IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. ~~12~~—Original

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THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Motion of California Association of Port Authorities for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae.

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THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Motion for Leave to File Amicus Curiae Brief of the California Association of Port Authorities as Amicus Curiae.

Motion.

The California Association of Port Authorities, appearing herein through the following named counsel, respectfully moves that it be permitted to file a brief as *amicus curiae,* pursuant to Rule 27 (9) of this Honorable Court.

CALIFORNIA ASSOCIATION OF PORT AUTHORITIES,

By RAY L. CHESEBRO,
City Attorney of City of Los Angeles, for the Association.

Of Counsel:

COMMITTEE ON TIDELANDS, CALIFORNIA ASSOCIATION OF PORT AUTHORITIES,

W. REGINALD JONES, Chairman,
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Assistant City Attorney,
City of Los Angeles.

IRVING M. SMITH, Member,
City Attorney, City of Long Beach.

HUGH H. MACDONALD,
Deputy City Attorney,
City of Los Angeles.

The United States of America, plaintiff herein, gives consent to the filing of *amicus curiae* brief by and on behalf of the California Association of Port Authorities.

.....

Attorney General, United States of America.

The State of California, defendant herein, gives consent to the filing of *amicus curiae* brief by and on behalf of the California Association of Port Authorities.

.....

Attorney General, State of California.

IN THE

Supreme Court of the United States

October Term, 1946.

No. 12—Original

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

BRIEF OF AMICUS CURIAE.

Statement.

The California Association of Port Authorities is an association whose members constitute most of the publicly owned and operated ports and harbors and privately owned and operated terminals in the State of California. The members are:

Board of State Harbor Commissioners, San Francisco;

Board of Harbor Commissioners of the City of Los Angeles,

Port of San Diego,

Port of Long Beach,

Port of Stockton,

Port of Oakland,

Howard Terminal,

Encinal Terminals,

Parr-Richmond Terminal Corporation,

Outer Harbor Dock & Wharf Company, San Pedro.

The members of the Association are each signatory to an agreement which was drawn and executed pursuant to the provisions of Section 15 of the Shipping Act (c. 451, sec. 15, 39 Stat. 733, enacted Sept. 7, 1916, as amended June 29, 1936, by c. 858, §§204, 904, 49 Stat. 1987, 2016). Said agreement has been accepted and approved by the United States Maritime Commission.

The Association was formulated and is continued for the purpose of enabling its members in concert and cooperation to procure unanimity of purpose and effort upon matters which might affect their property rights, their rates, and their operations.

The Association considers that the issues presented to this Court for decision by the pleadings in this proceeding may, if the theory of the Government is permitted to prevail, disastrously affect some, if not all, of the members of this organization.

The Association and its members are particularly disturbed by the extremity of several of the Government's theories.

The contention in the Government's Brief that the United States is the owner of the marginal sea is startling. Although the Government disclaims any intention of liti-

gating herein any title to inland waters, such as bays and harbors, the uncertainty in the complaint as to what and where the bays and harbors are in the State, leaves various members of this Association in a quandary as to whether their property rights are included within the "marginal sea" of the complaint.

This quandary is strengthened by the circumstance that the Government has classified San Pedro Bay as doubtful. This particular doubt affects three members of the Association: City of Los Angeles, City of Long Beach, and The Outer Harbor Dock and Wharf Company. Are these members located in a harbor, bay, or the marginal sea? There is no such certainty expressed in the complaint or Government's Brief as will enable anyone, even the Government, to determine that question.

In view of the fact that many of the members of this Association have many, many millions of dollars invested in improvements, it is rather to be expected that the Association would have a keen interest in the outcome of a challenge that might affect their fundamental property rights. One member is a port operated by a Commission established by direct legislative act of the defendant, State of California itself.

Moreover, assuming that the property referred to in the complaint does not now comprehend the properties now owned and being utilized by the Association members, many of the Government's theories, if found applicable to the title to the marginal sea, can, with little effort, be

stretched to include bays and gulfs and even harbors in the future.

In the firm belief that the issues presented in this proceeding endanger the vested rights of many, if not all ultimately, of the members of this Association, this Brief has been prepared and filed. That the Government's theories are fundamentally unsound and nationally dangerous is the firm belief of the entire Association.

In a proceeding of this kind, the parties and others whose interests are or may be affected should not have to rely upon anything except the law applicable to the situation. Considerations of policy, desirability or expediency should be given no attention or weight in the face of what are believed to be irrevocably established legal principles and rights of property. If the marginal sea along its borders belongs to the State of California, if the courts have so determined, and if the national government has acquiesced in that view for over a century and a half, then under no circumstances, regardless of necessity or desirability, should the Government undertake to divest the State of its ownership or should this Court lend legal sanction to such a proceeding. There are constitutional methods of acquiring that which the National Government must have for its needs.

The Government's theories, in the face of the settled law, cannot be characterized as even plausible. Under scrutiny they are seen to be entirely without logical or legal foundation. This we now propose to illustrate.

Summary of Argument.

Though cogent arguments might properly be advanced against the contentions of the Government based upon the vested rights, and the equities arising therefrom, of those now in possession of the seacoast and the marginal sea, the actual question in this case, being one of title, will receive the main consideration herein. Nevertheless, in considering this question, we feel that this Court should not forget for one moment that the Government is now challenging the general jurisdiction of the State of California, reserved to it by the Constitution, the exercise by the State of California of local control and regulation of the marginal sea, the use of the marginal sea and its bed proprietarily by the State of California, and the rights of the citizens of the State of California to enjoy the usufruct of the sea and the bed thereof in the maritime belt for their own advancement, and is at the same time challenging a rule of property and decision that has stood uniform and unaltered since the States formed a Union. By reason of the exercise by the State of California since 1850 of these sovereign and proprietary rights in the marginal sea, many questions of equity and justice, in addition to strictly legal propositions, exist.

But the basic proposition involved is whether, under the division of sovereign power between the States and the national Government provided for in our Constitution, title to the waters and the soil of the bed of the marginal sea is owned by the State of California or the United States of America.

Directing the argument in this Brief, therefore, to the legal issues involved, the points presented herein parallel for the sake of convenience and clarity of argument, those propositions which are advanced by the Government in its Brief.

I.

Point I of this Brief is intended as an answer to Point I and Point III, B, 4 and 5 of the Government's Brief, since both of those parts of the Government's Brief are somewhat repetitive of each other.

Upon considering all of the matters presented in Point I of both briefs it fairly can be stated historically:

(a) That there has been a marginal sea concept in international law, exemplified both in practice and theory, since the Middle Ages;

(b) That the broad claims of England, Portugal, Italy and Spain in the late Middle Ages to entire seas by common international concord gradually receded shoreward, so that by the sixteenth and seventeenth centuries, the width of the marginal sea was that of a cannon shot distance from shore, which distance by the eighteenth century had been translated, in the interest of certainty and definiteness, into three marine miles, or a marine league;

(c) That walking hand in hand with this evolution of the marginal sea concept international law has recognized that the littoral state has sovereign ownership of the marginal sea and the bed thereof, and that said recognition is exemplified by the past and present practice of nations and by international treaties, proclamations, and agreements, and, finally, by the partial acceptance of the theory by publicists, all for over a century before 1776;

(d) That publicists and international conventions are still arguing and failing to agree about the various theories of the marginal sea, its width, the character of sovereign rights therein, and whether there is an ownership of the *solum* thereof, although these questions have become settled in practice, especially by Great Britain for over two centuries and by the United States since the formation of the Union;

(e) That, therefore, the thirteen original colonies, when they declared their several independences, had the right to take unto themselves territorial sovereignty and territorial ownership of their own lands, including a marginal sea outside of inland waters, one marine league in width, and to appropriate as owners, for the benefit of their several inhabitants, the usufruct of such waters and of the soil thereunder.

II.

Point II of this Brief is intended to answer the correspondingly numbered point in the Government's Brief. In this point it is shown:

(a) That by the Treaty of Guadalupe Hidalgo the United States acquired the California Territory by cession from Mexico in 1848;

(b) That in 1850 California was admitted into the United States "upon an equal footing with the original States in all respects whatever";

(c) That under the common law, as it existed in 1776, the Crown of England held the *jus publicum* and *jus privatum* in and to the marginal sea and the inland tidal waters subject to certain public trusts;

(d) That the thirteen original States by the Declaration of Independence established their complete several sovereignties and by virtue thereof, whether they held them prior thereto or not, succeeded to all the prerogatives of the Crown of England in and to the marginal seas and the inland waters, subject to certain public trusts for the benefit of their several inhabitants;

(e) That by the Constitution of the United States these thirteen original States surrendered a portion of their complete sovereign rights to the national Government, but that their municipal or local sovereignties, subject to the regulation of commerce and the provision for the common defense by the national Government, were never surrendered to the national Government, and that their proprietary rights in and to the marginal seas and their inland waters and beds thereof, being a part of the reserved municipal sovereignty, were never granted by the Constitution to the national Government;

(f) That each new State is required to be admitted upon an equal footing with the thirteen original States;

(g) That by reason thereof each new State, upon its admission and as a necessary incident to the full enjoyment of its reserved municipal or local sovereignty, immediately became vested with general jurisdiction over and ownership of all the navigable waters, including the marginal sea, and the soil of the beds thereof within its territory.

(h) That there is complete unanimity of decision in all of the federal and state courts of this country to the effect that each of the above propositions is the law of the land;

(i) That the Government in its Brief has not referred to one respectable authority, either legislative, executive,

or judicial, American or English, that casts any doubt upon the legal correctness of the above statements, (a) to (i), inclusive.

III.

Point III of this Brief is intended as an answer to the corresponding point in Plaintiff's Brief. However, Point III, B, 4 and 5 of Plaintiff's Brief is particularly answered in Point I hereof.

In this point of this brief, it is definitely shown:

(a) That the ownership of submerged lands within the territories of the several States, including the marginal sea, subject to the powers granted to the United States, is a necessary and relevant concomitant of the exercise by the several States of their reserved municipal sovereignties, and that the ownership of the marginal sea is not related at all to national sovereignty, but that the national Government can exercise and has always exercised all of its constitutional powers, completely unhampered, without having had or claiming to have had any ownership of the marginal sea or the inland waters;

(b) That the thirteen original States succeeded to the rights of the Crown of England, under and by virtue of their inherent sovereignty, in and to the marginal sea and inland waters within their respective territories, including the ownership of the soil of the beds thereof, and that by operation of the equal footing rule each new State, upon its admission, became invested with the same sovereign and proprietary rights; that whether or not the thirteen original States chose in their constitutions or their statutes to declare or exercise sovereign rights of dominion or propriety over the marginal seas and their inland waters, the right nevertheless existed and exists, and that the equal

footing rule requires that all new States upon admission be given the same rights as the original States; that the equal footing rule does not depend in its application upon the manner in which the several States, once having succeeded to such sovereign rights, thereafter choose to exercise them.

(c) That the equal footing clause relates to the same attributes of sovereignty, but not to various ways in which the several States exercise it; so that it is immaterial whether the original States or some of them ever claimed the ownership of the bed of the marginal sea affirmatively or not; since they possessed such sovereignty as to enable them to claim such ownership at any time, the equal footing clause requires that new States be awarded the same sovereign right within the limits of their respective territories.

(d) That the ownership by the States of the bed of the marginal sea is not only an incident of general sovereignty, but of that local sovereignty which is exercised by the respective States; and that the duty of the several States to administer the public trusts in such beds for the benefit of their respective peoples proves that proposition.

IV.

Point IV of this Brief is intended as an answer to corresponding Point IV in Plaintiff's Brief. In this point it is definitely shown

(a) That the Supreme Court of the United States has repeatedly established the general principle of State ownership of navigable waters and the beds thereof within the territories of the respective States and that the "marginal sea" is a part of the general phrase "navigable waters" as

defined and used in the numerous decisions of the Supreme Court of the United States;

(b) That the original States, since the formation of the Union, and other States since their admission into the Union, have adopted, followed, and acted upon the law as announced by the Supreme Court of the United States;

(c) That each maritime State in some manner has undertaken to exercise its general jurisdiction over the marginal sea, such as by fishing regulations, by regulation of oyster, sponge, and kelp beds, and similar activities;

(d) That the United States of America, by reason of this long line of decisions, federal acquiescence therein, and the assumption of both general jurisdiction and propriety by the several maritime States over their navigable waters, is now precluded from challenging or questioning the title of the State of California in and to the waters and bed of the marginal sea along its coast under the principles of (1) *stare decisis,* (2) judicial rule of property, (3) long acquiescence, (4) actual appropriation of the property by the State for a long time, (5) estoppel, (6) laches.

V.

Point V shows that the Plaintiff's Complaint does not state a cause of action and is, therefore, subject to general objection in that it cannot be determined therefrom, and it cannot be actually determined from any outside source, just where in the Pacific Ocean the "marginal sea" is located; this uncertainty arises because it cannot be determined where the low-water mark is or as of what date its location is to be taken along the open coast of the State of California, where, in the case of bays and harbors, the so-called inland water line is, or just what portions of the coast are bays or harbors.

ARGUMENT.

I.

The Origin and Evolution of the Marginal Sea Concept.

A. Introductory.

In adopting and using in this Brief the terminology of the Government's Brief, particularly with reference to "marginal sea" on the one hand and "inland waters" on the other,[1] we are not to be understood as tacitly implying that, for the purposes of determining their ownership as between the United States and the State, there is any significant legal difference between the "marginal sea" and "inland waters." At the very outset it is our desire to clearly state that it is our firm and fixed belief that there is no difference between the "marginal sea" and "inland waters" that would serve in any way to substantiate the claim of the United States to be the proprietor of the former, if the latter are considered as State property.

The purpose of the following discussion is to trace the origin and evolution of the so-called "marginal sea" concept, with special emphasis upon the condition of its development in the decade from 1776 to 1786, with particular reference to the theory of proprietary rights in the soil of the bed of the marginal sea.[2]

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[1]See discussion of definition of these and other terms, Plaintiff's Brief, pp. 17-20.

[2]The United States claims that the marginal sea theory is a relatively modern one, arising in the writings of publicists in the Eighteenth Century, and that the concept of property rights in a three-mile maritime belt did not emerge in international law until after the original thirteen states ceased to be completely sovereign. The argument then is that the original states did not at the formation of the Union own the marginal sea, and, hence, neither did new States upon their admission. (Pltf. Br., pp. 7-8.)

Preliminarily it may be noted that concepts of an "open sea" and a "closed sea" go in cycles. Early Roman jurists looked upon the sea, as upon the air, as common to all mankind. It was not long, though, with the development of commerce in the Middle Ages, before maritime States began to claim dominion over parts of the open sea adjacent to their territories. The Adriatic Sea was claimed by Venice and the Ligurian Sea by Genoa.[3]

> "England not only asserted her dominion over the channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland."[4]

The Baltic Sea was shared by Sweden and Denmark.

> "Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, and Spain over the Pacific and the Gulf of Mexico, both basing their claims on two Papal Bulls promulgated by Alexander VI in 1493, which divided the New World between these Powers."[5]

These claims continued to be successfully asserted for several hundred years, favored by the circumstance that they served the purposes of suppressing piracy. This was of advantage to both the State and its foreign traders who

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[3]See Fulton, *Sovereignty of the Sea;* Potter, *The Freedom of the Seas;* Ogilvie, *International Waterways.*

[4]Hall, *Treatise on International Law,* 8th Ed., p. 179.

[5]*Oppenheim's International Law,* 5th Ed., p. 463.

desired protection. A right of jurisdiction came to be recognized, and tolls and dues began to be collected.[6]

This right of jurisdiction, coupled with the physical exercise of the right, became definitely recognized and accepted as one of property and dominion possessed by the State.[7] Denmark by Ordinance in 1598 even provided for

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[6]"From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported. In 1269, for example, Venice began to exact a heavy toll from all vessels navigating the Northern Adriatic. After paying the impost for a few years, Bologna and Ancona took up arms to free themselves from the burden, but the issue of their wars being unfortunate, they were compelled formally to acknowledge the sovereignty of Venice over the Adriatic, and to consent to pay the dues which she demanded. In 1299, it appears, from a memorial presented to certain commissioners sitting in Paris to redress damages done to merchants of various nations by a French Admiral within the English seas, that procurators of the merchants and mariners of Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark, and Norway acknowledged that exclusive dominion over the English seas, and the right of 'making and establishing laws and statutes and restraints of arms' and 'all other things which may appertain to the exercise of sovereign dominion' over them, were possessed by England. For nearly three centuries afterwards England kept the peace of the British seas either by cruisers in constant employment, or by vessels sent out from time to time.

"At the period, then, when international law came into existence, the common European practice with respect to the sea was founded upon the possibility of the acquisition of property in it, and it was customary to look upon most seas as being in fact appropriated." (Hall's *Treatise on International Law,* 8th Ed., p. 180.)

[7]In 1604 Antonius Peregrinus wrote a book relative to the Venetian claims, and stated that the Princes by possessing the sea acquired a property right in it. (Pltf. Br. p. 22, n. 13.)

Hall, *Treatise on International Law* (8th Ed. 1924), pp. 179-180;

Oppenheim's International Law (5th Ed. 1937), pp. 462-3.

the capture of English vessels caught fishing in the waters between Vespeno and Iceland or two Norwegian leagues northeast from Vespeno.[8] And King Philip II of Spain in October, 1565, fixed the visual horizon as the territorial limit.[9] Netherland delegates visiting England, May 6, 1610, gave this reason for not obeying a proclamation made in May, 1609, forbidding strangers to fish:

> "For that it is by the law of nations, no prince can challenge further into the sea than he can command with a cannon except gulfs within their land from one point to another."[10]

Because, principally, of the excessive claims of Spain and Portugal, and because they pushed their proprietary rights to the extent of prohibiting all foreigners from entering their waters, consisting of entire seas, a reaction in favor of freedom of the seas set in.

Hugo Grotius urged the freedom of the seas in his *Mare Liberum* (1609) and in his *De Jure Belli ac Pacis* (1625). But it was not entire seas to low-water mark of adjacent land that he included in his freedom doctrine. On the contrary, he acknowledged that a maritime belt existed as a lordship of the adjacent State "by way of *territory,* in so far as those who navigate in that part of the sea nearest

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[8]1598, May 10. Ordinance establishing two Norwegian leagues as a neutral zone. Crocker, *Extent of the Marginal Sea* (G. P. O. 1919), p. 513.

[9]Translation in Crocker, op. cit. *supra,* p. 622.

[10]Great Britain, State Papers, Domestic, Vol. 47, p. 111; Crocker, op. cit. *supra,* p. 606.

the land can be held in restraint from the land, no less than if they were found upon the land itself."[11]

The Government admits that other writers "like Thomas Digges (1569), Serjeant Callis (1622), and Sir Thomas Craig (1603), asserted rights of property and jurisdiction in the adjacent sea particularly."[12]

But this doctrine of Grotius, which he had advanced to meet the pretensions of Spain and Portugal, went too far; it went further than any nation, except Holland which was imprisoned in the British seas, cared to go.

> "The world was anxious to secure the right of navigation but it was willing that states enjoy the minor rights of property, and the general rights of sovereignty which accompany national ownership."[13]

Grotius' attack on the then existing claims of Spain, Portugal and England was met by authors of many nations. Gentilis defended Spanish and English claims in his *Advocatio Hispanica* in 1613. William Welwood defended English claims in 1618 in his *Mare clausum sive de Dominio Maris.* Sir John Burrows in 1653 published a further defense of British claims under the title *The Sovereignty of the British Seas.* Paola Sarpi, in defense of claims of the Republic of Venice, published his work, *Del Dominio del Mare Adriatico,* in 1676. John Selden replied to Grotius in 1618 in the most important of these books defending maritime sovereignty, his *Mare clausum.*

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[11]Grotius, *De Jure Belli ac Pacis,* Bk. II, ch. III, sec. 13, pp. 129-130.

[12]Pltf. Brief, p. 24.

[13]Hall, *Treatise on International Law* (8th Ed. 1924), p. 182.

Charles Molloy, an English legal writer and author of an extensive treatise on maritime law and commerce in 1676, which was the standard authority on the subject, wrote that

> "After the writings of the illustrious Selden, certainly 'tis impossible to find any prince or republic or single person imbued with reason or sense that doubts the dominion of the British Sea to be entirely subject to that imperial diadem. And as the sea is capable of protection and government, so is the same no less than the land subject to be divided amongst men, and *appropriated* to cities and potentates, which long since was ordained of God as a thing most natural."[14]

> "The general opposition to the bold attack of Grotius on maritime sovereignty prevented his immediate victory. Too firmly established were the claims then recognized to sovereignty over certain parts of the open sea for the novel principle of the freedom of the sea to supplant them. Progress was made regarding one point only—namely, freedom of *navigation* of the sea. England had never pushed her claims so far as to attempt the prohibition of free navigation of the so-called British Seas. And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the open sea was practically free for vessels of all nations. But with regard to other points, claims to maritime sovereignty continued to be kept up. Thus the Netherlands had by Article 4 of the Treaty of Westminster, 1674, to ac-

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[14]Crocker, *Extent of the Marginal Sea,* Molloy: *De Jure Martimo et Navali* (1744), pp. 297-298.

knowledge that their vessels had to salute the British flag within the 'British Seas' as a recognition of British maritime sovereignty."[15]

It is said[16] by the Government that "the beginning of the eighteenth century marked the development of a theory of an adjacent sea with characteristics different from those attributed to the open sea—a theory which eventually led to the concept of the marginal sea as we know it today." It is then said that the formulation of this "modern, wholly independent, concept, at least as to the width of the area, is usually attributed to the Dutch jurist, Cornelius Van Bynkershoek, whose *De Dominio Maris Dissertatio* appeared in 1702."

But this is not strictly true. Bartolus (1314-1357) advocated a maritime jurisdiction extending 100 miles from land, and Gentilis (1440-1508) supported the theory of dominion in addition to jurisdiction over the same area. By the latter half of the seventeenth century, several publicists proclaimed that a marginal belt around the State could become dominion.[17]

As early as 1565 and 1598, the concept of a marginal belt around the State was promulgated.[18]

In 1610, the Netherland delegates used the expression "cannon shot" as fixing the width of a jurisdictional marginal sea-belt around England.[19]

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[15]*Oppenheim's International Law, Lauterpacht,* Vol. I (5th Ed.) pp. 464-465.

[16]Pltf. Brief, p. 26.

[17]Fulton, *The Sovereignty of the Sea* (1911), pp. 539-552.

[18]Ordinance of Denmark, see note 8, *infra,* p. 17, and Decree of Philip of Spain, note 9, *infra,* p. 17.

[19]See note 10, *infra,* p. 17.

In the amended treaty of peace between the Federated States of Belgium and the Kingdom of Algiers,[20] it was provided that certain ships "should come to at a distance at which a ship could be struck by cannon shot."

Christian IV, in a declaration to Charles I, December 13, 1631,[21] recommended that he warn his subjects "to carry on fishing at a distance of at least six leagues from the main coast" of Iceland and Vespeno.

In 1636, Denmark granted a license to the Iceland Whaling Co. to a distance of six leagues;[22] and in 1643 by letters patent[23] all cruisers or fishing vessels, except belonging to subjects or to the old English or United Provinces Co., which had a proper license, were forbidden to come within "ten leagues of Christianberg, set aside for whaling, with intent to hunt or disturb whales." An exclusive franchise or fishing right was given in 1682 to trade, sell, buy and fish in Iceland and other islands within four leagues of the coast.[24]

A royal admiralty order in 1691 to Captain Moss of "Lindormen,"[25] required him to keep the cruisers out of the royal channels within sight of the coasts of his Majesty.

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[20]Translation, Crocker, *Extent of the Marginal Sea* (G. P. O. 1919), p. 511.

[21]Translation, Crocker, op. cit. *supra,* p. 514.

[22]Stephensen and Sigurdson, *Lovsamling for Island* (1853), Vol. I, p. 220; Crocker, op. cit. *supra,* p. 514.

[23]Translation, Crocker, op. cit., *supra,* p. 514.

[24]Manifesto of Denmark, translation, Crocker, op. cit. *supra,* p. 514.

[25]Translation, Crocker, op. cit. *supra,* p. 515.

In 1631, Denmark and Norway issued a decree establishing a territorial zone of four leagues within which foreigners, whether whale hunters or English sea fishermen, would be attacked.[26]

In a Royal decree (1691) regarding prizes and also in a treaty (1691) between Great Britain, the Netherlands, Denmark and Norway, a neutral zone within sight of the dominion or coasts was set up.[27]

In a French treaty dated January 29, 1682, with Morocco[28] it was provided that "the Emperor of Morocco or his subjects shall make no captures within the limit of *six leagues* of the coasts of France."

In 1691 the French Ambassador at Copenhagen in a communication to the Dano-Norwegian Government said "Respect of the coasts of any part of Europe whatsoever has never been extended further than *cannon range,* or *a league or two* at the most."[29]

Sec. XIV of the Treaty of Commerce and Alliance between Great Britain and Spain, 1667, provided that ships in bays or in the open sea shall keep a cannon shot distance apart.[30]

Art. VIII of the Treaty of Peace between Great Britain and Tripoli of 1675 provided that no Tripolitanian ships

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[26]Translation, Crocker, op. cit. *supra,* p. 517.

[27]Translation, Crocker, op. cit. *supra,* p. 518.

[28]Translation, Crocker, op. cit. *supra,* p. 519.

[29]Translation, Crocker, op. cit. *supra,* p. 519.

[30]*British and Foreign State Papers,* Vol. 1, pt. 1, p. 569; Crocker, *Extent of the Marginal Sea* (G. P. O. 1919), p. 533.

or vessels shall cruise near or in sight of Tangier.[31] Similar language was used in the treaties with Algiers of 1682, 1686, and 1700, and with Netherlands, Denmark and Norway in 1691.[32]

A rescript to the prefects of Norway (1691) provided that prizes captured within sight of the coasts of Norway shall be brought to port to be judged, but Art. 3 of a Royal concession for whale fishing forbade all foreigners and unprivileged persons to hunt whales in or outside the fjords, or in the surrounding waters within ten leagues of the land. This concession was renewed in 1698.[33]

It is therefore clear that while Grotius, Selden, and the other publicists in the 1600's were battling about the "open" versus the "closed" sea, many of the maritime states were, for territorial protection, establishing, by treaty and decree, a protective marginal sea out to the visual horizon. On the other hand, with regard to proprietary rights in the sea, such states were exercising exclusive dominion and ownership over fishing and whaling within smaller distances, usually fixed in leagues. It also appears that the idea of the distance of a cannon shot had been conceived and placed in writing over one hundred years before Van Bynkershoek published his *De Dominio Maris Dissertatio* in 1702. It also appears that the extravagant claims hereinbefore referred to gradually retracted into a more rational distance into the seas sur-

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[31]Crocker, op. cit. *supra,* p. 534; *British and Foreign State Papers,* Vol. 1, pt. 1, p. 715.

[32]Crocker, *Extent of the Marginal Sea* (G. P. O. 1919), pp. 534-535.

[33]Crocker, op. cit. *supra,* pp. 607-608.

rounding the state. The British pretentions were not entirely abandoned until much later.[34]

It is stated in the Government's Brief,[35] that while the beginning of the 18th century marked the development of a theory of a marginal sea, first stated as a cannon shot distance in width and then standardized into a marine league in width, this development was then only in the writing of publicists. This is a definitely erroneous statement, for, as we have seen, this concept of a marginal sea, variously put at the range of sight, a number of leagues, or the range of cannon shot, had been internationally known by decree, treaty, and regulation of fishing as far back as the sixteenth century, whereas Van Bynkershoek wrote in the first of the eighteenth.[36] As a matter of fact, the publicists were nearly a century behind actuality in adopting the theory of a marginal sea with a definite width.

From 1700 to this day, as we shall see, practically no progress has been made toward internationally standardizing that width. In international law, the width of the marginal sea was fixed in 1776 just as accurately and firmly as it is today. Then it was not less than three marine miles; today it is not less than the same distance. The

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[34]Fenwick, *International Law* (2nd Ed. 1934), p. 319; Hall, *Treatise on International Law* (8th Ed. 1924), p. 188; *Oppenheim's International Law* (5th Ed. 1937), p. 465; Butler, *The Development of International Law* (1928), Ch. II; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 4.

[35]Pltf. Brief, p. 26.

[36]"Yet for two or three hundred previous [to 17th and 18th centuries] years nations were familiar with the idea that a littoral state might properly claim a special interest in the waters adjacent to its shores." Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 3.

maximum then and now was and is not known. States and authoritities differed, but they all admitted that three marine miles was a minimum.

So, when Bynkershoek wrote in 1702 "that the control of land over the sea extends as far as cannon will carry,"[37] he was not expressing a "new" theory but was belatedly recording what international experience and practice between nations had already established, *i. e.,* that the gross pretentions to sovereignty of whole seas by one state should be retracted to a reasonable distance from the shore. This was not a "new" theory nor was it based upon different fundamental reasons. Both Selden and Bynker-

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[37]"I should think, therefore, that the possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland; for in that way, although it is not navigated perpetually, still the possession acquired by law is properly defended and maintained; for there can be no question that he possesses a thing continuously who so holds it that another cannot hold it against his will. Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory." Crocker, *Extent of the Marginal Sea* (1919), p. 14.

"Wherefore on the whole it seems a better rule that the control of the land [over the sea] extends *as far as cannon will carry;* for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of men's weapons ends; for it is this, as we have said, that guarantees possession. This seems to have been the opinion followed by the Estates of the Belgic Confederation who decreed on the third of January, 1671, that the commanders of vessels off the coasts of foreign princes should salute at sea *as far out as cannon will carry* from their cities and forts, according as the prince of the shore in question might prescribe; as for his caring to return the salute, that must be left to him to decide." Crocker, op. cit. *supra,* p. 15.

It should be noted that both Selden and Van Bynkershoek state that the littoral nation is the *owner* of the marginal sea.

shoek reasoned that some dominion over the sea, to be held by the littoral state, was necessary for its national protection. The marginal sea concept was a workable compromise between a completely open sea and a completely closed sea, and it evolved from the extreme views of Grotius and Selden as naturally and ineluctably as night follows day.

In 1758, Vattel promulgated the theory still adhered to at the present time by a majority of publicists that whatever the extent of the marginal sea may be, *i. e.*, whether the visual horizon, cannon shot distance, or other measure, it is a natural object of ownership and is the property of the littoral state.[38] He assigns two reasons for

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[38]De Vattel, *The Law of Nations* (1758), Fenwick translation, Crocker, op. cit. *supra,* pp. 456, *et seq.* He said:

"The various uses to which the sea near the coasts can be put render it a natural object of ownership. Fish, shells, pearls, amber, etc., may be obtained from it. Now, with respect to all these things, the resources of coast seas are not inexhaustible, so that the Nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership? And, although the supply of fish is less easily exhausted, yet if a nation has specially profitable fisheries along its coasts, of which it can take possession, are we not to allow it to appropriate that gift of nature as being connected with the territory it occupies, and to keep to itself the great commercial advantages which it may enjoy, should there be fish enough to supply neighboring nations? * * *

"A nation may appropriate such things as would be hurtful or dangerous to it if open to free and common use; and this is a second reason why the Powers extend their sovereignty over the seas along their coasts, as far as they can protect their right. It is a matter of concern to their security and their welfare that there should not be a general liberty to approach so near their possessions, especially with ships of war, as to hinder the passage of trading vessels and disturb navigation. * * *"

the conclusion: one, that the resources of the sea and submerged soil can be and are appropriated to the use of the littoral land inhabitants, and two, that the littoral state has the sovereign right to control over the marginal sea for its protection. The proprietary right grows out of the fact that for centuries littoral states had been using the seas surrounding them for exclusive fishing and had exercised dominion over the substance and usufruct of the sea and soil thereunder.

As indicated in the Government's Brief,[39] the majority of writers and authorities and the common practice of nations more than support this view. What should not be lost sight of is this fact, that ever since the latter part of the sixteenth century nations, exercising their sovereign rights, have appropriated and regulated, as a proprietary right, those things existing, living, and growing in, their marginal seas: that this amounted to more than the exercise of protective sovereignty therein; that such constituted the appropriation, as owners, of the *solum* of the marginal seas.

While the extent of the marginal sea in 1776 might still have been under debate by publicists, and still is, and while the question of whether the littoral nation is the actual owner of the sea and its bed, in 1776 was still unsettled by publicists and still is[40] so unsettled, such uncertainty did not actually exist in practice in England and America in 1776 and does not now exist.

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[39]Pltf. Brief, pp. 31, 32 (note 38), and pp. 34 to 58, incl.

[40]See authorities cited in Pltf. Brief, p. 33, notes 40, 41, 42, and 43.

Whereas Denmark and Norway in 1691 by Treaty forbade belligerent capture within sight of the dominion, in 1756, a decree[41] concerning prizes was issued whereby belligerent Powers were forbidden to capture any ships within "one league from our coasts."

A prize decision in 1759, a decree forbidding capture in 1807, and a Royal ordinance, enacted February 22, 1812, referred to one marine league as the territorial boundary of the state.[42]

Art. 41 of a Treaty of navigation and commerce between France and Great Britain, September 26, 1786, refers to cannon shot of the shore. So does a treaty between France and Russia dated January 11, 1787.[43]

In 1795, a new treaty was made between Tunis and France changing the territorial waters from 30 miles to extreme cannon range from the French coast.[44]

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[41]Crocker, *Extent of the Marginal Sea* (1919), p. 518.

[42]Crocker, op. cit. *supra,* pp. 518, 519. "1810, March 28.—*Decree forbidding Danish and Norwegian privateers from capturing enemy vessels in the territorial sea of any State.* Article 7. No privateer shall, at the risk of losing its commission or undergoing whatsoever punishment the occasion may demand, take any prizes, or in any way make use of said commission within the territory belonging to friendly or neutral Powers, which territory is usually considered as extending *one league* from the coast. As regards Oresund, it is to be noted that the privateers are not permitted to remain near the Swedish batteries or within *cannon range* of the Swedish coasts.

"1812, February 22.—*Royal Ordinance.*

"We will that it be established as a rule in all cases where it is a question of determining the maritime boundary of our territory, that that territory shall be reckoned to the ordinary distance of *one marine league* from the outermost islands or islets which are not overflowed by the sea."

[43]Crocker, op cit. *supra,* p. 521.

[44]Crocker, op. cit. *supra,* p. 522.

A convention between Great Britain and France, 1839, reserved to British subjects exclusively the oyster fishery within three miles of the island of Jersey and the coasts of the British Isles. It was also agreed that bays with mouths under 10 miles in width were excluded from the three-mile measurement. This three-mile measurement was again used in certain Fishing Regulations issued by France in 1843.[45]

In 1763, the English Parliament passed an Act granting certain duties in the British colonies and to prevent clandestine conveyance of goods to and from the Colonies. In Art. XXXIII thereof vessels were prohibited from anchoring within two leagues of the shore.[46]

Again England established a limit of three marine miles in 1819 for its exclusive fishing privilege on its possessions in North America in an Act of Parliament.[47]

In various other Acts, Treaties (1836-53) with Portugal and France, three marine miles were set as territorial limits for fishing rights.[48]

By Proclamation, the King of the Hawaiian Islands (1854) proclaimed a neutral zone of one marine league around the various islands.[49]

Japan consistently, between 1870 and 1904, adhered to a neutral zone of three marine miles.[50]

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[45]Crocker, op. cit. *supra,* p. 524.

[46]Crocker, op. cit. *supra,* p. 538.

[47]Crocker, op. cit. *supra,* p. 544.

[48]Crocker, op. cit. *supra,* pp. 546, 547.

[49]Crocker, op. cit. *supra,* pp. 595, 596.

[50]Crocker, op. cit. *supra,* pp. 604, 605.

The Netherlands adhered to a cannon shot distance and in 1895 suggested to the United States that six miles be set as the limit of the territorial sea.[51]

In Norway, by Royal decree and Rescript, since 1745, it has been customary to adopt the territorial limit of a marginal sea one league wide, both as applied to maritime prizes and fishing privileges.[52]

Russia and Spain continued for some time to use cannon shot range as the width of their marginal seas.

Sweden, in 1788, used a marine league in connection with regulating prize and capture and in 1808 proclaimed a like neutral zone.[53]

If the predominance given to fixing one marine league from shore as being the territorial limits of a state for purposes of neutrality, exclusive fishing rights, prize and capture, is properly considered, it will be readily appreciated that in 1776 and for some time prior, the modern view of the three-mile limit had been quite universally applied, both in a sovereign and proprietary sense, in international relations.

B. The Status of the Concept in England in 1776.

Bacon tells us,[54] "It is universally agreed that the king hath the sovereign dominion in all seas and great rivers, which is plain from Selden's account of the 'Ancient Saxons, who dealt very successfully in all naval affairs, and therefore the territories of the English seas always

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[51]Crocker, op. cit. *supra,* p. 606.
[52]Crocker, op. cit. *supra,* pp. 607-617, incl.
[53]Crocker, op. cit. *supra,* p. 627.
[54]Abr. Prerog. b. 3.

resided in the King.' " It will be found that Selden frequently refers to Roger Havenden, Henry of Huntingdon, Matthew Paris, William of Malmesbury and others as his authorities for parts of the "Mare Clausum."

Hargrave and Butler repeatedly quote from or refer to it. Hargrave's notes to Co. Litt. 107b, are a summary of the first chapter, second book of Selden's *Mare Clausum.*[55] Selden's work is named in the old abridgments; that is, in Viner, Comyn's Digest, and Bacon.

Horne's "Myrrour of Justice" appears to be referred to in this quotation:[56] "First, he (the king) hath supreme dominion both by sea and land, as is proved by the 'Mirror,' the greater part whereof was written before the Conquest. Some things are added to it by H. Horne in the reign of Edward IV. He holdeth that all land, and all jurisdiction, and all dominion, is derived from the crown; that whatsoever was not granted from the crown, remaineth in the person of the king. This *supremum dominium* is so inherent in the king's person, that if the king grants away his lands, *' absq. aliquo reddendo,'* yet the tenure must still remain in the king; 8 Hen. 7, 12; 30 Hen. 8, 45; Dyer. This dominion is not only upon the land, but is upon the sea. And so the king hath not only a dominion at sea, but he is *'dominus maris Anglicani'*; he is both owner of the sea and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the Barons in the Exchequer, in the case of *Sutton Marsh,* Mich. 13 Car., that the soil of the land,

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[55]Hall, *On the Seashore;* reprinted in Moore's *History & Law of the Foreshore and Sea Shore* (3rd Ed., 1888), p. 668.

[56]*Howell's State Trials,* Vol. iii, p. 1023.

so far as the sea floweth, is the king's and the king is seized thereof, *jure coronae.*—Mirror, 8; Bract. fol. 8, temps. Edw. I. Avowry, 46 Edw. 3, Com. 3 b., that not only the dominion of the sea, but the very soil, belongeth unto the king."

"If a river, as far as there is a flux of the sea, leaves its channel, it belongs to the king; for the English sea and the channels belong to the king, and he hath the property in the soil, having never distributed them out among his subjects."[57]

Sheppard's "A Grand Abridgment of the Common and Statute Law of England," (2nd Ed. 1675) thus stated the law:

> "The king being to look to the sea as well as to the dry land, and being to defend his subjects both by sea and land, the law, therefore, gives him many prerogatives both upon the one and the other. As thus:
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> "(1) That the king, as supreme, is *Custos totius regni Angliae,* and to take care both of sea and land: of both of which he, not only as to protection, but to propriety, is said to be lord."

Hale, in his *De Jure Maris,* cap. iv, said:

> "The narrow sea adjoining the coast of England is part of the waste and demesnes and dominions of the king of England, whether it be within the body of any county or not."

Again to quote from Chitty,

> "By implication of law, the property in the soil under these public waters is in the king.

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[57]2 Roll. Abr. 170 (1668).

"The king possesses the sovereign dominion in all the narrow seas, that is, the seas which adjoin the coasts of England, and other seas within his dominions."[58]

It is plain that anciently the king owned any lands under public waters, including the narrow seas, which are the marginal seas. The only thing that has changed in the law of England since these statements is the size or width of the marginal seas that are owned by the Crown.

Strange as it may seem, there are relatively few English decisions upon the subject of the title of the Crown to the soil of the bed of the marginal seas.

[59]"Assuming that the right of the Crown in the soil of the bed of the sea below low-water mark is a territorial right, *i. e.,* that the ownership of the soil, as apart from the mere right of jurisdiction, is vested in the King, the question of interest is, how far do these property rights extend, and what relation do they bear to the three-mile limit of the marginal belt of territorial waters?

"The rights and prerogatives of the Crown date from the earliest periods of the national history. The three-mile limit as the measure of the marginal jurisdiction of the Crown is of quite modern growth. It has developed out of Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis,* and Bynkershoek's *De Dominio Maris,* in which the rule was enunciated, was only published in 1702.

"Most of the cases to be found in the reports which throw light on the question whether the property in

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[58]Chitty, *Prerogatives of the Crown* (1820), pp. 173, 206.

[59]Hurst, *Whose Is the Bed of the Sea?* British Year Book of International Law, 1923-24, pp. 36-37.

> the soil of the bed of the sea is vested in the Crown are fishery cases, or are concerned with the question of the right of a subject by prescription or by presumption of a lost grant to establish as against the public at large a right which could not be good unless derived from the Crown. An exclusive right on the part of a private person to the fishing in any area below low-water mark would constitute a 'several fishery,' and the right of the Crown to make a grant of a several fishery disappeared with Magna Charta. As it is admitted in these cases that the rights claimed must have been derived from the Crown, it follows that the rights of the Crown in the bed of the sea must have been fixed at least as early as the thirteenth century."

A very early case (1800), decided just twenty-four years after the Declaration of Independence, and only twelve after the United States Constitution went into effect, entitled *The Twee Gebroeders,* 3 C. Rob. 162, 165 Eng. Rep. 422, was decided by Sir W. Scott. He held that the ship was lying in neutral waters because within "three miles, at most, from East Friesland," and that "in the sea, out of the reach of cannon shot, universal use is presumed."

Just five years later (1805), Sir W. Scott decided the case of *The Anna,* 5 C. Rob. 373, 165 Eng. Rep. 809. The Government, in its Brief, passes this case with but scant notice.[60] This was the case of a ship under American colors, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish main to New Orleans, and captured by the Minerva privateer near the

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[60]Pltf. Brief p. 44.

mouth of the river Mississippi. A claim was given under the direction of the American Ambassador (Minister) for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States."

Sir William Scott (Lord Stowell), said:[60a]

> "When the ship was brought into this country a claim was given of a grave nature, alleging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the court to show the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the river Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *'terrae dominium finitur, ubi finitur armorum vis,'* and since the introduction of firearms that distance has usually been recognized to be about *three miles* from the shore. But it so happens in this case that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which forms a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America; that they are a sort of 'no man's land,' not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds'

[60a] *"The Anna,"* 5 C. Robinson, 373; Evans, Cases, 65.

nests. It is argued that the line of territory is to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they bordered, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the book of law, *Quod vis fluminis de tuo praedio detraxerit, & vicino praedio attulerit, palam tuum remanet* (inst. L. 2. Tit. 1, §21), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendent to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America. It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlement. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

"I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river . . ."

This was a direct decision that alluvial islands, which have risen in the open sea, are the property of that state that owns the marginal sea, because the islands have been formed on and from that which was already owned by the state.

In Cornwall, where the east coast of England is on the open sea, certain submarine mines extended out under the marginal sea. A dispute[61] arose between the Crown and the Duchy of Cornwall as to the ownership of minerals won from workings lying beneath the water on the coast of Cornwall. The question was referred to Sir John Patteson and he decided that the Crown owned the soil of and minerals in the land below low water. Lord Coleridge, in his decision in *Regina v. Keyn* (1876), L. R. 2 Exch. Div. 63, at 155-157, discusses the Cornwall Arbitration and the Cornwall Submarine Mines Act[62] that carried out the terms of the arbitration. The comment of Sir Cecil J. B. Hurst thereon is as follows:[63]

> "Lord Coleridge and Lord Chief Justice Cockburn were on opposite sides in *R. v. Keyn,* and the former was laying stress on this enactment of 1858 to substantiate his argument that the Crown possessed a territorial jurisdiction within the three-mile limit below low-water mark. He had been given copies by the Lord Warden of the Stannaries of all the proceedings in this arbitration and of the written statements put forward on either side. He states

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[61] *Att. Gen. to Prince of Wales v. St. Aubyn* (1811), Wightw. 167.

[62] 21 & 22 Vict., ch. 109 (1858).

[63] Hurst, *Whose Is the Bed of the Sea?* Brit. Yearbook of Int. Law, 1923-24, p. 35. The Act referred to is reproduced in part in Pltf. Brief pp. 46-47.

in his judgment that the argument on the part of the Crown was founded on the proposition that the 'fundus maris' below low-water mark belonged in property to the Crown, whereas it was argued on behalf of the Duchy that the bed of the sea did not belong to the Crown, and that the Prince, as first occupier, was entitled to the mines thereunder.

"If in face of these two respective contentions Sir John Patteson decided that minerals won from workings below low-water mark belonged to the Crown, it is difficult to reconcile his award with anything but an intention to maintain that the right of the Crown to these minerals was a territorial right, i. e., that the property in the bed of the sea and not merely sovereignty and jurisdiction over it was vested in the Crown. The recitals of the Act also show that he had himself suggested that the Bill should make provision for giving to persons working these minerals below low-water mark in right of leases, etc., from the Crown, facilities to extract them upon terms to be agreed between the Crown and the Duchy. Such a recommendation is inconsistent with any view that the right to minerals won from below low-water mark is based on seizure or occupation of a 'res nullius.'"

It should be further borne in constant view that these cases did not decide that the Crown had fallen heir to a new type of property which had just been given life by recent international sanction, as the Government would have this Court believe is true of the American marginal sea. The decisions in *The Twee Gebroeders* and *The Anna* merely confirmed pre-existing proprietary rights in the marginal sea. Those rights have always existed in the marginal sea, dormant perhaps, waiting for a littoral

sovereign to assert title to them. Publicists and judges do not create property rights; they merely announce and confirm their existence.

It has been suggested[64] that much doubt was cast upon the right of the Crown to the bed of the sea below low-water mark by Lord Chief Justice Cockburn's opinion in *Regina v. Keyn,* L. R. 2 Exch. Div. 63 (1876). The decision was that the court lacked jurisdiction of the offense charged because it occurred out of the county, and there was no necessity for Lord Cockburn's stating by way of *dicta,*[65] and contrary to every other decision in England, that he did not believe that the marginal sea was English territory. It is interesting to note that upon this proposition Lord Cockburn's opinion was in the minority of the judges sitting with him.[66] That the *dicta* of a majority of the court actually held in favor of the Crown's ownership of the marginal sea is substantiated by two decisions, *Manchester v. Massachusetts* and *Annakumaru Pilai v. Muthupayal.*[67] The British Government also shared the view of the majority that the Crown owned and had jurisdiction over the bed of the sea to the international limit of three miles, because Parliament passed, August

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[64]Both by Lord Shaw in the case of *Secretary of State for India v. Chelikani Rama Rao,* L. R. 43 Ind. App. 192 (1916), and by the Government (Pltf. Br. p. 47). The Plaintiff's Brief contains a short statement of the facts of the case.

[65]See Lord Shaw's opinion, so holding, in *Secretary of State for India v. Chelikani Rama Rao,* L. R. 43 Ind. App. 192 (1916).

[66]A good analysis of the decisions of the various justices is contained in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 129.

[67]139 U. S. 240, 247; 35 L. Ed. 159; 27 Indian L. R. Madras Series (1904), 551, 561.

16, 1878, The Territorial Waters Jurisdiction Act,[68] declaring:

> "Whereas the rightful jurisdiction of her Majesty, her heirs and successors, extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions;"

and then stating that all offenses committed in territorial waters, defined as any part of the open sea within one marine league of the coast, are offenses within the jurisdiction of the admiral.

The case of *A. G. for British Columbia v. A. G. of Canada* (1914), A. C. 153, really decided nothing, and in view of a later decision of the Privy Council involving the identical question, dodged in the first case, the language of Viscount Haldane, quoted in Plaintiff's Brief, page 49, is of no legal effect whatsoever, even in the British courts. This later decision is that of *Secretary of the State for India v. Chelikani Rama Rao,* L. R. 43 Ind. App. 192 (1912).

The decision of the Privy Council in this case settled, once and for all, the judicial rule in Great Britain that the Crown has both the sovereignty and the propriety in the marginal seas surrounding England and her dominions within the three-mile limit. The decision was based upon the statements in Hale, *De Jure maris;* Hall, *On the Sea* Shore; and upon the following decisions of other English courts, *Attorney General to Prince of Wales v. St. Aubyn*

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[68]41 & 42 Vict., c. 73 (1878).

(1811) (Wightw. 167); *Fitzhardinge v. Purcell* (1908), 77 L. J. Ch. 529; *Lord Advocate v. Clyde Navigation Trustees* (1891) (19 Rettie 174) and *Lord Advocate v. Wemyss* (1899) (1900) A. C. 48.[69]

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[69]Islands arising *de novo* in the King's seas belong to the King "for they are part of that soil of the sea, that belonged before in point of proprietary to the King." Hale, *de Jure Maris,* in *Hall on the Seashore.*

The case of *Attorney General to Prince of Wales v. St. Aubyn* (1811), Wightw. 167, is the case that decided that the Crown owned the minerals and submarine mines in the marginal seas below low-water off the coast of Cornwall.

In the case of *Fitzhardinge v. Purcell* (1908), 77 L. J. Ch. 529 at 545, Mr. Justice Parker expressed himself thus:

> "Clearly the bed of the sea, at any rate for some distance below low-water mark, * * * are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership * * * The whole doctrine of *'incrementa maris'* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste."

In Scotland the law is firmly settled and in a similar sense. The question raised in *Lord Advocate v. Clyde Navigation Trustees* (1891) (19 Rettie, 174) was whether the latter body could dispose of dredgings in the bed of Loch Long, a sea-water loch. The Crown resisted the claim, maintaining it owned the bed of the loch and the bed of the sea for a distance of three miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord Kyllachy, who expressed himself thus (p. 177):

> "* * * with respect to the nature of the Crown's right in what is now acknowledged to be a part of the territory of the kingdom, viz., the strip or area of sea within cannon shot, or three miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within

C. The Status of the Concept in America in 1776.

We have found no statements of any decisions in the colonial period prior to 1776 that would indicate what the concept was of the marginal seas in the colonial courts, but just a few years after the ratification of the Constitution of the United States in 1788, by the required nine

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three miles of the shore. In each case it is of course, a right largely qualified by public uses. In each case it is therefore, to a large extent, *extra commercium;* but none the less is it, in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property."

The case of *Lord Advocate v. Wemyss* (1899) (1900 A. C. 48) had reference to the ownership of minerals in the bed of the sea below low-water mark and involved a question, not as to right upon or over the bed of the sea, but as to the actual ownership of the *corpus* or thing itself of which *corpus* the minerals formed a part. Lord Watson said (p. 66):

> "I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown."

Other cases holding similarly are *The Anna* (1805) (5 C. Rob. 373), *Gann v. Whitstable Free Fishers* (1865) (11 H. L. Cas. 192), *Attorney General v. Chambers* (1854), 4 DeM. & G. 206, *Denaby and Cadeby Main Collieries, Ltd. v. Anson* (1911) 1 K. B. 171, C. A., *Gammell v. Woods & Forests Commissioners* (1859) 3 Macq. 419, H. L.

The *dicta* of the minority in number of justices in *Reg. v. Keyn* (1876) 2 Exch. Div. 63, was definitely overruled in the Indian decision as not conforming to either the previous decisions in England or to the correct rule of law. The constant repetition in the Plaintiff's Brief to statements of Lord Chief Justice Cockburn in *Reg. v. Keyn* constitute an attempt to bolster the Plaintiff's argument by *dicta* in a decision which is not now and never was the law in England. Except for this *dicta* of Lord Cockburn and the other minority judges upon that particular point in the case, there is not one decision that we have come across or that the Plaintiff has cited in England that casts any doubt whatever from 1811 to date upon the sovereignty and ownership of the Crown in, on, and to the waters of the marginal sea and the soil of the bed of the ocean thereunder.

states, this court announced as early as 1804 the proposition that the marginal sea within the range of its cannon is the territory of the nation.[70]

In *Rose v. Himely,*[71] this court held that a seizure of a vessel beyond the territorial jurisdiction of a State is breach of a municipal regulation and is not warranted by the law of nations. A similar reference to the marginal seas as being within the territorial jurisdiction of the State is made in *Hudson and Smith v. Guestier.*[72]

In 1812, Justice Story in the case of the brig *"Ann"*[73] said:

> "As the *Ann* arrived off Newburyport, and within *three miles* of the shore, it is clear that she was within the acknowledged jurisdiction of the United States. All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a *cannon shot,* or *marine league,* over the waters adjacent to its shores (Bynk. Qu. Pub. Juris. 61; 1 Azuni [Mar. Law] 204, Par. 15; Id., p. 185, par. 4); and this doctrine has been recognized by the supreme court of the United States. [Church v. Hubbart], 2 Cranch [6 U. S.], 187, 231. Indeed such waters are considered as a part of the territory of the sovereign."

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[70]*Church v. Hubbart,* 2 Cranch, 187. This decision occurring only sixteen years after the ratification of the Constitution is so close to the Colonial Period that it must have reflected the status of international law, not only as it existed in 1804, but as it must have existed for some years prior thereto.

[71]4 Cranch 241 (1808).

[72]6 Cranch 283 (1810).

[73]Fed. Cases, Vol. 1, p. 926, Case No. 397 (1812).

A similar statement, that the jurisdiction of a state over waters surrounding its shores is within the range of cannon shot, is made by Justice Story in *"The Apollon."*[74] It should be noted that in all these cases, though they involved jurisdictional matters, the marginal sea within the three-mile limit or the range of cannon shot was characterized as "territorial." For further cases illustrating that this concept of a territorial sea in which the United States (and the several states thereof) under international law has both sovereign and proprietary rights, see the cases cited in Plaintiff's Brief, pages 34, 35, 70, 71 and 155. See also, the case of *Chicago Transit Co. v. Rose Campbell,* 110 Ill. App. 366 (1903) in which the statement of this court in the case of *Illinois Central Ry. Co. v. Illinois,* 146 U. S. 387, to the effect that at common law there was dominion and sovereignty over and ownership of lands under tide waters on the border of the sea, is quoted with approval. The Illinois Appellate Court further stated (p. 371) that "as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from the coast," citing *Manchester v. Massachusetts,* 139 U. S. 240, and cases there cited.

Beginning in 1916 the United States sought to prevent and enjoin the Alaska Pacific Fisheries from maintaining a fish-trap in navigable waters at the Annette Islands off southeast Alaska. This court, in affirming a decree granting an injunction in the case of *Alaska Pacific Fisheries v. United States,* 248 U. S. 78 (1918), stated that

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[74] 9 Wheaton 370 (1824). See also the case of *"Marianna Flora,"* 11 Wheaton 1 (1826).

the question was whether the Act of Congress (26 Stat. 1101) in question embraced only the uplands of the islands or included as well the adjacent waters and submerged land. In the course of the opinion the court stated (p. 87):

> "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank v. County of Yankton,* 101 U. S. 129, 133; *Shively v. Bowlby,* 152 U. S. 1, 47-48, 58; *United States v. Winans,* 198 U. S. 371, 383."

It should be noted that the jurisdiction of Congress in this case arose from the fact that Alaska was a territory and Congress had all of the jurisdiction which is usually divided between it and the State.

In another Alaska case it was held that the lands beneath the Bering Sea, valuable for gold mining, belonged to the United States as part of the public domain.[75] It can be stated positively that, without important exception, there is not one decision in the United States courts or in the state courts that holds that the United States and the states do not, within the limits of their respective divided sovereignty, have territorial jurisdiction over the marginal sea and over all navigable waters. And there

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[75] *Alaska Gold Recov. Co. v. Northern M. & T. Co.,* 7 Alaska 386.

is not one case that holds that the United States, as distinguished from the states composing it, has any proprietary rights whatsoever in the marginal seas or navigable waters or in the soil of the bed thereunder, except in those instances where the states have ceded to the Government such rights, or in those instances where by treaty, cession, or grant the United States is holding said rights in territory which has not yet been admitted as a state.

To support these views of our courts that there is both a jurisdictional and a property right in the marginal seas, both existing in 1776 and at all times since and for a long time prior thereto, it may be stated that both the legislative and executive departments of our Government have consistently, from the very inception of international relations between the United States and other countries, declared and affirmed such to be the fact under principles of both international and municipal law. In addition to those instances referred to in the Plaintiff's Brief, pages 37 to 43 and 121 to 135, we wish to call attention particularly to the following instances.

In a report of a Committee of Congress relative to the fisheries, January 8, 1782, it was suggested that the minister plenipotentiary for negotiating peace with Great Britain be instructed to state that with respect to he claim of the United States to a common right to take fish in the North American seas, particularly on the banks of Newfoundland, the claim did not extend to any parts of

the sea lying within three leagues of the shores held by Great Britain or any other nation.[76]

In a note from Mr. Jefferson, Secretary of State, to Mr. Hammond, the British Minister, November 8, 1793, it was stated that,

> "The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league. * * * The President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashore. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts."[77]

A similar statement was made by Mr. Jefferson, Secretary of State, to Mr. Genet on the same date.[78]

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[76]Extract from a report of Committee of Congress, consisting of Mr. Lovell, Mr. Carroll, and Mr. Madison, January 8, 1782. printed in Crocker, *Extent of the Marginal Sea* (1919), p. 630.

[77]British Counter Case and Papers, Geneva Arbitration, American reprint 553; Moore's *International Law Digest*, Vol. 1, p. 702.

[78]American State Papers For. Rel. I, 183; Wharton's *International Law Digest*, Vol. 1, p. 100. See also correspondence instructions to the District Attorneys Nov. 10, 1793 (MS. Dom Let.) and a circular of Mr. Hamilton, Secretary of the Treasury to Collectors of Customs Feb. 10, 1794 (British Counter Case and Papers Geneva Arbitration AM. reprint 568).

Mr. Pickering, Secretary of State, in a letter to the Lt. Governor of Virginia, September 2, 1796, stated that the jurisdiction of the United States has been fixed to extend "three geographical miles (or nearly three and one-half English miles) from our shores;"[79]

Mr. Buchanan, Secretary of State, to Mr. Jordan, January 23, 1849, stated that the exclusive jurisdiction of a nation "extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea increased by headlands; and, also, to the distance of a marine league, or as far as a cannon shot will reach from the shore along all its coasts."[80]

For further instances of very similar diplomatic language occurring between 1793 and the present time, see the following collections of documents: Wharton's *International Law Digest,* Vol. 1, 2d Ed (1887), pp. 100 to 115, inclusive; Moore's *International Law Digest* (1906), Vol. 1, pp. 698 to 722, inclusive; Hackworth's *Digest of International Law,* Dept. of State, Publication 1506, Vol. 1, pp. 623 to 651, inclusive. And as to the ownership of the sea bed and subsoil, see Hackworth, op. cit. *supra,* pages 653 to 656, inclusive. Again, with reference to fishing rights in territorial waters claimed by the United States, see Wharton, op. cit. *supra,* pages 38 et seq., and Hackworth, op. cit. *supra,* sec. 97, pages 656 to 660, inclusive.

In the conference at The Hague in 1930 for the codification of international law, a poll of the various countries was taken as to the breadth favored for the littoral maritime belt or marginal sea, eighteen states favored the

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[79]Moore, *International Law Digest,* Vol. 1, p. 704.

[80]37 MS. Dom. Let. 98; Moore's, *International Law Digest,* Vol. 1, p. 705.

three-mile limit, four favored the four-mile limit, thirteen favored the six-mile limit, one favored the twelve-mile limit, Greece would accept two miles, and some desired an adjacent zone, and others did not.[81]

It can be readily seen that the width and character of the maritime belt or the marginal sea is not even today the subject of uniform agreement, and each nation must, as have England and the United States since the middle of the eighteenth century, decide for itself by its municipal law what the international law for its own purposes is and shall be.

D. Conclusion.

From a perusal of the foregoing authorities and historical recital, *infra,* pp. 14 to 49, and Point I of Plaintiff's Brief, pages 15 to 58, we deem it self-evident, contrary to the artificial conclusions stated in Plaintiff's Brief,

(1) that, while theories of publicists have followed two complete cycles from open sea (Roman period) to closed sea (late Middle Ages) then to a modified open sea (1600-1750) which is again starting to close (Pres. Truman's Proclamation No. 2667, Sept. 28, 1945), actual international relationships and claims of states have acknowledged both the exclusive sovereignty and the right of ownership of littoral states in respect to their territorial waters, including the marginal sea, since the sixteenth century;

(2) that the sovereign and proprietary character of the right of a littoral nation in and to its marginal sea

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[81]Hackworth's *Digest of International Law,* Dept. of State, Pub. 1506, Vol. 1, pp. 628, 629.

one league wide was by 1750, generally, though not universally, approved;

(3) that at the present time neither the character nor width of the marginal sea is fixed more definitely than in 1750 by international law.

The Government in its Brief, pages 50-51, concludes from all of the evidence, and the conclusion is certainly borne out by the additional factors adverted to in this Brief, that "No nation today asserts a claim to a narrower belt than three miles. Subject to the common right of navigation, each state accedes to the others territorial sovereignty over a marginal belt extending from the coast outward a marine league or three geographic miles. In other words, a three-mile zone, generally speaking, seems to be a universally recognized territorial minimum. Some nations have insisted upon a marginal sea of four miles or more. But the majority of the nations have been unwilling to concede the existence of sovereignty over a belt wider than three miles, although several nations, especially for limited purposes, have often asserted jurisdictional rights over a wider zone." If this statement had been read immediately following the language used by Thomas Jefferson to Mr. Hammond in his note (1793), it would have sounded like a paraphrase of Mr. Jefferson's ideas concerning the width and character of the marginal sea back in the early days of our Nation. Certain it is that whatever the rights in and extent of the marginal sea may be today, they were, from all external evidence available, considered to be the same in 1776 when the original thirteen colonies became independent nations and assumed the robes of full sovereignty as complete and independent states.

II.

The State of California Became Vested With General Jurisdiction Over and With Ownership of All of the Navigable Waters and the Soil of the Beds Thereunder, Including the Marginal Sea Within Its Territory, Upon Being Admitted as One of the United States.

A. The Original Acquisition of California From Mexico.

The conquest of California, concluded by the Treaty of Guadalupe Hidalgo, signed February 2, 1848, and proclaimed July 4, 1848, resulted in the cession to the United States of certain territory out of which the State of California was subsequently carved. The treaty did not, by its language, attempt to transfer to the United States any of the Mexican sovereignty in the territory ceded. The United States could not have accepted such a cession of sovereignty, if attempted, because the sovereignty of the United States is that of an independent nation and is fixed and determined by the terms of the Constitution of the United States, and because the United States is limited by the Constitution, in the exercise of sovereign jurisdiction over all lands acquired by cession *without the consent* of the several States, to the exercise of that sovereignty granted to it by the Constitution. Such was the holding in *Pollard v. Hagan*.[82] Over this ceded territory, there-

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[82] *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565, at 572:

"If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. (Vat. Law of Nations, bk. 1, ch. 19, sec. 210, 244, 245, and bk. 2, ch. 7, sec. 80.)"

fore, the Federal Government could exercise all of the rights of sovereignty of both the Federal Government and the several States so long as the area ceded remained territorial. As soon, however, as a new State was formed therefrom, the United States lost a portion of that sovereignty which immediately vested in the said State so formed.

Article 5 of the Treaty of Guadalupe Hidalgo prescribed the boundary line to exist thereafter between the two republics of Mexico and the United States. That boundary line on the east commenced "in the Gulf of Mexico, three leagues from land, * * *" but on the west that boundary line followed the division line between Upper and Lower California "to the Pacific Ocean." It is evident that the boundary line did not go into the Pacific Ocean to any established international three-mile limit. That this is a correct interpretation of this language of the treaty is revealed by the further language of Article 5, in which it was provided that in order to preclude any difficulty in tracing this boundary line upon the ground, it was agreed that the said limit should consist of "a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point *on the coast of the Pacific Ocean* distant one marine league due south of the southernmost point of the Port of San Diego, * * *." It is, therefore, evident that the United States acquired no rights from Mexico in the navigable waters of the Pacific Ocean, nor, incidentally, in the marginal sea. This is the only interpretation that can be given to the language

of the treaty because it is evident that, by the maxim, *inclusio unius est exclusio alterius,* the boundary was intended to extend only into the gulf.

Upon the acquisition of California by the United States "to the Pacific Ocean," and while the said ceded area remained territory of the United States, such area was administered by the United States with full external and internal sovereignty, that is, the United States exercised under the Constitution that sovereignty which is usually exercised in combination by a State and the National Government.

The right of the United States to exercise over territories yet unformed into states such combined external and internal sovereignty stems from the constitutional provisions relative to the treaty-making power and the power to administer and provide rules for the regulation of territories and lands of the United States.[83]

But the United States can only continue to exercise the local sovereignty of a State so long as the territory is not formed into an admitted State, that is, so long as there has

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[83]*Sere v. Pitlot,* 6 Cranch. (U. S.) 332, 3 L. Ed. 240; *Downes v. Bidwell,* 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088; *American Ins. Co. v. 356 Bales of Cotton,* 1 Pet. (U. S. 511, 542, 7 L. Ed. 242. "Perhaps, the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." Marshall, C. J., in *American Ins. Co. v. 356 Bales of Cotton, supra.*

not been created a sovereign State possessing the requisite local or municipal sovereignty. Stated otherwise, the local sovereignty administered by the National Government in territories is held by the National Government in trust for any new State that may be formed out of such territory.[84]

So the United States, not having received from Mexico by cession any direct title to the tide and submerged lands or the marginal sea along the coast of California, could

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[84]*United States v. Gratiot,* 14 Pet. 526, 10 L. Ed. 573. Speaking with reference to the territory ceded by the original States to the United States Government out of which to carve new states, the Court in *Pollard v. Hagan,* 3 How. 212, said: "* * * we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding the territories.

"The right which belongs to the society or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. (Vat. Law of Nations, section 244.) This definition shows that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. * * *

"When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished

only become vested with title in the tide and submerged lands and the marginal sea in the same manner as the thirteen original colonies became vested with their titles to the beds of navigable waters in their respective territories upon declaring their independence. And when these thirteen original colonies ratified the Constitution of the United States, they did not cede thereby to the United States any of their general jurisdiction or property rights

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by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms in the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted."

Weber v. State Harbors Comrs., 85 U. S. 57, 21 L. Ed. 798;

City and County of San Francisco v. Leroy, 138 U. S. 656, 34 L. Ed. 1096.

Again, as was stated in *Knight v. United Land Ass'n.*, 142 U. S. 183, 35 L. Ed. 982, speaking of the Treaty of Guadalupe Hidalgo and the title that was acquired by the United States from Mexico "upon the acquisition of the territory from Mexico the United States acquired the title to tidelands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory."

Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331;

U. S. v. Mission Rock Co., 189 U. S. 391, 47 L. Ed. 865.

It was said in the case of *U. S. v. Holt State Bank*, 270 U. S. 49, at 55, 70 L. Ed. 465, that: "The United States early adopted and consistently has adverted to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States."

in and to the beds of their navigable waters, including the marginal sea.[85]

What existing sovereign rights are vested in each of the United States? One of the ways of determining is to consider each State as an independent nation, then determine what as an independent nation her rights would be among the whole family of nations, and then determine what portion of such rights under the Constitution have been delegated and transferred to the United States. With reference to the question of State control over fisheries on the seacoasts (the marginal sea) and in the bays and arms of the sea within the territory of a State, the Court in *Manchester v. Massachusetts* first assumed that Massachusetts had continued to be an independent nation, and then determined that her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations, that a right to control the fisheries within those boundaries would be conceded and that those boundaries would have included a strip not less than a

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[85]It was held in *U. S. v. Bevans,* 3 Wheat. 336, 4 L. Ed. 404, that the Constitution of the United States was not intended to and did not cede any State territory or any of the general jurisdiction of the State to the United States (p. 417):

"It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory; or, which is essentially the same, of general jurisdiction." *Pollard v. Hagan,* 3 How. 230, 11 L. Ed. 565; *Gibbons v. Ogden,* 9 Wheat. 203, 6 L. E. 23; *Martin v. Waddell,* 16 Pet. 367, 10 L. Ed. 997; *Den v. The Jersey Co.,* 15 How. 426, 14 L. Ed. 757; *Mumford v. Wardwell,* 6 Wall. 432, 18 L. Ed. 756; *Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331; *Appleby v. New York,* 271 U. S. 364, 70 L. Ed. 992.

marine league from the coast on the open sea. The Court decided that Massachusetts, considered as an independent nation, would have had control of her fisheries to the three-mile limit, that no provision of the Constitution ceded to the United States any of that control, and that, therefore, the State of Massachusetts had the exclusive control of its fisheries.[86]

Likewise, if California in 1850 had been considered as an independent nation when it was admitted to the Union, it would have had jurisdiction, control, and ownership of its navigable waters and their beds, including those of the marginal sea, just as the original thirteen colonies had; and that by becoming a party to the compact of union between the States, the State of California did not thereby cede to the United States any of its general jurisdiction with its concomitant property rights in and to the marginal sea and other navigable waters within its territory.

The rationale of the above statements of settled law in the United States are the results of the following valid reasoning:

1. Under the common law of England, as it existed in 1776, the Crown owned the navigable waters and the marginal sea thereunder by virtue of being the representative of a complete international sovereignty. This ownership was one of the Crown's prerogatives, that is, a part of its sovereignty, and was of a dual character. The Crown held a *jus publicum* and a *jus privatum* in the

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[86]*Manchester v. Massachusetts,* 139 U. S. 240, 35 L. Ed. 159. See, also, *Dunham v. Lamphere,* 3 Gray 268; *McCready v. Virginia,* 94 U. S. 391, 24 L. Ed. 248; *Smith v. Maryland,* 59 U. S. 71, 15 L. Ed. 269.

navigable waters and their beds, which meant that while its ownership was complete, it was not subject to indiscriminate alienation but was held impressed with a public trust for the use and benefit of its subjects, such trusts being for navigation, fishery, and other similar public rights and uses. These trusts were over the marginal sea as well as inland tidal waters.[86a]

2. As is indicated in the Government's Brief, some of the English colonies in America were not granted these royal prerogatives and some were. In those cases where the royal prerogatives had not been granted, the Crown continued to be the sovereign owner of the tide and submerged lands and the waters over them, adjacent to such colonies.

3. When the several colonies in America became independent nations in 1776, they became completely sovereign like any other international state, and, as such, and by virtue thereof, they assumed the royal prerogatives in and to the waters and bed of the sea, previously held by the English Crown.[87]

That the thirteen original states succeeded to the rights of the Crown is borne out by the manner in which they declared their independence. The Declaration of Inde-

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[86a]A complete review of the old English law is extensively set forth in the admirable opinion of Mr. Justice Gray in the case of *Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331; *Appleby v. New York,* 271 U. S. 364, 70 L. Ed. 992; *New York v. Delaware,* 291 U. S. 361, 78 L. Ed. 847.

[87]*Martin v. Waddell,* 16 Pet. 367, 10 L. Ed. 977; *Pollard v. Hagan,* 3 How. 212; *Weber v. State Harbor Commissioners,* 18 Wall. 57, 21 L. Ed. 798; *Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331; *Rundle v. Delaware & Raritan Canal Co.,* 14 How. 80, 14 L. Ed. 335.

pendence states with admirable clarity the decision of the original thirteen colonies to gain and hold sovereignty and to take and exercise all of the territorial rights formerly belonging to England and the English Crown, and that these thirteen original colonies were only united at that time for their mutual defense. In that greatest document ever struck off at a given time by the pen of man, we find this concluding paragraph:

> "We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

In the Articles of Confederation which were adopted only one year later, the following provision appeared in Art. II:

> "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled."

It appears that by the Articles of Confederation each of the original states retained its sovereignty, freedom, and independence.

The treaty of peace with Great Britain in 1783 (Treaty of Paris) distinctly shows by its language that Great Britain treated with each of the thirteen original states separately as a free, sovereign, and independent State. The treaty contained this language:

"Article I.

> His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachuset's Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the Government, propriety and territorial rights of the same, and every part thereof; and that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared that the following are and shall be their boundaries, viz:"

It is apparent that the territorial rights referred to included all territorial rights which, under international law, would include any rights and propriety recognized in the marginal sea. In Amendment X of the present Constitution of the United States, it is provided that

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

When each of the original colonies became an independent State, by reason of its complete sovereignty and the assumption of the prerogatives of the Crown, each State became the sovereign and proprietor of its territorial navigable waters and the soil under them out to the boundaries recognized by international law as being capable of being exclusively occupied and owned by a littoral State. These royal prerogatives, subject to the *jus publicum,* were held by each State in trust for its people.[88]

When the original thirteen States became United States in 1788, thirteen years after becoming independent nations having complete sovereignty, they granted to the United States by the Constitution all of their external sovereignty and a portion of their internal sovereignty. They were left with complete local or municipal sovereignty, subject only to the delegation of powers to the National Government, contained generally in the commerce and national defense clauses of the Constitution. By retaining their municipal sovereignty, however, these thirteen original States kept their prerogative of exclusive ownership of the navigable waters and fish therein and the soil thereunder, subject to the right of the United States to regulate commerce and provide for the common defense.[89] In other

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[88]These trusts comprising the *jus publicum* consist of navigation (*Illinois Central R. Co. v. Illinois,* 146 U. S. 387, 36 L. Ed. 1018; *Long Beach v. Lisenby,* 175 Cal. 575; *People v. California Fish Co.,* 166 Cal. 576), fishing [same cases], bathing (*Thiesen v. Gulf etc. R. Co.,* 75 Fla. 28), and such other public and useful purposes as the waters are adapted to (*State v. Gerbing,* 56 Fla. 603; *Home for Aged Women v. Commonwealth,* 202 Mass. 422). See, also, generally, *Martin v. Waddell,* 16 Pet. 367, 10 L. Ed. 997; *Weber v. State Harbor Commissioners,* 18 Wall. 57, 21 L. Ed. 798; *Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331.

[89]*United States v. Holt State Bank,* 204 Fed. 161, affirmed 270 U. S. 49, 70 L. Ed. 465.

words, the thirteen original States never ceded to the United States their sovereign right to the exclusive control and ownership for their people of fishing and of the other products of the sea in their territorial waters, or ownership of the soil and minerals therein, or general jurisdiction thereover, or their right to administer the public trusts therein (*jus publicum*) for the benefit and use of the people of each of them.[90]

B. Effect of California's Admission to the Union.

Having determined that the United States does not have, and never has had, any local or municipal sovereign rights over the respective territories of the original thirteen States, one of which local sovereign rights was the old prerogative of the Crown to jurisdiction over and ownership of the navigable waters and the soil of their beds for the purpose of administering the trusts imposed thereon and therein for the use and benefit of the people of each of said sovereign states, and having determined that those trusts and their administration must be subject to state sovereignty because the United States is not invested by the Constitution with the power or duty of administering such a class of trusts,[91] let us next investigate the conditions and circumstances surrounding California's admission to the Union and the effect thereof

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[90]In addition to the cases already cited under this point which support the above statements, the following should be added and noted: *Goodtitle v. Kibbe,* 9 How. 471, 13 L. Ed. 220; *Mobile Transportation Co. v. Mobile,* 187 U. S. 479, 47 L. Ed. 266; *Scott v. Lattig,* 227 U. S. 229, 57 L. Ed. 490; *Port of Seattle v. O. & W. R. Co.,* 255 U. S. 56, 63 L. Ed. 500.

[91]*Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331.

upon California's title to its navigable waters, including the marginal sea, and the beds thereof.

California was admitted as a State in 1850 by an Act of Admission (9 Stat. ch. L., 452). The Act recites that the people of California have presented a Constitution which was submitted to Congress and was found to be republican in its form of government, and then proceeds to state that:

> "The State of California shall be one, and is hereby declared to be one, of the United States of America and admitted into the Union on an equal footing with the original States in all respects whatever."

In addition thereto, section 3 of the Act provides, in substance, that there shall be no interference with the primary disposal of, and no impairment of the title of the United States, to its public lands. In Article XII of the Constitution of 1849, which was presented to Congress, it was provided that the boundary of the State of California shall extend into the Pacific Ocean three English miles, and shall include all the islands, harbors, and bays along or adjacent to the Pacific Coast.[92] The territorial boundaries of the State of California, therefore, have always, since 1850, included so much of the marginal sea as is within this three English mile limit. The Act of Admission ratified and confirmed these boundaries and is conclusive upon the United States, the State, and all peoples

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[92]*California Constitution of 1849,* Stats. 1850, pp. 24, 34. The present Constitution in Art. XXI carries the same boundary description.

therein.[93] The Government in its Brief argues that the equal footing clause only guarantees sovereign equality and not territorial equality. We are not much concerned with territorial equality because of the direct grant implied from the Act of Admission of three English miles out into the marginal sea, as set forth in the Constitution presented

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[93]In speaking of the establishment for the State of Florida of a territorial limit extending into the Gulf of Mexico three marine leagues, the Court said in *Pope v. Blanton,* 10 Fed. Supp. 18:

"The Treaty fixed the boundaries of Florida as the East and West Floridas, together with adjacent islands. The Act of Congress admitting the state to the Union fixed these boundaries as set out in the Treaty. This act in effect described one of the boundaries as being the Gulf of Mexico. Under international law this means that the jurisdiction of the state extends one league into the Gulf, or 3 miles. Admitting that the boundaries of the state were limited to one league off shore by the Treaty, and by Act of Congress admitting the state into the Union, and so remained until the Constitution of 1868, there is no rule of law to prevent the state, with the approval of Congress, from fixing the boundaries. It may be that it is usual to do this at the time of admission into the Union, but that does not signify that it cannot be done at any other time by agreement between the state and the Congress, so long as the change does not effect the territory of another state. *Louisiana v. Mississippi,* 202 U. S. 1, 26 S. Ct. 408, 50 L. Ed. 913; *New Mexico v. Colorado,* 267 U. S. 30, 45 S. Ct. 202, 69 L. Ed. 499; *Arkansas v. Tennessee,* 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258. * * *

"The consent of Congress need not be expressed, if it is implied from the acquiescence of Congress, and this may appear subsequently as well as at the time 'the compact in this case, having received the consent of Congress, though not in express terms, yet impliedly, subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee.' *Virginia v. Tennessee,* 148 U. S. 503, text 525, 13 S. Ct. 728, 737, 37 L. Ed. 537.

"Coequal with that of nations, it is a right of sovereignty inherent in states to fix their boundaries subject to the limitation, with the consent of Congress, and when a state acts with the consent of Congress, either expressed or implied, its action becomes conclusive upon the citizens. *Virginia v. Tennessee, supra,* Mr. Justice Field quoting from *Poole v. Fleeger,* 11 Pet. 185, 209, 9 L. Ed. 680."

to Congress and approved and ratified by that body. The territorial limits of California extend indisputably three English miles out into the marginal sea. It is also argued in the Government's Brief that there is no distinction between the marginal sea and public lands, and that, therefore, both were reserved by the Act of Admission to the United States, though the Government does admit that it has been decided many times that "public lands" do not include tide and submerged lands under navigable waters.[94] Upon investigating the reason for the differentiation between public lands and lands under navigable waters and the sea, we find that public lands are those lands held by the United States which are not impressed with a trust for the public and are, therefore, subject to the right of the United States to unqualifiedly dispose of them. Tide and submerged lands, including the marginal sea, are impressed, as we have heretofore discussed and shown, with a *jus publicum,* and the title that the sovereign holds in and to them is a qualified one. The administration of this public trust in such lands is a part and parcel of the local or municipal sovereignty and can be exercised only

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[94]The following cases hold that public lands do not include any lands under navigable waters: *Borax Consolidated v. City of Los Angeles,* 296 U. S. 10; *Mann v. Tacoma Land Co.,* 153 U. S. 273; *Newhall v. Sanger,* 92 U. S. 761; *Knight v. United Loan Ass'n,* 142 U. S. 161; *Doolan v. Carr,* 125 U. S. 618, 31 L. Ed. 844; *Leavenworth L. & G. R. Co. v. United States,* 92 U. S. 733, 23 L. Ed. 634. It was held in *St. Anthony Falls etc. Co. v. City of St. Paul,* 168 U. S. 349, 42 L. Ed. 497, that a grant of public lands does not include navigable waters or their soils. In the case of *Inland Finance Co. v. Standard Salmon Packers,* 7 Alaska 131, the Court decided that land held by the United States, situated below mean high tide along the coast of Alaska, was held in reserve for the benefit of the future state and was not public lands of the United States.

by that sovereign entity, the State, in which such sovereignty is lodged. Consequently, with respect to the original thirteen States, the National Government never had, and with respect to new States upon their admission, the National Government loses that local or municipal sovereignty capable of administering the trusts which are by law and custom imposed upon navigable waters and the soils thereunder, and for the same reason the several States in which such municipal or local sovereignty resides must be given the duty of administering such trusts. This distinction is very carefully brought out in the opinion in the case of *Van Brocklin v. Anderson,* 117 U. S. 151, 29 L. Ed. 845, where the Court said:

> "Upon the admission of a State into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order and the protection of persons and property throughout its limits, except where it has ceded exclusive jurisdiction of the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State, and not in the United States. New Orleans v. U. S., 10 Pet. 662, 737 [35 U. S. bk. 9, L. ed. 573, 602]; Pollard v. Hagan, 3 How. 212 [44 U. S. bk. 11, L. ed. 566]; Goodtitle v. Kibbe, 9 How. 471 [50 U. S. bk. 13, L. ed. 220]; Doe v. Beebe, 13 How. 25 [54 U. S. bk. 14, L. ed. 35]; Barney v. Keokuk, 94 U. S. 324 [Bk. 24, L. ed. 224]. But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting

> the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise."

It will be noted that in this case it was held that the navigable waters are held in trust for *municipal* purposes and that the United States, not being invested with municipal sovereignty, had no constitutional authority to retain title to such a type of property. In fact it has been held that a State of the United States can make no agreement which would grant the municipal right of sovereignty and eminent domain to the United States, because the United States has no constitutional capacity "to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted."[95]

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[95]*Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565. In the case of *Borax Consolidated v. City of Los Angeles,* 296 U. S. 10, 80 L. Ed. 9, the Court said:

"But this rule proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department. *Cragin v. Powell,* 128 U. S. 691, 32 L. Ed. 566, 9 S. Ct. 203, *supra.* So far as pertinent here, the jurisdiction of the Land Department extended only to 'the public lands of the United States.' The patent to Banning was issued under the preemption laws which expressly related to lands 'belonging to the United States.' Rev. Stat. §§2257, 2259. Obviously these laws had no application to lands which belonged to the States. Specifically the terms 'public lands' did not include tidelands. *Mann v. Tacoma Land Co.,* 153 U. S. 273, 284, 38 L. Ed. 714, 717, 14 S. Ct. 820. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' *Newhall v. Sanger,* 92 U. S. 761, 763, 23 L. Ed. 769, 770; *Barker v. Harvey,*

The distinction between public lands and lands under navigable waters is plain. Public lands are subject to sale and are not impressed with a public use and trust for the people of the State in which they are located. Navigable waters and lands thereunder are, on the other hand, not subject to sale in the ordinary sense of the usual uplands and are impressed with a public trust to be administered for the benefit of the people of each State. The United States by the Constitution is not empowered to administer any such trust (except in territories not yet formed into States), and any reservation of title thereto in the United States would defeat both the trust and its administration.

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181 U. S. 481, 490, 45 L. Ed. 963, 968, 21 S. Ct. 690; *Union P. R. Co. v. Harris,* 215 U. S. 386, 388, 54 L. Ed. 246, 247, 30 S. Ct. 138."

In the case of *Mann v. Tacoma Land Co.,* 153 U. S. 273, 38 L. Ed. 714, the Court said:

"That the title to tide lands is in the state is a proposition which has been again and again affirmed by this court, some of the earlier opinions going so far as to declare that the United States had no power to grant to individuals such lands at any time, even prior to the admission of the state and during the territorial existence. However, in the recent case of *Shively v. Bowlby, ante,* p. 331, after a careful review of the authorities, it was held that the denial in those opinions of the power of Congress to make such a grant was not strictly correct; but it was also held that, although Congress could, it had never undertaken by general laws to dispose of such lands, and in the summing up at the close of the opinion it was stated: 'The United States, while they hold the country as a territory, having all powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below highwater mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under

It is necessary that the State own and control the tide and submerged lands, including the marginal sea, in order for its municipal sovereignty to operate towards the administration of the public trusts impressed upon such property on behalf of its own people. The title to the corpus of the trust must be owned by the State so that the trust may be administered by the political entity in which the municipal or local sovereignty is lodged, *i. e.*, the State.

The administration of such trusts and the ownership of the corpus of such trusts is a part of eminent domain, and eminent domain is that portion of a state's sover-

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them, to the control of the states, respectively, when organized and admitted into the Union.'

"It is unnecessary, in view of this recent examination of the question, to enter into any discussion respecting the same. It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. * * *"

The distinction is very carefully brought out in *Illinois Central R. Co. v. Illinois,* 146 U. S. 387, 36 L. Ed. 1018, where the Court said (p. 1042):

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. * * *"

See, also: *United States v. Mission Rock Co.,* 189 U. S. 391, 47 L. Ed. 865; *United States v. Chandler-Dunbar Water Power Co.,* 209 U. S. 446, 52 L. Ed. 881.

eignty that, under the Constitution, is reserved to the several States of the Union.[96]

To fulfill the implications of the equal footing clause, it has wisely been held repeatedly by the courts that each new State must be accorded the same sovereign right of jurisdiction over and of ownership of the navigable waters and the beds thereof within its territorial limits as the original States held and now hold; and that public lands reserved to the United States do not include lands impressed with a trust which must be administered by the local or municipal sovereign. Propriety in navigable waters and the lands thereunder is so much a part of the exercise of local sovereignty of a State that a provision in an Act of Admission that would seek to

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[96]*Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565; *Martin v. Waddell,* 16 Pet. 367, 10 L. Ed. 997; *The Propeller Genesee Chief et al. v. Fitzhugh,* 12 How. 443, 13 L. Ed. 1058; *Barney v. City of Keokuk,* 94 U. S. 324, 24 L. Ed. 224; *Van Brocklin v. Anderson,* 117 U. S. 151, 29 L. Ed. 845; *Packer v. Bird,* 137 U. S. 661, 34 L. Ed. 819; *Hardin v. Jordan,* 140 U. S. 371, 35 L. Ed. 428. In this case the Court said that the state's "title to the shore and lands under water is regarded as incidental to the sovereignty of the state —a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be *retained* or granted out to individuals by the United States." The case continued that the State may even dispose of the usufruct of such lands, such as oyster beds, fisheries.

In the case of *Illinois Central R. Co. v. Illinois,* 146 U. S. 387, 36 L. Ed. 1018, it was held that while the State may grant restricted rights in the navigable waters and soils under them, a grant of all the lands would not be within its legislative power, because the State cannot abdicate its trust over such property in which the whole people are interested.

See, also, *United States v. Mission Rock Co.,* 189 U. S. 391, 47 L. Ed. 865; *Massachusetts v. New York,* 271 U. S. 65, 70 L. Ed. 838; *United States v. Oregon,* 295 U. S. 1, 79 L. Ed. 1267.

reserve them to the United States would be unconstitutional and void.[97]

The purpose of the Union was to establish complete equality between all States, original and new. To permit original States to own tide and submerged lands in their marginal seas, to utilize the products thereof for their people, to administer the public trusts therein solely for State benefit, and, on the other hand, to deny to new States like rights and privileges, would certainly not result in any kind of equality—political or otherwise. It is interesting to note that there is a line of cases holding that, when Congress admits a new State into the Union, it has no power to prescribe any conditions operating to limit in the future the legislative power of such new State over matters which in their nature are confided exclusively to the States as a part of their sovereign powers. In other words, the equality of new States with older States cannot be impaired with regard to municipal or local sovereignty by the provisions of enabling acts or conditions otherwise imposed by Congress at the time of admission.[98]

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[97]*Hardin v. Jordan,* 140 U. S. 371, 35 L. Ed. 428.

[98]*Escanaba etc. Transportation Co., v. Chicago,* 107 U. S. 678, 27 L. Ed. 442; *Coyle v. Smith,* 221 U. S. 559, 55 L. Ed. 853; *Permoli v. New Orleans Municipality No. 1,* 3 How. 589, 11 L. Ed. 739; *Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565; *Cardwell v American River Bridge Co.,* 113 U. S. 205, 28 L. Ed. 959.

It should be noted that in this latter case the equal footing clause was held to apply to not only sovereignty, but *dominion.* Likewise, in the case of *Goodtitle v. Kibbe,* 9 How. 471, 13 L. Ed. 220, reference is made to the vesting in the State upon admission of sovereignty and dominion over navigable waters and lands.

A very good statement of the meaning of the equal footing clause is to be found in *Spooner v. McConnell, 22* Fed. Cas. No. 13,245, 1 McLean 337 at 348:

> "Does this provision mean that the new state shall exercise the same powers and in the same modes, as are exercised by any other state. Now this cannot be the true construction of the provision, for there cannot be found, perhaps, any two states in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the states are not equal. But if the meaning be, that the people of the new state, exercising the sovereign powers which belong to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned; within the restrictions of the federal constitution, then the states are equal. Equal in rank, equal in their powers of sovereignty; and only differ in their restrictions, which, in the exercise of those powers, they may have voluntarily imposed upon themselves. Thus a state may, in her constitution, prohibit the legislature from incorporating banks, or in fact from passing any act of incorporation; and yet this state would be admitted into the Union on an equal footing with the other states. The same powers were exercised in forming a constitution, but in the distribution of the powers of the state government they were not given to the same extent, nor were they to be exercised in the same manner. But this produces no inequality. The states are equal, inasmuch as each has, by its own voluntary will established its own government, and has the power to alter it."

C. Conclusion.

The State of California is the owner in her sovereign capacity, not only of her inland navigable waters and their beds, but of the waters and bed of the marginal sea; for all the courts of the United States, both federal and local, have recognized for as long as the subject has been presented to them:

1. That the original thirteen States, as independent sovereignties, owned the lands under the navigable waters within their territorial limits subject to certain public trusts;

2. That new States admitted upon equal footing had equal sovereign rights in and to the lands under the navigable waters within their territorial limits;

3. That the State of California was admitted upon an equal footing with the original states *in all respects whatever* (which is by its very language not limited to political equality) and its territorial boundary was fixed by Congress as including three English miles out into the marginal sea;

4. That this Act of Admission must be construed as a grant of everything but the public lands owned by the United States, because Congress had no power, and no attempt was made in the Act of Admission, to withhold any sovereign rights or the control of the eminent domain from the new State of California (ownership of the marginal seas and the lands thereunder is part of the eminent domain);

5. That all courts have recognized the marginal sea and its bed as being within the territory and ownership of every State bordering on any portion of it;[99]

6. Hence, the State of California is the owner by reason of its inherent sovereignty of the bed of the marginal sea within the limits of three English miles, together with the other navigable waters and their beds within its territorial limits; and the Act of Admission, by ratifying the Constitution of the State of California and approving the limits of its territory set forth in the Constitution, and by withholding to the United States only its public lands, did grant, both affirmatively and by operation of law, all navigable waters and soil of the beds thereunder, including the marginal sea and its bed, out to the three English mile limit, to the State of California.[1]

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[99]*McCready v. Virginia,* 94 U. S. 391, 24 L. Ed. 248; *Manchester v. Massachusetts,* 139 U. S. 240, 35 L. Ed. 159; *Hamburg American Steamship Co. v. Grube,* 196 U. S. 407, 49 L. Ed. 529; *Louisiana v. Mississippi,* 202 U. S. 1, 50 L. Ed. 913; *United States v. Bevans,* 3 Wheat. 336; *Humboldt Lumber Manufacturers Ass'n v. Christopherson,* 73 Fed. 239.

[1]*Pope v. Blanton,* 10 Fed. Supp. 18.

The citations for the various propositions urged in this point have by no means been exhaustive, but the cases cited are merely representative of the great mass of authorities upon the various propositions stated. There are no cases in any jurisdiction in the United States, from the decisions of this Honorable Court to the decisions of the least court in the land, that sustain or even imply or suggest that the propositions urged by the Government in its Brief have any legal merit whatsoever. However ingenious the argument of the Government may be considered, it is not an argument based upon authority or logic.

III.

The Marginal Sea Along the Coast of California Is Owned by the State of California, Subject to the Rights Therein Granted to the United States by the Constitution; the Decisions of This Court and All Inferior Courts Definitely Establish This Ownership.

A. The Decisions of This Court Declare That the State of California Owns All of the Sea Within Its Territorial Limits; the Territorial Limits Include the Marginal Sea.

In the Government's Brief, it is admitted that this Court has repeatedly decided that the tidelands and inland waters within California territory are owned by that State.[2] It is also admitted that the State of California has legislative jurisdiction within the marginal sea.[3]

The marginal sea is, therefore, admittedly territory of the State of California for some purposes having to do with local State sovereignty.

We have therefore three premises admitted by the Government, and which in face of the overwhelming mass of decisions thereon it has apparently decided cannot be denied:

1. That the marginal sea is by international law a part of the littoral state, both territorially and in propriety;

2. That the marginal sea off the coast of California is within the boundaries, and is a part of the territory of the State of California; and

3. That the State of California has legislative jurisdiction thereover.

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[2]Pl. Brief, pp. 67-71 and pp. 153-163.

[3]Pl. Brief, pp. 4-5, 151-153, and 156-157.

In the light of these admitted premises, let us consider the line of Supreme Court decisions, which the Government with an assumption of confidence says only applies to inland waters. The logical method of reaching the decisions in those cases should be carefully noted. Each of the decisions employed this logical syllogism:

> Major premise—All navigable waters within a State are owned by the State;
>
> Minor premise—The particular river, harbor, bay, or portion of open sea involved lies within the State's boundaries and is navigable.
>
> Therefore—The State owns that particular river, harbor, bay, or portion of the open sea.

If either premise had been legally or factually false, the conclusion could not have been judicially reached or decided. In each case involving inland waters or the sea, it was necessary, in thus reasoning from the general to the particular, to decide upon a legally true general premise. In all of the decisions determining that the States own their navigable waters this was done. When a court judicially determines a broad, general principle and then decides that the particular situation before it falls within that principle, the announcement of the broad principle is not *dicta,* for it was necessary to the decision of the case. So in all of the cases decided by this Court involving State ownership of tide and submerged lands, the declaration therein of the basic principle, that all of the navigable waters of a State, together with the lands thereunder, are owned by that State, is not *obiter dicta,* but is an essential part of the decisions themselves.

In the first decision upon the subject, *Martin v. Waddell,* 16 Pet. 367, 10 L. Ed. 997, it was held that "when

the Revolution took place the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation." From the very first pronouncement of this Court upon the subject it is stressed that the people of the State own "all their navigable waters and the soil under them for their own common use." This was based upon the English law to the same effect. Lord Hale is cited to the effect that the king "is the owner of this great coast, and, as a consequence of his propriety, hath the primary right of fishing in the sea * * *."

In England, since there was only one sovereign, no possible distinction could exist between the marginal seas and inland waters. Each colony, upon declaring its independence, succeeded individually to the whole of the Crown's prerogatives in its territorial navigable waters. Each of the original States, therefore, upon the Revolution, became the owner of the waters that were navigable and the soil under them within its territory without reference to any artificial distinction, as urged by the Government, between marginal waters and inland waters. In fact, no such distinction, from the viewpoint of their ownership, has ever been suggested before the Government's Brief in this case.

Again, in the next decision of this Court in point of time, *Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565, it was held:

1. That "the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their common use";

2. That no compact between the United States and the State could diminish or enlarge these rights, because the United States is constitutionally incapable of holding any portion of the municipal right of sovereignty or eminent domain within the limits of a State;

3. That the ownership of the navigable waters and their beds is part of the eminent domain, a sovereign power of a state;

4. That the equal footing clause includes all rights of sovereignty, jurisdiction, and eminent domain; and

5. That, therefore, a new state holds title to all its navigable waters and their beds, because the English Crown so held them, the original states so hold them, new states admitted upon an equal footing so hold them, and the United States is constitutionally incapable of so holding them.

It must be palpably apparent from this decision that there is no distinction made between arbitrarily chosen classes of navigable waters, but that all are lumped into one common kind with the only distinguishing characteristic being that of navigability.

An exhaustive and learned opinion was written in the case of *Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331, by Mr. Justice Gray. The whole legal history of the subject is there reviewed in minute detail. We take oc-

casion in the footnote to quote the outline of Mr. Justice Gray's statements of fact and law.[4] This decision announced the principle that we believe is applicable here, and which confounds the Government in its attempt to differentiate between the marginal sea and inland waters

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[4]"I. By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the *tide ebbs and flows,* and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum,* in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof *jus publicum,* is vested in him as the representative of the nation and for the public benefit. * * *

"II. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States. * * *

"III. The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below, high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only. * * *

"IV. The new states admitted into the Union since the adoption of the Constitution have the *same rights as the original states in the tide waters,* and in the lands below the high water mark, within their respective jurisdictions. * * *

"V. That these decisions do not, as contended by the learned counsel for the plaintiff in error, rest solely upon the terms of the deed of cession from the state of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hidalgo of 1848. * * *" (*Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331.)

for the purpose of fixing ownership thereof. We quote from the opinion as follows (p. 347):

> "* * * In our view of the subject, the correct principles were laid down in *Martin v. Waddell,* 41 U. S. 16, Pet. 367 (10:997); *Pollard v. Hagan,* 44 U. S. 3 How. 212 (11:565), and *Goodtitle v. Kibbe,* 50 U. S. 9 How. 471 (13:220). These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genessee Chief. v. Fitzhugh,* 53 U. S. 12 How. 442 (13:1058), has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. * * *."

All of the other cases decided by this Court[5] proceed upon the same reasoning. In each the Court has merely asked one question: Are the waters involved navigable? If so, this Court has consistently held that they and their beds are owned by the State within whose borders they lie. No questions have ever been asked as to what kind of navigable waters there are. This Court has always deemed that inquiry immaterial. Navigability, and navigability alone, has been applied as the true and only

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[5]See list of cases in Pl. Brief, p. 70, n. 6, 7, 8, 9 and 10.

test of state ownership. It can therefore be seen that the enunciation of this simple, all inclusive test has not been the expression of mere *dicta* in all of these cases, but has been the expression of a legal conclusion necessary to the judgment announced in each. These same cases have therefore announced a rule of property that must be universally applied to all navigable waters. We presume that the marginal sea is navigable.

Some decisions of this Court have used the all-inclusive phrase "navigable waters, and the soils under them" in speaking of the dominion and propriety of the several States.[6] Other decisions have employed the phrase "soils under the tidewaters."[7] Still others have spoken of lands below the "high water mark." Several of these decisions and others have dealt with the title of the State of California in and to its navigable waters and the beds thereof.[8] Since the decision in *The Propeller Genesee*

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[6]*Mumford v. Wardwell,* 6 Wall. 423, 436; *County of St. Clair v. Lovingston,* 23 Wall. 46, 68; *Scott v. Lattig,* 227 U. S. 229; *Port of Seattle v. Oregon & W. R. R.,* 255 U. S. 56, 63; *United States v. Holt Bank,* 270 U. S. 49, 54; *Fox River Co. v. R. R. Comm.,* 274 U. S. 651, 655; *United States v. Oregon,* 295 U. S. 1, 14.

[7]*Weber v. Harbor Commissioners,* 18 Wall. 57, 65-66; *McCready v. Virginia,* 94 U. S. 391, 394; *San Francisco v. LeRoy,* 138 U. S. 656, 671; *Knight v. U. S. Land Association,* 142 U. S. 161, 183; *Illinois Central Railroad v. Illinois,* 146 U. S. 387, 435; *Appleby v. New York,* 271 U. S. 364, 381; *Borax, Ltd. v. Los Angeles,* 296 U. S. 10, 15.

[8]*Mumford v. Wardwell; Weber v. Harbor Commissioners; San Franisco v. Le Roy; Knight v. U. S. Land Association; Borax, Ltd. v. Los Angeles, supra; California v. Southern Pacific Co.,* 157 U. S. 230, 39 L. Ed. 683 (1894); *United States v. Mission Rock Co.,* 189 U. S. 391, 47 L. Ed. 865 (1902).

Chief v. Henry Fitzhugh,[9] there has been no distinction between "tidewaters" and "navigable waters." As stated in *Illinois Central R. Co. v. Illinois,*[10] "tidewater and navigable water are synonymous terms," when employed in cases relating to the title of the State to such waters. A perusal of the various decisions cited will show that this Court has often, in the same sentence, used the term "tidewaters," followed by the expression "navigable waters" or water "below high water mark," all in a plainly synonymous sense.

The Government[11] admits that the language of these many decisions is plainly broad enough to include the marginal sea, but attempts to pass the language employed off as "probably merely fortuitous." On the contrary, it is patent from a perusal of the decisions that such broad language was employed advisedly and with understanding that the exact terms used embraced the marginal sea. Let us consider for a moment that in *Shively v. Bowlby,*[12] for example, the Court studiously reviews the English authorities and arrives at the conclusion that at common law the Crown owned the bed of the sea and the arms of the sea (patently including the marginal sea) and that the original States succeeded to all these rights after the Revolution. This Court has always considered that the marginal sea is included in its references to "navigable waters," "water below high water mark" and "tidelands." This is plainly the case, as can be seen from the

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[9]12 How. 443, 13 L. Ed. 1058 (1851).

[10]146 U. S. 387, 36 L. Ed. 1018 (1892).

[11]Pl. Brief, p. 154.

[12]152 U. S. 1.

language used in *Smith v. Maryland,*[13] where a more definite, though no less inclusive, term for navigable waters was used. It was there declared that "whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, or within whose territory, it lies, subject" etc.

We have already referred to the fact that the State's title to the soil of the sea is a qualified one, impressed with a public trust for commerce, navigation, fishery, bathing, and other public uses. The right of the people of a State to enjoy the common right of fishery, for example, constitutes a property right in the waters and bed of the sea.[14] This right of fishery is under State control exclusively because the State has sovereignty and the property in the fish in and soil under its navigable waters.[15] To minimize the grave effect of these decisions upon the Government's theories, the Government has asserted that the decision in *Skiriotes v. Florida*[16] explains that this State control is only valid until Congress shall legislate. But the *Skiriotes* case involved the question of a state's jurisdiction on the high seas, outside the territorial limits of the nation under international law. In carefully distinguishing this situation from that which was involved in *Manchester v. Massachusetts,*[17] Chief Justice Hughes

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[13]18 How. 71, 15 L. Ed. 269 (1855).

[14]*Den v. Jersey Co.,* 15 How. 426, 14 L. Ed. 757 (1853).

[15]*Smith v. Maryland,* 18 How. 71, 15 L. Ed. 269; *McCready v. Virginia,* 94 U. S. 391, 24 L. Ed. 248; *Manchester v. Massachusetts,* 139 U. S. 240, 35 L. Ed. 159; *Lowndes v. Huntington,* 153 U. S. 1, 38 L. Ed. 615; *The Abbey Dodge v. U. S.,* 223 U. S. 166, 56 L. Ed. 390.

[16]313 U. S. 69, 85 L. Ed. 1193.

[17]139 U. S. 240, 35 L. Ed. 159.

stated that the *Manchester* decision involved territorial waters of the State of Massachusetts, in which waters it was decided that the State had exclusive control, subject only to the power of Congress to regulate commerce.

The case of *Manchester v. Massachusetts, supra,* still remains therefore, so far as the navigable waters of a State to the three-mile limit on the open sea are concerned, the law as announced by this Court, and its pronouncements have remained unmodified by any other decision.

The contentions of the defendant therein have a familiar ring. They were that Massachusetts under the Constitution had transferred her right of control over fisheries of *the ocean* and her rights over the waters adjacent to the coast and a part of the ocean to the United States, that in bays and on the open sea legislative control partook of national sovereignty, and that fishing is in its nature an integral part of national sovereignty. This Court decided, however, that if Massachusetts had continued to be an independent nation, her control of fisheries within three marine miles of the coast would have been unchallenged, and that under the Constitution, Massachusetts retained its right of propriety and control thereof. Furthermore, there was no decision as to whether Buzzard's Bay, the area involved, was a true bay or not, since that question was immaterial. It was sufficient in the *Manchester* case to determine that the *locus* was within the three-mile limit and, hence, subject to the control of the State over its own property and domain. The case is law therefore as to the marginal sea and the control and ownership thereof by the States.

In *McCready v. Virginia,*[18] it was stated:

> "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tidewaters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

In *Louisiana v. Mississippi,*[19] in answer to a contention that Lake Borgne is the open sea, the Court, in finding that the Lake was not in the open sea because it was in the "maritime belt," said:

> "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester v. Massachusetts,* 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559; *McCready v. Virginia,* 94 U. S. 391, 24 L. Ed. 248."

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[18]94 U. S. 391, 24 L. Ed. 248.

[19]202 U. S. 1, 50 L. Ed. 913.

This Court, in the case of *The Abby Dodge*[20] held that a Federal statute that would attempt to regulate the gathering of sponges in the territorial waters of a State out to the three-mile limit would be unconstitutional and void, because the several States own their territorial navigable waters and the fish and usufruct thereof out to the three-mile limit.

In view of the uncompromising language and the reasoning employed in these decisions regarding the ownership and regulation of fisheries, oysters and sponges, it is impossible for the Government by any argument to avoid the patent effect of them. The United States simply does not have any ownership of or general dominion or jurisdiction over *any* navigable waters within a State. Its control can only be that granted to it by the Constitution.

It is not surprising that inferior Federal courts and nearly all of the State courts in seaboard States have applied these principles at some time to the marginal sea within their boundaries, without making or perceiving any distinction in the application of the principle to bays and other inland waters, and to the high seas within the marginal three-mile belt.[21]

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[20]223 U. S. 166, 56 L. Ed. 390.

[21]*Humboldt Lumber Mfg. Ass'n v. Christopherson,* 73 Fed. 239 (1896). In this case it was said, on the authority of *U. S. v. Bevans,* 3 Wheat. 336 and *Manchester v. Massachusetts,* 139 U. S. 264, that the jurisdiction of the State of California extends out three English miles. This jurisdiction, as we have seen includes the ownership of the usufruct of the sea and its bed. In *Boone v. Kingsbury,* 206 Cal. 148 (1928), cert. den. *sub. nom. Workman v. Boone,* 280 U. S. 517, a question arose regarding the right of the State to grant prospecting oil permits in the marginal sea, "not situated upon a harbor, bay, or inlet or estuary" (p. 182), it was decided that the State owned such waters and lands thereunder in trust for the people of the State.

An impartial reading of the many decisions of this Court and other courts upon this subject demonstrates that only a biased litigant could say (Pltf. Br. p. 153) that "This court never has held that the States own the marginal sea or the soil or minerals thereunder."

In fact, the Government's admission that State jurisdiction extends over the marginal sea, completely demolishes its entire argument. A portion of that jurisdiction consists of administering the trusts in the marginal sea for the benefit of its peoples, trusts which require the exercise by the State of control over the use and disposition of the fruits of the sea and its bed. Should the ownership be that of the United States, the State would lose the power to control the use and disposition of the usufruct of the marginal sea, and the marginal sea would be held in the same manner as "public lands." The trusts in favor of the inhabitants of the State would cease to exist, for the national government has no constitutional authority to exercise any of the States' local or municipal sovereignty within the borders of any State.

B. Ownership of the Marginal Sea Is an Attribute of the Municipal Sovereignty of the States; and the Sovereignty Ceded to the National Government by the Constitution Neither Comprehends Nor Requires National Ownership Thereof.

International law only determines the rights of one sovereign state as against other coequal sovereign states. Those rights having once, by international law, been determined (in this case, that each state is sovereign, both as to control and ownership of all of its navigable waters, including a marginal sea) to appertain to the sovereignty

of an international state, reference must be had to the municipal law of the State to determine who within the State is the owner. The court in *Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565, held that

> "Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it."

The Government has admitted[22] that "the constitution, not international law, is determinative of rights as between the States and the United States." If the Government had pointed to one power granted to it that required the ownership in general of the marginal sea for its proper exercise, then its argument, Plaintiff's Brief, pages 72-91, inclusive, might have had some semblance of validity. But instead of doing that, the Government again admits, Plaintiff's Brief, page 89, that it does "not argue that the effective exercise of the foregoing powers granted to the Federal Government by the Constitution would be impossible without ownership of the bed of the marginal sea."

In *Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565, these two facts, that the Government has admitted, impelled the Court to decide that the States own their navigable waters, including the marginal sea. The portion of the opinion to which we refer is as follows:

> "* * * This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions,

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[22]Pl. Brief, p. 74.

and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, 'and the laws which shall be made in pursuance thereof.' "

There being not one single power vested in the national government which requires the *ownership* of the marginal sea for its proper exercise, we can fairly ask, what would the national government do with the marginal sea if it did own it; what *could* it do with the *ownership* of the marginal sea and at the same time confine itself to the exercise of the powers and duties confided to it by the Constitution? Every proper power belonging to the national government is now exercised, when required, in and on the marginal sea, without ownership or claim of ownership by the United States. By what right, then, does the United States claim this ownership? Certainly not by the Constitution. And if not by the Constitution, by what else? For the Constitution is the sole source of the sovereignty of the United States.

C. The Thirteen Original States Do Own the Bed of the Marginal Sea and Upon Being Admitted Upon an Equal Basis, All New States Likewise Have the Same Ownership; Furthermore, Regardless of Whether the Original States Own the Bed of the Marginal Sea, If Outside of Their Declared Boundaries, New States Do Own the Bed of the Marginal Sea If Their Boundaries Are Such as to Include It.

At common law, the Crown owned the bed of the marginal sea. This ownership existed regardless of whether the Crown or Parliament so declared it by statute or otherwise.[23]

The Crown's ownership, because of the public character of the right, existed as an incident of sovereignty. Sovereignty does not depend for existence upon being declared. An apt parallel is that of the right of eminent domain in the sense of taking property for public use. Being an incident of sovereignty, the power of eminent domain does not depend for its existence upon being declared or claimed by the sovereign. Similarly, the ownership of the bed of the marginal sea, as with all other navigable waters, does not depend for its existence upon any declaration or claim by the littoral State. Claims and declarations cannot create; they can only state or confirm a preexisting right of sovereignty.

If the original States succeeded to the rights of the Crown upon declaring their independence, they became the owners of their respective marginal seas by virtue of their sovereignty, regardless of whether such ownership was

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[23]See survey of common law in *Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331; also summary of common law in Point I, pp. 14 to 49, incl., of this Brief, especially *Secretary of State of India v. Chelikani Rama Rao,* L. R. 43 Ind. App. 192, which was decided upon cases and writings of publicists in part before the Revolution.

exercised or declared. Until exercised, such ownership lay dormant, but it was nevertheless an ownership.[23a]

In *Manchester v. Massachusetts,* 139 U. S. 240, it was held that the territorial limits of Massachusetts extended into the marginal sea. The declaration was contained in a statute. If the ownership of the bed of the marginal sea had not been in Massachusetts since 1776, we fail to see how in reason a statute of the State could create a property right where none existed before. The validity of the statute must have been placed upon the ground that Massachusetts owned the bed of the marginal sea and other navigable waters at all times since 1776, regardless of whether they were so declared or claimed. Such was the decision in *Dunham v. Lamphere,* 3 Gray 268 (Mass. 1856).

But we believe that nearly all, if not all, of the States, both original and new, have in various ways so acted as to directly or indirectly claim and assert their ownership of the marginal sea and its bed. Regulatory fishing statutes are well-nigh universal among the several seaboard States. Since the regulation of the right to *appropriate*

[23a]See *State of Ruvido,* 137 Me. 102, 15 Atl. (2d) 293, where it was held that a State need not declare nor define its sovereignty over the territorial sea in order to have it. The court said:

"He complains because he says this state has not by statute, as has Massachusetts, defined its territorial limits on the coastal waters. Such a statute, however, would be only declaratory of the law. A man cannot 'add one cubit unto his stature,' and the legislature by its act cannot extend the jurisdiction of the state beyond the limits generally recognized by law. The sovereignty over territorial waters exists even though the state has never seen fit to define their limit. The State of Maine has exercised this authority as to portions of these waters. *McClain v. Tillson,* 82 Me. 281, 19 Atl. 457; *State v. Thompson,* 85 Me. 189, 27 Atl. 97. There is no reason why it may not assume control over all. This was certainly the intent of the legislature in enacting the statute here in question."

(as distinguished from regulation of commerce or the exercise of the State's police power) fish, oysters, sponges, etc., in the marginal sea presupposes dominion over and ownership of that which is thus being regulated, it would seem that such fishing regulations are declarations of ownership of the marginal sea by those States. In California, the declarations have gone much further. Statutes now regulate the leasing of the marginal sea for prospecting for oil.[24]

The discussion in the Government's Brief, pp. 93 to 139, inclusive, is therefore immaterial. That many of the colonial boundaries ran only to the ocean or sea, or that many of the original states have not declared or directly

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[24]*Boone v. Kingsbury,* 206 Cal. 148, app. dis. and cert. den., 280 U. S. 517. If, as contended by the Government, there is doubt as to the ownership of the bed of the marginal sea being an incident of sovereignty, then there is no ownership except by declaration followed by occupation. The United States has never declared that it owns the bed of the marginal sea. In fact, Congress has actually refused to so declare. In 1939, H. J. Res. 176 and H. J. Res. 181 were introduced in the House (76th Cong., 1st Session) to declare the title of the United States in the submerged lands within the territory of the United States. About the same time, S. J. Res. 83 and S. J. Res. 92 were introduced in the Senate to declare title and ownership of the oil reserves along the coasts of California. All of the Resolutions failed of passage. H. J. Res. 225, which had passed both the Senate and House in 1946, and which was designed to confirm the States in their title to the submerged lands off their seacoasts and to quitclaim any title of the United States thereto, was vetoed by the President. Quite apparently, Congress has never desired to claim, and has never claimed the tide or submerged lands (including the marginal sea) belonging to the maritime States. On the other hand, California has actually occupied the marginal sea for many purposes, *i. e.,* fishing and kelp bed regulation and oil leasing. If, in the language of Lord Cockburn in *Reg. v. Keyn,* L. R. 2 Exch. Div. at 198-199 (cited in Pl. Brief many times with approval at pp. 47, *et al.*), the bed of the sea beyond low-water mark "would become the property of the first occupier," then the bed of the marginal sea belongs to California as the first occupier thereof.

asserted their ownership of the bed of the marginal sea is immaterial to the question of State ownership, especially if such a declaration may be effectively made at any time at the option of the State.

Let us assume that the original States only own the beds of their navigable waters within their expressed boundaries, and not in the marginal sea unless within such boundaries. In the case of California we have found that her boundary, three English miles into the marginal sea, has been approved by Congressional action. The equal footing clause means, if nothing else, equal sovereign rights within the boundary of the State of California with the rights of the original states within their boundaries. If the original states owned the beds of all their navigable waters within their boundaries (even though the marginal sea may not have been included in some of the boundaries), to be upon an equal footing with them California must own the beds of all her navigable waters within her boundary (which in her case, by the Act of Admission and her Constitution, includes the marginal sea).[25]

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[25]In *Smith v. Maryland,* 18 How. 71, 15 L. Ed. 269, for example, it was said that the State is sovereign within its territorial limits and is the owner of the beds of its navigable waters therein. The equal footing clause may not guarantee boundaries for new States that are similar to those of the original States, in actual territorial extent, because the State, with the consent of Congress, may fix its own boundaries, and because each State is differently located. But, on the other hand, the equal footing clause certainly does guarantee that, the boundaries of the territory of a new State having been fixed, the sovereignty and right of eminent domain of such new State within those territorial limits shall be the same as in the original states. It follows, at least, that, if the territorial limits of California, as approved by Congress, embrace the marginal sea, California owns the soil of the bed thereof as a part of its eminent domain and as an incident of its inherent sovereignty.

The Government does not refer to one case in Point III, B, of its Brief, pp. 92-142, inclusive, that even remotely has anything to do with any of the propositions summarized on pp. 139-142, inclusive. On the other hand, the cases of *Martin v. Waddell,* 16 Pet. 367; *Pollard v. Hagan,* 3 How. 212, and *Shively v. Bowlby,* 152 U. S. 1, especially the latter, contain reference material and discussions that directly refute practically every assertion and conclusion in Plaintiff's Brief, Point III, B, p. 92 *et seq.*

D. The Ownership of the Bed of the Marginal Sea Is an Incident, Not Only of Sovereignty in General of an International State, But of That Portion of a State's Sovereignty (Termed Municipal or Local) Which by the Constitution Was Reserved to the Several States of the Union.

The legal principles that, in England in 1776, the Crown owned the marginal sea and held it in trust for the common enjoyment of the people; that upon the Revolution the thirteen original states, as independent sovereignties, took the Crown's title to the bed of the marginal sea in trust for their own people; that new States upon their admission upon an equal footing take the same title to the bed of the marginal sea in trust for their people; that the equal footing clause must operate in this manner because the ownership of the bed of the marginal sea is part of the eminent domain, a part of the municipal sovereignty, never granted by the States to the national government by the Constitution; that the ownership of the beds of navigable waters are an incident of sovereignty because they are encumbered with certain public trusts in favor of the people of each State, trusts that constitutionally *cannot* be administered by the national govern-

ment but only by the States; have in other portions of this Brief been stated and documented with authorities.

In Point III, C, of Plaintiff's Brief, pp. 143-153, inclusive, an attempt is made to show that the navigable waters are not held by the States in trust for their peoples, because the States may alienate such lands into private ownership free of such trusts. That therefore, the ownership of the beds of navigable waters should be treated like public lands of the United States and not as a necessary incident to the municipal sovereignty of the several States.

It is true that in special instances the tidelands of a State may so change in character and consequent usefulness as to be no longer adaptable to the common use of the people of the State for the trust purposes originally impressed thereon. Under such circumstances the State may alienate such lands as other private property. Illustrative of this statement are certain of the decisions cited by the Government.[26]

These cases proceed upon the principle that such grants do not interfere with the use or enjoyment by the people of the State of those particular classes of land, which were held by the State in trust for the people thereof; but that in administering such trust for its people a State may decide to alienate portions of such lands for a consideration, thus placing them on the tax rolls as being the best

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[26]Pl. Brief, p. 151; *Weber v. Harbor Commissioners,* 18 Wall. 57 (uplands which were formerly tidelands in San Francisco); *Seattle v. Oregon & W. R. Co.,* 255 U. S. 56; *U. S. v. Holt Bank,* 270 U. S. 49;*Appleby v. City of New York,* 271 U. S. 364; *U. S. v. Dern,* 289 U. S. 352.

manner of securing to its people an advantage from its primary ownership thereof.

The following is quoted with approval in *Appleby v. New York,* 271 U. S. 264, from *Lansing v. Smith,* 4 Wend. 9 (N. Y.), as illustrative of this principle:

> "By the common law, the King as *parens patriae* owned the soil under all the waters of all navigable rivers or arms of the sea where the tide regularly ebbs and flows, including the shore or bank to high watermark . . . He held these rights, not for his own benefit, but for the benefit of his subjects at large; who were entitled to the free use of the sea, and all tidewaters, for the purpose of navigation, fishing, etc., subject to such regulations and restrictions as the Crown or the Parliament might prescribe. By Magna Charta, and many subsequent statutes, the powers of the King are limited, and he cannot now deprive his subjects of these rights by granting the public navigable waters to individuals. But there can be no doubt of the right of Parliament in England, or the legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual. Hence, the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals."

This is also the reasoning employed in *Illinois Central R. Co. v. Illinois,* 146 U. S. 387, where this Court said:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective States within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard v. Hagan,* 44 U. S. 3 How. 212 [11:565]; *Weber v. Board of State Harbor Comrs.,* 85 U. S. 18 Wall. 57 [21:798]."

In the case of *City of Long Beach v. Marshall,* 11 Cal. (2d) 609, the transfer from the State to the City of Long Beach preserved the public trusts for the people of the State. But the City could use the property for all private purposes not inconsistent with or destructive of such trusts. The State Supreme Court said (pp. 614-615):

> "* * * The state propounds the theory that there is a 'dual title' or 'split fee' in tidelands, consisting of the *jus privatum,* or proprietary right, and the *jus publicum,* or governmental right. The proprietary right, *i. e.,* the ownership or title in the state's proprietary capacity, is subject to the governmental right, embracing the trusts for navigation,

commerce and fishing upon which the state itself holds the lands for the benefit of its inhabitants. It is contended that the *jus privatum* or proprietary right was not intended to pass to the city; that only the *jus publicum* or governmental right passed; and that the city acquired no more than the authority and political power to establish, operate, govern and maintain a harbor, as a subordinate governmental agency.

"We are unable to see any substance in the theory that the state's ownership of tidelands is so radically different from its ownership of other lands that a transfer by the state is not governed by the ordinary rules of interpretation of grants. There is neither logic in, nor practical necessity for the 'double fee' doctrine. It is established law that the state became the owner of tidelands in fee simple upon its admission to the union, holding them subject to the public trusts for navigation, commerce and fishing (*Shively v. Bowlby,* 152 U. S. 1 [14 Sup. Ct. 548, 38 L. Ed. 331]; *Borax Consolidated v. Los Angeles,* 296 U. S. 10 [56 Sup. Ct. 23, 80 L. Ed. 9]); that it likewise became owner of the minerals therein (*Boone v. Kingsbury,* 206 Cal. 148, 170 [273 Pac. 797]); and it should reasonably follow that it has the power to grant these lands to municipalities, *subject to those same trusts.* (See *Atwood v. Hammond,* 4 Cal. (2d) 31, 37 [48 Pac. (2d) 20]; *Los Angeles v. Pacific Coast S. S. Co.,* 45 Cal. App. 15, 17, [187 Pac. 739]; *Lloyd v. Redondo Beach,* 124 Cal. App. 541, 545 [12 Pac. (2d) 1087]; and *infra.*) There is noth-

ing startling in the idea of a legislative grant of the fee to a city, subject to limitations and reservations, and there is no reason why the state, as proprietary owner of these tidelands, may not grant the fee in them, just as it may grant the fee in other lands held in its proprietary capacity." (Emphasis ours.)

The following excerpt from the decision in *Oakland v. Oakland Water Front Co.,* 118 Cal. 160, will illustrate the principle by which all of these cases are entirely reconcilable and indeed shows that the State does hold title to the beds of navigable waters in trust for its people:

"* * * The conclusions of the court upon these points and the doctrine thereby established are conceded to be a necessary part of its decision, and I not only do not dissent from them, I entirely approve them. Stated briefly, I understand the doctrine of that case to be that the several states hold and own the lands covered by navigable waters within their respective boundaries in their sovereign capacity, and primarily for the purpose of preserving and improving the public rights of navigation and fishery. They have in them a double right, a *jus publicum* and a *jus privatum.* The former pertains to their political power—their sovereign dominion, and cannot be irrevocably alienated or materially impaired. The latter is proprietary and the subject of private ownership, but it is alienable only in strict subordination to the former. No grant of lands covered by navigable waters can be made which will impair the power of a subsequent legislature to regulate the enjoyment of

the public right. The grantee takes the mere proprietary interest in the soil, and holds it subject to the public easement, * * * But in perfect accord with this doctrine it was also held that the state might alienate irrevocably parcels of its submerged lands of reasonable extent for the erection of docks, piers, and other aids to commerce. It was further conceded to be a proper exercise of the power of the state to establish harbor lines and to authorize the reclamation of mud flats and shoals, where that could be done without detriment to the public rights. The filling up of such lands, it was said, was often an improvement of navigation, and an advantage to commerce, and therefore lands susceptible of reclamation by that method may be alienated irrevocably. * * * Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery; and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public right above mentioned. But this restriction does not prevent her from disposing of them so far as to advance and promote the interests of navigation. On the contrary, such a disposition of them would be in keeping with the purposes of the trust in which she holds them. Nor of reclaiming them from the sea, where it can be done without prejudice

to the public right of navigation, and applying them to other purposes and uses. * * *"[27]

The decision in *Boone v. Kingsbury,* 206 Cal. 148, 183, is no exception to the rule. The court there held that no alienation of tide or submerged lands is valid if it operates to extinguish or substantially interferes with the right of the people of the State to the use and benefit thereof for commerce, navigation or fishery.

The statement of the Government[28] that "In actuality, then, the States, once they acquire title, unless they choose otherwise, hold it not as a public trust, but as a 'full proprietary right,' " is flatly contradicted by the authorities. The exact contrary is in all cases held to be the law. Navigable waters and their beds are held by the States in their sovereign capacity in trust for certain uses for their peoples, which trust cannot be extinguished or materially impaired, and the only alienations of such waters and beds which are recognized are those made in aid and furtherance of those very trusts or which do not materially affect such trusts. Such is the holding of all the cases upon the subject.

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[27]See, also, to the same effect: *Ward v. Mulford,* 32 Cal. 372; *Taylor v. Underhill,* 40 Cal. 471; *Eldridge v. Cowell,* 4 Cal. 80. For a complete discussion of all the authorities, see *People v. California Fish Co.,* 166 Cal. 576, 584-596, in which the Court declares that all tide and submerged lands are held by the State impressed with the public trusts for its peoples, and that they are inalienable except subject to such trusts or in furtherance of such trusts.

[28]Pl. Brief, p. 151.

IV.

Long Acquiescence by All Departments of the United States Government, and the Rules of Property, Stare Decisis and Res Judicata Preclude the United States From Asserting Any Purported Rights Against the States in This Case.

In discussing this point we think that attention must first be drawn to the attempt by the Government to create a distinction in the governing rule of law where none exists. We refer to the assertions throughout the Government's brief that the numerous decisions of this Court, of inferior Federal Courts and of the highest State Courts apply only to tide and submerged lands of navigable rivers, bays and harbors, and that they do not apply to the marginal seas on the open coasts of the States. As we propose to show, no such distinction has ever been considered, announced, or mentioned in any decisions examined.

A. As Between the United States and the States, the Rule That the State Is the Owner of the Lands Beneath Its Navigable Waters Applies to Those Lands Beneath Its Marginal Seas as Fully as to Those Beneath Its Bays, Harbors and Navigable Lakes and Streams.

For over a hundred years this Court, inferior Federal Courts and the highest Courts of the States have again and again announced and established the doctrine that the States are sovereign and that they have retained, and still do retain, all powers of ownership of and jurisdiction over their lands not ceded to the United States by the Constitution. It is conceded that few of the cases reported deal

specifically with the open coast, but the reasons therefor are apparent. Submerged lands beneath harbors and bays are obviously susceptible of a wider range of uses, and accordingly, are more fruitful subjects of litigation than those unprotected portions of the coasts. But in not one decision which has come to our attention has any Court, State or Federal, in pronouncing upon this question, ever attempted to draw any distinction between bays, harbors, rivers and the open sea and, as indicated below, the application of the rule with equal force, whether the area considered be in a bay or harbor or on the ocean proper, has been repeatedly approved. Indeed the first assertion of any *contra* theory which we have ever seen has been that of the Government in this proceeding.

We shall discuss briefly herein some of the authorities which conclusively prove that no such distinction has ever been considered to exist.

Martin v. Waddell,[29] in the year 1842, was the first decision of this Court upon the question. This was an action in ejectment, to recover one hundred acres of submerged lands in the township of Perth Amboy, New Jersey. This Court reviewed the English law upon the subject, in construing the effect of certain Crown grants to the Duke of York involving New Jersey lands, and stated that the principal matter in dispute was the right to the oyster fisheries of the public bays and rivers of Eastern New Jersey. It further held that upon the Revolution the people of the State became themselves sovereign

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[29]16 Pet. 367, 10 L. Ed. 997. This case adheres to the old rule of navigability depending upon the ebb and flow of the tide, which was modified in the *Genesee Chief v. Fitzhugh,* 12 How. 443, 13 L. Ed. 1058.

and in that character held the absolute right to all their navigable waters and the soil under them.

The next case involving the question, *Pollard et al. v. Hagan,*[30] was decided in 1845. This was an action of ejectment involving tidewater lands along the Mobile River in Alabama. The Court said:

> "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which Alabama or any of the new states were formed, except for temporary purposes, and to execute the trusts created by the acts of Virginia and Georgia Legislatures and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803 ceding Louisiana. * * * Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits subject to the common law to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution laws and compact to the contrary notwithstanding. * * * By the preceding course of reasoning we have arrived at these general conclusions. First, the shores of *navigable waters* and the soils under them were not granted by the Constitution to the United States but were reserved to the states respectively. Second, the new states have the same rights, sovereignty and jurisdiction over this subject as the original states."

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[30]3 How. 212, 11 L. Ed. 565.

Howard v. Ingersoll[31] was decided by this Court in 1851. It involved a question of the boundary between the States of Georgia and Alabama, particularly with reference to one of the rivers of Georgia. Mr. Justice Nelson stated the rule as follows:

> "Grants of land bounded *by the sea* or by navigable waters where the tide ebbs and flows extend to high water mark; that is to the margin of the periodical flow of the tide unaffected by extraordinary causes and the shores below common high water mark belong to the state in which they are situated. * * *"

In *Smith v. The State of Maryland*[32] this Court considered a Maryland statute providing for the forfeiture of any vessel found taking or destroying oysters in the waters of the State. The vessel in question was seized while dredging for oysters in Chesapeake Bay off the shores of Anne Arundel County. In discussing the force of the State Act the Court held that *whatever soil below low water mark is the subject of exclusive proprietary ownership belongs to the State on whose maritime borders or within whose territories* it is, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the Declaration of Independence. The Court further held that the State law under which the seizure was accomplished was not repugnant to the clause of the Constitution which confers on Congress the power to regulate commerce, and affirmed the judgment of the Circuit Court of Maryland for Anne Arundel County.

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[31]13 How. 381, 14 L. Ed. 189.

[32]18 How. 71, 15, L. Ed. 269.

This Court again considered the question in *Mumford v. Wardwell.*[33] The action was likewise ejectment, involving certain submerged lands in San Francisco Bay, California. The Court briefly announced the rule as follows:

> "California was admitted to the Union September 9, 1850 and the act of Congress admitting her declares that she is so admitted on equal footing in all respects with the original states. (9 Stat. at L. 452.) Settled rule of law in this court is that the shores of *navigable waters* and the soils under the same in the original states were not granted by the Constitution to the United States, but were reserved to the several states; and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders. (*Pollard v. Hagan,* 3 How. 212.) When the Revolution took place the people of each State became themselves sovereign and in that character hold the absolute right *to all their navigable waters* and the soils under them subject only to the rights since surrendered by the Constitution. Necessary conclusion is that the ownership of the lot in question when the state was admitted into the Union became vested in the state as the absolute owner subject only to the paramount right of navigation."

Barney v. Keokuk[34] was another action of ejectment, relative to lands along the Mississippi River in Iowa. The Court had the following to say about navigable waters:

> "In this country as a general thing all waters are deemed navigable which are really so and especially

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[33]73 U. S. 423, 18 L. Ed. 756.

[34]94 U. S. 324, 24 L. Ed. 224.

it is true with regard to the Mississippi and its principal branches. * * * In our view of the subject the correct principles were laid down in *Martin v. Waddell, Pollard v. Hagan* and *Goodtitle v. Kibbe* (9 How. 471.) *These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters.* And since this court in the case of *Genesee Chief v. Fitzhugh* (12 How. 443) has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense, entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In the leading case of *Manchester v. Massachusetts,*[35] this Court had before it a situation similar to that considered in *Smith v. Maryland, supra.* The Court was called upon to interpret an act of the State for the protection of the fisheries in Buzzard's Bay and to determine the propriety of an arrest made of an individual violating that act. The Court made these remarks relative to the ownership of the submerged lands by the State:

"The extent of the territorial jurisdiction of Massachusetts *over the sea adjacent to its coast* is that of an independent nation and except so far as

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[35]139 U. S. 240, 35 L. Ed. 159.

any right of control over this territory has been granted to the United States this control remains with the state."

In *Hardin v. Jordan*[36] plaintiff sought to recover possession of certain lands lying on the west and south sides of a small lake in Cook County, Illinois, and also to recover certain lands under water. The Court said:

"With regard to the grants of the government for lands bordering on tide water it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. * * * This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas, and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio and in Pennsylvania to all the permanent rivers of the state."

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[36]140 U. S. 371, 35 L. Ed. 428.

In *Illinois Central R. Company v. People of Illinois*[37] this Court had before it a question of title to certain submerged lands in Lake Michigan in the vicinity of the City of Chicago. The Court said:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in these waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. * * * *The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes* over which is conducted and extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion or sovereignty and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

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[37]146 U. S. 387, 36 L. Ed. 1018.

The opinion quotes *People v. New York and S. I. F. Company*[38] as follows:

> "The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways. * * *"

and states further that

> "The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state."

The leading case of *Shively v. Bowlby*[39] was before this Court in the year 1893, to review a judgment of the Supreme Court of Oregon quieting title to certain lands below high water mark in the City of Astoria, at the mouth of the Columbia River. The opinion exhaustively reviews many cases, including those already mentioned hereinabove, beginning with the statement in the famous treatise of Lord Hale, that "the shore is that ground that is between the ordinary high water mark and low water mark. This doth *prima facie* and of common right belong to the King *both in the shore of the sea and the shore of the arms of the sea,*" and then stating "that in England from the time of Lord Hale it has been treated as settled that the title to the soil of the sea or of the arms of the sea below ordinary high water mark is in the King,

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[38]68 N. Y. 71, 76.

[39]152 U. S. 1, 38 L. Ed. 331.

* * *" the decision further discusses the law in Massachusetts, particularly the Ordinance of 1641, holding that the title of the owner of land bounded by tide water extends from high water mark over the shore or flats to low water mark if not beyond 100 rods. The Court likewise said:

> "It is because of the ordinance vesting the title in fee of the flats in the owner of the upland, that a conveyance of his land bounding on the tide water, *by whatever name, whether 'sea,' 'bay,' 'harbor,' or 'river,' has been held to include the land below high water mark as far as the grantor owns.*"

This case contains one of the most careful and exhaustive reviews of previous authorities that we have ever seen, and all the cases cited, State and Federal, apply the rule equally, regardless of the location of the submerged area considered. We shall mention only a single additional portion of the opinion, namely, the Court's allusion to the rule of *Pollard v. Hagan, Goodtitle v. Kibbe* and *Martin v. Waddell:*

> "These cases related to tide water, it is true, *but they enunciate principles which are equally applicable to all navigable waters.*"

The theory of *Shively v. Bowlby* was applied to navigable inland waters in *McGilvra v. Ross,*[40] decided in 1909, a case involving title to submerged lands in Lakes Union and Washington, in the State of Washington. It was contended in that case that the tide-land rule was not applicable, since the lands bordered on navigable waters

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[40]215 U. S. 70, 54 L. Ed. 95.

but not on tide-waters; that whenever the Court used the term "navigable waters" the term meant "tide-waters," and that the old English common law rule was applicable. The Court held otherwise:

> "It is enough to say that the test of navigability of waters insisted on has had no place in American jurisprudence since the decision in the case of *The Genesee Chief v. Fitzhugh* * * * and the term 'navigable waters' as there used, meant waters which were navigable in fact. * * * The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

United States v. Holt State Bank[41] was a bill in equity by the United States to quiet title to a lake in the State of Minnesota. Defendant claimed that the lake was navigable; plaintiff, that it was not. In passing upon the question this Court said:

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect. * * * The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. * * * The State of

[41] 270 U. S. 49, 70 L. Ed. 465.

> Minnesota was admitted into the Union in 1858 and under the constitutional principle of equality among the several states the title to the bed of Mud Lake then passed to the state, if the lake was navigable, and if the bed had not already been disposed of by the United States. * * * The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law."

Massachusetts v. New York[42] was an original suit in equity brought by the Commonwealth of Massachusetts against the State of New York and one of its cities to quiet title to land fronting upon Lake Ontario, within the City of Rochester. The Court thus stated the rule:

> "It is a principle derived from the English common law and firmly established in this country that the title to the soil under navigable waters is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription. (*Shively v. Bowlby,* 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548.) The rule has been applied both to the territory of the United States (*Shively v. Bowlby, supra*) and to land within the confines of the states, whether they are original states or states admitted into the Union since the adoption of the Constitution. (*United States v. Holt State Bank,* 270 U. S. 49.) The dominion over navigable waters and the property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their sep-

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[42]271 U. S. 65, 70 L. Ed. 838.

> aration from sovereignty must be indulged. * * * The precise question now under consideration was before this court in *Martin v. Waddell, supra.* * * * The reasoning of the opinion was addressed wholly to the proper interpretation to be placed upon grants or reservations of rights of sovereignty with respect to their operation to transfer title of lands under navigable waters; and it is decisive of this case."

In *United States v. Oregon*[43] the Government sought to quiet title against the State to land in Harney County, Oregon. A portion of the lands was submerged beneath five certain bodies of water. The Court held that if the water were navigable in fact title passed to the State upon her admission to the Union as incident to the transfer of local sovereignty, and was subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce.

Uniformly and without exception the State courts, beginning with the very early case of *Arnold v. Mundy,*[44] have announced the same rule. This case, decided in 1821, involved the right of the defendant to take oysters from submerged lands opposite or bordering upon uplands held by the plaintiff. Kirkpatrick, C. J., after outlining the history of the applicable colonial grants, stated:

> "I am of the opinion that when Charles II took possession of this country by his right of discovery

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[43]295 U. S. 1, 79 L. Ed. 1267.

[44]Supreme Court of New Jersey, 1 Halsted 1, 10 Am. Dec. 356. See also: *Chicago Transit Co. v. Campbell,* 110 Ill. App. 366, 371.

> he took possession of it in his sovereign capacity; that he had the same right in it and the same power over it as he had in and over his other dominions and no more; that his right consisted chiefly in the power of granting the soil to private citizens for the purpose of settlement and colonization; but that he could not and never did so grant what is called the common property as to convert it into private property; that these royalties therefore which constitute that common property, *of which the rivers, bays, ports and coasts of the sea were part,* by the grant of King Charles passed to the Duke of York. * * * And that if they passed from the Duke of York to his grantees, which is a very doubtful question, then upon the surrender of the government *as appurtenant thereto and inseparable therefrom,* they reverted to the Crown of England. I am further of the opinion that upon the revolution all these royal rights became vested in the people of New Jersey as the sovereign of the country and are now in their hands. * * *"

Passing over a myriad of intervening State Court decisions, we quote briefly from the decision of *Boone v. Kingsbury*[45] decided by the Supreme Court of California in December, 1928. The petitioners in that action were applicants for permits to drill and prospect for oil and gas on tide and submerged lands fronting on the Pacific Ocean in the County of Ventura, California. No bay or

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[45]206 Cal. 148, certiorari denied, 280 U. S. 517. See, also, *Rex, Inc. v. Sup. Ct.,* 34 Cal. App. (2d) 96, 93 P. (2d) 182; *Suttori v. Peckham,* 48 Cal. App. 88, 191 Pac. 960; *Ex parte Marincovich,* 48 Cal. App. 474, 192 Pac. 156; *Winston Bros. v. Tax Com.,* 156 Or. 505, 62 P. (2d) 7; *State v. Pollock,* 136 Wash. 25, 239 Pac. 8.

harbor was involved; the lands were plainly in the "marginal sea." The Court stated (p. 170):

> "The minerals contained in the soil covered by tide and submerged lands belong to the state in its sovereign right."

It is impossible within the space of this Brief to discuss all the decisions,[46] bearing upon the point, which apply the principle in exactly the same way and announce precisely the same rule, without regard to whether the lands considered be in the marginal sea, harbor or navigable river. We believe that those cited above, however, are more than ample to show that the distinction sought to be established by the Government is in fact no distinction whatever, and that the rule operates uniformly upon the submerged lands beneath *all* navigable waters. The statements above quoted mean exactly what they say, that "navigable waters" comprehend *all* navigable waters, including naturally the marginal sea.

Our confidence in this interpretation is confirmed by other authorities than the courts.

Tyler, *Law of Boundaries, Fences and Window Lights* (1876), has the following to say on the subject generally (Chap. II, p. 32):

> "The law of the American States upon this subject is the same as that in England. That is to say, by our law, whatever soil below low water mark is the subject of exclusive propriety and ownership belongs to the state *on whose maritime border,* and

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[46]For example, see *Humboldt Lbr. Mfrs. Assn. v. Christofferson,* 60 Fed. 428, aff'd 73 Fed. 239.

within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence. This doctrine was distinctly declared by the Supreme Court of the United States in a case decided in 1842, wherein the claim was for lands lying beneath the navigable waters of the Raritan River and Bay, where the tide ebbs and flows, and the principal right and dispute was the property in the oyster fisheries in the public rivers and bays of East New Jersey. * * * The court seemed to have adopted the doctrine of a case previously decided by the Supreme Court of New Jersey, in which it was held that navigable rivers, where the tide ebbs and flows, and the ports, bays and coasts of the sea, including both the waters and the land under the water, are common to the people of New Jersey (*Arnold v. Mundy,* 1 Halsted 1) and the same general doctrine has been subsequently affirmed by the Supreme Court of the United States."

The author continues with the following remark (Chap. III, p. 40):

"The same principle which governs the question of boundary of property adjoining the sea, applies to arms of the sea, estuaries and navigable rivers below tide water. * * * To state the rule in a few words, it may be affirmed that by the common law, which is generally enforced in this country, the alveus or bed of all navigable waters as far as the tide ebbs and flows is vested in the state, subject to the public rights of navigation and fishing. In determining the line of demarkation between the property of the state in the soil of a navigable river and the property of the riparian owners on each side

of the stream the same rule is to be applied as in the case of property *bounding on the seashore.*"[46a]

Numerous opinions of the Attorney General of the United States adhere to the same rule; not one that we have seen even mentions the distinction contended for by the government in this case. Most of these opinions are referred to in the Appendix to the Answer and we shall not take the Court's time in quoting from them. However, one of such opinions written in the year 1853 seems particularly applicable. In that year the Honorable Caleb Cushing,[47] in a communication to the Secretary of War relative to the construction of a breakwater at Waukegan, Illinois, stated that the right and title to the lake shore of the Great Lakes is in the several States, not in the United States and wrote further:

> "In the case of *Pollard's Lessee v. Hagan* (3 How. 212) the Supreme Court came to the following conclusions: First, the shores of *navigable waters* and the soils under them were not granted by the Constitution to the United States but were reserved to the states respectively.
>
> "Secondly, the new states have the same rights of sovereignty and jurisdiction over this subject as the original states.
>
> "The doctrine of this case has been considered and affirmed and reaffirmed * * * and must be taken to be the law of the land.

[46a]It will be noted that the doctrine of *Arnold v. Mundy* and *Martin v. Waddell* was modified in *The Genesee Chief v. Fitzhugh, supra,* to include all waters navigable in fact, regardless of location.

[47]6 Opn. Atty. Gen. 172, 173.

"The principle extends in fact to the whole body of any navigable water in the United States and the soil under it."

In another opinion[48] a short time later he held that the waters of the Chicago River, although entirely within the State of Illinois, are navigable in fact and therefore constitute a portion of the navigable waters of the United States.

The conclusion, from these cases and authorities is inescapable. There is no difference whatever in the character of the ownership by a state, in its sovereign capacity, of the soil under its navigable waters, whether such waters form a river, a lake, a harbor, a bay or a portion of the open and unindented sea margin. The rule depends not upon the conformation of the shore but upon navigability in fact; if any such waters are capable of bearing traffic and commercial burdens the soil beneath belongs to the State.

In all the theory of the framework of our government and of State and Federal relationship this is the only consistent and reasonable conclusion. The sovereignty of the general government is a special and restricted one, measured entirely by the specific grants in the United States Constitution, which were made by States ever jealous of their own residual sovereignty, and it was never the intention of either the original or the newly created ones that proprietary rights, or indeed any rights to their tide- and submerged lands, whether on open seashore or not, should be granted to the central government, save only

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[48]7 Opn. Atty. Gen. 317.

those rights specifically granted to regulate commerce and to provide for the common defense.

We entirely agree with the Government[49] that no title to any of such submerged lands is required by the United States Government to carry on such functions; we urge that accordingly no title to such lands has ever vested or need be vested, in the Federal Government.

B. The History of the Attitude of All Departments of the United States Government Toward Ownership by the States of the Soil Under Their Navigable Waters, on the Open Coast as Well as Elsewhere, Is One of Complete Approval and Acquiescence.

As we have mentioned in our previous discussion, the Government has attempted in its Brief to create a distinction, where none in fact exists, from the argument that the myriad decisions of all departments of the Federal Government relative to such ownership have not taken into consideration the soil underlying the marginal seas. This, we think, is an attempt to parry the impact of all of those decisions upon the problem now before this Court.

We have attempted to point out heretofore that the single test of state ownership, which is a concomitant of the state sovereignty, is navigability—not that defined by tidewater standards as in England—but navigability in fact, whether the waters in question be river, bay, or unprotected coast. No decision of this or any other court has ever been noticed which has announced any other test; no action or decision by any State, or by Federal legisla-

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[49]Pl. Brief, p. 89.

tive or executive authority has noted or suggested any contra rule.

It is true, as counsel assert, that the considerably greater number of official and judicial decisions concern bays, harbors or inland waters, but, as we have mentioned, the reason for this immediately suggests itself. The sheltered and protected waters in the indentations of our coasts are generally more desirable for commerce, more valuable as ports; accordingly, they are and have been more readily and quickly settled and appropriated, and thus inevitably much more the source of controversy and litigation.

But although lesser in number, such decisions are many and the significant point to be remembered is that without a single exception which has come to our attention they follow and approve and again and again confirm the point we urge, *i.e.,* that the States own the bed of the marginal sea. If there is now or had ever been any such distinction in the minds of the founders of this Nation, or their successors, or of those in the high courts who have interpreted their enactments and decided their judicial questions, surely somewhere in the long and involved history of the creation of the Union and the birth and growth of the new States, and of their relationship to the general government, surely we say, somewhere there would have been some mention or proposal of such a theory. But none has been found, at least until the period immediately prior to the commencement of this action. Since the close of the eighteenth century, cases, legislative measures and executive decisions by the hundreds have grouped the marginal sea as one with river, bay, or harbor, conceding or denying State ownership by the single and exclusive test of navigability in fact.

1. LEGISLATIVE AND JUDICIAL ATTITUDES:

Counsel attempt to minimize the effect of *Spalding v. United States*[50] discussed in the Government's Brief at pages 183, *et seq.* This case admittedly did not turn on a dispute between the State and the United States as to the title to the oil lands involved, but much more vigorous treatment of the question will be found therein than mere "assumption that the State owned the lands." In the District Court, finding against the plaintiff, Judge Yankwich said (17 Fed. Supp. 960):

> "We cannot agree to the taxpayers' contention. The tide-lands of California are held by the state in trust for the people for the purpose of navigation, commerce and fishery. Constitution of California, art. XV, Sec. 2; Borax Consolidated v. Los Angeles . . . etc."

And in the Circuit Court of Appeal the trial court's findings that the State granted appellant a permit to prospect for oil and gas *on certain state tide-lands* "are not challenged." (97 F. (2d) 698.) In the related case (97 F. (2d) 701) similar findings of fact by the trial court were likewise not challenged.

It is likewise true that the United States was not a party to the case of *Dean v. City of San Diego*[51] but we think that the rule of state ownership announced therein is precisely the same as if it had been:

> "By repeated declarations of our Supreme Court, with respect to lands acquired by the United States

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[50]17 F. Supp. 957, aff. 97 F. (2d) 697, cert. den. 305 U. S. 571; 17 F. Supp. 966, reversed 97 F. (2d) 701, cert. den. 305 U. S. 571.

[51]275 Fed. 228.

> and out of which sovereign states of the Union were thereafter created and set up, it has been definitely decided that lands lying beneath the navigable waters *of the sea or any of its arms* became the property of the sovereign state adjacent thereto, subject only to the rights surrendered to the general government through the Federal Constitution . . ."

We think that the strongest example of complete acquiescence found throughout the history of this Nation is the approval given by Congress to the fixing and defining by many of the sovereign states of their territorial borders on the open coast.[52] Some accomplished this by their original constitutions; some by later legislative enactment. It was probably unnecessary to fix borders by any specific enactment, since in this respect the States are sovereign, and:

> "Such a statute, however, would be only declaratory of the law. A man cannot 'add one cubit unto his stature' and the legislature by its act cannot extend the jurisdiction of the state beyond the limits generally recognized by law. The sovereignty over territorial waters exists even though the state has never seen fit to define their limit. The state of Maine has exercised this authority as to portions of these waters. . . . There is no reason why it may not assume control over all . . ."[53]

But the courts and Congress, in approving the original constitutions and in all instances where the statutes were

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[52]Forida: Constitutions of 1868 and 1885. California: Constitution of 1849. Oregon: Act of Admission, 35th Cong., 2nd Sess. App., Feb. 14, 1859.

[53]*State v. Ruvido,* 137 Me. 102, 15 Atl. (2d) 293.

drawn in question, could not have done otherwise than to have agreed entirely with the action of the States which did formally establish such borders.

In *Manchester v. Massachusetts*[54] this court considered a statute of the state which reads in part as follows:

> "Sec. 1. The territorial limits of this commonwealth extend one marine league from its seashore at low water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shoreline.
>
> Sec. 2. The sovereignty and jurisdiction of the commonwealth extend to all places within the boundaries thereof, subject to the rights of concurrent jurisdiction granted over places ceded to the United States."

In considering the defendant's contention that the English law of Counties should apply the court said:

> "It is also contended that the jurisdiction of a state as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was

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[54]139 U. S. 240, 35 L. Ed. 159.

> adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts *over the sea adjacent to its coast is that of an independent nation;* and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State . . ."

In *State of Virginia v. State of Tennessee*[55] the dispute concerned a land boundary between these two states. The Court referred to *Poole v. Fleeger,*[56] one of its earlier decisions and quoted from that case as follows:

> ". . . it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories. . . . It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from their being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress . . ."

The jurisdiction of a state cannot extend beyond its territorial limits and is always coextensive therewith (*United States v. Bevans,* 3 Wheat. 336).

Congressional acts have carefully and uniformly observed such jurisdiction and such territorial claims and

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[55]148 U. S. 503, 37 L. Ed. 537.

[56]11 Pet. 185, 9 L. Ed. 680; and see Tyler, Law of Boundaries, Ch. XIX, p. 233 *et seq.*

have conformed legislation acordingly. For example, the criminal statutes of the United States, which punish certain offenses committed "upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state," furnish a significant reminder that such jurisdiction will not be exercised on the high seas *within* the jurisdiction of a particular state.[57]

Pursuant to the powers granted by the Constitution the Congress has extended general admiralty and maritime jurisdiction to all navigable waters within the United States.[58] Such powers and jurisdiction of course imply no territorial ownership.[59] But the Congress has never attempted to interfere with the control by a State of its fisheries, since fisheries are affected by a proprietary interest:

> "These remain under the exclusive control of the State, which has consequently the right in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. . . . The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and their property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."[60]

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[57]*United States v. Newark Meadows Imp. Co.,* Circuit Court, S. D., N. Y., 173 Fed. 426.

[58]*The Genesee Chief v. Fitzhugh,* 12 How. 443, 13 L. Ed. 1058.

[59]*United States v. Bevans,* 3 Wheat. 336, 4 L. Ed. 404.

[60]*McCready v. Virginia,* 94 U. S. 391, 24 L. Ed. 248.

Again, it has been common knowledge for many years that the soil under the marginal seas is often enriched with petroleum and other minerals. Its potential value has been realized in California for upwards of 25 years. Unquestionably various officers in all departments of the United States Government have likewise deemed them capable of exploitation for at least that long. The failure of the government until very recently to assert some theory of Federal ownership or control, instead of clinging to the doctrine which has obtained since the formation of the Union, cannot be ascribed to governmental inertia alone. It can only mean that all departments of the Government have been convinced beyond all doubt of the proprietary right of the state in such lands.

We do not intend to be exhaustive upon this question. Time and the extent of this brief are necessarily limited. But it is doubtful if additional instances need be mentioned to show that for over 150 years the Congress and the Courts have conformed to the doctrine of state ownership of lands beneath *all navigable waters over which they exercise jurisdiction,* and have without exception recognized in statute and decision the right of the States to define their seaward borders in accordance with the Constitution.

2. The Executive Attitude:

The necessities above mentioned likewise preclude an extended study of the instances of executive acquiescence. We may briefly refer, however, to many opinions of the Attorney General of the United States, together with rulings of the War and Navy Departments, cited in the Appendix to the Answer of the State.

Not one of these opinions indicates a theory contrary to State ownership, and the Government's effort to sidestep their effect on the question now before this Court is, we think, adequately disposed of by the words of the opinions themselves, in particular, the words of the Honorable Caleb Cushing, above quoted, that:[61]

> ". . . The principle extends in fact *to the whole body of any navigable water in the United States and the soil under it*"

and the further words of the same individual in a later communication to the Secretary of War[62] that:

> "The shores and beds of *navigable waters* within a state, where not held by individuals are the property of the State, not of the United States."

It is to be noted in passing that the first of these was written three years after the admission of California into the Union and the second seven years thereafter. There seems accordingly no doubt as to the Government's interpretation of the law when California became a state.

No attempt will be made to discuss in detail the fourteen transactions between California and the United States which have been singled out in the Government's Brief as dealing with the open seacoast, as distinguished from other instances involving bays, harbors or rivers. It is sufficient to mention again that their treatment has in all respects been in accordance with precisely the same principle that governed the treatment of the hundreds of other in-

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[61] 6 Opn. Atty. Gen. 172.

[62] 7 Opn. Atty. Gen. 317.

stances. But we earnestly urge that, in order to create the classification which is attempted in the Government's Brief, *it must be shown that the marginal seas are in fact not navigable waters,* a theory so patently absurd that it must be instantly discarded. Otherwise the rule of *all* the cases cited, beginning with *Martin v. Waddell, supra,* and the history of *all* the transactions set forth in the Appendix to the Answer must be considered controlling.

This rule of State ownership, so early established by this Court, and so consistently adhered to by all courts, state and Federal, was unquestionably the governing consideration in all such transactions.

We cannot agree with counsel that "it is important to note that the action taken by the officers of the United States was usually motivated by desire to solve some problem arising out of the peculiar circumstances surrounding a particular project" (Government's Brief, p. 180). In the case of the tide-land permits in the Elwood oil field, therein discussed, which permits involve submerged lands on the open coast beyond all question, it must have been perfectly plain to all concerned officers of the Government that the transactions involved the lessening of oil reserves, and the receipt by California of large and substantial royalties from the oil recovered. If the War Department and other agencies had thought that the Government owned the marginal sea, it is hardly likely that United States sanction would have been given to the construction of such piers and wharves, without at least raising some question as to the right of the State to lease the submerged lands, to receive the royalty, and to allow the capture of the oil and the consequent draining of the sands.

C. The Reliance by This State and Its Political Subdivisions on the Decisions and Actions of All Departments of the United States as to the Ownership of Its Submerged Lands Should Preclude the United States Government From Asserting Such Title.

Counsel urge (Plaintiff's Brief pp. 198-203) that nothing that the State or its political subdivisions have done in that regard can result in injury to them if the rule be adjudged otherwise. We cannot agree. At the outset, however, we shall concede the point asserted by counsel in discussing the subject that all are presumed to know the law and that it is rarely, if ever, that any estoppel may be founded upon a misrepresentation of the law.

But this is not an action between individuals or between an individual and a sovereign; it is an action between two different sovereigns, for, except as to the powers granted to the United States by the Constitution, the State is completely sovereign within its boundaries.

If we may consider for a moment the establishment of a different rule relative to the ownership of these lands, injury and confusion almost impossible to calculate seem inevitable. For example, what disposition is to be made of the enormous expenditures by the State and its political subdivisions on jetties, dredging and the creation of beaches? What disposition is to be made of the expenditures of the same bodies for surveying, mapping and classifying the shore lands? What about the cancellation or amendment of tide-land oil leases on the open coast? What is to happen to the royalties already received, allocated and expended, derived from the oil drawn from the submerged lands? What of the confusion resulting with regard to fisheries for, as we have noted, the State owns

the fish running in the waters along its borders (*McCready v. Virginia, supra; Manchester v. Masachusetts, supra; Smith v. Maryland, supra*). Will such change result in the United States owning all of the marine life in the submerged soil while the State in its respective sovereignty owns the fish occupying the submerged waters just above it? What of the endless work of conforming the codes of the State? What of the rights and obligations of lessees of tide-lands from the State, with myriad financial transactions to unravel and reconstruct, including uncounted questions of State and Federal taxes? What of the thrice accentuated difficulty of an individual who applies for permits to drill for oil, who then must lease the shore from the State and the submerged soil from the United States, or the fisherman who, for example, being permitted by the State to take swimming fish, must touch no marine life on the bed of the sea unless he first be granted permission by the United States, and if such a rule became the law and, as counsel say, the harbors and bays are not to be involved, where would be the dividing line between the marginal sea and a bay or harbor? How wide, how deep must a curve or indentation of the coast be and what distance between its headlands before it would be held definitely State or Federal with respect to the submerged lands therein?

It seems to us that the decision sought here by the Government would be productive of confusion and uncertainty beyond measure for many, many years, together with financial and property loss to the States and to concerned individuals far beyond the practical reach of any curative or confirmatory Acts of Congress, in addition to the alteration of a rule of law which is as old as the Na-

tion and which is so consistent and reasonable, and so perfectly in accord with the fundamental theory of State and Federal relationships that any departure therefrom is almost impossible to conceive.

We agree with counsel that no estoppel in this case is to be based upon the mistakes or unauthorized acts or commitments of officers of the United States (Pl. Brief, p. 206). We fail to find any such unauthorized acts or such errors in the material discussed or cited. We believe that from the beginning such officers have acted in conformity with the true rule of law and with proper authorization, but, right or wrong, authorized or no, in an action of this character, where this and so many other States have exercised dominion and ownership of their submerged resources and have established and developed their internal law, and have conducted commercial and financial relationships in great number with their citizens and those of other States, entirely in reliance on these decisions for upwards of 150 years, great and grievous injury will certainly be suffered by both state and citizen if a different rule is now for the first time established. Accordingly, we respectfully submit that even though no estoppel can generally be based upon a mistake of law, in this case there are present elements which should safeguard this and other States against the losses suggested and which should confirm the titles to the lands in question. Likewise, conceding again as we do, that as against the United States, the defenses of laches and adverse possession are not normally to be invoked, the same argument is applicable.

We agree with counsel (Pl. Brief, p. 217) that the area involved is without doubt within the territorial boundaries

of the State and the United States, but this being true, we cannot see how if the jurisdiction of this State extends to its boundaries, as counsel concede and as we have noted that it must, its complete local sovereignty must not also, since it is a fundamental rule (*United States v. Bevans, supra*) that the jurisdiction of a State may not exceed its territorial limits and its proprietary domain is co-extensive with its jurisdiction. We fail to find one single instance in all the history of this nation, or mentioned in this proceeding, where the Government has questioned the extent of California's jurisdiction.

D. The Decisions of This Court Have Established a Rule of Property. In Accordance With This Rule and That of Stare Decisis, Title to the Lands in Question Should be Confirmed in the States.

The United States, as the general government, invested with only those rights and powers granted it specifically or by necessary implication by the Constitution, cannot by its very nature assume ownership of submerged lands such as those in question, except in trust for new States to be created. This trusteeship terminates immediately upon the coming into existence of the new State, and all sovereignty, save only that necessary for the exercise of these limited and delegated powers, thereupon passes to the State.[63]

The United States needs no title to any submerged lands, regardless of location, in order to improve and regulate

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[63]*Shively v. Bowlby,* 152 U. S. 1. And see *Port of Seattle v. O. W. R. Co.,* 255 U. S. 56, 65 L. Ed. 500.

navigation;[64] certainly no such title is required for the exercise of its Admiralty and Maritime jurisdiction, nor is it required, although often secured for convenience, in furtherance of its duty to provide for the common defense. And it assuredly needs title to no lands in connection with the treaty-making power, nor is any required to regulate commerce and trade with foreign nations or between States.

And however supreme in the exercises of these delegated powers, the national government is subject to State sovereignty in matters reserved to the States quite as fully as the States are so subject to Federal sovereignty respecting its enumerated powers.

It was never the intention of the founders of the nation that such enumerated powers should ever include the exercise of any permanent proprietary rights whatever in the beds of navigable waters. Initially all lands, both above tide-water and submerged, were the property of the several States, by virtue of a sovereignty untouched by any of the delegated powers. Certain cessions of lands were thereafter made to the United States by the States, but it was then the sense of both States and the Congress respecting all unappropriated lands that they should "be disposed of for the common benefit of the United States, *"and be settled and formed into distinct republican states, which shall become members* of the Federal Union and have the same rights of sovereignty, freedom and independence as the other states." (3 Jour. Cong. 516, quoted in *Howard v. Ingersoll, supra.*)

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[64]*Scranton v. Wheeler,* 179 U. S. 141; *Lewis Blue Point Oyster Co. v. Briggs,* 229 U. S. 82; see Pl. Brief, p. 181.

Such ownership is an indispensable attribute of, and inseparable from, sovereignty—not that created by the enumerated powers granted in the Constitution—but the residual and municipal sovereignty of the State:

> "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which Alabama or any of the new states were formed, except for temporary purposes . . . " (*Pollard, et al., v. Hagan, supra.*)

The Government states (Pl. Brief, p. 2) that no claim is made to any lands under ports, harbors, bays, rivers, lakes or any other inland waters, "nor is any claim here made to any so-called tide-lands, namely, those lands that are covered and uncovered by the daily flux and reflux of the tides." The Government concedes, then, the right and title of the State to those lands, and accordingly concedes as we think it must, the application of the principle of *stare decisis* and a rule of property. To obviate this conclusion, the Government claims there are no decisions respecting the ownership of the marginal sea.

But what attribute of national sovereignty, national as opposed to State sovereignty, requires title to these lands to be held by the United States? Surely not national protection—our forts and arsenals are all on dry ground; our naval bases likewise, and for the most part, in sheltered harbors; our airfields, submarine bases and all other military installations are similarly situated. Surely not the regulation of commerce; for as counsel remind us, no title is needed for the erection of jetties, lighthouses and similar devices. Can it be imagined that the United States,

as protector and representative of the individual States in dealing with foreign governments, now requires, or has ever really needed such title to properly discharge *any* of its functions? By what theory can the government say that, though it requires no submerged lands under the waters of ports or harbors to perform its duties, it shall require those beneath the marginal sea?

The answer is obvious. There never has existed such an idea. The rule of the harbor or bay is the rule of the coastal waters, and the decisions of this Court over a period exceeding a century have established a rule of property. It is a rule to be modified only with the greatest caution, and only under pressure of necessity that cannot be found in a situation such as this.

In *Goodtitle v. Kibbe,*[65] discussed *supra,* this Court, in denying the effectiveness of a United States grant to submerged lands in the vicinity of the city of Mobile, held that the question had been settled by the earlier case of *Pollard v. Hagan,* and said that "it must be a very strong case indeed, and one where mistake and error had been evidently committed to justify this Court, after the lapse of five years, in reversing its own decision, thereby destroying rights of property which may have been purchased and paid for in the meantime upon the faith and confidence reposed in the judgment of the Court . . ."

In *The Thomas Jefferson,*[66] the admiralty and maritime jurisdiction of the United States was held not to extend to the navigable reaches of the Missouri river, since they

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[65]9 How. 471, 15 L. Ed. 269.

[66]10 Wheat. 428, 6 L. Ed. 358.

were above the ebb and flow of the tide. This Court departed from that rule in *The Genessee Chief v. Fitzhugh, supra,*[67] when it decided that the former holding, made in 1825 "When commerce on the rivers of the west and on the lakes was in its infancy," was not to be applied in a later period of greatly increased internal commerce, and that such jurisdiction must now be held to extend to all navigable waters. But even in recognizing the need for such extension, consequent on the tremendous westward surge of settlement and trade, the Court said:

> "The case of the Thomas Jefferson did not decide any question of property or lay down any rule by which the right of property should be determined. *If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed.* For everyone would suppose that after the decision of this Court in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy and should always be adhered to. . . ."

Gilman v. City of Philadelphia[68] came before this Court on a bill to enjoin Defendant from erecting a bridge without a draw over the Schuylkill river in that city, which would cut off access by ship to certain waterfront properties. The Court sustained the power of the State to au-

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[67]12 How. 443, 13 L. Ed. 1058.

[68]3 Wall 713, 18 L. Ed. 96.

thorize construction of the bridge, under the *Wheeling Bridge* case (13 How. 553), stating that

> "It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly unless clearly erroneous. Vacillation is a serious evil . . ."

We think the clearest warning of the evils of ever reversing an ennunciated rule of property is found in the words of this Court in *Pollard v. Hagan,*[69] thus:

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States, and the laws which shall be made in pursuance thereof."

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[69]3 How. 212.

In all the history of this nation the Congress has never made any claim to these lands. Its attitude, and that of subordinate Federal agencies, has consistently been, as we have stated, one of acquiescence in and approval of, the action of the States in their occupation and administration of them. And when the Courts have joined in that attitude for nearly 150 years, we submit that it would be disastrous and unthinkable to permit a change in that attitude:

> "The construction placed upon the Constitution by the first Act of 1790, and the Act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive. . . ."

These are the words of Mr. Justice Miller, of this Court, in *Lithographic Co. v. Sarony,*[70] decided in 1883. We think them particularly applicable to the present question, involving as we insist that it does, both property rights in great volume and the fundamental sovereignty of all of the States of this Union.

Since the rule of *Martin v. Waddell* was established in 1842 scores of decisions have followed it, including not less than nine handed down by this Court involving Cali-

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[70]111 U. S. 53, 28 L. Ed. 349.

fornia submerged lands.[71] Federal and State Court cases have again and again applied it[72] without even the suggestion of any attempt to distinguish between harbor, bay, navigable river or marginal sea. In this and other States property and commercial transactions without number

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[71]*Mumford v. Wardwell,* 6 Wall. 423; *Weber v. Board of Harbor Com'rs.,* 85 U. S. 57; *Packers v. Bird,* 137 U. S. 661, 34 L. Ed. 819; *San Francisco v. Le Roy,* 138 U. S. 656; *Knight v. U. S. Land Association,* 142 U. S. 161; *United States v. Mission Rock Co.,* 189 U. S. 391; *United States v. Coronado Beach Co.,* 255 U. S. 472; *Borax Consolidated Ltd. v. Los Angeles,* 296 U. S. 10; *United States v. O'Donnell,* 303 U. S. 501.

[72]In addition to the cases cited and discussed the following is a partial list of decisions relative to ownership of submerged lands: *Rhode Island v. Mass.,* 4 How. 591; *Hallett v. Beebe,* 13 How. 25, 14 L. Ed. 35; *Den v. New Jersey,* 15 How. 425, 14 L. Ed. 757; *County of St. Clair v. Lovington,* 23 Wall. 46, 23 L. Ed. 59; *Indiana v. Kentucky,* 136 U. S. 479, 34 L. Ed. 329; *Lowndes v. Huntington,* 153 U. S. 1, 38 L. Ed. 615; *Mann v. Tacoma Land Co.,* 153 U. S. 273, 38 L. Ed. 714; *St. Anthony v. Board,* 168 U. S. 349, 42 L. Ed. 497; *Morris v. U. S.,* 174 U. S. 196, 43 L. Ed. 946; *Mobile Transp. Co. v. Mobile,* 187 U. S. 479, 47 L. Ed. 266; *The Abby Dodge,* 223 U. S. 166, 56 L. Ed. 390; *Scott v. Lattig,* 227 U. S. 229, 57 L. Ed. 490; *Greenleaf, etc. v. Garrison,* 237 U. S. 251, 59 L. Ed. 939; *Seattle v. O. and W. R. Co.,* 255 U. S. 56, 65 L. Ed. 500; *United States v. Oregon,* 295 U. S. 1, 79 L. Ed. 1267; *Skiriotes v. Florida,* 313 U. S. 69, 85 L. Ed. 1193; *Pacific Gas Co. v. Ellert,* 64 Fed. 421; *Coburn v. County of San Mateo,* 75 Fed. 520; *United States v. Alaska Packers etc.,* 79 Fed. 152; *Cunningham v. Skiriotes,* 101 F. (2d) 635; *Pope v. Blanton,* 10 Fed. Supp. 18; *United States v. Carillo,* 13 Fed. Supp. 121; *Lloyd v. City of Redondo Beach,* 124 Cal. App. 541, 12 P. (2d) 1087; *S. F. Sav. Union v. R. & R. Pet. Co.,* 144 Cal. 134, 77 Pac. 823; *People v. Kerber,* 152 Cal. 731, 93 Pac. 878; *F. A. Hihn Co. v. City of Santa Cruz,* 170 Cal. 436, 150 Pac. 62; *Churchill Co. v. Kingsbury,* 178 Cal. 554, 174 P. 329; *Ord. Land Co. v. Alamitos Land Co.,* 199 Cal. 380, 249 Pac. 178; *Ocean Industries etc. v. Superior Ct.,* 200 Cal. 235, 252 Pac. 722; *City of Oakland v. E. K. Wood Lumber Co.,* 211 Cal. 16, 292 Pac. 1076, 80 A. L. R. 379; *Southlands Co. v. City of San Diego,* 211 Cal. 646, 297 Pac. 521; *City of Oakland v. Buteau,* 219 Cal. 745, 29 P. (2d) 177; *People v. Stralla,* 14 Cal. (2d) 617; *Ghione v. State* (Wash.), 175 P. (2d) 955.

have rested upon the repeated affirmance by all these courts that the lands are owned by the States. In the face of such overwhelming unity in decision, then, how is it possible to imagine any reason why a distinction should now be made, where none such has ever existed?

E. The Matter Is Res Judicata.

We doubt that an extended discussion of this point is required. This Court, in the year 1902, handed down its decision in the case of *United States v. Mission Rock Co.*, 189 U. S. 391. It held that when California became a state there passed to it "absolute property in and dominion and sovereignty over, all soils under the tide-waters within her limits . . ."

Where are her limits? They are as defined in the Constitution of the state, accepted and approved by the Congress, referred to and confirmed again and again by decisions, judicial and otherwise, namely, three English miles westward of her coast line. They are, and must be, coextensive with her jurisdiction, which is admittedly that far seaward.

Little in addition remains to be said. Counsel again have attempted to parry the significance of this decision by reminding us that the submerged lands involved lie in San Francisco Bay. We have already replied that any distinction between bay or harbor and the marginal sea in this respect is arbitrary, unfounded in reason, wholly without precedent and adopted merely for the purpose above suggested. When this and the inferior courts repeatedly apply the rule to "all soils under the tide-waters within her limits" we find it difficult to believe that any tide-waters within those limits are to be excluded from its operation.

V

This Proceeding Should Be Dismissed Because the Description of the Lands, Alleged in the Complaint to Be Owned by the United States, Is so Uncertain and Indefinite as to Be Unintelligible.

The complaint describes the property, in and to which it seeks to quiet title, as "the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low-water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles * * *."

Several questions immediately present themselves.

Does the complaint refer to the ordinary low-water mark as it exists at the time of this proceeding or as it existed at the time of the admission of California into the Union? In some places along the coast great changes have taken place during the last ninety-seven years in the low-water mark. Again, in many places along the coast the low-water mark, especially as of 1850, would be well-nigh impossible to ascertain. There has been, in the past, extensive litigation affecting portions of the California coast for the purpose of establishing the mean high tide line. The line of ordinary low-water, though, has received but scant attention from the judiciary, and there is no certain record of where it is on the land, either now or in 1850, especially in the latter year.

More difficulty is encountered with the exclusion of "inland waters."

The plaintiff states that inland waters are "bays, harbors, rivers and other inland waters" of the State.[73]

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[73]Pl. Motion for Leave to File Complaint, p. 2.

It is intimated that this marginal zone, the title to which is sought by the Government, lies outside of bays, harbors, rivers and other inland waters.

Three questions of uncertainty immediately obtrude themselves.

What is a bay or a harbor?

As of what year are we to study the coastline (1850 or now) for the purpose of locating all the bays and harbors, and the low-water mark?

Even assuming that the bays and harbors may be determined upon, where in the bay or harbor is the line separating it from the maritime 3-mile zone?

That these questions do not involve theoretical uncertainties, let us look first at the Government's Brief, then at some of the authorities. The Government admits that certain bays, so-called, are in the doubtful class.[74] For example, the Government is doubtful whether San Pedro Bay is a true bay. If it is not, the Government's claim in this proceeding may be that a fair portion of both Los Angeles and Long Beach Harbors are located in the marginal sea, under Government ownership. The Government has listed San Pedro as a doubtful bay.[75] If so, how about Santa Monica Bay, where the headlands are twenty-five nautical miles apart and the indentation of the bay is shallow? Fourteen of the transactions plead in the Appendix to the State's Answer occurred in San Pedro Bay and are listed by the Government as doubtful,

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[74]Pl. Brief, p. 167.

[75]Pl. Brief, p. 167 and Appendix B, p. 227.

i. e., it is not certain whether San Pedro is a bay or in the marginal sea.

If it is not a bay, because the headlands are too far apart, is it still a bay landward of a line drawn from points where the headlands narrow to a distance of six (or ten) nautical miles, or is it no bay at all?

The same questions can arise as to Santa Monica Bay, and other bays along the coast.

Again, these fourteen "doubtful" situations, as classified by the Government, involved "lands situated in the harbors of Long Beach and Los Angeles." If harbors, as well as bays, are not in the marginal sea, why are these fourteen situations doubtful? Or must a harbor be in a bay to be a harbor? The plaintiff does not seem to be sure of where its alleged marginal sea is and we frankly admit, from the language of the complaint and the uncertainties expressed in the Government's Brief, that we are not certain either.

This very uncertainty is the hidden danger underlying the apparently open language of the Government's pleading.

If we look to international law for aid we find that bays are much more variously defined than the marginal sea, with many exceptional cases allowed contrary to definition. Without going into the subject in much detail, we quote from Oppenheim's *International Law*, 4th Ed., pages 406-409:

> "§191. Such gulfs and bays as are enclosed by the land of one and the same littoral State, and have

an entrance from the sea not more than six miles wide, are certainly territorial; those, on the other hand, that have an entrance too wide to be commanded by coast batteries, erected on one or both sides of it, even though enclosed by one and the same littoral State, are certainly not territorial. These two propositions may safely be maintained. It is, however, controversial how far bays and gulfs encompassed by a single littoral State, and possessing an entrance more than six miles wide, yet not too wide to be commanded by coast batteries, can be territorial. Some writers state that no such gulf or bay can be territorial, and Lord Fitzmaurice declared in the House of Lords on February 21, 1907, in the name of the British Government, that only bays with an entrance *not* more than six miles wide were to be regarded as territorial. But in the *North Atlantic Coast Fisheries* case, which was decided by the Permanent Court of Arbitration at The Hague in 1910, Great Britain disowned the declaration by Lord Fitzmaurice. The United States contended for its accuracy, but the Court refused to agree. Other writers maintain that gulfs and bays with an entrance more than ten miles wide, or three and a third marine leagues, cannot belong to the territory of the littoral State, and the practice of several States, such as Germany, Belgium, and Holland, accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus France holds the Bay of Cancale to be territorial, although its entrance is seventeen miles wide; Great Britain holds

the Bay of Conception in Newfoundland and the Bays of Chaleurs and Miramichi in Canada to be territorial, although the width between the headlands is twenty, sixteen, and fourteen miles respectively. Even the Hudson Bay in Canada, which embraces about 580,000 square miles, and the entrance to which is fifty miles wide, is claimed as territorial by Great Britain. Norway claims the Varanger Fiord as territorial, although its entrance is thirty-two miles wide. The United States claims the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial, although the entrance to the one is twelve miles wide and to the other ten miles. The Institute of International Law has voted in favour of a twelve-miles-wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than one hundred years.

"As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Example of territorial bays in Europe are: The Zuider Zee, which is Dutch; and the Bay of Stettin, in the Baltic, which is German, as is also the Jade Bay in the North Sea. An international congress is desirable to settle once for all which gulfs and bays are to be considered territorial. And it must be specially observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers, which include portions of the sea between lines drawn from headland to headland."

Three bays in California have been judicially determined to be such.[76] They are San Pedro, Santa Monica, and Monterey. They are of the indentation type where the headlands do not close.

To show the variety of thought as to the maximum allowable distance between headlands before an indenture ceases to be a bay, we quote from *People v. Stralla,* 14 Cal. (2d) 617, as follows:

> "* * * In the absence of any controlling legislative or executive act or judicial decision, the court

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[76]There is, in *People v. Stralla, supra,* a very good discussion of the fact that the rules of international law as to bays are so confused that it rightly can be said that there is no international agreement at all upon the subject, except that bays, without defining them, are territorial in character.

In *United States v. Carrillo,* 13 F. Supp. 121, San Pedro Bay was judicially declared to be a bay.

In *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, Monterey Bay was also decided to be a bay. The court there expressed itself, with reference to the confusion in international law as to the proper definition of a bay, in this manner:

"The petitioner, however, insists that by the rules of international law the territorial jurisdiction of a maritime state does not extend beyond three miles from the shore line and follows the identations of the coast into all bays or gulfs, the headlands of which are more than six miles apart, and cites certain text-writers upon international law in support of that contention. These text-writers give as the reason for this rule the somewhat fantastic one that while our modern international law was in the process of forming, the range of coast planted cannon did not exceed three miles. These text-writers, however, while suggesting such a rule based upon such a long-lost reason admit that as to the stronger maritime powers of modern Europe the rule was more honored in the breach than in the observance. Britain, which has depended more upon its "Wooden Walls" than upon its coast ordinance, has always asserted its sovereignty not only over the entire area of the bays, ports, harbors, friths, and other inlets along its much indented coast line, but also over the bays, gulfs, and inlets of its dependencies; such, for example, as the bay of Conception in Newfoundland, which has a breadth of fifteen miles. These text-writers also point out that France has always asserted sovereignty over the bay of Cancale,

will look to the international law, namely, the customs and usages of civilized nations. (*The Paquete Habana,* 175 U. S. 677, 700 [20 Sup. Ct. 290, 44 L. Ed. 320].) But resort to the law of nations does not disclose any agreed definition of what constitutes a bay which may be included within the territorial waters of a state. (See, also, *Ocean Industries, Inc., v. Superior Court, supra,* p. 246.)"

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which is seventeen miles wide at its headlands, and that the United States asserts and has maintained its jurisdiction over the bays of Delaware and Chesapeake, although the former has a headland width of fifteen and the latter of twelve miles. In Moore's Digest of International Law the basis of our assertion of jurisdiction over the entire area of Chesapeake Bay is set forth in its reference to the decision of the Commissioners of Alabama Claims, wherein the extent of that jurisdiction was directly involved. The decision of the commission is illuminating in its bearing upon the instant proceeding. It reads: 'Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English Courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig "Grange" and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States.' While it is true that by treaties and conventions between the powers chiefly in arbitration cases the fixation of a six-mile distance between headlands of certain bays and inlets have at times been agreed upon in the settlement of international disputes, it cannot be said that there is any rule of international law upon the subject, the whole matter resting in the undisputed assertion of jurisdiction by the power of possessing the inclosing shore line of the bay or inlet in question. This being so, we arrive at the conclusion that the bay of Monterey between its headlands and the ocean adjacent to a line drawn between these headlands for a distance of three nautical miles is within the boundaries of the state of California and of the counties respectively of Santa Cruz and Monterey."

As was said once, in international law, "we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose."[77]

Are all these harbors, erected in "doubtful" bays with local expenditure of millions of dollars, going to be claimed the products of a trespass should the United States prevail in its novel pretentions urged as the foundations of its title in this case? Are all of the other doubtful portions of the California coast line, concerning which no adjudications have been made, going to be claimed by the Government? Is this case just a prelude to a national storm of litigation if the Government is sustained in its pretentions, despite nearly one hundred years peaceful possession by California and its subordinate governmental agencies and its grantees and lessees of its entire coastline, including bays, river mouths, harbors and the marginal sea on open coast?

One of the most elementary principles of pleading in a quiet title action is that the defendant's title cannot be put into jeopardy unless it can be determined with reasonable certainty the property that is involved.

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[77]*Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), L. R. 2 App. Cas. 394.

It should be remembered that in *Manchester v. Massachusetts,* 139 U. S. 240, 264, 35 L. Ed. 159, contrary to these last three cited cases, it was indicated that a bay was confined to those indentations in the coast with not more than 6 miles between headlands.

A ten-mile headlands rule has been asserted. *Moore's Digest of International Law,* p. 720. Also, twelve miles, Moore, *op. cit.,* p. 735.

There are not too many authorities upon the necessity of an adequate description being alleged in a quiet title complaint. This is probably due to the circumstance that real property is always capable of an accurate description and pleaders have rarely failed to adequately describe that property in and to which some title has been sought to be quieted.

A very striking parallel to this case is that of *Aalwyn's Law Institute v. Martin,* 173 Cal. 21 (1916), where a complaint in quiet title described the property as follows:

> "Rights of way, terminal lands, and all the property known as the 'Ocean Shore Railway Property,' more particularly described in the public records of said City and County of San Francisco in Liber 62 of Mortgages, page 29 et seq., and to which reference is hereby made for said description."

The court held that the complaint was generally demurrable, not merely specially, for uncertainty, in this language:

> "* * * There is no description of the rights of way and terminal lands at all, while the other property is vaguely designated as that 'known as the Ocean Shore Railway property.' It is a general rule of pleading that a complaint in an action to quiet title must contain a pertinent description of the land in controversy. The court passing upon the demurrer from the face of the pleading itself could not possibly determine the location of the property unless recourse were had to the book of records indicated, and this could not be required of the court. To be sure 'Ocean Shore Railway Property' is given as a common designation of a part of the realty to which

> plaintiff seeks to quiet the title, but this does not bring the pleading within the rule of those cases where a well-known tract of land is described by name and by the enumeration of some other identifying characteristics, and the whole description aided by reference to the public records. There must be something in the pleading itself by way of actual description. (32 Cyc. 1355.)"

The only difference between the pleading in that case and in the instant one is that here the complaint does not even seek the aid of any public record or document.

Where is the shoreward line from which the plaintiff starts his description? It cannot be ascertained from the complaint where the low-water mark is nor what low-water mark is referred to. Is it the low-water mark as it existed in 1850 or as it exists now, changed by time and the results of man's activities? The complaint does not define a harbor, a bay or other types of water that may be termed inland. What are the bays of California? The plaintiff admits he does not know. San Pedro may or may not be a bay. Where then in the complaint can anyone tell where the shoreward line of the three marine mile belt is situated?

The Government in its Brief has adopted a pattern of argument of attempting to distinguish the voluminous authorities, holding that all navigable waters within the territorial limits of the respective States are owned by those States, in such manner as to avoid their applica-

tion to the so-called marginal sea, without on the other hand advancing one respectable authority, either judicial or otherwise, which can be said to support its contentions in any degree whatsoever. We suggest that none of the propositions advanced by the Government have ever been recognized. The motion for judgment should be denied.

Respectfully submitted,

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