duc, de marquis ou de comte, ont réuni le plus souvent sous leur pouvoir plusieurs comtés carolingiens. Ce sont là de véritables États, gouvernés par des dynasties héréditaires qui exercent tous les droits régaliens dans la mesure où elles ne les ont pas aliénés à des seigneurs de moindre importance. En tout cas, le roi y a perdu tout pouvoir de contrôle ; c'est à peine si dans quelques-uns d'entre eux il a conservé la nomination de rares évêques. On ne songe même pas à solliciter de lui la délivrance de diplômes et sa suzeraineté, purement théorique, ne saurait exiger de ces vassaux, pourtant descendants des anciens fonctionnaires carolingiens, aucun des devoirs que comporte « la fidélité » ; le régime seigneurial est parvenu au terme de son évolution, et il faudra longtemps avant que la royauté puisse reconquérir les droits qu'elle a successivement abandonnés."

(d) Giry, A. *Manuel de diplomatique*, 1894.

[From pp. 318-319]

"Pépin et Charlemagne s'intitulèrent dans les protocoles de leurs diplômes : *Rex Francorum vir inluster ;* mais à cette dernière qualité Charlemagne ne tarda pas à en substituer une autre, rappelant l'intervention divine à laquelle sa famille devait le trône ; il s'intitula *Rex Dei gratia*. Tous les autres monarques de la dynastie carolingienne employèrent cette formule ou d'autres analogues, telles que : *Domini Dei propitiante gratia, Dei misericordia*, etc. Ils furent imités par les rois de la troisième race, sous lesquels la formule se fixa définitivement (à partir du règne de Louis VII) dans l'expression *Dei gratia*, qui resta seule en usage et passa dans les actes français : tous les souverains de la France jusques et y compris Napoléon III le furent désormais *par la grâce de Dieu*.

Cette très humble formule, qui n'exprimait à l'origine qu'une pensée pieuse et avait été empruntée, avec beaucoup d'autres, au formulaire ecclésiastique, prit avec le temps une signification bien différente : on en vint à l'interpréter en ce sens que le roi déclarait par là « ne tenir son royaume que de Dieu ». Il est difficile de déterminer avec précision l'époque à laquelle cette idée d'indépendance, de souveraineté et de droit divin s'est attachée à ces mots. Au IXme, au Xme siècle et jusqu'aux

premières années du XIIIme, on voit des seigneurs féodaux s'intituler souvent, comme les rois et à leur exemple, seigneurs par la grâce de Dieu, et non pas seulement de grands feudataires quasi indépendants, mais des seigneurs de fiefs secondaires, tels que le comte de Meulan, les seigneurs de Combourg et de Fougères. Au commencement du XVme siècle encore, Archambaud de Grailly s'intitule régulièrement *Dei gratia comes Fuxi*, etc. ; mais au XVme siècle le comte d'Armagnac, les ducs de Bretagne et de Bourgogne se virent interdire cette formule par les rois de France ou furent obligés à des déclarations de non-préjudice ; elle était dès lors une prérogative de la souveraineté."

(*e*) Sismondi, J. C. L., *France under the Feudal System*, 1851 Ed. (Trs.).

(i) [From p. 1] .

"The period, the history of which we have now undertaken to present, is therefore like a long interregnum, during which the royal authority was suspended, although the name of king was always preserved. He who bore this title in the midst of a republic of princes, was only distinguished from them by some honorary prerogative, and he exercised over them scarcely any authority. Until very near the end of the eleventh century, these princes were scarcely less numerous than the castles which covered France. No authority was acknowledged at a distance, and every fortress gave its lord rank among the sovereigns. The conquest of England by the Normans broke the equilibrium between the feudal lords ; one of the confederate princes became a king in 1066 ; gradually extended, until 1179, his domination over more than half of France, and although it was not he who bore the title of king of the French, it may be imagined that in time the rest of the country would also pass under his yoke."

(ii) [From p. 7]

"These infeoffments, on account of alliance, contributed greatly to maintain a sentiment of equality among all the possessors of a noble fief, at whatsoever distance they might be from suzerain lord. In fact, no great lord disdained to receive from a prince less powerful than himself, a fief which suited him, and render to him faith and homage for that fief. Between two knights, one was often the lord of the other in one land, and his vassal in another. The count often, after having received homage from the viscount, paid him homage in his turn for some barony which he received from him, and which formed a part of that very viscounty. The kings themselves did not disdain to hold, in their turn, lands in the dependence of their subjects, and the oriflamme become the standard of the kings of France, was only the banner of a barony, for which those kings were vassals of the abbey of St. Denis."

(f) Halphen, L. *L'Essor de l'Europe (XIme-XIIIme siècles)*, 1948 (3rd Ed.).

[Contained in *Peuples et Civilisations*, Vol. VI]

(i) [From p. 19]

"De proche en proche, l'État s'èst ainsi trouvé démembré administrativement, non moins que politiquement, et, aux premiers temps

de l'âge féodal, on peut dire que ce ne sont plus les rois, mais les seigneurs qui gouvernent."

(ii) [From p. 20]

"Mais, en attendant que la royauté soit en mesure de remettre de l'ordre dans la maison, le régime féodal dégénère en une épouvantable anarchie. Orientée vers la guerre, organisée en vu de la guerre, la vie des seigneurs, s'ils ne trouvent pas à employer au dehors le trop-plein de leur activité, se passe en luttes perpétuelles."

II. THE WEAKNESS OF LATER FRANKISH AND EARLIER CAPETIAN KINGS

(a) Michelet, J. *Histoire de France jusqu'au XVI^me^ siècle,* 1852

[From Volume III, pp. v, vi]

"Cette locution : *Un bon Français*, date du quatorzième siècle.

Jusqu'ici la France était moins France que chrétienté. Dominée, ainsi que tous les autres États, par la féodalité et par l'église, elle restait obscure et comme perdue dans ces grandes ombres. Le jour venant peu à peu, elle commence à s'entrevoir elle-même."

(b) Ibid. [From Vol. I, pp. 387-390]

"Ainsi fut démontrée l'impuissance du pouvoir épiscopal pour défendre et gouverner la France. En 870, le chef de l'église gallicane, l'archevêque de Reims, Hincmar, écrivait au pape ce pénible aveu : « Voici les « plaintes que le peuple élève contre nous : Cessez de vous charger « de notre défense, contentez-vous d'y aider de vos prières, si vous « voulez notre secours pour la défense commune.... Priez le seigneur « apostolique de ne pas nous imposer un roi qui ne peut, de si loin, « nous aider contre les fréquentes et soudaines incursions des païens.... »

Le pouvoir local des évêques, le pouvoir central du roi se trouvent également condamnés par ces graves paroles. Ce roi, qui n'est rien sans l'Église, ne sera que plus faible en s'en séparant. Il peut disposer de quelques évêchés, humilier les évêques, opposer le pape de Rome au pape de Reims. Il peut accumuler de vains titres, se faire couronner roi de Lorraine et partager avec les Allemands le royaume de son neveu Lothaire II ; il n'en est pas plus fort. Sa faiblesse est au comble quand il devient empereur. En 875, la mort de son autre neveu, Louis II, laissait l'Italie vacante, ainsi que la dignité impériale. Il prévient à Rome les fils de Louis-le-Germanique, les gagne de vitesse et dérobe pour ainsi dire le titre d'empereur. Mais le jour même de Noël où il triomphe dans Rome sous la dalmatique grecque, son frère, maître un instant de la Neustrie, triomphe lui aussi dans le propre palais de Charles ; le pauvre empereur s'enfuit d'Italie à l'approche d'un de ses neveux, et meurt de maladie dans un village des Alpes (877).

Son fils, Louis-le-Bègue, ne peut même conserver l'ombre de puissance qu'avait eue Charles-le-Chauve. L'Italie, la Lorraine, la Bretagne, la Gascogne, ne veulent point entendre parler de lui. Dans le nord même de la France, il est obligé d'avouer aux prélats et aux grands qu'il ne tient la couronne que de l'élection. Il vit peu, ses fils encore moins. Sous l'un d'eux, le jeune Louis, l'annaliste jette en passant cette parole terrible, qui nous fait mesurer jusqu'où la France était

descendue : « Il bâtit un château de bois ; mais il servit plutôt à forti-« fier les païens qu'à défendre les chrétiens, car ledit roi ne put trouver « personne à qui en remettre la garde. »"

(c) Luchaire, A. *Les premiers Capétiens (987-1137)*, 1901.

[Contained in *Histoire de France depuis les origines jusqu'à la Révolution*, E. Lavisse, Volume II (2)]

[From pp. 144-145]

"Entre la Féodalité et l'Église, qui se sont partagé la terre et le gouvernement des hommes, quelle place reste-t-il pour le Roi ? On a incidemment parlé de lui dans les pages qui précèdent, mais pour constater surtout son impuissance. Il suffit de jeter les yeux sur une carte de la France au XIme siècle : le mince territoire qui constitue le domaine de la Monarchie donne la mesure de sa déchéance. Le plus étonnant est qu'elle persiste à vivre, et qu'une dynastie nouvelle ait pu reprendre et faire durer pendant des siècles le pouvoir qui échappait aux Carolingiens.

L'homme qui fonda cette dynastie, Hugue Capet, était le fils aîné du « Duc des Francs », Hugue le Grand. Ce dernier avait tantôt combattu, tantôt protégé Louis d'Outremer, travaillant à le supplanter dans la France du Nord, comme dans l'Aquitaine et la Bourgogne, sans pouvoir ou sans oser le déposséder tout à fait. En 956, Hugue Capet succédait à son père dans les comtés de Paris, de Senlis, d'Orléans, de Dreux, dans sa dignité d'abbé laïque de Saint-Martin de Tours et de Saint-Germain des Prés, et dans cette espèce de vice-royauté qui était attachée au duché de France. Il hérita aussi de sa politique astucieuse et de ses habitudes équivoques, tour à tour adversaire et ami de la dynastie carolingienne, mais gagnant toujours à jouer l'un ou l'autre rôle. Peu à peu, il réduit le roi Lothaire à s'enfermer dans Laon, et va jusqu'à Rome (981) pour s'allier contre lui à l'empereur d'Allemagne, Otton II. Puis il fait tout à coup volte-face, et, réconcilié avec la famille royale, embrasse publiquement Lothaire comme le plus dévoué des vassaux. L'énigmatique personnage aspirait-il secrètement à la couronne ? On ne peut l'affirmer, puisqu'en 979 il ne fit rien pour empêcher l'association au trône du jeune Louis, le prince royal, et qu'à la mort de Lothaire, en 986, il ne s'opposa pas davantage au couronnement du dernier Carolingien. Il apparut même dans l'armée de Louis V, pour remplir son devoir de feudataire, lorsque celui-ci marcha sur Reims, décidé à punir l'archevêque Adalbéron de ses complaisances envers l'Allemagne."

(d) Halphen, L. *L'essor de l'Europe (XIme-XIIIme siècles)*, 1948.

[From pp. 183-184]

"La maison carolingienne qui, au milieu du Xme siècle, ne se maintenait déjà qu'à grand'peine, avait succombé en 987. Avant de mourir, elle avait eu sous Lothaire (954-986) un dernier sursaut d'énergie : secouant violemment l'encombrante tutelle des Otton, le roi carolingien avait réussi, en 978, à pousser par surprise jusqu'aux abords du Rhin et à se donner un instant l'illusion de la puissance en allant trôner à Aix-la-Chapelle dans le célèbre palais fondé par Charlemagne.

Vain exploit : au bout de trois jours, il avait fallu battre précipitamment en retraite ; laisser le camp libre aux troupes allemandes, qui

s'avancèrent jusque sous les murs de Paris ; assister la rage au cœur aux louches tractations de l'empereur germanique et du nouveau « duc des Francs » Hugues Capet, le fils de cet Hugues le Grand qui, en 940, s'était reconnu le vassal du premier des Otton. Enserré dans un réseau de trahisons, que tissait autour de lui l'archevêque de Reims Adalbéron, Lothaire était mort, le 2 mars 986, en pleine tourmente, sans être parvenu, malgré ses efforts courageux, à vaincre l'audace croissante d'une partie de l'aristocratie laïque et ecclésiastique liguée contre lui. La royauté carolingienne lui avait survécu quelques mois sous son fils Louis V, énergique jeune homme de dix-neuf ans, qu'un accident mortel avait enlevé le 21 ou le 22 mai 987. Six semaines après, le 3 juillet, le duc des Francs avait enfin reçu de ses partisans la couronne royale.

Mais la restauration de l'autorité monarchique était une œuvre de longue haleine, bien au-dessus des forces du nouveau roi. Quoique, en apparence, le premier de tous les barons du royaume, Hugues Capet ne disposait, lors de son avènement, que d'une autorité très réduite, souvent même purement nominale, sur la majeure partie des provinces qui jadis avaient constitué, aux mains de ses ancêtres, l'immense « marche » de Neustrie, maintenant démembrée en plusieurs seigneuries féodales (duchés, comtés, vicomtés) : Normandie, Maine, Anjou, Touraine, Blésois, Vendômois, pays chartrain, etc. Dans l'état d'émiettement féodal auquel on était arrivé, il manquait au Capétien cette solide base territoriale, sans laquelle il était difficile à celui qui portait la couronne de triompher, en cas de conflit, de ses propres vassaux. Son domaine direct, en y ajoutant l'héritage des Carolingiens, confisqué avec le titre royal, ne comprenait que les régions de Paris, Senlis, Poissy, Étampes et Orléans, avec quelques annexes excentriques, dont la plus importante était le comté de Montreuil, à l'embouchure de la Canche."

III. The relations between the French Monarchs and Norman Dukes with particular reference to their relative strength and to the fate of the Channel Islands

(a) Michelet, J. *Histoire de France jusqu'au XVI^me^ siècle*, 1852.

[From Vol. I, pp. 404-406]

"Charles-le-Simple, reconnu roi en 898, par une grande partie de ceux qui avaient travaillé à l'exclure, régna d'abord vingt-deux ans sans aucune opposition. C'est dans cet espace de temps qu'il abandonna au chef normand Rolf tous ses droits sur le territoire voisin de l'embouchure de la Seine, et lui conféra le titre de duc. Le duché [912] de Normandie servit plus tard à flanquer le royaume de France contre les attaques de l'empire germanique et de ses vassaux lorrains ou flamands. Mais le premier duc fut fidèle au traité d'alliance qu'il avait fait avec Charles-le-Simple, et le soutint, quoique assez faiblement, contre Rodbert ou Robert, frère du roi Eudes, élu roi en 922. Son fils, Guillaume I^er^, suivit d'abord la même politique, et lorsque le roi héréditaire eut été déposé et emprisonné à Laon, il se déclara pour lui contre Radulf ou Raoul, beaufrère de Robert, élu et couronné roi, en haine de la dynastie franque. Mais peu d'années après, changeant de parti, il abandonna la cause de Charles-le-Simple et fit alliance

avec le roi Raoul. En 936, espérant qu'un retour à ses premiers errements lui procurerait plus d'avantages, il appuya d'une manière énergique la restauration du fils de Charles, Louis, surnommé d'Outre-Mer.

Le nouveau roi, auquel le parti français, soit par fatigue, soit par prudence, n'opposa aucun compétiteur, poussé par un penchant héréditaire à chercher des amis au delà du Rhin, contracta une alliance étroite avec Othon, premier du nom, roi de Germanie, le prince le plus puissant et le plus ambitieux de l'époque. Cette alliance mécontenta vivement les seigneurs, qui avaient une grande aversion pour l'influence teutonique. Le représentant de cette opinion nationale, et l'homme le plus puissant entre la Seine et la Loire, était Hugues, comte de Paris, auquel on donnait le surnom de Grand, à cause de ses immenses domaines. Dès que les défiances mutuelles se furent accrues au point d'amener, en 940, une nouvelle guerre entre les deux partis, qui depuis cinquante ans étaient en présence, Hugues-le-Grand, quoiqu'il ne prît point le titre de roi, joua contre Louis-d'Outre-Mer le même rôle qu'Eudes, Robert et Raoul avaient joué contre Charles-le-Simple. Son premier soin fut d'enlever à la faction opposée l'appui du duc de Normandie ; il y réussit, et, grâce à l'intervention normande, parvint à neutraliser les effets de l'influence germanique. Toutes les forces du roi Louis et du parti franc se brisèrent, en 945, contre le petit duché de Normandie. Le roi, vaincu en bataille rangée, fut pris avec seize de ses comtes et enfermé dans la tour de Rouen, d'où il ne sortit que pour être livré aux chefs du parti national qui l'emprisonnèrent à Laon."

(b) Ibid.

[From Vol. II, pp. 152-154]

"Le duc des Normands le [the French King, Henri I (1031-1060)] prit sous sa protection, et força Robert [younger brother of Henri I] de se contenter du duché de Bourgogne. C'est la tige de cette première maison de Bourgogne qui fonda le royaume de Portugal. Toutefois, le Normand ne donna la royauté à Henri qu'affaiblie et désarmée pour ainsi dire. Il se fit céder le Vexin, et se trouva ainsi établi à six lieues de Paris. Henri essaya en vain d'échapper à cette servitude et de reprendre le Vexin, à la faveur des révoltes qui eurent lieu contre le nouveau duc de Normandie, Guillaume-le-Bâtard. Ce Guillaume, dont nous parlerons tout au long dans le chapitre suivant, battit ses barons et battit le roi. Ce fut peut-être le salut de celui-ci, que le duc ait tourné contre l'Angleterre ses armes et sa politique.

Henri et son fils, Philippe Ier [1031-1108], restèrent spectateurs inertes et impuissants des grands événements qui bouleversèrent l'Europe sous leur règne. Ils ne prirent part ni aux croisades normandes de Naples et d'Angleterre, ni à la croisade européenne de Jérusalem, ni à la lutte des papes et des empereurs ; ils laissèrent tranquillement l'empereur Henri III établir sa suprématie en Europe, et refusèrent de seconder les comtes de Flandre, Hollande, Brabant et Lorraine, dans la grande guerre des Pays-Bas contre l'empire. La royauté française n'est guère encore qu'une espérance, un titre, un droit. La France féodale, qui doit s'absorber en elle, a jusqu'ici un mouvement tout excentrique. Qui veut suivre ce mouvement, il faut qu'il détourne les yeux du centre encore impuissant, qu'il assiste à la grande lutte

de l'empire et du sacerdoce, qu'il suive les Normands en Sicile, en Angleterre, sous le drapeau de l'Église, qu'enfin il s'achemine à la terre sainte avec toute la France. Alors il sera temps de revenir aux Capets, et de voir comment l'Église les prit pour instrument à la place des Normands, trop indociles ; comment elle fit leur fortune, et les éleva si haut, qu'ils furent en état de l'abaisser elle-même."

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"Dès le onzième siècle, à l'époque où la royauté capétienne, faible et inerte, ne peut les seconder encore, l'épée des Français de Normandie repousse l'empereur des murs de Rome, chasse les Grecs et les Sarrasins d'Italie et de Sicile, assujettit les Saxons dissidents de l'Angleterre."

(c) Lauer, P. *Le Règne de Louis IV d'Outre-Mer*, 1900.

[From p. 251]

"La Normandie fut de 943 à 945 la principale préoccupation de Louis. La situation de ce pays lui fournit l'occasion de développer la même activité qu'il avait déjà montrée lors des événements de Lorraine de 939. Le résultat ne fut pas meilleur, car à partir de sa captivité son action dans ce pays est comme annihilée, et son fils Lothaire ne recevra même pas l'hommage du duc Richard."

[From p. 93]

"Le jeune Richard n'était pas encore apte à prêter l'hommage. Aussi ce furent les seigneurs normands *(principes)* qui le prêtèrent à sa place. Certains d'entre aux firent scission et se tournèrent du côté du seigneur le plus voisin et le plus fort. Ils portèrent leur hommage à Hugues-le-Grand."

. . . . . .

"L'hommage qu'ils [the Normans] prêtèrent n'était d'ailleurs qu'une mesure transitoire. Il était à prévoir que, dès que leur jeune duc aurait atteint sa majorité, ils se débarrasseraient de toute ingérence étrangère et jouiraient de leur autonomie comme par le passé."

(d) Prentout, H. *Essai sur les origines et la fondation du Duché de Normandie*, 1911.

[From p. 232]

"Suivant certaine théorie, Rollon ne peut posséder l'État normand à titre de fief, puisque les Normands, avant Guillaume le Conquérant, n'avaient pas connu le système féodal et ses obligations [1] ; Rollon tient la terre en alleu, c'est ainsi que Charles le Simple la lui a donnée à Saint-Clair-sur-Epte : *terram determinatam in alodo et in fundo* [2] : c'est l'alleu franc et quitte, libre comme l'air [3]. M. Steenstrup croit que c'est dans ces conditions que les Normands reçurent de lui la terre lors du partage : « Il est hors de doute que les Normands reçurent leurs parts « comme propriété perpétuelle sans autre devoir que celui d'aider « Rollon à la défense du pays [4]. »

[1] Waitz, *loc. cit.*
[2] Dudon, p. 169.
[3] Suivant une expression de M. Flach, *op cit.*, p. 190.
[4] Steenstrup, *op cit.*, p. 388.

Que cela ait été la conception de Rollon et des siens, cela est possible."

(e) Bayet, C., Pfister, C., and Kleinchausz, A., *Le Christianisme, les Barbares, Mérovingiens et Carolingiens*, 1903.

[In *Histoire de France depuis les origines jusqu'à la Révolution*, E. Larsse, Vol. II (1)]

[From p. 401]

"Une entrevue a lieu entre lui [Charles the Simple] et le chef normand [Rollon] à Saint-Clair-sur-Epte. Rollon s'engage à cesser toute attaque et à embrasser le christianisme. Le roi lui abandonne un territoire que les barbares occupaient en fait depuis longtemps, qui avait pour centre la ville de Rouen et s'étendait d'un côté jusqu'à la rivière de l'Epte, de l'autre jusqu'à la mer. Mais ce pays, désolé par les guerres continuelles, était inculte, et les Normands n'y pouvaient trouver à vivre. Charles leur livra la Bretagne voisine, en promettant de fermer les yeux sur leurs incursions de ce côté. Les barbares jurèrent de respecter les autres régions, et le royaume franc put respirer ; les paysans ensemencèrent leurs champs et moissonnèrent leurs blés, et les saintes reliques furent rapportées dans les monastères."

[From p. 408]

"En apparence, la puissance de Louis a été encore considérable. Les grands seigneurs ne lui contestent pas sa qualité de suzerain. Il a reçu l'hommage de Guillaume Longue-Épée, duc de Normandie ; et, après l'assassinat de celui-ci (943), il a investi du duché Richard Ier, bâtard de Guillaume : « il lui a donné la terre des Normands ». Dans sa chevauchée d'Aquitaine, il a distribué des investitures. Ses vassaux ont pris de ses mains leurs seigneuries comme des dons de sa bonne grâce et à charge de lui être fidèles. Et lui-même est un roi sans terre. Il ne possède à peu près rien si ce n'est le pays de Laon qu'il perd et reprend. Qu'est-il en face de son puissant adversaire auquel il a donné le *ducatus Francorum* qu'on commence à nommer le duché de France, et auquel il a ajouté, en 943, le duché de Bourgogne ?"

(f) Luchaire, A. *Les premiers Capétiens (987-1137)*.

[*Une Histoire de France depuis les origines jusqu'à la Révolution*. E. Lavisse, Volume II (2)]

[From p. 42]

"A l'Ouest, si le roi de France veut dépasser Mantes, il se heurte au « duché de Normandie », puissance à qui ses origines et le caractère de sa constitution politique donnent une physionomie bien tranchée. Aux anciens pirates scandinaves, aux Normands, appartiennent l'antique cité de Rouen, avec son archevêque et sa corporation de marchands de l'eau, les villes épiscopales d'Évreux, de Bayeux, de Séez, de Lisieux et de Coutances, les centres commerçants de Caen et d'Alençon, le port de Dieppe, les riches abbayes de Jumièges, de Saint-Wandrille et de Fécamp. Le traité de Saint-Clair-sur-Epte qui céda la Neustrie maritime aux compagnons de Hrolf ou Rollon n'avait fait que clore une immigration qui remontait loin. Sur cette terre nourricière et attrayante entre toutes, le chef normand avait rencontré des compa-

triotes déjà fixés en maints endroits. L'étude des noms de lieux de la province et même des vocables du dialecte normand qui sont d'origine scandinave ; l'examen du type physique (encore caractérisé aujourd'hui) des paysans du Bessin et du Cotentin, prouvent combien les envahisseurs étaient nombreux."

(g) Besnier, R. *La Coutume de Normandie*, etc., 1935.

(i) [From pp. 10-11]

"L'état féodal normand apparaît pour la première fois en 911 quand Charles le Simple abandonne, par la convention de Saint-Clair-sur-Epte, à la bande de Rolf (Rollon) le territoire qu'elle occupe. C'est seulement à partir de cette date qu'il est possible de parler de la Normandie. Unité politique, religieuse, administrative, elle ne tardera pas à être également une unité juridique. Comme l'a nettement montré Robert Génestal, le droit du moyen âge est un droit morcelé en une infinité de coutumes. Le temps est passé des législations uniformes imposées par naturalisation à tout un empire, comme le droit romain, ou appliquées à un peuple comme les lois barbares. Le droit du moyen âge est morcelé parce qu'il se forme au moment même où le royaume des Francs se subdivise en une série de petits États presque indépendants."

(ii) [From p. 23]

"I. — La Normandie est un État féodal, le duc est donc placé au sommet d'une double hiérarchie constituée par la féodalité laïque et par la féodalité ecclésiastique."

(h) Gibon, P. de. *Les Îles Chausey*, in *Le Pays de Granville*, janvier, 1910.

"Comment les grandes îles de la côte, The Channel Islands, comme disent les Anglais, échappèrent-elles au roi de France à ce moment, après une première et rapide occupation ? Pour plusieurs causes.

Philippe-Auguste dut envahir l'Anjou, la Touraine et le Poitou, comprimer, même en Normandie, des coalitions féodales toujours renaissantes, lutter contre cette grande coalition extérieure qui aboutit à Bouvines.

Et cependant il comprenait l'importance des îles Normandes ; mais il préférait attaquer d'abord l'Angleterre chez elle, ce qui eût entraîné la soumission des îles. Seulement ces projets préparés à grands frais ne purent aboutir, et la flotte française fut en grande partie détruite par une tempête.

Par-dessus tout, ce fut, comme à d'autres époques, hélas ! l'insuffisance de la marine qui empêcha de profiter des circonstances pour retenir dans la même main que la Normandie tout cet archipel qui en est comme le prolongement naturel.

Les successeurs de Philippe-Auguste ne purent suffisamment songer aux îles Normandes. Avant, pendant, comme après la guerre de Cent Ans, les tentatives (et il y en eut un certain nombre) ne furent jamais soutenues comme il convenait.

Il faut enfin faire entrer en ligne de compte le sentiment d'attachement aux rois-ducs anglais très ancré dans le cœur des insulaires ; leur particularisme, greffé sur un fond d'indépendance, y trouvait d'ailleurs les plus grands avantages."

(i) Pégot-Ogier, *Histoire des îles de la Manche*, etc., 1881.

[From pp. 186-187]

"Les îles de la Manche furent la concession dernière du roi (Philip Augustus) de France. Il les accorda à la couronne anglaise comme compensation, plus glorieuse que réelle, de la Normandie, du Maine, de l'Anjou, de la Touraine et du Poitou, acquis par le traité au roi de France. Il restait à l'Angleterre l'archipel, *la perle* de ce patrimoine normand perdu par Jean.

Louis de France s'engageait à envoyer des lettres patentes à Wistace le Moine (le cadet), afin qu'il rendit les îles à Édouard III [*recté* Henry III] reconnu roi d'Angleterre. Louis s'engageait en outre, si son père ne les faisait pas rendre, à les restituer à son avènement au trône, car le cas était prévu où Wistace mis hors la loi n'exécuterait pas les ordres du roi de France. Philippe d'Aubigny signa le traité ; il est probable que c'est à cette intervention personnelle qu'il faut attribuer la clause qui concerne l'archipel."

[From p. 189]

"L'archipel devait être évacué par les Français, en vertu du traité signé par Louis de France ; Philippe d'Aubigny se chargea de l'exécution de cette clause au nom d'Henri III mineur. Le 24 janvier 1218, il avait repris Jersey ; le 13 février, Guernesey, Aurigny et Serk. Deux pièces le prouvent officiellement. On ignore complètement ce qu'il advint du jeune Wistace. Il est certain qu'il n'y eut pas de résistance, car les moindres actions de l'amiral étaient rapportées avec soin, et Wistace avait probablement abandonné les îles qu'il n'était pas possible de défendre contre le vœu des populations.

La prise de possession effective des îles résulte d'un acte de février 1219 ordonnant la levée du droit de *fouage* qui était dû au duc de Normandie tous les trois ans. Cet impôt sur *chaque feu* devait être payé en argent ; de là le mot latin *monetagium*, souvent employé dans ce sens.

En 1219, c'est Philippe, neveu de l'amiral, qui reçoit la garde de l'archipel, son oncle partant pour la terre Sainte. Le 18 février 1220, un aide pour son pélerinage est demandé aux *hominibus probis* des îles, à la requête du roi. L'amiral mourut en Palestine."

(j) Besnier, R. *Compte Rendu*, in *Revue historique*, Volume 58 (1934).

[From pp. 736-737]

"R. Besnier, professeur à la Faculté de droit de Caen. — Le statut juridique des îles anglo-normandes, du XIII^me^ au XVIII^me^ siècles.

Détachées de la Normandie en fait en 1204, en droit par le traité de 1217, les îles anglo-normandes de Jersey et Guernesey restent rattachées au roi d'Angleterre par l'allégeance féodale.

Elles luttent pour faire reconnaître leurs privilèges traditionnels. Elles obtiennent d'abord d'être considérées comme des épaves du duché disparu, liées au roi d'Angleterre en tant que duc de Normandie et non en tant que souverain anglais. Les enquêtes de 1248, de 1308 et 1331 montrent que les insulaires finissent par obtenir en outre une véritable autonomie administrative, financière, judiciaire et même militaire. Il leur manque cependant le pouvoir législatif, moins nécessaire

à une époque où les litiges sont réglés sur la base de la coutume et de l'équité."

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"A la même époque, la neutralité des îles est proclamée et acceptée par Louis XI et par le pape Sixte IV. A partir de ce moment les îles font figure d'îlots indépendants, constitués chacun par une fédération de communes. Cette indépendance est tempérée par l'union personnelle avec l'Angleterre sous la forme traditionnelle de l'allégeance féodale. Les revisions ordonnées en 1591, les ordonnances de 1619, 1654, 1661, 1668, 1671 et 1720 n'apportent que des rectifications ou des perfectionnements de détail sans toucher à l'esprit des rapports des îles et de l'Angleterre.

Loin d'entraver l'évolution des idées constitutionnelles, la forme féodale traditionnelle du status des îles leur a permis d'éviter des crises constitutionnelles brutales. Elle les a fait bénéficier d'un empirisme fécond, d'une adaptation spontanée aux problèmes politiques, sociaux et économiques et des possibilités infinies de rajeunissement du droit coutumier."

(k) Perrot, M. *Deux expéditions insulaires françaises*, 1929.

[From p. 5]

"Dans le traité de 1204 qui rattachait la Normandie à la France, les îles, pour une raison que l'histoire n'a jamais pu éclaircir, furent omises. La Normandie était divisée en onze bailliages. Deux d'entre eux étaient ceux de Jersey, d'une part, et de Guernesey, de l'autre, à laquelle étaient jointes Serk et Aurigny. Or ces deux bailliages ne figurent pas au traité. Ont-ils été oubliés ou sciemment mis de côté ? On ne sait. Toujours est-il que les îles étaient restées fidèles à Jean sans Terre en 1204, et le traité de Brétigny (1360) devait explicitement consacrer leur perte pour la France. A partir de cette époque, ce n'est plus que par la force que les Français tentèrent de les reconquérir."

[From p. 6]

"Ce qui ressort de l'étude de cette histoire des îles pendant toute cette période, c'est l'énergie farouche et belle avec laquelle les habitants défendirent toujours leur indépendance. Ils étaient, il est vrai, sous le protectorat de l'Angleterre, mais celle-ci leur avait concédé une sorte d'autonomie, n'intervenant pas dans leurs affaires intérieures et se contentant de les considérer comme terres franches qu'elle s'engageait à défendre par ses armes contre les entreprises de leurs voisins.

Sous cette domination des plus légère et librement consentie, les Jersiais montrèrent un loyalisme qui ne se démentira pas jusqu'à nos jours.

Dans les attaques nombreuses auxquelles ils eurent à parer, l'on peut dire que c'est à la vaillance de leurs milices, ne désespérant jamais après leurs défaites, qu'ils durent de conserver toujours cette indépendance qui fait leur gloire.

C'est de leur sang, vieux sang normand, qu'ils ont payé leur autonomie."

(l) Halphen, L. *Les Barbares*, 1926.

[From pp. 300-301]

"Alors commence la longue suite d'opérations qui ne s'achèvera qu'en 911 par leur installation définitive et officiellement reconnue sur les deux rives de la basse Seine et dans une grande partie de ce qui va devenir le duché de Normandie....

La guerre civile qui a éclaté en France et qui met aux prises Charles « le Simple », le descendant de Charlemagne, et Eude, le roi élu dans un moment de détresse, fournit aux Danois l'occasion de revenir à la charge du côté de la Seine. Durant l'été 896, ils s'établissent à l'embouchure du fleuve, et désormais on ne pourra plus les en expulser. On les verra rôder jusque dans la vallée de la Loire, jusqu'en Bourgogne, en Champagne ou même en Lorraine ; on les verra sur l'Oise et sur l'Aisne ; mais ils ne feront qu'y passer ; tandis que, sur la basse Seine, l'afflux de leurs compatriotes transforme rapidement leur occupation en une colonisation véritable. Le roi de France Charles le Simple a renoncé à empêcher l'inévitable, et la Normandie se trouve déjà en grande partie occupée quand, en 911, un traité conclu à Saint-Clair-sur-Epte entre le Carolingien et le chef scandinave Rollon vient transformer en un état de droit l'état de fait qu'à la faveur des circonstances les colons du nord ont su créer dans le pays qui porte encore leur nom."

8. REPLY OF Mr. HARRISON

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF OCTOBER 3rd AND 5th, 1953

[Public sitting of October 3rd, 1953, morning]

Mr. President and Members of the Court :

I should like if I may, before I embark on my reply, to say two or three words in relation to something that I said in the course of my address to the Court the other day which I have reason to fear may have given offence to my learned friend Professor Gros and more particularly to his colleague Admiral Durand de Saint-Front. In referring to the erection of a shelter for French fishermen on the Maîtresse Île of the Minquiers in 1939, I spoke of it as having been erected by the "so-called Marin Marie". I infer from what Professor Gros said that he took those words of mine as being intended to disparage a gallant Frenchman, and I therefore take this, the first opportunity, of expressing publicly my sincere regret for having given any such impression. I knew that Marin Marie had a very distinguished record ; I knew also that he was the brother of Admiral Durand de Saint-Front. What I did not know was that his Christian names were Marin Marie. I had always thought that Marin Marie was a nickname, and it was for that reason that I used the words "so-called". I withdraw completely, Mr. President, any suggestion of disparagement which may have been thought to lie behind my words.

The Court will remember, Mr. President, that, in my first speech, I dealt with the events of the last 150 years mainly from the point of view of establishing the facts. I propose, therefore, now to reply to those parts of Professor Gros's speech in which he dealt with these same matters. The Court will remember also that I began with a description of the position of Jersey and of its interest in this question of the sovereignty over the Minquiers and the Écréhous. From that I went on to deal with certain geographical considerations, and tried to give the Court a picture of the physical and geographical relationship of these islets to Jersey. My learned friend's counter-geography, if I may so put it, has not, I believe, in any essential way affected the picture which I painted. It was indeed only by treating the Channel Islands as a whole, which, I noticed, he did not hesitate to do for this purpose, and also by treating them as if they were French, that he was able to make out his case for treating the Minquiers and the Écréhous as dependencies of the French mainland rather than as related to the other islands, and in particular Jersey. His argument breaks down, however, for the simple reason that the Channel Islands are not part of France. I need therefore only make a few remarks on one or two particular points.

One matter on which great stress was laid was the uninhabitability of the groups. I shall say no more about that for the moment, but I shall come back to it in another connection. Then the suggestion was put forward that the Minquiers and the Écréhous should, in relation to the French mainland, be regarded as comparable to the Norwegian

skærgaard. So far as the French mainland is concerned, this seems to us a very exaggerated proposition. In relation to the French mainland, the Écréhous are a small and isolated group of islets and rocks. The Minquiers are situated some 17 miles from the mainland, and between them and this mainland the Chausey group is interposed. In fact, in relation to the French mainland, it is again only by taking the whole archipelago, that is to say, *all* the Channel Islands, that anything approaching a skærgaard can be shown to exist. On the basis of the Minquiers and the Écréhous alone, it simply does not exist in relation to the French mainland. On the other hand, in relation to Jersey, the position is very different. As I showed in my speech the other day, the Écréhous, at any rate, together with the Dirouilles and the Paternosters, constitute a true rock rampart, a substantial part of which is even within the territorial waters of Jersey—a true rampart stretching along Jersey's north and north-eastern coast. In the same sort of way, though of course the relationship is not so close, the Minquiers form a group which stretches parallel to the whole southern coast of Jersey at a distance of only 11 miles from Jersey, as compared with 17 from the French mainland.

Another point in Professor Gros's geographical observations which I noticed, was his implied suggestion that such islets as Mont-St.-Michel, Tombelaine and Bréhat, were part of the Channel Islands. This, I submit, is quite incorrect. Neither geographically nor historically have these places ever been considered a part of the Anglo-Norman archipelago. All these islets are situated well within French territorial waters off the mainland coast, and they are so near, indeed, that they are joined to the mainland at low water. Bréhat, incidentally, lies just off the coast of Brittany—nowhere near the coast of continental Normandy. In this connection I would refer the Court to the French map No. 1. The Roches Douvres also were mentioned. These, Mr. President, are isolated rocks more than 20 miles west of Jersey and nearly the same distance to the south of Guernsey. To the best of my knowledge and belief they have never been regarded as part of the Channel Islands archipelago, nor have they ever been put to any use, even temporarily, except for the purpose of the French lighthouse which was erected there some years ago.

The next matter I dealt with in my previous speech, Mr. President, was the Jersey connection with the Minquiers and the Écréhous, and the use made of them by inhabitants of Jersey for various purposes, such as fishing, cutting seaweed, the quarrying of stone, and so on. I described the Jersey buildings on the groups and the interest taken in them by Jersey men. My learned friend did not seriously question any of the facts which I gave. He mainly queried their legal significance and their validity in support of the United Kingdom claim. To that aspect of the matter I shall come presently. There were, however, certain observations of his, relative to the facts, on which I should like to comment.

He poured a good deal of scorn on the suggestion that there was what amounted to a Jersey community at the Minquiers and the Écréhous. This he described (and I use the term as it is given in the English translation of his speech) as "ludicrous". I would submit to the Court that, far from being ludicrous, the Jersey connection with the Minquiers and the Écréhous during the period I am dealing with is in fact rather

a remarkable one, and that, to assert the existence of a British community or, if you prefer it, a Jersey settlement on the Minquiers and the Écréhous, is not in the circumstances any exaggeration. Let me consider what these circumstances are. Professor Gros himself told us what they are, and I will quote his words verbatim from page 195 of the proceedings of Monday, September 28th (I quote) :

> "The chief rock of the Minquiers group is less than 150 metres in length and 30 metres in width at high tide—the size of a merchant ship. It only rises a few metres above sea-level ; not a single blade of grass grows there ; the total area of the other rocks—some 25 in number—of the group does not exceed that of this islet, so that the total area of the 'above-water rocks' of the Minquiers is barely a hectare. The Ecrehos are no larger : the principal islet is 300 metres long and the total area of the above-water rocks is three hectares. No cultivation is possible in this group either, and it is very difficult for anyone to live there. No one has described these waters so well as Victor Hugo, who liked to place the shipwrecks in his books either on the Casquets or on the Minquiers, with which he had become familiar during his exile. Referring to reefs of this sort, he wrote (I quote) : 'What should anybody go there for ? It is not an island. No food is to be found there, neither trees, fruit, pasture nor animals ; there are no wells of drinking water. It is a desolation in a solitude .... nothing but wrecks would be found there....' " (*Travailleurs de la Mer*, p. 262.)

Elsewhere Professor Gros cited documents referring to these groups, or at any rate to the Minquiers, as "these awful rocks"—"*ces affreux rochers*".

Now, I would ask the Court, having heard that description, to consider the photographs of the Minquiers and the Écréhous given in our Annex C series, and the long history of the facts which we have been able to furnish to the Court regarding the Jersey activities on these islets. Without accepting every word of Professor Gros's description of the physical condition of the islets as literally true, I accept it as being substantially true 100 or more years ago. This being so, are not we Jerseymen entitled to feel rather proud of what we have made of these islets ? Are we not entitled also to say that what we have done in regard to these islets affords real evidence of our interest in them and of their value to us?

A hundred and seventy years ago, Mr. President, these islets were regarded by the French as "affreux rochers", and it appears from the document which our opponents have put in as Annex 1 in their Additional Documents that no French authority could imagine why anyone should wish to go there. To-day, on the other hand, when, largely through the efforts of Jerseymen and by reason of works carried out by the Jersey authorities, these islets have ceased to be "affreux rochers" and have become capable of profitable use, a French claim to them is strenuously pressed.

Not only have our opponents disparaged the Minquiers and the Écréhous as barren and uninhabitable rocks, but, Mr. President, they have compared them unfavourably with the Chausey, in which, as we know, cultivation is possible. I wonder what exactly the relevance of this is, or what it is that our opponents hope to establish by it. Is the

fact that they are so much better off in the Chausey, their title to which we do not question, is the fact that they are so much better off there, I repeat, a reason for wanting the Minquiers as well, and even, in addition, the Écréhous ?

My learned friend, however, evidently felt that the existence of Jersey habitations on the Minquiers and the Écréhous, and the total absence of any French habitations, required something by way of explanation. He said, on page 193 of the same day's proceedings that I have already referred to—that is to say, the proceedings of Monday, September 28th (I quote) : "But the Court will perhaps ask why the fishermen's huts .... were erected by Jersey fishermen and not by French fishermen." He went on to say that the explanation was very simple, that in the days of sailing ships the direction of the prevalent winds and currents made it quite easy for the French fishermen to return to their ports at any time, whereas the Jersey fishermen often could not do so, and were therefore obliged to build shelters for themselves on the islets. The Court may feel that this explanation is neither entirely satisfactory nor, in itself, sufficient to account for the exclusive presence of Jersey constructions and the total absence of French ones. But quite apart from this, this explanation surely cannot be correct, because the Minquiers and the Écréhous lie on different sides of Jersey ; one, the Écréhous, roughly to the North and East, the other, the Minquiers, to the South. The winds and currents which might hinder navigation towards the one would assist it, surely, towards the other. It certainly cannot be true that the winds and the tides made it invariably difficult for Jerseymen to get home from both these groups and invariably easy for Frenchmen to do so. I suggest, Mr. President, that a simpler explanation is that the Jersey fishermen fished the waters of these islets much more regularly than the French did, and that these fisheries were also of far greater importance to them.

Apart from these various matters and one or two others which I shall mention later in another connection, my learned friend made little attempt to question the correctness of my facts. As I said earlier, it was their legal significance and probative value in support of our claim to sovereignty which he chiefly denied. This he did on two grounds. First, that some of these acts were mere applications of the 1839 Fishery Convention, or, alternatively, that they were in violation of that Convention. This matter, Mr. President, falls within the scope of Mr. Fitzmaurice's opening speech, and I shall therefore leave it to him to deal with. Secondly, Professor Gros's objection was that even leaving the 1839 Convention out of account, the United Kingdom and Jersey acts did not fulfil the conditions required by international law for the acquisition of a title by prescription or by occupation. This, too, I shall leave to Mr. Fitzmaurice, as regards the law, but I shall discuss certain points of fact in relation to this French contention.

Originally, our opponents offered a third category of objection to the probative value of the British acts. This was that most of them were to be accounted for on the basis of an exercise of jurisdiction *ratione personæ* and not *ratione soli*. My learned friend only made one brief mention of this matter when he said that acts (I quote) "such as inquests on dead bodies or the taxing of houses belonging to Jerseymen were to be explained *ratione personæ* and therefore gave rise to no protests through diplomatic channels". This, as the Court will

see, is a mere reiteration of the previous French contention and makes absolutely no attempt to answer the demonstrations we gave, that acts such as inquests and rating could not possibly be accounted for on a basis of *ratione personæ*, even if such a basis were possible under Jersey law, which it is not. For instance, to take the matter of inquests, what is Professor Gros's answer to our demonstration that an inquest has nothing to do either with the nationality of the deceased person, which is not even officially established until the inquest is held, or with the nationality of any potential criminal, since it is not even established until the inquest is held that a crime has been committed? What is his answer to our contention that these acts are acts of an administrative character carried out as a matter of good order and police by the authorities of a territory in relation to an event which has occurred there?—acts which they would not think of carrying out in relation to similar events occurring on foreign soil. I will not enlarge upon this any further, for I believe that Professor Gros's contestation was not a serious one. But I would remind the Court of the proofs which I gave and which are also afforded by the Annexes to our written pleadings that the Jersey connection with the Minquiers and the Écréhous involves a real exercise of sovereignty in the sense of actual administration and jurisdiction. It is not only Jersey habitations which are there, Mr. President, it is also Jersey law which runs in the islets.

I now turn to the suggestion that the United Kingdom acts lack probative value for other reasons. As I said a moment ago, I shall not discuss the law, but I should like to deal with certain points of fact that arise in this connection. Professor Gros reiterated several times that practically all the United Kingdom acts, including, that is to say, the Jersey acts, had taken place since 1876. I want to show that this gives a very misleading impression of the situation. No doubt many of the United Kingdom acts have taken place since that date. This is only natural. Indeed, it would be strange if it were not so. But a considerable number also took place before that date, and the Jersey connection with the groups was by then already long established. I think I should not be far wrong if I suggested that the whole French contention about the inadmissibility of the British acts, from the point of view of establishing a title based on prescription or occupation, assumes that France was the sovereign over these groups, and, therefore, that the British position was one of endeavouring to acquire sovereignty by the process of establishing title in the face of an already existing French title. But suppose, Mr. President, that the position was entirely different. Suppose that it was not France who was sovereign, and suppose that, as we contend, British sovereignty over the groups had already been established for centuries. Then, perhaps, the United Kingdom acts during the last 150 years would assume an entirely different complexion. There would then be no question of their sufficiency or validity for the purpose of giving us title. They would simply be acts in the normal exercise of an existing sovereignty. That, of course, is what we contend to be the true position. My learned friend asks the Court to contemplate the United Kingdom acts in the light of something done in order to gain possession or establish title. We invite the Court to look at them in their true perspective as the natural consummation of a process which had its

origins in a distant past, and which had been in existence for a very long time. Let us now against this background briefly review some of the main features of these acts, though of course I do not for a moment propose to recapitulate them in detail, since I described them in full in my earlier speech. From this review we shall see, amongst other things, that, although the United Kingdom acts, subsequent to 1876, may have been more numerous than those which occurred before, many of them fall into exactly the same category. In short, there was no new departure in 1876. We did not then start suddenly to exercise a sovereignty we had never exercised before, or to carry out a whole number of new acts never previously applied to the groups. The post-1876 acts should, therefore, be regarded, in my submission, simply as the natural continuation of a process which was already fully in existence before.

[Public sitting of October 5th, 1953, morning]

Before the adjournment on Saturday, Mr. President, I was approaching the matter of the United Kingdom's acts of sovereignty over the Minquiers and the Écréhous up to 1876. My consideration of this matter will cover, first, the period up to the signing of the 1839 Fishery Convention, which, even on the basis of Professor Gros's argument, is prior to the earliest possible "critical date" ; and, secondly, the period between 1839 and 1876.

In dealing with the first of these periods, I shall go back rather further than I did in my opening speech and consider certain matters which arose in the seventeenth and eighteenth centuries.

I think I can dispose quite quickly of the latter—that is to say, the seventeenth and eighteenth century matters. Earliest in time in this period were the cases in 1615, 1616 and 1617 in the seignorial court of Noirmont and then the case of 1692 in the Royal Court of Jersey. Professor Wade dealt with these the other day and, except for one observation of a general character that I shall make later, I shall say no more about them. My learned friend, Professor Gros, drew the attention of the Court to certain Acts of the States of Jersey of 1646, 1692, 1720 and 1754. He referred to them because he said they afforded proof of the fact that Frenchmen at those times resorted to the Minquiers and the Écréhous. I may point out here, Mr. President, that of these Acts, only that of 1754, produced by us as Annex A 160, has been placed textually before the Court. My learned friend appeared the other day to be somewhat disturbed by what Sir Lionel Heald had said about the lack of documentation of the French case, but it would surely not have been impossible for our opponents to produce copies of all these Acts of the States of Jersey, nor, just to refer to one statement among many made by my learned friend, which are entirely unsupported by anything in the nature of evidence, should it have been impossible for them to produce a copy of the document in which, in relation to the cancellation of the lease granted to M. Leroux in 1929, the French Government reserved its rights. It is perfectly clear, reverting to the Acts of the States which I have just mentioned, that the Jerseymen who were in the habit of resorting to the two groups in those days were fishermen who made one of the islets in each group their base of

operation. But we do not know what was the occupation of the Frenchmen who went there occasionally, nor the purpose for which they went. They certainly had no base in either group. It may well have been that they went there for purposes of smuggling or even espionage, or it may have been that it was whilst fishing on the fringes of the reefs that they encountered Jersey fishermen operating from their bases within the groups themselves. We simply do not know, and I challenge my learned friend to provide any real evidence that he does, either.

As regards the Act of 1754, my learned friend goes even further. He asserts that this Act affords evidence of the fact that the States of Jersey regarded the Chausey, Minquiers and Écréhous as being included within the Kingdom of France. I will quote, Mr. President, the relevant part of the text in question :

> "Qu'aucun Vaisseau ou Bateau venant du Royaume de France ne sera souffert à entrer dans aucun Havre, ni mettre à Terre Aucun Passagers ou Marchandises en aucun Endroit de cette Isle, pareille Deffence étant faite à l'égard des Iles & Rochers de Chauzé, Marqués, & Icrehots, ou Rochers adjacents."

I will translate, if I may :

> "That no vessel or boat coming from the Kingdom of France shall be allowed to enter any harbour, nor to bring to land any passengers or merchandise in any place in this island, the like prohibition being imposed in relation to the islands and rocks of Chausey, Minquiers and Écréhous, or adjacent rocks."

Our opponents interpret this prohibition as applying to ships coming *from* the Chausey, the Minquiers and the Écréhous, but in order to justify this interpretation they have to introduce the word "including" —"*y compris*"—which is not to be found anywhere in the text. We, on the other hand, had interpreted this in the contrary sense ; that is to say, as applying to boats coming from the Kingdom of France *to* the Chausey, Minquiers and Écréhous, and in so doing we had relied on Father de Gibon, the authority on whom also our opponents appear to rely heavily for other purposes. Referring to this Act of the States of Jersey, Father de Gibon said on page 224 of his book : "*A noter cette indication de Chausey et des Minquiers parmi les îles et îlots réclamés comme dépendances de Jersey.*" ("We may note this indication of Chausey and the Minquiers among the islands and islets claimed as dependencies of Jersey.") The Court will notice that Father de Gibon mentions only the Chausey and the Minquiers in this connection. He seems to find nothing remarkable in the fact that Jersey should have claimed the Écréhous in 1754.

But, Mr. President, whatever may be the correct interpretation of the Act of the States of Jersey, a clear distinction is drawn in it between the Kingdom of France and the Chausey, Minquiers and Écréhous—a distinction which is emphasized by the particular provision relating to the Écréhous which is contained in the last sentence of the Act. As the Court will see, there is nothing in the text of this Act to support our opponents' statement that the prohibition applied to all boats coming to Jersey from the Kingdom of France, *including* those coming from the Chausey, Minquiers and Écréhous.

Now, I do not propose to weary the Court by mentioning again the various matters which I advanced in my opening speech as being acts manifesting British sovereignty over the Minquiers and the Écréhous during the early years of the nineteenth century. The one to which we attach the most importance is the prosecution of George Romeril in 1826, and it is very significant, in my submission, that my learned friend did not attempt to deal with this at all, for here was a very clear assertion of sovereignty thirteen years before 1839. Nor, incidentally, did Professor Gros attempt to deal with the other instances, which I gave in my original speech, of prosecutions in the Jersey courts for offences alleged to have been committed at the Écréhous—in one instance, by a Frenchman. One is left to assume that the explanation is that our opponents are maintaining the arguments advanced in their written pleadings that this exercise of jurisdiction by the Royal Court of Jersey was *ratione personæ*. As the Court is aware, I dealt with this contention at some length in my opening speech, and it is one of the obvious weaknesses of our opponents' case that they are unable to offer any sort of reply.

This, Mr. President, would appear to be an appropriate point at which to consider what my learned friend had to say about our Additional Annex A 164 at page 12 of the English transcript[1] for Tuesday, September 29th. The Court will remember that this Annex contains the record of the salvage case heard in the Royal Court of Jersey on May 28th, 1811. There were joined in those proceedings three different actions arising out of the wreck at the Minquiers of one ship. The plaintiffs in the second action alleged that they had been prevented by other persons, who were already in the wrecked ship when they (the plaintiffs in the second action) reached it, from effecting any salvage. It seems clear from a reading of the judgment of the Court that the persons who had first boarded the wreck were the plaintiffs in the first action, but my learned friend has suggested that they must have been Frenchmen, and he goes on to say (I quote from p. 12 of the English transcript[1] for Tuesday, September 29th) that "The very text of Annex 164 of the United Kingdom Memorial shows that the two countries are at one on this point of manorial jurisdiction over seamen". This very sweeping statement, Mr. President, is, in my submission, quite unsustainable.

It was always clear that our opponents would be hard put to it to dispose of the evidence which we had advanced of the exercise of jurisdiction by the Jersey Courts in matters arising at the Minquiers in the seventeenth century, but I cannot think that the Court will find that this statement by my learned friend affords an adequate answer.

It is perhaps also appropriate that I should refer here to the letter from the French Minister of Marine to the French Foreign Minister dated the 14th September 1819 (Annex A 25 to our Memorial), in which the writer referred to the Minquiers as being "*possédées par l'Angleterre*" ("possessed by England"). As I said in my opening speech, we relied on this letter which, incidentally, was transmitted by the French Ambassador in London to the British Foreign Office on the 12th June 1820 (Annex A 24), as showing that there could not at that time have been in the minds of French Ministers any thought that the Minquiers were under French sovereignty. My learned friend seeks to dispose of this by invoking a supposed principle of international law that no use can be made of declarations, admissions or proposals made in the course

[1] English text not reproduced. See p. 225 of this volume.

of direct negotiations between parties when those negotiations have not resulted in agreement. I would submit, however, that this principle cannot be invoked in this connection. The statement of the Minister of Marine was made in a letter in which he sought the assistance of the French Foreign Minister to put an end to alleged violations of French territorial waters by British fishermen. It was, therefore, primarily a domestic communication on the internal plane from one French authority to another and, as such, we contend, fully admissible as evidence of the French view at that time that the Minquiers were "*possédées par l'Angleterre*".

In an endeavour to offset this piece of evidence, my learned friend invoked what he described as a "characteristic admission" on the part of the States of Jersey in 1822. The relevant paragraph of the Act of the States of Jersey to which he thus referred is cited in Annex No. 2 of the French Additional Documents. I could have supplied my learned friend with the complete text, of which I have photostat copies, but this paragraph cited by our opponents seems to us to be wholly devoid of any probative value. It is certainly not, in my submission, an admission in any sense of that word. In the first place, it appears to be little more than a mere description or recitation of the fact that oyster banks had been discovered in certain areas. But my learned friend suggested (I quote from p. 4 of the English transcript[1] for Wednesday, September 30th) that this Act of the States of Jersey showed that "The Jersey people did not therefore, in 1822, consider the Minquiers in any way as a dependency of their island; indeed, they regarded them much rather as part of the dependencies of Chaussey." There is, I submit, Mr. President, nothing whatsoever in this instrument to justify such a suggestion. It was a petition addressed to His Majesty the King in Council, and it would therefore be natural, and indeed necessary, to give an exact description of the situation of the islands referred to. The Chausey were only mentioned as a convenient way of giving the exact location of the Minquiers, and it cannot be inferred from this that the latter were regarded as a dependency of the former. The Court will remember that the Royal Court of Jersey had, only a few years earlier, dealt with two cases of salvage at the Minquiers. Furthermore, considering that only a few years earlier still, a petition had been addressed by Jersey fishermen to the States of Jersey praying that the quarrying at the Minquiers should be stopped (para. 166 of the United Kingdom Memorial), the suggestion that at this time the States of Jersey can have thought the Minquiers to be dependencies of the Chausey is clearly lacking in any semblance of plausibility.

Mr. President, I have digressed somewhat from the main thread of my argument in order to deal with these miscellaneous points arising on the earlier part of my period. I had originally started to discuss the validity of the French contention that all our acts of sovereignty had occurred after 1876, and, in dealing with this, I said I would cover the periods up to 1839 and between 1839 and 1876. I think the simplest thing I can do, and the one which will save the most time, will be to enumerate without comment the principal acts or evidences of sovereignty which we have produced relating to the period up to 1876, some of them of dates prior to 1839 and some after.

Apart from the records of the Seignorial Court of Noirmont regarding the cases in 1615, 1616 and 1617, the case heard in the Royal Court of

[1] English text not reproduced. See p. 249 of this volume.

Jersey in 1692 and the Acts of the States of Jersey of 1646, 1692, 1720 and 1754, to which I have already referred, these acts and evidences are, as regards the Minquiers, the following :

1. Act of States of Jersey, January 12th, 1779, subsidizing Jean Richardson and his crew for the carrying out of rescue work at the Minquiers (Additional Annex A 162).

2. Act of States of Jersey, February 23rd, 1872, regarding French interference with Jerseymen fishing at the Minquiers (Annex 140).

3. Judgment of the Royal Court of Jersey, May 28th, 1811, on the salving by Jerseymen of a vessel wrecked at the Minquiers (Additional Annex A 164).

4. Judgment of the Royal Court of Jersey, October 3rd, 1817, on the salving by Jerseymen of a vessel wrecked at the Minquiers (Additional Annex A 165).

5. Three inquests on bodies of passengers in the ship *Superb* wrecked at the Minquiers in September 1850 (Additional Annexes A 168, 169, 170).

6. Evidence of workmen quarrying stone at the Minquiers in 1792 ; work continued until early in the nineteenth century ; fishermen made protests which eventually brought work to an end (para. 166 *(a)* of our Memorial, and Annex A 129, p. 337, 2nd para.).

7. The cutting of initials by quarrymen on Maîtresse Île and evidence of its occupation by them. (I may say in parenthesis that I notice that my learned friend scoffed at this, but nevertheless it is, I submit, of probative value.) (This is referred to in paras. 166 *(b)* and *(c)* of our Memorial, pp. 95-96.)

8. Captain Martin White's survey in 1812, with its evidence of buildings on the Minquiers (para. 169 *(a)* of the Memorial, on p. 98, and Annex A 138).

9. The evidence of buildings at Maîtresse Île in 1869 (para. 167 of the Memorial).

10. Despatch from British Embassy in Paris, November 12th, 1869, claiming that the Minquiers were a dependency of the Channel Islands (Annex A 51).

11. The evidence of the presence of fishermen at the Minquiers and the building of huts by them (para. 173 of the Memorial, and Annex A 139).

As regards the Écréhous :

1. The examination by the Bailiff of Jersey of a fugitive from French justice found at the Écréhous on May 28th, 1706 (Additional Annex A 159).

2. The prosecution of George Romeril in 1826 (para. 136 *(a)*, p. 79 of the Memorial, and Annex A 80).

3. Inquest, May 28th, 1859, on the body of an unknown seaman believed to be a French national, found drowned near the Écréhous (Additional Annex A 171).

4. The registration of Philip Pinel's boat by Her Majesty's customs officer in 1872 (para. 138 *(c)* of the Memorial, p. 81, and Annex A 87).

5. The warrant dated October 9th, 1875, constituting the island of Jersey as a port of the Channel Islands (Memorial, para. 85, pp. 56 and 57, and Annex A 30).

6. The evidence of the ruins of the stone hut on Blanc Île bearing the date 1820, in which Philip Pinel later lived ; and the reference to

other huts by Captain Martin White (paras. 143 and 144 of the Memorial, and Annex C 11).

7. The evidence of houses at the Écréhous in, and before, 1846 (para. 144 *(c)* of the Memorial, and Annex A 101).

8. Evidence of Jersey fishermen resorting to the Écréhous from the seventeenth century onwards (para. 146 of the Memorial, p. 86, and Annexes A 106 and C 14).

9. The evidence of the residence of Philip Pinel at the Écréhous from 1850 to about 1895 (Memorial, para. 150, p. 87). And finally, Mr. President:

10. The contract of sale of property, registered in the Public Registry of Deeds in Jersey, in 1863 (Memorial, para. 141, and Annex A 91).

France, Mr. President, can show nothing at all comparable with these acts during the period up to 1876, or indeed after. Moreover, these acts were all accomplished before the earliest date at which any French protest was received. It is difficult to take seriously the French plea that during all this period up to 1876 they were aware of the British claim but refrained from protest simply for the sake of not disturbing good relations. I included just now in my enumeration of the principal acts or evidences of sovereignty the United Kingdom note to the French Government of November 12th, 1869, given as Annex A 51. This was a clear affirmation of sovereignty on the part of the United Kingdom Government. The French reply, contained in Annex A 52, however, not only does not contest the United Kingdom claim, but seems to proceed on the basis that this claim is admitted. It was not until seven years later that the first French protest was received, and even then the protest related to the question of fisheries and did not involve any French claim to sovereignty. Thus, the picture during the first three-quarters of the last century is that Jersey administers the Minquiers and the Écréhous as part of her territory without any protest or comment from France.

After 1876, we are told by Professor Gros (I refer to p. 38 of the English transcript[1] of Wednesday, September 30th) that there came into existence what he describes as a sort of permanent state of protest. As to this, I would again refer the Court to paragraph 200 of the United Kingdom Reply, in which a long list was given of the various acts or categories of acts against which the Government of the Republic have never protested. I pointed out in my previous speech that these omissions related to acts of sovereignty so definite and significant that the failure to take any notice of them amounted to virtual acquiescence in the United Kingdom and Jersey position, despite the formal protests which the Government of the Republic did from time to time address to the United Kingdom Government.

But let us recall what this so-called permanent state of protest really amounted to. No doubt the diplomatic correspondence appears at first sight to be voluminous, and my learned friend has insisted on that very much. I refer, however, to pages 170-173 of the printed report which covered my previous speech to show what actually happened, and I would remind the Court that no word of any sort or kind about the Écréhous was received after 1888. As regards the Minquiers, there

[1] English text not reproduced. See p. 267 of this volume.

were three widely spaced protests, each of which was concluded by a detailed and reasoned affirmation of the grounds of British sovereignty to which no further reply was made. In the meantime, Jersey acts continued certainly on the basis of a complete conviction on the part of Jerseymen and the Jersey authorities that the groups were part of Jersey. The long-standing Jersey connections with the islets and the absence of any French reaction, at least for three-quarters of the last century, would alone have been sufficient to warrant this belief. Those, Mr. President, are the facts. I shall leave it to Mr. Fitzmaurice to deal with their legal implications.

I come now, Mr. President, to Professor Gros's remarks on the alleged French acts of sovereignty. I can most easily deal with these, I think, in relation to the Additional French Documents which were put in and circulated as Annexes 1 to 13.

There is a certain pattern running through these documents which I think the Court will not have failed to have noticed. Let us take, for instance, Annex 1, the so-called "Demande de concession des Minquiers" of 1784, an account of which appears in the number of the *Pays de Granville* for April 1951. I would ask the Court to consider this in relation to Annex 8, which contains a long and detailed correspondence about the buoying and lighting of the Minquiers. In each case, the Court will see a desire on the part of the French authorities to claim the Minquiers as French territory, coupled with an evident realization of the fact that there was equally a British claim to this group: that any assertion of the French claim would lead to difficulties with the British authorities, and finally, a decision, largely for that reason, not to proceed with the particular object which the French authorities had in mind. The same observation also applies to Annex 6, which consists of a letter from the French Foreign Ministry to the French Ambassador in London, dated February 1937. In the first of these cases, the request for a concession at the Minquiers by the French authorities was refused, and, in the second and third, French proposals for the creation of a depot on the Maîtresse Île of the Minquiers for the use of their buoying service and proposals for the co-ordinating of buoying and lighting in that area, were not proceeded with. No attempt was made by the French Government to establish the proposed depot on the Maîtresse Île nor to interfere in any way with the buoying and lighting which had been carried out by the Jersey authorities.

In short, the documents in these three Annexes, 1, 6 and 8, fully bear out our contention that France, while persisting in maintaining a claim to these islets, was not in practice prepared to assert it and therefore did in practice acquiesce in the British and Jersey position, whatever she may have maintained on paper.

There are certain further points of interest arising out of these three Annexes individually. For instance, it is quite clear from the letters of the Intendant at Caen and the Sub-Délégué at Granville, in Annex 1, that they themselves knew very little or nothing of the Minquiers in 1784. The Sub-Délégué at Granville, in his Report to the Intendant, said that he had derived the information contained in that Report from "ceux qui ont été dessus"—from those who have been there. This may be compared with the obvious knowledge of the Minquiers which prevailed in Jersey at that time and earlier and is amply shown by the evidence before the Court. On the other hand, we find this same

curious lack of knowledge—this time about the Écréhous—in French quarters much later. I refer to our Additional Annex A 174, page 662, where it will be seen that in 1886 the journalist M. Sutter Laumann enquired about the Écréhous at Cherbourg and was met with the enquiry "'Les Écréhous', qu'est-ce que c'est qu'ça!" ("The Écréhous —what are they!")

Annex 8 is also significant in another sense, as it establishes out of the very mouth of the French authorities themselves, and on the basis of their own internal official correspondence, precisely what we said was the position in regard to the buoying and lighting of the Minquiers, and that is, that all the buoys, lights and beacons on the islets and on the plateau itself were installed and are maintained by the Jersey authorities. The sketches given in Annex 8 clearly establish this, as, apart from other things, all these beacons, marks, etc., are shown to bear the name *États de Jersey*. The whole concern of the French authorities in 1938 was that the colour and form of the beacons and marks on the Minquiers itself were different from those employed for the French buoying and lighting of the waters situated at some distance from the main islands and rocks and marking the approaches to Granville and St.-Malo. What the French authorities sought was uniformity in the matter, which was no doubt quite natural. Nevertheless, the existence of these differences serves to mark quite clearly the two facts, first, that all the marking and beaconing of the Minquiers themselves was—as it is to-day—by Jersey, and secondly, that there was—as there is to-day—no French buoying or lighting of the Minquiers. It is only outside the reef and for a different purpose.

Incidentally, Mr. President, support for our contention that the French buoys in this area are designed to assist navigation to and from the Port of St.-Malo, is to be found in a letter dated March 17th, 1937, addressed to the British Foreign Secretary by the French Ambassador in London. That letter, though it was the immediate sequel to the letter dated February 23rd, 1937, given as the French Annex 6, is not produced in that Annex, but I would submit that it is clearly relevant since in it (and I have a copy of it) the French Ambassador spoke of the reinforcement of the beaconing system of the approaches to the port of St.-Malo.

The object of the French buoying and lighting in this area also emerges very clearly from the correspondence between the British Naval Attaché in Paris and the French Ministry of Marine, given in Annex 11. I would, however, incidentally point out that this correspondence, not having been exchanged until September 1952, and relating as it does to events taking place at that date, that is to say, a year after this dispute was submitted to the Court and nearly two years after the signature of the Compromis, is not, strictly speaking, receivable as evidence before this Court. We have not objected to its production, but I would nevertheless draw the attention of the Court to the dates in question. However, what does this correspondence show? It shows that it was the British ship *Falaise* which reported the extinction of the light on the south-west Minquiers buoy. Now the *Falaise*, Mr. President, is the British Railways' ship which during the summer maintains the regular service between Southampton and St.-Malo, and she was reporting that one of the lights on her route was extinguished. This again bears out our contention that these lights have, as their object, not the buoying

or lighting of the Minquiers but that of the approaches to St.-Malo. The request made by the British Naval Attaché for the re-lighting of this buoy was in the ordinary routine interests of navigation, and of the maintenance of the service between St.-Malo and Southampton. Such interchanges on technical matters between the competent authorities of different countries are common form, and are, I submit, devoid of any legal or political significance. We have never denied that there are buoys and lights in this vicinity, which have been installed by the French authorities and which are their property. It is obviously for them to maintain these lights. All we have denied is that these lights have any direct connection with the Minquiers themselves, or that their existence is in any way evidence of French sovereignty over the Minquiers.

I do not know, Mr. President, what the Court will think of Annexes 12 and 13. These documents are dated September 21st, 1953, that is to say, not only after the submission of the dispute to the Court, but even after the opening of the present oral hearing. However, we offer no objection to them : we merely draw attention to the fact. In any case, we fail to see what it is exactly that these documents establish, assuming them to be accurate, and the memories of those concerned to be reliable. All that they show is that, in 1903 or 1904, and again in 1935 or 1938 (the two letters in Annex 13 are not in agreement about this), certain French visits to the Maîtresse Île of the Minquiers took place. We do not deny that such visits, which we would regard as quite unauthorized, may from time to time have occurred, but the circumstances surrounding these particular visits seem, at the very least, to be equivocal. In any case, I would submit that such isolated acts occurring at intervals of thirty or forty years signify nothing and are not evidence of French sovereignty.

Annex 9 appears to relate to nothing more than the grant of an *ex post facto* subsidy in respect of the refuge hut erected on the Maîtresse Île of the Minquiers just before the war, which we have already fully discussed in our pleadings and in my original speech. I am interested now to observe that this hut was called "Maison de France". Why a "Maison de France" on French territory ? It is usually, I suggest, outside France that one finds a "Maison de France". Incidentally, there are a number of discrepancies between the actual terms of this document and what my learned friend said in relation to this matter generally, on pages 44 and 45 of the English transcript [1] for Wednesday, September 30th. He spoke of the essential interest in the matter being that of the Conseil municipal of Granville headed by the Mayor of Granville. Annex 9 records proceedings of the Conseil municipal of Cancale—but that, I have no doubt, my learned friend will be able to explain.

Annex 10 appears to be totally without probative value of any kind, and I do not propose to make any further comment on it, except that I would ask the Court to note the date at which it is stated that the efforts of the gallant Admiral had resulted in the decision to hoist the French flag on the Minquiers—August 20th, 1945. Already, Mr. President, in May 1945, shortly after the liberation of the Channel Islands, a visit had been made by Jersey officials to each of the groups and the British flag had been hoisted there (I refer the Court to Annex A 131 to our Memorial). Equally lacking in probative value is Annex 2, which I discussed at an earlier stage of my speech.

[1] English text not reproduced. See pp. 272-273 of this volume.

It is also difficult to see in what way Annex 4 helps the French case. It consists of a protest by the British naval authorities at depredations committed at the Minquiers by French fishermen. In reply, the French naval authorities offer to open an enquiry about this, and complain at the constant hoisting of the British flag at the Minquiers. If anything, this Annex only confirms the fact that this flag was flown at the Minquiers and that the Minquiers were regarded by Jersey fishermen and the Jersey authorities as British territory.

This leaves us, therefore, with Annexes 3, 5 and 7. The correspondence in Annex 7 was quite clearly the precursor and cause of representations contained in M. Corbin's notes of October 1937 and January 1938, which figure as Annexes A 76 and 77 to the United Kingdom Memorial. This correspondence adds nothing to the effect of those notes, which was fully discussed in my first speech. The French Annex 7 is, however, interesting as evidence from French sources of the *de facto* position at the Minquiers and of the occupation of that group by Jersey fishermen.

Annex 5, which consists of a letter from the French Ambassador in London to the French Foreign Minister of April 1903, shows exactly the same thing as certain of the other French Annexes to which I have already drawn attention—namely, that the real interest and position of France in this matter was not to assert her own sovereignty but to prevent the assertion or recognition of British sovereignty and to establish for the islands a sort of indeterminate or neutral position. I will have more to say about this later, Mr. President, but for the moment I will only say that it is difficult to reconcile letters of this kind with the French claim to have the sovereignty over the groups.

Annex 3, consisting of a letter of February 1876 from the French Foreign Ministry to the French Ambassador in London, is clearly the precursor of the representations made by the latter, which are contained in Annex A 31 to the United Kingdom Memorial. This letter indeed contains the instructions on which those representations were based, and it therefore adds nothing to the latter. It does, however, add strength to certain observations that I shall make in a few moments. It also contains evidence of a French desire to split up the Dirouilles, part of which are definitely within Jersey waters—and also an admission of our contention that the Écréhous are a submarine prolongation of the Paternosters and the Dirouilles and therefore, geographically, a unity with Jersey.

That is all I shall say about the Additional French Documents, Mr. President. But perhaps, in view of the fact that some of them are dated even after the opening of the present oral proceedings, I might be allowed, on the same basis, to mention a piece of information which I have received from Jersey, since I made my opening speech, from a member of a local firm of advocates. It refers to a well-known Jersey family of the name of Tocque, and to a book of family history and records kept by that family. In it appears the following note, and I would emphasize the date: "A.D. 1690—Nicholas Tocque. Died and buryed by the side of his house the south side of the Maître Île, Minquiers." If this can be credited as accurate, and with respect I see no reason why it should not be, it indicates the existence of Jersey habitations on the Minquiers as early as the end of the seventeenth century. The Court will remember that the Dumaresq case, given in our Annex A 21, was heard in 1692.

There is very little more I need say about the alleged French acts of sovereignty. I believe the Court will not have been favourably impressed by my learned friend's attempt to disparage the efforts of Jersey in the buoying and beaconing of the Minquiers. Great stress was laid on the superiority of the French efforts and its far greater cost. This we do not dispute. We only say that the French buoying and lighting is not of the Minquiers themselves, whereas the Jersey works are. This is indeed proved, as I have shown, by the French documents themselves, and there is only one small correction to Professor Gros's observations that I would like to make. He suggested that the only passage for shipping between Jersey and St.-Malo was to the West of the Minquiers. That, Mr. President, I, as an eye-witness of the passage of ships between St.-Malo and Jersey, would say is not correct. May I refer the Court, Mr. President, to the chart Annex B 3 to our Memorial. My learned friend produced it in Court when he was speaking the other day. We were quite familiar with it because we had produced it as our Annex B 3. It is here on the blackboard behind me, and I would point out, if I may, to the Court, where the French lightbuoys and other buoys respectively are. [Mr. Harrison here indicated the appropriate places on the chart.] Here, on the extreme right of the chart is the Caux buoy, as we know it. That is a lightbuoy—it is well to the East of the Plateau, which the Court well knows is here. Here, at this point, is the Sauvages, another lightbuoy. Here, another. Here, another and, finally, the Minquiers buoy, here to the West. Those, Mr. President, are the five French lightbuoys: there, there, there, there and there—not one of them within three miles of any permanently uncovered rock on the reef itself. There remain the four other buoys which are not lightbuoys but are whistling buoys, I think: one here, the Nuisible; one here, another here and another there. The Court will see that these buoys, all of them, form a circle around and away from the Minquiers. What is significant, I submit, Mr. President, is that there are two buoys to the East of the Minquiers, the Caux (the lightbuoy of which I spoke first)—here, with the red circle round it—and the Nuisible, the one with the blue circle round it, which is on the left of the first on the chart. Those two buoys, the one a light, the other a bell, are there, Mr. President, for shipping passing to the East of the Minquiers, and, as I have said, I am regularly myself a witness of the passage of the British Railways steamer *Brittany*, which goes regularly every week from Jersey to St.-Malo, and three times during the summer. Invariably that ship passes to the East of the Minquiers and, I submit, quite apart from the fact that it shows that my learned friend is perhaps no better informed on this particular point than he is about the *régime des vents et des courants* in that area, it shows quite clearly that shipping passes from Jersey to St.-Malo on both sides of the reef; and that it is in order that shipping should do so that the area is so lighted and buoyed by the French authorities.

There is, of course, Mr. President, no French buoying or lighting at the Écréhous. Everything there is done, has been done, by Jersey. My learned friend, quoting from one of our Additional Annexes, suggested that in 1886 French customs boats visited or had visited the Écréhous weekly. I can only say that we have no evidence of it and that the Annex in question is an article written by a French journalist.

I would add simply that is it quite inconceivable that there should have been weekly visits to the Écréhous on the part of French customs authorities without our knowledge, more particularly having regard to the fact that a Jersey custom-house had been established at the Écréhous in 1884 (Annex A 86) without, as I have shown, any comment or protest from the French Government ; and having regard also to the evidence we have produced of the vigilance of Mr. Bertram, the sub-agent of the Impôts of Jersey.

The VICE-PRESIDENT, Acting President *[interpretation]:* Mr. Harrison, I would like now to give an opportunity to Judge Hsu Mo, who wants to put two questions with regard to the last part of your speech. You are under no obligation to answer these questions at once—you may do so later at your own convenience.

Judge HSU MO : My first question is : Do ships usually navigate inside or outside the semi-circle formed by the French buoys ? And my second question is : Can you show us the buoys constructed by Jersey on the Minquiers ?

Mr. HARRISON : I can give the answer to the first question very simply, Mr. President. It is that, to the very best of my knowledge, no ships—apart from fishing boats—ever navigate inside the French line of buoys. They navigate exclusively—and I would submit that they *must* navigate exclusively—outside those buoys. I would say, however, that there is one exception to that, and that is that I know that one of the Masters of the *Brittany*—one of the former Masters of the ship *Brittany*—used to take a passage which, as far as I know, none of his colleagues will take, that is the passage which goes near to the Coq Beacon placed by the Jersey authorities in, I think, 1931 or 1934. I can point that out to the Court. [Mr. Harrison indicated on the map.] There, Mr. President, is the Coq. The other Jersey buoys and beacons are principally within this area ; most of them are immediately round the Maîtresse Île here and in that area. There is one which is marked on the chart—I would admit that it is the only one of the Jersey buoys or beacons which is marked on the chart—that bell, at that point near to the Petit Vascelin, is a Jersey bell and buoy. The remainder of the Jersey buoys and beacons, as I have said, Mr. President, are principally in this area, although there is one, as the Court will find from the Annexes, on the Pipettes. There is another on the Maisons, and indeed there are others elsewhere, I am quite certain, of which I am not able at this moment to tell the Court exactly where they are on the map, but I can say that all the Jersey buoys and beacons are within this area. All the French buoys and beacons are right outside, and I have not the slightest reason to think that there is any navigation by shipping properly so called inside the line of those lights.

The VICE-PRESIDENT, Acting President *[interpretation]:* Judge Hsu Mo states that he is satisfied with your answer and I would thank you.

Mr. HARRISON : And now, in conclusion, Mr. President, may I place before the Court a view of this case which, speaking with the local knowledge of a Jerseyman, I believe to be a true and correct view. It is this : that the Government of the Republic in this matter is principally—if not indeed entirely—concerned with the interests of French fishermen. It is not—and I would submit that it never has been—

really interested in the matter of sovereignty. I have in point of fact always believed that the real concern of the Government of the Republic was solely the protection of the interests of French fishermen, but it would seem that I must now modify that view to some extent, at least so far as the Minquiers are concerned, having regard to the recent disclosure of the hydro-electric projects for the installation of tidal power plants in the Bay of Mont-St.-Michel and the region of the Minquiers archipelago.

I would now say, therefore, that the main objects of the Government of the Republic are—as they always have been—to protect the interests of French fishermen in the areas of the Minquiers and the Écréhous and now to further the hydro-electric projects. But I would repeat, Mr. President, that France is not—and never has been—*really* interested in the matter of sovereignty as such.

I shall try to show in a moment why I consider myself amply justified in making this statement, but I should like first to say that our opponents need have no fears in regard to these matters. Whatever the outcome of the present proceedings, French fishery rights will be respected by us and, as I said the other day, no unreasonable obstacle will be placed in the way of the hydro-electric projects by the Government of the United Kingdom or by the States of Jersey.

Now, as to France's real interest in this matter. I draw the attention of the Court to two principal points. The first is that my learned friend, Professor Gros, said that it was for the sake of the fishermen of St.-Malo, Carteret, Camaret and Chausey that the Government of the Republic had brought this matter before the Court, so that it might be established that they were right when they said : "These rocks are ours." Now why should these fishermen wish to claim these rocks as theirs ? They have no huts on them—apart from the shelter erected in 1939 at the Minquiers —and they never have had any huts on them. Moreover, if we accept as correct the explanation offered by our opponents to account for the building of huts on the islets by Jerseymen only—namely, that the *régime des vents et des courants*—the prevalent winds and tides in these areas—is always unfavourable to Jersey fishermen and never to French fishermen—this I have already discussed—then one simply cannot see why French fishermen should ever have wanted to have huts there. They have, in fact, no interests whatsoever on the habitable portions of the reefs. Their only interest is in fishing in those waters. When one considers all that my learned friend had to say to show what insignificant, miserable things the reefs are—devoid of vegetation and without drinking water ; when one compares, as he invited the Court to do when he produced his photographs, these *écueils* with the *île habitable*, Chausey, one cannot help asking oneself : "Why on earth are our opponents making such strenuous efforts to secure these *écueils ?*" It is true, of course, as I have said, that Jerseymen in the last 150 years have made them much more attractive than they were, but even so, they have, according to Professor Gros, very little to commend them even now.

And if that is, in fact, the French view, then it is difficult to see how the Government of the Republic can be really interested in the matter of sovereignty. This brings me, Mr. President, to my second point.

I believe it not unfair to say that—certainly in comparison with Jersey—France has never at any time performed any true act of administration or act manifesting sovereignty over either of the groups. She

has certainly contributed nothing towards making them usable. Moreover, up to 1876—a date to which our opponents themselves obviously attach considerable importance—France never reacted in any way at all against the very obvious acts of possession on the part of Jerseymen and the Jersey authorities over both the groups, of which we have already given proof. What was it, then, that in 1876 produced the very first reaction on the part of the French? It was, of course, the United Kingdom Treasury Warrant of 1875, of which the Court has already heard a great deal. I would, however, ask the Court to refer again to Annexes A 30, 31, 32, 33 and also Annex 3 of the new documents submitted by our opponents.

It is, I submit, perfectly clear from these documents that the immediate concern of the Government of the Republic was lest any prejudice should be suffered by French fishermen. The question of France's sovereignty over the Écréhous was never raised—even in the letter from the French Foreign Minister to the French Ambassador in London, dated February 17th, 1876, which is reproduced in Annex 3 of the new French documents. What they were interested in was the maintenance of the rights of French fishermen under the 1839 Convention, and securing for the French fishermen the right to avail themselves of the shelter to be found in the *fosse* to the East of the Maîtresse Île.

It was not until several years later that, following a protest in 1883 against an alleged and in fact non-existent *Projet de loi* of the States of Jersey, said to be designed to prevent French fishermen having access to the Écréhous, the French began to show an interest in the matter of sovereignty. They then set up a Committee of Experts to look into the question, and that Committee eventually, in November 1886, produced the Report (Annex A 42 to our Memorial) which led to the Government of the Republic putting forward, for the first time, a claim to sovereignty over the Écréhous.

Following that, it was no doubt natural that the Government of the Republic should put forward a claim to sovereignty over the Minquiers and, in 1888, they seized the opportunity afforded by an official visit made to the Maîtresse Île by the Piers and Harbours Committee of the States of Jersey and, for the first time, advanced that claim. I will not weary the Court by referring again to the correspondence that followed. The point I seek to make is simply this—it was only with the object of upholding what they believed to be the rights of French fishermen under the 1839 Convention that the Government of the Republic raised the question of sovereignty at all. This indeed seemed to be admitted and even declared by my learned friend the other day. It emerges clearly from the correspondence beginning in 1876 that France had previously regarded the Minquiers and the Écréhous as neutral territory. I think it is not unreasonable to suggest that the claims to sovereignty over the islets were put forward with no other object than to secure an agreement with the Government of the United Kingdom which would have the effect of confirming the groups as neutral territory. Striking evidence of this is to be found in the letter of M. Paul Cambon, French Ambassador in London, to M. Delcassé, French Minister of Foreign Affairs, dated April 27th, 1903, which is reproduced at Annex 5 of the new French documents—and I would like to ask the Court, if I may, to take particular note of the terms of that letter. Apart from revealing a curious lack of liaison between

departments of the Government of the Republic on the question whether or not there was any intention on the part of that Government to erect a lighthouse on the Minquiers, this letter shows quite clearly that what M. Cambon was aiming at in 1903 was to obtain (I quote) "la reconnaissance de la neutralité des Minquiers" ("an acknowledgment of the neutrality of the Minquiers"). And we know that M. Cambon's suggestion to the French Foreign Minister was followed up almost immediately (Annex A 62) and again in 1905 (Annexes 71 and 72). The same fundamental concern over fishery rights rather than sovereignty also appears clearly from the French Additional Annex 7, the correspondence in which led up to M. Corbin's representations of 1937.

It is, I submit, Mr. President, abundantly clear that the Government of the Republic, which now so boldly asserts that France is and always has been sovereign over these islets, would, at the turn of the century, have been completely satisfied if the United Kingdom Government had been willing to agree that the groups were neutral territory. Our opponents are seeking now, by efforts both skilful and energetic, to make good a claim to sovereignty, and the Court has heard from Professor Gros a very able exposition of the historical and legal aspects of their case. Yet to me the whole French case gives the impression of something put forward *ex post facto*, rather than of a case always firmly believed in. And the invocation at a very late stage of the hydro-electric scheme, combined with the failure of my learned friend to reply in any way at all to my contention that this is a matter of political expediency and certainly of no relevance whatsoever to the issue before the Court, merely serves to strengthen this impression.

I ask the Court, Mr. President, on a basis of law, to declare that sovereignty over the Minquiers and the Écréhous is where it so clearly lies already.

9. REPLY OF Mr. FITZMAURICE

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF OCTOBER 5th AND 6th, 1953

[Public sitting of October 5th, 1953, afternoon]

Mr. President and Members of the Court :

I am conscious that after the speech you heard this morning, with all its colourful detail, a speech which really contained the whole essence of this case, since, after all, we are not dealing with the dead past nor the unborn future, but with the living present, the rather pedestrian—or perhaps I should say, piscatorial—matters that I have to address you about will come as somewhat of an anticlimax. I am also conscious that whereas I and my colleagues—and this applies also to our French friends—will shortly be able to go away and forget all about this case (that is, until we receive your judgment), the work of the Court is, I will not say, only just starting, but at any rate, by no means finished. I should, therefore, have liked to have made my own remarks as brief as possible and to have terminated this afternoon, but my friend Professor Gros gave me so much to think about in that part of his speech the other day which covers the matters I have to put before you that it will in fact be impossible for me to finish before to-morrow morning, though I shall certainly do so before lunch-time.

I shall address you, Mr. President, on two topics in reply to my friend Professor Gros : first, the question of the critical date ; secondly, his argument that, even if 1839 is not the critical date, the United Kingdom acts in relation to the Minquiers and the Écréhous during the nineteenth and twentieth centuries would not fulfil the conditions required by international law for the acquisition of a title by prescription or occupation, although there is a certain unreality in a discussion on that matter, because, of course, it is not our position in the very slightest degree that we were acquiring a title by prescription or occupation during that period. Nevertheless, I will deal with the matter on that basis, hypothetical though it is in our view. Then, since my speech will conclude the case for the United Kingdom, I shall also, at the end of it, summarize very shortly our main argument relating to the case as a whole.

Before I begin, there are certain preliminaries I must deal with. I should like to add my personal tribute to the spirit in which these proceedings have been conducted by our French friends. Given the history of both our countries, there are no doubt various ways in which each Party might have sought to embarrass the other by enlarging the field of debate. This has happily been avoided, and we have confined ourselves to our supposed "Anglo-French Mediterranean", which I must say seems to have afforded plenty of scope for controversy !

Next, a question arose the other day about the right of the Parties to invoke the 1951 Fishery Agreement, and my friend Professor Gros, in very generous terms, withdrew any imputation that the United Kingdom Government, contrary to the understanding between our two countries, had made any use of the 1951 Fishery Agreement for the purpose of supporting its claim to sovereignty. May I, in my turn,

unreservedly withdraw any imputation of bad faith on the part of the Government of the Republic, or its Agent in this case, which might have seemed to be contained in my previous remarks concerning the French position about the Convention of 1839. Certainly no such imputation was intended, and what is really involved is yet another of the many misunderstandings to which this ill-fated Convention has given rise.

I also entirely agree with Professor Gros that within the scope of the Compromis submitting this dispute to the Court, there is nothing at all to prevent either Party from advancing any argument in support of its claim or against the claim of the other Party. But equally, of course, it must be open to either Party to contend that the arguments of the other are, or may be, contrary either to the letter or to the spirit of the Compromis, as we believe this argument about the 1839 date to be. That I shall discuss presently.

Mr. President, I spoke of the 1839 Convention just now as ill-fated—a term which the interpreter translated as *cette malheureuse convention ;* perhaps it would be a little more in accordance with the idea in mind if it were translated : *destinée au malheur.* If there is one thing that is certain, it is that this Convention has given rise to constant difficulties and misunderstandings, and I think it is worth while enquiring why this should be so, for after all, on the face of it, this Convention is a perfectly normal one, very similar in many ways to many another fishery convention. There have been, I think, two principal reasons for this. The first has been the uncertainty about the exact territorial sphere of application of Article 3 of the Convention. France regarded this provision as applying to the Minquiers and the Écréhous. The United Kingdom evidently did not. But the second cause of difficulty has surely been the constant attempts on the part of successive French Governments to read into an ordinary fishery convention implications about sovereignty. Thus a vicious circle was set up. France became alarmed on perceiving that the United Kingdom did not consider that the Convention created a common fishery position at the Minquiers and the Écréhous. But, equally, the United Kingdom Government was alarmed when it became apparent what was the basis on which France claimed these common fishery rights—in short, when it appeared that France wished to use this Convention, not merely to claim fishery rights, but also to contest, or at any rate deny, the existence of the United Kingdom sovereignty.

Now the argument about the 1839 Convention has been presented in various forms in the course of this case, and from this the Court may draw its own conclusions. However, Professor Gros has greatly helped us now by defining his attitude on certain points in the French thesis which were previously obscure. This will enable us to ignore the inessentials and concentrate on the only matters which are really decisive. From the moment that Professor Gros admitted or declared three things, as he did the other day, this whole question becomes relatively simple. What were these three things ? They were, first, that in 1839 the main, and indeed the sole, object of the Parties was to regulate fisheries, and to do so (I quote his words) "without touching on the question of sovereignty" ; secondly, that the 1839 Convention neither created a joint régime or condominium for the islands, nor caused them to become *res nullius*, but that they continued to be under the exclusive sovereignty of whatever Party had sovereignty in 1839—that Party

unreservedly withdraw any imputation of bad faith on the part of the Government of the Republic, or its Agent in this case, which might have seemed to be contained in my previous remarks concerning the French position about the Convention of 1839. Certainly no such imputation was intended, and what is really involved is yet another of the many misunderstandings to which this ill-fated Convention has given rise.

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being, of course, in his view, France ; and, thirdly, that what the Parties agreed to in 1839 was the common use of the islands for fishery purposes. I hope that I have described his theory in objective terms.

Now with this introduction I shall come to my main argument, and, in the light of my friend's speech the other day, I shall ask the Court to reject his thesis on three grounds. First, that it is inconsistent with the Compromis, which it is the primary duty of the Court to apply. Secondly, that, since the question at issue in this case is the territorial sovereignty over the Minquiers and the Écréhous, the French theory cannot be accepted unless it is at least quite clear that Article 3 of the 1839 Convention did apply to those groups ; and I shall submit that this fact is by no means clear. I shall, however, be extremely brief over that part of my argument. I shall certainly not attempt to re-open all the geographical or historical details or to go through the various negotiations and instruments again. It will really be sufficient for my purposes on that point that, although Professor Gros argued that the territorial application of this Article was perfectly clear, it took him some hours of most intricate exposition in order to do so. Then, thirdly, and even on the assumption that the Article applied to the Minquiers and the Écréhous, I shall ask the Court to reject the French theory because it is clear, and indeed is now clear from the observations made by my friend the other day, that this provision applied in a purely fishery sense and had no bearing on the question of sovereignty.

My first argument is that the French theory about 1839 is difficult to reconcile with, at any rate, the spirit of the Compromis which the Court has to apply. The Compromis recites—in the Preamble—that differences (I quote these words) "have arisen" between the Parties (and then I quote again) "have arisen .... as a result of claims by each of them to sovereignty over the islets and rocks in the Minquiers and Ecrehos groups". It goes on to say that it is "these differences" which the Parties are desirous of having settled by a decision of the Court. It is further quite clear from Article 1 of the Compromis that the Court is to determine the matter on the basis that the sovereignty belongs to the one country or the other. This evidently assumes and pre-supposes that claims to exclusive sovereignty have already been put forward by the Parties, and the natural interpretation is that the Court is being asked to determine which of these claims to exclusive sovereignty which *ex hypothesi* have already been put forward, which of these claims is the correct one. That in turn pre-supposes that it must have been open to the Parties to put forward such claims, and that the matter is being submitted to the Court on that basis. One of the Parties' claims is correct and the other will be found to be incorrect, but both Parties are, and also were previously, *entitled* to claim this exclusive sovereignty, and of course therefore necessarily entitled to claim to *exercise* it. That, we suggest, is the natural meaning and effect of the Compromis.

Now, the French theory, if it were correct, would have this result, that the claims which have already been put forward by the Parties, in so far as they were based on acts carried out since 1839, were invalid as well on the one side as on the other because, according to this theory, neither Party was at that time entitled to make a claim on that basis.

There is no doubt that the differences which arose between the Parties in the period 1839 to 1950 were in fact differences about the right of the Parties to exercise an exclusive sovereignty, for both the Parties put forward their claims on that basis, including, from about 1880 onwards, France. And there is no doubt that in making these claims, both Parties (including again France) invoked acts of the very kind that Professor Gros now says they may not invoke. Now, since it is differences about these claims which the Parties have asked the Court to adjudicate upon, and since these claims were based in considerable measure upon these alleged non-invocable acts—if I may so call them—it has to be assumed that, in submitting these claims to the Court, the Parties have themselves validated the basis on which the claims are put forward. Otherwise the Court would be asked not to say which of two claims to sovereignty was correct but which of two invalid claims was the better—an obviously impossible situation. To repeat, it is precisely differences about claims which both Parties have put forward invoking all the various acts which, according to the French theory now, they were not entitled to invoke—it is precisely these claims made on this basis which are apparently submitted to the Court under the Compromis and this is why we say that the present French argument is inconsistent with the letter of the Compromis. It is certainly inconsistent with its general tenor and intention.

I would add that the present French contention about the effect of the 1839 Convention is one which had not been put forward until the present proceedings for many years by France. Since 1880 or thereabouts, France has claimed exclusive sovereignty invoking hydrographic missions, buoying and lighting, and so forth. So has the United Kingdom. It must be assumed therefore that this is the basis on which the matter has been submitted to the Court—namely, that such acts are properly invocable ; and I ask the Court to interpret the Compromis in that sense.

I now turn to my second point. The French contention is based on Article 3 of the 1839 Convention, and, therefore, since this is a dispute about territorial sovereignty, it is surely essential to that contention to show that Article 3 was *territorially* applicable to the Minquiers and the Écréhous. I submit to the Court that the territorial application of Article 3 to the groups must be established quite clearly before a contention so far-reaching and drastic in its effects as this French contention could be accepted. If there is any room for serious doubt as to whether Article 3 applied to the groups at all, then effect should not be given to the contention that neither Party can invoke against the other the events subsequent to 1839.

Now, as the Court knows, successive United Kingdom Governments, rightly or wrongly, have maintained with unvarying consistency and over a long period of years, that Article 3 never had any application to the groups. Professor Gros suggested that the United Kingdom only began to challenge the French interpretation of the Convention some thirty years after its conclusion. This may be so in fact, but no occasion to challenge that interpretation arose earlier. There is no evidence between 1839 and 1869 of any incident which necessitated such a challenge. In that year—in 1869—incidents began to arise, and thereafter the French interpretation was consistently challenged, particularly when it became clear that this interpretation involved a claim

not merely to common fisheries, but also a denial of British sovereignty over the groups.

We have equally, in the course of this case, questioned whether Article 3 had any territorial application to the Minquiers and the Écréhous, and we rely on and adhere to our previous arguments. But I will not go over them again. The point I want to make is that, on any view, the exact territorial application of this Article must remain one of great doubt. The very fact that Professor Gros had to employ so long and intricate an argument on the matter, which, indeed, took up the greater part of the time which he spent on the 1839 Convention, shows that it must be far from clear. The Article does not mention the Minquiers or the Écréhous, or, indeed, any particular territory, and it is certainly possible to read it as not applying to territory which was under the sovereignty of one or other of the Parties. Indeed, it is not only possible to do this, but it is also possible to put forward a number of cogent arguments in support of that view.

May I, without re-opening the matter, just remind the Court of one or two of these arguments. It will be remembered we maintained that what the Parties were really interested in was the Article 1 line off the French coast. If the Court will re-read the historical part of Professor Gros's argument, in which he told the story of the question from about 1820 onwards, it will see that his argument fully supports our contention, and shows even more clearly than we had that this Article 1 line was the important thing. It was here that the important oyster banks lay, and each side obtained a compensation because, in some places, British fishermen were allowed to fish within French territorial waters, while in other places French fishermen had an exclusive right, even outside French territorial waters. And that being so, there would be nothing particularly surprising if the common area under Article 3 were quite a small one, and if it excluded any territory or waters in that region which were under the exclusive sovereignty of one or the other of the two countries.

Again, it did not seem to me that Professor Gros gave any convincing explanation of why, if one of the two countries had sovereignty over the Minquiers and the Écréhous, and therefore, according to his own view—for he insisted very much on the connection between territorial sovereignty and fisheries—that Party, having the sovereignty, had an exclusive fishery right at the Minquiers and the Écréhous, there was no explanation of why a Party in that position should have been willing to abandon this exclusive right and to share the fisheries—for which, be it remembered, there would be no compensation, since the compensation had already been found for both sides by the way in which the Article 1 line was drawn.

Now, Professor Gros does assert that one of the Parties, that is to say, France, had the exclusive sovereignty in 1839; but the only explanation which he gives of why France should have been willing to place the groups under the régime of Article 3 appears on page 257 of the printed record (p. 18 of the English transcript[1]). But it is not really an explanation at all, for it begs the whole question and assumes that Article 3 applied to the groups. Professor Gros asks this, and I quote a passage from that page:

[1] English text not reproduced.

"Why should the owner of the islands have made any objection? Why should he have prevented them from being used for fishing? What would he have gained from doing so, since it had been agreed that the fishing should be common in the waters of the Minquiers and the Ecrehos, and that agreement appears in Article 3 of the Convention? Neither the United Kingdom nor France had any longer an interest in inserting a mention of the sovereignty, properly so-called, over the islets."

Well this, as the Court will see, gives no explanation of why the country having sovereignty should have been willing to place the groups under the régime of Article 3, because it assumes that they had already been so placed. I repeat my friend's words: "What would he [that is, the owner] have gained from doing so, since it had been agreed that the fishing should be common in the waters of the Minquiers and the Ecrehos?" It is no doubt arguable that if the groups had already been placed under the régime of Article 3, for whatever reason, the country having sovereignty might then have had no particular motive for preventing the fishermen of both countries from landing on the islets and using them. But there would still have to be answered the preliminary question why the country having the exclusive sovereignty, and therefore *prima facie* the exclusive right of fishery, should ever have been willing to place the groups under this common régime at all, thereby, as I have said, sacrificing the exclusive fishery rights in return for no compensating advantage anywhere else. On Professor Gros's interpretation, this fact still remains completely unexplained, and I cannot find any other passage in his speech than the one I have read, in which he attempts to put forward any explanation.

Another difficulty about the French argument is that it would apparently lead to the result that, not only did the Minquiers and the Écréhous have no territorial waters in which any exclusive fishery right could be enjoyed, but also that none of the Channel Islands did, except Jersey, for which special provision was made by Article 2. If Members of the Court will in due course look at pages 242 to 244 of the printed Report (*English transcript, pp. 41 to 44*[1]), they will see that this is precisely the effect of what Professor Gros said. From these passages and also from other parts of his speech it would appear that, in his view, the "British Islands" referred to in Article 9 were simply the United Kingdom and Ireland and possibly one or two others, such as the Isle of Wight. He denies any validity or interpretative effect to Article 38 of the later, unratified, 1867 text, which made it clear that this term was to be read as including the main Channel Islands "with their dependencies"—amongst which we, of course, place the Minquiers and the Écréhous. Of course, he did this largely in order to try to establish that Article 9 did not apply to the Minquiers and the Écréhous, but the *effect* of his argument is that Article 9 did not apply to any of the main Channel Islands. So, according to the French interpretation of these articles, Articles 1, 2, 3 and 9, an exclusive right of fishery was reserved to Jersey alone—under Article 2, but not to the other Channel Islands. Now, that is clearly an impossible interpretation. The meaning ascribed to the term "British Islands" is in any case incorrect, since

[1] English text not reproduced.

the technical term used to describe the United Kingdom and Ireland is, or was, at any rate, "British *Isles*", not "Islands".

I mention these points, and there are a considerable number of others which I could mention and which will be found in my previous speech and also in the United Kingdom Reply, in order to show that, despite all that our opponents have said, the question of the territorial application of Article 3 remains one at best of doubt and difficulty. The French explanation by no means solves all the difficulties, and it leaves a considerable number of the most important points unexplained. It is certainly impossible to say, at this date, with complete certainty to what precise areas Article 3 applied. Even our French friends would, I believe, agree that no entirely satisfactory interpretation can be found. If that is so, can this provision afford an adequate or reasonable basis on which to build the consequences which the French theory involves? I submit to the Court that, unless it is quite clear that Article 3 must have applied to the Minquiers and the Écréhous, the Court cannot, in a dispute relating to the territorial sovereignty over them, regard that provision as applicable if the consequences of doing so would be to preclude the Parties from invoking any of the acts of territorial sovereignty which have occurred in relation to these same groups since 1839.

Before I pass on to what is obviously the principal point at issue in all this, namely—assuming that Article 3 did apply to the groups, in what sense did it do so and what was its effects—before I embark on that, I would like to correct the impression which may have been made by one part of Professor Gros's argument, and that was the assertion that there would be nothing contrary to previous United Kingdom claims or practices in asserting jurisdiction over areas of the high seas or claiming exclusive fishery rights there. I am conscious that this matter is strictly irrelevant to the present proceedings, but nevertheless, in the circumstances, I have to say something about it. I am sure it was quite unintentional, but my friend did misdescribe our practice and policy, and also, I am sure unwittingly, he made certain mis-statements of fact which I am obliged to correct. He cited a number of Acts of Parliament under which he said jurisdiction was asserted up to ten or twenty miles from the English coast. It is, however, an understood thing, that is to say, to all intents and purposes, a presumption of law, so far as the English legal system is concerned, that unless the contrary is stated, a United Kingdom Act of Parliament only applies outside territorial waters to British subjects and British vessels, unless perhaps it may be in the application of an international convention which permits the exercise of jurisdiction over foreigners outside territorial waters. Apart from that, jurisdiction is not exercised outside the three-mile limit under United Kingdom Acts of Parliament except in regard to British vessels, and it is in this sense, and in this sense alone, that Acts of Parliament asserting jurisdiction outside the three-mile limit are to be understood. Then my friend cited the Agreement between the United Kingdom and Venezuela of February 1942, about the submarine areas of the Gulf of Paria. This Agreement, however, refers solely to the sea-bed and the sub-soil of the Gulf. Article 5 expressly says (I quote it):

> "This Treaty refers solely to the submarine areas of the Gulf of Paria, and nothing herein shall be held to affect in any way the status of the islands, islets or rocks above the surface of the sea together with the territorial waters thereof."

So that, so far from that being in any sense a precedent for the Minquiers and the Écréhous (it could not be a precedent because it happened much later in date) but being at all similar to that case, it is exactly the opposite. And similarly, Article 6 of the Agreement with Venezuela says :

> "Nothing in this Treaty shall be held to affect in any way the status of the waters of the Gulf of Paria or any rights of passage or navigation on the surface of the seas outside the territorial waters of the Contracting Parties...."

This Treaty is therefore most definitely *not* a claim to the division of the actual waters of the Gulf, nor does it involve any claim by either country to exclusive fisheries or rights of any kind in the waters of the Gulf outside the ordinary territorial waters of the two countries. This, I may say, represents the settled policy of the United Kingdom Government. Professor Gros also mentioned an Australian claim to sedentary fisheries to a distance of 100 miles. This he characterized—with technical correctness, in a sense—as being equally a "British claim", but the Court will know that an Australian claim is not imputable to the United Kingdom as such. But, in any case, I can assure the Court that the Australian claim is not a claim to jurisdiction over the high seas or to any exclusive right of fishery there. It is a claim solely to the submarine areas and to the sedentary fisheries actually attached to the bed of the sea.

Well then, that great authority Gidel was cited, and the Report drawn up by the Secretary-General of the United Nations for the International Law Commission on the Régime of the High Seas, and the actual author of this Report was himself Gidel, so that in a sense Gidel was cited twice, under different capacities—himself and *qua* Secretary-General of the United Nations. But now, as I think most people who are acquainted with the practice of the United Nations know, these reports which the Secretary-General, employing very often a well-known authority to do so, draws up for various committees and commissions, are compilations intended to assist the committees or commissions in their work—and that, of course, applies equally to the International Law Commission. These reports do not represent the views of the commission itself nor even the official views of the Secretary-General on the law. Now in point of fact, the International Law Commission, in the articles which it has framed on this subject of the régime of the high seas, has been most careful to distinguish claims to the bed of the sea and the sub-soil from claims to the waters above the sub-soil, which are quite another matter and which are not normally exercisable outside territorial waters. I was anxious to give that explanation to the Court of our position and of these various matters.

Mr. President, I now come to my third main argument, which is the essential part of this matter. Assuming, contrary to our view, that Article 3 of the 1839 Convention did apply to the Minquiers and the Écréhous, in what sense did it apply and with what effect ? Now, I am greatly assisted here by the fact that Professor Gros defined the French position on a number of points which have hitherto been uncertain. The Court will remember, for instance, that I asked what, according to the French view, was the status of the islands in 1839. We now know that, according to the French view, they were definitely

French and not, for instance, a *res nullius*. Similarly, I had asked what status Article 3 was supposed to have created for the groups in 1839 and thereafter, according to the French view. We now know that the Article is not said to have created either a status of *res nullius* or of condominium, and that French exclusive sovereignty is said to have continued. Now for my present purposes it is unnecessary to discuss whether the sovereignty over the groups at the time was French or British. It suffices that both Parties agree that it was one or the other. According to the view now put forward on behalf of the Government of the Republic, one of the two countries—naturally, they say it was France—was sovereign in 1839 and went on being sovereign afterwards.

On this basis, let us see how the French argument is put: and here I hesitate, because there are in fact two possible ways of putting it, one of which it seemed to me Professor Gros was putting during some part of his speech, but later he put forward what I think was a rather different view and one which perhaps more nearly represented his real intention. However, I shall deal with the matter systematically, and I shall begin with the view which it seemed to me Professor Gros was putting forward some time before the end of his observations, and I shall come later to the second basis of his argument. On what I will call the first basis, it seemed to me that the argument put forward was this: it was said that, although one of the Parties was sovereign, an agreement was made involving a common use of the islands for a certain purpose. Then, the argument proceeded, the resulting position was as follows:

The Parties were entitled to make common use of the islands for the stated purpose. Any use of them which they did in fact make for that purpose would then be explicable in terms of the Convention as something done under the Convention, and therefore would not be of any significance from the point of view of supporting a claim to sovereignty. On the other hand, any act performed by the Parties *not* in pursuance of this common use would be a violation of the Convention and therefore invalid, and consequently equally not capable of being invoked in support of a claim to sovereignty.

Let us follow the matter out on that ground and see what will be involved by that way of putting the argument. According to that theory, the Convention permitted the use of the groups by both Parties for fishery purposes. Therefore, in so far as the Parties used them for fishery purposes, they could not quote that use in support of their claims to sovereignty. But if either of them used the islands for any other purpose than this particular purpose, then they were breaking the Convention and could not invoke those acts either. Well, that is surely reading a great deal into a common fishery provision. The whole argument, I suggest, on that basis, appears to be founded on the implied proposition that anything which is not expressly permitted by a certain clause must be assumed to be forbidden, which is surely a complete *non sequitur*.

Let me take the example which the United Kingdom Attorney-General gave the other day, the erection of a wireless station, or else it might be a meteorological station, or again, if it were a larger island it might be the construction of an airfield. Can we believe that when two countries, one of them being sovereign over the island, have agreed

to use it for common fisheries, or rather, more accurately, have agreed that the fisheries of the island shall be available to both of them—can we believe that the country having sovereignty must thereby be held to have impliedly undertaken not to erect a wireless station or a meteorological station, or to construct an airfield, or in fact to make any of the normal uses of the island which the country having sovereignty would normally be entitled to do?

Alternatively, are we to believe that the country having sovereignty, having agreed that the fisheries of the island shall be available to both Parties, has thereby undertaken that everything else will equally be available to both Parties? In short, if a wireless station is erected, it must be done in common, if an airfield is constructed, that must be done in common too, and everything else, every other normal act of property or sovereignty, if done at all, can only be done by the two countries acting jointly or by agreement? Are we not here going back to something very like the condominium position which Professor Gros was at pains to say his theory did not involve?

Similarly, if we revert to the other meaning, that when two countries, one of them being sovereign, agree on a common use for fishery purposes, this means that the country having sovereignty is precluded from using the island for any but the common fishery purposes, does not this reduce the sovereignty of the country possessing it to nothing? The French theory, on the basis I am dealing with now, which I know Professor Gros may say presently does not correctly describe his intention (but I shall come to that in due course), affirms that one of the two countries was sovereign and continued to be sovereign, but it places that Power in a position in which it would not, in effect, be able to exercise any individual sovereignty at all, or it would place it in a position where it would only exercise its sovereignty in conjunction or in agreement with the other country, in short, condominium.

And I suggest, therefore, that this form of the French theory would be no less self-destructive than it was previously in the form in which it was put forward in the French Counter-Memorial and Rejoinder.

These results would all be sufficiently extraordinary if the two Parties had been intending to deal with the question of sovereignty. We have always maintained that they were not, but it is unnecessary for me to argue that point any further, since my friend has himself admitted, and indeed declared and adopted, it as part of his argument. I might have pointed out, for instance, that when two countries intend to deal with the question of sovereignty and to produce results of this kind, they do not normally appoint as their negotiators officers in their Navy, a local Consul, and an official of their Ministries of Marine or Fisheries. Any question of sovereignty is normally treated as a political matter, and not as a technical fishery matter. I might have pointed out that, if these are the kind of consequences which are going to be read into provisions about common fisheries, countries will in future have to be extraordinarily careful as to how they enter into agreements of this kind.

However, it is unnecessary for me to point out these and a number of other things tending to the same conclusion because, as I say, Professor Gros has admitted, and indeed made it a principal point of his argument, that the Parties had no thought of any question of sovereignty over the Minquiers and the Écréhous when they drafted Article 3. By this he meant, and indeed he said, that what they wished to do was to deal

with the question of fisheries (I quote) "without touching on the question of sovereignty". That I can imagine and am quite prepared to accept —indeed, we too agree with it—but how can it follow that because they dealt only with fisheries and were not intending to deal with the question of sovereignty, these consequences *concerning sovereignty* postulated by, at any rate, this basis of the French theory, how can it be that such consequences can follow from a fishery provision not intending to deal with sovereignty? Surely exactly the opposite conclusion should be drawn from the fact that the Parties did not intend to touch on the question of sovereignty or to deal with it. This surely means or ought to mean that when they dealt with the question of fisheries they did so without prejudice one way or the other to the question of sovereignty; as to which of them was sovereign; or whether either of them was sovereign. The fisheries were to be common, but otherwise the position would not be affected in any way.

It could only be otherwise if there were some absolutely necessary connection between a common fishery position and an absence of any exclusive exercise of sovereignty for any other purpose. We tried to show in our previous arguments, written and oral, that there was no such necessary connection. But it is at least in part on some such basis that Professor Gros founds his argument. The Court will remember that he said a good deal about the connection or liaison between fishery matters and territorial questions. I cite, for instance, from page 5 of the English transcript[1] of Document 53/17. Referring to the earlier 1824 Convention, he said that it was the direct ancestor of the 1839 Convention, and then he added:

> "it explicitly confirms the link, which we regard as essential, between questions of fishery and questions of territorial sovereignty".

Again, the Court will remember that he cited Article 1 of the 1824 Convention, which provided (I quote):

> "The High Contracting Parties reciprocally recognize as inherent in the territorial sovereignty of each State the exclusive right of fishing within the distance of one marine league...."

Surely this, however, involves no more than an affirmation of the usual position by which, in the absence of any agreement to the contrary or any other applicable legal status, the country which has sovereignty over a territory or an island has the exclusive right of fisheries in the territorial waters of the territory or island. This cannot possibly mean that the existence of an exclusive sovereignty *necessarily* implies an exclusive fishery right, if there is an agreement which gives a right of common fisheries; nor can it possibly imply that the effect of the common exercise of fisheries by two countries in certain waters must be to exclude the exclusive sovereignty of either of them. We pointed out long ago in our Reply that, if this were the position, no country could ever grant fishery rights to another country in its waters without apparently losing or renouncing its right altogether of exercising sovereignty there. We gave examples of cases where common fishery rights actually existed in waters under the exclusive sovereignty of one of the parties. To these the Government of the Republic replied with the contention that in those cases there was no dispute about sovereignty,

[1] English text not reproduced See p. 249 of this volume.

but Professor Gros has now said that there was no dispute about sovereignty in 1839 either, and that the Parties were not even indeed thinking about sovereignty. In any case, we pointed to the 1951 Fishery Agreement as a perfect example, applicable to these very groups, of a common fishery position established in territory, the sovereignty of which was in dispute, and the sovereignty over which was to be determined in the sense of an award of exclusive sovereignty in favour of one or the other Party—common fisheries still continuing except in certain small reserved zones.

Now I can imagine my friend Professor Gros, having listened very patiently up to this point, saying that I have entirely misrepresented his argument. He does not say, he will tell us, that the Party having sovereignty in 1839 could not continue to exercise it. What he is saying is that the Party *not* having the sovereignty could not subsequently acquire it, and that since you must distinguish between the two—between the Party which has sovereignty and the Party which has not sovereignty —therefore the Court must begin by deciding who was sovereign in 1839. And then his argument is that since, *ex hypothesi*, according to him, the 1839 Convention precluded the Party not having sovereignty from acquiring it; no change in the situation can have taken place since 1839. Whoever had the sovereignty then, has it now. With the permission of the Court, I shall deal with that argument to-morrow.

[Public sitting of October 6th, 1953, morning]

Mr. President and Members of the Court, when I broke off yesterday, I had been discussing the French contention on the basis that, according to this contention, the Parties, having agreed to use the Minquiers and the Ecréhous in common for fishery purposes (if that was indeed the effect of Article 3 of the Convention), they then became disentitled to use the groups for any other purpose unless they also did so in common, and that this applied even to the country having the sovereignty: and I showed that on that basis the French doctrine would empty that sovereignty of all content, and reduce it to nothing, and consequently that this conception involved a wholly untenable interpretation of Article 3.

I now have to deal with the French contention on the basis that, according to it, a distinction has to be drawn between the country having sovereignty in 1839 and the country not having it. The country having it could, according to this contention, continue to affirm and exercise its sovereignty, subject to giving effect to the other country's fishery rights. On the other hand, the country not having the sovereignty could only act in such manner as the Convention permitted. Under the Convention it could exercise fishery rights, but no other rights. Any other acts would be invalid because not expressly permitted by the Convention, and therefore could not be cited in support of title. In short, the Convention would operate to prevent the country not having sovereignty from acquiring it. Thus, no change could take place, and whichever country was sovereign in 1839 would still be sovereign now. Hence, what the Court must do, according to this theory, is to determine who was sovereign in 1839, and that would be the end of the matter.

Obviously this is a very cleverly constructed argument, but it is open to the same fundamental objection to which I drew attention yesterday. It involves the fallacy that whatever is not expressly authorized is forbidden, and that because one thing is permitted, nothing else is permitted. It also involves another and more important fallacy, for it invites us to assume that everything that occurred after 1839 must be related to and read in terms of the Convention. Now for this idea there is no basis at all, except in the imagination of our opponents. I shall hope to show that when the Parties fished the Minquiers and the Écréhous after 1839, it was certainly not *because* the Convention permitted them to do so. It was on a basis of having sovereignty there that they fished and exercised their rights, or at any rate, such was undoubtedly the position of the United Kingdom and Jersey. Their acts are therefore fully "invocable" as evidence of sovereignty.

Leaving that on one side for the moment (I shall come back to it), is it not clear that the French contention really begs the whole question of what effect Article 3 was intended to have, and assumes that it was intended to have some effect, direct or indirect, on territorial status; whereas Professor Gros's whole theory is that it was not intended to have any such effect, that the Parties did not intend to deal with sovereignty, that they left this question entirely on one side. If you first decided that Article 3 was intended to affect sovereignty in some way, or the rights of the Parties in regard to it, the results suggested by my friend might follow—though even then there would remain much that would be open to argument. But the moment you postulate that there was no such intention, that there was a positive absence of it—a point on which we are in entire agreement with Professor Gros, for we have never seen how these fishery commissioners of 1839, who were quite evidently carrying out a technical fishery task, can be regarded as having dealt with any question of territorial status—the moment you have *that* position, the consequences suggested by our opponents cannot conceivably follow.

If, as we are now apparently agreed, Article 3 was not intended to deal with any question of sovereignty, the Parties must surely have remained completely free in that respect. They must have remained free, and *both* must have remained free, so far as this Article was concerned, to exercise any sovereignty either of them thought it possessed and to invoke such acts in support of its title. Equally, the Parties must have remained free, so far as this Article was concerned, to acquire sovereignty if they had not already got it. The Article, in short, was completely negative or neutral on the subject, and therefore the French theory in its present form, as in its previous one, falls to the ground.

Again, if Article 3 effected no change in the existing sovereignty—a point on which Professor Gros insisted very strongly—it could equally not prevent such a change being brought about, if that were material, in conformity with the ordinary rules of international law governing the matter. A provision permitting, or rather, simply declaring the existence of a common fishery position, could not possibly take away or affect the ordinary international law rights of the Parties, either to exercise sovereignty (if they thought they had it) or, if that matter arose, to acquire it. Therefore, we cannot agree in particular with the passage on page 20 of the English transcript[1] of Professor Gros's

[1] English text not reproduced. See p. 259 of this volume.

speech, where he says, after referring to acts of sovereignty not connected with fisheries (I quote) :

> "These acts would be *ipso facto* unlawful in the eyes of international law, because they would be contrary to the Convention of .... 1839 which does not authorize a party to effect changes of sovereighty, even if this were done under the pretext of common fishery."

Here we see the same fallacy as before—that because Article 3 did not expressly authorize a given thing, it thereby forbade it. Article 3 is neutral on sovereignty and acts of sovereignty. It permits common fisheries in the areas to which it applies. It neither permits nor forbids anything else, and therefore cannot rule out or invalidate the subsequent acts of the Parties, whose rights in the matter of sovereignty must depend on factors wholly extraneous to this Article—in fact, on the ordinary rules of international law.

If we analyze Professor Gros's position a little more closely, I think we shall find that he is really inviting us to read Article 3 as if it consisted of a *grant* of common fishery rights on the part of the country possessing sovereignty to the Party not possessing it. From this he argues that it would be contrary, if not to the letter, at any rate to the spirit and intention of the grant, if the other Party proceeded to make use of the right so granted in order to carry out acts of sovereignty, and then assert a claim of sovereignty based on those acts. Without entering into the question of what exactly the mutual rights of the Parties would be in such a position, it is surely obvious that Article 3 of the 1839 Convention is in no sense a grant of rights by a Party having sovereignty to one not having it. This is indeed precisely one of the reasons why we have always thought that Article 3 could not apply to islands under the sovereignty of either Party, because if it had, if it had belonged to one of the Parties—and that had been known to both of them—an article providing for common fisheries in the islands must have been quite differently worded. By no possibility could a common fishery position have been established, or all these results have been produced in the indirect and almost incidental way that Article 3, in its present form, in its actual form, involves. However that may be, Article 3 is in no sense a grant by one of the Parties to the other. It is simply an affirmation of the existence of common fisheries in certain regions, or an agreement that both Parties shall have the right to fish there. A provision of this kind simply affirms the common fishery position, without either affirming or denying the rights of either Party, *in other matters*, or as respects sovereignty or the right to assert or claim it. Since it has no effect on these matters, it cannot rule out the evidence or "invocability", so to speak, of subsequent acts.

A similar fallacy can be seen in the example of the use of the field which Professor Gros gave. He said (I will quote his words) :

> "If I should agree to share the use of a field belonging to me with my neighbour, can the latter rely upon this use to support a claim that he is in fact the true owner of the field ?"

There is much here that could be discussed, but surely the answer to the question posed is that it does not represent a true analogy. A truer

analogy would be if, supposing two neighbours both claimed a certain field, they agreed that they would both use it. In that case, since each of them believes he owns the field, what each really does is to agree that he will not prevent the other from using it. He himself, however, continues to use the field on the basis of his own claim of right to it, and not because of the agreement. He can therefore invoke his use in support of his title—both can. *A fortiori*, of course, he can invoke any other basis of title that he has or which may subsequently arise.

And this brings us, I think, to what is really the most important point in all this matter, and the real answer to the theory which Professor Gros has put forward. As I said earlier, he has invited us to regard the whole period subsequent to 1839 in the light of the 1839 Convention and to interpret the acts of the Parties solely in terms of that Convention. According to that theory, all the acts of the Parties are either attributable to the Convention and therefore without significance, or else contrary to the Convention and therefore invalid. But is there the slightest reason why we should do this? Why should we imagine that it was by reason of Article 3 of the Convention, and solely by reason of that Article, that the Parties went on fishing the Minquiers and the Écréhous after 1839 (and for the purposes of my argument I will suppose that both of the Parties did in fact do so)? Article 3 did not mention the Minquiers and the Écréhous; it applied to a certain area, which was partly high seas, in which there might be territory of different kinds with different statuses; some of it might be under the sovereignty of the Parties or one of them; some of it might not be. Article 3 said nothing at all about anything of that sort; it simply established a common fishery régime over a certain area, without reference to territorial status. Now, the situation that arose from that was one in which we have to assume that each Party regarded itself as sovereign over the Minquiers and the Écréhous, or would certainly have claimed sovereignty if challenged. Is it not therefore manifest that each of them went on fishing those groups on whatever basis they previously fished those parts of the area? Either of them that claimed sovereignty over the groups obviously went on fishing the groups on the basis of an exercise of its sovereignty, *not* on the basis of the Convention. All that the Convention did for each Party was to regularize the position of the *other* Party so far as participating in the fisheries was concerned. For each Party the position was that it had a right to fish *independently* of the Convention. The sole question was the right of the other Party to do so too. It is therefore illusory to suppose that the Parties, in fishing the Minquiers and the Écréhous after 1839, did so solely, or even chiefly, because they believed themselves to be entitled to do so under the Convention. They did so because they believed themselves to be sovereign, and the only effect the Convention had, assuming that Article 3 applied to the Minquiers and the Écréhous at all, was to prevent, as I have said, either Party from objecting to fishing by the other. If the other Party was not permitted to fish, that would, of course, be a breach of the Convention if Article 3 did apply to the groups, but it would have no effect one way or the other on the question of sovereignty.

I would like to ask our French friends: do they really imagine that when the 1839 Convention was concluded, the fishermen of both countries gathered around and said "Ah, now at last we can fish at the Minquiers and the Écréhous—the Convention gives us a right to do so"? Obviously

not. They went on fishing because they thought this was their territory —that was the basis on which they fished the Minquiers and the Écréhous *not the Convention—, or at any rate most certainly* that was the basis on which Jersey fishermen did.

This being so, it must follow that the acts of the Parties after 1839 in the exercise, or purported exercise, of what each believed to be its sovereign position, including any acts of fishery, must be read precisely in the light of their respective claims to sovereignty, not in terms of the Convention. Those acts are therefore fully "invocable" in support of title. The fishery acts are indeed "invocable" just because they were carried out on a basis of sovereignty, and not simply on the basis of a right conferred by Article 3. Neither side, believing itself to be sovereign (and that is what we have to assume in this argument), could for a moment have listened to the idea that it was not fishing at the Minquiers and the Écréhous because it was sovereign, but only because it had rights under the Convention. That is something which it is obviously quite impossible to imagine or believe, and that seems to me to dispose completely of the theory which has now been put forward by our opponents.

In conclusion on this subject of 1839, I come back for a brief moment to the question of the interpretation of the Compromis, and I hope that the interpretation I have suggested will in the meantime have been strengthened and supported by my other observations. Whatever the theoretical position, there can be no doubt that, previous to the submission of this dispute to the Court, the Parties did put forward claims to exclusive sovereignty, and that each of them invoked the very type of act which, according to our opponents, must be excluded by the operation of the 1839 Convention. It is these claims, based on the invocation of these acts, amongst others, and by both sides, that the Court is asked to adjudicate. The Compromis must therefore be interpreted in the sense of permitting the Parties to invoke these acts in support of their respective claims.

Mr. President, this brings me to the second part of my speech, the question whether the United Kingdom acts during the eighteenth and nineteenth centuries would be sufficient to give us a title by prescription or occupation, if that were necessary. I may say at once that we regard this as an unreal question, since we have never contended that that part of our claim which is founded on long possession is based in any way solely on the acts of the last 150 years. However, if it is necessary for us to show that we had the sovereignty in 1839, we cite the evidence we have adduced in support of the view that we had the sovereignty at that time. The same applies *a fortiori* to the later date of 1876 which has been invoked. But we regard our acts in the eighteenth and nineteenth centuries simply as the continuation of a title already fully in being.

Nevertheless, I will deal with the question whether, assuming we had not got any title before, say, 1800, we have validly acquired a title since. It will be convenient to begin with the question of occupation. That question, of course, only arises in regard to territory which is *res nullius* and not under the sovereignty of any country. It would therefore only be a material question if the Court should hold that the Minquiers and the Écréhous were *res nullius* in 1800 and not under the sovereignty of either country. If that were the

position, we should say that without question the subsequent British acts have given us a title by occupation. Moreover, since the task of the Court is in effect to say which of the two countries' claims is the better, it would follow inevitably that if the groups were *res nullius* in 1800, it is the United Kingdom to which they must now be adjudged, since there can be no comparison at all between the respective weight of the Parties' acts since that date. The question of the effect of any French protests would not arise on this basis, since, if the groups were *res nullius* in 1800 or thereabouts, there would be no legal basis for any French protest, or, indeed, for any British protest, because both Parties would be fully at liberty to occupy the groups and acquire a title in that way. On the basis of occupation, therefore, there can be no doubt at all about our title, for we have been in continuous and effective possession of the islands, certainly ever since 1800, and, of course, in our view, from much earlier, but I am at the moment simply dealing with that period. On the other hand, it is evident that France has not exercised any effective possession or control of the islands during the same period. If, therefore, they were *res nullius* in 1800 or thereabouts, they certainly belong to us now. And perhaps I might add that, in considering this question of occupation and prescription to which I am coming, we can, of course, exclude the question of the 1839 Convention in this sense—that all the arguments which I have just given as to its inability, its ineffectiveness, for determining any question of sovereignty apply equally and with equal force to the question of the acquisition of sovereignty by occupation or by prescription. The arguments which I have advanced to show that that provision, Article 3 of the 1839 Convention, cannot prevent the Parties from invoking acts subsequent to the Convention, equally show that nothing in that entirely neutral provision could have prevented them from acquiring title by occupation or prescription, if that were material.

My friend, Professor Gros, when it comes to his turn to speak, Mr. President, will of course say that on the question of occupation as from the date of the 1839 Convention all the acts of the Parties are not only to be understood in terms of that Convention, but in any case that they are to be understood simply as an exploitation of the Minquiers and the Écréhous for fishery purposes. I shall deal with that when I come to prescription, but I think all I need really say on that subject is that from the point of view of any title by occupation, it is quite unnecessary to consider the exact bearing and effect of any acts of pure fishery, because it is so obvious that the United Kingdom acts in relation to the Minquiers and the Écréhous went far beyond mere fishery—they went far beyond it in many ways and were quite obviously assertions of sovereign right, and constituted occupation on the ordinary basis of sovereignty.

I now turn to the question of prescription. This implies that France was the sovereign in 1800. I ought to say, of course, Mr. President, that it implies it only for the purposes of my argument—we naturally do not admit that France was sovereign in 1800. We think *we* were, but I am simply discussing the question of whether we *could* have acquired a title by prescription since that date. And since prescription consists of the acquisition of a title to territory which is under the sovereignty of another country, we assume for the purposes of the argument that France was sovereign. And the question is, then, whether the events

which have taken place since 1800 would have caused France to lose her sovereignty and the United Kingdom to acquire it. There is no doubt that international law recognizes the possibility of the acquisition of title by prescription, and, as Professor Gros also agrees with this; there is no dispute on that point between us. Authorities on international law give various reasons for permitting this mode of acquisition, chiefly the need to preserve international order and stability. One aspect of this matter is well stated by Ortolan in his work, *Des Moyens d'acquérir le domaine international*, in which he bases prescription on the view that, if one State has maintained law and order in a territory and has developed it, that State is entitled to sovereignty over the territory as compared with the State which, though originally possessing the same territory, has neglected it. And I need hardly call attention to the fact that this doctrine would fit the circumstances of the present case exceedingly well. A similar view was put forward by the American Secretary of State, Mr. Olney, in a letter to the British Ambassador in Washington in June 1896, which can be found in the *British and Foreign State Papers*, Volume 88, page 1288, and a well known modern jurist, Mr. Max Sörensen, in the *Nordisk Tidsskrift for International Ret* (1932), page 243, expresses a similar view.

What are the conditions necessary for the acquisition of a title by these means? The first is that the possession of the prescribing State, or acquiring State, must be exercised *à titre de souverain*. Professor Gros invoked this principle when he said, quite correctly, that the facts relied upon in support of title by prescription must be such as to imply a claim of sovereignty and not merely constitute the utilization of the riches of the territory. He deduces, of course, that all the United Kingdom acts in relation to the Minquiers and the Écréhous were merely an exploitation of the fisheries there, and consequently not exercised *à titre de souverain*. In answer to that I need only point to the facts. Even the most cursory examination of the evidence we have produced and the arguments we have placed before the Court will show that our acts *did* imply a claim of sovereignty, and that many of them were the most public and emphatic acts of sovereignty possible, which could not conceivably have been carried out on any other basis than that of a claim to sovereignty. This would still be the case even if one were to rule out all those acts which could be attributed to the exercise by a State of jurisdiction over its own subjects. I think my friend may here be confusing the motives or reasons which may inspire a country to claim sovereignty—confusing that with the actual claim itself. Even assuming, in the case of the Minquiers and the Écréhous, that fisheries were the sole motive (which they were not), and which would be very far from the truth, the acts themselves were nevertheless undoubted manifestations of sovereign right and went far beyond any exploitation of the fisheries.

The next condition for the acquisition of a title by prescription is that possession should be continuous, in the sense that the acquiring country does not, as it were, come and go, but takes possession and remains there. This condition is obviously fulfilled in the present case so far as the United Kingdom is concerned, and need not be further discussed.

Then the next condition is that possession should be peaceful, at any rate in the sense of not being maintained by force in the face of violent opposition. Our opponents have tried to argue that our possession

was not peaceful, but obviously it was peaceful in the sense that we did not invade the Minquiers or the Écréhous or commit any act of war of any kind in relation to them. But it has been argued that our possession was not peaceful, because from time to time some Frenchmen may have been expelled from, or prevented from landing on, the islands. Well, in so far as those acts were not the result of mere quarrels between fishermen of the two countries, the expulsion of a Frenchman or the prevention or prohibition of residence applied to him—those are mere acts of police, such as would, such as must, be carried out by whatever authority is administering or purporting to administer given territory on an orderly basis. The requirement of peacefulness in the acquisition of a title by prescription only extends to preventing the maintenance of possession by acts in the nature of war or public armed force or hostilities. It cannot prevent ordinary acts of police carried out in the territory concerned in the process of administration, for that would be to deprive the country concerned (the country acquiring title, that is) of the possibility of maintaining law and order in territory which it is undoubtedly administering *de facto*—in which it is therefore to that extent internationally responsible for the maintenance of law and order.

Finally, we come to the requirement that the possession must be undisturbed, and to the question how far protests from the other country having, or believing itself to have, the sovereignty, operate to disturb and interrupt the possession of the acquiring country so as to prevent the acquisition from ever maturing as a matter of law. The whole subject of protests, of course, pre-supposes the existence of a title on the part of the protesting country, and the Court will bear in mind that we do not admit that France had any title in the nineteenth century or even earlier. For this reason alone, French protests were necessarily without legal effect. However, for present purposes we must discuss the matter as if France had some right.

One of the leading authorities on the subject of acquisitive prescription, Verkyios, in *La prescription en Droit international public* (1934), discusses the question of protests and suggests that, while they constitute a warning to the other State concerned that its claim or its position is not acquiesced in, nevertheless a protest not followed up by other action becomes in time "academic" or "useless". This was also admitted, I think by Professor Gros when he said (I quote from p. 39 of the English transcript [1]):

> "Of course, an isolated protest which was not pursued for many years would not signify a great deal; protracted silence over such a protest might even be regarded as an abandonment by the State of its own claim."

Does not this exactly describe the present case?

Naturally, Professor Gros added:

> "But in the present case, France kept its protests alive in the minds of the United Kingdom Government without interruption. The United Kingdom Government could never have believed that these claims were abandoned."

Well now, oddly enough that is exactly what we did believe, and in our view were entitled to believe. Take the Écréhous. The last

[1] English text not reproduced. See p. 269 of this volume.

French utterance on that subject was, as the Court have been told before, received in 1888, and despite the most public acts in the exercise of sovereignty over the Écréhous since that date, no word of protest of any kind has been received from the Government of the Republic. Without question there has here been acquiescence in fact, even if there has been no formal abandonment. In the case of the Minquiers, although two or three protests of a certain kind have been received since about the same date, we maintain—for reasons which I shall develop a little more fully in a moment—that they were nevertheless ineffectual protests, not sufficient to interrupt the acquisition of title ; though, of course, the Court will bear in mind that we in no way regard the position as one in which we were acquiring title. Protests must, however, be related to the circumstances. Abundant evidence has been put before the Court that the real basis of all these French protests was the question of fisheries rather than a claim of sovereignty. As Mr. Harrison said yesterday, if the Court studies the diplomatic correspondence of the periods 1902 to 1905, and again in 1937-1938, it will see that the aim of these protests was neither to assert nor to secure the recognition of French sovereignty, but to secure the "neutralization" of the islands and the recognition of common fishery rights. Now, you cannot in law interrupt the acquisition of title by another country unless you assert, or protest on the basis of, a claim of right yourself. You cannot in law keep territory ownerless by protesting at the exercise by another country of a sovereignty you are not prepared to assert yourself.

Mr. President, when I said just now that we had heard nothing about the Écréhous since 1888, I meant, of course, until the two or three years preceding the submission of this case to the Court. Naturally we heard something then. We say, therefore, that when you have protests continuing intermittently over a period, the situation must be looked at as a whole and the protests considered in relation to the facts of the situation. On that basis we say that the inadequacy of the French protests becomes very apparent. It is not even as if protests were the only recourse open to France, though this has, of course, been suggested by our opponents. Authorities such as Verkyios and others have stressed the inability of protests to produce legal effects if not followed up by such other action as is possible. The mere fact that compulsory arbitration was not possible at this time does not meet the point, for there was nothing to prevent France from making at least a proposal for arbitration. Many famous arbitrations took place in the nineteenth century by agreement between the parties. It cannot be assumed that the United Kingdom Government, which was itself a Party to several of these arbitrations during that century, would have refused to arbitrate the matter. There was even, as from 1903, a Franco-British Arbitration Agreement, the text of which can be found in the volume of the *British and Foreign State Papers* for that year. At the end of paragraph 230 of our Reply, we indicated the various means of recourse, apart from protests, that might have been available to France. In the light of modern means of settling international disputes—means which were certainly not unavailable fifty or eighty years ago—it can be said that the diplomatic protest is now of greatly reduced significance and no longer constitutes necessarily the principal method of interrupting

prescription. For a long time, indeed, it has amounted to little more than a temporary bar.

Perhaps the matter could best be summed up in this way. The character of the action taken by the protesting State must be related to that being taken by the State acquiring title, and the two must be considered together. Minor manifestations in the purported exercise of title might well adequately be met by protests. The United Kingdom and Jersey acts of sovereignty, however, were of a character demanding much more than that. To any country concerned to maintain its title, those acts must have created a situation of *urgency*. No country faced with acts of that kind, and concerned to maintain its title, could be content with a few diplomatic protests at long intervals. It must try and obtain a settlement: it must at least propose arbitration. Viewed in this light, it is surely evident that the French protests which, as we have shown, were not even really directed to asserting French sovereignty so much as to securing a "neutral" position, were quite ineffective to stop the acquisition of title on our part. I repeat, of course, that we in no way regard ourselves as being in the position of acquiring title, any more than we regard France as having had a legal basis of title herself on which to justify any protests.

Professor Gros also referred to the question of abandonment, but the Court will remember that in the *Island of Palmas* case, Judge Huber did not find that there had ever been any formal abandonment by Spain of her title. What he found (I refer to p. 36 of the printed Record of our first set of speeches) was that the Netherlands had acquired sovereignty. It was not necessary that it should be established as having begun at a precise date. It sufficed that it existed at the critical date. Abandonment is not necessarily dependent on a formal act: it may arise simply from the facts. Title is abandoned by reason of letting another country acquire it. The process that causes the one to occur also causes the other to occur, and, I may add—because it is pertinent to this case—it is abandoned (the title is abandoned) by letting another country assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned. Could anything be imagined more obviously amounting to acquiescence, that is in effect abandonment? Such a course of action, or rather inaction, disqualifies the country concerned from asserting the continued existence of its title. France protested on paper but acquiesced in fact.

A further point, of course, is that these French protests only started in 1876 and that they began on the fishery question, the French claim of sovereignty only being advanced later. By 1876, however, we had undoubtedly acquired title over the Minquiers and the Écréhous. Even if we had not got a title then by ancient right or by long-continued and immemorial possession, the acts that had occurred between 1800 or thereabouts and 1876 were quite sufficient in themselves to give us title. Protests made after that date, therefore, could not possibly affect what was already an acquired position—an acquired position on the basis of which the people and authorities of Jersey were fully entitled to disregard any French protests subsequently received.

I sum up our position on this matter, therefore, as follows. Assuming it were necessary for us to show that we had acquired a title by pre-

scription since about 1800, we affirmed that we have fulfilled all the conditions necessary in order to do so. The French protests, related to the circumstances, were quite inadequate to interrupt the acquisition of title. In any case, they were all received after 1876, when title was already acquired.

Mr. President, I can imagine my friend replying with a *tu quoque*. He may say, why did not the United Kingdom propose arbitration during all this period? But of course the positions were entirely dissimilar. It was France which was in the position of the complaining Party. We had no reason to propose arbitration, or even to protest, because it was not France which was carrying out all the acts of sovereignty at the Minquiers and the Écréhous, but we. Here I would ask the Court once again to consider the position of the Chausey, which afford a very good illustration of the principle that I am trying to establish. France was carrying out at the Chausey all the acts which we were carrying out at the Minquiers and the Écréhous. Now supposing we had suddenly sent France a diplomatic note reminding them of our ancient possession of the Chausey—which after all existed—supposing we had done that, and supposing after that we had sent no further note for perhaps another thirty years, and then sent them another note, I can imagine that our French friends would certainly be saying now—and I myself would entirely agree with them—that our protests were ineffectual; and certainly that if we had wanted, in any serious way, to interrupt their possession of the Chausey, our protests were ineffectual for that purpose, at any rate unless we followed them up in some way by proposing arbitration. And that seems to me, if I may suggest it, to be a very good illustration of the real position, and to establish exactly what we maintain. The French protests in relation to the Minquiers and the Écréhous were just as ineffectual as similar protests on our part would have been if we had made them in the case of the French position at the Chausey.

Mr. President, that concludes my remarks on the subject of the acquisition of title in relatively recent times, though I must again stress the fact that the whole matter involves a distortion of the case as far as the United Kingdom is concerned. It involves a distortion to regard us as having been, during these last 150 years, in the position of acquiring title. And I venture to suggest that there is not a single thing in the whole history of this case, or equally in recent times, which has even the shadow of an appearance of an attempt by the United Kingdom or by Jersey to acquire title to these islands, to annex them or take possession of them. Everything which we have done in connection with them from the earliest times has been absolutely natural and has been carried out as part of the ordinary daily lives of the persons concerned. It is in this light that I venture to suggest the Court should view our claim.

I come now to my concluding remarks. May I try to summarize our whole position. Fundamentally, we rest our claim to the Minquiers and the Écréhous on the same basis as our existing title to the rest of the Channel Islands, our right to which is not questioned. In our view, our title to the Minquiers and the Écréhous is simply part of our title to the Channel Islands as a whole, and in particular Jersey, the historic connection between which and the disputed groups is manifest and requires no further proof.

The case starts with the question of ancient title. Both Parties have a claim based on that ground and both are evidently worthy of consideration. We maintain that ours is the better one because it is founded on more certain and unquestioned facts. There is at least no doubt about the Norman conquest of England. There is no doubt that, at least at that time, the Norman Dukes were possessed of the whole of the Channel Islands, including the Minquiers and the Écréhous. There is no doubt that, whether as English Kings or as Dukes of Normandy, they continued in possession of the islands. There is no doubt that, even after they were dispossessed of continental Normandy, they continued in possession of the Channel Islands, and there is no doubt that this possession at the time comprised the Minquiers and the Écréhous as part of the whole archipelago. All those facts are concrete and certain.

The French claim of ancient title, on the other hand, is based on facts which are highly disputable, and have been disputed, not merely before this Court, but before the bar of history. Furthermore, this claim, even if the facts on which it is based are admitted, is nevertheless still uncertain, because of the uncertainty as to the exact character of the right involved by it. We have tried to show that it was not sovereignty—it was a purely feudal title, not in any way equivalent to sovereignty, and no sovereignty over the islands was actually *exercised* by the entity possessing this feudal title—namely the French Crown. The sovereignty, as we understand it, was always exercised by those who wore, or became entitled to wear, the Crown of England.

If the Court agrees with us that the ancient title, in the sense of title to sovereignty as we understand it, lay with us, there can be little further room for discussion, for there is absolutely no evidence that we ever lost it, and a great deal of evidence that we retained it, and effectively exercised it in one form or another throughout the centuries up to the present time.

On the other hand, though of course this is not a view which I in any way put forward or advocate, but I still have to take account of it, the Court may feel that as far as ancient title is concerned, honours are about even. Theoretically, there was a French title of a kind—there was perhaps one, the Court may feel. The effective title, on the other hand, lay with us. The Court may therefore leave that on one side and pass on to consider simply the situation of fact. It will then find there is no doubt about the fact that we had possession up to 1204, and I believe the Court will feel that all the probabilities and practically all of the evidence indicate that we retained that possession after that date. There is absolutely no evidence of any alteration after 1204 of the situation of fact which undoubtedly existed before that date—a situation of fact admitted by our opponents and one which included the Minquiers and the Écréhous, and indeed the Chausey, as part of the Channel Islands in English hands. It is only in respect of the Chausey that our opponents have been able to show definitely any change in the situation of fact admitted by all to have existed before 1204.

If the Court comes to the conclusion that this was the position, I venture to suggest that it must also come to the conclusion that this situation of fact was confirmed by the treaties of the thirteenth, fourteenth and fifteenth centuries, for the general effect of those treaties, to sum the matter up in a sentence, was to leave the islands in the

hands of whichever sovereign actually possessed them *de facto*, and to confirm the holder in his possession.

If this analysis is correct, there can be no doubt that the English sovereignty over the Channel Islands at the end of the Middle Ages and thereafter included the Minquiers and the Écréhous. In those circumstances, I am not even sure whether, as a matter of law, it would really be necessary for us actually to demonstrate acts of sovereignty in the period following on the Middle Ages, provided we can show—as we undoubtedly can—that we still have that sovereignty now, or had it on any date that could be selected as the critical date in this case. In point of fact, however, we unquestionably can show a number of acts during the period 1500 to 1800 which are evidence that our sovereignty over both the groups was kept up.

If we now turn to the French claim, the points that stand out are that it depends chiefly on the alleged ancient title, and on the presumption of the continued existence of that title right up to the present time. The whole French case (I venture to suggest) consists of that and little else. This presumption is, however, not enough when it has to meet an actively competing claim. More is needed—and there is no more. There is no evidence at any date of the actual exercise of sovereignty by France over the groups or of any possession and control. Indeed, one can go further and affirm positively that France has never possessed, controlled or administered these islands in historic times. French title to them no more exists to-day than it does in relation to any of the other Channel Islands. And, as I said, only if France could show actual possession, as she can in the case of the Chausey, and demonstrate by some sort of concrete evidences the process by which this has been accomplished, could she claim title to these groups.

If French title is ruled out for these reasons, the only alternative to the existence of a British title would be that, at some period, the groups had become ownerless. If so—it is not what we suggest, but if it were so—there could be no doubt that during the last 150 years, or thereabouts, the United Kingdom has acquired a title by occupation, and had equally done so by any date that could be selected as the critical one. It is not necessary for me to recapitulate the evidence in support of this. There could equally be no doubt that France has not done so. The question before the Court would then be, on the basis that at some point the islands became ownerless, first of all, which of the two countries' acts were the weightier and more numerous, and secondly, did those acts amount to the assertion and exercise of sovereignty? The only possible answer must be that the United Kingdom acts prevail by a very heavy margin, and that they unquestionably constituted an assertion and exercise of sovereign right.

So the whole case could be summed up in these words: England, and later the United Kingdom and Jersey, have exercised the effective sovereignty over the Minquiers and the Écréhous. France has not. It would be a very strange thing if, for the first time in more than a thousand years, she started to do so now.

Mr. President, it only remains for me to thank the Court for the patience with which it has heard the long exposition of our case—the nature of the case has made it extremely difficult to be brief. And may

I also take this opportunity of paying my tribute equally to the patience with which our French friends have listened to things which must often perhaps have been hard to listen to. They have done so with the good humour and the fortitude so typical of their great country.

As regards our conclusions, Mr. President, we maintain the conclusions which we put forward in our Memorial, but we wish to make one or two small changes of wording and therefore we shall hand in a written version to the Registry [1].

[1] For the text of the Conclusions, see Part IV, No. 104, p. 518.

10. DUPLIQUE DE M. LE PROFESSEUR GROS

(AGENT DU GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE)
AUX SÉANCES PUBLIQUES DES 7 ET 8 OCTOBRE 1953

[Séance publique du 7 octobre 1953, après-midi]

Monsieur le Président, Messieurs de la Cour.

C'est un redoutable honneur de prendre la parole après mes collègues britanniques, le professeur Wade, M. Harrison et M. Fitzmaurice. Le cours d'histoire donné par le successeur de Maitland avec autorité mais aussi l'objectivité prudente qu'imposent les incertitudes d'époques très reculées ; la description du décor local si habilement retracé par M. Harrison ; la discussion juridique approfondie de mon collègue et ami le jurisconsulte du Foreign Office, resteront dans ma mémoire comme un exemple et comme une leçon.

La seule ombre qui pourrait demeurer provient d'une partie du discours du premier orateur pour le Royaume-Uni. Je demande à la Cour de m'autoriser à la dissiper, afin que, après nos échanges d'arguments, il ne reste pas autre chose que les éléments de droit et de fait que les Parties doivent soumettre à la Cour.

J'imagine que quelques vivacités de langage peuvent sembler naturelles devant certains tribunaux nationaux ou dans des assemblées parlementaires, mais l'agent du Gouvernement de la République est tenu de relever certaines allégations lorsqu'elles sont apportées devant la Cour internationale de Justice.

Le premier orateur pour le Royaume-Uni nous a fait grief d'avoir éludé les questions essentielles dans le présent litige (p. 278, plaidoiries britanniques, texte anglais, vendredi 2 octobre), d'avoir essayé par tous moyens d'échapper à l'argumentation du Royaume-Uni (p. 281), d'avoir déployé devant la Cour un « écran de fumée » (p. 279) destiné à lui voiler le véritable problème, et d'avoir égaré la Cour sur de fausses pistes en invoquant des précédents pour « inviter la Cour à trancher la présente affaire en se fondant sur un préjugé », invitation qu'il appela la Cour à « rejeter avec indignation ».

Avons-nous éludé le problème essentiel posé par la convention de 1839, à savoir la démonstration que l'article 3 entraînait certains effets quant au statut territorial des îlots contestés ? Si la Cour veut bien se reporter au compte rendu imprimé de la plaidoirie française, elle verra qu'après avoir indiqué la portée de la convention en ce qui concerne la pêche (pp. 252 à 256), nous avons montré pourquoi ce texte concernait également le statut territorial des Minquiers et des Écréhous (pp. 256 à 259), et pourquoi l'article 3 entraînait des conséquences importantes quant à la détermination de la date critique (pp. 260 à 265).

Avons-nous consacré « plusieurs heures » — comme on nous le reproche (p. 278, plaidoirie du 2 octobre) — à discuter du problème de la « sphère géographique d'application » de la convention de 1839 et fait semblant d'ignorer toute l'argumentation de M. Fitzmaurice ? L'analyse de la portée géographique de la convention couvre tout juste la moitié de la

page 252 et la page 253 ; plusieurs heures pour une page et demie ? Quant à la réfutation des arguments du Royaume-Uni, elle se trouve notamment aux pages 240 à 248, 253 (en bas) à 256, et 259.

Avons-nous essayé d'induire la Cour en erreur en invoquant l'arrêt des pêcheries, comme on nous en accuse (pp. 285 et 286 de la plaidoirie britannique du vendredi 2 octobre) ? La Cour se souviendra sans doute que nous avons indiqué expressément que la France ne cherchait pas à tirer des conséquences juridiques de l'étude des données géographiques (plaidoirie française, p. 195, premier paragraphe). Les données géographiques, la proximité des îles par rapport au continent, nos remarques sur l'arrêt des pêcheries ne se trouvent que dans nos observations préliminaires. Pas une seule fois nous n'avons utilisé ces arguments au cours même de notre exposé, de la page 205 à la page 276 ! Nous n'avons jamais prétendu tirer des lignes de base appuyées sur chacune des îles de la Manche ; nous avons simplement dit, pour illustrer la situation géographique de ces îles : « *si* la totalité des îles de la Manche *était* restée française, le Gouvernement français *pourrait* revendiquer l'ensemble de cette baie à titre d'eaux intérieures.... » (p. 199). Ceci montre bien qu'il s'agissait de géographie, et non pas d'une revendication de souveraineté fondée sur l'arrêt des pêcheries.

Avons-nous accusé où que ce soit le Royaume-Uni d'être un « intrus » ou un « usurpateur » dans les îles de la Manche, comme on nous en a fait grief (plaidoirie britannique, 2 octobre, pp. 281 et 282) ? Nulle part, nous n'avons dit que toutes les îles de la Manche *devraient* être françaises et que le Royaume-Uni nous les a ravies ; nous avons dit simplement qu'avant 1202, toutes les îles *étaient* une dépendance du Royaume de France et que c'est au Royaume-Uni de prouver la possession effective des deux groupes d'îlots pour lesquels cette possession est contestée. Il s'agit là d'un problème objectif et purement juridique de charge de la preuve, en exécution d'un traité de limite, et non d'usurpation ou d'intrusion.

Le premier orateur pour le Royaume-Uni a essayé de compromettre notre thèse en disant qu'elle aboutirait à déclarer française l'île de Jersey, pour laquelle nous aurions le même titre originel que pour les Minquiers et les Écréhous. Cela déforme à nouveau ce que nous avons dit. Oui, nous avons un titre originel à *toutes* les îles de la Manche, mais ce titre a été rendu caduc en 1259 pour celles des îles que le roi d'Angleterre *tenait alors*, et nous n'avons jamais contesté que ce fût le cas de Jersey et de Guernesey. Et si nous avons parlé des Chausey, pour montrer qu'elles appartenaient à la France bien avant le XVIIIme siècle, c'est parce que ce fait confirme la scission entre les îles de la Manche tenues par le roi d'Angleterre et les îles de la Manche tenues par le roi de France. J'avais d'ailleurs indiqué expressément ce motif, page 226, deuxième paragraphe de ma plaidoirie.

Enfin, n'avons-nous pas terminé nos observations de caractère géographique par ces mots : « les données géographiques du litige, *pour n'être pas déterminantes*, n'en sont pas moins intéressantes à connaître » (p. 201) ? Peut-on être plus clair ?

La Cour trouvera dans notre texte les preuves, si besoin était, de l'inexistence des intentions qu'on nous a prêtées — et quelles intentions !

On nous a reproché également d'avoir fait « appel au sentiment et au préjugé plutôt qu'au droit » (p. 281). Il faut encore une fois rouvrir devant la Cour — et je m'en excuse — le compte rendu imprimé de

la plaidoirie française. Il n'y est parlé « sentiment » qu'à la page 192, pour dissiper l'impression que seuls les pêcheurs jersiais étaient moralement et matériellement intéressés au présent litige. Pour le reste, je ne vois pas, de la page 201 à la page 276, un seul passage où il ne soit pas question de droit. Tous nos arguments ne convaincront sans doute pas la Cour. On peut les réfuter, on peut les combattre en droit — mais non pas dire qu'ils sont étrangers à la cause, qu'ils font appel au préjugé et qu'ils ne constituent qu'un écran de fumée destiné à égarer la Cour.

La Cour aura compris dans quel esprit nous avons présenté, forcés et contraints, ces quelques rectifications à l'exposé du premier orateur britannique : c'était un nuage à dissiper, et je vais maintenant pouvoir concentrer mes observations sur les quelques points qui appellent de nouveaux éclaircissements au terme de ces débats. Ces remarques suivront le même plan que le premier exposé : période féodale — les temps modernes.

Dans la période féodale, nous grouperons nos observations sous deux rubriques :

Premier point : Le titre originel de la France est encore valable aujourd'hui.

Deuxième point : Développement et maintien de ce titre sur les Minquiers et les Écréhous.

Quant à la période moderne, nous n'insisterons également que sur quelques questions que, pour la commodité de l'exposé, nous pouvons grouper de la manière suivante :

1) La portée de la convention de 1839 pour le règlement du présent litige ;

2) la question de l'acquisition de la souveraineté par le Royaume-Uni par voie de prescription ou d'occupation ;

3) la question des faits de possession des XIXme et XXme siècles.

Première partie

Période féodale : premier point : la validité du titre originel de la France.

Le Royaume-Uni affirme que si même la France a eu un titre originel à la souveraineté sur les Minquiers et les Écréhous, ce titre ne saurait plus être invoqué à l'heure actuelle, et les arguments du Royaume-Uni sont au nombre de deux.

Premier argument : Le roi de France n'a jamais eu la souveraineté sur les îles de la Manche, ni sur la Normandie continentale. Il s'agissait tout au plus d'une « sorte de suzeraineté » (p. 38) de caractère purement féodal, non accompagnée d'un exercice effectif de la souveraineté étatique telle que nous la connaissons aujourd'hui, et le titre de la France est donc « abstrait », « formel », « une ombre sans substance » (ces formules sont des citations de la plaidoirie britannique, pp. 38 et 122). Et ce titre « abstrait », « formel », ne saurait en aucune façon être comparé à la souveraineté au sens actuel du terme.

Deuxième argument : A supposer même que le titre féodal de la France ait été valide à l'origine, il se serait en tout cas évanoui avec l'époque féodale, c'est-à-dire vers la fin du XVme siècle (pp. 40, 50 à 52, 122 de la plaidoirie du Royaume-Uni).

Les avocats du Royaume-Uni ont ainsi soulevé la délicate question du droit intertemporel, c'est-à-dire la valeur juridique dans un système juridique déterminé d'un titre acquis dans un système juridique différent. Il convient donc de se référer au célèbre passage de l'arbitrage de *Palmas* consacré à ce problème. M. Huber s'exprimait ainsi :

> « Pour savoir lequel des différents systèmes juridiques en vigueur à des époques successives doit être appliqué dans un cas déterminé (question du droit dit intertemporel), il faut distinguer entre la création du droit en question et le maintien de ce droit. Le même principe qui soumet un acte créateur de droit à la loi en vigueur à l'époque où le droit naît, exige que l'existence de ce droit, en d'autres termes sa manifestation, continue, suive les conditions requises par l'évolution du droit. » (N. U., *Doc. des sent. arbitr.*, II, p. 845.)

L'arbitre voulait exprimer ainsi une double règle :

Première règle : « Un fait juridique doit être apprécié à la lumière du droit qui lui est contemporain et non à celle du droit en vigueur au moment où le différend s'élève ou est réglé. »

Deuxième règle : Lorsque disparaît le système juridique en vertu duquel le titre a été valablement créé, ce droit ne peut plus être maintenu dans le système juridique nouveau, à moins qu'il ne se conforme aux conditions exigées par ce dernier.

L'arbitre a tiré de ces règles la conséquence qu'une souveraineté, acquise par la découverte, pouvait exister tant que le droit international considérait la découverte comme faisant acquérir la souveraineté à elle seule, mais qu'elle ne pouvait se maintenir, lorsque l'exercice effectif de l'autorité étatique est devenu, en droit international, une condition de l'acquisition de la souveraineté par l'occupation effective.

Les règles posées par l'arbitrage de *Palmas* ne sont d'ailleurs pas sans rappeler les principes du droit international en matière de respect des droits acquis lors d'un changement territorial : certains droits, valablement acquis sous l'empire de la législation de l'État ancien, peuvent demeurer intacts, mais à la condition que la législation de l'État successeur soit analogue à la législation précédente.

Ces règles concilient heureusement les deux exigences fondamentales du droit : la sécurité et l'adaptation. La sécurité, parce qu'elle évite de rendre caducs des droits acquis valablement sous l'empire du système juridique ancien ; l'adaptation, parce qu'elle exige que le titre ancien se conforme aux conditions du droit nouveau et évite ainsi de prolonger à l'infini, isolé de tout le reste du milieu juridique contemporain, un droit acquis sous l'empire d'un ordre juridique aujourd'hui périmé.

Tels sont les principes que nous devons appliquer à la présente affaire. Le problème est le suivant : dans quelle mesure, à quelles conditions, un titre, né à l'époque féodale, peut être invoqué valablement devant la Cour internationale de Justice en 1953. Il le peut à une double condition : 1) il faut que ce titre ait été valablement créé sous l'empire du droit féodal ; 2) il faut qu'à l'expiration du système féodal il se soit conformé aux conditions exigées par le droit qui a succédé au droit féodal dans les relations internationales. Examinons donc ces deux questions.

Premièrement : Le titre originel français était valable au regard du droit féodal

Cette proposition est contestée par nos adversaires d'un point de vue très particulier. Ils soutiennent, en somme, que le titre français, dans la mesure où il existait, n'était pas un titre de *souveraineté* effective, réelle, mais une simple *suzeraineté* féodale. Ils prétendent, en effet, que le roi de France n'a jamais eu la *souveraineté effective* sur la Normandie et les îles de la Manche et que son unique droit sur ces territoires était une suzeraineté purement nominale et théorique sur la *personne* du duc de Normandie. Et nos adversaires de montrer, citations à l'appui, que le système féodal ne connaissait ni État, ni souveraineté, ni frontières territoriales, ni nationalisme, et que les rapports purement féodaux entre le faible roi de France et le puissant duc de Normandie ne sauraient donc être invoqués, au XXme siècle, à l'appui d'une revendication de *souveraineté*, au sens moderne du mot, sur les Minquiers et les Écréhous.

Mais c'est précisément parce qu'il n'y avait pas de *souveraineté* aux Xme et XIme siècles, parce qu'il n'y avait pas d'autorité étatique au moyen âge, que l'on ne saurait aujourd'hui exiger l'exercice d'une telle souveraineté, d'une telle autorité étatique à l'époque féodale. N'est-il pas extraordinaire d'exiger au XIme siècle la preuve d'une souveraineté territoriale effective dont la notion même ne date que de la création de l'État moderne, au XVIme siècle ? Pour être logique avec lui-même, le Royaume-Uni devrait écarter toute preuve en sa propre faveur, tirée du moyen âge, puisqu'aussi bien il lui sera impossible — au même titre et pour la même raison que cela n'est pas possible pour la France — d'établir que l'Angleterre avait, dès l'époque féodale, une véritable *souveraineté* sur les îles de la Manche. Nous reprocher de ne pouvoir établir la *souveraineté* du roi de France sur la Normandie aux Xme et XIme siècles est donc un anachronisme déraisonnable pour les partisans du droit intertemporel. C'est un véritable contresens sur la sentence de M. Max Huber.

Mais s'il n'y avait pas, dans le système féodal, une véritable souveraineté étatique, il y avait une notion qui en tenait lieu — et dont la souveraineté moderne descend directement — : je veux parler de la suzeraineté. Tout le monde admet que la caractéristique essentielle du système féodal est le morcellement de la souveraineté et le remplacement de cette dernière par une cascade de liens féodaux. Mais, comme l'a admis le professeur Wade, cette pyramide féodale a un sommet, en la personne du roi, appelé « suzerain universel » ou même « souverain fieffeux du royaume ». Que le roi ait été ou non plus puissant, matériellement, que ses vassaux importe peu dans le système féodal ; la suzeraineté était une notion entièrement étrangère à celle de puissance effective ; le lien féodal était à la fois patrimonial et personnel, mais n'impliquait jamais un contrôle effectif du territoire du vassal par le suzerain. Dire que le duc de Normandie était tellement puissant qu'il avait sa propre armée, sa propre monnaie, sa propre justice, est une vérité de La Palisse : les droits régaliens appartenaient à chaque seigneur séparément et n'étaient en rien exercés par le roi. Sans doute les rois de France s'efforcèrent-ils de s'attribuer l'ensemble de ces droits effectifs au cours des siècles, mais leur succès signifia précisément la fin de la féodalité ; l'État était né, la souveraineté territoriale avait désormais sa place. La souveraineté, au sens moderne du mot, est absolument antinomique avec

le système féodal : exiger une preuve de la souveraineté au sens moderne, c'est-à-dire de l'exercice effectif d'une compétence territoriale à l'époque féodale, c'est omettre entièrement l'enseignement de M. Huber. Il disait : « Un titre doit être apprécié au regard du droit contemporain et non au regard du droit actuel. »

Nous n'avons donc pas à établir que le roi de France exerçait quelque pouvoir effectif, que ce soit en Normandie ou sur les îles. Tout ce que nous devons établir, c'est qu'il exerçait la suzeraineté dans les conditions établies par le droit féodal. Or cela, nous l'avons prouvé. Nous avons montré que depuis 911 le duc de Normandie était uni au roi de France par un lien féodal, et que ce lien était on ne peut plus effectif. L'hommage exigé par le droit féodal était prêté, son caractère obligatoire est rappelé par le traité de 1259, la sanction du lien féodal — la commise des fiefs — a été appliquée par l'arrêt de 1202 et par une cour qui n'était pas composée de fonctionnaires à la solde du Roi mais de grands vassaux, les égaux, selon le professeur Wade, du duc de Normandie, qu'ils n'eurent pas la moindre hésitation à condamner (Petit-Dutaillis, *Le déshéritement de Jean sans Terre*, p. 176). Que veut-on de plus ? Accuser le roi de France de ne pas avoir lui-même exercé l'autorité en Normandie, c'est ignorer les règles du droit féodal, c'est méconnaître le principe fondamental du droit intertemporel. Le lien entre le duc et le roi était purement formel et abstrait ? Certes non, il était ce que devait être le lien féodal, ni plus, ni moins : le roi était le suzerain du duc, et cela suffit.

Deuxième question : Le titre français n'a pas disparu à la fin de l'époque féodale.

Le Gouvernement de la République pense que la fin de l'époque féodale n'a pu en aucune manière entraîner la caducité du titre de la France sur les Minquiers et les Écréhous. Ce titre avait été en effet incorporé dans un traité international, le traité de Paris de 1259, qui était un traité de limites, un traité de frontières, un acte qui aurait pu être conclu dans les mêmes conditions à l'époque moderne et qui ne revêtait aucun caractère spécifiquement féodal. Il s'agit d'un traité instituant une situation juridique objective et qui ne peut être rendu caduc par la transformation du milieu juridique et social. S'il est donc établi qu'en vertu du traité de 1259 les frontières entre les deux royaumes étaient telles que les Minquiers et les Écréhous appartenaient au roi de France, ces frontières doivent demeurer en dépit de la disparition du régime féodal.

Nos adversaires nous répondraient sans doute que le titre réel de l'Angleterre est d'avoir exercé une souveraineté effective sur Jersey et Guernesey dès le moment où cette notion est apparue, au moment de la création de l'État au sens moderne du mot, et que c'est grâce à cette possession effective que l'Angleterre a pu conserver son titre acquis à l'époque féodale. Le professeur Wade nous a d'ailleurs demandé pourquoi nous n'avions produit aucune preuve de possession effective sur les Minquiers et les Écréhous aux XVI^me^, XVII^me^ et XVIII^me^ siècles, alors que nous avions produit de telles preuves pour les Chausey. Nous répondrons simplement que la France est à égalité sur ce point avec le Royaume-Uni, qui peut bien produire de nombreuses preuves de possession effective sur Jersey et sur Guernesey entre le XVI^me^ et le

XVIIIme siècles, mais qui, en ce qui concerne les Minquiers et les Écréhous, ne peut en produire aucune.

En ce qui concerne les Écréhous, nous avons eu la possession effective dès l'époque féodale, par l'intermédiaire de l'abbaye de Val Richer. Or, les droits féodaux se sont maintenus en France en vigueur jusqu'à la Révolution française, au même titre qu'ont existé jusqu'à cette date les droits du duc de Lorraine ou de maints autres seigneurs de l'ancien régime. La révolution de 1789 a nationalisé les biens de l'Église et de ces seigneurs, et les droits féodaux sur le prieuré d'Écréhou sont tombés dans le domaine public de l'État français, où ils sont encore.

Quant aux Minquiers, nul n'ignore qu'ils étaient inhabitables et inhabités. Rien n'établit que la personne citée par M. Harrison lundi dernier, page 341 de la plaidoirie britannique, comme ayant été enterrée à l'île Maîtresse, était un habitant permanent, mais très probablement un pêcheur qui mourut par hasard au cours d'une expédition de pêche peut-être assez loin des Minquiers d'ailleurs, et qui fut enterré près de l'abri que, comme beaucoup d'autres pêcheurs, il avait installé sur l'île. La suzeraineté féodale du roi de France s'est donc transformée *ipso facto* en souveraineté moderne : à la fin de l'époque féodale ces îles faisaient partie du territoire français ; il n'y a aucune raison de penser que le changement du milieu juridique et social ait modifié cela. Sans doute le Royaume-Uni pourrait-il prétendre avoir acquis la souveraineté sur les Minquiers et les Écréhous s'il avait exercé seul cette souveraineté entre le XVIme et le XVIIIme siècles : mais cette preuve, le Royaume-Uni ne l'a pas fournie. Il soutient sans doute qu'il a eu sur les îlots litigieux — et c'est une très belle formule — une possession continue pendant mille ans, et quand il faut en apporter les preuves, en ce qui concerne les Minquiers, il n'a pu, pour mille ans, produire avant l'an 1800 que les faits évoqués par le professeur Wade dans sa plaidoirie (texte imprimé, p. 125, et par moi-même, p. 225).

Ces discussions permettent de comprendre un peu mieux les documents cités. Il s'agit, comme le reconnaît le professeur Wade, d'épaves *apportées* des Minquiers à Noirmont, épaves dont l'attribution devait être réglée dès lors par la cour seigneuriale de ce fief.

Le fait se produisit en 1615 et se renouvela, autant que nous le sachions, en 1616, 1617 et 1692 (annexes A 20, 21, 22). Le professeur Wade lui-même a attiré l'attention de la Cour sur le fait qu'il s'agit en 1615 et 1616 d'épaves *apportées* à Noirmont, et en 1692 d'épaves *apportées* sur la seigneurie des Dumarescq. Mais il n'en persiste pas moins à penser que les procédures ouvertes à Noirmont et la procédure de 1692 s'expliquent par le fait que les Minquiers faisaient partie du fief de Noirmont ou du fief des Dumarescq et par conséquent du fief de Jersey. Cependant, des textes produits *une* seule chose résulte clairement, à savoir que les Minquiers ne faisaient partie ni de Noirmont ni du fief des Dumarescq. Il résulte en effet nécessairement du jugement de la cour royale de Jersey, rendu en 1692 (annexe 21) que les Minquiers ne faisaient pas partie de Jersey.

Voyons encore une fois l'affaire. Le fond du procès est le suivant : des épaves trouvées aux Minquiers avaient été saisies par la dame Dumarescq, veuve, en qualité de tutrice de son fils, seigneur du lieu où les épaves avaient été *apportées*. Elle refusait, sur le fondement d'un titre ancien qu'elle alléguait, de subir sur les épaves le concours du roi. Elle acceptait de partager avec les sauveteurs, mais non avec le roi.

Or il fut jugé que les Minquiers étaient en tout état de cause situés hors de la seigneurie des Dumarescq, puisqu'il est dit que les épaves furent *apportées* des Minquiers *dans* ladite seigneurie. Mais le roi ne soutient pas ses droits en disant que les épaves ont été trouvées *aux* Minquiers et que dès lors la dame Dumarescq ne peut lui opposer aucun droit. Il soutient qu'il a le droit de partager, à Jersey, avec les Dumarescq, les épaves qui y ont été *apportées*. Or il lui était facile, si les Minquiers avaient été à lui, ou à un autre seigneur, de soutenir ou bien qu'il avait un droit exclusif sur ces épaves en tant que seigneur des Minquiers, ou bien que c'était une affaire entre lui et le seigneur des Minquiers, mais qu'en tout état de cause les Dumarescq n'avaient rien à y voir. Il n'a rien fait de pareil, et le Gouvernement de la République soutient dès lors que ni le roi, ni les Dumarescq, ni les seigneurs de Noirmont, ni personne d'autre à Jersey, n'étaient, aux dates en cause, seigneur des Minquiers. Dans sa réplique samedi, pages 309 et 310, le professeur Wade ne parle plus des faits de 1615, 1616 et 1692 qu'avec un certain détachement, mais il maintient que l'affaire de 1617 est très probante. Elle du moins ne pourrait s'expliquer que si l'on admet que les Minquiers faisaient partie de Jersey. Mais il n'est même pas dit (annexe 20), il n'est même pas dit en 1617 que la fameuse ancre a été *trouvée* aux Minquiers. Elle a été enlevée *aux* Minquiers ou dans les parages, mais non pas *des* Minquiers, et d'autre part la rédaction du motif au dernier paragraphe « en défaut envers les officiers du seigneur » suggère tout aussi bien une action criminelle ou disciplinaire contre un individu relevant de Noirmont et monté sur une barque de Noirmont qui aurait, partant des Minquiers, détourné une ancre qu'il aurait laissée à Saint-Malo, soit qu'il l'y ait vendue, soit qu'il en ait autrement disposé. Les termes de ce motif, qui étaient peut-être très clairs pour les contemporains au courant des faits, sont fort obscurs pour nous, et rien ne prouve même qu'il se soit agi d'une épave plutôt que d'une ancre appartenant à un autre bateau de pêche de Noirmont.

Le Gouvernement de la République est donc fondé à soutenir que, avant l'an 1800, il n'existe à l'appui des prétentions du Gouvernement du Royaume-Uni sur les Minquiers *aucun* fait. Il n'y a exactement rien.

En l'absence de toute possession contraire du Royaume-Uni, la souveraineté sur les Minquiers a donc été conservée à la France, au même titre que sur toute autre partie du territoire français, jusqu'à l'époque moderne.

Je voudrais clore ces remarques sur le premier point de cette partie féodale en indiquant à nouveau — puisque ce point a été contesté par le professeur Wade vendredi (p. 51 de la traduction française [1]) — qu'il existe encore, à l'heure actuelle, au moins un territoire où la suzeraineté féodale s'est entièrement maintenue sans aucune exercice effectif d'une souveraineté d'État moderne par une administration centralisée : Andorre.

Les vallées d'Andorre sont un fief aujourd'hui encore, comme au XIII^me^ siècle, sur lequel s'exerce la double suzeraineté de la France et d'un évêque espagnol, l'évêque d'Urgel. Les vallées ne constituent pas un État ; ce ne sont pas un État protégé ni une confédération de paroisses, c'est un fief (je me réfère au volume *France* dans la collection *La vie juridique des peuples*, 1933, p. 393). Le statut d'Andorre a sa source dans l'*acte de paréage* du 8 septembre 1278, qui plaça le territoire sous la double suzeraineté de l'évêque d'Urgel et du comte de Foix,

[1] Texte français non reproduit. Voir p. 303 du présent volume.

dont les droits passèrent plus tard à la Couronne de France par la fusion des familles de Foix et de Béarn et par l'avènement d'Henri IV (édits de juillet 1607 et du 19 octobre 1620). La position respective des co-princes découle encore aujourd'hui de l'acte de paréage de 1278 ; ils possèdent l'autorité suprême, nomment chacun un viguier pour la justice criminelle et alternativement un bayle pour rendre la justice civile. Tout auteur ayant écrit sur Andorre a dit et redit que le Président de la République française agissant *en* Andorre est entièrement indépendant de l'organisation politique et administrative dont il est le chef en France ; il agit comme suzerain féodal en 1953 en vertu du titre conventionnel de 1278. La juridiction administrative compétente en France, pour annuler les actes illégaux des autorités administratives, y compris les actes du Président de la République, s'est *toujours* déclarée incompétente en ce qui concerne tout acte du Président de la République en Andorre, car, dit le Conseil d'État, ce ne sont pas les actes d'une « autorité française ». L'administration française n'a *rien* à voir avec les choses d'Andorre.

Et ceci démontre avec ampleur qu'un fief authentique au moins survit en Europe.

Maintien et développement du titre féodal

En histoire, il nous semble qu'il faut distinguer entre les faits bien établis et leur interprétation par un système les reliant au passé et aux événements ultérieurs. Pour notre propos, qui est d'établir des faits, c'est-à-dire ce qui s'est passé sur un territoire donné dans un temps donné, il est important de ne pas mêler ce qui est interprétation à ce qui est arrivé. Pour simplifier l'exposé des problèmes historiques, nous devons donc nous restreindre à ce qui intéresse le juge dans une situation née au moyen âge, aux éléments prouvés de cette situation, et éliminer toute conjecture dont la place — si intéressante qu'elle puisse être dans une construction d'historien — n'est pas dans le raisonnement du juriste. Cette observation de méthode étant rappelée, que cherchons-nous à établir ? Qui, du roi d'Angleterre ou du roi de France, était maître, au sens féodal du mot, de certaines îles de la Manche ? J'avais résumé le résultat de mes développements sur l'ensemble de cette période féodale, au cours de la première plaidoirie, en quatre propositions, qui se trouvent page 230 du texte imprimé. Je vais les reprendre, en y ajoutant simplement les précisions et les observations que la réplique du professeur Wade pourrait rendre nécessaires.

« Première proposition : Dans le « regnum Francorum », il y avait un ensemble : îles et continent. »

Le professeur Wade, qui avait développé à ce sujet une théorie des roitelets scandinaves des îles de la Manche (pp. 104-105 du texte imprimé), ne semble pas avoir repris ce point avec beaucoup de conviction. Le seul argument qu'il apporte pour prouver l'occupation des îles par ces roitelets scandinaves est maintenant l'étymologie des mots Ecrehou et estac, qui, étant des mots nordiques, prouveraient l'occupation par les roitelets et la séparation des îles par rapport au continent. Si le mot Ecrehou est sans doute d'origine scandinave, il ne l'est ni plus ni moins que bien d'autres toponymes normands. De plus, le choix d'Ecrehou paraît particulièrement malheureux, car la Cour se souviendra peut-être que c'est aussi le nom d'une partie de la commune

de Carteret sur la côte du Cotentin, dans le département français de la Manche (Plaidoiries françaises, p. 198). Il est vraiment paradoxal d'avoir pris ce nom pour illustrer une prétendue séparation des îles et de la Normandie continentale.

Quant à l'intéressant exposé sur le caractère nordique du mot « estac », me sera-t-il permis de faire remarquer à la Cour que cette théorie du professeur Wade va conduire nos conquérants normands assez loin, car nous avons, à cinq kilomètres de Marseille, la chaîne de l'Estaque, et Marseille passe plutôt pour une colonie grecque que pour une colonie normande ; et surtout, suivant le professeur Wade, nous allons découvrir des Normands en plein centre du Texas, à neuf cents kilomètres de l'océan, dans le Llano estacado (staked plain) où une ville s'appelle Estacado (*Andrees Handatlas*, 7me édit., Leipzig, 1921, p. 207, qui, au fait, attribue les Écréhous à la France). On ne saurait donc être trop prudent en voulant s'appuyer sur l'étymologie.

« Deuxième proposition : Le fief de Normandie, tenu par les ducs normands, comprenait de 933 à 1202 toutes les îles, par la donation des diocèses de Coutances et d'Avranches. »

Dans cette proposition deux constatations étaient faites : le duché de Normandie de 933 à 1202 comprenait toutes les îles ; le duché de Normandie était un fief, tenu par les ducs, des rois de France.

Sur le premier point le professeur Wade n'a plus apporté d'arguments contraires. Le Gouvernement du Royaume-Uni avait d'ailleurs reconnu dans son mémoire (par. 22) que les îles furent rattachées au duché de Normandie en 933, lorsque Guillaume Longue-Épée reçut du roi de France les diocèses d'Avranches et de Coutances. Et comment pourrait-on expliquer autrement l'introduction de la coutume de Normandie dans ces îles dès le XIIIme siècle ?

Mais sur le second point, la question du fief de Normandie, le professeur Wade s'est étendu très longuement ; il a de nouveau repris sa théorie de l'« hommage nominal », du fief indépendant, si je puis dire, bien que le rapprochement même de ces mots contienne une contradiction. Mon collègue de Cambridge a avancé, à l'appui de cette théorie, un grand nombre de citations tirées d'auteurs très divers ; si grand même était leur nombre qu'une note annexe a dû être déposée à ce sujet.

Revoyons quelques-unes des citations du professeur Wade. Que lisons-nous sous la plume de Henri Berr ? « Le roi n'est qu'un suzerain supérieur au sommet de la pyramide féodale » ; sous celle de Petit-Dutaillis (p. 10) : « On parlait de justice et de seigneurie, non de souveraineté » ; mais nous avons eu la curiosité de tourner la page, et nous avons lu (p. 11) : « Le roi de France, depuis l'hommage prêté par le comte Henri (de Champagne) à Frédéric Barberousse pour ces trois fiefs, n'y avait plus aucun droit féodal, mais il y restait le roi. »

Nous devons constater que ces citations ne prouvent qu'une seule chose ; elles ne peuvent mener le lecteur attentif qu'à une seule conclusion : au moyen âge, la notion de souveraineté n'existait pas encore dans sa forme actuelle ; elle était remplacée par la notion de suzeraineté, et cette suzeraineté, en ce qui concerne le roi, était d'un caractère spécial : c'était une suzeraineté absolue. Nous avons déjà exposé, et fait nôtres, toutes ces notions aujourd'hui encore.

Remarquons de plus que dans les citations de mon éminent collègue de Cambridge, nous ne trouvons que l'énoncé d'opinions extrêmes, des

raccourcis d'historiens voulant mettre en évidence des caractères particuliers et distinctifs d'une période. La réalité était plus complexe, comme l'a montré notre propre extrait de Petit-Dutaillis, comme le montre aussi cette page d'un ouvrage que la Partie adverse ne récusera pas, il s'agit de *The Shorter Cambridge medieval History* (vol. I, p. 469) :

> « La monarchie appartenait au nouvel ordre féodal d'où elle était sortie, et par lequel les Carolingiens avaient été écartés, mais en même temps elle conservait le prestige de l'ancienne royauté : les rois, qui recevaient le sacre de l'Église, étaient plus que de simples suzerains, parce qu'ils représentaient et étaient la source du gouvernement légitime. Même un grand rebelle, comme Eudes II de Champagne, s'adressait à son royal ennemi avec une profonde déférence, parce qu'il tenait ses fiefs et ses droits du roi. »

Continuons l'examen des citations de la Partie adverse. Dans le cas particulier du fief de Rollon, le professeur Wade préfère se rallier au point de vue de Michelet — pour lequel Charles le Simple « abandonna » les territoires cédés — plutôt qu'à celui de Pollock et Maitland, d'après lesquels Rollon « reçut » ces mêmes territoires (Plaidoiries françaises, p. 210). Que penser de cette fidélité de mon collègue de Cambridge à ce grand poète que fut Michelet ? Et quelle garantie supplémentaire peut-il espérer tirer d'une citation de la très désuète histoire de Lavisse ?

Pour nous, nous préférons nous en tenir au témoignage des chroniqueurs anciens, comme Flodoard, Richer, Hugues de Flavigny, et à la conclusion de Pollock et Maitland, que nous avons citée.

Ajoutons, enfin, pour en terminer avec les citations, et pour en avoir, nous aussi, notre bon poids, d'autres extraits tirés de Petit-Dutaillis, toujours Petit-Dutaillis, dans la *Monarchie féodale* (pp. 72 et 76) :

> « Rollon, vaincu dans une sanglante bataille qui aurait coûté aux Normands près de sept mille hommes, dut battre en retraite, après quoi il s'empressa de signer avec Charles le Simple le traité de St-Clair-sur-Epte »,

et plus loin :

> « .... le duché de Normandie a revêtu une physionomie semblable à celle des autres grands fiefs. Tout d'abord il reconnaît la suzeraineté du roi de France. »

Quoi qu'il en soit, les faits eux-mêmes ne peuvent être contestés ; ces faits sont les hommages qu'à diverses reprises, et depuis 911, les ducs de Normandie ont prêtés pour leur duché aux rois de France. Nous ne reprendrons pas l'énumération et l'interprétation de ces divers hommages, un par un, puisque nous l'avons déjà fait dans la première plaidoirie (pp. 207-211). Il suffira simplement, croyons-nous, d'établir avec plus de précision qu'au début du XIIIme siècle, à la veille de la sentence de 1202, le duc de Normandie, roi d'Angleterre, faisait hommage au roi de France, se considérait comme son vassal, tenait de lui en fief le duché.

Un acte permet justement de faire le point. Deux ans seulement avant la sentence condamnant Jean sans Terre : et c'est un traité : le traité de paix du Goulet, conclu le 22 mai 1200 entre le roi de France et le roi d'Angleterre. Ce traité ne laisse aucun doute sur la situation respective des deux rois. Laissons la parole à cet historien impartial,

que la Partie adverse a la première et souvent cité, Petit-Dutaillis. Ce dernier écrit dans *Les copies du traité de paix du Goulet* (Bibliothèque de l'École des Chartes, 1941, pp. 35 et 42) :

> « Le traité lui assura [à Philippe-Auguste] de précieuses annexions domaniales, et la pleine subordination vassalique de Jean, qui non seulement lui fit hommage, mais lui paya un droit de relief considérable : c'était entièrement reconnaître au roi de France une supériorité féodale que les rois normands et angevins n'avaient jamais acceptée que de mauvaise grâce. »

Et un peu plus loin :

> « Dès le début de l'acte sont nettement marqués les rapports de suzerain à vassal que le roi de France entend maintenir. Il s'agit moins d'un traité entre deux rois que d'une paix entre un seigneur et son homme. »

> « Troisième proposition : L'arrêt de 1202, juridiquement, reprend l'ensemble : Normandie continentale et les îles. Mais, en fait, il y a éclatement de l'unité des îles avec le continent, certaines étant reprises par le roi de France, d'autres non. L'idée de la tenure effective, comme distinction entre les deux rois, est née. »

La Partie adverse n'a pas renouvelé ses attaques contre la valeur juridique de la sentence de 1202, contre la commise. Aussi peut-on conclure sur ce point comme l'a fait Petit-Dutaillis dans un article sur « le déshéritement » (p. 176) : « Une sentence prononcée ainsi dans le tumulte et le cliquetis des armes avait cependant une valeur juridique, que les Français de cette époque ne songeaient pas à contester.... La procédure adoptée en 1202 fut à la fois régulière et sommaire. »

Par contre, mes collègues britanniques se refusent à admettre qu'il y ait eu un éclatement de l'unité des îles après la commise, certaines îles étant reprises par le roi de France, d'autres non. Le professeur Wade reconnaît seulement qu'une scission s'est produite entre la Normandie continentale et la Normandie insulaire, la conquête de la Normandie continentale par Philippe-Auguste étant achevée dès 1204 et ce territoire ayant été réuni définitivement à la couronne de France ; par contre, les îles seraient restées complètement en dehors de la commise. Le roi de France se serait, en somme, arrêté au bord des flots. Ainsi voyons-nous réapparaître cette théorie de l'entité des îles de la Manche, déjà longuement soutenue dans le plaidoyer britannique, et qui a comme effet miraculeux de maintenir une unité indissoluble des îles au cours des siècles, malgré tous les événements historiques et, pourrait-on dire, contre vents et marées.

Nous constatons cependant que les faits ne s'accordent pas avec cette théorie, que la limite entre le royaume de France et le royaume d'Angleterre n'a pas suivi forcément et régulièrement la côte du continent. Après 1202 et pendant un demi siècle, jusqu'au traité de 1259 — que nous étudierons avec notre quatrième proposition —, des guerres maritimes presque continuelles firent osciller la limite entre les deux royaumes, à l'intérieur même des îles. De même que nous avons montré, juste avant 1202, le roi d'Angleterre faisant hommage au roi de France pour toute la Normandie, de même nous pouvons montrer, juste après

1202, le roi de France en possession non seulement de la Normandie continentale, mais d'une partie des îles, de la plus grande partie.

Et où trouvons-nous cette idée aventureuse, révolutionnaire, d'une exécution de la sentence de 1202 sur les îles ? Tout simplement dans le mémoire du Gouvernement du Royaume-Uni, paragraphes 23, 24 et 30. Nous y lisons : « vers 1205 Philippe Auguste s'était emparé des îles par la force des armes ». En 1205, par conséquent, aussitôt après la saisie de la Normandie continentale, les îles étaient conquises par le roi de France.

Les îles tombèrent ensuite entre les mains d'un aventurier, Eustache le Moine, qu'il est difficile de considérer comme un représentant du roi d'Angleterre, surtout lorsqu'Eustache le Moine reconnait, au moins dès 1212, qu'il tenait les îles pour le roi de France ; il conquit même pour ce dernier Sark, qui était la seule île restée soumise au roi d'Angleterre. En 1214, Sark fut peut-être repris par les Anglais, mais ce fait n'est pas sûr.

L'offensive française ne se ralentit pas dans les années suivantes. Après la Normandie continentale, après les îles de la Manche, confisquées régulièrement en vertu de la commise, une expédition de caractère non officiel, conduite par Louis de France, le futur Louis VIII, débarqua en Angleterre. L'échec de cette expédition aboutit au traité de Lambeth de 1217, par lequel Louis de France restituait au nouveau roi d'Angleterre Henri III toutes les conquêtes qu'il avait faites « par cette guerre en tout lieu du royaume d'Angleterre », « per guerram istam in quocunque loco regni Anglie » (art. 9).

Les îles, qui ne faisaient pas partie du « regnum Anglie », étaient visées par l'article 10 : Louis s'engageait à envoyer des lettres aux frères d'Eustache le Moine, pour leur demander de remettre les îles au roi d'Angleterre ; et, prévoyant leur désobéissance, Louis ajoutait que s'ils ne le faisaient, ils resteraient en dehors de la paix conclue à Lambeth, « extra pacem istam ».

Le professeur Wade m'a reproché d'avoir ainsi traduit ces trois mots latins ; il préfère voir dans « cette paix », la paix avec le roi de France. Nous n'hésitons pas à dire que cette traduction n'est pas soutenable : l'expédition de Louis était une aventure personnelle, à laquelle le roi Philippe Auguste n'avait pas voulu participer, et le roi de France n'est pas partie au traité. « Cette paix » ne peut renvoyer qu'à la paix qui intervient entre Louis et Henri III. Et s'il était besoin encore d'un argument pour préciser ma traduction, on le trouverait dans le texte de l'article 9 que nous avons cité : « extra pacem istam » correspond exactement à « per guerram istam ».

Il est bien évident que « cette guerre » et « cette paix » n'engageaient pas le roi de France. On comprend, dans ces conditions, que la désobéissance des frères d'Eustache le Moine eût pu être prévue. La guerre pour la possession des îles continuait. En fait, rien ne nous permet de croire que le roi d'Angleterre avait repris toutes les îles avant le traité de Paris de 1259.

Le mémoire du Royaume-Uni (par. 30) est d'ailleurs fort prudent sur ce point, en ce qui concerne Chausey. Il dit que l'île revint aux Anglais « probablement » lors du traité de Lambeth. Mais comme il reconnait que Chausey était de nouveau aux mains des Français dans la première moitié du XIVme siècle, il serait plus vraisemblable de penser qu'elle n'en est jamais sortie.

Et voilà ce qui reste de la théorie de l'unité des îles constamment entre les mains anglaises à partir de 1202.

« Quatrième proposition : Les traités de 1259 et de Brétigny confirment cette distinction. Il n'y aura plus jamais unité des îles, et le cas de Chausey le prouve. »

Le professeur Wade a donné des articles 4 et 6 du traité de Paris une interprétation dont le mérite principal est évidemment la simplicité. Dans cette interprétation, les îles de la Manche disparaissent : elles ne seraient pas visées par le traité. L'article 4, qui énumère les tenures du roi d'Angleterre, mentionnerait les îles de l'Atlantique. Quant à l'article 6, qui énumère les renonciations du roi d'Angleterre, il n'aurait plus aucun sens en ce qui concerne les îles ; sa signification disparaîtrait comme les îles de la Manche. Le professeur Wade s'est contenté de dire que les îles de l'article 6 n'étaient pas les îles de la Manche ; mais ni dans les plaidoiries, ni dans les répliques, je n'ai trouvé quelles étaient ces îles.

Est-il admissible qu'un traité de paix, liquidant cinquante années de guerre, réglant dans les plus grands détails la situation territoriale des Parties en présence avec l'incertitude dans la possession des îles que le mémoire britannique a reconnue entre 1202 et 1259 (par. 22 du mémoire), n'ait pas parlé des îles de la Manche ? Peut-on admettre que ces îles, un fragment de ce duché de Normandie où commença la guerre, aient été exclues du règlement du conflit ? Cette exclusion nous paraît insoutenable. Il faut que le traité de Paris se soit occupé des îles de la Manche, et toute interprétation qui ne les inclut pas est forcément inexacte. Peut-on croire en outre qu'un traité si soigneusement établi contienne un article 6 vide de sens ? Que cet article fasse mention d'îles sans qu'il soit possible de les identifier ? Devant ces incohérences auxquelles aboutit le système du professeur Wade, nous devons en revenir à notre interprétation.

L'article 4 concerne les îles de la Manche tenues par les Anglais en fief. L'objection du professeur Wade selon laquelle il est impossible que le roi d'Angleterre tienne ces îles « comme pair de France et duc d'Aquitaine » ne nous paraît pas pertinente. Le roi d'Angleterre ne pouvait tout de même pas tenir les îles comme duc de Normandie, puisqu'il avait perdu presque toute cette province et que, dans l'article 6, il renonçait précisément à tout droit sur ce duché. Le roi de France n'aurait d'ailleurs pas accepté que le roi d'Angleterre, dans un traité qu'il signait avec lui, reprît le titre de duc de Normandie. Le titre de duc d'Aquitaine, dans l'article 4, peut ne s'appliquer qu'à Bordeaux et à la Gascogne. Quant au titre de pair de France, plus général et sans précision territoriale certaine, il s'applique à l'ensemble des possessions tenues par le roi d'Angleterre dans le royaume de France.

L'article 6 vise deux catégories d'îles sur lesquelles le roi d'Angleterre abandonne tous ses droits. Les unes relèvent de l'apanage d'Alphonse de Poitiers, frère du roi : ce sont les îles de l'Atlantique comme Ré et Oléron. Les autres relèvent directement du roi de France : comme ce ne sont ni les îles de la Manche tenues par le roi d'Angleterre à l'article 4, comme Jersey et Guernesey, ni les îles de l'Atlantique dépendant d'Alphonse de Poitiers dont nous venons de parler, ce sont forcément les Chausey, les Minquiers, les Écréhous, le Mont-St-Michel, Césambre et l'île Bréhat.

L'article 6 du traité de Paris consacre la sentence de 1202, en ce qui concerne la Normandie continentale et certaines îles ; il consacre l'exécution de cette sentence, la commise, faite de 1202 à 1205 sur la Normandie continentale et sur certaines îles, comme nous l'avons montré.

Le traité de Brétigny de 1360 ne modifia pas cette répartition des îles entre rois de France et rois d'Angleterre. Rien ne permet d'affirmer le contraire.

Le professeur Wade a fait état de la situation critique dans laquelle se trouvait alors la France, pour dire que certaines îles de la Manche ne pouvaient être restées entre les mains des Français. Cependant il faut constater qu'en 1360 la situation n'était plus la même qu'en 1359. C'est en 1359 que le roi Jean, prisonnier à Londres, avait accepté, dans un projet de traité, de céder la Normandie au roi d'Angleterre. Ce projet avait été repoussé par les autorités françaises de régence ; les hostilités s'étaient poursuivies ; la Normandie n'avait pu être conquise en entier par les troupes anglaises. Et le traité de Brétigny, en 1360, consacrait cette résistance française en Normandie, en laissant la province au roi de France.

Ces événements, les termes trop vagues du traité de Brétigny, et enfin le fait que les renonciations qui devaient être échangées pour transférer la souveraineté ne le furent jamais, permettent d'affirmer que le traité de Paris de 1259 n'a pas été modifié sur ce point par les traités postérieurs.

Nous avons dit ce que nous pensions des prétentions du Royaume-Uni à mille ans de possession ininterrompue sur les Minquiers, prouvée en somme par l'enlèvement d'une ancre dans les parages, seul fait que le Royaume-Uni puisse finalement apporter à l'appui de sa thèse. Nous n'avons rien à ajouter à ce que nous avons déjà dit sur ce point. Ce n'est que pour les Écréhous qu'il nous faudra donc ajouter à nos premières explications certaines observations rendues nécessaires par les critiques de mon collègue britannique.

[Séance publique du 8 octobre 1953, matin]

Monsieur le Président, Messieurs de la Cour, j'en étais arrivé hier à la fin de mes premières observations sur la période féodale et il me restait à traiter le problème d'Écréhou.

Le professeur Wade a repris sa théorie suivant laquelle la franche-aumône d'une manière générale et la donation de 1203 en particulier ne seraient que des sous-inféodations. Nous avons déjà longuement réfuté cette conception dans nos plaidoiries (pp. 216-219), mais il nous faut revenir sur deux nouveaux arguments soutenus par la Partie adverse à l'appui de sa théorie.

Le premier est l'affirmation que Pierre des Préaux, dans sa donation à Val Richer en 1203, a retenu quelque chose, et n'a par conséquent pas pu créer une franche aumône. D'après le professeur Wade, Pierre des Préaux se serait réservé expressément le service suivant : la célébration d'une messe quotidienne dans l'église d'Écréhou pour le repos de l'âme du roi Jean, de la sienne, et de celle de ses parents.

Nous avons relu l'acte de 1203 et nous n'avons absolument pas trouvé pareille stipulation. Voici le résumé de la donation, comme il est facile de l'établir d'après le texte publié qui se trouve aux annexes au mémoire

du Royaume-Uni, page 155 : Pierre des Préaux, mû par un sentiment de piété, pour le salut de l'âme du roi Jean, pour le salut de la sienne et de celles de ses parents, a donné à Val Richer l'île d'Écréhou, pour qu'une église y soit construite, afin d'y célébrer la messe chaque jour.

La clause : « mû par un sentiment de piété » et « pour le salut de l'âme », placée en tête de l'acte et avant le dispositif, est une clause de style bien connue de tous les historiens, mais le but même de la donation est évidemment la construction d'une église pour la célébration de la messe quotidienne ; c'est une fondation « ad majorem Dei gloriam », pour que, sur cet îlot inhabité, des prêtres fassent le service divin. On peut aussi supposer que les habitants occasionnels d'Écréhou — quand il y en avait — profitaient de ces secours religieux, et que la libéralité de Pierre des Préaux remédiait en somme à leur déréliction spirituelle.

Mais où le professeur Wade a-t-il lu que l'église d'Écréhou avait une obligation de prières particulières ? Où a-t-il lu que Pierre des Préaux avait retenu quelque droit ? En vérité Pierre des Préaux a fait sa donation sans la moindre réserve, nous dirions aujourd'hui sans la moindre réticence. Il n'est que de lire le texte. Nous sommes bien en présence d'une franche aumône.

Le deuxième point de l'argumentation du professeur Wade est l'affirmation que la donation de Pierre des Préaux a créé une tenure féodale, car, dit-il : « il était de l'essence d'un fief tenu grâce à un lien spirituel, que des services d'ordre ecclésiastique, mais non laïque, fussent rendus ».

Nous venons de voir ce qu'il fallait penser de ces « services d'ordre ecclésiastique ». En fait la donation de 1203 ne contient aucune stipulation de ce genre, aucune réserve. Et par conséquent la Partie adverse n'est pas fondée à soutenir que la donation de Pierre des Préaux a créé une tenure féodale. Nous pourrions nous en tenir là sur ce point. Mais nous voudrions encore une fois faire remarquer, à propos de la franche aumône, combien les théories de mon éminent collègue de Cambridge sur le droit féodal nous paraissent nouvelles et contestables : qu'il s'agisse de Rollon et des grands fiefs, ou des tenures ecclésiastiques — et on sait combien ces dernières étaient nombreuses au moyen âge —, le professeur Wade ne voit là que des fiefs nominaux et hommages de pure forme ; le système féodal à ce compte-là ne serait plus qu'une espèce de vaste mystification !

Or ce système était fort cohérent, et les diverses catégories de possessions ecclésiastiques, par exemple, étaient bien définies. Si nous laissons de côté les grands fiefs ecclésiastiques, qui devaient, avec l'hommage, le service de plaid et d'ost, nous trouvons deux sortes de biens : les tenures par service divin et les franches aumônes. Le professeur Wade nous semble avoir confondu ces deux catégories. Pour les distinguer, nous aurons recours à l'ouvrage, souvent cité par nos collègues britanniques, de Pollock et Maitland « Histoire du droit anglais » ; nous donnerons notre traduction de passages qui se trouvent aux pages 240-241 (2me éd., t. I).

Voici ce que disent ces auteurs pour la tenure par service divin :

« Si une terre était donnée à un ecclésiastique avec la stipulation d'un service défini, bien que de nature spirituelle (par exemple une stipulation que le donataire devra chanter une messe une fois l'an, ou distribuer une certaine somme d'argent aux pauvres), la tenure ainsi créée était appelée, non pas franche aumône, mais tenure par service divin ; le possesseur pouvait être contraint, peut-être, de jurer fidélité

à son seigneur, et l'accomplissement du service pouvait être exigé par l'action de la cour royale. »

Et voici maintenant pour la tenure en franche aumône : « Par contre, si le possesseur tenait en franche aumône, c'est-à-dire si les termes de la donation (ce qui était souvent le cas) ne parlaient pas de service, ou stipulaient simplement des prières pour le donateur, alors la fidélité n'était pas due. »

D'après ces définitions, la donation de Pierre des Préaux ne peut pas être considérée comme créant une tenure par service divin. On peut aussi constater que cette donation ne stipule même pas ce que Pollock et Maitland admettent pour la franche aumône, à savoir des prières pour l'âme du donateur. Une donation en franche aumône, d'après Pollock et Maitland, est compatible avec une clause vague prévoyant des prières pour le donateur. Or, nous l'avons vu, la donation de 1203 ne contient même pas cette clause vague. Dans son préambule, Pierre des Préaux a expliqué les motifs de cette libéralité : ce sont des motifs pieux, le salut de l'âme du roi Jean, le salut de son âme, mais dans son dispositif il a défini le but de sa libéralité, la construction d'une église à Écréhou pour y faire dire la messe.

Nous pouvons donc reprendre entièrement nos conclusions :

1° la donation de 1203 n'est pas une sous-inféodation, elle ne contient aucune réserve ;
2° l'île d'Écréhou est donnée à Val Richer en franche aumône pure, et non pas en tenure par service divin ;
3° entre Écréhou et Val Richer il n'existe plus, après 1203, aucun intermédiaire féodal.

A propos d'un point secondaire, les donations faites au prieuré d'Écréhou, le professeur Wade aurait relevé les noms de trente Jersiais, contre le nom d'un seul Français (que j'avais cité), Guillaume d'Argences, parmi les donataires. Il s'agit de l'annexe A 18, page 164, des annexes britanniques. Et le professeur Wade ajoute : « Si l'on trouve dans ces donations une preuve quelconque de l'appui que fournit ce don, ces preuves penchent bien plus en faveur du Royaume-Uni ; je pourrais dire sur la base de trente contre un. »

Nous avons relu l'annexe A 18. Parmi les premières mentions que trouvons-nous ? « Sus le moulin de Barneville IIII quartiers de fourment du don Simon de Dammartin, conte, et de Aalis, sa femme, fille du roy Louys de France. » Le professeur Wade a-t-il naturalisé Jersiais le comte de Dammartin, gendre d'un roi de France ?

Mais quel titre porte donc le rentier du XV^me^ siècle, édité dans cette annexe A 18 ? « Les rentes de Notre-Dame de Escrehou en Gierresy » (c'est-à-dire en Jersey). Il n'y a rien d'étonnant à ce que des rentes « en Jersey » aient été données par une majorité de Jersiais.

En ce qui concerne la procédure de « *quo warranto* », le professeur Wade ne peut plus contester que le prieur d'Écréhou s'est refusé à répondre sur la question de l'« *advocatio* » tenue par Val Richer. Mais il soutient que les juges itinérants pouvaient légitimement enquêter sur cette question, et la meilleure preuve en serait — toujours d'après mon collègue — le texte de la sentence finale, par laquelle les juges permettent au prieur de tenir cette « *advocatio* » en même temps que le moulin et la rente. Évidemment la Partie adverse ne peut pas prétendre que l'« *advocatio* » ait été désignée explicitement dans la procé-

dure ; mais la sentence ayant dit que le prieur fut autorisé à tenir « *premissa* », c'est-à-dire les choses susdites, toutes les choses contestées et en particulier l'« *advocatio* » seraient, nous dit-on, forcément visées par cette expression.

Ouvrons encore une fois les annexes britanniques, A 12, page 158, et que lisons-nous à la fin de cette annexe ? « Ideo permittitur ipsum priorem tenere premissa sicut tenet. » « C'est pourquoi il est permis au prieur de tenir les choses susnommées comme il les tient. » Les choses susnommées se trouvent cinq lignes plus haut, dans la phrase précédente et à laquelle la phrase que nous étudions se rattache logiquement par la conjonction « ideo », « c'est pourquoi ». Ce sont les mots : « predictum molendinum et predictum annuum redditum viginti solidorum ». Où peut-on trouver mention de l'« *advocatio* » dans cette phrase ? L'« *advocatio* » n'est citée qu'au début de l'acte, une seule fois, et après on n'en parle plus, nous l'avons déjà signalé.

D'ailleurs, à défaut même de preuve littérale, le bon sens suffirait à écarter l'interprétation incluant l'« *advocatio* » dans « *premissa* ». C'est l'abbé de Val Richer, le supérieur religieux et temporel qui tenait l'« *advocatio* » en 1309, même en admettant que le fait ait pu faire l'objet d'une enquête. Ce n'est en tout cas pas le prieur, seul présent, qui tenait l'« *advocatio* » de son propre prieuré.

Au sujet maintenant des lettres de protection accordées en 1337 par le roi d'Angleterre au prieuré d'Écréhou, le professeur Wade s'est montré surpris parce que j'ai insisté sur le fait que nous ne possédions pas le texte de ces lettres, et il me renvoya à l'annexe A 17 au mémoire britannique. Mais je ne peux cependant que maintenir mes affirmations : nous n'avons pas le texte des lettres de protection, à quelque prieuré qu'elles aient été adressées. Ce que nous avons, c'est une analyse, une mention d'enregistrement fort brève, comme il est vraiment facile de le constater, page 164 de l'annexe.

L'intérêt de cette question réside uniquement dans l'interprétation qu'a donnée le Gouvernement du Royaume-Uni de la particule « *de* », dans « prior de Acrehowe de insula de Jereseye ». Nous avons dit que « *de* » pouvait avoir plusieurs sens, parmi lesquels celui de « au sujet de » (Plaid. fr., p. 222). Le professeur Wade tient à ce que « *de* » n'ait jamais qu'un seul et même sens dans un texte donné. Sur cette question il sera peut-être nécessaire d'ouvrir un dictionnaire.

Une dernière observation de caractère accessoire doit être faite sur un point repris par le professeur Wade pour contester à nouveau l'ancienneté de l'appartenance de Chausey à la France. La Cour sait le rôle que joue Chausey dans notre affaire (Plaidoiries, p. 226).

Il s'agit de la bulle de 1500, qui transférait les îles Chausey du diocèse de Coutances au diocèse de Salisbury, puis de Winchester, soi-disant parce que ces îles étaient dans le domaine temporel du roi d'Angleterre ; admettons même qu'elle soit authentique. Le pape pouvait fort bien s'être prêté à ce transfert, car il était alors en mauvais termes avec le roi de France qui entreprenait les guerres d'Italie. Mais il est justement étrange, et bien contraire à la thèse de la Partie adverse, que cette bulle n'ait jamais été exécutée.

Voici ce qu'un auteur, peu suspect de partialité à notre égard, Eagleston (p. 49), dit à cet effet :

> « Mais le transfert semble avoir été ignoré ; après 1500 on ne peut trouver aucun cas où Winchester ait exercé sa juridiction,

cependant que Coutances continua de l'exercer sans arrêt jusqu'à la fin du règne de Marie et après. »

Si vraiment la juridiction spirituelle sur Chausey avait été officiellement transférée de Coutances à Winchester, cette inexécution ne peut prouver qu'une chose : c'est que le roi d'Angleterre était incapable de faire exécuter la bulle donnée à son profit. Comment peut-on supposer, s'il avait eu Chausey en sa possession, qu'il n'ait pas fait exécuter la bulle ?

Il est temps de conclure ces observations sur la première partie de notre exposé sur la période féodale. Nous avions, dans la plaidoirie, résumé nos vues en quatre propositions. Nous les avons reprises une par une en examinant les critiques dont elles avaient fait l'objet, et selon nous ces propositions demeurent intactes. La France possède et a conservé un titre originel sur les Minquiers et les Écréhous.

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Deuxième partie : Période moderne

La réplique du Royaume-Uni a soulevé trois séries de problèmes : d'abord les questions posées par la convention de 1839 ; en second lieu la question de l'acquisition par le Royaume-Uni de la souveraineté par voie d'occupation ou de prescription ; enfin la question des faits de possession pendant les XIXme et XXme siècles.

A. Questions posées par la convention de 1839.

Mon ami M. Fitzmaurice a essayé de dénoncer les contradictions qui entacheraient notre interprétation de la convention de 1839. Il l'a fait avec une grande courtoisie, dont je le remercie, et avec un esprit de finesse auquel on ne saurait rester insensible. Mais je crois que, malgré son talent et malgré ses efforts, il n'a pas réussi dans sa tâche.

Il a porté son attention sur trois questions : celle de la portée de l'article 3 de la convention de 1839 en ce qui concerne la délimitation des zones de pêche ; la question de notre interprétation de ce texte en ce qui concerne la souveraineté ; enfin la compatibilité de notre interprétation avec le compromis. Ce sont ces trois questions que je vais reprendre une à une.

I. Quelle est la portée de l'article 3 de la convention de 1839 en ce qui concerne la délimitation des zones de pêche ?

M. Fitzmaurice a repris l'argumentation présentée par le Royaume-Uni dans la procédure écrite comme dans les plaidoiries, selon laquelle l'article 3 ne saurait s'appliquer aux Minquiers et aux Écréhous, mais il a reconnu que cette interprétation n'était pas, au fond, plus certaine que celle du Gouvernement français, et il a demandé à la Cour d'écarter l'article 3 du débat à cause de son obscurité.

On peut être surpris par ce changement de tactique de nos adversaires. Jusqu'ici l'article 3 était tellement clair qu'il en devenait superflu. Maintenant il est tellement obscur qu'il devient inutilisable. Mais ce changement de tactique laisse entier le but poursuivi, qui est d'écarter du débat l'article 3, ce texte qui gêne tellement le Gouvernement du Royaume-Uni.

Pour montrer la véritable portée de l'article 3, le mieux sera peut-être de retracer le plus brièvement possible sa genèse et son histoire,

à la lumière de ce qui a été dit depuis trois semaines devant la Cour. Je m'excuse de revenir sur cette question, mais elle est essentielle dans le débat.

Cette histoire commence avant 1824, car la convention de 1824 (annexe A 26, p. 176), qui est l'ancêtre de la convention de 1839 et où l'article 3 de la convention de 1839 se trouve en germe, a eu pour but et pour effet de régler des difficultés anciennes.

Depuis très longtemps, les pêcheurs français et anglais exploitaient en commun et sur un pied d'égalité l'étendue de mer qui s'étend entre la côte de France et la côte de Jersey. Après 1815, les pêcheurs anglais se portèrent sur des bancs d'huîtres que les Français considéraient comme leur propriété. Les uns étaient situés à plus de trois milles de la laisse de basse mer des côtes de France, dans la baie de Granville, les autres, au contraire, tout près de la côte de France, à la toucher. Les Français se défendirent contre les prétentions des pêcheurs anglais en invoquant, même au delà de la limite de trois milles, un droit de propriété sur les bancs et sur les étendues marines qui les recouvrent. Des incidents violents se produisirent auxquels les deux États décidèrent de mettre fin par un accord. Les deux Parties convinrent de procéder à une délimitation des zones de pêche. A la suite de longues conversations, elles aboutirent à l'idée d'un principe général de délimitation : c'est l'article premier de la convention de 1824. La limite de la pêche exclusive était fixée à trois milles des côtes de Jersey et de la France, marée basse, parce que cette limite était celle des eaux territoriales sur lesquelles les deux Puissances se reconnaissaient mutuellement le droit de souveraineté (art. 1, par. 1, de la convention de 1824). Il était expressément convenu que les eaux territoriales ainsi délimitées constitueraient une zone de trois milles, mer basse, et, en conséquence, autour des îles énumérées dans l'article 3, Guernesey, Alderney, Sark et Jersey, et le long de la côte de France, toutes les pêches étaient réservées aux pêcheurs français, d'un côté, aux pêcheurs britanniques, de l'autre, dans un rayon de trois milles. La pêche générale était commune dans l'espace compris entre la côte de Jersey, d'une part, et la côte de France, d'autre part. En ce qui concerne les huîtres et d'autres coquillages, la limite de ces pêches particulières était fixée dans les parages à six milles le long des côtes de l'île de Jersey, d'une part, de la côte française opposée, de l'autre. En d'autres termes, dans les parages litigieux, la ligne des eaux territoriales qui, du fait qu'elle était la limite de l'exercice des pouvoirs souverains des deux nations, était également la limite des pêcheries, se trouvait doublée en ce qui concerne les huîtres et d'autres coquillages par une seconde ligne trois milles en avant dans la mer. Si l'on reporte sur la carte cette délimitation, nous avons autour de l'île de Jersey une ligne de trois milles et autour des côtes de France une autre ligne de trois milles, et en avant de chacune de ces deux lignes une ligne spéciale, qui représente, tant du côté de Jersey que du côté français, les limites de la pêche spéciale des huîtres.

On constate que, entre ces lignes, la pêche générale s'exerçait nécessairement en commun dans les espaces litigieux aussi bien des Écréhous, sur lesquels se croisent les limites spéciales, que des Minquiers qui sont en dehors. A cet égard, la convention de 1824 est incompatible avec toute autre interprétation, car elle maintient le *statu quo ;* elle ne fait que préciser les limites de l'espace intermédiaire ouvert aux pêcheurs des deux nations sur un pied d'égalité, en fixant, tant du côté de l'île

de Jersey que du côté français, la limite de la pêche commune qui est aussi, à l'intérieur de ces limites, celle de la pêche exclusive, de laquelle il est dit clairement dans l'article premier qu'elle correspond à la limite de la mer territoriale.

Entre les limites ainsi définies il n'existe aucune étendue d'eaux territoriales appartenant exclusivement à l'une des deux nations et engendrant un droit de pêche exclusif. D'autre part, comme il a été dit et répété par les deux Parties, si l'une d'entre elles l'avait voulu en 1824, il lui était facile, en faisant état de sa souveraineté, si elle s'y croyait fondée, de soutenir ses prétentions à la pêche exclusive dans des parages que l'une et l'autre convoitaient. Rien n'empêchait une Partie de tracer ce cercle de trois milles que j'ai tracé sur cette carte autour des Écréhous et autour des Minquiers et de le reproduire sous la forme appropriée dans la convention de 1824. Au lieu de recourir à une tactique si simple et si efficace, que font-elles ? Elles conviennent pour les huîtres de limites spéciales qui coupent en deux les Écréhous et laissent les Minquiers dans l'intervalle qu'elles renferment.

Ces faits ne sont pas contestables. La carte est là.

Il est également certain que ni la France, ni le Royaume-Uni ne renonçaient pour autant à défendre leurs droits anciens contre des tiers. Cela dit, remarquons trois points : la convention de 1824 n'a jamais été signée ni ratifiée ; deuxième point : elle a été appliquée juqu'en 1839 par les deux Parties qui lui reconnaissaient, après treize ans, quand a commencé la négociation de 1837, une certaine force contraignante, puisque la première chose que font les commissaires anglais en arrivant à Granville, c'est de dénoncer ce qui n'était pas une convention, puisqu'elle n'avait jamais été ni signée ni ratifiée et que, de leur côté, les Français paraissent avoir soutenu avec succès que la convention de 1824 continuerait d'obliger les deux Parties jusqu'au terme des négociations entreprises, donc jusqu'à l'entrée en vigueur de la convention de 1839. Troisième remarque : la convention de 1839 n'est qu'une version de la convention de 1824, fidèle au même principe, nouvelle seulement en ce qui concerne la délimitation.

Je ne reviendrai pas sur les circonstances particulières qui expliquent la mauvaise rédaction de la convention de 1839. Mais si elle est maladroitement rédigée, elle n'est tout de même pas aussi dépourvue de sens que nos contradicteurs se plaisent à le dire.

La convention de 1839 était en premier lieu destinée à régler la situation dangereuse qui résultait de contestations qui s'étaient élevées, en dépit de l'arrangement de 1824, en ce qui concerne la pêche aux huîtres. Le long des côtes de France la limite de six milles n'était pas respectée, et les pêcheurs anglais convoitaient des bancs très nombreux situés à l'intérieur même de la limite des trois milles de la mer territoriale reconnue par l'article premier de la convention de 1824, donc dans les limites de la pêche réservée aux seuls Français.

Qu'ont fait les commissaires de Granville ? Ils ont fait une convention réglant une délimitation nouvelle de la pêche aux huîtres qui, moyennant des compensations savamment calculées, donnait à peu près satisfaction aux pêcheurs britanniques sans léser dangereusement les pêcheurs français. Tout cela a été expliqué déjà et ce n'est pas là-dessus que les deux Parties se recherchent.

Mais pour tout le reste, leurs thèses s'opposent. Suivons notre méthode. Qu'ont fait les commissaires de Granville ? Ils ont dit : désormais,

autour de l'île de Jersey la limite de la pêche aux huîtres sera à trois milles de la côte, basse mer. Du côté français, elle sera déterminée par une ligne *ad hoc* qu'ils ont matérialisée par des repaires faciles à distinguer pour les pêcheurs et ensuite reportée sur une carte, car il ne suffisait plus dans ces parages d'appliquer simplement la règle des trois milles. C'est cela qu'ils ont fait, et rien de plus. Mais c'étaient des hommes capables. Ils savaient très bien qu'il s'agissait de remplacer la convention de 1824, non seulement en ce qui concernait la pêche aux huîtres, mais aussi pour tout ce qui concernait la pêche générale. Cependant, les principes les dépassaient, et pour régler équitablement la pêche aux huîtres, disaient-ils, voilà ce qu'il faut changer dans le régime de 1824. Aux chancelleries de décider comment il faut s'y prendre pour conserver ou modifier les principes, pour aménager ce qui doit être aménagé.

Les chancelleries — car ce sont elles et non plus les commissaires de Granville qui mettent la dernière touche à la convention, d'ailleurs signée non pas par les commissaires de Granville mais par le duc de Dalmatie et par lord Granville, les deux ministres des Affaires étrangères —, les chancelleries ajoutent l'article 9 (voir Plaidoiries françaises, p. 251) et aboutissent à un texte qui dit la même chose, sans doute moins bien que la convention de 1824. La seule différence importante entre la convention de 1824 et celle de 1839 est en réalité qu'il n'y a plus, de part et d'autre, qu'une seule limite de pêche valable pour les huîtres comme pour tous les autres animaux marins. Il faut ajouter, il est vrai, comme je l'ai déjà dit, que du côté français la règle des trois milles reçoit une exception dans les parages en cause où la ligne générale est remplacée par une ligne *ad hoc*. Mais pour tout le reste et surtout en ce qui concerne les principes, c'est la convention de 1824 qui subsiste, y compris la corrélation de la délimitation de la pêche et de la mer territoriale (art. premier de la convention de 1824). Je reconnais volontiers que, en 1839, les chancelleries n'ont pas donné une forme élégante à la convention ; elles ont cousu sans retailler. Elles ont mis à l'article 9 ce qui faisait si bien à l'article premier de la convention de 1824. Elles ont reçu des commissaires de Granville le projet de convention relative aux huîtres, auquel elles ont rajouté l'article 9.

Mais il me paraît impossible de soutenir que la délimitation résultant dès lors de la combinaison des articles 3 et 9 de la convention de 1839 ait pu avoir pour objet ou pour effet de modifier le statut des espaces maritimes situés au milieu de l'intervalle compris entre les deux lignes. En ce qui concerne les Écrèhous, notons d'ailleurs que ce groupe d'îlots ne se trouvait même plus intéressé, comme en 1824, par le croisement, en son beau milieu, de deux lignes de délimitation de la pêche.

Voilà ce qui s'est passé en 1839. Pas plus en 1839 qu'en 1824, aucune des deux nations n'a invoqué au milieu de l'espace délimité à l'article 3 un droit de souveraineté qui aurait engendré des eaux territoriales et qu'elle aurait pu, à ce titre, interdire aux pêcheurs de l'autre nation. La carte est plus éloquente qu'un long récit, et elle nous permettra de résumer en quelques propositions nos observations sur le sujet.

Premier temps : Avant 1824, les pêcheurs des deux nations pêchent en commun dans l'ensemble de ces espaces maritimes entre la côte de l'île de Jersey et la côte française. Ils se disputent les bancs d'huîtres situés près de la côte française.

Deuxième temps : 1824. La pêche générale est délimitée à trois milles de la côte laisse de basse mer de l'île de Jersey et de la côte de France opposée. La limite de trois milles prise pour la pêche générale est convenue parce que c'est celle de la mer territoriale. Toutefois, pour la pêche aux huîtres une deuxième limite est portée à trois milles en avant de la première, donc à six milles de la côte de l'île de Jersey et de la côte de France.

Troisième temps : La convention de 1839, article 3, est destinée à éliminer les difficultés qui sont apparues en raison de l'existence de cette deuxième ligne spéciale de pêche aux huîtres. Le principe de 1824 est rétabli dans toute sa rigueur. La limite des pêches aux huîtres est ramenée des deux côtés jusqu'à la limite de la mer territoriale : *du côté français c'est une ligne géométrique, une ligne ad hoc,* afin de donner satisfaction autant que possible aux revendications des pêcheurs des deux côtés, mais le principe de l'unité de limite est exactement sauvegardé, et l'état antérieur à 1824 dans les espaces intermédiaires est rétabli. Ni d'un côté ni de l'autre personne ne fait valoir des droits exclusifs sur une part quelconque de ces espaces intermédiaires, alors que, comme nous l'avons vu, rien n'aurait été plus facile que de le faire. Lorsqu'on eut écarté ces deux lignes spéciales de six milles, la situation des Minquiers et des Écréhous éclatait aux yeux des commissaires. Que disent-ils ? Rien. Et on voudrait que ces îlots qui n'avaient pas de mer territoriale propre en 1824 en acquièrent une par ce rien ?

Quatrième temps : La pratique est restée conforme de 1839 à 1870 environ, sans contestation, et de 1870 à 1951 malgré les prétentions du Gouvernement britannique, qui n'ont jamais eu d'autre prétexte que l'interprétation — erronée, à notre sens — de l'article 38 de la convention de 1867.

Arrêtons-nous un moment pour considérer l'œuvre de 1839, celle des commissaires de Granville, comme celle des chancelleries. Elle porte, assurément, la marque d'une certaine négligence. Depuis longtemps, sans doute, cette affaire avait passé de bureau en bureau, sans être repensée, et les conséquences étaient parfois amusantes. A prendre la convention de 1839 au pied de la lettre, par exemple, il n'y aurait autour des îles de la Manche autres que Jersey, Guernesey, Sark, etc., aucune ceinture d'eaux territoriales. Cette bévue apparente a déjà été signalée. C'est elle qu'on a peut-être voulu réparer en 1867 en écrivant dans le projet d'article 38 que le mot Îles britanniques comprenait les îles de la Manche. En fait, cette glose était une utile correction de forme, mais personne ne pouvait douter en 1839 ni en 1867 que, en ce qui concernait les autres îles que Jersey, la convention de 1824, dans son article 3, avait une fois pour toutes réglé les limites de leurs eaux territoriales et la bévue de 1839 était sans conséquence. C'est une curiosité, une petite étourderie dans la longue liste de celles dont l'histoire de la diplomatie a gardé le souvenir. Cependant, c'est elle qui explique l'article 38 de 1867. Mais venons-en à l'essentiel.

On peut dégager deux points.

D'abord l'article 3 et l'article 9 combinés ont un sens clair. Entre les deux limites, celle qui entoure l'île de Jersey et la limite *ad hoc* le long de la côte de France opposée, la pêche est commune sur un pied d'égalité aux pêcheurs des deux nations. Nos contradicteurs ne le nient pas mais

soutiennent qu'il faut excepter dans ces espaces les territoires appartenant à l'une ou à l'autre nation et engendrant une zone de mer territoriale interdite aux pêcheurs de la nation qui n'a pas la souveraineté.

Le Gouvernement du Royaume-Uni soutient toujours que la pêche des huîtres est interdite aux Français en dépit de la convention de 1839 autour des Minquiers et des Écréhous, parce que ces îlots sont britanniques. Mais cette prétention à la pêche exclusive des huîtres elle-même va contre un texte clair et une pratique conforme constante. Pour soutenir leur thèse, nos amis britanniques ont en somme commis une sorte de péché contre l'esprit. Ils ont été jusqu'à dire que l'article 3, qui est écrit, n'était pas écrit. Mais il est clair qu'une interprétation aussi désespérée ne plaide pas en faveur de la thèse britannique. Le meilleur commentaire de l'article 3 est fourni dans une lettre du marquis d'Harcourt (annexe A 31, p. 213, des annexes britanniques), où il est dit, à la fin du premier paragraphe : « Si nous revenons à la convention précitée [c'est celle de 1839] et envisageons la question au point de vue de droit international, nous apercevons que la première conséquence de cette mesure serait, en vertu de la délimitation des trois zones, française, neutre et anglaise indiquées sur les cartes marines, de déplacer complètement les limites de la mer territoriale anglaise qui si elles commençaient aux rochers d'Écréhous arriveraient, pour ainsi dire, sur « la côte de France. »

En second lieu, nos adversaires nous opposent les conséquences inacceptables de l'interprétation française. En réalité, quand on nous dit cela, cela veut dire que, aux yeux de nos amis britanniques, si la convention de 1839 était à refaire, ils seraient plus sages que leurs anciens et se prémuniraient contre ces conséquences dont ils ne veulent pas ou dont ils ne veulent plus. Peu importe ce que nos amis anglais voudraient que l'article 3 fût. Ce qui importe, c'est ce qu'il est. Or, le langage de cet engagement est clair, et, traduit en lignes reportées sur la carte, il est encore plus clair.

Continuons l'histoire de 1839. La convention est appliquée trente ans sans la moindre difficulté ; des difficultés surgissent parfois le long des lignes définies par l'article premier ou l'article 2 et surtout le long de la ligne *ad hoc*, qui représente la limite française. Mais s'il y avait eu des lignes de délimitation du genre de celles que j'ai tracées aux Minquiers et aux Écréhous, à quelques milles de la côte française, est-ce qu'on croit vraiment que des incidents ne se seraient jamais produits alors que la configuration même des Minquiers avec ses rochers découvrants eût exigé une délimitation particulièrement compliquée, et que personne n'a encore faite aujourd'hui ? En fait, l'article 3 n'a été contesté contre son sens parfaitement clair que du jour où l'on s'est avisé du côté anglais que si l'on pouvait tirer parti de l'article 38 de la convention de 1867, on arriverait à modifier le sens de l'article 3. De bonne foi, bien sûr, mais avec de grands efforts d'exégèse, on me le concédera. Or cet article 38 était destiné très probablement à redresser la mauvaise rédaction de la convention de 1839. Interprétée littéralement sans tenir compte de la convention de 1824 qui avait, à mon sens, à tout jamais réglé le problème des eaux territoriales pour Guernesey, Alderney, Sark et Jersey, la convention de 1839 demandait sans doute une correction. C'est cette correction que proposait M. Cave en 1867 lorsqu'il suggéra d'inclure les îles de la Manche dans le terme Îles britanniques. Si nous avons évoqué sa suggestion, c'était uniquement pour dire que dans la thèse du Royaume-Uni l'article 38 de la convention introduisait quelque

chose de nouveau dans la convention de 1839, et qu'à ce titre il ne pouvait pas être retenu pour son interprétation.

Pour faire dire à l'article 3 ce qu'il dit, la thèse française se contente donc de donner au texte son sens naturel et d'alléguer la pratique conforme suivie d'abord pendant trente ans sans contestation puis jusqu'à nos jours, malgré les prétentions nouvelles de nos amis britanniques énoncées depuis 1870 environ, à la faveur d'une addition introduite dans l'article 38 de la convention de 1867 avec un autre sens et en tout état de cause inopposable à la France en tant qu'elle modifierait la convention de 1839.

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II. *Quels sont les effets de l'interprétation française de l'article 3 en ce qui concerne la question de la souveraineté.*

M. Fitzmaurice a examiné ce que l'on pourrait appeler deux versions de la thèse française, en reconnaissant que l'une seulement devait être la thèse véritable du Gouvernement de la République.

La première version de notre thèse présentée par M. Fitzmaurice est, la Cour s'en souvient, fort simple. L'article 3 a mis en commun entre les deux pays l'usage des îles aux fins de la pêche. Les actes accomplis en exécution de cette convention sont donc inopposables à l'autre Partie en tant que manifestation de la souveraineté. Quant aux actes autres que les actes de pêche, ils ne sont pas permis par la convention et sont donc interdits sauf accord de l'autre Partie. Ainsi présentée, notre interprétation se heurte évidemment à l'objection de M. Fitzmaurice qu'il y a là quelque chose de très proche d'un condominium et qu'un tel statut ne peut être déduit du silence de la convention. Mais il est inutile d'insister sur ce point, car, M. Fitzmaurice le reconnaît lui-même, nous n'avons jamais dit que l'État qui avait la souveraineté sur les îles devait, pour accomplir des actes autres que les actes de pêche, *obtenir préalablement l'accord de l'autre Partie.* C'était une hypothèse d'école. Aussi voudrais-je préciser très brièvement ce qu'est authentiquement la thèse française en ce qui concerne les effets de l'article 3 sur la question de la souveraineté. Je fais donc abstraction pour le moment de la portée géographique du texte et je suppose acquis qu'il s'applique à la région des Minquiers et des Écréhous ; le problème se pose alors de savoir quels sont ses effets en matière de souveraineté territoriale.

L'histoire de la convention de 1839 nous a montré que les deux Parties étaient d'accord pour autoriser la pêche en commun dans les eaux des Minquiers et des Écréhous. Il n'y avait pas là une « concession », un « octroi » accordé par l'État qui avait la souveraineté à celui qui ne l'avait pas : c'était la simple confirmation d'un état de choses ancien et que la convention de 1824 avait déjà confirmé quinze ans plus tôt. C'était probablement aussi la condition d'un règlement nécessaire d'ensemble de la pêche entre l'île de Jersey et la côte française ; enfin, aucune des Parties n'avait soulevé le problème au cours de la négociation, sachant vraisemblablement que la revendication d'une zone de pêche exclusive autour des Minquiers et des Écréhous compromettrait définitivement les chances d'un pareil règlement.

Les Parties étaient donc d'accord pour la pêche commune dans les eaux des Minquiers et des Écréhous. En principe, un pareil accord n'aurait entraîné aucune conséquence en ce qui concerne non plus les eaux des îlots, mais les îlots eux-mêmes. Dans le cas des Minquiers et des Écréhous, la terre des îles ne pouvait en 1839 servir à rien d'autre que d'abri temporaire aux pêcheurs, et il est normal dans ces conditions que la communauté de pêche se soit traduite par un usage commun des îles elles-mêmes aux fins de la pêche. Pendant une trentaine d'années, la convention fut d'ailleurs interprétée comme cela sans difficulté ; aucune des Parties ne prétendit à autre chose qu'à la pêche, et aucune controverse ne se produisit. Vers 1870, les difficultés commencent, et des actes furent accomplis par les deux Parties qui n'ont aucun rapport avec la pêche. Ces actes sont invoqués aujourd'hui devant la Cour à titre de preuve de la souveraineté, et la question que nous posons est celle de savoir si l'utilisation de ces actes est valable.

Nous avons suggéré à cet égard qu'il fallait distinguer entre les actes de pêche proprement dits (c'est-à-dire la pêche et les activités connexes : construction de jetées ou abris de pêcheurs) et les actes que nous appellerons pour plus de commodité les actes de souveraineté.

En ce qui concerne les actes de pêche, les deux Parties pouvaient valablement les accomplir entre 1839 et aujourd'hui, la convention de 1839 ayant placé les îles dans la zone commune de l'article 3. M. Fitzmaurice nous dit que les pêcheurs des deux nations ont exercé la pêche aux îles non pas parce qu'ils pensaient exécuter la convention de 1839, mais parce qu'ils pensaient que leur État avait la souveraineté sur les îles. Nous avouons ne pas voir la portée de cet argument, car les mobiles qui ont inspiré, si on les connaît, les pêcheurs de nos deux nations, sont étrangers à la cause ; ce ne sont pas les pêcheurs qui vont interpréter la convention de 1839 et décider du sens de l'article 3. C'est un fait que des actes de pêche ont été permis par la convention de 1839 à l'État qui n'avait pas la souveraineté comme à l'État qui l'avait. Ils ne peuvent donc être invoqués aujourd'hui comme preuve de souveraineté.

Quant aux actes de souveraineté proprement dits, construction d'édifices publics non destinés à la pêche, visites de personnalités officielles, déploiement du drapeau national, hypothèses telles que la construction d'un radar, etc., il faut distinguer selon qu'ils ont été accomplis par l'État qui avait la souveraineté ou par l'État qui ne l'avait pas. L'État qui avait la souveraineté pouvait évidemment accomplir tous les actes que comportait son droit de souveraineté, sauf dans les cas où son activité aurait gêné en quoi que ce soit la pêche des ressortissants de l'autre Partie ; l'article 3 ne vidait donc aucunement le contenu de la souveraineté de l'État véritablement souverain, exception faite de l'objet précis de ce texte, c'est-à-dire la pêche. Il n'y avait pas condominium, il y avait souveraineté exclusive et intégrale sauf pour la pêche. Quant à l'État qui n'avait pas la souveraineté, il ne pouvait au contraire accomplir aucun acte autre que des actes de pêche. Mon ami M. Fitzmaurice me dit que cela revient à affirmer que tout ce qui n'était pas expressément permis à l'État qui n'avait pas la souveraineté lui était interdit. Mais n'est-ce pas l'évidence même ? Depuis quand un État peut-il accomplir des actes de souveraineté sur le territoire d'un autre État ? N'est-il pas normal que les actes de pêche prévus par l'article 3 mis à part, l'État qui n'avait pas la souveraineté

n'ait pu accomplir aucun acte impliquant la souveraineté sur un territoire qui relevait de l'autre Partie ? Comme l'a dit très justement M. Fitzmaurice, l'article 3 n'entravait en rien la liberté des Parties. C'est exact, en ce sens que l'État souverain pouvait continuer comme auparavant à faire tout ce qu'il voulait dans la mesure où cela ne gênait pas la pêche des ressortissants de l'autre Partie, mais l'État qui n'avait pas la souveraineté continuait à ne pouvoir accomplir aucun acte sur les îles, à l'exception des actes de pêche désormais formellement autorisés par la convention de 1839.

Juridiquement, la situation était parfaitement claire. En pratique, elle le fut beaucoup moins, car chacun des deux États prétendait avoir la souveraineté et considérait comme illicites les actes, autres que de pêche, accomplis par l'autre Partie. C'est la Cour qui va nous dire qui avait raison et quels sont ceux des actes — accomplis par le Royaume-Uni et par la France — qui ont été illicites au regard du droit international, parce que commis en violation de la convention de 1839. C'est parce que la licéité de nos actes de souveraineté, aussi bien du Royaume-Uni que de la France, était contestée par l'autre Partie, que le Gouvernement de la République s'est abstenu d'insister sur les faits de possession des cent dernières années. Il était convaincu — et il l'est toujours — que ce sont les faits invoqués par le Royaume-Uni qui sont seuls inopposables comme preuve de la souveraineté britannique sur les îlots, car il considère que, le Royaume-Uni n'ayant jamais eu la souveraineté sur les Minquiers et les Écréhous, n'a pu valablement accomplir sur ces îlots aucun autre acte que des actes de pêche. Mais c'est là précisément l'enjeu du présent litige, et c'est pour cette raison que le Gouvernement de la République a préféré rejeter en bloc les actes de possession des deux Parties postérieurs à 1839, et c'est, je le répète, parce que les avocats du Royaume-Uni nous ont, en quelque sorte, mis au défi de présenter des preuves de notre souveraineté que nous avons produit en annexes nouvelles ces preuves que peut-être ils pensaient inexistantes.

L'arrêt de la Cour va, si elle accepte notre thèse, lever tous les doutes exprimés par mon ami M. Fitzmaurice, car l'interprétation donnée par la Cour au texte d'une convention a, selon la jurisprudence de la Cour permanente, un effet rétroactif en ce sens que le texte de la convention doit être réputé avoir toujours eu le sens résultant de cette interprétation. (*Écoles minoritaires allemandes en Haute-Silésie*, A/B 40, p. 19.) La situation s'éclairera donc rétroactivement. Les deux États pourront continuer à utiliser en commun les îles aux fins de la pêche. L'État auquel la Cour aura attribué la souveraineté pourra, seul, de sa propre initiative, construire des maisons de douane, des stations de T. S. F., installer un radar. L'État qui n'aura pas la souveraineté ne pourra rien faire sur les îlots, excepté des actes de pêche. Tout cela nous semble clair, simple et sans contradiction possible.

M. Fitzmaurice a dit que notre interprétation de l'article 3 de la convention de 1839 prêtait à ce texte si modeste des ambitions bien vastes. Ce grief n'est pas fondé. Nous n'avons jamais dit que l'article 3 modifiait en quoi que ce soit la souveraineté sur les Minquiers et les Écréhous. Tout au contraire, nous avons insisté sur le fait que du silence de ce texte on pouvait tirer une conclusion, et une seule, à savoir que les Parties n'ont pas voulu modifier la souveraineté existante (Plaidoiries, p. 258). Et c'est précisément parce que l'article 3 est muet sur la souve-

raineté que les actes accomplis en son exécution ne peuvent pas être invoqués en faveur de la souveraineté de l'une ou de l'autre des Parties.

M. Fitzmaurice nous a, il est vrai, reproché d'interpréter tous les actes de ces cent dernières années en fonction de la convention de 1839. Mais cela n'est-il pas naturel ? Un traité intervenu entre deux États n'affecte-t-il pas, n'imprègne-t-il pas les actes postérieurs qui ont un rapport avec son objet ? Est-il donc indifférent que les actes accomplis aient été conformes ou contraires à la convention de 1839 ? Il nous semble que poser ces questions, c'est les résoudre.

* * *

III. Le troisième point de l'argumentation de mon collègue britannique était que notre interprétation de la convention de 1839 serait incompatible avec le compromis de 1950.

La thèse de M. Fitzmaurice peut se résumer ainsi. Le compromis suppose que la Cour est appelée à trancher des revendications contradictoires par les deux Parties à la souveraineté sur les Minquiers et les Écréhous ; il suppose donc l'existence de telles revendications et la possibilité pour les Parties de les avoir formulées. Or, selon la thèse française, la convention de 1839 avait pour effet de rendre inopposables à l'autre Partie tous les actes de possession accomplis par chacune des Parties postérieurement à sa conclusion et de rendre donc irrecevables les revendications de souveraineté fondées sur ces actes. Il en résulte, nous dit M. Fitzmaurice, que l'interprétation française de 1839 est incompatible avec le compromis.

Mon collègue britannique revient ainsi purement et simplement à la thèse primitive du Royaume-Uni selon laquelle la convention de 1839 — autour de laquelle ont pourtant tourné toutes les controverses avant comme après la soumission de l'affaire à la Cour — doit être laissée complètement hors du débat et que les faits de possession de ces cent dernières années doivent être envisagés comme ils le seraient si cette convention n'avait pas existé.

L'objection de M. Fitzmaurice est d'ailleurs dirigée exclusivement — la Cour l'aura remarqué — contre la première version de la thèse française. Entre la deuxième version, la seule exacte, et le compromis il n'y a pas la moindre incompatibilité. D'une part, la Cour est saisie des prétentions contradictoires globales des Parties et non des seules prétentions fondées sur des actes accomplis depuis 1839. D'autre part, l'État qui avait la souveraineté et qui sera jugé tel par la Cour pouvait continuer, nous l'avons dit, à accomplir tous actes de souveraineté sur les îles ; quant à l'État qui n'avait pas la souveraineté en 1839, ce n'est pas à vrai dire la convention de 1839 qui barre l'évocation de ses faits de possession, mais le fait qu'il n'avait pas la souveraineté et ne pouvait donc pas accomplir valablement de tels actes. Il n'y a donc aucune contradiction entre notre interprétation de la convention de 1839 et de l'article 3 et le compromis.

* * *

B. La question de l'acquisition de la souveraineté par le Royaume-Uni par voie de prescription ou d'occupation.

En ce qui concerne l'acquisition de la souveraineté par voie d'occupation, je suis évidemment d'accord avec M. Fitzmaurice pour dire qu'elle ne peut être envisagée que si l'on admettait qu'aux environs de 1800 les deux groupes d'îlots étaient *res nullius*. Nous pensons aussi que tel n'était pas le cas, et si nous avons parlé très brièvement (pp. 270-271) de ce mode d'acquisition de la souveraineté, c'était pour l'éliminer en ce qui concerne le Royaume-Uni, pour le cas où la Cour estimerait, contrairement à l'opinion des deux Parties, que les îlots étaient *res nullius* aux environs de 1800.

Pour ce qui est de la prescription, M. Fitzmaurice ne me semble pas avoir ébranlé ce que nous avions dit (pp. 265 à 270), et je ne serais pas revenu sur cette question s'il n'avait dans l'exposé de nos arguments négligé quelques points de nos propos. Nous n'avons pas dit que tous les actes invoqués par le Royaume-Uni n'étaient que de simples actes d'utilisation des richesses des îles et non pas des actes de souveraineté : nous avons seulement dit que n'étaient pas des actes de souveraineté les actes de pêche de Jersiais aux îles et l'existence sur les îles de maisons appartenant à des Jersiais (p. 267). Quant au caractère paisible de la possession requise, nous n'avons pas dit qu'il s'agissait de l'absence de violence de la part de l'État qui acquiert la souveraineté par voie de prescription, mais de l'absence de contestation de la part de l'État à l'encontre duquel la prescription s'opère. Or, les protestations françaises ont été nombreuses, nous l'avons vu (pp. 268 à 270). Même si le Gouvernement français s'abstenait d'élever des protestations pendant de longues années, il n'en demeurait pas moins ce que j'ai appelé une sorte d'état de protestation permanente, et je m'étonne que M. Fitzmaurice ait pu dire que le Gouvernement du Royaume-Uni avait cru que la France avait « acquiescé » aux revendications du Royaume-Uni : pour quiconque relit la correspondance diplomatique le contraire semble évident. Le seul fait d'avoir constamment invoqué, dans notre correspondance, la convention de 1839, constitue cette protestation permanente ; le Gouvernement du Royaume-Uni ne pouvait dès lors ignorer comment le Gouvernement français estimait trouver dans cette convention une défense adéquate aux revendications de souveraineté du Gouvernement britannique. A quoi auraient servi nos tentatives de négociations vers 1903 par exemple, si on les qualifie d'acquiescement ? C'est encourager les États à ne jamais modifier leurs positions primitives dans une négociation de peur qu'on ne leur dise ensuite : vous avez acquiescé à nos prétentions. On nous reproche aussi de n'avoir pas fait suivre ces protestations d'actes positifs, ces derniers étant seuls, nous dit-on, susceptibles d'interrompre la prescription. Je prierai encore une fois la Cour de garder en mémoire les circonstances de l'histoire de France des années 1870 à 1914, voire même à 1950, et demanderai une seconde fois à nos amis britanniques : que fallait-il faire ? Débarquer des fusiliers-marins, faire sauter la maison de douane à la dynamite ? Expulser les pêcheurs jersiais lorsqu'ils hissaient votre pavillon ?

Quant à l'absence de propositions d'arbitrage, tout arbitrage sur une question territoriale soulève aujourd'hui encore une émotion qui fait comprendre qu'aucun des deux pays n'y ait songé en des temps d'amitié moins parfaite.

Mais M. Fitzmaurice, se rendant sans doute compte de la faiblesse de ses arguments sur ce point, a fini par dire que si vraiment la France avait la souveraineté vers 1800, le Royaume-Uni l'avait acquise par

prescription entre 1800 et 1876, date de la première protestation française qui aurait pu interrompre cette prescription. Nous poserons simplement une question : Comment cette acquisition a-t-elle pu se faire alors qu'en 1822 les États de Jersey, s'adressant au roi d'Angleterre, n'invoquent aucun droit de souveraineté et que la quasi-totalité des faits de possession britanniques est postérieure à 1870 sans qu'on puisse trouver pratiquement aucun fait de possession anglais dans la première moitié du XIXme siècle ? Je me suis référé en faisant allusion à 1822 à cet acte des États de Jersey que j'avais cité pour partie et que, grâce à l'extrême obligeance de mes collègues britanniques, je détiens maintenant : c'est l'acte du 18 avril 1822.

Les faits énumérés par M. Harrison (pp. 336-337) ne sont pas en effet des faits et des actes de souveraineté.

Les uns sont de simples actes de pêche ou des actes liés à la pêche autorisée par la convention de 1839 et ne constituent pas, comme nous l'avions déjà montré (Plaidoiries, p. 267), des actes de souveraineté. Tels sont, pour les Minquiers, les faits nos 1, 2, 10 et 11 ; pour les Écréhous, les faits nos 4 et 8. D'autres concernent la construction de cabanes appartenant à des particuliers, question qui, nous l'avons dit (p. 267), est entièrement étrangère au problème de souveraineté : tels sont, pour les Minquiers, les faits n° 9, pour les Écréhous les faits nos 6, 7, 9 et 10.

Deux faits au moins sont absolument en dehors de la question : il s'agit du fait n° 7 des Minquiers — l'inscription des initiales d'un Jersiais sur Maîtresse Île — et du fait n° 6 — extraction de pierres aux Minquiers par des Jersiais : des pierres ont été également extraites aux Chausey, au XVIIIme siècle, je l'ai rappelé dans ma plaidoirie, page 227 ; va-t-on en déduire que les Chausey appartenaient au XVIIIme siècle au Royaume-Uni ?

Le fait n° 8 des Minquiers, c'est-à-dire la mission du capitaine de vaisseau Martin White, a été remis à sa juste place lors de notre premier exposé (pp. 257-258).

Le fait n° 5 des Écréhous — inclusion des Écréhous, en 1875, dans les limites du port de Jersey — a précisément fait l'objet d'une protestation du Gouvernement français reproduite en annexe A 31, et c'est l'un de ces actes illicites au regard du droit international comme violant la convention de 1839. De tous les faits énumérés par M. Harrison, que reste-t-il ? Les cas d'enquête sur les personnes décédées et l'application de la juridiction jersiaise relatés aux nos 3, 4 et 5 pour les Minquiers ; 1, 2 et 3 pour les Écréhous. Je pourrais faire remarquer que certains de ces faits se réduisent à de pures hypothèses : ainsi le fait n° 3 des Écréhous concerne l'enquête faite sur le cadavre d'un « inconnu *supposé* être un marin français », ce sont les termes mêmes du document publié en annexe additionnelle A 171, et je pourrais demander si on ne fait pas à Jersey, comme dans tous les pays du monde, une enquête sur tout noyé trouvé n'importe où, en pleine mer ou sur tout rocher.

Le fait n° 1 des Écréhous concerne, comme l'indique l'annexe additionnelle A 159, un Français fugitif trouvé aux Écréhous par des pêcheurs jersiais et non par des fonctionnaires, et emmené, sur sa demande, car il fuyait des poursuites pénales, à Jersey où il a comparu comme immigrant irrégulier devant l'autorité jersiaise. Mais sur tous ces faits de juridiction que M. Harrison a qualifiés de territoriale, on pourrait soulever une question de principe. Nous voulons bien croire

que la *loi de Jersey a une application territoriale, mais que prouve* cela dans le présent litige ? Il est en effet de principe que l'application d'une loi interne ne peut en rien affecter une situation établie légitimement selon le droit international ; si la France a établi son titre originel et sa possession sur les Minquiers et les Écréhous, ce n'est pas la prétendue application d'une loi intérieure jersiaise à ces îlots qui pourra modifier la situation internationale de la France. Je me réfère sur ce point à la décision de la Cour permanente sur les communautés gréco-bulgares (B 17, p. 32). Les lois internes des Parties ne sont que des faits pour la Cour, elle les prend naturellement en considération, mais comme tels ; le raisonnement du Royaume-Uni en fait la source directe du droit de souveraineté par une sorte de syllogisme qu'il est facile de démontrer. Le Royaume-Uni nous dit :

1° notre loi est une loi territoriale ;
2° nous appliquons notre loi aux Minquiers et aux Écréhous ;
3° donc, les Minquiers et les Écréhous sont un territoire dépendant de Jersey.

Le seul raisonnement valable serait le suivant :

1° Minquiers et Écréhous sont un territoire dépendant de Jersey ;
2° notre loi est territoriale ;
3° nous l'appliquons aux Minquiers et Écréhous.

Et ceci ramène le raisonnement britannique à une simple pétition de principe.

Ajoutons encore pour clore cette discussion sur la loi *ratione personæ* ou la loi *ratione loci* que, même si la loi jersiaise dont nous n'avons aucune raison de douter qu'elle soit, comme nous l'a dit M. Harrison, essentiellement une loi *ratione loci*, la Cour permanente a jugé :

> « Il est constant que les tribunaux de beaucoup de pays, même de pays qui donnent à leur législation pénale un caractère strictement territorial, interprètent la loi pénale dans ce sens que les délits dont les auteurs, au moment de l'acte délictueux, se trouvent sur le territoire d'un autre État, doivent néanmoins être considérés comme ayant été commis sur le territoire national, si c'est là que s'est produit un des éléments constitutifs du délit et surtout ses effets. » (A 10, p. 23.)

Ainsi, la territorialité du droit pénal n'est pas un principe général de droit international, il ne sert de rien de citer des exemples de prétendue juridiction, que nous avons d'ailleurs expliqués par d'autres motifs, pour appuyer la prétention du Royaume-Uni.

Cet examen des faits énumérés par M. Harrison permet de rejeter l'idée présentée par M. Fitzmaurice que le Royaume-Uni aurait pu acquérir la souveraineté par voie de prescription avant même la première protestation française en 1876.

Il nous restera à étudier la troisième question dans cette partie consacrée aux temps modernes : les faits de possession.

* * *

[Séance publique du 8 octobre 1953, après-midi]

C. Les faits de possession du XIXme et du XXme siècles.

Je voudrais tout d'abord revenir sur quelques points soulevés par l'exposé de mon collègue M. Harrison.

En ce qui concerne le prétendu exercice de la juridiction jersiaise relativement aux Minquiers et aux Écréhous, je me suis expliqué ce matin sur le caractère et la portée en droit international de tels actes ; je n'y reviens pas.

M. Harrison a contesté l'interprétation que nous avions donnée (pp. 228-229 de la plaidoirie) de l'acte des États de Jersey de 1754, publié en annexe additionnelle A 160. Ce texte prohibait l'entrée de navires venant de France, où sévissait alors une épidémie de peste. Nous avions indiqué que cette interdiction s'appliquait à tous les navires venant du Royaume de France, y compris ceux qui venaient des Chausey, des Minquiers et des Écréhous. M. Harrison a dit (p. 333) que nous avions mal interprété ce texte. Mais il s'est curieusement abstenu de faire mention d'un autre texte, un des rares documents non publiés dans les annexes du Gouvernement du Royaume-Uni et que j'avais cité (Plaidoiries, p. 229) : il s'agit d'un autre acte des mêmes États de Jersey, sur la même question : la prohibition aux navires venant du continent. Que dit ce texte de 1720 qui n'est pas très éloigné du texte de 1754 (je cite) :

> « Qu'aucun vaisseau ou bateau venant de quelque port de France ou lieux adjacents, comme sont Chausey, Ecreho et autres isles et rochers, ne mettront ni gens ni marchandises à terre en cette isle. »

Faut-il donc croire que les États de Jersey considéraient les Écréhous comme français en 1720, et comme anglais en 1754 ? L'acte de 1754, comme celui de 1720, signifie donc clairement qu'au XVIIIme siècle Jersey même considérait que les Écréhous faisaient partie du Royaume de France au même titre que les Chausey.

M. Harrison est également revenu sur le prétendu « aveu » du comte de Caraman, ambassadeur de France à Londres, en 1820 (Plaidoiries). J'ai traité ce point précédemment (Plaidoiries, p. 249). Je n'en reparlerai pas autrement que pour souligner à nouveau que depuis 1820 jusqu'à 1952 il n'a jamais été une seule fois invoqué par le Gouvernement du Royaume-Uni à l'appui de sa prétention de souveraineté et à l'encontre des prétentions françaises. D'autre part, si jamais ce prétendu « aveu » était considéré comme ayant une portée quelconque, il me semble qu'elle est largement compensée par l'aveu correspondant et contemporain des États de Jersey dans un acte dont j'ai déjà parlé : la pétition des États de Jersey en date du 18 avril 1822 dont j'avais produit un simple extrait et qui se trouve maintenant, grâce à la grande obligeance de mes collègues britanniques, sous la forme de l'annexe française nouvelle n° 21.

Dans ce document, les États de Jersey se plaignaient, la Cour s'en souvient, de ce que les pêcheurs français voulaient s'emparer des bancs d'huîtres situés « entre ces côtes » — c'est-à-dire celles de Jersey — « et la côte de France qui y est opposée, s'étendant depuis le cap Rozel aux rochers appelés les Minquiers, à peu de milles au nord-ouest des petites îles Chausey, entre une et trois lieues des côtes de France ».

De ce texte, il semble bien résulter qu'en 1822 les États de Jersey considéraient les Minquiers aussi bien que les Chausey comme faisant partie de la « côte de France ». En tout cas, les États de Jersey étaient bien loin de les considérer comme une dépendance de Jersey, car si tel avait été leur sentiment, ils se seraient plaints non pas des prétentions françaises à la pêche exclusive, mais de la présence même des pêcheurs français dans des eaux territoriales britanniques. Ce dont se plaignaient les États en 1822, c'était de la revendication française de pêche exclusive dans une zone de pêche libre, et non pas d'une prétention française à pêcher dans une zone exclusivement britannique, car cette pétition se plaint de sévices de bateaux du Gouvernement français devant Jersey même. Il n'est pas prétendu dans ce document que les pêcheurs français violent les droits de souveraineté territoriale du Royaume-Uni sur les Minquiers. Si vraiment les États de Jersey en 1822 avaient considéré les Minquiers comme britanniques, ils auraient tenu un autre langage en face de ces prétentions françaises à la pêche exclusive entre la côte du Cotentin et la côte même de Jersey. Et je suis convaincu que si la pétition de 1822 avait indiqué les Minquiers comme dépendances de Jersey, le Royaume-Uni aurait attiré notre attention sur ce fait. M. Harrison nous a dit que les autorités de Jersey étaient bien renseignées sur les Minquiers, bien mieux que les autorités françaises. Leur connaissance aurait-elle subitement fait défaut le 18 avril 1822 ?

M. Harrison considère que la France s'est contentée d'affirmer sa souveraineté sur les Minquiers et les Écréhous, mais qu'elle n'a jamais traduit sa souveraineté en actes positifs. J'ai déjà expliqué à la Cour (p. 271 de la plaidoirie) pourquoi nous avions jusqu'ici attaché peu d'importance à établir l'existence d'actes positifs de souveraineté de la part de la France. Puisque mes collègues britanniques m'ont permis — et je les en remercie bien sincèrement — de faire état aujourd'hui de documents qui me sont parvenus assez tard et que je leur ai communiqués le 6 octobre, je voudrais indiquer que j'ai déposé au Greffe divers témoignages, sur lesquels je ne m'attarderai pas, et qui confirment l'existence d'une pêche française aux Minquiers depuis fort longtemps, ainsi que le déploiement sur les Minquiers du pavillon national (pièces 14 à 17 [1]). Parmi ces pièces figure également la réponse à une question que M. Harrison a posée, lorsqu'il s'étonnait de ne pas avoir vu la preuve d'une subvention du maire de Granville à l'entreprise de Marin Marie (c'est la pièce n° 19 [2]). Enfin, la Cour trouvera là deux télégrammes (pièces 20 et 21 [3]) de MM. Daladier et Guy La Chambre, ancien président du Conseil et ministre de l'Air du Gouvernement français avant la guerre, qui lèveront les derniers doutes de mes collègues britanniques quant aux visites « équivoques » et « illégales » de ce président du Conseil et de ce ministre français aux Minquiers avant 1939.

Puisque nous dissipons nos doutes mutuels, puis-je à mon tour appuyer un doute que j'avais déjà exprimé en donnant, cette fois, une preuve nouvelle à l'appui : il s'agit de l'importance de la pêche jersiaise aux Minquiers, dont M. Harrison nous avait fait le tableau. Mon document est récent, du 30 septembre 1953, et il est jersiais, car il s'agit d'un extrait du journal jersiais *Chronique de Jersey*. J'y trouve ceci (c'est un article sur les modes d'alimentation de l'île) :

[1] Voir pp. 451-457.
[2] » p. 458.
[3] » p. 459.

« Passons maintenant au poisson, qui joue son rôle dans l'alimentation insulaire. Il est évident que la profession de pêcheur n'a guère d'attrait localement, si par contre il existe un bon nombre d'amateurs qui profitent des grandes marées et se plaisent à la « pèque à basse iaue », les plus favorisés étant ceux qui peuvent se rendre jusqu'aux Minquiers, ces îlots dont on parle tant actuellement. »

M. Fitzmaurice a terminé son exposé en disant qu'il serait étrange que pour la première fois depuis mille ans la France commence à exercer la souveraineté effective sur les Minquiers et les Écréhous. La formule est belle. Mais est-elle vraie ?

On nous a dit que la France s'était toujours intéressée à la pêche plutôt qu'à la souveraineté proprement dite. Cette souveraineté, nous l'aurions affirmée sur le papier, nous n'aurions jamais tenté de l'assumer effectivement. Toutes les responsabilités que la souveraineté confère à l'État qui en est investi, la France les aurait laissées au Royaume-Uni. Pour faire justice de cette accusation, il nous suffira de donner quelques nouveaux détails sur la question du balisage.

Le Royaume-Uni n'a jamais affirmé que les signes extérieurs de la souveraineté, des panonceaux sur des maisons de douanes vides, des cérémonies de drapeaux. Mais, dans ces parages terribles, il y avait une vraie responsabilité à assumer, une seule, celle de protéger la navigation. Et cette responsabilité étatique, celle qui aurait en effet constitué une revendication de souveraineté de la part du Royaume-Uni, quand y a-t-il pensé pour la première fois ? En 1936. En 1850, c'est un navire anglais à vapeur qui naufrage aux Minquiers, le *Superb ;* quelle est l'affirmation de la responsabilité du Royaume-Uni ? Une enquête sur les noyés. La France, elle, installe dès 1865 un bateau-feu, et c'est ensuite le travail complet de ceinture des écueils qui — je me permets de le signaler à la Cour — a depuis 1865 coûté à la France 375 millions de francs en fourniture et entretien des bateaux-feu et 450 millions de francs en fourniture et entretien des bouées, soit un total de 825 millions de francs ; ces chiffres m'ont été donnés par la direction des Phares et Balises du ministère français des Travaux publics.

Ce balisage vise à protéger la navigation hauturière contre les dangers redoutables de ce plateau. Les rochers qui ne couvrent jamais étant prolongés très loin par des dangers sous-marins touchables par les navires, il faut évidemment que nos bouées soient en dehors de ces dangers, sous peine de ne servir à rien, comme les marques jersiaises qui, placées sur de hauts rochers comme les Pipettes ou les Maisons, ne sauraient par elles-mêmes prévenir les navigateurs à temps, et n'ajoutent rien d'utile, étant d'ailleurs invisibles si le rocher l'est lui-même, la nuit ou par mauvais temps.

Le rôle du balisage jersiais me paraît très bien illustré par un article publié dans la revue *The Yachtsman,* sous la signature de M. Philippe Matelot (qui me semble bien, d'après le texte, être le pseudonyme d'un yachtman jersiais, peut-être un de ces propriétaires aux Minquiers, p. 175, numéro d'hiver 194?) :

« .... Le sentiment [jersiais] était que les Minquiers ne pouvaient être que britanniques, quoiqu'il soit regrettable que ce soient les Français qui maintiennent une belle série de huit bouées lumineuses.

[il y a d'ailleurs une erreur] et à sifflet. Certes, ce fut une économie pour nous.... ! »

Plus loin (p. 178) :

« .... Le non-initié se gardera de visiter cet îlot rocheux avec son propre et précieux bateau sans avoir trouvé un pilote ou fait tout au moins une exploration à bord d'un autre bateau. A moins d'avoir à votre bord quelqu'un de familier avec les lieux, abordez le plateau après escale à Chausey ! »

M. Harrison nous dit encore qu'il trouve compréhensible que les services français critiquent le balisage jersiais parce qu'il diffère du leur, mais que précisément cette différence atteste son origine. Je regrette de lui dire que là n'est pas la question. Il y a des conventions internationales qui fixent la forme et la couleur de semblables signaux, qui doivent vouloir dire quelque chose : « Passez à droite » ou « Passez au Nord ». Les marques jersiaises en question ne correspondent à aucune norme, ni ancienne, ni nouvelle, ni anglaise, ni française. Elles ne servent strictement qu'à donner l'appellation du rocher, qu'il faut d'ailleurs s'approcher pour lire. C'est sans doute la raison pour laquelle elles n'ont été, sauf erreur, ni signalées par des avis aux navigateurs, ni portées sur les cartes.

Je précise que je ne parle pas ici de la balise « Le Coq », ni de la bouée du Vascelin, qui ont toutes deux une utilité ; la première, la balise « Le Coq », avait d'ailleurs été posée initialement par la France, et elle fut emportée, sans doute par la tempête, vers 1937, juste au moment où les travaux du balisage jersiais étaient en cours.

Enfin, mon collègue nous a fait savoir, et ses photographies le montrent, que ces balises portent l'inscription très apparente « États de Jersey ». Mais ni la France, ni l'Angleterre, ni aucun pays que je sache n'a coutume d'inscrire « Gouvernement de la République française, Gouvernement du Royaume-Uni » sur les innombrables balises de ses côtes.

Dans ces conditions, la Cour jugera qui, des deux pays, a su où étaient les vraies responsabilités et les a assumées.

* * *

Monsieur le Président, Messieurs de la Cour, telles sont les remarques fragmentaires que m'ont paru appeler les répliques de mes collègues du Royaume-Uni sur cette deuxième partie de la plaidoirie française consacrée aux temps modernes. Il est temps de conclure, mais, auparavant, la Cour me permettra peut-être de dire un mot sur une question qui doit rester en dehors de l'argumentation mais qui présente un intérêt dans le débat, je veux parler des usines marémotrices. Je répète ce que j'avais déjà rendu clair dans la plaidoirie : la France ne dit pas que ces projets d'usines marémotrices constituent un titre pour l'acquisition de la souveraineté sur les Minquiers. Elle expose devant la Cour quels sont ces projets qui constituent pour elle la manifestation d'un intérêt — non pas d'un droit —, intérêt de la même portée que l'intérêt de pêche ou d'habitation que mon collègue M. Harrison nous a exposé avec tant de talent.

Les renseignements que j'ai recueillis sur la question des usines marémotrices et que j'exposerai très brièvement répondent donc aux observations de M. Harrison (Plaidoiries, pp. 186-188).

Nous sommes heureux de prendre note du fait que, sur l'avis de leurs experts, nos collègues britanniques ont volontiers reconnu qu'« il est parfaitement exact qu'il s'agit là, non de rêves d'ingénieurs, mais de projets réalisables », et que « même le plus ambitieux de ces trois projets », c'est-à-dire celui qui s'appuie sur l'archipel des Minquiers, leur semble « techniquement réalisable ». Ceci ne m'étonne pas, car les ingénieurs français qui étudient ces projets se sont constamment tenus en effet en contact avec les spécialistes anglais, en particulier avec sir William Halcrew, Mr. S. B. Donkin et leurs collaborateurs, Mr. Bertram Darell Richards et Mr. H. Headland.

M. Richards et M. Headland ont fait mention des projets et des études de la France dans diverses conférences sur l'utilisation de l'énergie des marées, que, si la Cour le permet, je déposerai dans la pièce 211. Ce sont des documents publics.

Nos contradicteurs nous objectent que « le prix de revient en serait si formidable que l'on peut se demander si le projet serait financièrement pratiquable au moins dans le proche avenir ».

La réalisation du premier projet, qui est purement français, appuyé sur la rivière Rance, coûtera une trentaine de milliards et devra durer de sept à huit ans. Ce n'est qu'après la mise en service de cette première usine que l'on entreprendrait la réalisation du second projet, celui qui est basé sur les Chausey, qui coûtera dans l'ordre de 1.000 milliards et dont les délais d'exécution, d'après les estimations faites en fonction des moyens techniques actuels, seraient d'une vingtaine d'années. Ce n'est qu'après ce deuxième stade que serait entreprise l'exécution du troisième projet, celui des Minquiers. Mais la Cour est appelée aujourd'hui à se prononcer sur un différend de frontière entre les deux pays ; l'incidence de sa décision sur ce projet reste la même, quel que soit le délai de réalisation des ouvrages.

Quant au prix de revient, certes, il est, pour employer l'expression de M. Harrison, « formidable » : 1.000 milliards pour l'un (Chausey), 1.500 peut-être pour l'autre (Minquiers). Mais notons que la production d'énergie à attendre de ces usines est, elle aussi, « formidable » : 15 milliards de kwh. pour le second (Chausey) et plus de 20 milliards de kwh. pour le troisième projet (Minquiers). La consommation d'énergie électrique double actuellement en dix ans. C'est sur cette base que doivent calculer les ingénieurs français. Or, notre consommation en 1952 s'est élevée à 40 milliards de kwh. Les 15 milliards de Chausey et les 20 milliards des Minquiers ne sont absolument pas hors de proportion dans un programme d'accroissement régulier.

Quant au financement de projets de cette envergure, n'oublions pas que ces tranches de 1.000 ou 1.500 milliards de francs doivent s'échelonner sur une vingtaine d'années, ce qui finalement en restreint le budget annuel à cinquante milliards. C'est une somme importante, mais tout de même une très faible fraction du revenu national français, qui est de l'ordre de 10.000 milliards.

Depuis une dizaine d'années, la France a équipé divers grands barrages : Donzère-Mondragon, Bort-les-Orgues, Ottmarsheim sur le Rhin, après avoir achevé celui de Génissiat, soit au total une production

d'une dizaine de milliards de kwh. par an, pour un coût qui se monte aujourd'hui à plusieurs centaines de milliards.

Voici les chiffres exacts des trois dernières années :

Le budget total des investissements français pour l'équipement électrique en 1950 était de 149 milliards, en 1951 de 153 milliards, en 1952 de 160 milliards : 462 milliards en trois ans consacrés à l'équipement de centrales nouvelles tant hydrauliques que thermiques.

J'en viens à l'affirmation de M. Harrison, selon laquelle le second projet (Chausey) et le troisième (Minquiers) « ne manqueraient pas d'entraver la pêche aux Minquiers », sur laquelle, dit mon collègue, « les deux Parties disposent de certains droits ». La réalisation des projets, par son incidence sur les courants, peut en effet comporter des effets indirects sur l'abondance des poissons. Mais si des modifications locales interviennent, rien ne prouve que ce sera dans un sens défavorable. En Hollande, la fermeture du Zuyderzee en a modifié le peuplement en poissons, mais la pêche dans l'IJsselmeer, d'une part, et au large de la digue, d'autre part, existe toujours. N'oublions pas que, selon les déclarations mêmes de la presse de Jersey et certaines déclarations officielles que j'ai relevées dans ma plaidoirie, les pêcheurs professionnels de Jersey ne sont d'ailleurs plus très intéressés par la pêche aux Minquiers.

La construction de digues coupant des zones navigables nécessitera évidemment la mise en place, parfaitement réalisable du point de vue technique, d'écluses de navigation.

Notons d'ailleurs à ce propos que, à côté d'un trafic purement français, nous ne voyons dans ces parages que des navires à destination ou en provenance d'un port français, sans qu'il y ait aucune navigation de transit. Les digues et écluses qui permettront le franchissement ne constitueront donc qu'une sorte de passage dirigé qui existe sous une autre forme, sans que les Britanniques s'en plaignent, puisque la Southern Railways, dont les navires assurent le trafic maritime entre Southampton, Jersey, Saint-Malo, utilise le balisage externe des Minquiers assuré par le service français des Phares et Balises.

Poursuivant la lecture de l'argumentation britannique, j'ai noté « les entraves au libre écoulement des marées, qui constituent naturellement le but de ces projets, pourraient soulever d'autres problèmes ». Cet aspect de la question que relève le Gouvernement britannique a été étudié très soigneusement par nos ingénieurs. Les modifications apportées aux courants et aux dénivellations par l'implantation et l'exploitation d'une usine marémotrice peuvent se prévoir, de même que les ingénieurs hollandais ont prévu l'incidence sur les marées de la mer du Nord de la fermeture du Zuyderzee à propos de laquelle les calculs du professeur Lorentz se sont trouvés vérifiés à un pouce près, c'est-à-dire 2 centimètres 1/2. J'ai trouvé cette citation à la page 117 du volume *Dredge Drain Reclaim* par le Dr Joh. van Veen, La Haye, 1948, que je déposerai également dans la pièce 211. Une étude approfondie de la question de l'incidence précise de nos projets d'usines sur la marée dans la Manche est en cours ; cette étude est suffisamment avancée pour permettre d'affirmer que l'ordre de grandeur de cette incidence sera très limité et d'effet pratique négligeable (je me réfère au Bulletin de la Société française des Électriciens n° 29 (mai 1953), *L'énergie des Marées*, par M. Gibrat, dont j'ai également un tirage à part dans ce dossier).

Nos plans sont donc techniquement et financièrement dans les limites actuelles de nos possibilités. J'ajouterai que plus de cent millions de francs ont déjà été dépensés en sondages dans la région de Chausey, sondages qui sont marqués sur cette carte malheureusement trop éloignée pour qu'ils puissent être vus, mais je peux également déposer la carte, si mes collègues m'y autorisent, naturellement. J'ai diverses photographies représentant les appareils de sondage et je signale, en hommage à la construction britannique, que ces appareils de sondage sont anglais.

Nous prenons naturellement acte des déclarations du Gouvernement britannique selon lesquelles (p. 188 ci-dessus) « le Royaume-Uni et Jersey seraient heureux de coopérer » à l'œuvre française et (p. 188 ci-dessus) ne songeront jamais à exciper de leur souveraineté (éventuelle) sur les Minquiers « pour empêcher la réalisation de travaux hydrauliques qui pourraient être au bénéfice de la France ». Tout en étant très reconnaissant au Gouvernement du Royaume-Uni de cette déclaration, puis-je d'un simple point de vue de juriste faire remarquer que, comme l'a dit la Cour permanente, « un engagement de négocier n'est pas un engagement de conclure ». Nous avons dans cette propre affaire l'exemple de tentatives prolongées de négociations sans conclusion. La situation juridique de la France en ce qui concerne la construction des usines marémotrices, appuyées sur les Minquiers, sera toute différente selon que la Cour attribuera la souveraineté à la France ou au Royaume-Uni. Dans le cas où la souveraineté française serait reconnue, nous pourrions construire sauf à indemniser des conséquences dommageables, ce que la négociation ou la juridiction internationale peuvent toujours régler. Dans la solution inverse, celle de la souveraineté du Royaume-Uni reconnue sur les Minquiers, la question se pose de savoir s'il ne serait pas beaucoup plus délicat de prouver un abus du droit de négocier, c'est-à-dire du droit de conclure.

Monsieur le Président, je voudrais résumer en quelques propositions les points essentiels de cette réplique.

Premièrement: La prétention du Royaume-Uni ne peut se fonder sur aucun élément en aucune époque.

Elle ne peut se fonder sur un titre originel, car le seul titre que le Gouvernement du Royaume-Uni ait invoqué — la conquête de l'Angleterre par le duc de Normandie, vassal du roi de France — n'a pas le moindre rapport avec la question. Elle ne peut se fonder sur le traité de Paris de 1259, car le Gouvernement du Royaume-Uni n'a pas pu établir qu'à ce moment le roi d'Angleterre tenait les îlots contestés. Elle ne peut se fonder sur une possession effective de ces îlots pendant la période ancienne, car cette possession n'a jamais existé pendant cette période : pour les Minquiers, le Gouvernement du Royaume-Uni n'a pas invoqué d'autres faits que les jugements de la Cour seigneuriale de Noirmont relatifs au ramassage de certaines épaves, et nous avons montré ce qu'il fallait en penser ; pour les Écréhous, le Gouvernement du Royaume-Uni n'a rien pu citer qui ne soit davantage une preuve de possession française qu'une preuve de possession anglaise.

Les événements de la période moderne ne lui sont pas plus favorables. La prétention du Royaume-Uni ne peut se fonder sur un exercice effectif, continu et paisible de la souveraineté : les faits invoqués sont, ou bien accomplis en exécution de la convention de 1839 et donc dénués de

toute force probante, ou bien contraires à cette convention et, en conséquence, illicites au regard du droit international ; ils ont soulevé les protestations du Gouvernement français, ils ont été contredits par l'exercice effectif de l'autorité étatique par la France et la prise en charge par ce pays des responsabilités essentielles inhérentes à la souveraineté ; ils ne sont donc de nature, ni à conserver au Royaume-Uni une souveraineté antérieure, à supposer que celle-ci ait jamais existé, ni à *lui faire acquérir la souveraineté par voie de prescription* à l'encontre de la France ou par voie d'occupation, si les îlots avaient été à un moment quelconque *res nullius*.

Deuxièmement : La prétention de la France, au contraire, peut se fonder sur des éléments nombreux, anciens aussi bien que modernes.

Elle peut se fonder sur un titre originel incontestable : la possession des îles de la Manche dans leur ensemble, d'abord par le roi de France avant 933, ensuite par le duc de Normandie, vassal du roi de France, à qui ce dernier les a données à cette date. Elle peut se fonder sur la possession effective du duc de Normandie, vassal du roi de France, entre 933 et 1202. Elle peut se fonder sur l'arrêt de la Cour de France en 1202, privant le duc de Normandie de son fief. Elle peut se fonder sur le traité de Paris de 1259 et les traités ultérieurs, lesquels faisaient de la possession effective des îles de la Manche le critère de leur propriété, car le Royaume-Uni n'a jamais pu faire la preuve de sa possession, à cette date, des Minquiers et des Écréhous. Elle peut se fonder pour les Écréhous sur la possession effective, par l'intermédiaire de l'abbaye du Val Richer, pendant tout le cours du moyen âge. Elle peut se fonder, pour les Minquiers, sur le principe que la souveraineté sur des territoires de ce genre ne se perd pas par une simple absence de possession effective, fût-elle prolongée. Elle peut se fonder pour les deux groupes sur la transformation du titre féodal en titre de souveraineté au sens moderne, au moment où pour le territoire français cette transformation a été accomplie.

Dans la période moderne, la prétention de la France peut se fonder sur la convention du 2 août 1839, dont l'article 3 a eu pour effet, en mettant en commun entre le Royaume-Uni et la France la pêche sur les Minquiers et les Écréhous, et autour de ces îlots, de rendre inopposables à l'autre Partie les actes de possession accomplis par chacune après 1839 ; la France, ayant eu la souveraineté avant 1839, l'a donc encore aujourd'hui.

Les actes du Royaume-Uni au cours de cette période n'ont pu lui faire acquérir la souveraineté par voie de prescription.

Troisièmement : La France, par ses actes positifs et par ses protestations, a exercé, dans toute la mesure possible, l'autorité étatique, exercice suffisant compte tenu du caractère du territoire envisagé.

Avec la permission de la Cour, je lirai les conclusions du Gouvernement de la République française :

PLAISE A LA COUR,

Dire et juger :

1) que la France possède un titre originel sur les îlots et rochers du groupe des Minquiers d'une part, et du groupe des Écréhous d'autre part ;

2) que la France a confirmé, à toute époque, ce titre originel par un exercice effectif de sa souveraineté dans la mesure où le caractère de ces îlots et rochers se prêtait à un tel exercice ;

3) que le Royaume-Uni n'a pu établir avoir eu la possession effective de ces îlots et rochers au moment de la conclusion du traité de Paris, lequel faisait de la possession effective la condition nécessaire de la souveraineté anglaise sur les diverses îles de la Manche, ni à une époque ultérieure ;

4) que, par la convention du 2 août 1839, le Royaume-Uni et la France ont créé, entre la ligne située à 3 milles de la laisse de basse mer de l'île de Jersey et la ligne *ad hoc* définie à l'article premier de la convention, une zone où la pêche de toute espèce de poisson est commune aux ressortissants des deux pays ;

5) que les îlots et rochers des groupes des Minquiers et des Écréhous se trouvant situés dans la zone de pêche commune ainsi définie, ont été soumis par les Parties en 1839 à un régime d'utilisation commune aux fins de pêche, sans que la souveraineté territoriale sur ces îlots et rochers ait été affectée par ailleurs par ladite convention ;

6) que, par voie de conséquence, les actes accomplis par chaque Partie sur les îlots et rochers postérieurement au 2 août 1839 sont inopposables à l'autre Partie en tant que manifestation de la souveraineté territoriale, de sorte que cette souveraineté appartient aujourd'hui à celle des Parties à qui elle appartenait avant le 2 août 1839 ;

7) que cette « date critique » demeurerait, alors même que le Gouvernement français aurait donné à la convention du 2 août 1839 une interprétation erronée, étant donné que le Gouvernement du Royaume-Uni n'ignorait pas cette interprétation ni la possibilité qu'elle donnait au Gouvernement du Royaume-Uni et aux ressortissants britanniques de bénéficier de la mise en commun des îlots et rochers des deux groupes à des fins de pêche, telle qu'elle découlait, dans l'esprit du Gouvernement français, de l'article 3 de la convention du 2 août 1839 ;

8) que, même si la « date critique » devait être fixée à une date postérieure au 2 août 1839, les faits de possession invoqués par le Gouvernement du Royaume-Uni ne réunissent pas les conditions requises par le droit international pour l'acquisition ou la conservation de la souveraineté territoriale ;

9) qu'au surplus, la France a accompli pendant le XIX^me^ et le XX^me^ siècles les actes de souveraineté que comportait le caractère particulier de ces îlots et a assumé les responsabilités essentielles inhérentes à sa souveraineté.

10) que, pour ces motifs, la souveraineté sur les îlots et rochers du groupe des Minquiers, d'une part, du groupe des Écréhous, d'autre part, appartient, dans la mesure où ces îlots et rochers sont susceptibles d'appropriation, à la République française.

Ces conclusions ont été déposées au Greffe et communiquées à mon collègue, M. l'agent du Royaume-Uni.

Je prierai simplement la Cour de bien vouloir noter qu'à la différence des conclusions du Gouvernement du Royaume-Uni, nos conclusions, conformément au compromis, demandent à la Cour de bien vouloir se prononcer sur les seuls îlots susceptibles d'appropriation.

Telles sont, Monsieur le Président, Messieurs de la Cour, les prétentions qui s'affrontent. L'agent du Gouvernement de la République se joint aux avocats du Royaume-Uni pour remercier la Cour de sa patience et de l'attention avec laquelle elle a écouté nos prétentions.

La Cour me permettra, au moment où se clôt le débat, de me tourner vers mes collègues du Royaume-Uni et de leur dire : nous avons égrené devant la Cour mille ans de luttes ; de St.-Clair-sur-Epte en 911 jusqu'à la date qui sera celle de l'arrêt de la Cour il nous a fallu cheminer lentement dans une voie où se succèdent les traités et les combats. L'heure est aujourd'hui venue où tout ce passé glorieux de nos deux pays va, pour ces deux petits groupes d'îlots dont chacun de nous pour quelques jours encore peut se croire le seul souverain, s'effacer devant un acte nouveau qui nous sera, comme tous les précédents, commun, la marque finale de notre lutte : l'arrêt de la Cour. En acceptant à l'avance, avec sérénité, votre décision, Monsieur le Président, Messieurs de la Cour, nos deux Gouvernements vont clore dignement leur conflit de mille ans.