Supreme Court of the United States

OCTOBER TERM—1946

No. 12, Original

6

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES, AS *AMICUS CURIAE*

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UNITED STATES OF AMERICA,

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STATE OF CALIFORNIA,

Defendant.

Motion for Leave to File a Brief as *Amicus Curiae*

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

COMES NOW The American Association of Port Authorities, by its Attorney, Leander I. Shelley, and petitions this Honorable Court for leave to appear herein as *Amicus Curiae* and to file the subjoined brief in behalf of the position of the defendant, and in support thereof respectfully shows:

1. Your petitioner is an Association, the corporate membership of which consists of public and governmental departments, boards, agencies or bodies having jurisdiction with respect to the development and operation of ports and port facilities. It includes the state and municipal port authorities at the great majority of United States ports,—among others, Portland (Maine), Boston, New York, Baltimore, Miami, Mobile, New Orleans, Chicago, Milwaukee, Houston, San Francisco, Tacoma and Portland (Oregon).

In addition its corporate membership includes certain Canadian and Latin American port authorities but in accordance with its by-laws, only port authorities of this country and their representatives have participated in the proceedings culminating in this application.

2. The issue presented is whether the State of California or the United States owns submerged or reclaimed lands below the original high water mark of navigable waters off the coast of California. The United States Attorney General has stated in Plaintiff's brief herein that the decisions of this Honorable Court which establish the title of the states to submerged and reclaimed lands below the original high water mark of navigable bays, harbors and rivers were incorrectly decided. Thus, although the Plaintiff's brief does not ask that these cases be overruled, it directly challenges and beclouds the title of the states and their grantees to the lands upon which the members of the Association, your petitioner, have erected port improvements at a cost in excess of $860,000,000 and upon which they plan the erection of further improvements at a cost of many millions of dollars. Since the decision in this case may well affect the title of the members of the Association, your petitioner, to the improvements already so erected, and to the lands upon which they have been erected, the interest of your petitioner in the outcome is patent.

In lieu of submitting a separate memorandum in support of this motion setting forth more fully its interest, your petitioner respectfully refers to the opening statement (pp. 5 to 11, inclusive) in the subjoined brief, which statement, this Honorable Court permitting, is incorporated herein by reference.

The undersigned has been orally authorized by the Attorney General of California, attorney for the Defendant herein, to state that he has no objection to the granting

of leave to your petitioner to appear and file a brief herein as *Amicus Curiae.*

WHEREFORE, The American Association of Port Authorities, by the undersigned, prays leave to appear herein as *Amicus Curiae* to file the subjoined brief in behalf of the position of the defendant.

Dated: March 5, 1947.

LEANDER I. SHELLEY
Attorney for the American Association of Port Authorities.

The undersigned, attorney for the Plaintiff herein, raises no objection to the granting of leave to The American Association of Port Authorities to file a brief herein as *Amicus Curiae.*

.....

Attorney General of the United States, Attorney for Plaintiff.

Supreme Court of the United States

OCTOBER TERM—1946

No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES, AS *AMICUS CURIAE*

Statement

The present suit is to oust the state of California and its lessees from lands underlying the so-called marginal sea from which according to the complaint they have been producing petroleum "for a long time past." Since this Court has consistently held that lands under navigable waters within the territorial limits of a state are the property of such state (or of its grantees, or the grantees of its predecessor sovereigns), the suit is in effect an attempt to expropriate real property without the payment of just compensation.

The subject matter of the suit is not, however, confined to petroleum lands, and the relief sought is not confined to

the state of California and the persons leasing petroleum lands from it. The subject matter is the entire marginal sea within the territorial limits of California, and relief is sought against all persons whatsoever claiming title therein from the state.

The suit, moreover, is not confined to lands which are presently submerged. The claim is made that the state never did have title to lands below low water mark. The relief sought, therefore, extends to lands which were formerly submerged but which have since been reclaimed or filled under state grants.

In addition, the Plaintiff's brief attacks the titles of all other coastal states to the lands underlying the marginal seas along their coasts, including by necessary implication lands reclaimed or filled and wharves and similar structures constructed pursuant to state grants.

The Plaintiff's brief does state that no question is "here presented" as to rights in lands between high and low water mark or in bays, harbors or other inland waters. Nevertheless, the same brief states that the decisions of this Court upholding the title of the states and their grantees in such lands between low and high water mark and in bays, harbors and other inland waters, have "proceeded upon a false premise" and are "erroneous" and "unsound" (pp. 11, 72 and 143). Although the Plaintiff does not ask that these cases be overruled, nevertheless, it argues that they are not sound law.

The Plaintiff's brief, at pages 197 and 206, asserts that a federal officer is not bound by a ruling or interpretation which he has made, and that he can and should reverse his position if he believes that it was erroneous. Upon this basis, if the Plaintiff should succeed in the present suit after having challenged the soundness of decisions upholding state title to lands under the waters of bays and harbors, it would then become the duty of the Attorney Gen-

eral's office to reverse its present recommendation that the cases dealing with bays and harbors be affirmed despite their alleged error, and to bring a subsequent proceeding requesting this Court to reverse its prior decisions on that point.

The American Association of Port Authorities is an association, the corporate membership of which consists of "public and governmental departments, boards, commissions, agencies, authorities, organizations or bodies," exercising powers, jurisdiction or authority with respect to the planning, development or operation of one or more ports or harbors, or with respect to the construction, operation, or maintenance of piers, wharves, terminals or other port or harbor facilities or improvements (By-Laws of the American Association of Port Authorities).

The corporate members of the Association include the great majority of United States ports,—among others such major ports as Boston, New York, Baltimore, Chicago, New Orleans, Houston, Milwaukee, Philadelphia, Toledo and Portland (Oregon). A list of the United States corporate members is annexed hereto as Appendix I.[1]

For the most part, the corporate members of the Association in this country are charged with the construction, development and operation of publicly owned piers, wharves, docks, transit sheds and other waterfront facilities in their respective ports.

The state and municipal investment in waterway terminals in this country was estimated in 1932 by the Federal Coordinator of Transportation at $810,000,000.[2] According to the Board of Investigation and Research established by

1. The membership of the Association includes certain governmental agencies of the Dominion of Canada and of the Latin American countries, as well as of this country, but in accordance with its by-laws, only United States members of the Association or representatives of such members have participated in the proceedings leading to this brief. See Appendix II.

2. Public Aids to Domestic Transportation, 79th Congress, 1st Session, House Document No. 159, p. 379.

the Transportation Act of 1940, the total historical investment in such facilities as of 1941 was $861,000,000.[3] This figure did not include "publicly owned lands on which terminals are located, where such lands not involving any expenditure of funds have been dedicated to terminal use, sometimes for many years." The Board reported a total capital cost of such terminal facilities in New York City alone in the amount of $340,000,000.

To this total investment in port facilities it is proposed to add $150,000,000 in the near future.[4] The present and prospective state and municipal investment in port facilities thus exceeds one billion dollars. Many of the port terminal improvements included in this figure extend out over navigable waters or are constructed upon filled or reclaimed lands. They have been constructed in reliance upon titles to submerged or reclaimed lands held by or derived from the respective states.

The investment of public moneys in port facilities in the United States is many times greater than the value of the oil lands which are in controversy in this case. According to the California State Division of Lands,[5] the total estimated future production from all the known oil bearing lands off the coast of California amounts to approximately 184,000,000 barrels, having a current market value of approximately $265,000,000. This figure does not, however, represent the value of the petroleum in its natural situs since it must be reduced by the expenditure required to extract the oil therefrom. The value of the oil land here in controversy is only a small fraction of the value of the improvements made by state and municipal agencies upon submerged and reclaimed lands.

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3. Public Aids to Domestic Transportation, 79th Congress, 1st Session, House Document No. 159, p. 379.

4. 1945 proceedings of the American Merchant Marine Conference, The Propeller Club of the United States, p. 151.

5. Information furnished at the request of your Amicus by the Attorney General of California.

The active interest of your *Amicus* in the question here at issue, predates the commencement of this litigation. Indeed, it predates the participation of the State of California. The controversy was precipitated in 1937 by an attempt by various federal executive departments to secure action by Congress resolving that "submerged lands along the coast of the United States and below low water mark and within a distance of three miles under the ocean below such low water mark * * * are asserted to be the property of the United States."[6] This resolution sought to direct the United States Attorney General to assert and establish such title and to eject the occupants of such lands. There was no exception as to bays and harbors.

Your *Amicus* appeared at the hearing upon this resolution before the House Committee on the Judiciary and objected to the passage thereof. At the hearing, an Assistant Solicitor of the Department of the Interior was asked what the position "of these various port authorities" would be if the resolution was adopted. He did not deny that the bill would apply to them, but merely said that the question should be settled.[7] At the same hearing, a representative of the Navy Department supported his arguments for the passage of the resolution by citation of cases dealing with submerged lands within bays and harbors.[8]

This resolution failed to pass the House of Representatives, and at the next Congress, a renewed but unsuccessful attempt was made by various federal executive departments to secure the passage of legislation directing the United States Attorney General to assert and establish the right and interest of the United States in "petroleum deposits underlying submerged lands adjacent to and along the coast of the State of California, below low water mark and under the territorial waters of the United States of

6. S. J. Res. 208, 75th Congress (1937-8).
7. Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, 3rd Session, p. 65.
8. Id. at p. 259.

America.'"[9] Again no exception was made for lands under bays and harbors, and the restriction to petroleum deposits did not serve to answer the objections of the port authorities since the United States could have title to such deposits only if it owned the lands in which they lie.

Your *Amicus,* therefore, appeared at the Congressional hearings and resisted the efforts to secure the passage of such legislation. It is noteworthy that at these hearings, a proponent of the bill, representing the Office of the Judge Advocate General, for the Navy Department, actually questioned the power of this Court to determine title to lands between high and low water marks, and stated:

> "Under the Constitution it belongs to the Congress and not to the Supreme Court of the United States."[10]

He, too, cited cases dealing with lands under bays and harbors.

On May 29, 1945, at the time United States Attorney General Biddle initiated a suit, subsequently discontinued, in the United States Federal District Court at Los Angeles against the same lessee of the State of California as is named in the complaint herein, he issued a public statement, saying:

> "The suit does not involve public lands or lands under inland waters, *though the status of these will, no doubt, be clarified to some extent by the decision.*" (Italics ours.)

In the light of the past history of this controversy, as well as the attack herein upon the soundness of the decisions upholding state title to lands under bays and harbors and the argument made that federal executive officers should not consider themselves bound by their previous rulings, the Court will perceive the anxiety with which the

9. S. J. Res. Nos. 83 and 92—76th Cong. (1939-40).
10. Hearings before the Committee on Public Lands and Surveys, U. S. Senate, 76th Cong., 1st Session, p. 59.

outcome of the present suit is awaited by the public port agencies of the country. The Court will also understand their complete inability to take comfort from the statement that their title is not directly challenged in this case.

The basic allegation in the Plaintiff's complaint, and the major premise in its argument, is that the federal government is "the owner in fee simple of" or in the alternate "possessed of paramount rights in and powers over" the lands under the marginal sea off the California coast.

Curiously enough, the Plaintiff's brief contains little material on this vital point. It cites no cases holding that it has title to lands under the marginal sea and no cases holding that it is possessed of paramount rights in such lands, and of course there are no such cases to cite. It makes only the untenable argument that the national boundaries along the coast are not established by the nation but by international law and that there are "primary governmental aspects" of the so-called marginal sea which are predominantly to be associated with the federal government rather than the state government (pp. 10, 82-88). In lieu of a serious effort to establish the fundamental allegations of the complaint, the Plaintiff's brief is primarily devoted to an attempt to attack the title of California to the submerged lands,—an attempt which, even if successful, would not justify a decision in the federal government's favor if it fails to establish the basic allegations in its complaint.

So far as this attempt is concerned, the federal government faces these unescapable facts,—that the western boundary of California is three miles seaward from its coast, and that this Court has repeatedly held that title to submerged lands under navigable waters within the territorial limits of a state belong to the state (or to its grantees or the grantees of its predecessor sovereigns), whether the state be one of the original thirteen states or be a subsequently admitted state.

Definitions

In this brief, lands between high and low water marks will be called the "foreshore." The term "tidelands" suggested by the Government to describe these lands is likely to be confused with the phrase "soils under tide waters" and similar phrases which have been frequently used by this Court to describe lands below low water mark as well.

We shall use the terms "bays" and "harbors" without explicit definition. The terms have always been used to denote indentations of the coast between definite headlands, but there is no agreement as to the distance between headlands or the depth of indentations which distinguishes a bay or harbor from any other irregularity of the coast (see pp. 39-41, *infra*).

The term "marginal sea" will be used to describe the belt of waters measured outward from the mean low water mark (or from the seaward limit of a bay or river mouth) to the territorial limit of the state.

Summary of Argument Herein

The arguments herein will take the following lines:

Points I to V hereof are in support of the proposition that title to submerged lands within her boundaries passed to California at the time of her admission to the Union. The proposition that it did so as a matter of constitutional necessity because of the peculiar nature of lands under navigable waters, is fully discussed in the Defendant's brief. No attempt is made to repeat that argument herein. Instead, we will demonstrate that regardless of any constitutional necessity, the act of admission clearly and unmistakably evinces the intent of Congress to vest California with title to all lands under navigable waters within her

boundaries, including lands under the marginal sea, subject only to grants made by California's predecessor sovereigns.

The basis for this conclusion is that the act of admission was adopted by Congress in light of contemporaneous decisions of this Court interpreting a similar act as conveying land under navigable waters to the new state (Point I); that the condition imposed upon California by the act of admission to maintain navigable waters as free common highways is inconsistent with any intent on the part of Congress to retain title thereto, as is also the reservation in the act of title to uplands (Point II); that an interpretation of the act of admission as reserving lands beneath navigable waters to the federal government would be inconsistent with the settled policy of Congress to hold such lands in trust for future states (Point III); that there is a presumption against the severance of ownership of unappropriated real property from local sovereignty and that since the state is the dominant sovereign so far as real estate is concerned and the ultimate owner of all real property within its limits, title to all unappropriated real property is presumed to pass to the state in the absence of an express reservation (Point IV); and that the many opinions of this Court upholding state title make no distinction between lands under navigable waters of bays, harbors and other inland waters, and lands under navigable waters of the marginal sea, and that the *ratio decidendi* of those cases applies equally to the marginal sea (Point V).

In light of the attack made in the Plaintiff's brief upon the original thirteen states, their territorial limits and their rights to property therein, Point VI will be devoted to a discussion of the status of title in the marginal sea in these original states, and will demonstrate that the attack is wholly without foundation.

Point VII hereof will be devoted to the proposition that the Plaintiff must succeed, if at all, upon the strength of its

own case and not upon the basis of any alleged weakness in California's case, and that it has failed to sustain this burden.

Finally, Point VIII will be devoted to the disastrous effects which would result from the doctrine advocated by the Plaintiff.

POINT I

The act admitting California was adopted in the light of contemporaneous Supreme Court decisions holding that similar language in an earlier act of admission passed title to lands under navigable waters to the new state.

The question whether an act admitting a new state passed title to lands under navigable waters was first decided in this Court only five years before California was admitted into the Union. In *Pollard* v. *Hagan,* 3 How. 212 (1845), Alabama's act of admission was considered in this connection. The language in that act was similar in all material respects to the language employed by Congress in admitting California. The three provisions of substance were:

(a) Admission of the state into the Union on an equal footing with the original states.

(b) Reservation in the United States of title to certain lands within the state's boundaries, described in the case of Alabama as "waste and unappropriated lands," and in the case of California as "public lands."[11]

11. That both these phrases were intended to have the same meaning is clear from the use by this Court in *Pollard* v. *Hagan,* 3 How. 212, 230 (1845), of the words "public lands" to describe the "waste and unappropriated lands" reserved to the federal government in the Alabama act.

(c) A provision that all navigable waters within the said state shall forever remain free public highways.

The Alabama act of admission received detailed consideration from the court in the *Pollard* case in 1845. The importance of the question was recognized at the outset of the opinion (3 How. 212, 220):

> "And we now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones."

The decision of the court was that Alabama, upon its admission, succeeded to title to "the navigable waters and the soils under them" within her boundaries. The opinion contains no hint of a distinction between navigable waters inside and outside of Mobile Bay.

The *Pollard* decision was handed down on February 18, 1845. On that date there was pending in Congress the bill to admit Florida and Iowa into the Union. Although Congress was thus on notice that the language employed in the Alabama act[12] would be interpreted by this Court to pass title to a new state to all lands under all navigable waters within its boundaries, Congress, on March 1st, adopted an act admitting Florida finally and Iowa provisionally,[13] and employed the same basic language as had been interpreted in the *Pollard* case. The act was approved March 3, 1845, within a fortnight of the *Pollard* decision. It is inescapable that Congress intended Florida and Iowa to succeed to lands under all navigable waters within their boundaries. In rapid succession, similar language was used in admitting Texas[14] on December 29, 1845, Iowa finally on December 28, 1846[15] and Wisconsin provisionally on March 3, 1847 and finally on May 29, 1848.[16]

12. 3 Stat. 489; 3 Stat. 608.
13. 5 Stat. 742.
14. 9 Stat. 108.
15. 9 Stat. 117.
16. 9 Stat. 178; 9 Stat. 233.

The bill for the admission of California was before Congress in the spring of 1850. After the amendments of April 23, 1850, (21 Cong. Globe 798), the bill contained the same three essential elements as the earlier act admitting Alabama.

While the California bill was before Congress, this Court, on May 28, 1850, in *Goodtitle* v. *Kibbe,* 9 How. 471, again passed upon the effect of such language in the Alabama act and specifically reaffirmed its 1845 decision in *Pollard* v. *Hagan,* which held that such language passed to the new state all title to land under "navigable waters." On August 13, 1850, two and one-half months after the *Goodtitle* v. *Kibbe* decision, the Senate passed the California act of admission.[17] The House adopted it on September 7, 1850,[18] and it was approved on September 9, 1850.[19]

In the light of this history, the conclusion is inescapable that Congress intended to give California (as well as Florida, Texas, Iowa and Wisconsin) the same title to lands under navigable waters as this Court decided had passed to Alabama as a result of parallel language. This result follows whether or not the *Pollard* and *Goodtitle* cases were decided rightly or wrongly. Even if this Court should today be convinced that those two cases should have been decided differently, nevertheless the fact would remain that Congress acted in light of these two decisions when it used substantially the same language in the California act of admission as it did in the Alabama act, and that it obviously did so with the intent to produce the same result in California as this Court said had been produced in Alabama.

An act of Congress passed after a decision by this Court must be held to have intended the result reflected in the

17. Cong. Globe, 31st Cong., 1st Sess., p. 1573.
18. Id., p. 1772.
19. 9 Stat. 452.

Court's decision as of the time of the enactment regardless of a possible change in this Court's opinion at a later date, *Helvering* v. *Griffiths,* 318 U. S. 371 (1943).

It must be emphasized that in the *Pollard* case this Court said that Alabama's act of admission passed title to lands within her territorial limits under "navigable waters," —it did not limit its decision to lands under "bays, harbors and other inland waters." This decision was reaffirmed in the *Goodtitle* case. It is apparent, therefore, that in immediately thereafter using substantially the same language in the California act of admission, Congress intended to pass to that state title to lands under all navigable waters within her boundaries,—those under the marginal sea as well as those under bays, harbors and inland waters. In such a connection Congress cannot be presumed to have distinguished between holding and dictum, if dictum it be.

POINT II

The intention of Congress to transfer to California title to lands under navigable waters is apparent also from the fact that Congress specifically reserved title to all lands except those under navigable waters, and inserted with respect to navigable waters only a condition that they should remain free common highways.

The act admitting California contains intrinsic evidence to prove the Congressional intent to vest in the new state title to all lands under navigable waters. The act was not silent on the reservation of property to the United States—but the only reservation was of "public lands." The prototype of this reservation was that in the Alabama admission act in which Congress reserved title to all "waste and unappropriated lands" within the boundaries of Alabama.[20] In *Pollard* v. *Hagan,* 3 How. 212 (1845), shortly before

20. 3 Stat. 489; 3 Stat. 608.

California's admission, such lands had been described as "public lands" and the phrase had already been interpreted as including only the uplands. Later cases have reached the same result regarding the statutory reservation of "public lands." *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284 (1894); *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17 (1935). In other words, while ceding local sovereignty over the whole territory of California to the new state within her boundaries, which included the marginal sea, Congress elected to reserve specifically only title to the uplands. The implication is obvious that there was no intention to reserve title to the navigable waters and soils beneath them.

This conclusion is the more obvious because Congress was not silent upon the question of navigable waters themselves. It specifically inserted in the act a condition that such waters "shall be common highways, and forever free, as well as to the inhabitants of the said State as to the citizens of the United States, without any tax, impost or duty therefor" (Sec. 3, Act of California's admission, 9 Stat. 452). This condition is wholly inconsistent with an intent to reserve *title* to the federal government.

POINT III

To interpret the California act of admission as reserving the lands beneath navigable waters to the federal government would be inconsistent with the settled policy of Congress.

With the exception of Vermont, Kentucky, Maine, Texas and West Virginia, each state admitted into the Union subsequent to the original thirteen was, prior to its admission, a territory exclusively within the control of the United States. During the territorial status, Congress freely granted uplands to private persons. But exactly the op-

posite course was pursued with regard to lands under navigable waters. As to the latter lands, Congress imposed upon itself a policy of holding them in trust for the newly admitted States.

In *Shively* v. *Bowlby,* 152 U. S. 1, 48-50 (1894), this Court said:

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so * * *.
>
> "But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. * * *
>
> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community."

The importance of this Congressional policy is apparent. Even assuming Congress had a power to reserve to the United States lands under navigable waters within the boundaries of a newly admitted state, it nevertheless has consistently restrained itself from granting such lands during the territorial status. Such restraint is consistent only with a policy to turn over to the new states intact title to all lands under navigable waters within their boundaries.

In *Mann* v. *Tacoma Land Company,* 153 U. S. 273, 284 (1894), this Court again pointed out that such a policy of restraint was followed by Congress. In referring to the act providing for the admission of Washington, Montana and the two Dakotas,[21] the Court said:

> "No one can for a moment suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the tidewaters and those of navigable streams."

In *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926), the Court said:

> "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 most recent evidence of this policy of Congress was its action regarding the recent bills dealing with title to lands beneath the marginal seas. In the opening Statement of this Brief we pointed to the attempts in two consecutive Congresses, made by various federal executive departments, to secure an assertion by Congress that the

21. 25 Stat. 677.

United States is the owner of lands beneath the marginal seas. Congress refused to adopt such a resolution in each case.[22]

The attacks, however, thus made by federal officers upon state and local titles, prompted the introduction in the 79th Congress of legislation[23] to quiet the title of the respective states and their grantees to lands beneath all navigable waters, including the marginal seas, by releasing and quitclaiming to the states any claim of the United States to such lands. The resolutions recited that they were "in recognition of the title and interest of the several states" in such lands. Both houses of Congress passed this legislation. When the President, on August 1, 1946, vetoed the bill, he stated that he did so because of the pendency of the present suit.

Despite the fact that the release and quitclaim resolutions failed to become law, there is no doubt as to the attitude and policy of Congress with respect to the title of the states in lands under navigable waters, including the marginal seas, consistent with its century old policy, as being against any ownership of such lands by the United States within the boundaries of a state of the Union.

22. S. J. Res. 208—75th Cong. (1937-8); S. J. Res. Nos. 83 and 92—76th Cong. (1939-40).
23. H. J. Res. 225 and S. J. Res. 48—79th Cong., 2d Sess.

POINT IV

The conclusion that Congress intended to convey title to lands under navigable waters to the State of California is further supported by the fact that the state is the dominant sovereign insofar as real property is concerned and that there is a presumption against severance of title to real property from local sovereignty.

This Court has repeatedly held that under the doctrine of equality between states, subsequently admitted states have the same rights to lands beneath navigable waters as did the original thirteen states, and that therefore they are vested with title thereto and ownership thereof. There is language in certain of these cases that suggests that this is a constitutional doctrine resulting from the inherent relationship between the states and the federal government. This doctrine is discussed at length in the Defendant's brief, and we will not burden the court with a repetition here.

Prescinding, however, from the question whether title to submerged lands must as a matter of law pass to a newly created state upon its creation, it is clear that the state government is the dominant sovereign insofar as real property is concerned and that there is a presumption against severance of title to real property from the local sovereignty.

Whenever one sovereign makes a cession of territory to another without reserving the ownership of any property within the territory, the presumption must be against any such reservation. Thus the court said in *Shively* v. *Bowlby,* 152 U. S. 1, 57 (1894):

> "Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by a treaty with a foreign country, or by discovery and settlement, the same title and dominion pass to the United States, for the benefit of the whole peo-

> ple, and in trust for the several states to be ultimately created out of the territory."

For example, the Treaty of Guadalupe Hidalgo,[24] upon which all claims of the United States and California to lands within the boundaries of the state depend, merely delineated a new territorial boundary between the Republic of Mexico and the United States of America. There was no specific deed to the United States of the Mexican government's title in unappropriated and waste lands or to lands under navigable waters, including those under marginal seas. Nevertheless, in the absence of any reservation of such title by Mexico, it was obvious that it was the intention of both parties that all such title theretofore held by Mexico passed to the United States. Certainly, the treaty could have provided that the outgoing sovereign should nevertheless retain property rights in the territory ceded (*cf. Massachusetts* v. *New York,* 271 U. S. 65 [1926]). But such a situation between coordinate sovereigns is so bizarre that it would take most explicit language to accomplish that result.

This presumption applies equally to uplands, the foreshore of and lands under navigable waters, whether bays, harbors, rivers, lakes or the marginal seas. The application of the presumption to lands under navigable waters has been expressed several times by this Court. Thus, in *Martin* v. *Waddell,* 16 Pet. 367, 416 (1842), the Court said:

> "And if the great right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them, were to have been severed from the sovereignty, * * * the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language."

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24. 9 Stat. 922.

See also *Massachusetts* v. *New York*, 271 U. S. 65, 89 (1926); *United States* v. *Oregon*, 295 U. S. 1, 14 (1935).

Where the cession of sovereignty is between the United States and a state, the same presumption must be indulged. Thus, when Texas ceded territory to the United States in 1850,[25] the United States succeeded to all title theretofore held by the state of Texas to lands within the ceded territory, including lands under navigable waters therein.

Where the cession of sovereignty is, however, as in the instant case, by the United States to a new state, the cession is not of complete sovereignty. Both the United States and California, since September 9, 1850, have been sovereign within California's boundaries. But, as between the national and local sovereignties, this Court has already stated that the presumption is that title to lands under navigable waters passes to the possessor of *local* sovereignty,—*i. e.* the State. *Massachusetts* v. *New York*, 271 U. S. 65, 89 (1926) and *United States* v. *Oregon*, 295 U. S. 1, 14 (1935) (both per STONE, *J.*).[26]

This result is not only established by these recent unanimous decisions but follows from the nature of the national and state governments under our Federal Constitution. The state of California was admitted into the Union "on an equal footing with the original states,"—a result not only intended by Congress but required by the Constitution.[27] Whatever else such admission entailed, it resulted in a political, governmental and sovereign parity between California and the original states. This the plaintiff concedes (Br., pp. 69, fn. 5; 92). Included in this equal

25. 9 Stat. 108; 9 Stat., app. 10.

26. The same presumption would apply, in the absence of specific reservation, to uplands. There has been no occasion, however, for the Court to include such lands within the presumption of transfer to the local sovereign since every act of admission specifically reserved the right of primary disposal to such lands to the United States.

27. *Pollard* v. *Hagan*, 3 How. 212, 229 (1845); *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 434 (1892); *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926); *United States* v. *Utah*, 283 U. S. 64, 75 (1931).

sovereignty, jurisdiction and political standing is California's right, within her own borders, to exercise all the powers of government possessed by the original states.

The federal government is a government of delegated and limited powers. The states are the possessors of the residual sovereignty.[28] California, by reason of her admission on an equal footing, is on a parity with the original states in this respect. In keeping with the concept of the national government as a limited sovereign, the presumption against severance of title to lands under navigable waters from sovereignty would naturally have no application in favor of the federal government.

It is unquestionable that in this country the states are the source of rights in real property and that California, having, both by statute and as a constitutional requirement, been admitted on a political, governmental and sovereign parity with the original states, shares their rights in this respect.

Under our Constitution, the transfer of property at death by will or succession is a privilege derived from the state and which the state may withhold absolutely.[29] Even where succession and devise are permitted, the rules of succession and the formalities of wills are matters of state law, and in the absence of a valid will or lawful heirs, it is to the state as dominant sovereign in the field of real property and not to the United States that title escheats.[30] Under our Constitution, the question of the nature of the permissible estates in real estate,[31] the formalities necessary to transfer title, the form and effect of deeds, mortgages,

28. 10th Amendment to Federal Constitution.

29. *Mager* v. *Grima*, 8 How. 490 (1850); *United States* v. *Fox*, 94 U. S. 315, 320 (1877); *United States* v. *Perkins*, 163 U. S. 625, 627 (1896); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283 (1898); *Plummer* v. *Coler*, 178 U. S. 115, 134, 137 (1900).

30. *Sullivan* v. *Burnett*, 105 U. S. 334 (1882); *Greene* v. *Biddle*, 8 Wheat. 1, 12 (1823); *Mager* v. *Grima*, 8 How. 490, 493 (1850); *United States* v. *Fox*, 94 U. S. 315, 320 (1877). See also other cases cited in previous footnote.

31. See, *e. g.* New York Real Property Law, Art. 3; R. S. N. J. 46:3.

leases and other instruments conveying real property or interests therein, within the limits of the several states, are matters of state and not federal law.[32] These rules of law are familiar and undisputed.

The subordination of the United States itself to the dominance of the states in this field is shown in a few dramatic cases. In *United States* v. *Crosby,* 7 Cranch 115 (1812), the United States sought to recover lands in Maine which had been deeded to the United States by an instrument executed in the West Indies, without seal, and valid at the place of execution. The laws of Massachusetts, under whose sovereignty Maine was in 1812, required a sealed instrument to pass title to realty. The Court held against the claim of the United States, holding in an opinion by Justice STORY (7 Cranch 115, 116):

> "The court entertain no doubt on the subject; and are clearly of the opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."

In *United States* v. *Fox,* 94 U. S. 315 (1877), the decedent willed all his real and personal property to the United States. The decedent's heirs contested the validity of the will. The New York courts held that the will was void as to real property but valid as to personalty since the New York statute permits only natural persons to succeed to lands at death. On error to this Court, the New York decision was upheld and the attempted devise to the United States stricken down. The Court stated (94 U. S. 315, 320):

> "The power of the State to regulate the tenure of real property within her limits, and the modes of

32. *Sullivan* v. *Burnett,* 105 U. S. 334 (1882); *Hamilton* v. *Brown,* 161 U. S. 256 (1896); *American Loan & Trust Co.* v. *Grand Rivers Co.,* 159 Fed. 775, 778 (1908); *Klein* v. *Brodbeck,* 15 F. Supp. 473 (1934); *United States* v. *Crosby,* 7 Cranch 115, 116 (1812); *Clark* v. *Graham,* 6 Wheat. 577, 579 (1821); *Greene* v. *Biddle,* 8 Wheat. 1, 12 (1823); *Kerr* v. *Moon,* 9 Wheat. 565, 570 (1824); *M'Cormick* v. *Sullivant,* 10 Wheat. 192, 202 (1825); *Oakey* v. *Bennett,* 11 How. 33, 44 (1850); *Montgomery* v. *Samory,* 99 U. S. 482, 483 (1879); *Sunderland* v. *United States,* 266 U. S. 226, 232, 233 (1924).

> its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners is undoubted * * *. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the States."

See also *United States* v. *Perkins,* 163 U. S. 625, 627 (1896).

In *American Loan & Trust Co.* v. *Grand Rivers Co.,* 159 Fed. 775 (1908), the United States sought to secure certain proceeds of a mortgage foreclosure sale of property located in Kentucky. The sale was under the authority of a federal court and the claim of the United States was pursuant to a federal statute requiring money deposited into court which is unclaimed for ten years or longer to be deposited "to the credit of the United States." The Court said (159 Fed. 775, 778, 780):

> "To maintain this right it is contended that the United States, as parens patriae, is entitled to have the court do what the statute in question has authorized. This proposition demands consideration, and nonetheless, that it is altogether new as applied to any right of escheat in the United States outside of the territories and the District of Columbia. * * *
>
> "These authorities inevitably lead to the conclusion that the national government is not in any case parens patriae to which ownerless property of any sort in any state of the Union reverts. We think that within the states respectively it is the state which exclusively is parens patriae, and this result cannot be affected by the fact that the property might happen to be in the registry of a federal court."

This conclusion is in line with the nature of the reservation made by the United States in California's act of admission with regard to the uplands. What was reserved was only "a primary right of disposal." The United States did not purport to retain that ultimate ownership of all real property which belongs to the sovereign and which is superior even to a fee simple absolute. See *People* v. *Rector, &c. of Trinity Church,* 22 N. Y. 44, 47 (1860); *Pollard* v. *Hagan,* 3 How. 212, 221 (1845); *Hardin* v. *Jordan,* 140 U. S. 371, 381 (1891). By the same token, even if a primary right of disposal in navigable waters had been reserved by the United States in the lands underlying navigable waters within the boundaries of California, nevertheless, the ultimate ownership would still have passed to California upon her admission and, after the exercise of the primary right of disposal by the United States to an individual, California would still have power to forbid the transfer of that property at death and to acquire the same by escheat.

There can be no doubt, therefore, that in the field of ownership of property, particularly real property, the dominant sovereignty is state sovereignty, and in the absence of a specific reservation by the United States of any title to lands under navigable waters, the presumption must be that title to lands under such navigable waters passed to the state of California.

The Plaintiff argues that ownership of lands under navigable waters is so closely identified with national sovereignty that the presumption must be indulged that Congress intended to reserve title in the United States to such lands, citing *Massachusetts* v. *New York,* 271 U. S. 65, 89 (1926) and *United States* v. *Oregon,* 295 U. S. 1, 14 (1935) (Br., p. 73). The citation is indeed anomalous since each of these cases states that the presumption is against the severance of such title from *local* sovereignty.

The Plaintiff suggests that the purposes of the federal government to "insure domestic tranquility," and to "pro-

vide for the common defence" and the obligation to protect the states from invasion, and related powers, somehow involve title to lands under the marginal seas in the United States as the only government with adequate power to protect the security of the coasts (Br., pp. 83-84). It is anomalous in view of such lofty grounds for the claim of title, that of all the lands under the marginal seas along the coast of the United States, the Plaintiff should have chosen to raise the question regarding revenue producing oil lands. The purpose of this suit apparently is to secure the oil or revenues from the lease of oil lands which now accrue to the State of California, and not to effectuate any of the purposes or powers upon which the Plaintiff makes the claim of technical title.

In this connection it is interesting that former Secretary of the Interior Ickes, in testifying against the legislation to release to the states any claim of the United States to lands under navigable waters,[33] attributed to oil company lawyers his conversion from his earlier view that the states' title to such lands was unimpeachable. The oil company lawyers to whom he referred were "applicants" for federal leases of the lands which California had theretofore leased.

The Plaintiff's argument from the power and duty of the United States to protect the security of the coasts proves too much. Of course, it is true that the central government has power to make war and to maintain an army. But in delegating these powers to it, the states certainly did not give up title to their property which they obligated the United States to protect. If the Plaintiff's argument is sound as applied to lands under the marginal seas, it would apply equally well to the lands under bays and harbors, and it would also constitute a basis claim of title by the United States to all uplands as well as lands beneath navigable waters. A policeman on the beat does not own the house on the corner because of his duty to protect it.

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33. Hearings before the Committee on the Judiciary, United States Senate, 79th Cong. 2nd Sess., on S. J. Res. 48 and H. J. Res. 225, p. 4 (1946).

Moreover, the Constitution does not allocate the defense of the coasts exclusively to the federal government. The several states may repel invasions (U. S. Constitution, Art. I, sec. 10).

Furthermore, if the Plaintiff's argument that its obligation to protect the borders of the United States entails ownership of the lands along such borders is sound, then it must claim title not only to the lands in the marginal seas along the ocean borders of the country, but also the lands beneath the river boundaries of the St. Lawrence and Rio Grande Rivers and the lake boundaries of the Great Lakes, to say nothing of other lands along the boundaries with Canada and Mexico.

Nor does ownership of lands under marginal seas follow from the federal government's power to regulate interstate and foreign commerce upon such waters. The federal power to regulate interstate and foreign commerce is not restricted to the marginal seas, but extends to all navigable waters, including bays and harbors, and to all uplands as well. Yet, no claim of title to such uplands in the original states has been or can be advanced on the basis of such power with regard to commerce upon them.

Nor is the ownership of real property within the boundaries of a state any matter of international law or external sovereignty within the sphere of the federal government. It may be admitted that the federal government is dominant in the field of external sovereignty, but we cannot see how it is the concern of any foreign government whether title to lands in California belongs to the federal or state government. The question is clearly domestic and local.

In the local and domestic field of ownership of real property, the states are the dominant sovereigns, and as the ultimate owners of all real property within their boundaries, the presumption against severance of title to such property from local sovereignty results in the passage of such title to them upon their admission into the Union.

Even if the United States' position as "paramount" sovereign over the lands in question should be conceded for argument's sake, this suit is nonetheless an attempt at expropriation without just compensation. By the fifth and fourteenth amendments to the Federal Constitution, the paramount sovereign, whether the federal or state government, has no right to take lands of others without payment.

A related difficulty with Plaintiff's theory is that it requires the untenable conclusion that lands admittedly within the territorial boundaries of a state were and perhaps still are ownerless. Whatever the territorial limits of the United States may have been prior to California's admission into the Union in 1850, there can be no doubt that the admission of that state with boundaries "extending * * * three miles" into the Pacific Ocean was an assertion both by the state and the United States that the three mile belt off California's coast was within the territorial limits of both of them.[33a]

If Plaintiff argued that title then passed to or remained in the federal government, we should understand the argument although it is erroneous. But the Plaintiff's citation of *Queen* v. *Keyn,* L. R. 2 Exch. Div. 63 (1876) as denying national ownership of the marginal seas (Br., p. 47),[33b] coupled with the vague talk of "emergence" of rights "susceptible of possession and ownership," (Plaintiff's Memorandum in Support of Motion for Leave to File Complaint, p. 4) must mean that such rights had not "emerged" by 1850, indeed not even by 1876 when the *Keyn* case was decided.

The result is an assertion that land within the boundaries of both state and nation after 1850 were completely ownerless for many years. But this theory falls afoul of the basic rule that no property within the territorial limits

33a. Article XII of California Constitution of 1849, referred to in Act of Admission, 9 Stat. 452. Plaintiff's brief, pages 4-5, 217.

33b. The dictum of the *Keyn* case on this point, discredited in both American and British law, is discussed more fully below at page 51 and footnote 44.

of any state or of the United States can be ownerless (*Martin* v. *Waddell,* 16 Pet. 367, 410 (1842). If no one else owns a parcel of property, it belongs to the sovereign. As Chancellor KENT said (4 Kent's Commentaries 426 [12th ed., by Holmes] [1873]):

> "It is a principle which lies at the foundations of the right of property, that if ownership becomes vacant, the right must necessarily subside into the whole community, in whom it was originally vested when society first assumed the elements of order and subordination."

See also *Johnson and Graham's Lessee* v. *M'Intosh,* 8 Wheat. 543, 595 (1823).

If the property is within the boundaries of a state, it belongs to the state as parens patriae (*American Loan & Trust Co.* v. *Grand Rivers Co.,* 159 Fed. 775 [1908]. Title could not be held in abeyance awaiting the ripening of the emergent claims of the federal government.

POINT V

The decisions of this Court with respect to the ownership of lands under navigable waters make no distinction between lands under the marginal sea and lands under other navigable waters. The sole test has been navigability.

As early as 1867, this Court said in *Mumford* v. *Wardwell,* 6 Wall. 423, 436:

> "*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." (Italics added.)

In 1877, the Court said in *McCready* v. *Virginia,* 94 U. S. 391, 394:

> "*The principle has long been settled in this court,* that each state owns the beds of all tidewaters within its jurisdiction, unless they have been granted away." (Italics added.)

Similar statements not only expounding the rule, but stressing the uniformity with which it has been accepted by this Court over the years, appear in *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387, 435 (1892); *Scott* v. *Lattig,* 227 U. S. 229, 242 (1913), and *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926). In the most recent case on the subject, *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 15 (1935), Mr. Chief Justice HUGHES, speaking for a unanimous Court,[34] again applied "settled principles" and held that:

> "The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. * * * This doctrine applies to tidelands in California."

No hint of even the sheerest *obiter dictum* to the contrary has ever appeared in an opinion of this Court. Rarely has the Court adhered so consistently and for so long to any principle of law.

1. The Test Established by This Court Has Been Navigability and Not Location.

The Plaintiff attempts to dismiss this long line of consistent rulings by arguing that in each of those cases the lands in controversy were not beneath the marginal seas but were foreshores or beneath other navigable waters—

34. Mr. Justice MCREYNOLDS may have concured in the result only.

bays, harbors, rivers and lakes. Assuming the truth of this statement,[35] nevertheless these cases establish the title of the states to the lands beneath the marginal seas. The Plaintiff chooses to look at the facts of these cases while ignoring the reasoning completely. Not one of these cases, deciding title to the land in question, ever turned upon the question whether it was beneath a bay, a river, a lake, a harbor, an arm of the sea. *In every single case the sole question pertinent to this inquiry was whether the waters under which the lands lay were navigable in fact.*

This Court has so consistently, for over a century, used the test of navigability of the covering waters as the deciding test of a state's title to submerged and reclaimed lands, that it has effectively decided that all lands beneath all navigable waters belonged to the states upon their creation unless they were granted by a predecessor sovereign. The policy behind the rule was expressed in *Barney* v. *Keokuk,* 94 U. S. 324, 338 (1877), and repeated in *Packer* v. *Bird,* 137 U. S. 661, 671 (1891):

> "In our view of the subject, the correct principle was laid down in *Martin* v. *Waddell,* 16 Pet., 367, *Pollard* v. *Hagan,* and *Goodtitle* v. *Kibbe,* 9 How., 471. *These cases related to tidewater, it is true; but they enunciate principles which are equally applicable to all navigable waters.*" (Italics added.)

At the threshold of the long line of cases on the subject, in *Martin* v. *Waddell,* 16 Pet. 367, 407 (1842), the Court mentions the location of the lands in controversy only in connection with the statement "that the land claimed lies beneath the *navigable waters* of the Raritan River and Bay, where the tide ebbs and flows." In stating the rights which the people of a state acquired upon the Revolution in con-

35. The difficulty of drawing a line between the waters of a bay or tidal estuary and the marginal seas proper, makes us hesitant to concede that none of the decided cases dealt with lands under the marginal seas in the absence of maps showing the location of the lands in controversy.

nection with their newly acquired sovereignty, the Court said that they "hold the absolute right to all *their navigable waters and the soils under them* for their own common use." The question of interpreting the Charter to the Duke of York was "Whether the dominion and propriety in the *navigable waters, and in the soils under them,* passed as a part of the prerogative rights annexed to the political powers conferred on the duke" (16 Pet. 367, 411). Throughout, it is clear that the opinion applies to all lands under all navigable waters within the boundaries of one of the original states, and that whenever rivers, bays and arms of the sea are referred to, it is merely as examples of navigable waters.

The same holds true for the first case in this field dealing with a new state. In *Pollard* v. *Hagan,* 3 How. 212 (1845), the reference is made over and over again to lands under "navigable waters." The entire controversy there arose as to the admissibility of evidence offered by the defendants "that the premises in question, between the years 1819 and 1823, were covered by water of the Mobile River at common high tide" (3 How. 212, 220). The question was stated to be "whether Alabama is entitled to the shores of the navigable waters, and the soils under them, within her limits" (3 How. 212, 225). And the conclusion of the Court is (3 How. 212, 230):

> "First. The shores of *navigable waters, and the soils under them,* were not granted by the Constitution of 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." (Italics added.)

It will be noted that the reference here was not only to the "shores of navigable waters" but also to "the soils under them." Such a dichotomy, obviously including within the meaning of the word "shores" lands between low and high water mark, necessarily requires that "soils under" navigable waters includes the lands below low water mark.

Similarly, in *Smith* v. *Maryland,* 18 How. 71, 74 (1855), the decision is in terms of "land below low water mark." The Court said:

> "Whatever soil below low water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border, and 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."

There is a clear implication that the Court had in mind the marginal seas as well as other navigable waters when, in attributing to the state the ownership of "soil below low water mark," it included such soil on the "maritime border" of the state as well as "within (its) territory."

In *Den* v. *The Jersey Company,* 15 How. 426, 432 (1853), the plaintiffs claimed title to reclaimed lands on the ground that "the fee of the soil under the navigable waters of that part of the State was conveyed to them." The Court repeated its opinion in *Martin* v. *Waddell, supra,* "that the soil under the public navigable waters of East New Jersey belonged to the State."

We have already quoted the language from *Mumford* v. *Wardwell,* 6 Wall. 423, 436 (1867), in which the Court has applied the general rule to California in terms of "navigable waters."

The statement of the rule in *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65 (1873), is that by the common law

> "the title to the shore of the sea, and of the arms of the sea, and in the soils under tide-waters, is, in England, in the King, and in this country, in the state."

Elsewhere in the opinion the Court ruled that upon California's admission into the Union, she acquired absolute property in "all soils under the tide-waters within her

limits" (18 Wall. 57, 66). The lands in question were below low water mark, and the Court described them as being "under the tide-waters of the bay." Therefore, when, in stating the general rule, California's title was asserted to "all soils under the tide-waters within her limits," the Court obviously included all lands below low water mark within the boundaries of California, without exception.

Such statements of the rule in terms of "lands under navigable waters" are made over and over again by this Court down through the years.[36] *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68 (1874); *Manchester* v. *Massachusetts,* 139 U. S. 240, 259, 260 (1891); *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387, 437 (1892); *Shively* v. *Bowlby,* 152 U. S. 1 (1894); *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 283, 284 (1894); *Mobile Transportation Company* v. *City of Mobile,* 187 U. S. 479, 482 (1903); *Hardin* v. *Shedd,* 190 U. S. 508, 519 (1903); *Scott* v. *Lattig,* 227 U. S. 229, 242 (1913); *Donnelly* v. *United States,* 228 U. S. 243, 260 (1913); *Oklahoma* v. *Texas,* 258 U. S. 574, 583 (1922); *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926); *Massachusetts* v. *New York,* 271 U. S. 65, 89 (1926); *Fox River Paper Co.* v. *Railroad Commission of Wisconsin,* 274 U. S. 651, 655 (1927); *United States* v. *Oregon,* 295 U. S. 1, 14 (1935).

In addition to the instances already pointed out, the language in several other cases must of necessity have applied the general rule to lands under the marginal seas. Thus, in *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387, 437 (1892), the Court asserts the state's ownership "of lands under tide waters on the borders of the sea." Again,

36. In some of the cases, the rule is phrased in terms of "tide waters" but in such cases that term is obviously intended to mean the same thing as "navigable waters", inasmuch as the cases which talk in terms of "navigable waters" are cited. See, *e. g., Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65 (1873); *McCready* v. *Virginia,* 94 U. S. 391, 394 (1877); *San Francisco* v. *Le Roy,* 138 U. S. 656, 670 (1891); *Hardin* v. *Jordan,* 140 U. S. 371, 381 (1891); *Knight* v. *United Land Association,* 142 U. S. 161, 183 (1891); *Shively* v. *Bowlby,* 152 U. S. 1, 15 (1894); *United States* v. *Mission Rock Company,* 189 U. S. 391, 404 (1903); *Appelby* v. *New York,* 271 U. S. 364, 381 (1926); *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 15 (1935).

in *Shively* v. *Bowlby,* 152 U. S. 1, 11 (1894), the Court refers to the common law rule regarding "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." By referring to "the sea" in addition to "rivers and arms of the sea," the Court could only have intended the marginal seas.

Particularly informative is the group of cases dealing with lands beneath waters in new states, where, in order to decide whether a title claimed by or under the United States must yield to a title claimed by or under a state, this Court has stated that the sole question for determination was whether the waters in question were, at the time of the state's admission, in fact navigable or not. If the waters were navigable, every such case upheld the title claimed by or under the state. Only where the waters were non-navigable did the Court uphold title claimed by or under the United States, and in such cases the Court regularly included a statement that if the waters were in fact navigable, the result would have been the other way. See, *e. g., Barney* v. *Keokuk,* 94 U. S. 324 (1877); *San Francisco* v. *Le Roy,* 138 U. S. 656, 661 (1891); *Packer* v. *Bird,* 137 U. S. 661 (1891); *Hardin* v. *Jordan,* 140 U. S. 371 (1891); *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387 (1892); *Shively* v. *Bowlby,* 152 U. S. 1 (1894); *United States* v. *Mission Rock Company,* 189 U. S. 391 (1903); *Hardin* v. *Shedd,* 190 U. S. 508 (1903); *Scott* v. *Lattig,* 227 U. S. 229 (1913); *Donnelly* v. *United States,* 228 U. S. 243 (1913); *United States* v. *Chandler-Dunbar W. P. Co.,* 229 U. S. 53 (1913); *Oklahoma* v. *Texas,* 258 U. S. 574 (1922); *United States* v. *Holt State Bank,* 270 U. S. 49 (1926); *United States* v. *Utah,* 283 U. S. 64 (1931); *United States* v. *Oregon,* 295 U. S. 1 (1935); *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935).

Nothing in the decided cases justifies a distinction between navigable waters in the marginal seas and all other

navigable waters. Indeed, the entire logic of the cases supports the states' title to ungranted lands under both alike.

2. The Difficulty in Distinguishing Between Bays and the Marginal Seas.

One of the reasons which militates against a distinction between the marginal seas and other navigable waters along the coast is the extreme difficulty of making any valid distinction between such waters. Plaintiff itself, in Appendix B of its brief, in attempting to classify locations between "inland waters or tidelands" and "open sea," is unable to reach a decision in 22 cases listed as "doubtful."

Bays have been defined by various lexicographers as follows:

> "A body of water around which the land forms a curve; a recess or inlet between capes and headlands" (Ballentine Law Dictionary, 1930).
>
> "A bending or curving of the shore of the sea or of a lake, so as to form a more or less inclosed body of water" (Bouvier's Law Dictionary, 3rd Ed., 1914).
>
> "An opening into the land where the water is shut in on all sides except at the entrance" (Black's Law Dictionary, 2nd Ed., 1910).
>
> "Tract of water, around which the land forms a curve, or any recess or inlet between capes or headlands" (Webster's Dictionary, 2nd Ed.).
>
> "An indentation of the shore line of a body of water; the water between two projecting headlands; sometimes an arm of the sea connecting with the ocean" (Funk and Wagnalls New Standard Dictionary).

Various judicial decisions give the following definitions: "inclosed parts of the sea";[37] "sheltered bodies of

37. *United States* v. *Bevans*, 3 Wheat. 336, 387 (1818).

water";[38] "an expanse of water between two capes or headlands."[39]

But nature has not drawn our coast lines with a straight-edged ruler. The coast line is a continuous series of indentations and projections, and it is literally true that no point on the coast is not either on a headland or between two other projections which may be called headlands. Thus, a distinction between lands within bays and arms of the sea and lands under the marginal seas "along the open coast" is a distinction without a difference.

The futility of the distinction is seen from another point of view as well. The entire Gulf of Mexico is one huge bay. Similarly, Chancellor KENT, in his Commentaries (Vol. 1, p. 30, 12th ed., by Holmes [1873]), would draw lines which would place practically the entire American coast line within a few relatively enormous bays:

> "* * * it would not be unreasonable, as I apprehend to assume, for domestic purposes connected with our safety and welfare, the control of waters on our coasts, though included within lines stretched from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of Delaware, and from the south cape of Florida to the Mississippi."

Recognizing the absurdity of using a simple definition of indentation between headlands, there is frequently added to the definition a requirement that the headlands be not less than a specified distance apart. See, *e. g., Manchester* v. *Massachusetts,* 139 U. S. 240 (1891) (six miles).

However, definitions in terms of distance appear to be honored more often in the breach than in the observance, and the legal nature of bays has been recognized in the

38. *Columbia Land Co.* v. *Van Dusen,* 50 Ore. 59, 62 (1907).
39. *People* v. *Anderson,* 30 Cal. App. 542, 546 (1916).

case of the following: Bay of Monterey (eighteen miles), *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722, 724 (1927); Chesapeake Bay (twelve miles), *The "Alleganean"* (Ct. of Commrs. of Alabama Claims), 32 Alb. Law J. 484 (1885); Delaware Bay (sixteen miles), 1 Op. A. G. 32 (1793); Conception Bay, Newfoundland (forty miles); *Direct U. S. Cable Co. Ltd.* v. *Anglo-American Telegraph Co.,* 2 App. Cas. 394 (1877).

Sometimes the Court is impressed by the fact that the body of water is generally called a "bay," *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722, 724 (1927), but elsewhere it has been said: "The question cannot be determined by ascertaining what appellations have been given to it." *State* v. *Gilmanton,* 14 N. H. 467 (1843).

A few frank commentators have admitted that there is no law on the question at all. Thus, in the *Ocean Industries* case, *supra,* the Court said (252 Pac. 722, 726):

> "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 possessing the enclosing shore line of the bay or inlet in question."

And in the *Direct U. S. Cable Co.* case, *supra*:

> "We find an universal agreement that harbors, estuaries and bays landlocked belong to the territory of the nation which possess the shores around them, but no agreement as to what is the rule to determine what is a 'bay' for this purpose."

Unless the Court is willing to open the Pandora's Box of a multiplicity of litigation on this vexing point, it will reject the attempted distinction by the Plaintiff between navigable waters under "bays" and "marginal seas."

3. There Are No Differences Between the Marginal Seas and Other Navigable Waters Which Distinguish the Decisions of this Court and Which Prevent the Application to Lands Under Marginal Seas of the Decisions Regarding Lands Beneath Other Navigable Waters.

The Plaintiff seeks to avoid the force of precedent by suggesting that there are "pivotal distinctions" between the three-mile belt on the one hand and the tidelands and inland waters on the other hand (Br., p. 9). Each so-called distinction is either a distinction without a difference or else no distinction at all but merely a disagreement with the authorities even as they apply to "tidelands and inland waters."

(a) *The false attempt to associate the marginal seas with national sovereignty.*—We have already disposed of the attempt to claim that ownership of lands beneath the marginal seas is more closely identified with national sovereignty than with state sovereignty. Congress thought otherwise and intended a different result. Moreover, the ownership of land within the boundaries of a state has nothing to do with external sovereignty. The state, as the sovereign from whom all rights in property are held within its borders, is the owner of lands under all navigable waters, including the marginal seas. An attempt to deduce federal title from the federal duty to protect the coasts and regulate interstate and foreign commerce offers no distinction at all, since there is an equal federal duty to protect the bays and harbors and regulate interstate and foreign commerce within them.

(b) *The utterly fallacious suggestion that there is a distinction between lands under the marginal seas and under bays because of some imagined international law aspect of the former.*—We cannot state too strongly our opinion that international law does not have a single thing to do with the ownership of any lands within the United States of

America, whether they be the uplands, the foreshore or lands beneath rivers and bays or beneath the marginal seas. This argument, however, is more pertinent to establishing the error of the Plaintiff's assertion that the original states had no title to lands under the marginal sea at the Revolution, which will be treated in Point VI, *infra.*

At this point, it is sufficient to say that international law has just as much and just as little to do with the territorial rights of any state to waters inside its bays as with waters in the marginal seas; and international law has just as much and just as little to do with the ownership of lands underlying waters of both types. Territorial rights in bays is a constant matter of international law concern and has been the subject of treaties just as much as has the extent of the marginal seas.[40] Indeed, the only workable definition of a bay has been in conjunction with the extent of the marginal seas. And if the three-mile width of the latter is a matter of international law, the twice three-mile distance between headlands of the former is no less so.

(c) *The fallacy of the attempted distinction by denying the original states' title to lands under the marginal seas.*— Here the so-called distinction is really not a distinction but a disagreement with this Court's opinions. The true basis of the original states' title to lands under the marginal seas will be dealt with at length in Point VI. At this point, however, we submit the following:

The argument against the original states' title derived from the absence of statutory boundary definitions is not sound. If it required a statutory definition to assert title to marginal seas, then the United States has not included the marginal seas within its boundaries, either as against the states or as against foreign sovereigns because there is no statutory definition of the boundaries of the United States except those with Canada and Mexico.

40. See the authorities cited *supra* in sub-point 2 of this Point, pp. 39-41.

In addition, almost every colonial and state statute which the Plaintiff quotes (Br., pp. 94-97) contains no more specific assertion of title to lands within bays than to lands beneath the marginal seas. Thus, if the Plaintiff is correct and the boundaries are to be construed as having literally followed the coastline, then again the Plaintiff has suggested a distinction without a difference since the original states would then have as little right to lands under the water within bays. Here also, there is utter failure to show any "pivotal distinction" of the many cases in which this Court has upheld the original states' ownership of submerged lands within bays.

The same fallacy runs throughout the Plaintiff's argument which attempts to construe the Treaty of 1783 (Br., pp. 109-111) as defining a boundary of the original thirteen states which literally followed the coastline and did not include the marginal sea.

The attempt to construe the original British Crown charters and grants as excluding the marginal seas is fruitless. If the Crown did not grant such waters to the Colonies, then the rights remained in the British Government; and then the states succeeded to the rights of the Crown and Parliament upon the Revolution. (See *Martin* v. *Waddell,* 16 Pet. 367, 410 [1842]; *Harcourt* v. *Gaillard,* 12 Wheat. 523, 526 [1827]; *Weber* v. *Board of Harbor Commissioners,* 18 Wall. 57, 65 [1873]; *Shively* v. *Bowlby,* 152 U. S. 1, 14-15 [1894].) It matters little whether the original states secured their rights to lands under the marginal seas as successors to the Colonies or to the British Government directly.

(d) *The attempted distinction on the ground that ownership of lands under the marginal seas is not an attribute of sovereignty.*—We have attempted not to use the phrase "attribute of sovereignty" which the Plaintiff finds objectionable, in explaining in Point IV why the presumption

against severance of title to lands under navigable waters, including the marginal seas, is a presumption against severance from local sovereignty. However, even as the Plaintiff frames the "attribute of sovereignty" argument for purposes of demolishing it, it is clear that here again no "pivotal distinction" is offered. The essence of this argument (Br., pp. 143-153) does not even purport to be a distinction of the many decided cases of this Court dealing with "bays, harbors and inland navigable waters." It is merely an out and out disagreement with the Court's reasoning even as applied to "bays, harbors and inland waters."

In summary of this Point we submit that the *ratio decidendi* of the many cases in this field applies with full and equal force to establish the ownership of the states to lands beneath the marginal seas. The test universally employed was whether the lands were under navigable waters or not. The reasoning applied to all navigable waters, with no possible exception of the marginal seas. An attempt to substitute for the clear test of navigable waters a new test based on location of such waters would run afoul of the prodigious difficulty of arriving at a workable definition of a bay and would entail a disheartening multiplicity of litigation to decide the title of every single piece of land below low water mark off the coast.

Nor has the Plaintiff submitted any real "pivotal distinction" between bays on the one hand and the marginal seas on the other which serves to distinguish the many decided cases of this Court in this field.

POINT VI

The original states acquired title to all lands under the marginal seas upon the Revolution except for possible previous grants by or under the authority of predecessor sovereigns.

We have shown heretofore in this brief that whether or not Congress had the power to reserve title to lands under the marginal seas in the United States it actually intended to pass such title to the newly admitted states. It would therefore appear unnecessary in this brief to establish also the title of the original states to such lands off their coasts. Yet the errors of the Plaintiff on this question should not go unanswered. The basic theory of the Plaintiff is spun from a few foreign and domestic text writers on international law whose statements the Plaintiff somehow prefers to the opinions of this Court. We would assume that even a dictum of this Court would be entitled to somewhat more standing than those of foreign and domestic text book writers.

The theory seems to be that there were no territorial rights in the British Government to the marginal seas off the coasts of the American colonies and that, therefore, the original states could not have succeeded to the ownership of lands within such seas upon the Revolution as this Court held in *Martin* v. *Waddell,* 16 Pet. 367, 410 (1842) and in many subsequent cases. The Plaintiff argues that there was a convenient hiatus in the claims of the British and American Governments to the marginal seas between some unspecified date after the establishment of the Colonies and some unspecified time after 1793. This hiatus is necessary to its argument because if the British Government had title in 1776, there is no doubt that the Declaration of Independence and the successful Revolution transferred its title

to the sovereign states. That the termination of the alleged hiatus should have begun in 1793, so soon after the new nation was finally established is enough to invite suspicion of the Plaintiff's contention that the rights of the British Crown and the successor sovereign states were suspended until after the formation of the United States.

And therein lies the entire fallacy of the argument.

The British Government, at least from the beginning of the era of Colonial settlement consistently asserted title to all the marginal seas off the coasts of its homeland and colonial possessions.

The earliest judicial decision on the point was *Royal Fishery of the Banne,* decided between 1604 and 1612 and reported in Davie's Reports (Ireland) 149, 152. There the Court said:

> "* * * the reason for which the King hath an interest in such navigable river so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea so far as it flows; and the sea is not only under the dominion of the King, but it is also his proper inheritance, and therefore the King shall have the land which is gained out of the sea * * *."

The reasoning of this statement throws an interesting light upon the Plaintiff's attempted distinction between "inland" navigable waters and the marginal seas. Historically, it appears the sovereign's title to the navigable rivers and the soils beneath them was derived from his title to the sea and the sea bed.

We need not repeat the statements of law made by Lord Hale in the seventeenth century which have always been accepted as stating the common law rule that the title to lands under the marginal seas off British and British colonial territory is in the British Crown. *Shively* v. *Bowlby,* 152 U. S. 1, 11 (1894).

The Plaintiff attempts to dismiss this authority as an "extravagant and pretentious" claim which was abandoned before the Declaration of Independence. The basis on which the authority is dismissed is an attempt to show that it was opposed to international law as it developed through the seventeenth and eighteenth centuries.

The Plaintiff has fallen into the error of supposing that as between the government of England (or any other government) and its subjects and citizens, international law determines the boundaries of the country or of any colony or state and of property rights therein.

It is settled in this Court that when the United States of America asserts title to any property, even though the assertion might be a clear violation of international law, the citizens of the United States, and the states, and this very Court itself, are foreclosed from challenging the assertion. If that were not so, then Attorney General Clark is under a duty to advise President Truman that the Presidential Proclamation of September 28, 1945 asserting the ownership of this country to natural resources within the sea bed of the continental shelf was invalid as a flagrant violation of the international law of this day which, according to Plaintiff's brief, limits the territorial rights of a sovereign nation to three marine miles from its coast.

The law of this country was early stated by this Court by Chief Justice MARSHALL in *Foster and Elam* v. *Neilson,* 2 Pet. 253, 309 (1829) (quoted in *Pollard* v. *Hagan,* 3 How. 212, 228) as follows:

> "If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

If this were not so, then Congress would have grossly exceeded its powers when it established boundaries of the states bordering on the Gulf of Mexico, and therefore the boundary of the United States, at distances of three leagues from the coast, as against Plaintiff's assertion that international law limits territorial rights to one league into the sea.

International law establishes no boundaries and creates no rights in territories within those boundaries *vis-a-vis* the citizens, political subdivisions and component divisions of any Nation. Those rights are wholly a matter of domestic law.

Thus, no matter how "pretentious" the Plaintiff, with its advantage of hindsight as to the course of the development of international law, may deem the assertions of the British Crown in the seventeenth century and no matter how "extravagant" they might have appeared to other nations at that time or even to the subjects of the British Crown including the American colonists, the fact remains that those assertions conclusively bound every British subject whether in Great Britain or in the American colonies. Regardless of the opinion of the foreign critics, it was the law of Great Britain and her American colonies in the seventeenth century that title to the marginal seas with an extent far beyond any three mile limit belonged to the British Government.

It may be that Great Britain prior to the Revolution, had retreated from the full extent of her original claim of ownership of the seas. But we find no evidence of any surrender of claim to a belt of marginal seas, at least three miles wide prior to the American Revolution. Indeed, Blackstone, a respectable authority on English law, wrote in 1768, just before the Revolution, in connection with the Crown's title to a newly risen island in the sea:

> "for, as the king is the lord of the sea, and so owner of the soil while it is covered with water, it is but

> reasonable he should have the soil when the water has left it dry.''[41]

The Plaintiff is thus driven to the impossible burden of proving that the claims of the British Crown, still asserted to be the law in 1768, suddenly disappeared before 1776, and that no territorial rights in the marginal sea existed until they ''emerged'' beginning with the diplomatic actions of the United States Department of State in 1793.

The burden becomes all the more impossible to sustain because throughout the nineteenth century, after the Revolution, English law adhered to the rule of ownership by the Crown of title to lands beneath the marginal seas.

Recognition in English law of territory in the marginal seas appears soon after the American Revolution in *Twee Gebroeders,* 3 C. Rob. 336, 339 (1801), which set a limit at ''the reach of common shot.''

Shortly afterwards, in 1805, in *The Anna,* 5 C. Rob. 373, the British court recognized that the territorial limits of the United States extended three miles outward from Mud Islands at the mouth of the Mississippi River. The territorial limits of the United States, so recognized, were used to defeat the claim of a British privateer which had captured a ship flying the American colors, over three miles from the mainland, but only one and one-half miles beyond the Mud Islands.

In 1830, Hall stated the English law to be:

> ''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 arms of the sea below ordinary high-water mark is in the King * * *.''[42]

Hall's statement admits of no hiatus.

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41. Blackstone's Commentaries, Chase Ed. (1877), Vol. 1, p. 417.
42. ''Essay on the Rights of the Crown and the Privileges of the Subjects in the Sea-shores of the Realm'' (1830) (contained in Stuart Moore's ''History of Law of the Foreshore'' [3rd. Ed. 1888, p. 667]).

Both the territorial nature of the marginal seas to an extent of at least three miles from the coast and the ownership by the Crown of the lands underlying such marginal seas were consistently recognized by the English courts over the next century. See *Attorney-General* v. *Chambers,* 4 DeG. M. & G., 206, 213 (1854); *Gammell* v. *Commissioner of Wood and Forrests,* 3 Macq. 419 (1859); *Whitstable* v. *Gann,* 20 C. B. (NS) 1 (1865);[43] *Duchess of Sutherland* v. *Watson,* 6 Macph. 199, 213 (1868); *Lord Advocate* v. *Wemyss* (1899), A. C. 48, 66; *Lord Fitzhardinge* v. *Purcell* (1908), 2 Ch. 139, 166; *Secretary of State for India* v. *Chellikani Rama Rao,* L. R. 43 Ind. App. 192, 32 T. L. R. 652 (1916).

It is symptomatic of the almost complete absence of any judicial authority to support Plaintiff's claim that it relies so heavily on the discredited case of *Queen* v. *Keyn,* L. R. 2 Exch. Div. 63 (1876). Plaintiff cites this case twelve times in its brief. Yet, the dictum of the *Keyn* case[44] on this subject was considered and discredited in this country in *Manchester* v. *Massachusetts,* 139 U. S. 240, 257 (1891). It was considered and discredited in the British Empire by the House of Lords in *Secretary of State for India* v. *Chellikani Rama Rao,* L. R. 43 Ind. App. 192, 32 T. L. R. 652 (1916).

So far as the English law is concerned, then, we find the rights of the Crown in the bed of the marginal seas asserted from 1604 through 1916 and the evidence is directly against Plaintiff's suggestion that there is a break

43. "The soil of the seashore to the extent of three miles from the beach is vested in the Crown." Rev'd on other grounds, 11 H. L. Cas. 192 (1865).

44. The decision was by a vote of 7-6 against the admiralty jurisdiction of the Central Criminal Court on a charge of manslaughter arising out of a collision between a German ship and a British ship two and one-half miles from the English coast. The dictum which appears in some of the majority opinions denying that the offence charged was committed within the territorial limits of Great Britain was vigorously disputed in others of the numerous opinions filed. The decision was with regard to jurisdiction of the court, and there was no need to embark upon a discussion of the extent of British territory in the marginal seas. Indeed, even the actual decision, narrow as it was, was shortly afterward undone by statute which enlarged the court's jurisdiction (41 and 42 Vict. c. 73) (1878).

in the line of precedents just before the American Revolution. Nevertheless, Plaintiff offers the novel idea that the concept of the marginal seas along the coast of the United States "emerged" beginning in 1793. But its evidence on this point defeats its own purpose. The note addressed by Secretary of State Jefferson to the British Minister on November 8, 1793 (see Pltf.'s Br., pp. 130, 131) shows that the United States, in the field of international law, did not purport to create any new zone of territorial waters but merely purported to declare a pre-existing right. Thus, Mr. Jefferson said:

> "You are sensible that very different opinions and claims *have been heretofore advanced on this subject.* 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." (Italics added.)

The absolute right of the United States in its marginal seas is not questioned by Secretary Jefferson; it is asserted. The sole question is whether the United States should restrict itself to the minimum claims made by other nations or to a maximum. The decision is given "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."

And at the other end of American history, when President Truman asserted the ownership of the United States of America, including the states, of the minerals in the continental shelf underlying the seas far beyond any three-mile limit, again the assertion is stated to be in terms of a pre-

existing right. Thus, President Truman stated that the exercise of jurisdiction over such natural resources by the contiguous nation "is reasonable and just"; and that it was "naturally appurtenant to it."[45]

While the many pages of international law discussion in Plaintiff's brief are interesting, they have nothing to do with the question of ownership of lands admittedly within the boundaries of the state of California and the United States of America. Certain it is that the British government has always claimed ownership of the lands beneath the marginal seas and has retreated only in the extensiveness of its claim, never abandoning the claim to the innermost three mile belt. Certain it is, that this was the law of the American colonies upon the Revolution; no matter how "extravagant and pretentious" the claim may have appeared or may now appear to others, it was the law of Great Britain binding upon British subjects in the American colonies before the American Revolution.

Certain it is that even in the international law field there is a continuity of law conceding the territorial rights of every nation to a marginal belt off its coasts and that while the width of the belt claimed may have varied over the centuries, there is no "emergence" of a new concept in this respect after the American Revolution; whatever assertion the United States of America has made on behalf of itself, including its component states, since the American Revolution, has been by virtue of pre-existing right which arose upon the Revolution.

The result is that the ownership of the lands beneath the marginal seas, at least to the extent of three miles below low water mark, belonged to the British government prior to the Revolution and upon the Revolution passed directly to the sovereign states. As successor sovereigns to the British government, the original states succeeded to all the

45. *Supra*, p. 48.

rights of government and all the rights of property within the erstwhile American colonies, whether uplands, foreshores, lands under bays and arms of the sea or lands beneath the marginal seas themselves.

POINT VII

The United States must base its case upon the strength of its own title, and not upon any alleged weakness in the title of California.

A person claiming an interest in real property, including submerged lands, must succeed, if at all, upon the strength of his own title and not upon the basis of any weakness in that of his opponent. *Hardin* v. *Jordan,* 140 U. S. 371, 379 (1891). Upon analysis it is seen that the federal brief makes no serious effort to sustain this burden.

If the federal government asserted that it had title to and ownership of the lands under the marginal sea at the time of the admission of California to the Union, the issue would be simple. The federal government would sustain its burden of proof if it succeeded in showing that title to these lands did not pass to California upon its admission.

Plaintiff's brief, however, makes no clear claim that the federal government owned the lands under the marginal sea prior to California's admission. It does state (p. 59) that by the Treaty of Guadalupe Hidalgo the federal government acquired "complete rights in the submerged lands from Mexico."

While it might be hastily assumed that "complete rights" should include title and ownership, nevertheless at page 47, Plaintiff cites the case of *Queen* v. *Keyn,* L. R. 2 Exch. Div. 63 (1876), as casting "much doubt * * * upon the right of the Crown to the bed of the sea," and as sug-

gesting that beyond low water mark the bed of the sea might be said to be unappropriated. This case was decided in 1876, and its citation for these propositions would seem to be inconsistent with any claim by the federal government that it owned title to the marginal sea a quarter of a century before at the time California was admitted to the Union.

Finally, in the very complaint in the present case the allegation is that the federal government is "the owner in fee simple of," or in the alternate is "possessed of paramount rights in and powers over" the lands under the marginal sea along the California Coast.

Even today, it appears that the office of the federal Attorney General does not know whether or not the United States claims to own the submerged lands.

What is meant by ownership in fee simple is of course clear. On the other hand, what the Plaintiff intends by its alternate allegation to the effect that it may not own the property in fee, but nevertheless has paramount rights therein and powers thereover, is by no means clear.

It may be assumed that the complaint does not refer to the "paramount" powers which are mentioned at pages 82-88 of the Plaintiff's brief. At that point, the brief asserts as undisputably paramount the powers of the federal government with respect to safeguarding the security of the coasts and safety of the nation, protecting it and advancing commerce, controlling immigration, enforcing the customs and revenue laws and sustaining the population.

Certainly no one would deny that the powers of the federal government to provide for the common defense, to maintain an army and navy, to make war, to regulate interstate and foreign commerce, to enforce the revenue laws and to make treaties are paramount. No one, moreover, can deny that with respect to these powers the federal government is paramount on land as well as upon the

sea. Its powers in this respect are by no means confined to navigable waters,—much less to the marginal sea.

The fact, however, that the federal government may maintain an army upon dry land, that it may maintain naval establishments upon the shore, that it may wage war upon the uplands and repel invasion of interior states, that it may regulate commerce by rail and motor vehicle as well as by water, and that it may enter into treaties affecting things above high watermark, can obviously never lead to the conclusion that the federal government is entitled to an order of this Court ousting all and sundry from the places at which these paramount national powers may constitutionally be exercised. Even the exercise by the federal government of its treaty-making power to protect fisheries finds its parallel in the exercise of that power to protect migratory birds, but no one has yet claimed that this leads to the conclusion that the states and their grantees should be ousted from lands over which migratory birds fly or in which they nest.

It seems quite clear, therefore, that the assertion of "paramount rights in and powers over" lands and minerals underlying the marginal sea to which reference is made in the complaint are not those of the type mentioned. If they were, the complaint would be nothing more or less than an allegation that the Plaintiff may not own title in fee simple of those lands, but it does have the paramount right to exercise the above mentioned powers therein,—powers which it exercised at each and every other place within the territorial limits of the United States and of the several states. If this is what the complaint intends to allege, it is obvious that the Plaintiff is not alleging facts which justify the relief which is sought, and therefore that judgment should be rendered in favor of the Defendant.

Unless the Plaintiff has thus pleaded itself out of court, it must be assumed that the ambiguous phrase, "paramount rights in and powers over" lands, minerals and other

things of value underlying the marginal sea, refers to rights and powers of a type entirely different from those just discussed.

It is, of course, notorious that the purpose of the present suit is to enable the Plaintiff to abstract the petroleum from the lands in question, and either to consume it itself or to market it, and to do so either directly or through leases or mineral permits granted to others, all without paying compensation to the state or other owners. It is also the purpose of the present suit to prevent the state or other owners from themselves extracting petroleum from these lands and using or marketing it.

The paramount powers and rights which the Plaintiff alleges in its complaint must of necessity be the paramount right and power to take and use minerals, shell fish and other things of value from the marginal sea within the territorial limits of California. But these are nothing more nor less than the rights and powers possessed by owners of submerged lands. In this connection it must be borne in mind that the Plaintiff claims at page 59 of its brief that the United States acquired "complete rights in the submerged lands" by the Treaty of Guadalupe Hidalgo. Also that it claims never to have ceded these rights to California.

If these allegations were true, it would mean that the United States alone had power to take minerals and other things of value from the submerged lands and to exclude all other persons therefrom (subject only to the public easement of navigation and fishing), and that no one else whomsoever had any rights therein,—unless and to the extent that the Plaintiff or its predecessor sovereign had granted such rights. As indicated, this is nothing more nor less than a statement of the rights of ownership in and to lands underlying navigable waters.

If that be the case, then the alternate allegation of "paramount rights and powers" simply serves to confuse

the issue. The Plaintiff is alleging ownership, and if it fails to establish this allegation, its entire case fails.

The federal government has the heavy burden of establishing its ownership without question, even though it is not itself sure what its claims may be. It may be because of those doubts that in lieu of such proof its brief is largely devoted to an attempt to attack the title of California,—an attempt which even if it could be successful, would not entitle it to judgment in this case.

POINT VIII

The harsh effects of the Plaintiff's attempt to upset the states' title to lands under navigable waters.

Plaintiff is forced to recognize that whatever rights of ownership have been exercised in lands under the marginal seas have always been exercised on the basis of titles assumed to be in or derived from the states. Therefore, a holding in favor of the Plaintiff in this case would upset all existing titles to lands underlying the marginal seas below the original low water mark. Plaintiff is forced to admit that this would result in great hardship, but it attempts:

1. To belittle the number of cases where long-accepted titles would be destroyed;

2. To suggest that the result of the decision could be undone in such cases by Congressional action; and

3. To assert that "in the present case" the Plaintiff seeks merely a declaration of rights as to the future and does not ask for an accounting with regard to past profits.[46]

46. Brief, page 207, fn. 52.

In connection with the first statement, the Plaintiff does not favor us with any evidence of the amount actually at stake. We have been unable to make a statistical study of the cost of improvements erected upon lands below low water mark in the marginal seas on the strength of titles from the states. The value of the oil lands off the California coast is itself considerable. The market value of the oil, without allowance for the cost of extraction, has been estimated at $265,000,000.[47] The great piers extending into the ocean at Atlantic City, New Jersey, are nationally famous and must have been erected at the expense of great sums of money. The expenditures in reliance upon state title to lands below low water mark along the "open coast" are not restricted to water front terminal facilities.

Lacking precise information as to the location of the original low water marks, we could not estimate the value of reclaimed lands, the validity of the titles to which depends upon the outcome of this case. However, it is likely that the values of such lands up and down the coasts would add up to an enormous sum—a sum which is a matter of economic life or death to many of the private owners thereof.

Of course the most tremendous destruction of property rights would occur not along the "open coast" but in bays, harbors, and tidal estuaries. The statement is made by the Plaintiff that those titles are not involved and the Court is asked to reaffirm "erroneous" decisions with regard to them. However, the damage cannot be so easily undone. If the federal government should succeed in this suit upon the reasoning it has advanced, it would have shaken the basis for every title to submerged or reclaimed lands under the original high water mark of bays and harbors. The implication might be unavoidable that the decisions upon which those titles rest are "unsound." The vexing ques-

47. Information furnished at the request of your Amicus by the Attorney General of California according to information furnished by the State Division of Lands.

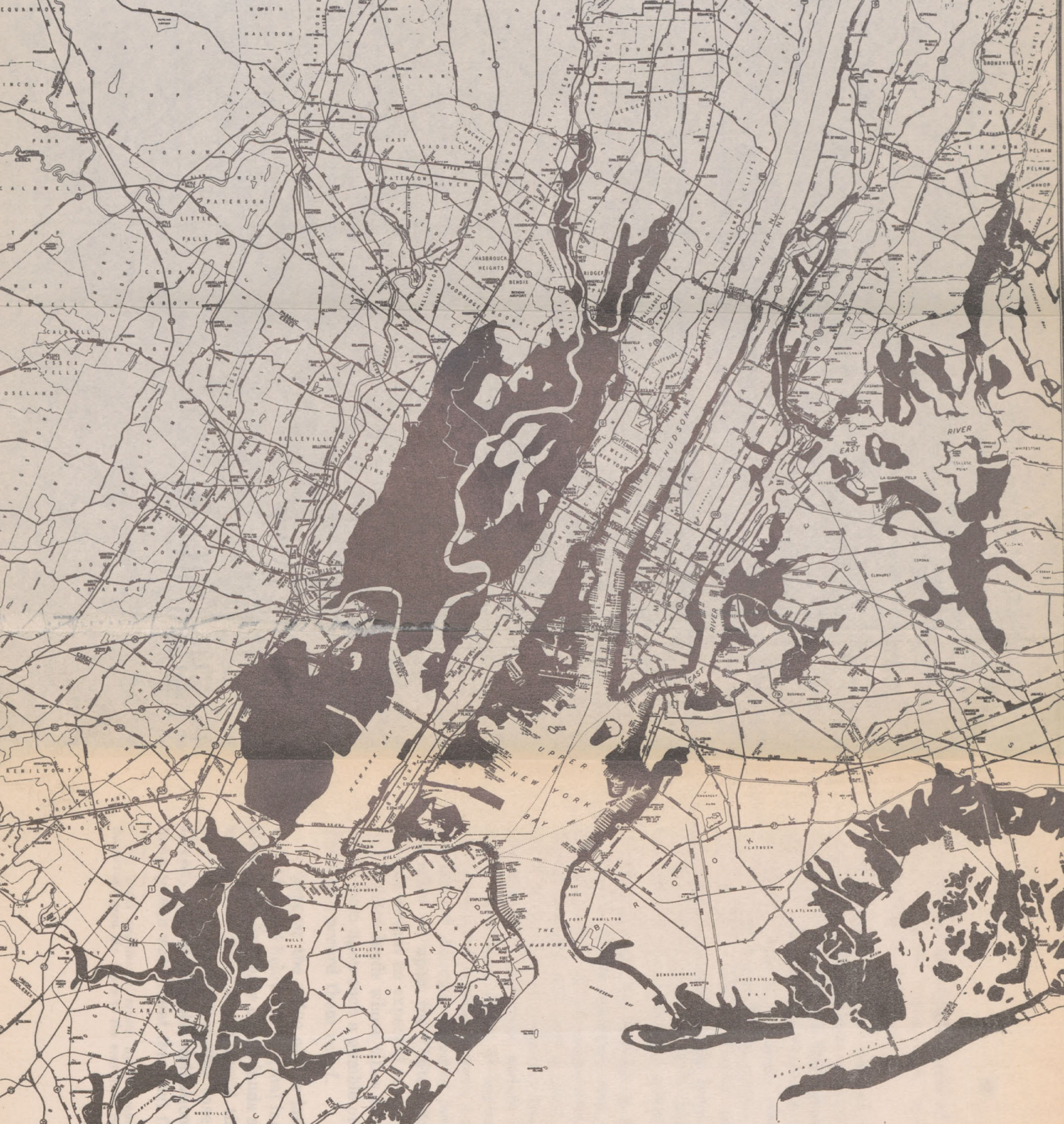
tion whether any single parcel of land was in fact within a bay or along the "open coast" would confront every owner of property of this class.

To escape from the natural consequences of the fact that federal officers have always acted upon the assumption that the states and their grantees owned title to lands under all navigable waters,[48] the federal Attorney General asserts the duty of a federal officer to repudiate his own prior rulings which he has reason to believe were incorrect (Br., p. 197). But he thereby undermines any confidence that property owners might have that they can rely in the future upon his disclaimers in this case of intention to seek a reversal of the cases upon which their basic titles depend.

Even though the decision in this case might deal only with lands in the marginal seas, a holding for the Plaintiff, in the light of the arguments made by the federal Attorney General, will cast a cloud upon title to every parcel of submerged or reclaimed land below the original high water mark of navigable waters regardless of its location within or without a bay or harbor. Title companies cannot be expected to gamble upon a statement of policy which the federal Attorney General insists is not binding upon his office or upon the United States. Prospective purchasers cannot be expected to advance the sums necessary to purchase lands whose titles are so beclouded and to improve them upon such a gamble or upon the hope that Congress will accord them relief.

Whatever the value of the land and improvements directly located below the original low water mark in the marginal seas, the value of the lands and improvements within bays and harbors which would thus be affected by a victory for the Plaintiff in this case is enormous. We have already pointed to the valuation of $860,000,000 placed upon public waterfront terminal facilities by the Board of

48. Until arguments raised by oil company attorneys seeking federal leases convinced Mr. Ickes to the contrary. See page 29, *supra*.



THE PORT OF NEW YORK AUTHORITY

MAP OF NEW YORK HARBOR

SHOWING AREA ENCLOSED BETWEEN ORIGINAL AND PRESENT HIGH WATER LINE

LEGEND

ORIGINAL HIGH WATER LINE DETERMINED CHIEFLY FROM

A. Map of The City of New York, by C. J. Griffin, a compilation of authentic local surveys including the B. Ratzer (1766) and John Randel, Jr. (1807) surveys.

B. The 1835 Survey of the Coast of the United States.

C. The 1887 U. S. Geological Survey, used for high water line where inshore of earlier surveys.

- Railroads
- R. R. Terminals and Yards
- Waterfront Terminals
- R. R. Passenger Stations
- Lighterage Limits
- R. R. Interchange Points
- FB Float Bridges
- Car Load and L. C. L. Delivery
- Car Load Delivery
- Less than Car Load Delivery
- R. R. Classification Yards
- LTG Lighterage
- Hud. and Man. Tubes
- City Boundaries
- County Boundaries
- State Boundaries
- State Highways
- U. S. Highways
- Ferries

SCALE IN FEET

Investigation and Research,[49] and the same source lists capital costs upon such facilities incurred by individual cities, headed by $340,000,000 expended by New York City.

This figure, however, represents only the cost of waterway terminal facilities. It does not even include, in all cases, the value of the lands upon which the improvements are built. In addition, there is the tremendous value of all the reclaimed lands and the improvements which have been erected upon them.

The Port of New York Authority has made a study of such lands within the Port of New York District. A map showing lands enclosed between the original and the present high water lines, representing reclaimed lands in the New York Port area is enclosed herewith. It will be seen that if this Court accepts Plaintiff's argument that the decisions upholding state title to lands below the original high water line were incorrectly decided, then the titles which will have been undermined would include lands along the entire perimeter of Manhattan Island, the entire waterfront of the Borough of Brooklyn, the entire waterfront of the cities of Bayonne, Jersey City, Newark, Elizabeth and Hoboken. In addition to the waterfront, huge areas in northern New Jersey have been reclaimed. There are blocks upon blocks of reclaimed land above the original high water mark in lower Manhattan, containing some of the most valuable real property in the world.

Plaintiff's second suggestion to avoid the impact upon the Court of these consequences of its argument, is to the effect that the result of this Court's decision can be undone by Congressional legislation. The answer to such a suggestion was made by this Court in *Helvering* v. *Griffiths*, 318 U. S. 371, 403, 404 (1943):

> "The Government acknowledges the hardship which would be incident to the rule we are now asked

49. "Public Aids to Domestic Transportation," 79th Cong., 1st Sess., House Doc. No. 159, page 379.

> to declare, and promises its assistance in obtaining legislative correction. * * * This assurance that if we will but find that Congress has intended to lay the tax it will be asked to declare that it does not intend it to be collected is hardly reassuring that the decision contended for would be what Congress intended. Since it is acknowledged that legislation would be required to adjust equities that are beyond judicial power and to prevent our decision's being used to harass taxpayers, we may well inquire why the legislation should not precede the judicial decision."

Results which must be undone by congressional act do not commend themselves to this Court.

The third attempt made by the Plaintiff to sugarcoat the bitter pill of title destruction which all its arguments involve is the suggestion that this suit looks to future rights only and seeks no accounting of past profits. The suggestion is hardly reassuring when it is in such close proximity with the assertion that the federal government is not bound by such representations made by government officers and that they have a duty to correct erroneous rulings. If the United States should be held by this Court to own the specific lands in question, let alone all the submerged and reclaimed lands within the limits of bays and harbors, might not the federal Attorney General or his successor deem it his duty to press for the collection of all of the rentals and profits derived from the use of the lands adjudged to belong to the United States? And since it is alleged that the statute of limitations does not run against the United States in this connection, might the claim not be for decades of use?

CONCLUSION

For reasons hereinbefore set forth, we respectfully urge that the complaint of the United States herein should be dismissed.

Dated: March 5, 1947.

Respectfully submitted,

LEANDER I. SHELLEY,
Attorney for The American Association of Port Authorities, Amicus Curiae.

With him on the Brief:

GEORGE D. LA ROCHE,
WILBUR LA ROE, JR.,
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REUBEN SATTERTHWAITE,
DANIEL B. GOLDBERG,
ALBERT J. BUCKLEY.

[APPENDICES FOLLOW]

APPENDIX I

United States Members of The American Association of Port Authorities, Inc.

Ports Over 250,000 Population

Baltimore, City of
Bureau of Harbors,
Broadway Pier,
Baltimore, Maryland

Boston Port Authority,
16th floor, Custom House,
Boston 9, Mass.

Board of State Harbor Commrs.,
Ferry Bldg.,
San Francisco 11, Calif.

Chicago, City of
Commissioner of Public Works,
Room 406, City Hall,
Chicago 2, Ill.

Houston, Port of
5th floor, Court House,
Houston 2, Texas

Los Angeles, Board of
Harbor Commissioners,
Room 189, City Hall,
Los Angeles 12, Calif.

Massachusetts Department
of Public Works,
State House, 100 Nashua St.,
Boston 14, Mass.

Milwaukee Board of Harbor
Commrs.,
Room 710, City Hall,
Milwaukee 2, Wisconsin

State of New Jersey Board of
Commerce & Navigation,
1060 Broad Street,
Newark 2, New Jersey

New Orleans, Board of Commissioners of the Port of
2 Canal Street,
New Orleans 6, Louisiana

The Port of New York Authority
111 Eighth Avenue,
New York 11, N. Y.

City of Newark
Office of the Mayor
City Hall
Newark 2, New Jersey

City of Oakland,
Harbor Department
Grove Street Pier,
Oakland 7, California

City of Philadelphia,
Dept. of Wharves, Docks & Ferries,
Pier No. 4 South,
Philadelphia 6, Pennsylvania

Portland Commission of Public Docks,
Foot of N. W. Front Avenue,
Portland 9, Oregon.

City of Providence,
City Engineer,
City Hall,
Providence, Rhode Island

Rhode Island Port Authority
605 Union Trust Bldg.
Providence 3, R. I.

Port of Seattle,
P. O. Box 1878,
Seattle 11, Washington

South Jersey Port Commission,
Foot of Beckett Street,
Camden, New Jersey

City of Toledo
City Manager
310 Safety Building
Toledo, Ohio

The State Port Authority of Virginia,
1203 Royster Building,
Norfolk 10, Virginia

Ports Over 100,000 and Under 250,000 Population

Albany Port District Commission,
Administration Building,
Port of Albany,
Albany 2, New York

Greater Miami Port Authority,
P. O. Box 1861,
Miami 30, Florida

Honolulu Board of Harbor Commissioner,
Honolulu, T. H.

Long Beach Board of Harbor Commissioners,
P. O. Box 318,
Long Beach 1, California

Norfolk Port-Traffic Commission,
308 City Hall Bldg.,
Norfolk 10, Virginia

Port of Tampa,
Tampa, Florida

Port of Tacoma,
P. O. Box 1612,
Tacoma, Washington

City of Trenton,
Trenton, New Jersey

City of Wilmington
Board of Harbor Commissioners,
P. O. Box 1191,
Wilmington 99, Delaware

Ports Over 50,000 and Under 100,000 Population

Alabama State Docks & Terminals,
P. O. Drawer 721,
Mobile 4, Alabama

Port of Beaumont
Dock & Wharf Commission,
Beaumont, Texas

The Port of Portland Authority,
218 Middle Street,
Portland 3, Maine

Galveston Wharves,
Galveston, Texas

Port of Savannah Authority,
P. O. Box 768
Savannah, Georgia

South Carolina State Ports
Authority,
#5 Exchange Street,
Charleston 3, S. C.

City of St. Petersburg,
Port Authority,
Room 222, Municipal Bldg.,
St. Petersburg 1, Florida

Ports Under 50,000 Population

Baton Rouge Municipal Docks,
Terminals & Warehouses,
P. O. Drawer 1030,
Baton Rouge 2, Louisiana

Broward County Port Authority,
Port Everglades Station,
Fort Lauderdale, Florida

City of Newport News,
Newport News, Virginia

Port of Olympia,
P. O. Box 827,
Olympia, Washington

Brownsville Navigation,
P. O. Box 231,
Brownsville, Texas

The Brunswick Port Authority
P. O. Box 394,
Brunswick, Georgia

Port of Corpus Christi,
Neuces County Navigation Dist.,
P. O. Box 1541,
Corpus Christi, Texas

Fort Pierce Port District,
Fort Pierce, Florida

Gulfport Port Commission,
Gulfport, Mississippi

Lake Charles Harbor & Terminal
District,
Lake Charles, Louisiana

Monroe Port Commission,
Monroe, Michigan

Harbor & Dock Commission of
Oswego,
Oswego, New York

Pensacola Port Authority,
P. O. Box 1270,
Pensacola, Florida

Port of Pascagoula Port
Commission,
Pascagoula, Mississippi

Port Isabel-San Benito Navigation,
District of Cameron County,
Port Isabel, Texas

Stockton Port District,
P. O. Box 2089,
Stockton, California

Texas City Terminal Railway Co.
Texas City, Texas

Port of Vancouver,
P. O. Box 570,
Vancouver, Washington

APPENDIX II

Extract From By-Laws of The American Association of Port Authorities, Inc.

Matters Involving National Policy

(19) If it shall be or become necessary to take a vote of the membership to determine the action to be taken by the Association with respect to any legislative proposal pending before the Congress of the United States or with respect to any other matter which involves the policy of Congress or the governmental policy of the United States, only the votes cast by or on behalf of corporate members from the United States (including its territories, possessions and dependencies) shall be counted. Similarly, if it shall be or become necessary to take a vote of the Board of Directors or of any committee with respect to any such matter, only the votes of such members of the Board or of such committees as are citizens and residents of the United States shall be counted.

If as a result of any such vote, any recommendation shall be made or any opinion expressed on behalf of the Association with respect to any such matter (whether to Congress or to any officer or agency of the United States or to the public press or otherwise), it shall also be stated that only United States ports, or United States citizens, as the case may be, voted upon such recommendation or expression of opinion.