opportunity of expressing its views when difficult social questions arise, such as whether the search for oil and gas is to be allowed on the Great Barrier Reef.

For the courts, the challenge is one presented by a new field of law. Guidance will undoubtedly be obtained in this field by studying the law in other jurisdictions, such as the U.S.A. and Canada. Nevertheless, what is required for Queensland is a unique body of law developed to meet Queensland's own background and future needs. The challenge will never be met by the simple application of precedent, whatever the source.

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OIL POLLUTION FROM SHIPPING: THE INTERNATIONAL RESPONSE

The Problem

The memory of the *Torrey Canyon* disaster remains vivid for most people. It is probably that incident which, more than any other, directed world public opinion to the environmental hazards of ocean transportation of oil. The *Torrey Canyon* was an American owned Liberian registered tanker which ran aground on the Seven Stones reef in international waters on March 18, 1967. At the time of the accident it was manned by an Italian master and crew. Most of its cargo of 118,000 tons of Kuwait crude oil was released, and large quantities drifted onto the west Cornish coast and the northern coast of France. The vessel and its remaining cargo were eventually destroyed by R.A.F. aircraft[1]. This particular accident was only one of a succession in which oil released from tankers has caused alarm to coastal authorities[2]. The Australian public was reminded of the dangers of oil pollution when the tanker *Oceanic Grandeur* was holed in Torres Strait in March 1970[3].

The sensational appeal of such incidents ensures them of notoriety; but it is not so well known that each year roughly one million metric tons of oil enters the oceans from oil transportation operations alone[4], this being 0.1% of the total oil shipped[5]. Most of this results not from maritime casualties, but from the activities of ship operators who flush empty tanks and dump oily ballast at sea before entering a terminal to take on a new cargo of crude oil[6]. The dangers of pollution following an accident involving an oil tanker will be related to the increasing size of these vessels. In 1930, the maximum tanker size was less than

1. *The Torrey Canyon* (1967; Cmnd. 3246); N.A. Holme, "Effects of 'Torrey Canyon' Pollution on Marine Life", in D.P. Hoult, ed., *Oil on the Sea* (1969), 1; C. Gill, F. Booker, T. Soper, *The Wreck of the Torrey Canyon* (1967).
2. See, for instance, the list in the Comment, "Oil Pollution of the Sea", (1969) 10 Harvard International L.J. 316, 318, n. 19.
3. *Sydney Morning Herald*, 4 March 1970. See also the Special Report in the *Newsletter of the Queensland Littoral Society*, No. 37, March-April 1970, p. 17.
4. M. Blumer, "Oil Pollution of the Ocean", (1969) XV *Oceanus* 3.
5. M. Blumer, "Oil Pollution of the Ocean", in Hoult, *op. cit.*, p. 6. The 4000 tankers currently trading make up 40% of the world's ocean traffic: Rienow & Rienow, "The Oil Around Us", *New York Times*, June 4, 1967 (Magazine), p. 24.
6. W.A. Bachman, "Oil Spills", *Oil and Gas Journal*, 1 June 1970, p. 93.

20,000 deadweight tons[7]; already there are tankers of 327,000 tons in operation, and plans have been announced for the construction of vessels of 500,000 tons[8]. Shipping operations account for part only of sources of oil pollution; regard must also be had to shore-based facilities and off-shore drilling operations[9].

The persistent oils (crude oil, diesel oil, heating oil) are relatively stable and do not dilute readily in water. Their short-term effects are apparent: they may lead to the death of surface-feeding fish and shellfish, and to the death of birds from ingestion of oil while preening, by starvation, or by absorbing poisonous oil constituents through the skin[10]. The effect of oil washed ashore is to reduce the recreational and aesthetic values of coastal areas, and may result in economic loss to local establishments.

Less obvious are the long-term effects of hydrocarbons in the marine environment. It appears that hydrocarbons are concentrated in the marine food chain, and may eventually reach organisms harvested for human consumption. The long term poisons harvested from crude oil may endanger health when accumulated in human food[11]. Again from the ecological viewpoint, the oceans are being asked to accept vast quantities of pollutants of many different categories. Oil pollution contributes to the growing number of substances which are toxic to the marine diatoms which produce some seventy percent of the earth's annual supply of oxygen. Scientific opinion differs as to the end result of the killing of these marine diatoms. Dr. LaMont Cole, professor of ecology at Cornell University, warns that photosynthesis may be inhibited, and man may quite literally run short of oxygen to breathe[12]. De Bell disputes this result, maintaining that the effect on the world's oxygen supply would be minimal. In his view, the death of marine plankton through pollution would result in the starvation of the animal life of the ocean, with a catastrophic effect on the world's food supply[13].

The Response

The international community has moved slowly, in a manner reminiscent of the dictum of Mr. Justice Holmes, "We have no concern with the future. It has not come yet."[14] Claims to establish controls over shipping and potentially hazardous operations on the oceans have been countered by the received notion of the freedom of the high seas, now enshrined in Article 2 of the Geneva Convention on the High Seas, 1958. The Convention does require that freedom of

7. Tonnage measured in gross tons is not weight but volume (1 gross ton = 100 cubic feet of enclosed space). Net tonnage is the gross tonnage less the non-earning spaces (engine room, crew quarters, etc). The deadweight tonnage is the weight of the cargo and fuel which can be carried, i.e., the difference in weight of the ship when empty and fully loaded. B. Moody, *Ocean Ships* (1967), p. v.
8. R.F. Cooke, "Oil Transportation by Sea", in Hoult, *op. cit.*, 93 at 95.
9. The annual input of oil into the ocean, deliberately or accidentally, has now been estimated at ten million tons. United Nations Centre for Economic and Social Information, CESI Features ESA/47, 8 July 1971, p. 4.
10. Commonwealth of Australia, *Report from the Senate Select Committee on Water Pollution* (1970), p. 18.
11. M. Blumer, *supra* n. 5 at 10. The possibility of cancer has been mentioned as one of the long-term risks. United Nations Centre for Economic and Social Information, *op. cit.*, p. 4.
12. LaMont C. Cole, "A Race for Survival", in *The Environmental Crisis*, U.S. Information Service, (1970), p. 8.
13. G. de Bell, "Energy", in G. de Bell, ed., *The Environmental Handbook* (1970), p. 73. On the death of the oceans, see Paul R. Ehrlich, "*Eco-Catastrophe*", *op. cit.*, 161.
14. *Union Trust Co.* v. *Grosman*, (1918) 245 U.S. 412, at p. 417.

navigation, together with the other freedoms, be exercised with reasonable regard to the interests of other states in their exercise of the freedom of the high seas.

1922 saw the first attempts to deal with the problem of oil pollution at an international level. In that year the U.S. Congress by joint resolution[15] requested the President to call an international conference, which was subsequently held at Washington in 1926. The draft Convention prepared by the conference was never ratified, but is of interest because of the introduction of the concept of prohibited zones within which governments were to require national vessels to refrain from discharging oil or oily mixtures causing a nuisance. The usual width of the prohibited zones was to be 50 miles from the coast, but may extend up to 150 miles in special circumstances[16].

International concern over oil pollution had increased sufficiently to enable a conference on the issue to be held in London in 1954. Thirty-two countries attended the International Conference on Pollution of the Sea by Oil, and the resulting convention adopted the scheme of prohibited zones and enforcement by the flag state[17].

The 1954 convention applied to seagoing ships registered in the territories of a contracting government, but excluded naval auxiliaries, ships under 500 tons gross, whaling ships, and vessels navigating the Great Lakes[18]. Article III and Annex A specified the prohibited zones within which tankers were not to dischange oil or oily mixtures. Discharges for the purpose of saving life at sea or to prevent damage to the ship or its cargo were excepted[19]. Enforcement of the convention against ships of foreign registration depended on notification of the violations to the flag state, which then was to proceed against the owner or master.[20] The penalties imposed in respect of unlawful violations outside the flag state's territorial sea were not to be less than those which may be imposed for such violations within the territorial sea[21]. The installation of oily-water separators in respect of bilge water discharges was in effect required[22], and contracting parties were directed to provide within three years adequate port facilities for receiving oily wastes[23]. Ships were required to carry an Oil Record Book in which discharges were to be recorded, it being hoped that violations could be detected by port authorities on inspection of these entries[24]. The convention was to be administered by the Inter-Governmental Maritime Consultative Organization (IMCO), a specialized agency of the United Nations[25].

15. (1922) 42 Stat. 821.
16. J.C. Sweeney, "Oil Pollution of the Oceans", (1968) 37 Fordham L.R. 155, 188; "Preliminary Conference on Oil Pollution of Navigable Waters", (1926) 20 A.J.I.L. 555. The concept of prohibited coastal zones was taken up by Britain in 1934 in discussions with the League of Nations, which in 1935 proposed that a further conference be held to debate a convention similar to the 1926 draft. World War II intervened, and the conference was never held. League of Nations Document C/449/M/235/1935/VIII.
17. International Convention for the Prevention of Pollution of the Sea by Oil, 1954, 327 *U.N.T.S.* 3. The convention entered into force on July 26, 1958.
18. Art. II.
19. Art. IV.
20. Art. X.
21. Art. VI.
22. Art. VII.
23. Art. VIII.
24. Art. IX.
25. See Convention on the Inter-Governmental Maritime Consultative Organization, (1948), 289 *U.N.T.S.* 3. IMCO was not actually established until 1958; in matters relating to the 1954 convention the United Kingdom was to act on its behalf pending its organization.

The major deficiency of the 1954 convention was the insistence on enforcement by the flag state, rather than by a state whose interests were affected or threatened by a violation. The convention was also hampered by the difficulty of detecting an oil discharge sufficiently close to a vessel to be able to identify its source, and the fact that it applied only to ships registered in the territory of a contracting state.

The discharge of oil from ships on the high seas, including areas outside the prohibited zone system, was examined at the 1958 U.N. Conference on the Law of the Sea. The resulting High Seas Convention calls upon states to draw up regulations to prevent pollution from such discharges, but no standards of discharge are recommended, and a total prohibition is not required[26]. Such measures would only be enforceable against vessels flying the flag of the enacting state.

The scope of the 1954 Pollution Convention was widened by amendments adopted by the Conference of Contracting Governments in 1962[27]. The Convention now covered unregistered ships having the nationality of a contracting government, and covered all tankers over 150 tons gross tonnage. There was incorporated into Art. III a complete prohibition on the discharge of oil or oily mixtures from new ships of 20,000 tons gross tonnage or more, except in special circumstances. Contracting governments were required to provide facilities for the reception of residues and oily mixtures at ports, and oil loading terminals; any cases of allegedly inadequate facilities were to be reported to IMCO[28]. Zones of prohibited discharge were widened, and provisions relating to the Oil Record Book were revised.

Then the *Torrey Canyon* ran aground. This casualty emphasised the potential damage which could follow from an accident involving one or more of the huge supertankers trading in already congested shipping lanes. The 1969 International Legal Conference on Marine Pollution Damage discussed issues arising from such an accident, including the right of a coastal state to intervene when a casualty on the high seas may result in oil pollution, and also the question of civil liability for oil pollution damage. Further amendments to the 1954 convention were adopted by the IMCO Assembly in October 1969[29].

The latest amendments abolish the system of prohibited zones of discharge, and differentiate between tankers and other vessels. For tankers, only discharges not exceeding 1/15,000 of the total cargo-carrying capacity are permitted, if the tanker is more than 50 miles from the nearest land, and the discharge rate does not exceed 60 litres per mile. For other vessels, discharges are prohibited except those made "as far as practicable from land", provided the oil content is less than 100 parts per million of the mixture, and the discharge rate does not exceed 60 litres per mile. These amendments still present difficulties in enforcement; already the Swedish coastguard has declared itself incapable of ascertaining that no more than 60 litres per mile of oily mixture have been discharged during a

26. Geneva Convention on the High Seas, Art. 24. *Cf.* the commentary of the International Law Commission to its draft Art. 48: II *Yearbook of the International Law Commission*, (1956), p. 285.
27. See IMCO, *International Conference on Prevention of Pollution of the Sea by Oil 1962*. Amendments to Arts. I – X, XVI, XVIII and Annexes A and B entered into force 18 May 1967. Amendment to Art. XIV entered into force 28 June 1967.
28. Art. VIII.
29. The amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, (1954), appear in consolidated form in (1970) 9 *I.L.M.* 1. The amendments had not come into force as at 30th September 1971.

vessel's passage[30]. Further, the removal of the 1962 total prohibition on discharge from new vessels exceeding 20,000 gross tons might be viewed critically, and it is to be hoped that governments will retain this requirement in legislation relating to national vessels. The entries required in a ship's Oil Record Book have been made more comprehensive.

One effect of the 1969 amendments will be to ensure the complete adoption of the "load-on-top" system of dealing with oily residues. Under this system, now used by 80% of tankers, all dirty ballast and slops are discharged into a special tank. The oil floats to the top; water is removed from underneath, leaving an oily residue on top of which the fresh crude is loaded. A small amount of cargo contamination may result, but this has been accepted by most oil receivers[31].

The right of a coastal state to take measures on the high seas to protect its interests from pollution damage is dealt with in the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[32]. Under the convention, parties may take such measures "as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline and related interests", these interests being defined to include fishing activities, tourist attractions, the health of the coastal population and the well-being of the area, "including conservation of living marine resources and of wildlife."[33] This latter inclusion will be found to be of great importance as studies of marine ecology reveal the delicate interrelationships of diverse marine organisms. Before taking the chosen measures, the coastal state is to notify other states affected, particularly the flag state or states involved. It may also consult with independent experts listed by IMCO under Art. IV. The measures taken must be proportionate to the actual or threatened damage; excessive measures may result in liability to compensate for any damage caused.

The International Convention on Civil Liability for Oil Pollution Damage[34] is wide-ranging in its scope, covering not only pollution damage but also the cost of preventive measures and further loss or damage caused by preventive measures[35], provided such damage is caused on the territory including the territorial sea of a contracting state. Although the 1969 Conference heard arguments in favour of basing liability on fault, or for making the cargo strictly liable, the basis adopted in the Convention is strict liability on the owner of the vessel, provided that the owner is not to be held liable if the damage

(i) resulted from an act of war, hostilities, civil war, or a "natural phenomenon of an exceptional, inevitable and irresistible character"; or

(ii) was wholly caused by an act or omission done with intent to cause damage by a third party; or

30. G. Boos, "Critical View of 1969 Amendments", (1970) 1 *Marine Pollution Bulletin* (NS), p. 170.
31. Bachman, *op. cit.*, p. 93. Japanese refineries refuse to accept oil with any salt content, and it has been alleged that the practice of Japanese tankers in pumping oil-contaminated water directly into the sea distinguishes them as the "world's worst polluters". "Recent Developments in the Law of the Sea II: A Synopsis", (1971) 8 San Diego L.R. 658, 680.
32. Done at Brussels, 29 November 1969. See text (1970) 9 *I.L.M.* 25. Not in force as at 30th September 1971.
33. Arts. I, II. Such action may be taken against any sea-going vessel or floating craft except installations and devices for exploration and resource exploitation.
34. Done at Brussels, 29 November 1969. See text (1970) 9 *I.L.M.* 45. Not in force as at 30th September 1971.
35. Art. I. It will be recalled that the detergents sprayed over the oil released from the *Torrey Canyon* in fact caused more harm to marine life than would have been caused by the oil alone.

(iii) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function[36].

Article V provides that owners may limit their liability under the convention to U.S.$134.40 per ton of the adjusted net tonnage, up to a maximum of U.S.$14,112,000. However, the liability of the owner is not to be limited in this way if the accident occurred through his fault or privity.

To ensure that an owner can meet his liability in the event of an incident, he is required to constitute a fund for the limit in Article V. If the ship is carrying more than 2000 tons of oil in bulk as cargo, he must maintain insurance or other financial security up to this limit, and carry a certificate to this effect. Contracting states are not to permit such a ship under its flag to trade unless such a certificate has been issued. Further, they are to ensure that such insurance or other security is in force in respect of any ship (wherever registered) entering or leaving one of their ports if the ship is actually carrying more than 2000 tons of oil in bulk cargo. Jurisdiction over oil pollution claims is vested in courts of the contracting states in which damage has actually occurred[37].

The nations present at the 1969 Conference recognised that the Civil Liability Convention would not afford full protection for victims in all cases of oil pollution. Accordingly, the Conference passed a Resolution requesting IMCO to prepare a draft for an International Compensation Fund, to enable the full and adequate compensation of victims under a system based on strict liability. Such a fund should in principle relieve the shipowner of the additional financial burden imposed under the Civil Liability Convention[38].

Apart from activity at governmental level, efforts have also been made within the oil industry to deal with loss or damage caused by pollution from oil tankers. In January 1969 an agreement was signed by tanker owners to reimburse national governments for costs incurred in preventing or cleaning up pollution of their coast lines. The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) is of limited scope, covering the costs of national governments only, and excluding third party claims. It also excludes damage from fire or explosion, consequential damage, or ecological impairment. Liability is based on negligence, (the onus being placed on the tanker owner to establish that the discharge occurred without fault), and is limited to U.S.$100 per gross registered ton, up to a maximum of U.S.$10,000,000[39].

Additional protection for pollution victims is provided in the agreement signed by various oil companies in January 1971, CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution)[40]. Pending the creation of an International Compensation Fund to supplement the 1969 Civil Liability Convention, the parties to CRISTAL have agreed to provide compensation beyond the financial limits under existing schemes, including that Convention and TOVALOP. The contract covers pollution damage similar to that dealt with in the Civil Liability Convention, but excludes "any loss or damage which is remote, or speculative, or which does not result directly from the escape or

36. Art. III.
37. Art. IX. For implementation of the 1969 Conventions within Australia, see *Navigation Act* (*No. 2*) 1970, (No. 117 of 1970).
38. Resolution on Establishment of an International Compensation Fund for Oil Pollution Damage. (1970), 9 *I.L.M.* 66.
39. The International Tanker Owners Pollution Federation Ltd., *TOVALOP* (1969). In force 6 October 1969.
40. Signed 14 January 1971. (1971) 10 *I.L.M.* 137.

discharge." In the event of a discharge for which the tanker owner would be liable under the above convention, CRISTAL provides extra compensation to the extent of U.S.$30,000,000 less the TOVALOP payment, certain expenses met in removing oil, and the maximum liability and maximum amount recoverable under existing laws and conventions.

The response to the threat of oil pollution has included certain regional arrangements by governments. Of these, perhaps the most significant is the Agreement made between states surrounding the North Sea to co-operate in the exchange of information on casualties and oil slicks, and to keep each other informed on ways of avoiding and handling oil spills[41].

International action still lags behind foreseeable damage, and it may be that unilateral action by a concerned state will be necessary to fill gaps in existing conventional arrangements. The Canadian *Arctic Waters Pollution Prevention Act*[42] is an example in point. By this legislation, Canada established pollution control zones in Arctic waters up to 100 miles from Canadian territory. Within these zones, Canada claimed the right to control all shipping and to prohibit the free passage of vessels if necessary.

The legislation was attacked by the United States as a unilateral infringement of the freedom of the high seas[43]. In reply, Canada asserted that the legislation constitutes a lawful extension of a limited form of jurisdiction to meet particular dangers, and is based on the "overriding right of self-defence of coastal states to protect themselves against grave threats to their environment."[44] The challenged statute might in fact be regarded as a legitimate claim by a coastal state to prescribe and apply policy in an area of the high seas contiguous to its territorial sea. It is true that Art. 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone only permits such an action for sanitary purposes in a twelve-mile zone, but it is submitted that customary international law would allow the Canadian claim. The custom developed from state practice through the recognition of the fact that different interests of the coastal state would need to be protected by authorized controls at varying distances from the shore[45]. The important judgment of Marshall C.J. in *Church* v. *Hubbart*[46] approved the notion of a zone of variable width in different circumstances as reasonable and necessary to enforce the relevant revenue and customs laws, and international law did in fact develop along these lines for customs and revenue purposes. It is submitted that the Canadian measures do not go beyond what is reasonably

41. Agreement Concerning Pollution of the North Sea by Oil, Done at Bonn, 9 June 1969; entered into force 9 August 1969. Council of Europe Document 2697, 13 January 1970. (1970) 9 *I.L.M.* 359.
42. 18–19 Eliz. II, c. 47 (1970). As at 30th September 1971 the Act had not taken effect. Note the remarks of Prime Minister Trudeau to the press following the introduction of this legislation in the House of Commons, (1970) 9 *I.L.M.* 600. The legislation was introduced following the successful voyage of the tanker *Manhattan* through the heavily iced North West Passage. The oil company concerned has now dropped plans to use this tanker route. *The Australian*, 29 October 1970.
43. Statement by U.S. Department of State, (1970) 9 *I.L.M.* 605. "The United States has long sought international rather than national approaches to problems involving the high seas": *Ibid. Cf.* the Truman Proclamation on the Continental Shelf, 1945.
44. Canadian Secretary of State for External Affairs, (1970) 9 *I.L.M.* 607 at 608–610.
45. See the table concerning the breadth and juridical status of the territorial sea and adjacent zones, Second United Nations Conference on the Law of the Sea, A/CONF. 19/8, Annexes pp. 157–163, Doc. A/CONF. 19/4, 8 February 1960. See in particular Masterson, *Jurisdiction in Marginal Seas* (1929), for an exhaustive analysis of the development of controls by littoral states over adjacent waters.
46. (1804) 6 U.S. 187 (U.S. Supreme Court).

necessary to protect the Arctic waters from the dangers of an oil spill or discharge, and constitute a valid claim of jurisdictional competence.

Current research projects include studies to develop reliable methods of identifying the source of oil found on the ocean. One suggested method is to add a hydrocarbon compound tagged with tritium to each cargo during loading; it would be possible in this manner to provide a distinctive "signature" for each tanker, enabling ready analysis and identification of an oil discharge[47]. Another proposal would use the unique and persistent compositional features of every oil to provide an identifying "fingerprint"[48]. To reduce the risk of a collision involving tankers, the Maritime Safety Committee of IMCO has recommended that measures be taken at a national level to require national vessels to navigate in accordance with the traffic separation schemes already approved by IMCO[49]. The possibility of international agreement to limit the size of oil tankers is being investigated[50], and recommendations have been made as to the maximum size of tanks within the vessels themselves[51].

The United Nations Conference on the Human Environment to be held in June 1972 should highlight the dangers of oil pollution to the marine environment, and the gaps in the existing law. Pending further international action, it is to be hoped that national governments will apply effective regulation to tankers flying their flags, to prohibit discharges of oil or oily mixtures completely, and to require implementation of stricter standards of design and construction of vessels. Or shall we wait until the next *Torrey Canyon?*

W.J. TEARLE*

47. Comment, *supra* n. 2 at 354.
48. M. Blumer, *supra* n. 5 at 9.
49. IMCO Press Release, IMCO 1/71, 22 March 1971.
50. The initiative came from the United Kingdom government. (1971) Bulletin of Legal Developments 29.
51. The recommendations of the IMCO Maritime Safety Committee will be submitted to the seventh IMCO Assembly in October 1971. IMCO Press Release, *supra* n. 49.

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SECTION 51(xx): THE POWER TO ENACT A FEDERAL COMPANIES ACT[1]

One of the most important constitutional decisions for many years was handed down by the High Court on 3rd September, 1971 in a case entitled *Strickland* v. *Rocla Concrete Pipes Limited*[2] (here referred to as *Concrete Pipes.*) The case involved primarily a challenge to the constitutional validity of the *Trade Practices Act* 1965–1969 (Cth.) and particularly to those sections of the Act which required, under threat of a criminal sanction, the registration of examinable restrictive trade practice agreements.[3] The Court (by a majority decision) held that the sections were invalid. Barwick C.J.[4] expressly stated that

1. I wish to thank Mr. O.I. Frankel Q.C. (formerly of the South African Bar) for reading a draft of this note and for making several valuable suggestions for its improvement.
2. (1971) 45 A.L.J.R. 485.
3. Sections 35 and 41 to 43 inclusive.
4. At 494. Menzies J. also suggested that the Act was wholly invalid when he said that "the Trade Practices Act is not such a law [supportable by section 51(xx) of the Constitution].": at 499.