Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

BRIEF OF DEFENDANT OPPOSING PLAINTIFF'S MOTION FOR JUDGMENT AND SUPPORTING DEFENDANT'S MOTION TO DISMISS AND OTHER DEFENSES.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
STAMPS FARRAR,
New Orleans, Louisiana

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, Louisiana
Of Counsel.

Sendker Printing, 307 Chartres Street, N.O., La.

INDEX

	Page
Jurisdiction	1
Plaintiff's Motion for Judgment	2
The Pleadings	4
Argument:	
Introduction	7
First Defense	8
(a) United States does not have fee simple title	10
(b) The constitutional paramount rights and powers of the United States do not include proprietary interest in the minerals and other things of value within territorial limits of Louisiana	16
(c) There has been no assertion by Congress of power and authority over the resources of the Gulf; nor has any law been adopted to authorize their use	34
Second Defense and Affirmative Defenses	57
(1) Louisiana's title under Treaty of 1803	61
(2) Louisiana's title under the "equal footing" rule	79
Conclusion	96
Appendix	100

CITATIONS

Cases:	Page
Abby Dodge, The, 223 U.S. 166	27, 30, 31, 33
Apollon, The, 9 Wheat. 362	40
Arizona v. California, 283 U.S. 423	52
Ashwander v. Tennessee Valley Authority, 297 U.S. 288	52
Atchison, T. & S. F. Ry. Co. v. United States, 284 U.S. 248	19
Barney v. Keokuk, 94 U.S. 324	47, 75, 91
Best v. Polk, 18 Wall. 112	75
Borax, Ltd. v. Los Angeles, 296 U.S. 10	15, 73
Camfield v. United States 167 U.S. 518	54, 55
Cardwell v. Bridge Co., 113 U.S. 205	39
Carter v. Carter Coal Co., 298 U.S. 238	28
Chisholm v. Georgia, 2 Dall. 419	39
Cooper, In re, 143 U.S. 472	25, 26, 42
Cotton v. United States, 11 How. 229	53, 54, 55
County of Mobile v. Kimball, 102 U.S. 691	39
County of St. Clair v. Lovingston, 23 Wall. 46	65
Cunard Steamship Co. v. Mellon, 262 U.S. 100	41, 42
Doe v. Beebe, 13 How. 25	75
Economy Light & Power Co. v. United States, 256 U.S. 113	39
Gibson v. Chouteau, 13 Wall. 92	76
Gilman v. Philadelphia, 3 Wall. 713	39
Goodtitle v. Kibbe, 9 How. 471	75
Gorham v. Mathieson Alkali Works, 27 So. (2d) 299	43
Harcourt v. Gaillard, 12 Wheat. 523	13, 85
Huse v. Glover, 119 U.S. 543	39
Illinois Central R.R. v. Illinois, 146 U.S. 387	93
International Bridge Co. v. New York, 254 U.S. 126	40
Irvine v. Marshall, 20 How. 558	76

INDEX—(Continued)

CITATIONS

Cases—(Continued) Page

Irwin v. Dixion, 9 How. 10 ... 75
Johnson v. McIntosh, 8 Wheat. 543 ... 85
Jones v. United States, 137 U.S. 202 ... 25, 41, 42
Liberty Warehouse Co. v. Grannis, 273 U.S. 70 ... 52
Lindsay & Phelps Co. v. Mullen, 176 U.S. 126 ... 39
Manchester v. Massachusetts, 139 U.S. 240 ... 30, 41
Mann v. Tacoma Land Co., 153 U.S. 273 ... 47
Martin v. Waddell, 16 Pet. 367 ... 13, 86, 87, 89, 90
Minnesota Rate Case, 230 U.S. 352 ... 39
Morgan v. United States, 304 U.S. 1 ... 3
Morris v. United States, 174 U.S. 196 ... 75
Mumford v. Wardwell, 6 Wall. 423 ... 87, 88
Muskrat v. United States, 219 U.S. 346 ... 52
McCready v. Virginia, 94 U.S. 391 ... 87, 88
McCulloch v. Maryland, 4 Wheat. 316 ... 39
McDonogh's Executors v. Murdoch, 15 How. 367 ... 75
Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249 ... 52
Nebraska v. Iowa, 143 U.S. 359 ... 75
New Jersey v. Sargent, 269 U.S. 328 ... 52
New Orleans v. Louisiana Construction Co., 140 U.S. 654 ... 75
New Orleans v. United States, 10 Pet. 662 ... 4, 13, 14, 15, 30, 56, 59, 61, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 82, 83, 86, 95, 98, 99
New York v. Illinois, 274 U.S. 488 ... 52
Newark v. Central R. Co., 267 U.S. 377 ... 39
Penhallow v. Doane's Administrators, 3 Dall. 54 ... 39
Perry v. United States, 294 U.S. 330 ... 39
Pigeon River Co. v. Cox Co., 291 U.S. 138 ... 39
Pollard's Lessee v. Hagan, 3 How. 212 ... 13, 33, 75, 76, 87, 88, 89, 91, 93
Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U.S. 672 ... 75
Pound v. Turck, 95 U.S. 459 ... 39
Rhode Island v. Massachusetts, 12 Pet. 657 ... 75
Sands v. Manistee River Improvement Co., 123 U.S. 288 ... 39
Schools v. Risley, 10 Wall. 21 ... 75
Shively v. Bowlby, 152 U.S. 1 ... 13, 90, 91, 95
Skiriotes v. Florida, 313 U.S. 69 ... 26, 45
Smith v. Maryland, 18 How. 74 ... 87
Toomer v. Witsell, 334 U.S. 385 ... 13, 29, 42, 45
Transportation Co. v. Parkersburg, 107 U.S. 691 ... 40, 41
United States v. Appalachian Electric Power Co., 311 U.S. 377 ... 52, 53
United States v. Belmont, 301 U.S. 324 ... 26
United States v. Bevans, 3 Wheat. 336 ... 97
United States v. California, 332 U.S. 19 ... 3, 4, 6, 9, 10, 11, 12, 13, 16, 17, 21, 23, 25, 27, 29, 30, 31, 32, 33, 34, 41, 43, 45, 46, 47, 48, 51, 53, 54, 55, 56, 57, 58, 59, 60, 62, 65, 83, 86, 91, 95, 98
United States v. California (Decree), 332 U.S. 804 ... 12, 17, 19
United States v. Curtiss-Wright Corp., 299 U.S. 304 ... 23, 27, 28
United States v. Gratiot, 14 Pet. 526 ... 76
United States v. Illinois Central, 154 U.S. 225 ... 76, 77
United States v. Mammoth Oil Co., 5 Fed. (2d) 330 ... 32
United States v. Standard Oil Co., 332 U.S. 301 ... 54
United States v. West Virginia, 295 U.S. 463 ... 52

INDEX—(Continued)

CITATIONS

Cases—(Continued) Page

Van Brocklin v. Tennessee, 117 U.S. 151 75
Watkins v. Holman, 16 Pet. 25 75
Weber v. Harbor Commissioners, 18 Wall. 57 ..... 87, 93
Werk v. Parker, 249 U.S. 130 19
Werlein v. New Orleans, 177 U.S. 390 75
Willing v. Chicago Auditorium Ass'n., 277 U.S. 274 52
Willson v. Black Bird Creek Marsh Co., 2 Pet. 245 39
Yick Wo v. Hopkins, 118 U.S. 356 39

Federal Constitution and Statutes:

Constitution of the United States:
Art. I, Sec. 8 ..... 28, 38
Art. III, Sec. 2, Cl. 2 1
Art. IV, Sec. 3 38
Art. IV, Sec. 4 25
Art. VI, Cl. 2 ..... 67, 84
U.S.C., Title 30, Sec. 181 ..... 47, 48
Secs. 221-236, 241, 211-214, 261-263, 281-287, 271-276 48
U.S.C.A., Title 33, Sec. 403 22
Act of October 31, 1803, c. 1, 2 Stat. 245 79
Act of March 26, 1804, c. 38, 2 Stat. 283 80
Act of February 20, 1811, c. 21, 2 Stat. 641 ..... 80, 81, 82
Act of April 8, 1812 (Act of Admission), c. 50, 2 Stat. 701 ..... 79, 81, 82
Act of April 14, 1812, c. 57, 2 Stat. 708 81
Act of August 7, 1947, c. 513, secs. 2 and 3 ..... 48, 49

Louisiana Constitutions and Statutes:

Louisiana Constitution of 1812 81
Louisiana Constitution of 1921, Art. IV, Sec. 2 60
Revised Civil Code of Louisiana, Art. 455 61
Revised Civil Code of Louisiana, Art. 668 61
Act 110 of 1892 43
Act 121 of 1896 43
Act 182 of 1898 43
Act 52 of 1904 43
Act 178 of 1906 43
Act 167 of 1908 43
Act 291 of 1908 43
Act 127 of 1912 43
Act 42 of 1914 43
Act 30 of 1915 42
Act 93 of 1936 42
Act 157 of 1940 61

Treaties:

Provisional Treaty, Congress of Confederation and Great Britain, November 30, 1782 ..... 83, 84
Treaty ceding Louisiana to Spain, 1763 (1769) 62
Treaty, Great Britain and United States, 1783 ..... 62, 63, 82, 83, 84, 85
Treaty of St. Ildefonso, October 1, 1800 ..... 62, 66
Treaty of Cession, France and United States, 1803 ..... 15, 65, 66, 67, 73, 79, 80, 81, 82

INDEX—(Continued)

Miscellaneous:	Page
Act of Parliament 1736, 9 Geo. II., cap. 35	64
Articles of Confederation, Art. IX	86
Blackstone's Commentaries	65
Coke, Institutes of the Law of England ("Coke Upon Littleton")	18
Conservation of Oil and Gas, A Legal History, 1948—American Bar Association	32
Digest of International Law (Government Printing Office, 1906), Vol. I, p. 701	94
Domat, liv. 1, Title 8, Sec. 1, Art. 1	71
Fenn, Origins of the Theory of Territorial Waters	63
Fulton, The Sovereignty of the Sea	63
H. Rep. 1778 on H.R. 5992, 80th Cong. 2d Sess. (1948)	24
Hale, De Jure Maris	65, 87
Hall, A Treatise on International Law	63
Hamilton, "The Answer", Lodge's Ed. VI., 218	63, 64
Jefferson, Thos., Note to British Minister, November 8, 1783	64
Las Siete Partidas III, Title XXVIII, Law III (Scott, 1931)	71
Martin's History of Louisiana	61
Pamphlet, titled "Submerged Lands" (Government Printing Office, 1947)	48
Waits, Am. State Papers I, 195	64
Wheaton, International Law, Dana's Ed.	64
69th Congress, 1st Session, House Document No. 298	85

Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

BRIEF OF DEFENDANT OPPOSING PLAINTIFF'S MOTION FOR JUDGMENT AND SUPPORTING DEFENDANT'S MOTION TO DISMISS AND OTHER DEFENSES.

JURISDICTION

Plaintiff alleges jurisdiction for this Court under Article III, Sec. 2, cl. 2 of the Constitution.

That jurisdiction has been denied before by Defendant's special Objection and Motions on Jurisdictional Grounds. Although Defendant, in responding to the present Motion for Judgment, has put at issue all of Plaintiff's claims, it has consistently reserved and reasserted the Motions and Objections that were filed in advance.

While this Court overruled the first Motion on Jurisdictional Grounds, that action was without written reasons and raises the presumption that full decision was reserved to be included in the Court's final opinion. As

this brief, brought forth by Plaintiff's Motion for Judgment, also reserves all objections that were filed before, the arguments that were made in support of those objections should need no repetition; but still Louisiana insists that those arguments are sound and that jurisdiction should be denied.

QUESTION PRESENTED

If Plaintiff's brief, under this heading, [redacted] by the words "and ownership of the lands, minerals and other things" intended to say that the issue here is limited to its claim to fee title, the explanatory paragraph could be accepted for this suit. But, in that event, Plaintiff's case would immediately fall, as it actually has abandoned its "title" claim and its brief does not even argue in its favor. If the quoted words mean something else, as the brief later indicates, then there are several different questions presented for decision. And those questions will be developed in the presentation of Defendant's side of the case to deny Plaintiff a proprietary interest in the area described, and therefore deny the decree that is prayed for.

PLAINTIFF'S MOTION FOR JUDGMENT

Plaintiff's first Motion for Judgment was denied on October 10, 1949. By its second Motion of the same kind, filed while there was pending Defendant's Motion for Trial by Jury, the United States first moved for judgment as prayed for; but in the accompanying statement suggested that judgment could be appropriately entered "forthwith on the pleadings" and, therefore, without trial and without argument. While Plaintiff then asked this Court to not only deprive Defendant of its constitutional right to trial by jury, but of its constitutional

right to any trial, and thereby to violate the "cherished judicial tradition embodying the basic concepts of fair play", *Morgan v. United States*, 304 U.S. 1, 22, this Court fairly rejected the suggestion but has fixed the Motion for argument in response to Plantiff's alternative request.

The Motion and its accompanying Statement proceed on the assertion that the Defenses in the Answer are "insufficient in law". But the Motion asks for judgment on **Plaintiff's** case. So, the Statement overlooks the fundamental requirement that, before the Answer can be considered sufficient or "insufficient in law", the Complaint or Petition must be found to set forth a valid and legal claim. **And that burden is on the United States.**

Plaintiff's Statement offers the opinion that there is here "no legal question which was not decided adversely to the State's position in the decision of the Court in *United States v. California*, 332 U.S. 19". But, that suggestion is entitled to no consideration until the defenses have been given full attention and until they have been accorded their deserved weight, after when Plaintiff's Motion will fall. For this case is different from *United States v. California* in that the Defenses bring forth objections that were not offered there or decided in the light of factual and historical circumstances; and contrary assumptions by Plaintiff in its Motion and in its brief can not change the situation. And this case is also quite different from California's, for Louisiana is happily able to cite a decision of this Court, in a suit by the United States against citizens of Louisiana, rendered more than a hundred years ago and denying a federal claim of the same sort which the Com-

plaint attempts to assert here.* But Plaintiff's brief, with the overconfidence which it exhibits, proves that the decision has never been brought to its attention. For that case, insofar as Louisiana is concerned and as it later will appear, really denies Plaintiff's claim which was not a new one when *United States v. California* was decided and is not a new one now.

As Plaintiff's Motion asks for judgment on the pleadings, it disputes the effect of the Answer and all the defenses there made. It, therefore, puts the whole case at issue so far as it can be heard without the introduction of evidence and without consideration of Defendant's Motion for Trial by Jury. And, consequently, the Motion for Judgment includes and calls for a decision on Defendant's First Defense which is a Motion to Dismiss for lack of an actual justiciable controversy and for failure of the Complaint to set forth a claim on which relief could be granted.

THE PLEADINGS

Article II of the Complaint alleges that at all times material "Plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana". That part of the allegation contains the disjunctive claims to ownership in fee simple **or** paramount rights and full dominion and power over the lands, minerals and other things underlying the Gulf. These disjunctive allegations form the basis of this suit.

The same Article recognizes the area sued upon as

---

* *New Orleans v. United States, infra.*

being within the territorial boundaries and limits of the State of Louisiana, as it refers to the property as extending seaward 27 marine miles and as being bounded on the east by the eastern boundary and on the west by the western boundary of the State; and being within boundaries, so alleged, of the State, extending that distance seaward, the property is admittedly within the State and part of it.

Article III recites that the State claims some right or interest in these lands and other things, and Article IV states that it has leased lands for the discovery of petroleum and other mineral deposits pursuant to Acts of the Louisiana Legislature authorizing such contracts.

Article V refers to the granting of mineral leases by the State; and the payments of sums of money therefor; and sets forth that wells have been drilled for the discovery of hydrocarbon substances.

Article VI is a denial that there is any title to or interest in this area vested in the State of Louisiana, although it is again admitted that the State possesses some governmental powers because the property is allegedly in the same class as lands belonging to the United States "within the lawful territorial jurisdiction of the State".

Article VII alleges that the State has denied the rights and powers of the United States in the areas described and has claimed full and complete ownership for itself and will continue to do so unless the rights of the United States should be established and declared; and the Article continues to say that the State and others acting under it would continue to take minerals and "**other things of value** in the area, in violation of the

rights of the United States" unless relief should be granted. (Emphasis added).

The prayer is for a decree declaring and adjudging the rights of the United States as against the State; enjoining the State and all persons claiming under it from continuing "to trespass upon the area in violation of the rights of the United States"; the prayer also asking for an accounting for sums of money derived since June 23, 1947.

The Answer reserves all motions heretofore filed and by the "First Defense" moves to dismiss the Complaint for failure to state a claim and because it presents no justiciable controversy between the United States and the State of Louisiana; that Defense requiring detailed explanation for full understanding of it which will be reserved for the arguments that will follow. But it can be said now that the arguments will readily prove that the ideas upon which the Defense is based have not been decided before in favor of the United States. While it deals with justiciable controversy, it relates more to the lack of any cause of action in Plaintiff to prosecute this suit; and the point is argued in the light of the pronouncements of this Court in *United States v. California* and not without their guide as was the burden of Defendant in that suit.

The Second Defense is a categorical answer to the Articles of the Complaint. It denies jurisdiction and denies that Plaintiff ever was or is now "the holder of fee simple title to such lands, minerals and other things underlying the Gulf of Mexico within the said limits of the State of Louisiana". It admits that the State of Louisiana claims to be, and alleges that it is, the holder of fee simple title to the area described; but it

also admits that it is subject to Plaintiff's paramount rights in and full dominion and power over the lands, minerals and other things underlying the Gulf to the extent granted by the Constitution.

The First Affirmative Defense continues to deny Plaintiff's claim to fee simple title or paramount rights of a proprietary nature. And, affirmatively, it sets forth that the State of Louisiana has title in fee simple to the bed of the Gulf of Mexico within the limits described in the Complaint, and its muniments of title are listed in their order. But again Louisiana admits that its title is subject to the paramount, constitutional powers and dominion of the United States.

The Second Affirmative Defense avers that the State of Louisiana has exercised continuous and unchallenged sovereignty over and peaceful possession of the lands and other things underlying the Gulf of Mexico, in accord with its title, and always with full recognition of the constitutional paramount powers of the United States. And that Defense, like the others, denies that the United States is the owner in fee, and denies that its constitutional powers include proprietary rights or authority to search for and produce minerals and other things of value on and under the bed of the Gulf within the area which the Complaint describes.

ARGUMENT

Plaintiff's brief (page 10) begins its argument with the gross misstatement that "Louisiana presents no substantial defenses which were not raised by California". And the idea is continued on page 11 by the erroneous assertion that "Louisiana makes no real attempt to differentiate its case from that of California". But it will

appear as this brief progresses, that some of the Defenses here presented were not offered for this Court's consideration in that case; and Louisiana can not be made to suffer if or because errors were made before.

The First Defense, not even suggested by California, should dispose of this case by dismissal, although of necessity the arguments will reach all phases of the suit.** And Louisiana believes that if this Court takes jurisdiction it will exercise it in the usual way when a **plaintiff** has the primary burden of a law suit, a burden which the United States can not carry here.

FIRST DEFENSE

This Defense does not concern, nor does it depend upon, title claimed by the State of Louisiana in a later part of its Answer. For the First Defense deals with the Complaint; it is in the nature of a General Demurrer and has for its foundation the charge that the allegations of the Complaint, and the inferences drawn from them, are "insufficient in law" to give Plaintiff the relief prayed for.

** Footnote on page 8 of Plaintiff's brief says:

"No question is here raised as to the **boundary** of Louisiana, . . . The issue here relates to rights in the submerged lands seaward of the ordinary low water mark, whether they be within or without the State's boundary". And no question could be raised when the Complaint particularly identifies the area sued upon as extending 27 miles seaward and being within the boundaries of Louisiana. But for no apparent reason, page 8 of the brief cites an opinion of Louisiana Attorney General's Office directed to private parties in 1934 having no bearing on anything in this case and having no legal force in Louisiana or elsewhere. It merely referred to the Enabling Act of 1811 which, like the others, defined the landed portion of the State within which lived the inhabitants who were to form a state which would have sovereign and littoral rights in the sea. Part II in Plaintiff's brief also discusses Louisiana's boundary, but has no apparent purpose except to say in effect that whatever Louisiana has the United States would take away.

Defendant, throughout, admits the governmental paramount rights and powers of the United States, but always denies that they could support the **prayer** of the Complaint.

So, what first requires this Court's attention under the Complaint and the First Defense is not whether **Louisiana** has title in fee, but **whether the United States** can show title or constitutional power which would include the proprietary right to take and use minerals **and other things of value** in the Gulf to the exclusion of the State and its citizens. And to that end the argument for the First Defense will be divided into three, partly alternative, sections:

(a) While Plaintiff pins its hopes on *United States v. California*, the First Defense postulates that the Court there did not decide that the United States had title to any part of the bed of the Pacific Ocean; and here it will be demonstrated that the United States could make no serious argument in favor of title in fee and that the decision in *United States v. California* does not make one in its behalf.

(b) The second argument accepts the announcement in *United States v. California* that the United States has paramount rights and powers in and over the bed of the sea along the coastal states; but it denies that such rights and powers, necessarily restricted by constitutional limits, carry with them the proprietary right to search for and produce, or to grant licenses to search for and produce, oil or other minerals or other valuable resources on and under the bed of the Gulf of Mexico. And, the chapter contends, that as the governmental powers are not at issue, there is no actual justiciable controversy up for decision and no basis for the relief prayed for.

(c) In the third chapter, alternative argument will accept as a premise, but only *arguendo*, that some governmental power of the United States could include the right to take and use, or to authorize the taking and use of, the minerals and other things of value in the Gulf, to the exclusion of Louisiana; but it denies that any such dormant power or right ever has been exercised by action of the only branch of the government with such authority, Congress; and it argues, therefore, that the majority of the findings of this Court in *United States v. California*, and the declaration here prayed for, constitute and would be only abstractions beyond the function of this Court for that they present no actual and justiciable controversy and give Plaintiff no ground for relief.

And, while there may be some necessary repetition or some additions to the basic thoughts, the arguments will be presented in that order.

(a)

United States does not have fee simple title.

Article II of the Complaint alleges that Plaintiff is "the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the land, minerals, and other things underlying the Gulf of Mexico" throughout an area which the Complaint defines as being within the boundaries of Louisiana.

When the United States of America acquired its alleged title; **from whom** it was purchased or taken by conquest; **how** such title in fee simple is claimed to have vested, the Complaint does not say. It presents only the conclusions in the disjunctive that the United States either owns the area in fee simple, **or** is possessed of

paramount rights in and full dominion and power over it.

Nothing could demonstrate more fully that the United States **has no evidence of title** than the Complaint's failure to set it forth. And arguments against the allegation of title would not be so apparent were it not for Plaintiff's brief in *United States v. California.* It might here be said, par parentheses, and it will be proved later on, that Louisiana has more for answer than did California in that suit. And, contrary to page 15 of Plaintiff's brief, Louisiana does stand on a "better footing" than California, particularly to the extent that the method now employed will evidence the true nature of this case more clearly than did the defenses in that suit.

While Plaintiff's brief now makes no claim to **title,** in *United States v. California* the rights urged were based on the nebulous argument that because of certain sovereign powers in the Federal Government "ownership should be attributed" to it "if it is to be attributed to sovereignty at all". Plaintiff's brief, California case, page 89. And there Plaintiff assumed that whatever rights the United States has in the marginal sea "are derived exclusively" from the national sovereignty in international affairs.

Relying wholly on the California decision, Plaintiff now by the use of the word "ownership" attempts by some magic or alchemy to transform power into proprietary rights, overlooking or trying to hide the idea that title or proprietorship is necessary for the decree which it seeks.

The postulate that fee simple title could not now be successfully claimed by the United States by virtue of sovereignty or otherwise, should it attempt to revive that allegation of the Complaint, can be supported with

little difficulty by three binding forces. **First,** not only the present brief but the Motion for Judgment practically abandons such claim when it is averred that "the United States has asserted its rights" and when there is silence on the question of title. Without repeating the arguments made in *United States v. California,* Plaintiff still places its entire faith in and sole reliance on that decision; but this brief will demonstrate that the decision could not and does not support a claim to fee title or to other proprietary rights.

Secondly, this Court in *United States v. California* actually adjudged that the United States was not the owner, in fee simple, of the bed of the sea off the coast of that State. Proof of that result is abundant. The Complaint, in that case, had alleged that the United States "is the owner in fee simple of, or possessed of paramount rights and power over" the lands, minerals and other things of value under the waters of that sea; language like that used in this suit against Louisiana. But the **decision** made no allusion to a fee simple title in the general government. The decree (332 U.S. 804) upheld its claim to paramount rights and power, but it treated the disjunctive claim to title with disdain. So, in the final analysis, the alleged fee simple title in the United States was not secured, but, in effect, was denied. For this Court well knows that the record well shows that the form of decree presented pursuant to the Court's suggestion, was originally so worded by Plaintiff as to give the United States proprietary rights or title in and to the area in suit; but that part of the suggested decree was ordered stricken and was omitted from the decree issued by the Court so that it was thereby adjudged that proprietorship was not in the United States. Indeed, the opinion and decree affirmatively gave nothing to

the United States beyond a recognition of its paramount governmental powers. And the later case of *Toomer v. Witsell*, 334 U.S. 385, discussed more fully further on, construed *United States v. California* against exclusive federal power over and against federal title to the marginal sea when this Court said "that such is neither the holding nor the implication of that case" (p. 393).

Thirdly, and more important, this Court, in a decision[1] not mentioned in *United States v. California* either in the briefs or the opinion, and dealing with the State of Louisiana and its sovereign rights and titles, specifically held that the United States, by virtue of its sovereignty, never did acquire proprietorship of public places or areas within the limits of Louisiana, like roads or streets or the rivers or the sea. That decision, as between the United States and this State, adjudicated that the United States had no title to any part of the original territory of Louisiana except vacant lands subject to alienation.

Whether the decision just mentioned will uphold the Affirmative Defense of fee simple title in Louisiana, is not within the frame of this preliminary argument. That claim, along with cases that have been brought to the Court's attention before, such as *Pollard's Lessee v. Hagan*, 3 How. 212, *Martin v. Waddell*, 16 Pet. 367, *Harcourt v. Gaillard*, 12 Wheat. 523, and others, including the important case of *Shively v. Bowlby*, 152 U.S. 1, will be discussed more appropriately with the Second and Affirmative Defenses. The First Defense now presented is of negative character; it first

[1] *The Mayor, Aldermen and Inhabitants of New Orleans v. The United States*, 10 Pet. 662, 9 L. Ed. 573, generally and herein referred to as *New Orleans v. United States.*

denies the allegation of fee simple title in the United States. And in further support of such denial of title, Defendants offers *New Orleans v. United States, supra,* as a controlling authority adopted by this Court more than a hundred years ago.

The case was on appeal by the Mayor, Aldermen and Inhabitants of New Orleans, who were considered as representatives of the State sovereignty, from a decision against them by the District Court of the United States for East Louisiana. The suit, like this one, originated by petition on the part of the United States claiming fee title or superior proprietary rights to certain public property on the banks of the Mississippi River (known in Spanish parlance as a quay), and seeking an injunction against the officials who had threatened to sell or dispose of it.

While the importance of the suit, its judicial finality and control, will be more fully advanced when the question of State title is reached, a short resumé should be sufficient to deny the United States fee title to any part of the Gulf of Mexico; although the Court can now find more detailed argument, if it thinks it important, in the later chapter on Louisiana's title under the Treaty of 1803.

While the property involved was a public quay, the Court found that legally and historically it had been of the same class of public things held in trust for the people as the "rivers, the sea and its shores" and "streets, highways . . . and other public places" (p. 720) so that neither the King of Spain nor France could "alien such lands". (p. 726). And the conclusion was that as a result of the Treaty of Cession and upon the admission of Louisiana as a State, the United States held title

only to those vacant or public lands which theretofore "the King could sell and convey"; but that the public things and property remained in Louisiana in trust for its people. (*Borax, Ltd. v. Los Angeles*, 296 U.S. 10, and other cases there cited settle the rule that such public or vacant lands do not extend below navigable waters). And, it was clear, said the Court in the New Orleans case, that title was not acquired by the United States under the Treaty of 1803, nor did it vest by the Constitution, because:

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."
> 10 Pet. p. 737.

And the final decision was:

> "It is enough for this court, in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government . . ."
> 10 Pet. p. 737.

While Plaintiff's brief assumes that the Treaty of 1803 "saved only the title to property which was privately owned" and, therefore, that all rights in the marginal sea "belonged solely to the United States" (pp. 11, 12), confidence in those assertions is flatly denied by *New Orleans v. United States.* For it there was decided that the United States did not acquire under the Treaty of 1803 any property rights or any title except title to the vacant lands which it could then sell or convey.

As the legal principles supporting that decision equally apply in this suit, this Court by that precedent must say that the United States did not acquire fee

simple title to the area described in its Complaint and did not acquire any other proprietary right; and if claim to title, or other claim that would carry proprietorship, is still intended in this case, the claim should be denied.

(b)

The constitutional paramount rights and powers of the United States do not include proprietary interest in the minerals and other things of value within territorial limits of Louisiana.

In *United States v. California*, this Court upon reaching the merits of the case, cast aside the issue of title for one of "paramount rights" and stated that the crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. For, it was said, the United States claims its rights in two capacities "transcending those of a mere property owner". So, with Plaintiff's claim to fee title out of the picture, the First Defense opens the question not "whether the State or the Federal Government has" paramount rights and powers in the sea, but **whether the proprietary rights Plaintiff seeks are within the orbit of the international and constitutional powers and rights of the United States.** And further on, in a separate chapter, it leads to the alternative discussion of whether there has been any exercise of dormant power by constitutional method or means.

So far as the opinion in *United States v. California* concludes that the United States, rather than the State, has paramount rights and powers in international affairs and as to some that are internal, such as commerce interstate, this brief is in entire agreement with the thoughts there expressed.

But, the Defense challenges the idea that such rights and authority justify the relief asked for in Plaintiff's prayer. For, Louisiana denies that the constitutional and other sovereign powers, which need no pronouncement by this Court, could include rights which are proprietary in nature, and which would be of interest to the central government only for its internal and fiscal growth. Because of that challenge, attention has been called to the details of the claim, and there will appear later some discussions around the resources and commodities which the Complaint attempts to take from Louisiana. For it is obvious that the decree in *United States v. California,* and some of the implications that were attached to "paramount rights and powers", were reached without disclosure to the Court of the nature of the "minerals and other things" underlying the waters adjacent to the shores of California.

The later allusions to the decision in *United States v. California* will be in the light of the allegations found in the present Complaint and of the realistic and practical side of the activities which Plaintiff would enjoin; and they must be kept in mind.

And, throughout these discussions, the locus of the claim should be considered. In Articles II and VI of the Complaint, the area involved is placed within the boundaries and limits and territorial jurisdiction of Louisiana; and Plaintiff's brief to the contrary, the boundaries are so given in Article II, and the other Article recites that Louisiana possesses powers over the area to the same extent as it would over lands of the United States "within the lawful territorial jurisdiction of the State".

While the suit of the federal government is levelled

principally at petroleum, or oil, it also deals with "lands, minerals and **other things** underlying the Gulf of Mexico". (Emphasis added). And a decree, as prayed for by Plaintiff, would transfer to the United States proprietary right in all that is claimed. "Lands" includes sands, shells, gravel and possibly materials of other names.[1] "Minerals" relates to oil, gas, sulphur, salt and numerous other substances within that genus. "Other things" is all-inclusive—it can mean oysters on the bed, sponges, shells and more commercial substances too numerous to mention and the existence of some of which might now be unknown. While the Complaint probably was not intended to include the waters themselves, or the free-swimming fish in them, the omnibus language might be extended that far, if reduced to a decree.

And, it should ever be remembered that Article V of the Complaint chides Louisiana for having negotiated leases with various persons and corporations and for having received substantial sums of money from them. It charges that these persons have entered upon the property and drilled wells for the recovery of petroleum and other hydrocarbons. It is alleged that wells have been producing quantities of oil and the lessees have converted it to their own use, paying the State substantial amounts in rentals and royalties, but that no one has accounted to the United States for the value of these products. In VII, it is said that the granting of these leases and the taking and using of these minerals "and other things of value in the area" are in violation of the **rights** of the United States.

---

[1] "The term 'land' includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it". Co. Litt. 4a.

Not only do these references to the pleadings throw light on what is actually sought by Plaintiff in this case, more familiarity with the things that are being done by Louisiana and its lessees will further reveal how tenuous is the tie between the proprietary rights which are being claimed and the fundamental rules of international law which have been offered for the appropriation of those rights in favor of the United States. The Appendix contains discussions of factual conditions and some technical activities which this Court can notice without proof;[2] and it is attached for background which apparently was not considered in reaching the decree in *United States v. California.*

The business of searching for and producing oil and gas in the United States has become so widespread and so much a part of everyday life that anyone interested in the subject can learn how it works in a well-stocked public library. But those, like the members of this Court, whose relations are not close to these affairs are apt to assume the existence of facts, as some press writers do, indicating that the whole of the property involved here is a great reserve of oil resources ready for use, to be held intact for future wars or future generations. But nothing could be further from the truth than assumptions or claims along that line. Those who have familiarity with the business know that the search for underground conditions (whether under the sea or under upland areas) which produce oil or gas is a hazardous undertaking. As the Appendix points out, even preliminary investigations require the employment of numerous techniques through those skilled in different sciences, and these first explorations only record

[2] *Werk v. Parker,* 249 U.S. 130; *Atchison, T. & S. F. Ry. Co. v. United States,* 284 U.S. 248.

indications or the failure of indications of a possible source of supply. It appears that when favorable underground structural conditions have been indicated, difficult and tedious drilling operations must be carried on which may or may not result in the discovery of an oil or gas pool. Oil and gas are resources that must be located in underground traps before they have any practical existence; and the chances of finding them, because of the many surrounding difficulties and uncertainties, are highly speculative. While there are large areas which, because of geographic location, offer the chance of providing other deposits, very little oil, comparatively, has been found under the Gulf of Mexico.[3] And the assumption that they exist does not give them commercial or governmental or international value or importance. They can not be made known unless and until through private search the source beds are identified, are found to be productive, are located in areas allowing the drilling of wells, and prove to contain sufficient oil to make the venture commercially profitable. Now, the discovery of gas away from shore, far from being a profitable venture, is one of disappointment as gas can not be stored but must reach its market through pipe lines and these locations of gas fields in this era leave them without present commercial worth. The Appendix also reveals that in the Gulf coast area the underground structures are formed by upthrust salt plugs or cores. If they are found to be near enough to the surface and if other conditions allow, the salt itself may be susceptible to being mined on a commercial scale, either by the sinking of shafts or by pipes using a dissolving process. In rare cases these salt cores are overlain with sulphur

[3] The daily production of oil in the United States is approximately 5,000,000 barrels; about 5,000 barrels (1/10th of 1%) come from the Gulf area.

deposits that might be operated commercially even under water areas if other conditions are fit. But these minerals are also useless unless and until someone has found them to exist and that they can be mined by customary methods.

While there are also many other resources on and under the bottom of the Gulf and over which Louisiana has exercised proprietary rights, one example will serve to dispel the illusory State-Federal conflict which has been assumed to be within the realm of international responsibilities and law. Widespread areas off the outer shores of Louisiana are covered with reefs, sometimes extending to considerable depths, of oyster shells formed during some geologic periods by the continuing birth and death of generations of the mollusk family. They are part of the bed of the sea and underlie the Gulf of Mexico. Were proof allowed, it would disclose that millions of yards or tons of these shells are available for industrial use. The State of Louisiana has granted licenses to dredge them from the bed; and manufacturing plants have been established on the faith of those contracts to use this natural resource for its lime (about 90%) content. The search for such deposits is not fraught with the uncertainties that confront one looking for oil; but, except in degree, the location of these shell deposits, the removal of the resource and its use in domestic affairs, are no different from the search for and production of oil.

Now, the thing that Plaintiff seeks to deny the State by injunction, and to claim for itself, is the right in the Gulf to search for and extract minerals and **other things of value,** not mentioned by name. And, while *United States v. California* considered the problem

to be of international scope, there is no allegation in the present petition that Defendant, by leases or otherwise, has intruded within any of the external relations or affairs of the United States or interfered with any of its responsibilities to make war or to keep the peace. To the contrary, it should be noted that oil and other operations in the Gulf are now and always have been conducted subject to the paramount sovereign and constitutional powers of the United States. As an example, evidence would show that each drilling operation on what is a relatively small point in the Gulf always has been and now must be with the sanction and approval of the War Department and its Engineers, and oil production, as well as anything else that is done incidental to it, needs be, as it has been in the past, under their supervision and control.[4] There the federal government has performed and performs its responsibilities so that there could be no interference with commerce interstate and foreign and that nothing will be done to hamper the use of the waters of the Gulf for the protection of the shores of this Nation. But no part of this suit indicates or suggests that Louisiana has disputed that authority.

Now, if wars come, whatever operations are being conducted in the Gulf of Mexico, through State leases, would continue or no according to the demands and needs of the United States. The oil then being produced would be subject to first call in aid of "the common defense" along with oil produced from private lands. Indeed, federal claim to these resources began in 1937, long after Louisiana asserted its rights, and has been discussed and urged in the press and through Congressional committees and since then a great war has been fought

[4] *U.S.C.A. Title* 33, *Section* 403 requires such authority for structures in any navigable waters of the United States; but the law does not pretend to thereby give proprietary rights to the United States.

and won. Oil played an important part in that conflict; but the exercise by the State of rights to the resources in the Gulf, the operations in that sea, did not impede the waging of the fight nor interfere with the Government's international compacts or its international responsibilities.

It is true, of course, that "the supreme will" in external sovereign affairs must be in the Nation. It can be conceded that the federal government's external powers, its sovereign international duties and rights, are not limited to the enumerations in the Constitution (*United States v. Curtiss-Wright Corp.*, 299 U.S. 304). But it is also true that any extended sovereign responsibilities in that sphere could only concern "the powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties" (p. 318) and other necessary concomitants of nationality in the external field of relations between the federal government and foreign states.

And, if Louisiana were here denying the paramount governmental rights and responsibilities of the United States and if it were claiming them for itself, then this Court could properly repeat the language used in *United States v. California* (pp. 35, 36) that "the State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks". But, Louisiana does not claim **paramount** rights or powers in the marginal sea any more than it claims them in the Mississippi River or Lake Pontchartrain. For it admits that its rights and its proprietorship always are subject to the Constitutional paramount rights and powers of the United States and to its duties to

protect the Nation in the event of war. And, there is no allegation to the contrary in the Complaint. On the other hand, Louisiana is equipped, indeed it is better equipped than the United States, to exercise and regulate the proprietary rights to search for and to produce minerals and other things of value in State territorial waters.[5] And these rights and powers of the State are no different one mile, say, off shore than they are in its waters that are inland. Nor are the paramount rights, powers and duties of the United States any different in one direction than in the other.

While the oil, if and when it is produced, could possibly "become the subject of international dispute and settlement", that fear of the future does not give proprietorship in the oil that now might be underground or over the right to find it. And, can that fear, by any legal concept, give the Federal Government a proprietary interest in the many other heterogeneous substances within the purview of the prayer of the Complaint? Can the "very gas" that might underlie the Gulf belong to the United States because of some assumed future possibilities? Can the fear be attached to sand, or to salt, or to oysters or to oyster shells? Do these things arouse possible future difficulties or dangers to the security and tranquillity of the people of the

[5] The House Judiciary Committee (1948) after extensive hearings, reported:

> "None of the Federal Government's representatives had any criticisms to offer concerning either the management by the States of their submerged lands or the conservation regulations imposed upon the oil industry generally by the States . . . the committee believes that it would not be in the public interest for this Congress to destroy the highly developed, experienced, and efficient State organizations now controlling the submerged oil deposits by transferring such resources to a Federal bureau which has no facilities, no intimate knowledge of the complex local problems, and no laws or established rules or practices under which operations can be carried on." (H. Rep. 1778 on H.R. 5992, 80th Cong. 2d Sess. (1948) 19-20.)"

United States and its relations with other nations; and does that fear create proprietorship in the federal government? Or, is proprietorship claimed by the United States by the right of conquest? Here there is no suit and no dispute between anyone except the United States and Louisiana as a member of the Union. To resolve the so-called "State-Federal conflict" by the powers of the United States in external affairs, when the claim relates to resources of value, would nullify the compact between the individual states. For it would violate the rights of Louisiana as a State and reduce it to the status of a foreign, nay an enemy, nation.

But the paramount powers and responsibilities of the United States are the other way. And, while the ethereal support of its responsibilities is offered by Plaintiff, and that is all that Plaintiff offers, for the rights "which it seeks", the responsibilities were undertaken by the Constitution without pay:

> "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion . . ." Article IV, Section 4.

No authority has been offered to support Plaintiff's proprietary claim when urged as an incident to such governmental function and responsibility, and certainly none can be found in its favor.

Cases like *Jones v. United States*, 137 U.S. 202, and *In re Cooper*, 143 U.S. 472, cited in *United States v. California*, do more to uphold the arguments later made in this brief on the necessity for Congressional action than they do for Plaintiff in attempting to attach a proprietary interest to a sovereign responsibility. *Jones v. United States* only confirmed the rule that **Congress**

may extend jurisdiction of the United States over Guano Islands, discovered by private citizens; but proprietary rights of the private discoveries were protected and not given to the United States. *In re Cooper* was concerned with congressional legislation about fur seals in Alaskan waters—territorial only to the United States. Nor does the decision in *United States v. Belmont,* 301 U.S. 324, also mentioned in *United States v. California,* give comfort to a claim of internal proprietorship as an incident to external sovereignty. For that decision is only one among many authorities for the rule that sovereign power over external affairs is exclusively in the national government.

Louisiana repeats that it has no complaint about the pronouncements in *United States v. California* that federal authority, in international affairs, is exclusive and supreme. Louisiana ever admits that its property rights in the Gulf, like its rights in the Mississippi, must be subservient to federal paramount powers. But the challenge is to the relief prayed for—to the decree sought here—which would attach proprietorship to those powers and take it from the State. For the decree here projected by the present prayer involves many resources and the right to search for them and the funds already paid to the State therefor; things that do not suggest an external problem or international implications, but only internal and domestic concern.

And no strange avenues of the law need be explored for support of that idea. *Skiriotes v. Florida,* 313 U.S. 69, 72-73, approved in *United States v. California,* recognized that Florida had control in the marginal sea "with respect to matters in which the State has a legitimate interest" and that sponge fishery in waters of the Gulf

only concerns "domestic rights and duties". The same principle is found in *The Abby Dodge*, 223 U.S. 166, another sponge case, treated more fully further on, and it applies here. There is no legal distinction between sponges and the resources in this suit, except perhaps in degree, a thought also made more certain by discussions in earlier and later parts of this brief. In truth, sponges necessarily are within the present claim to "other things" of value. And, thus, Plaintiff's chief error is in confounding governmental paramount rights and powers in the external realm with the use of the bed of the marginal sea for the production and conservation of valuable resources, well within the internal fiscal scheme. So the relief which the United States seeks, the use and value of these domestic goods, must depend upon title or some other superior proprietary right. And federal **title** is definitely absent from the scene.

Whether it is necessary that assumed power be exercised by Congress is not within the grasp of this chapter, being the subject of later argument in part (c). But, without fee simple title in the United States, the Complaint must offer, or the decision in *United States v. California* must reveal, some constitutional power giving proprietary rights and interests in the minerals and other things of value under the Gulf, superior to the rights of the State, before necessity arises for the Court to pursue the inquiry further.

"The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers", see *United States v. Curtiss-Wright*

Corp., supra, (pp. 315-316) is categorically true "in respect of our internal affairs".

Carter v. Carter Coal Co., 298 U.S. 238, 296, confirms:

> "**And the Constitution itself is in every real sense a law**—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. **It is by that law, and not otherwise, that the legislative, executive and judicial agencies which it created exercise such political authority as they have been permitted to possess.**" (Emphasis added.)

And, it was recognized in that decision, no matter what purposes are in view, there is nothing that can "serve in lieu of constitutional power".

What can be found in the enumerations of the Constitution to give Plaintiff relief?

Under Article I, Section 8 of the Constitution, Congress has power "to declare war" and to provide for "the common defense", which are those powers bearing upon international relations to which Louisiana is always subservient and to which all its properties and rights might be subjected if and when the necessities arise. Congress's power "to regulate commerce with foreign nations and among the several states" . . . "to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be" for the erection of certain needful buildings and to "make all laws which shall be necessary and proper" for carrying into execution the numerous other powers set forth in Section 8 of Article I of the Con-

stitution are really inclusive of many responsibilities and Louisiana concedes that they are paramount to its rights. But Plaintiff has been unable to offer legal authority to say that such abstract ideas could give proprietorship or take it away.

On the other hand, *Toomer v. Witsell*, 334 U.S. 385, decided after *United States v. California*, clarified that earlier decision. And, this Court then recognized the "importance to its people that a state have power to preserve and regulate the exploitation of an important resource"; pointing out that, ownership aside, *United States v. California*

> "does not preclude all State regulation of activity in the marginal sea". (p. 402).

Toomer v. Witsell really did more. In effect it so explained the decision in *United States v. California* as to make it without force so far as Plaintiff is here concerned. It was said that Appellants "urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark". And, in the lower Court they had relied for that contention on the decision in *United States v. California*. But this Court said (p. 393):

> "Here Appellants seem to concede, **and correctly so,** that such is neither the holding nor the implication of that case." (Emphasis added).

The right of South Carolina to the control of shrimp in its territorial waters (called "marginal sea") was upheld without regard to ownership (p. 402):

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate

the exploitation of an important resource."

And the State's rights in all things in its territorial waters were recognized by that decision and emphasized by the concurring opinion of Mr. Justice Frankfurter and Mr. Justice Jackson (p. 408):

> "A state may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers."

Manchester v. Massachusetts, 139 U.S. 240, in its refutation of "rights" here claimed by Plaintiff, is clear and binding on this Court:

> "The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State." (p. 264).

And, *New Orleans v. United States*, *supra*, also fits here:

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."

The Abby Dodge, 223 U.S. 166, also denies rights here claimed by the United States so far as they are proprietary in nature. And the case is important to the First Defense which postulates that there is no fee simple title in the Federal Government and denies that Federal paramount rights and powers include a proprietary interest in the resources in and under the bed of the Gulf.

The Abby Dodge was discussed in *United States v. California*, but the Court there considered it as being only "concerned with the state's power to regulate and **conserve** within its territorial waters" and that it had no relation to the right of the State to "use and **deplete** resources which might be of national and international importance". (pp. 37-38) (Emphasis added). *The Abby Dodge* may have dealt with regulation in its narrow sense, but it still denied the United States power to authorize the taking or gathering of sponges from land under water "within State territorial limits", which necessarily denied proprietorship in the United States.

While the California decision was limited to oil and based on its importance, and while Plaintiff would limit this case in a similar way, there was then and there are now involved many resources in different degrees of importance and concern. And the tenuous distinction between conservation of sponges in the Florida case and the assumed depletion of a resource by California or this State, does not detract from the force of *The Abby Dodge* in determining the merits of the First Defense.

Sponges are a low form of animal life which attach themselves to rocks in the sea. Oil results from the decomposition of low grade organic matter during a geologic age. It merely occurs under the bed of the sea like under the surface of landed areas. Search must be made for either resource; the difference in methods is not legal, but controlled by practical and physical considerations. The proprietorship must be based on the same kind of claim; and, except for its assumed greater worth, oil is no more an element of national sovereignty than are sponges or other resources of value above or below the ground.

Now, the search for and production of oil and gas is not to use and deplete them against national or international interests, as was suggested in *United States v. California*, but is actual conservation because it brings into being something that otherwise would never be of use to any one. The finding of underground sources of oil and gas and the development of those discovered are as much within the field of conservation as is the use of legalized equipment in the sponge traffic. And, the so-called oil reserves under the Gulf of Mexico are mostly imaginary. Like sponges off Florida, to be useful they must be found. Without private leases, without private license, without private technical knowledge and skill, many possible sources of oil under the bed of the sea would never exist for any practical good because they never would be known. Unless and until the source beds are located and drilling proves successful, they are a total loss to the State and Nation; and to develop them for the good of the two sovereigns is true conservation.

"Conservation", when used in its larger sense, includes "the saving from loss, as distinguished from the more limited meaning of holding the content in the ground". *United States v. Mammoth Oil Co.*, 5 Fed. (2d) 330, 351. (See also "Conservation of Oil and Gas, a Legal History, 1948", published by Section Mineral Law, American Bar Association).

The discovery of underground sources and the production of oil, saving it from loss, carried on under usual State regulations, meet every element of effective "conservation". And "depletion" is not its antithesis. It is the inexorable result—perhaps in the far distant future—when individual pools will become exhausted whether operations be under Federal or State ownership

and control. But new or additional source beds for oil will be located, like sponges will continue to be found. After discovery, after it has been brought into useful being by production, and before exhaustion of any particular source of supply, the oil from that pool will be as available to the Nation when produced under State lease as it could be under one by a Federal agency.

Thus, there is no real distinction between *The Abby Dodge*, **with its denial of Federal right,** and this suit, by which Plaintiff seeks not only control but ownership of oil, gas and **all other resources** on and under the bed of the Gulf of Mexico. And, in its true light, with the title question aloof, *The Abby Dodge* should be accepted in Defendant's favor, refusing Plaintiff's claim. For, while it deals with sponges only, it actually reaches lands, minerals and "other things of value" in the Gulf and denies Plaintiff proprietary rights.

Now, a great part of the opinion in *United States v. California* was consumed with California's Defense and little attention was given to Plaintiff's positive claims. But the Court's treatment of *The Abby Dodge* and of the Pollard [6] rule at this phase of the case, when State title is not concerned, does not supply Plaintiff's needs. For, in order that Plaintiff have its prayer, it would be required to affirmatively prove that because of its governmental paramount rights, dominion and power, it has and could exercise, to the exclusion of the State, proprietorship of the minerals and **all other resources** on and under the bed of the Gulf of Mexico.

As nothing has been submitted to support this idea, the Complaint signally fails to meet that necessity.

---

[6] *Pollard's Lessee v. Hagan,* 3 How. 212.

(c)

There has been no exercise by Congress of power and authority over the resources of the Gulf; nor has any law been adopted to authorize their use.

Denying that the United States has title in fee; pretermitting the question of State ownership; but granting, *arguendo*, that there is some dormant Federal power over or right in the minerals and other things of value off Louisiana's coast, narrows the scope of this inquiry to a determination of whether that power has been exercised through constitutional means.

United States v. California spoke of "governmental powers to authorize" the use of the territory described. And it was suggested that there were conflicting claims "as to which government, State or Federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath" the land (p. 25). But let it again be remarked that this suit involves more than oil and gas; it includes many other things of value on and under, and perhaps above, the bed of the Gulf.

A reading of the California case strikes one forcefully that this Court there assumed, and the contrary does not appear to have been argued, that by a decree for Plaintiff, someone acting for the Federal Government could take up with the things that the State had accomplished through its lessees, and that Federal authorities could immediately act in taking or using or conserving the resources involved as would ordinarily follow a decree in one's favor. And, the same thought would apply here. But the present argument is intended to demonstrate that such assumptions were and would

be unfounded and that, no matter how far the Government's paramount rights and powers could be extended, there has been no exercise of that power in the manner provided by organic law. And, the argument will prove that there is no "conflict" that amounts to a justiciable controversy to be decided by this Court and that there is no basis for granting the relief prayed for in Plaintiff's Complaint.

Before entering that decisive discussion, it is well to pause to analyze that part of the California decision rejecting the defense that the case presented no justiciable controversy. For at first blush, it might suggest some answer for the arguments that have gone before and some of those that follow. But it can be demonstrated readily that the questions brought forth here were given no thought in the California case and were not decided adversely to anyone; and most certainly will it appear that there was no denial there of Louisiana's Defense that the Complaint fails to set forth a claim on which relief could be granted.

When the argument was made by California, there still was a claim on each side to fee simple title to the bed of the Pacific Ocean within the three-mile belt. While the dispute did present a controversy "in the classic legal sense", it was resolved against the Government when its alleged fee simple title was denied. And, the argument here, under the First Defense, irrefutably postulates that Plaintiff's claim to fee simple title is no longer in the case.

California, in dealing with justiciable controversy, sought to classify the dispute as abstract because a lead-

ing government official had expressed doubts "as to the extent of his statutory and constitutional powers" (page 7, California's appendix brief), but Louisiana makes the argument that the admitted paramount rights and powers, to which the State's interests always must bow, need no declaration by this Court. And the argument hereafter made will further demonstrate that there is no federal official having any powers to do the things that the Complaint would deny to Louisiana.

While the California brief did call attention to the failure of Congress to pass any statute "asserting any right or claim over the marginal sea", that was not the full basis of its argument. For it was admitted in California's brief (Appendix, page 5) that "the only thing that prevented" the Secretary from acting "was his own doubts", the inference being that there was some authority in law for him to proceed. California did not urge the point, but it here will appear, and there is nothing against it, that **there is no Congressional authority for any federal official or for any federal lessee to search for and produce minerals or other things of value in and from the Gulf of Mexico.** The point is made, different from the argument by California, that the United States has not exercised any rights, in that it has authorized no one to act, in conflict with the lessees of Louisiana, through the only governmental department—Congress—having authority to exert such power, if authority exists at all. And that is the irresistible force of this chapter (c).

California argued the absence of a case or controversy because it was impossible to locate the limits or boundaries of the area claimed by the United States. Therefore, California concluded, all that was prayed for was a declaration of rights concerning an unidentified

three-mile belt. Had California's argument continued into another abstraction, the decision of this Court probably would have been different. Here, the Complaint deals with oil, but gas, sulphur, salt, sand, shells and innumerable other things, are just as much a part of the case as that important hydrocarbon. The theory propounded by Plaintiff, and on which it depended in *United States v. California*, is that **oil** is so important that its proprietorship must be within the superior or paramount rights of the United States. But how can that argument apply to oil any more than to gas, or to shell, or to sand, or to salt, or to the many unknown or to the undefined substances falling within the limits of "other things of value"? No complaint was made by California that a decree for the **unnamed** resources would be an abstraction without judicial authority.

In the end, California suggested (page 10 of its appendix brief) that there remained "only a debated question of law" in that Federal officials were seeking "an advisory opinion before proceeding to act upon matters pending before them". But that is not the case. The absence of a case follows the lack of conflict between the State and Plaintiff's paramount rights and responsibilities and the failure of Congress to exercise the power, if it exists, to use the rights that Plaintiff demands. The Defense here is not that Federal officials are delaying their actions for an advisory opinion by this Court. **It is that there is no Federal law under which they could act at all. So, in reality, Plaintiff seeks an advisory opinion by judicial declaration of abstract principles to uphold some later possible legislative action by Congress.**

As the question of justiciable controversy was not argued by California nor decided by this Court in the

light of Plaintiff's complete lack of title or with a realization of the factual background for this suit, the decision can not influence a determination of the problem as it is presented here. Too, it is worthy of more attention now for Louisiana's objection goes to greater depths than mere lack of justiciability. It exemplifies the absence of support for a claim on which relief could be granted. **For, a decree, as it is prayed for, would prohibit as unlawful, activities which Congress in the future may or may not attempt to place in that class.**

To return to this argument, it is well to look to the Constitution itself for guidance in resolving the questions that arise:

> "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states . . . to define and punish . . . offenses against the law of nations; to exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Article I, Section 8, Constitution of the United States.
>
> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ." Article IV, Section 3, Constitution of the United States.

So, Defendant now confidently contends that, even

if it be admitted (but only for argument, because it is always denied) that the United States could exert some proprietary power over the resources sued upon, there is nothing upon which to base a decree unless and until there should be some attempted exercise of dormant authority by the Federal Government through Congress.

> "In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. *Chisholm v. Georgia*, 2 Dall. 419, 471; *Penhallow v. Doane's Administrators*, 3 Dall. 54, 93; *McCulloch v. Maryland*, 4 Wheat. 316, 404, 405; *Yich Wo v. Hopkins*, 118 U.S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains." *Perry v. United States*, 294 U.S. 330, 353.
>
> **"Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith can not be made the subject of review by this court."** *Gilman v. Philadelphia*, 3 Wall. 713, 732. (Emphasis added).

The principle is well known and well settled.[6a] Nor can any possible international implications avoid the influence of that timeworn rule. In *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 158, it was applied in a case which involved improvement in a stream forming the international boundary between the United States and Canada:

> "In the absence of a violation of treaty, or

[6a] *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245; *Pound v. Turck*, 95 U.S. 459, *County of Mobile v. Kimball*, 102 U.S. 691, *Cardwell v. Bridge Co.*, 113 U.S. 205; *Huse v. Glover*, 119 U.S. 543; *Sands v. Manistee River Improvement Co.*, 123 U.S. 288; *Lindsay & Phelps Co. v. Mullen*, 176 U.S. 126; *Minnesota Rate Case*, 230 U.S. 352, 403-405; *Economy Light & Power Co. v. United States*, 256 U.S. 113; *Newark v. Central R. Co.*, 267 U.S. 377.

> of conflict with an act of the Congress, there can be no doubt as to the power of the state to establish such an aid to commerce. An undertaking of this character by the state falls within the familiar category of cases in which a state may make reasonable provision for local improvements until its authority is superseded by dominant Federal action."

In *International Bridge Co. v. New York*, 254 U.S. 126, 133, one finds this interesting language:

> "No doubt in the case of an international bridge the action of a State will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream."

While these decisions really dealt with regulations, the principles are the same when there is no title but merely some assumed right that could be exercised. And, to reach the opinion that oil is of such national and international importance that the central government, rather than the states, should have proprietary control, would be beyond judicial function. For, there has been no change in the rule that the Court has no power to "enter into political considerations on points of national policy", but must exercise its duties within a "more narrow compass" and only "administer the laws as they exist". See *The Apollon*, 9 Wheat. 362, 366.

In *Transportation Co. v. Parkersburg*, 107 U.S. 691, 700, 701, this Court had before it a conflict between State and Federal authorities with regard to a wharf charging alleged extortionate rates said

to effect a duty on tonnage; and international policies were in the case. These comments by the Court in that decision also prove how far afield of judicial function it would be to determine that oil is of sufficient importance to allow some unnamed department of the United States to take over all resources without Congressional Act:

> "Our system of government is of a dual character, State and Federal. The States retain general sovereignty and jurisdiction over all local matters within their limits; but the United States, **through congress,** is invested with supreme and paramount authority in the regulation of commerce with foreign nations and among the several states." (Emphasis added).
>
> * * * * *
>
> "But until congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is the Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject."

Manchester v. Massachusetts, 139 U.S. 240, can not be denied as authority for the argument now made. For the entire decision, in its phases most favorable to the United States, clearly announced the doctrine that there was no power over a resource in the federal authorities which Congress "does not assert by affirmative legislation".

The idea finds support in *United States v. California.* The Court there leaned heavily on *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, *Jones v. United*

States, 137 U.S. 202, and *In re Cooper*, 143 U.S. 472, for the statement that (332 U.S. p. 34):

> "And this assertion of national dominion over the three-mile belt is binding upon this Court."

In the Cunard case, for example, Congress **had asserted** national power over the three-mile belt for the control of intoxicating liquors. But the point now is that there has been no "assertion", except by Louisiana, of authority over the three-mile belt in the Gulf of Mexico, or any other part thereof, looking to the discovery and production of oil or gas or other things of value.

Toomer v. Witsell, supra, assumed that South Carolina had power to regulate shrimp in the "marginal sea" off the shores of that state "at least where the federal government has made no conflicting **assertion of power**" —through Congress. (p. 394) (Emphasis added). And there it was found that the case "evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power" (p. 393), so this Court again agreed that federal power, to be exerted at all, would have to be asserted or exercised through Congress.

Louisiana has exercised its authority over the resources within its territorial limits and there is no question here as to whether its power has been so "exercised" within the confines of generally applicable constitutional limitations. According to Article IV of the Complaint, admitted by all parts of the Answer:

> "In the exercise of the rights claimed by it, the State of Louisiana has, by general law, Act 30 of 1915 (Louisiana Acts, 1915, page 62), as superseded by Act 93 of 1936 (Louisiana Acts, 1936, page 276), as amended, authorized the

> leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas and other mineral deposits in the area herein described."

but there is no allegation of the "exercise of the rights claimed" by the United States. Article V avers that Louisiana has granted mineral leases for wells in the marginal sea and the evidence is that such leasing began more than 20 years ago. For many years State licenses have been authorized for the removal of shell, sand, gravel, and other things from the beds of Louisiana waters, to be issued by the Department of Conservation.[7] Since Act 42 of the Legislature of 1914, licenses have been granted for oyster shells in the Gulf, mentioned in another part of this discussion.

The necessity for "conflicting assertion of power" by Congress before there could be an actual controversy or right to relief by the Complaint, can be emphasized by parenthetical mention of the dilemma which Plaintiff made for itself in its own Motion for Judgment. The Complaint alleges (Article VII) that Defendant is trespassing against the **rights** of the United States when it takes and uses the "minerals and **other things of value** in the area"; and the prayer is for a decree enjoining the State of Louisiana from continuing these alleged acts. (Emphasis added) But the rationale of this Court's opinion in *United States v. California* was only that **oil** was of such international and national importance that the Federal Government should be able to keep it under its control. And, Plaintiff finds difficulty in meeting

[7] See *Gorham v. Mathieson Alkali Works*, 27 So. (2d) 299. Act 42 of 1914 authorized licenses for removal of oyster shells "from any of the shell reefs within the boundaries of this State and located in or on the borders of **the Gulf of Mexico** or of any of the bays, lakes, inlets, or waterways connected with or emptying into the said Gulf . . ." Louisiana has exercised similar jurisdiction for many years as evidence would show. Acts 110 of 1892; 121 of 1896; 182 of 1898; 52 of 1904; 178 of 1906; 167 of 1908; 291 of 1908; 127 of 1912.

that test for the "**other things** of value in the area"; and because of that perplexity, it is strange to observe, page 3 of the Statement in support of the Motion studiously avoids reference to those other things and recites only that by the Complaint the United States claims rights with respect "**to the lands and minerals underlying the Gulf of Mexico**". (Emphasis added). And Plaintiff's brief refers to "other things" only in its statement of "Question Presented" but mentions them no more and fails to offer any argument in support of that claim.

Has Plaintiff abandoned its claim to these other things? If it has, should it not file proper pleadings along that line? But that, of course, might lead Plaintiff into an even more embarrassing situation. If Plaintiff's rights depend upon opinion as to need for a resource, admission along that line would further point up the necessity for Congressional action. Or would Plaintiff have the temerity to then say to this Court that the Attorney General is the arbiter of governmental affairs so that he decides what resource will be claimed and submitted for this Court's sanction? Whether or not, if the importance of oil, say, is to decide the issue, certainly decision is to be made by Congress and not by the Attorney General and this Court. And Congress may decide for oil and against gas; it may hold for shell and against gravel. Or, contrariwise, it may conclude that gas and sand or even sponges are of more international importance, or give more national concern, than oil which is found in such great quantities under landed areas of the country.[8] An advance abstract declaration by this Court in favor of one and against

[8] The United States produces about 5,000,000, Louisiana approximately 500,000 barrels per day. Less than 5,000 come from Louisiana coastal waters, and a relatively small amount from other parts of the marginal sea.

another resource would not bind Congress; but if injunctive decree should be given against the State of Louisiana based on such abstractions, Louisiana would be bound to comply conformably to its recognition of the power of the judgments of this Court, an unconscionable result which was not foretold in *United States v. California.*

Although no Congressional action is recorded in the books, this Court, in *United States v. California,* indicated an erroneous belief that there had been some conflicting legislative exercise of power on behalf of the federal government. The *Toomer v. Witsell* (p. 393) discussion of the California decision supports that idea:

> "In the court below *United States v. California,* 332 U.S. 19 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes v. Florida,* 313 U.S. 69, 75 (1941), that 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the (state) statute **so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State.'** " (Emphasis added.)

The part emphasized here was italicized by the Court in the quotation as it appeared in the California decision; and it clearly demonstrates that this Court then thought the United States had "asserted" its claim or had exercised some rights in the marginal sea by "conflicting federal legislation". The observation that

in deciding that the United States "had paramount rights in the three-mile belt" as it appears in the last quotation "where it asserted its claim" could not have been intended as a pronouncement that power could be derived or created merely by the filing of suit. It must be assumed that this Court used the word "asserted" in its more narrow meaning of governmental exercise of power through Congress rather than the mere averment of allegation by proceedings in Court. For such creative assertion must be by Congress. Support for that proposition is in its mere recital and needs citation of authority no more than does the hornbook rule that this Court is not blessed with creative powers but only with those that are within the juridical field.

And, it is said again, this Court in *United States v. California* obviously assumed, when the issue had not been made, that any existing dormant power of the Constitution had been exercised by Congress. Not only is there no law on the books attempting to exercise federal power over the Gulf in conflict with Louisiana, the lack of Congressional action actually denies federal authority to use the oil or any other resource of that sea and denies a cause of action here.

For, even if some federal or constitutional power over the things of value under the Gulf of Mexico could exist without Congressional legislation, Plaintiff still is without right to relief when there are no "conflicting claims of governmental powers" to authorize the use of the resources in the territory described in the Complaint.

Plaintiff well knew when the California decision was rendered and Plaintiff now knows that there has been no legislation adopted by Congress to authorize any federal agency or license to private parties to search for

and produce oil, or gas, or salt, or sand, or sponges, or any other resource underlying the Gulf of Mexico:

> "An important fact to be noted in respect to these decisions is that in each instance the application being considered was filed under the provisions of the Mineral Leasing Act (41 Stat. 437; 30 U.S.C. sec. 181 ff.) which applies to 'public lands'. However, since the term 'public lands' has been held not to extend to land situated below high water mark (*Barney v. Keokuk*, 94 U.S. 324, 338; *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284, discussed *supra*, pp. 62, 70), there was room for the conclusion that the Department of Interior had no **jurisdiction** over the lands covered by the several applications under the provisions of the Act." (Emphasis added).
>
> Brief for the United States in support of Motion for Judgment, *United States of America v. State of California*, pages 194-195.

Then, after the decision in *United States v. California*, the Solicitor for the Department of Interior advised the Secretary:

> "You have orally requested my opinion on the question whether the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437, 30 U.S.C. 181 *et seq.*), authorizes the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States. This question arises by reason of the fact that there are awaiting disposition in the Department a number of applications for oil and gas leases in submerged areas of the Pacific Ocean and the Gulf of Mexico below low tide and outside the inland waters of the adjacent States.
>
> * * * * *

"Land situated below high water mark has not been regarded heretofore as included in the term 'public lands'. For this reason alone, it may be concluded that the Mineral Leasing Act does not apply to the submerged lands, as they are, of course, below low tide. In fact, in the Government's brief in the *California* case, the Attorney General so argued (p. 195).

* * * * *

"For the reasons indicated above, it is my opinion that the Mineral Leasing Act of February 25, 1920, as amended, does not authorize the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States."

And the Attorney General, by letter dated August 27, 1947, to the Secretary of the Interior, agreed. There is no law to the contrary.[9] Nor do the statutes reveal

---

[9] "After the Supreme Court decision in the *California* case, the question whether the Mineral Leasing Act applied to these areas became material. On August 8 and 28, 1947, the Solicitor of the Department of the Interior and the Attorney General, respectfully, held that the act did not apply to the submerged coastal areas. Accordingly, on September 8, 1947, the Director of the Bureau of Land Management denied the applications pending in that Bureau, and on October 6, 1947, the Secretary of the Interior denied the applications pending in his office."

"There is no reason to think that the legal conclusions of the Solicitor and the Attorney General, and the consequent administrative actions denying all the then pending applications can be successfully challenged in the courts."

(Statement of Solicitor General, page 30, pamphlet "Submerged Lands", Government Printing Office, report of "Hearings before the Committee on Interior and Insular Affairs, U. S. Senate, 81st Congress, 1st Session", bills S. 155, S. 923, S. 1545, S. 1700 and S. 2153).

Oil and gas, (Act of February 25, 1920) secs. 13 and 14, 30 U.S.C. 221-236; oil shale, 30 U.S.C. 241; phosphate, 30 U.S.C. 211-214; sodium, 30 U.S.C. 261-263; potash, 30 U.S.C. 281-287; sulphur, 30 U.S.C. 271-276.

By Act, August 7, 1947, 30 U.S.C. 352, the Secretary of Interior was authorized to lease for oil and other minerals "acquired lands of the United States", to which the mineral leasing laws had

(Continued)

any Federal law relating to "other things of value" in the bed of the Gulf.

When the nature of oil, and of the other resources, is considered, it requires no further discussion to prove that the United States would not and could not take and use them for its own or sell them to others when there is no constitutional or legislative authority to engage in that business. So, Plaintiff's argument here, when title is not in point, is not really over rights in the resources themselves. The question more concerns the right to authorize their use by the granting of leases or licenses to private parties to search for and to produce them upon payment of bonuses, rentals, royalties or some other fixed fee. The Louisiana Legislature, as pointed out before, has authorized such leases or permits for oil and many of the other things found in the marginal sea. But the United States, even by judgment in its favor, would not and could not presume to act under the Louisiana statutes when Congress has passed none giving similar federal authority. As Congress has not acted to provide a means for the exercise of the rights that are involved, the Attorney General could not create it by filing this suit, nor can this Court create it by its judgment or decree. And, therefore, there really is no controversy over the "right" when it has been "asserted" only by one side—Louisiana.

---

[9] —(Continued)

not been extended; but it was provided: "That nothing in this chapter is intended, or shall be construed, to apply to or in any manner affect any mineral rights, exploration permits, leases or conveyances nor minerals that are or may be in any tidelands; or submerged lands; or in lands underlying the three-mile zone or belt involved in the case of the United States of America against the State of California now pending on application for rehearing in the Supreme Court of the United States; or in lands underlying such three mile zone or belt, or the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America". The mineral leasing laws have not been extended to the marginal sea, and Congress positively asserted that its new law should not apply.

And all this leads to a tale of the shocking result that would obtain if judgment should be given on the prayer of the Complaint. For it has been demonstrated that possibly there may be great quantities of minerals and other things of value underlying the Gulf of Mexico but that a relatively small amount has been discovered. It has been brought to light that to build up oil reserves that might eventually be found is a long, difficult and tedious chore. It appears that so far as oil is concerned, it has no value whatever under the ground until sufficient work has been performed to prove it susceptible to successful extraction. And it follows that the future use of this oil can be made certain only by allowing someone, and that customarily through business ventures and private enterprise, to engage in the speculative search with the hope of gain by making the resource available for use. Should judgment be in favor of Plaintiff here; should the operations under State authority be enjoined; and then should Congress disagree with this Court that oil in the marginal sea is a proper subject for federal control or should it never exercise its power, or authorize a use, no one could engage in further explorations. For Louisiana and her lessees would be forced to desist in their operations and no federal lessee or department could continue, in the absence of Congressional authority. Then, there would be no new oil reserves, for the search would have been shortened too soon. Then, if wars come, a greater part of the oil assumed to be under the bed of the Gulf would be of no use to the State or the Nation because no one would know where it is. For all needful purposes, it would not exist at all. Then, it would be too late to carry on the search during a period of armed conflict. And before and after such wars, not only the oil but all other things of value under the Gulf, if Congress should

not act upon them, would be completely out of commerce.

California's present plight should be proof enough of the force of these observations. The case has never been settled. After the decision, the Attorney General reported to the President the perplexing situation that resulted from the decree. And while he entered into a stipulation with the Attorney General of California, it was without legal support and could not withstand attack if someone with proper interest should question its efficacy.[10] But even these *ultra vires* arrangements, said "to deal with such problems as could not await Congressional and further judicial action", related only to past search and past discovery. New contracts for further investigations, new discoveries of oil pools would have to await Congressional action, which may never come even if it should be admitted that such constitutional authority could exist at all.

A decision here pronouncing paramount rights in the United States, and its dominion over the minerals and other things under the Gulf of Mexico, would not create authority to search for, produce or use the resources involved. Nor could it settle any controversy in advance of action by Congress attempting to exercise such power, nor until some legislative assertion or exercise of power should be brought before this Court for its examination.

For an opinion repeating the *United States v. California* doctrine of paramount rights and powers would be pure abstraction beyond the function of this Court:

---

[10] In part, the Attorney General said in letter to the President:

"The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States . . ."

"The courts deal with concrete legal issues, presented in actual cases, not abstractions." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377.

"The judicial power does not extend to the determination of abstract questions. *Muskrat v. United States*, 219 U.S. 346, 361; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74; *Willing v. Chicago Auditorium Ass'n.*, 277 U.S. 274, 289; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 262, 264. It was for this reason that the Court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the state. *New Jersey v. Sargent*, 269 U.S. 328. For the same reason, the state of New York, in her suit against the state of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. *New York v. Illinois*, 274 U.S. 488. At the last term the Court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue 'too vague and ill-defined to admit of judicial determination.' *United States v. West Virginia*, 295 U.S. 463, 474. Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. *Arizona v. California*, 283 U.S. 423, 462." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324-325.

And, in the absence of Congressional exercise of

power and control, a judgment against Louisiana following the opinion in *United States v. California* would lead only to **future** conflict. It would not settle any "concrete legal issues, presented in actual cases, not abstractions". *United States v. Appalachian Electric Power Co., supra.* And the threat of such decree should be disposed of by the remarks of this Court in that case that "to predetermine" even in a limited field "the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function".

Now, turning light of the inquiry on a mere right to prosecute this suit, rather than on an unasserted authority in the sea, gives the same answer—the Complaint fails to state a claim on which relief could be granted.

Before examining the problem from that view, let it be said that, of course, if the United States held fee title to lands, an issue which it failed to carry, this brief would not have the temerity to urge that its rights could not be protected by suit against an alleged trespass. For the right to sue in those circumstances has always been recognized, although limited in the same way. In *Cotton v. United States*, 11 How. 229, this Court agreed that the Government, like a private proprietor, can bring suits under local law for trespass on its own lands. But the right was also made to depend on title as it was said that powers as a sovereign should not be confounded with rights "as a body politic". And the rationale of the decision was that when procedure is in the result of or based on governmental function, it must be supported by statute:

> "It is true, that, in consequence of the peculiar distribution of the powers of government between the States and the United States, offenses against

> the latter, as a sovereign, are those only which are defined by statute." (p. 231).

In *Camfield v. United States*, 167 U.S. 518, it was again recognized that with respect to its own lands, the Government could proceed by ordinary processes for protection against a trespass. But even there legislation was considered necessary to create a right in the government to abate a nuisance by the fencing of alternate tracts of land, by enclosures on other property. There an Act of Congress existed; it authorized suit to remove such interferences with federal lands and even the Act of Congress was in doubt, although upheld:

> "The General government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it can go in the exercise of such power is measured by the exigencies of the particular case." (p. 525).

But those cases are not apposite here when federal title does not exist and when assumed federal power has not been exercised.

With no Act of Congress authorizing the use of the bed of the Gulf for the removal of oil or other resource, with no Act of Congress supporting any basis for the present suit, the issue is brought well within the reach of the opinion of this Court in *United States v. Standard Oil Co.*, 332 U.S. 301, decided on the same day as *United States v. California.* Although the government claim there was based on injury to a soldier, it sought to recover for its monetary loss as part of its fiscal policy, like the Complaint here seeks an accounting for rents and royalties paid to the State. This

Court firmly announced that, except in the cases of absolute title ownership, like *Cotton v. United States* and *Camfield v. United States, supra*, there could be no right of action against assumed fiscal loss unless found in Congressional fiat.

On Plaintiff's behalf, it was argued that as a policy the federal government's executive arm should prevail in situations not covered by traditionally established liabilities. But, said this Court, whatever the merits of the policy might be "its conversion into law is a proper subject for Congressional action, not for any creative power of ours". The opinion recited history of the government's consistent loss through conduct of persons interfering "with federal funds, property and relationship". But (332 U.S. p. 314):

> "Congress, not this Court or the other federal courts, is the custodian of the national purse."

It continued in positive statements to announce that Congress is the "exclusive arbiter of federal fiscal affairs", and that it is the one to secure the government against loss "however inflicted" so as to require reimbursement "as well as filling the treasury itself". A long list of Acts of Congress was cited in support of the observation that "when Congress has thought it necessary to take steps to prevent interference with public funds, property or relations, it has taken steps to that end". And the conclusion was drawn, decisive here when the true character of this litigation is in view, that to establish a new liability through judicial power "would be intruding within a field properly within Congress's control and as to a matter concerning which it has seen fit to take no action".

To give judgment in this suit, on Plaintiff's prayer,

enjoining Louisiana's exercise of rights in the marginal sea and ordering an accounting for monies it has received from its lessees, would violate all the rules recognized and so firmly announced in the last cited decision. For *United States v. California* denied Plaintiff proprietary rights; and they also must be denied here.

While it has been assumed, for the purpose of argument, that there is some dormant federal power or authority to claim an interest in the resources of the Gulf, the silence of Congress denies Plaintiff relief.

So the First Defense denies title in the United States and exemplifies the total lack of any "State-Federal conflict". It points up the abstractions in *United States v. California*, and demonstrates that without some federal legislative authority to do the things which the decree here prayed for would enjoin, there is no actual **conflict** between governmental powers. It reveals that while the prayer of this Complaint is not limited to a declaration of acknowledged paramount powers of the United States as a sovereign, that abstraction is the only thing actually before the Court. In that regard, the Defense is suggestive of the opinion by Mr. Justice Frankfurter, dissenting in *United States v. California*, and some of the foregoing discussions about oil and other resources should add weight to his ideas. For the arguments prove how appropriate to this case are his remarks that to declare that the government has national dominion is merely to say that it is a sovereign and that if the decree means that "it needs no pronouncement by this Court".

In *New Orleans v. United States, supra*, the United States, as original plaintiff, had prayed for an injunc-

tion restraining Louisiana officials from "doing any other act which shall invade the rightful dominion of the United States over said land or their possession of it", peculiarly serving as a pattern for the relief Plaintiff seeks in this proceeding. In its final summation and in reaching its decree this Court said (p. 737):

> "It is enough for this court, in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government; and, consequently, that the decree of the district court must be reversed, and the cause remanded with directions to dismiss the bill."

There can be no remand here. But as "neither the fee of the land in controversy" nor a proprietary right to its use "is vested in the federal government"; as Plaintiff has failed to support an interest beyond its paramount governmental powers; and as there has been no attempt by Congress to exercise power that might be authorized by the Constitution, there can be and there should be dismissal.

And, the First Defense should be upheld to accomplish that end.

SECOND DEFENSE AND THE AFFIRMATIVE DEFENSES

Louisiana has presented the First Defense with full confidence in its merits and with the firm belief that it should end this suit by dismissal. But if the Court can not agree, the title issue then comes into play; and in that event Louisiana insists that it more appropriately should be accorded full trial before a jury in keeping

with the Motion that has been made before. For it has been pointed out that the law, even the mere spirit of fair play, demands that one have his day in court. And particularly is this true when evidence may be disputed and when a decision on facts might control the final judgment.

But, the present Motion for Judgment has forced Defendant to appear with legal answer to the issue of title on the face of the pleadings. So, while Defendant does not agree to that procedure, it confidently accepts the challenge and will meet it by showing title in itself.

The Second Defense categorically answers each Article of the Complaint and puts at issue all of Plaintiff's claims except that it admits that Louisiana's title is subject to the constitutional paramount rights and powers of the United States. But, like the First Defense, it denies that Plaintiff has title to the bed or resources in the Gulf of Mexico because of its constitutional powers or as an attribute of its sovereignty. And with the First Affirmative Defense and Second Affirmative Defense, Defendant's side of the title issue is made complete so far as it is possible without the introduction of evidence on factual issues.

And, contrary to the assumption in Plaintiff's Motion and its brief, *United States v. California* did not decide this case.

While Louisiana does not deny the paramount rights and authority of the United States, it contends throughout that neither do such governmental powers vest proprietorship nor refuse State title. Nor does Louisiana evidence its title or rights by an assumed grant from the United States to the State with the Act of Admis-

sion of 1812; for it is Louisiana's position, supported by sound authority, that the trust title in the Gulf of Mexico, now belonging to the State, was acquired under the Treaty of Cession for the benefit of Louisiana's people and that title to the bed of the sea at no time vested in the United States except in trust for the period required in the formation of the State. For Plaintiff's brief (p. 11-12) is in gross error in assuming that "the Treaty of Cession saved only the title to property which was privately owned", as Plaintiff will learn when it gives consideration to *New Orleans v. United States, supra.*

Louisiana also champions the "equal footing" rule that the original states, as well as all states since formed, as separate, independent, sovereign states acquired title to the bed of the adjoining marginal sea and that the title which they had was never surrendered to the United States; but Louisiana's title rests more in the Treaty of Cession than in the Treaty with the British Crown.

Louisiana also argues that this Court in *United States v. California* did not accord deserved breadth to the Pollard rule, and will so demonstrate, but its claim to title is not dependent upon that rule's effect in the marginal sea. For it could rest its affirmative title and can deny Plaintiff's claim, by another decision of this Court, *New Orleans v. United States*,[1] discussed before, which actually has the force of *res judicata* as between the United States and Louisiana.

That same case was offered to support the postulate for the First Defense denying fee title in the United States. And if the title issue is still to be decided the

[1] *The Mayor, Aldermen and Inhabitants of New Orleans v. The United States*, 10 Pet. 662, 9 L. Ed. 573.

case becomes more important because it not only denies that the United States acquired title to the marginal sea as an attribute of sovereignty, it places that title in Louisiana.

Louisiana's title has always been and is now subject to the paramount governmental rights of the United States. Its ownership is necessarily a qualified one like its title to lands under other navigable waters "such as rivers, harbors, and even tidelands down to the low water mark". *United States v. California,* p. 30. But it is qualified because of the powers of the United States under the Constitution and the responsibilities of the United States as a sovereign for the defense of the nation.

Nor does Louisiana claim the "right to block off the ocean's bottom for private ownership and use in the extraction of its wealth" (pp. 32-33), as was suggested in the California decision. For the argument under the First Defense has demonstrated that the taking of oil from underground, and the extraction of other resources and bounties from the marginal sea, must be in keeping with federal power exercised through the War Department Engineers in accord with the laws of Congress; and that does qualify Louisiana's title. Qualified titles are more the rule than the exception. Since the Constitution of 1921 (Art. IV, Sec. 2), Louisiana has denied its own Legislature right to "alienate, or authorize the alienation of, the fee of the bed of any navigable stream, lake or other body of water", except for purposes of reclamation and except that such beds may be leased "for mineral or other purposes". Even private lands are owned subject to superior governmental powers. They are liable to the rights of eminent domain and proper governmental regulations. In Louisiana, as in

most states, all titles are subservient to public demands under the conservation laws.[2] In this State, the ownership of land on a navigable stream is qualified by the rules giving use of the banks to the public for stated purposes.[3] All ownership of property here is qualified by various legal servitudes and the requirement that one shall so use it that he causes no damage to his neighbor.[4]

But, such qualified ownership does not deny, it includes, the right to draw from the thing owned all the utility it can supply without violating paramount governmental powers within the fields of State, National and International law.

Louisiana alleges title, although it only claims a qualified ownership. And these Defenses are intended to prove that the legal qualified title to the area in suit, with all its attendant rights, is in Louisiana as a sovereign holding it in trust for its people, as it was acquired in the beginning and as it always has been and always shall be.

(1)

Louisiana's title under Treaty of 1803

The territorial and legal histories of Louisiana are found in the report of *New Orleans v. United States, supra*, and little further reference to books is required for present purposes.[5] After LaSalle possessed Louisiana in the name of the King of France, charter was granted (1712) by the King to Anthony Crozat, conferring on him exclusive rights for commercial and other purposes over the great extent of country includ-

[2] Act 157 of the Legislature of Louisiana for 1940.
[3] Revised Civil Code, Article 455.
[4] Revised Civil Code, Article 668.
[5] See Martin's History of Louisiana.

ing the territory that now is the State of Louisiana. Title in fee simple was vested in him, and the laws, edicts and ordinances of the realm, and the customs of Paris were extended to the territory. That charter was surrendered to the King and a new one granted in September, 1717 to the Western Company; and the lands, coasts, harbors and islands were granted to this company as they had been to Crozat. In 1732 the charter of the Western Company was also surrendered to the King and a retrocession was made of the "property, lordships and jurisdiction of Louisiana".

After the Western Company surrendered the grant to the King, the French Crown was thus reinvested with its original title and the public domain reunited and so remained until 1769 when the secret Treaty of 1763, by which Louisiana was ceded to Spain, was promulgated and the territories delivered to the Spanish authorities.

The territories remained under Spanish dominion until the Treaty of Retrocession of St. Ildefonso of October 1, 1800, by which Spain ceded Louisiana to the French Republic.

It would be a useless task to again burden this Court with all the "wealth of material" supplied by the briefs in the California case or to repeat the lengthy discussions of the history of rights and powers in and over the marginal sea. Suffice it now to say that while this Court declined to agree with California that prior to the British Treaty of 1783 there has been a recognition of proprietary interest in the sea, it was admitted that long before, "some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean". 332 U.S. p. 32. The claims of Spain to owner-

ship to part of the sea have been among those termed "extravagant", leading to the "battle of books" which arose in the early part of the Seventeenth Century. Spain even by the Sixteenth Century had claimed exclusive rights in several seas, including "the Gulf of Mexico".[6] Despite any assertions with regard to the fixing of the so-called "three-mile belt", any fair approach to the historical problem gives certainty to the statement that prior to the Treaty of 1783, publicists, and nations as well, had recognized a territorial interest attached to the littoral nation.

Some additions to the material offered before can support not only California's argument but more properly the one here dealing particularly with the claims of France and the Louisiana coast. In "The Answer", Hamilton's Works, Lodge's Ed. VI, 218, one finds the following enlightening paragraph:

> "As to the jurisdiction exercised by the United States over the sea contiguous to its shores, all nations claim and exercise such a jurisdiction, and all writers admit this claim to be well founded; and they have differed in opinion only as to the distance to which it may extend. Let us see whether France has claimed a greater or less extent of dominion over the sea than the United States. Valin, the King's advocate at Rochelle, in his new Commentary on the Marine Laws of France, published first in 1761, and again by approbation in 1776, (Book V, title 1) after mentioning the opinions of the many different writers on public law on this subject, says: 'As far as the distance of two leagues the sea is the dominion of the sovereign of the neighboring coast; and that whether there be soundings there or not. It is proper to observe this method

[6] See Fulton, The Sovereignty of the Sea; Fenn, Origins of the Theory of Territorial Waters; Hall, a Treatise on International Law.

> in favor of States whose coasts are so high that there are no soundings close to the shore, but this does not prevent the extension of the dominion of the sea, **as well in respect to jurisdiction as to fisheries, to a greater distance by particular treaties,** or the rule hereinbefore mentioned, which extends the dominion as far as there are soundings, or as far as the reach of a cannon shot; **which is the rule at present universally acknowledged.'"** (Emphasis added).

And in Wheaton, International Law (Dana's Ed.) Section 179, is a reference to the British legislative jurisdiction extending back to 1736:

> "The British 'hovering act', passed in 1736 (9 Geo. II., cap. 35), assumes for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance without payment of duties. A similar provision is contained in the revenue laws of the United States, and both these provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations."

The note of Thomas Jefferson, Secretary of State, of November 8, 1793,[7] directed to the British Minister, discussed fully by the Government and California in California's suit, agreed that at that time and for a long time before, territorial rights had extended into the marginal sea; but then, speaking for the United States, it was his opinion that the safer course was to

---

[7] The note said in part: "Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. 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". A similar note was sent to the French Minister on the same date. Waits Am. State Papers I, 195.

adopt the least distance accepted by publicists and nations of one marine league from shore. And that was before Louisiana's title came by the Treaty of 1803.

Further proof that under the civil law, under the law of France and Spain, as well as the common law of England, ownership of the bed of the sea was attributed to the King, is found in this Court's narration of that legal history in *County of St. Clair v. Lovingston*, 23 Wall. 46. The case involved accumulations or accretions on a navigable water, but some of the law is helpful in this discussion.

A quotation from Blackstone (1765), found in the decision, gives the common law rule as to alluvion on the sea. And he said this:

> "But if the alluvion be sudden or considerable, in this case it belongs to the King; **for, as the King is 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." (p. 67). (Emphasis added).

And, according to this Court, Blackstone took his definition from Bracton, Judge in the reign of Henry III, who, according to Hale in his De Jure Maris, "says Bracton followed the civil law". (p. 67).

These authorities, added to those which were passively accepted in *United States v. California*, should support the King's title to the marginal sea—the same title that is now in dispute, if there is a dispute between the United States and Louisiana. For there has been no new title created by the discovery of oil. The one with which this case is concerned is the same one that belonged to France and to the King of Spain;

the same title that came through the Treaty of 1803.

By the Treaty of St. Ildefonso (1st October, 1800) it had been agreed between the First Consul of the French Republic and His Catholic Majesty, the King of Spain:

> "His Catholic Majesty promises and engages, on his part, to retrocede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other States."

Then, by the Treaty between the French Republic and the United States "concerning the cession of Louisiana" which was signed at Paris, April 30, 1803, the French Republic, claiming "an incontestable title to the domain, and to the possession of the said territory", did "hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above-mentioned treaty concluded with His Catholic Majesty". (Art. I).

By the second Article of the Treaty of Cession there were included "the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices which are not private property".

And then, by the Third Article, it was provided:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."
>
> (See complete copy of Treaty in Appendix).

This (treaty) was the basic title of the United States to "vacant lands" in the territory of Louisiana; it is the basic title of the people of Louisiana, represented by the State, to those other things recognized as being held by the sovereign in trust for the people and for their common good, as decided by this Court in *New Orleans v. United States.*

Article VI, Clause 2 of the United States Constitution provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The Treaty of Cession is the "supreme law of the land". And in its enforcement this Court is bound, as it found itself bound in *New Orleans v. United States,* to restrict the proprietary rights of the federal Government to the things which are vested in it by the Cession and to preserve to the State the things that were intended for its people.

New Orleans v. United States did not directly involve title to the sea; but in that case the United States sued the officials of New Orleans, in actuality and without success, sued the State of Louisiana, claiming title to a public quay. And the decision, as suggested before, should prove to the United States that its brief is wholly in error in discussing the Treaty of Cession and the rights of Louisiana resulting from it.

The case was of more importance than this reference to it would indicate. As was observed in the argument by Mr. Livingston, who represented the City along with that leader of the bar, Daniel Webster, it was well for the Attorney General to "call it an important cause", although "happily, importance and difficulty are not synonymous". For, he said, "its importance is far greater than any considerations of pecuniary value could give to it". If, Mr. Livingston further remarked, the case should be "decided in favor of the United States, the decree" would not only give them the land contended for but would cut off from access to navigation other properties, would close their streams, render their wharves useless and, "worse than an invading enemy", would create a blockade; all contrary to the State's right of sovereignty. (p. 689). Here, in more modern circumstances, the importance of the case rests on other grounds. A decision here for the United States would deprive the State of rights and interests, some of which are not even defined, that it has held in trust for its people unquestioned for more than a century, until the magic word "oil" excited the interest of some officials of the Federal Government.

The report, as was the habit in those days, published the arguments on both sides. Mr. Webster, in

his argument, pointed out that the question was not whether New Orleans had the right to use the property, but "it is the question, whether by the treaty of cession, the United States acquired a right to the same, as having had transferred to them the sovereign rights of Spain, and afterwards of France over the territory. This is the right asserted by the petitioner, and put in issue by the answers and pleas". (pp. 672-673). And he argued that the rights and obligation which had to do with "enforcing the uses to which it was appropriated" became vested in the State of Louisiana and did not continue in the United States after the State was formed. Although he was speaking of the public quay, his arguments are fully applicable to the issue that has been raised in this case by the claims of the United States and the Objections by Louisiana.

On the other side, the Attorney General for the United States submitted the argument that title, if not one in fee held by the United States, was held by the Federal Government in trust for all its citizens as an attribute of national sovereignty; **an argument remarkably akin, indeed dramatically like, the one which the Federal Government has offered in this proceeding. But in the New Orleans case, decided more than a hundred years ago, this Court denied the efficacy of that plea.**

The Court stated the issues this way:

> "And the petitioner further stated, that by the treaty of cession of the late province of Louisiana by the French republic of the United States of America, the United States succeeded to all the antecedent rights of France and Spain, as they then were, in and over the said province; the dominion and possession thereof, including all lands which were not private property; and

> that the dominion and possession of the said vacant lands, ever since the discovery and occupation of the said province by France, remain vested in the sovereign; and had not, at any time prior to the date of said treaty, been granted by the sovereign to the city. And the petitioner prayed for an injunction to restrain the city council from selling the land, or doing any other act which shall invade the rightful dominion of the United States over said land, or their possession of it; and a perpetual injunction was prayed." (p. 711).

The Court also acknowledged the case to be one of great importance. It remarked that, from one view, the title worth several millions of dollars depended upon its decision and that, in any aspect in which it might be considered, "principles of the civil law, and the usages and customs of the governments of France and Spain, and also, it is insisted, important principles of the common law, as well as the effect of certain acts of our own government, are involved". (p. 712).

To reach its final conclusions, the Court made an exhaustive study of French and Spanish legal authorities, to determine if the quay had been dedicated for public use, a great deal of the dispute being concerned with that problem, which was resolved in favor of the State.

The nature of the case and arguments also required the Court to closely examine the history of Louisiana relating to a time before the Treaty of Cession, as well as its history after that date and on its admission to the Union under the Federal Constitution. Particular attention was directed to the powers of the King of Spain and the King of France; and the discussions centered on the rights of the public and the people who later organized themselves into the State of Louisiana. And the Court agreed that historically and legally the

quay did not form part of the public lands, either under the governments of France or Spain "which the King could sell and convey", and that while the suit involved land within the very borders of the territory of Louisiana ceded to the United States, it had been reserved for public use, like streets and public roads, the sea and other things held in trust for the people.

In its examination of the French and Spanish legal authorities, the Court by analogy placed the quay in the quality of other things held for the common use of men, which the King could not alien. And with Domat as authority, the Court recognized the civil law as contemplating "two kinds of things destined to the common use of men, and of which everyone has the enjoyment. The first are those which are so by nature; as rivers, **the sea,** and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses, and other public places . . .".[8] (Emphasis added).

And then the Court, examining the character of the quay, leading to a determination of whether it passed to the United States or to the people of the new State, came to this conclusion:

"From a careful examination of the juris-

[8] "There are two kinds of things destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea, and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses, and other public places; and it belongs to those in whom the power of making laws and regulations in such matters is vested, to select and mark out the places which are to serve the public for these different purposes." (Domat, liv. 1, title 8, sec. 1, art. 1). 10 Pet. p. 720.

Las Siete Partidas III, Title XXVIII, Law III (translation by Samuel Parsons Scott, 1931) gives the Spanish law along the same line recognizing the sea and its shores as being different from ordinary lands which could be held in private ownership.

diction exercised over this common by the governments of France and Spain, and the laws which regulated this description of property in both countries, **the conclusion seems not to be authorized, that it was considered as a part of the public domain or crown lands, which the king could sell and convey.** This power was not exercised by the king of France, and the exercise of the power by the Spanish governor in the instances stated was in violation of the laws of Spain, and equally against its usages." (Emphasis added).

"The land, having been dedicated to public use, was withdrawn from commerce; and so long as it continued to be thus used, could not become the property of any individual. So careful was the king of Spain to guard against the alienation of property which had been dedicated to public use, that in a law cited, all such conveyances are declared to be void." (p. 731).

After more lengthly discussions and a consideration of different basic legal principles, this Court posed the important question to reach the denial of the claim by the United States to title to the common ground:

"We come now to inquire whether any interest in the vacant space in contest, passed to the United States under the treaty of cession." (p. 736).

And in answer the Court observed that if the "common" in contest, under the Spanish Crown, had formed a part of the public domain or crown lands which the King had power to alien as other lands, there could be no doubt that it passed under the Treaty to the United States with the right to dispose of it as other public lands. **"But if the king of Spain held the land in trust,** for the use of the city, or only possessed a

limited jurisdiction over it . . . " **the contrary would be true.** (p. 736) (Emphasis added).

And the conclusion was then further drawn that the ground in contest was not within the term of "vacant lands" or property which the King could alien, and, therefore, did not pass to the United States but to the people of Louisiana by the Treaty of 1803; and as appears throughout this entire discussion, the vacant lands or waste and unappropriated lands are those within the public domain which, by Federal laws, have been referred to as "public lands" subject to sale to private parties. And Plaintiff's brief joins in that statement.[9] For Plaintiff argues that such "public lands" do not extend beyond low tide.

And, for that reason if none other, title was not acquired by the United States under the treaty with France.

The Court agreed, in the New Orleans case, that a limited power in the King for certain purposes had been exercised over the ground that was subject to the dispute; the same kind of power that was exercised over the marginal sea. In answering whether that gave the federal government proprietary rights, the Court not only decided that case but its discussions serve as

---

[9] Affirmative argument is made on page 30 of its brief in the *Texas* case and the footnote on page 14 of the brief in this suit says: "We do not find it necessary to contend that Louisiana gave up potential claims to offshore lands by virtue of the 'waste or unappropriated lands' clause of her enabling statute".

"Vacant lands" subject to disposition by the Federal Government have never included tidelands or the soils under tidal waters. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, which, incidentally, held that "the soils under the tide waters within the original States were reserved to them respectively" (p. 15), cites a long list of cases for that conclusion and for the rule: "Specifically the term 'public lands' did not include tidelands . . . the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws". (p. 17).

authority to deny the claim which the federal government attempts against Louisiana here:

> "The state of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.
>
> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people.
>
> "It is enough for this court, in deciding the matter before them, to say, that in their opinion, **neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government**; and, consequently, that the decree of the District Court must be reversed, and the cause remanded with directions to dismiss the bill." [10] (Emphasis added).

In *New Orleans v. United States*, this Court denied the claim on which the United States sued the State authorities; and it remanded the case to be dismissed; all on a theory that is equally pertinent here because it reserved to the State all sovereignty rights in public property and common things acquired under the Treaty with France and held in trust for the people, except, and only except, the vacant or public lands which passed to the United States which it could sell or convey.

New Orleans v. United States is not an isolated

[10] 10 Pet., p. 737, 9 L. Ed. p. 602.

or forgotten decision, to be looked at askance. It has been cited in numerous cases involving a variety of questions [11] and it also has been followed as authority for defenses like Louisiana makes in this suit. For instance, in *Van Brocklin v. Tennessee*, 117 U.S. 151, the Court had before it the right of a State to tax lands belonging to the Federal Government; and in considering the problem, this Court found it necessary to delve into the sovereignty powers and rights respectively vested in the States and Congress. And in the discussion of the rights of local sovereignty, this Court classed *New Orleans v. United States* along with other familiar cases and ratified the decision insofar as it preserved for the State "the title in lands held in trust" for the people:

> "Upon the admission of a State into the Union, the State doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the State, and not in the United States. *New Orleans v. United States*, 10 Pet. 662, 737; *Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471; *Doe v. Beebe*, 13 How. 25; *Barney v. Keokuk*, 94 U.S. 324. But public and unoccupied lands, to which the United

---

[11] *New Orleans v. Louisiana Construction Co.*, 140 U.S. 654, 662 (1891); *Morris v. United States*, 174 U.S. 196, 246 (1899); *Irwin v. Dixion*, 9 How. 10, 30 (1850); *McDonogh's Executors v. Murdoch*, 15 How. 367, 410 (1853); *Schools v. Risley*, 10 Wall. 91, 116 (1869); *Werlein v. New Orleans*, 177 U.S. 390, 399 (1899); *Watkins v. Holman*, 16 Pet. 25, 55 (1842); *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U.S. 672, 684 (1884); *Nebraska v. Iowa*, 143 U.S. 359, 360 (1892); *Best v. Polk*, 18 Wall. 112, 117 (1873); *Rhode Island v. Massachusetts*, 12 Pet. 657, 749 (1838).

> States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise. *United States v. Gratiot*, 14 Pet. 526; *Pollard v. Hagan*, 3 How. 212; *Irvine v. Marshall*, 20 How. 558, 563; *Gibson v. Chouteau*, above cited." (pp. 167-168).

And, in *United States v. Illinois Central*, 154 U.S. 225, *New Orleans v. United States* was recognized as having even greater force. That case involved title to the fee in property on the shore of Lake Michigan, and the bill was dismissed on the defense that there was no legal or equitable claim in the United States to the public ground held for the citizens of Chicago.

According to the Court:

> "It is stated in the information that the United States never parted with the title to the streets, alleys, and public grounds designated and marked on the plat, and that they still own the same in fee simple 'with the rights and privileges, riparian and otherwise, pertaining to such ownership, subject to the use and enjoyment of the same by the public.'" (p. 237).

Supported by *New Orleans v. United States*, the Court decided that "the United States possess no jurisdiction to control or regulate, within a State, the execution of trusts or uses created for the benefit of public or of particular communities or bodies therein". And, this Court agreed that "the jurisdiction in such

cases is with the State, or its subordinate agencies". And *New Orleans v. United States* was given as "an illustration of this doctrine". (p. 239).

The decision in *United States v. Illinois Central*, with great detail, explained *New Orleans v. United States:*

> "In that case the United States filed a bill in the District Court for an injunction to restrain the city of New Orleans from selling a portion of the public quay, or levee, lying on the bank of the Mississippi river in front of the city, or of doing any other act which would invade the rightful dominion of the United States over the land, or their possession of it. The United States acquired title to the land by the French treaty of 1803. By it Louisiana was ceded to the United States, and it was shown that the land had been appropriated to public uses ever since the occupation of the province by France. It was contended that the title to the land, as well as the domain over it during the French and Spanish governments, were vested in the sovereign, and that the United States by the treaty of cession of the province of Louisiana had succeeded to the previous rights of France and Spain. The land and buildings thereon had been used by both governments for various public purposes. The United States had erected a building on it for a customhouse, in which, also, their courts were held.
>
> "It was argued on behalf of the city that the sovereignty of France and Spain over the property, before the cession, existed solely for the purpose of enforcing the uses to which it was appropriated, and that this right and obligation vested in the State of Louisiana, and did not continue in the United States after the State was formed. It was therefore contended that the

United States could neither take the property, nor dispose of it or enforce the public use to which it had been appropriated. A decree was rendered in the District Court in favor of the United States, and an injunction granted as prayed, but on appeal to the Supreme Court it was reversed, and it was held that the bill could not be maintained by the United States, because they had no interest in the property." (pp. 239-240).

The decision then quoted copiously from the New Orleans case, repeating portions of that opinion which have been quoted before in this brief. Among the paragraphs quoted are these which are worthy of further repetition:

> " 'Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.
>
> " 'The state of Louisiana was admitted into the Union on the same footing as the original states. Her rights of sovereignty are the same, and, by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust and prevent what they shall deem a violation of it by the city authorities.
>
> " 'All powers which properly appertain to sovereignty, which have not been delegated to the Federal government, belong to the states and the people.' " (p. 241).

And this Court then said that "this doctrine of the Supreme Court in the New Orleans case" was decisive

of the issue there. The claim of the United States in the New Orleans case was to title or some other proprietary right in property held for the common good, like the claim urged here, call it "title" or "ownership" or what you will. **And in that case, as between the parties to this suit, it was particularly and finally settled by this Court that the United States did not acquire, but that Louisiana held, "as an attribute of sovereignty", proprietary rights in things of that class, which include the bed of the sea. And Louisiana, therefore, urges that the "doctrine of the Supreme Court in the New Orleans case" is decisive here and should end this suit in its favor.** (Emphasis added).

(2)

Louisiana's title under the equal footing rule

Louisiana's denial of the claims of the United States and Louisiana's Affirmative Defenses, well supported by the Treaty of Cession and the cases mentioned before, are also in harmony with the long line of authorities supporting title under the "equal footing" clause of the Act of Admission of 1812.

The Treaty of Cession, as noted before, conditioned that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States".

By Act of Congress of October 31, 1803, the President of the United States, pursuant to the Treaty of Cession, was authorized to take possession of the territory in order to protect it and the inhabitants "in the

free enjoyment of their liberty, property and religion". And by Act of March 26, 1804, Congress declared that the portion of the territory ceded by France should be constituted as a territory of the United States under the name of the Territory of Orleans; and the residue of the province was to be called the District of Louisiana.

Then, by Act of February 20, 1811, the inhabitants of all that part of the territory ceded under the name of Louisiana by the said treaty made at Paris on April 30, 1803, within the following limits, that is to say:

> "Beginning at the mouth of the river Sabine; thence by a line to be drawn along the middle of the said river, including all islands, to the thirty-second degree of north latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence, along the middle of the said river and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast . . ."

were authorized to form **for themselves** a Constitution and State Government in the manner and under the conditions therein mentioned.

The description, it will be noted, was not a limitation on the sovereignty rights of the State to be formed, but delimited the landed property inhabited by the people of the territory who were authorized to form for themselves, pursuant to the directions of the Treaty of Cession, a State to be admitted into the Union; Section 1 of the Act particularly allowing these inhabitants "to form for themselves a Constitution and State Government".

By Section 3 the people "inhabiting the said territory" were required to agree and declare that they disclaimed right of title to the "waste or unappropriated lands lying within the said territory", **but there was no waiver or disclaimer of any rights of sovereignty title beyond that description.**

And Section 5, after providing mechanics for the adoption and transmission of the State Constitution, declared that "the said State shall be admitted to the Union upon the same footing with the original states".

April 8, 1812 is the date of the Act of Admission. It declared that (Section 1):

> "The said State shall be one, and is hereby declared to be one of the United States of America, and admitted to the Union on an equal footing with the original states, in all respects whatever, by the name and title of the State of Louisiana."

Then, by Act of April 14, 1812, an additional part of the original territory was incorporated into the State "in the same manner, and for all intents and purposes as if it had been included within the original" state boundaries.

By then and pursuant to the Act of February 20, 1811, the representatives of the people of the territory with which it was concerned had adopted a Constitution for the State of Louisiana by which they did "ordain and establish the following Constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent state by the name of the State of Louisiana".

That Constitution, dated January 22, 1812, was approved by Congress by the Act of Admission adopted

April 8, 1812, in which it was ordained that "the said Constitution having been transmitted to Congress and by them being hereby approved", that "the said state shall be one and is hereby declared to be one of the United States of America and **admitted into the union on an equal footing with the original states in all respects whatever** by the name and title of the State of Louisiana". (Emphasis added).

Section 3 of the Act of February 20, 1811 having provided in part that upon the adoption of its Constitution the representatives of Louisiana should "forever disclaim any right or title to the waste or unappropriated land lying within the said territory and that the same shall remain at the sole and entire disposition of the United States", Section 1 of the Act of April 8, 1812 made the approval of the Constitution and admission of the State, subject to "all other the conditions and terms contained in the third section of the Act" of 1811. And the Constitution of Louisiana, like the Act of Admission, gave special reference to the Treaty of 1803.

Not only do these Acts of Congress carry out the purposes of the Treaty of Cession, leaving sovereign powers and title in Louisiana as was decided in *New Orleans v. United States*, the "equal footing" clause of the Act of Admission, so far as rights in the marginal sea are concerned, supports the same title that came to the original colonies by their sovereignty and by the Treaty with Great Britain of 1783.

For, under the "equal footing" clause, and the rule that has been applied by this Court, the same trust title in the bed of the sea was preserved for Louisiana and for its people, in harmony with the idea of title under the Treaty of 1803 which gave them all things

like public places, the rivers and the sea as decided in *New Orleans v. United States.*

The title of Louisiana, like the title of other states, under the "equal footing" clause, is made more definite by an underlying muniment which was not called to this Court's attention and therefore not treated in *United States v. California* and that is the Treaty title which created proprietary rights in the original states and benefiting all those thereafter created and admitted under the "equal footing" rule.

With the success of the Revolution a provisional treaty was made between the original states through the Congress of the Confederation and the British Crown on November 30, 1782; and that provisional treaty was ratified as the definitive one, historically considered as the Treaty between the United States and Great Britain, on April 11, 1783. The original treaty, which was ratified by the final one, contained these important provisions:

> "Article 1st. His Britannic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts Bay, Rhode Island and Providence-Plantations, Connecticut, New-York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free, sovereign and independent states; that he treats **with them** as such; and for himself, his heirs and successors, **relinquishes all claims to the government, proprietary and territorial rights of the same, and every part thereof;** and that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be their boundaries, viz:

> "Article 2d. * * * East by a line to be drawn along * * * the rivers that fall into the Atlantic Ocean from those which fall into the river Saint Lawrence; **comprehending all islands within twenty leagues of any part of the shores of the United States. . . .** " (Emphasis added).

So, by the Declaration of Independence and as a result of the Revolution and the Treaty, the original thirteen states as separate, free and independent sovereign states, and named as the recipients thereof, acquired by relinquishment from the British Crown not only all claims to government, but also all **"proprietary and territorial rights of the same".** And by Article II of the Treaty of 1782, the proprietary and territorial rights were made so extensive that by specific reference, the boundaries comprehended **"all islands within twenty leagues of any part of the shores of the United States".** (Emphasis added).

And, as pointed out before, when the Constitution was written by the 1787 Convention of delegates from the original States, they were very careful to require that the blood-bought powers of government and the proprietary and territorial rights of the States, confirmed by the treaty with the British Crown in 1783, be made the supreme law of the land by a specific provision in the United States Constitution, which the people of the original States ratified finally in 1789.

Article VI, Clause 2 of the United States Constitution provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and **all treaties made,** or which shall be made, under the authority of the United States, **shall be the supreme law of the land;** and the judges in every state shall be bound thereby, anything

> in the constitution or laws of any state to the contrary notwithstanding." (Emphasis added).

In this connection, it should be remembered that on Saturday, August 25th, 1787, on motion of Mr. Madison, made in the Convention, Article VIII (later made Article VI by the Committee on Style) was reconsidered and, after the words "all treaties made" were inserted the words "or which shall be made", with the explanatory statement that, "This insertion was meant to obviate all doubt concerning the forces of treaties pre-existing, by making the words 'all treaties made' to refer to them, as the words concerned would refer to future treaties". (69th Congress, 1st Session, House Document No. 298, at p. 618).

So, it is that the 1783 treaty of the Revolution by which the British Crown relinquished to the original states all "proprietary and territorial rights" of the British Crown became, and is now, the supreme law of the land.

And there is no doubt that by this supreme law of the land proprietorship vested in the original states. *Johnson v. McIntosh*, 8 Wheat. 543, 584, so held:

> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States', whose boundaries were fixed in the second article. By this treaty, the powers of government, **and the right to soil,** which had previously been in Great Britain, **passed definitively to these States."** (Emphasis added).

The same idea was expressed in *Harcourt v. Gaillard*, 12 Wheat. 523, when this Court said:

> "There was no territory within the United States that was claimed in any other right than that of some one of the confederated States; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the States." (p. 526).

And until the Constitution was adopted and while the states functioned under the Articles of Confederation, there was a firm protection against the loss of title by the states, unless voluntarily, to the Union; there having been a proviso attached to Article IX which provided that

> "no state shall be deprived of territory for the benefit of the United States".

To repeat citation of the long list of cases brought to the Court's attention in *United States v. California* which support title of the original states and the later ones under the "equal footing" clause to navigable waters including the marginal sea, would be a burden unnecessary to give force to the very words of the Treaty itself, particularly as to Louisiana, when it can so thoroughly rely on the decision in *New Orleans v. United States.* But the same story should be told by quotations from leading cases against which there are none to the contrary.

In *Martin v. Waddell,* reported in 16 Pet. 367, decided in 1842, where the ownership of submerged coastal waters in New Jersey was at issue, the Court held:

> "For when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them

> for their own common use, subject only to the rights since surrendered by the Constitution to the general government." (p. 410).

The Court then cited approvingly a statement by Lord Hale in his treatise *de Jure Maris*, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British Crown, that the King "is the owner of this great coast". (p. 412). The court further observed that the lands under these waters were held by the King as a public trust for the benefit of the whole community, and that this dominion and propriety was an incident to the regal authority, and was held by him as a prerogative right, associated with the powers of Government; and that when the people of New Jersey took possession of the reins of government, and took into their own hands the power of sovereignty, the prerogatives and regalities which before belonged either to the Crown or the Parliament became immediately and rightfully vested in the **State.**

In *McCready v. Virginia*, 94 U.S. 391, this Court held that,

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan*, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 436; *Weber v. Harbor Commissioners*, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the People in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the **paramount right of navigation,** the regulation of which, in respect to foreign and

> inter-state commerce, has been granted to the United States. **There has been, however, no such grant of power over the fisheries.** These remain under the exclusive control of the State . . . The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact, a property right, and not a mere privilege or immunity of citizenship." (pp. 394-395). (Emphasis added).

This principle of title ownership of submerged lands, announced in the earlier cases, has been followed in numerous other decisions which have been brought to this Court's attention before. But the subject should not be developed further without first quoting some effective language in *Mumford v. Wardwell*, 6 Wall. 423:

> "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.
>
> "When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution." (p. 436).

And, this doctrine of proprietary rights also has been applied by specific decisions to almost all the states since admitted into the Union. In 1845, in *Pollard's Lessee v. Hagan*, 3 How. 212, the question arose whether a patent issued by the United States conveyed title to submerged land under navigable waters of Alabama.

There this Court pointed out that it was **"called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments,** over the subject in controversy", (p. 220) (Emphasis added) and that:

> "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands." (p. 224).

The "public lands" of which the states were temporarily deprived, spoken of in that decision, were the waste and unappropriated lands voluntarily ceded to the United States under the Old Congress of September 6, 1780, to aid in paying the public debt resulting from the war of the Revolution, but under the provision that

> "whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever". (p. 224).

Alabama, said the Court, was entitled to sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia (an original State) possessed it before she ceded it to the United States. For, "to maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States". Citing *Martin v. Waddell, supra,* the Court continued:

> "Then to Alabama belong the navigable waters, and soils under them, in controversy in

this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights." (p. 229).

And:

"By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original States." (p. 230).

Shively v. Bowlby, 152 U.S. 1, is full authority for State title through the same source. A reading of that decision can lead to no conclusion except that the Court there, after reviewing all the cases and all the legal background having anything to do with navigable waters, whether part of the sea or within the banks of a stream, denied the United States proprietary rights which were held to have vested in the states, new and old, by virtue of sovereignty and for the benefit of their people:

"At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States."

* * * * *

> **"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdiction."** (p. 57). (Emphasis added).

This is the "Pollard rule" which, in *United States v. California*, this Court would not accept as supporting the State's title under tide waters extending into the marginal sea; although the Court's refusal in that regard was against arguments unlike those in this suit when it is now contended that the State of Louisiana has title to the bed of the Gulf of Mexico and its resources within its jurisdiction subject to the paramount governmental powers of the United States. **But actually the "Pollard rule" needs no extension into the sea for, historically, it originated there and the earlier progression of the rule was toward and into inland waters affected by the tides.** The "inland- water" rule developed from the larger principle and, therefore, needs no **extension** in order to affect the marginal sea.[11a]

Indeed, *Pollard-Hagan*, by specific language, itself recognized the rule as applying to the sea. And that, for reasons equally germane to the present times and the present problems (p. 230 with emphasis added):

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen

[11a] The Supreme Court said in *Barney v. Koekuk* (94 U.S. 324) that the principles applicable to tidewaters "are equally applicable to all navigable waters". (p. 338).

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

a judicial pronouncement well calculated to demand, now as well as then, that title to the bed of the marginal sea be attributed to the State "if it is to be attributed to sovereignty at all".[12] (Emphasis added).

Additionally, it can confidently be said in the light of the discussions under the First Defense, that there is no sound legal or governmental reason for restricting the so-called Pollard rule to the mouth of a river, like the Mississippi, which flows into the sea. There is no conceivable difference, in necessity for proprietary rights or necessity for governmental control, between an oil well, say, a thousand feet within the mouth of the river, and one a thousand feet beyond where it empties into the Gulf. To limit the Pollard rule as between these two situations, and insofar as it relates to proprietary rights in the resources under the sea, one must find a legal reason for changing the title, or the qualified ownership if you will, from the State to the Federal

---

[12] See brief of United States in *United States v. California,* page 89.

Government at some particular physical bound. But Plaintiff does not meet that demand by its reliance on International Law when there is no demarcation of external authority, or even internal powers, at such a geographic line. **In truth, the line drawn in *Pollard's Lessee v. Hagan* was not to divide waters into different legal groups but, in the language of the Court, and as pointed out before, the purpose was to "draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy".** (p. 220). (Emphasis added).

To further demonstrate how nebulous is Plaintiff's attempted legal distinction between inland and outer waters, and the title to their beds, one need only refer to the case of *Illinois Central R. R. v. Illinois*, 1892, 146 U.S. 387, and some language in that opinion:

> "It is the settled law of this country that, the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.
>
> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and for-

> eign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." (p. 435).
>
> * * * * *
>
> "We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." (pp. 436-437).

The Great Lakes are inland seas. Their international importance is no less than the Gulf of Mexico. They separate littoral States from foreign lands. The difference is that the waters of the Great Lakes are fresh and that the Gulf of Mexico is salty. But the salt content of water could hardly upset a legal principle.

The decisions of this Court dealing with submerged lands have been so well recognized as applying to the marginal sea that the idea, in effect, has been approved by official declaration. Pursuant to Act of Congress of February 20, 1897, the Government Printing Office in 1906 published in eight volumes "A Digest of International Law" edited by Dr. John Bassett Moore. In Volume I, Section 144, pages 701-702, there appears this statement of the law, **in a work authorized by Congress,**

under the heading **"The Marginal Sea"**:

> "By the common law, title to the soil under tide waters, below high-water mark, unless private rights in it have been acquired by grant or prescription, is in the king, subject to the public rights of navigation and fishing. Upon the American revolution, the title to and dominion over tide waters and the lands under them vested in the several States, though certain rights were afterwards surrendered by the Constitution to the United States. The United States, on acquiring territory, whether by cession from one of the States or by treaty with a foreign country, or by discovery and settlement, takes the title and the dominion of lands below high-water mark for the benefit of the whole people, and in trust for the future States to be created out of the territory; although, while holding the country as territory, it possesses all the powers both of national and municipal government, and may grant, for appropriate purposes, titles to or rights in the soil below high-water mark. Congress, however, has not undertaken by general laws to dispose of such lands in the territories, but, unless in case of some international duty or public exigency, has left such waters and lands to the control of the States, respectively, when admitted into the Union."

And decisions of this Court, such as *Shively v. Bowlby*, 152 U.S. 1, and others along that line, were given as authority.

Those cases support Louisiana's claim under the "equal footing" rule regardless of the effect on the Defendant there of the decision and decree in *United States v. California;* for Louisiana has offered more here under that rule and, in addition, has in its favor the decision in *New Orleans v. United States* where title was recognized in Louisiana as an attribute of State sovereignty:

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the States and the people." 10 Pet. p. 737.

And these arguments close Louisiana's case under its Second Defense and First Affirmative Defense. The Second Affirmative Defense, contrary to Plaintiff's Motion for Judgment (p. 3) does not assert title based on possession adverse to the United States. Neither is the Defense interposed as a plea of acquiescence or estoppel although the nature and extent of possession exercised by Louisiana, were it allowed to give proof, would reflect a long, continued recognition and public conviction of its title and sovereignty rights in the marginal sea. Indeed, none of Louisiana's defenses attempts to wrest title from the United States when it is denied that Plaintiff ever held proprietary rights in the area in suit, except the temporary trust title between the Treaty of Cession of 1803 and the Act of Admission of 1812 when that trust title still held for the people became one of the attributes of State sovereignty. The Second Affirmative Defense, therefore, is cumulative. In view of Plaintiff's Motion, evidence in its support must now be presumed to exist as it has been alleged in the Answer; and it proves that Louisiana has exercised its sovereignty and its proprietary rights and its title, while the United States has claimed nothing beyond its Constitutional powers, over a long period of time; and, except for this suit, Louisiana's rights have been unchallenged and unopposed since it joined the Union in 1812.

CONCLUSION

It was demonstrated by the First Defense that the Complaint does not justify the relief prayed for as a decree could not be issued based only on the abstract

principles that the United States has paramount rights and powers over the Gulf of Mexico. What the decree asks for could come only under title or some other proprietary right.

Not only has Plaintiff failed to offer any evidence of fee simple title, it has failed to point to any constitutional provision, any statute or any decision, or to any rule of International Law, if you will, giving the United States proprietary rights in the area in suit.

And Louisiana contends that as a decree could only follow proof of a right of property, Plaintiff's case must fall; that unless the United States could prove title, it can not be "established" through a judgment of this Court:

> "The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction." *United States v. Bevans*, 3 Wheat. 336.

On the other side, Louisiana does not argue that the United States, either by the Pollard rule or by some other principle of law, "has lost its paramount rights in the belt" found within the territorial limits of the State. Louisiana has never denied that within the constitutional sphere, the United States has paramount rights and powers over the Gulf of Mexico, like it has over the Mississippi River and other navigable waters leading to the sea. But, to repeat, Louisiana contends that the United States did not originally acquire a title in the resources of the Gulf, except temporarily in trust for the State and its people, and that a decree which would transfer the right to their use and control would be the creation of a new title without constitutional or legal support.

Whether this Court in *United States v. California* was right or wrong in its decree denying California title is not the issue now before the Court. This suit is against Louisiana and involves Louisiana property. And if there is any necessity therefor, it meets the suggestion on page 11 of Plaintiff's brief in that Louisiana can "show special reason for different treatment" in Louisiana's case. That is particularly true in the light of *New Orleans v. United States* which decided the real issue in the State's favor more than a hundred years ago, a case which California failed to cite for the Court's consideration. If the end result must be the same in the two cases, then the remedy is to change the California decree for its benefit, not to deprive Louisiana of its rights because of the California decision.

In *New Orleans v. United States*, land held in trust by the State for the common good, recognized to be so owned under the Treaty of Cession of 1803, was sued upon by the United States, but it was decreed that title for the people had been reserved to the State and could not be taken away by mere judgment of court. This Court then did recognize the power of appropriating property to public purposes as an incident of national sovereignty, adding:

> "And it may be, that by the exercise of this power, under extraordinary emergencies, property which had been dedicated to public use, but the enjoyment of which was principally limited to a local community, might be taken for higher and national purposes, and disposed of on the same principles which subject private property to be taken." (10 Pet. p. 723).

So, if Congress should find it fit to say that, because of "extraordinary emergencies", certain resources of the

Gulf should "be taken for higher and national purposes", then means might be devised to transfer such resources to the Federal government. But Congress first would have to act. Its failure in that regard is one of the forces of the present First Defense. For, in the New Orleans case, this Court agreed:

> "in a government of limited and specified powers like ours, such a power can be exercised only in the mode provided by law". (p. 723).

And, to appropriate property to the national use, the Court continued, **"compensation must be paid".** (p. 730). (Emphasis added).

For the reasons given throughout this brief, the Motion for Judgment should be refused and the Complaint dismissed; or the decree should deny proprietary rights in the United States and should uphold the claims of Louisiana either on the pleadings or later after full trial before a jury on the merit.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
STAMPS FARRAR,
New Orleans, Louisiana

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, Louisiana
Of Counsel.

APPENDIX

Memorandum prepared for convenience of Court to show methods of exploring for and producing oil and other minerals in the Gulf of Mexico.

The statements herein made have been prepared under the direction of competent geologists and those familiar with the facts therein set forth; the discussions with regard to the character of mineral deposits being supported by numerous text books dealing with the science of geology and kindred subjects; and the other things being either based on public records or being a matter of common knowledge.

Support for the statements herein made, as well as a more thorough explanation of the operations involved, can be found by reference to the testimony of H. H. Kaveler (page 437) and of E. F. Bullard (page 445) in pamphlet titled "Submerged Lands", published by the Government Printing Office in 1950, being a report of "Hearings before the Committee on Interior and Insular Affairs, United States Senate, Eighty-first Congress, First Session" in connection with bills S. 155, S. 923, S. 1545, S. 1700 and S. 2153; the hearing having been held on October 4, 5, 6, 7, 8 and 10, 1949.

The Origin and Character of Oil and Gas Deposits

Petroleum and natural gas are organic hydrocarbons believed to have been produced over geologic periods from organic matter buried in the sediments of ancient seas now hundreds to thousands of feet below the surface of the earth. The portions of such hydrocarbons available to man have migrated from the source beds through

porous sands or other formations far below the surface of the earth until such migration has been arrested by an underground area or trap of restricted size, usually limited to a few miles in diameter. Such areas or traps are generally called structures and retain the oil and gas which so migrate if such structure contains, in proper juxtaposition, some impervious rock or formation to serve as a seal preventing further migration from that particular location. Such structures or traps are the result of various geologic processes occurring over long geologic periods of time. Under coastal waters of the Gulf of Mexico, as well as the coastal landed area, such forces have been the movement or upthrust of plastic salt plugs or domes thereby changing subsurface location or depths of strata, including porous sands, and bringing such strata or sands closer to the surface; although in such cases the actual surface area, landed or under the sea, usually shows little signs of such upthrusts because of long periods of erosive processes.

The Search for Structures and Possible Oil Fields

The sole business of the modern oil prospector is a search for underground traps. Prior to the invention of geopyhsical methods and improvements now in use, indications of such traps were limited to signs appearing on the surface; and these signs are not found in the sea or water covered areas. There have been important developments in the use of geophysics for the location of these underground structures during the last 27 years, some of the earlier techniques having been abandoned for later processes. Under present geophysical methods employing the generation of sound waves by dynamite explosions underlying domes or structures can

be located and defined with some accuracy, except that all of the work depends on mathematical computations and is subject to the margin of human error. Such structures are sometimes considered to be in one definite area based on seismograph work but later found to exist perhaps several miles away.

There are no differences in the geologic conditions between deposits under the waters of the Gulf and under the Gulf Coast landed area; except that under the water more difficulties are encountered in searching for such structures. Fields like some of those off the coast of California have been found because the structures were first discovered under landed areas and later determined to extend beyond the coast line and under coastal waters.

Several years ago, a campaign of geophysical surveys covered the entire Gulf Coast from Corpus Christi to east of the Mississippi River. The campaign lasted about 6 years and cost some $25,000,000.00 for geophysics alone, the work having been performed by 5 or 6 different companies. This survey on land resulted in doubling the number of domes known on the coast; but each new dome discovered, including those that thereafter produced no oil, cost an average of over $600,000.00 in geophysical work alone.

Because of known factors it is generally assumed that there are many of these structures or domes under the waters of the Gulf of Mexico within the area off the coast of Louisiana, although only a few have been definitely located in the Gulf of Mexico and still fewer have been proved productive of oil. Geophysical explorations have been conducted under permits, such operations consisting of reconnaissance work resulting only

in indications of possible underground structural conditions in given areas. After such geophysical exploration work under permits has shown "suspicious" areas, applications have been made to the State for leases, and, based on competitive bids, the State has received substantial amounts for leases because of information that has been obtained by private work. But more geophysical investigations are then required to definitely locate the supposed trap and to outline it before the commencement of drilling operations. It is believed that the relatively small number of domes found off the coast of Louisiana constitute only a small proportionate part of the number that might be located by future surveys; but a great percentage of all those so located may not produce oil. The geophysical work necessary in the search for oil is an expensive operation. Geophysical work alone in southern Louisiana and during the last 5 years has cost more than $105,000.00 per well for the several hundred exploratory wells, mostly on land, drilled during that period. When taken alone, the work on the sea is more expensive and more uncertain than that on land.

Proof of Structures

After extensive work is performed by such geophysical methods, it is necessary, in order to determine if the underground structure actually exists and whether it is of such quality that it could serve as a reservoir for oil and natural gas, to conduct drilling operations to the depth indicated by the geophysical investigations. Before any such work can be commenced in the Gulf, either a platform must be built for holding drilling equipment at a cost of not less than $500,000.00, or expensive barge equipment must be procured to be used

by submerging such barges at the drilling point for use as a platform; such operations being required because of the water area and hazards of drilling in the Gulf. The actual work of drilling a well requires a great deal of time and before drilling into the structure if one exists, or before proving its non-existence, the costs thereof amount to approximately three times the cost of similar operations on land particularly by reason of storm hazards and other dangers of the sea. During the course of this operation of drilling, various departments or crews are employed; those actually performing the drilling work, those supplying necessary pipe and materials and the transportation thereof, technical advisors, such as geologists, paleontologists and those of like professions.

Such drilling operations under present known methods or techniques can only be carried on in relatively shallow water areas; so that even if geophysical explorations indicate the presence of structural conditions below any particular area, such condition is of no value if the overlying waters are too deep to allow the building of platforms on piling or the use of submerged barges with derricks thereon for the drilling of wells.

That in order to determine whether the geophysical report correctly showed the location of a structure or trap at a given point, the well is drilled by the use of drill pipe to the assumed depth of such structure—anywhere from 3,000 to 15,000 feet—and when the bit, drilled into the surface and handled by the continuous addition of pipe going into the ground, reaches the proposed depth, samples and cores can be obtained by well recognized methods for examination to determine the character of the underlying strata by technical geologic and paleontological studies of the sands and other

rocks. Numerous other scientific methods are used, such as electrical surveys made by lowering recording instruments on cable into the hole, requiring the services of specialists and additional technicians. The drilling of a well into such structure might result in determining that it is capable of holding oil and gas and any such well so drilled could possibly result in producing oil and gas therefrom. That in the greater number of cases such wells prove either that the structure is not of such character that oil and gas could be accumulated or it suggests only the possibility thereof, indicating further drilling operations to be carried on for exploratory purposes.

Some of Mr. Bullard's testimony (page 449) more clearly points up these problems:

> "The purpose of all this work is to obtain maps that show probable salt domes, or anomalous areas, which the companies try to lease. The expectation of finding domes is usually justified, but it is not certain. These areas are referred to as anomalies until they have been proved by drilling. Then, we call them structures.
>
> "Through geophysical exploration we hope to find domes. If we do discover them and if we are successful in acquiring leases on the domes, only then can we begin drilling for oil.
>
> "It is estimated that on the blocks now under lease there are 79 structures. From the best information available, 20 of these are piercement domes, the other 59 are deep-seated or low-relief structures. However, many more structures are known to exist on acreage not yet submitted for bidding.
>
> "How many structures there are within the 100-foot-depth line along the coast of Mississippi,

Louisiana, and Texas is problematical. A reasonable guess is that at least 100 domes, or prospects, are known to the industry, and that possibly 150 to 200 prospects may eventually be found.

"Our exploration is not actually finished until we have found the oil. We can only do this by drilling. Each domes presents a different drilling problem.

"The deep-seated dome is normally broken up into a series of large fault blocks. Some of these blocks carry oil; others are dry. We not only have to drill into the block itself, but into that portion of the block where the oil occurs.

"In the case of piercement domes, the problems are more numerous. The beds are squeezed, tilted at high angles, and locally truncated. In most cases the top of the dome is barren or of little importance; the production is normally on the flank, but it is rarely found all the way around.

"There is no way yet devised to show when you reach the edge of an oil pool. Your next well may be a dry hole. In many cases, the edge well in a rich field may be within a few feet of an old hole drilled by a company that went bankrupt exploring that flank of the dome. The history of piercement domes is replete with examples in which 20 to 50 dry holes have been drilled before production was found."

The history of exploration for oil and gas in the coastal areas has proved that each structure has its own individual characteristics. One may produce from sands on one side while another may produce from sands or accumulations in an entirely different direction from the center of the dome. But even though the underground location of the trap or structure has been fixed

by geophysical means, there is no way to determine the point or points from which oil or gas could be produced except by the drilling of wells.

As was said by E. L. DeGolyer in his article appearing in the magazine "Fortune" of August, 1949:

> "Even a most perfect trap in a most prolific region may be dry. Such a trap within sight of the mammoth East Texas oil field has been drilled repeatedly without success. Even with the benefit of all scientific knowledge available, oil prospecting, no matter how attractive the prospect may be, is still a matter of chance. The drill is the final arbiter."

The salt plugs causing structural conditions above discussed occur in varying widths and extend to depths that have never been determined. There are several such salt domes near the Louisiana coast under private lands which are near enough to the surface to allow the production of salt for commercial purposes. Salt is there mined by shafts. At least one of the domes is producing salt in brine by the sinking of wells and by forcing water into the salt core to dissolve the salt, creating the brine which is then pumped to the surface. It is possible that some of these shallow domes will be found in areas of the open Gulf that could eventually be subject to commercial use.

In some cases the salt plugs are overlain with porous rock with accumulations in the interstices of crystallized sulphur assumed to have been deposited over geologic periods by percolating waters with sulphur content or in some other similar way. Along the landed part of the Louisiana and Texas coast, several salt domes have

been found to contain sulphur near enough to the surface to be mined by what is known as the Frasch process, consisting of the injection of heated water through wells drilled into the overlying rock, the melting of the sulphur and the pumping it in molten form to the surface of the earth. These operations can be carried on with present techniques only at depths to about 1500 feet. It is also possible that some of the domes that will be discovered in the Gulf will contain such sulphur deposits and if the overlying waters are shallow enough and if the domes are close enough to the coast, it may be possible to work them for the production of commercial sulphur. These domes producing salt and sulphur are also sometimes productive of oil in the overlying sands and particularly in the sands creating traps around the periphery of the dome. In at least one case in the coastal area of Louisiana, a salt dome has produced sulphur and is now producing salt by the dissolving process and oil is also being produced from the outer edges of the dome.

The records of operations in the Gulf of Mexico off the coast of Louisiana reveal that 32 structures have been drilled since 1945, but only 6 have produced oil. They show that on the 6 proven structures a total of 26 development wells have been drilled, but only 15 have been producers. Out of the other 26 structural prospects so drilled, 17 of the wells were dry and therefore failed to prove any productive character of the domes. The balance proved the existence only of gas. But in the operations so conducted off Louisiana there has been a total investment of something like $190,000,000, although the gross value of the oil produced has amounted to only about $900,000, or less than one-half of one per cent

of the investment made. Of course, one operator might have profited while another lost; but the over-all picture shows that the search for oil in these areas is highly speculative, is more expensive than operations on land and that oil is still only where you find it.

TREATY BETWEEN THE FRENCH REPUBLIC AND THE UNITED STATES, CONCERNING THE CESSION OF LOUISIANA, SIGNED AT PARIS THE 30TH OF APRIL, 1803

The President of the United States of America, and the First Consul of the French Republic, in the name of the French people, desiring to remove all source of misunderstanding relative to objects of discussion, mentioned in the second and fifth articles of the convention of the 8th Vendemiaire, an 9 (30th of September, 1800), relative to the rights claimed by the United States, in virtue of the treaty concluded at Madrid the 27th of October, 1795, between His Catholic Majesty and the said United States, and willing to strengthen the union and friendship which at the time of the said convention was happily re-established between the two nations, have respectively named their plenipotentiaries; to wit, the President of the United States of America, by and with the advice and consent of the Senate of the said States, Robert R. Livingston, Minister Plenipotentiary of the United States, and James Monroe, Minister Plenipotentiary and Envoy Extraordinary of the said States, near the government of the French Republic; and the First Consul, in the name of the French people, the French citizen Barbé Marbois, Minister of the Public Treasury, who, after having respectively exchanged their full powers, have agreed to the following articles:

Art. 1st. Whereas, by the article the third of the treaty concluded at St. Ildephonso, the 9th Vendemiaire, an 9 (1st October, 1800), between the First Consul of the French Republic and His Catholic Majesty, it was agreed as follows: "His Catholic Majesty promises and engages, on his part, to retrocede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other States." And, whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestable title to the domain, and to the possession of the said territory: The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, for ever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above-mentioned treaty concluded with His Catholic Majesty.

Art. 2d. In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property. The archives, papers, and documents, relative to the domain and sovereignty of Louisiana and its dependencies, will be left in the possession of the Commissaries of the United States, and copies will be afterwards given in due form to the

magistrates and municipal officers of such of the said papers and documents as may be necessary to them.

Art. 3d. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

Art. 4th. There shall be sent by the government of France a Commissary to Louisiana, to the end that he do every act necessary, as well to receive from the officers of His Catholic Majesty the said country and its dependencies, in the name of the French Republic, if it has not been already done, as to transmit it in the name of the French Republic to the Commissary or agent of the United States.

Art. 5th. Immediately after the ratification of the present treaty by the President of the United States, and in case that of the First Consul shall have been previously obtained, the Commissary of the French Republic shall remit all the military posts of New Orleans and other parts of the ceded territory, to the Commissary or Commissaries named by the President to take possession; the troops, whether of France or Spain, who may be there, shall cease to occupy any military post from the time of taking possession, and shall be embarked as soon as possible, in the course of three months after the ratification of this treaty.

Art. 6th. The United States promise to execute such treaties and articles as may have been agreed be-

tween Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon.

Art. 7th. As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty, until general arrangements relative to the commerce of both nations may be agreed on, it has been agreed between the contracting parties, that the French ships coming directly from France or any of her colonies, loaded only with the produce or manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain or any of their colonies, without being subject to any other or greater duty on merchandise, or other or greater tonnage than those paid by the citizens of the United States.

During the space of time above-mentioned, no other nation shall have a right to the same privileges in the ports of the ceded territory: the twelve years shall commence three months after the exchange of ratifications, if it shall take place in France, or three months after it shall have been notified at Paris to the French govment, if it shall take place in the United States: it is, however, well understood that the object of the above article is to favor the manufactures, commerce, freight,

and navigation of France and of Spain, so far as relates to the importations that the French and Spanish shall make into the said ports of the United States, without in any sort affecting the regulations that the United States may make concerning the exportation of the produce and merchandise of the United States, or any right they may have to make such regulations.

Art. 8th. In future, and for ever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favored nations in the ports above-mentioned.

Art. 9th. The particular convention, signed this day by the respective Ministers, having for its object to provide for the payment of debts due to the citizens of the United States by the French Republic, prior to the 30th of September, 1800 (8th Vendemiaire, an 9), is approved, and to have its execution in the same manner as if it had been inserted in the present treaty; and it shall be ratified in the same form, and in the same time, so that the one shall not be ratified distinct from the other.

Another particular convention, signed at the same date as the present treaty, relative to the definitive rule between the contracting parties, is in the like manner approved, and will be ratified in the same form, and in the same time, and jointly.

Art. 10th. The present treaty shall be ratified in good and due form, and the ratifications shall be exchanged in the space of six months after the date of the signature by the Ministers Plenipotentiary, or sooner if possible.

In faith whereof, the respective Plenipotentiaries

have signed these articles in the French and English languages; declaring, nevertheless, that the present treaty was originally agreed to in the French language; and have thereunto put their seals.

Done at Paris, the tenth day of Floreal, in the eleventh year of the French Republic, and the 30th of April, 1803.

ROBERT R. LIVINGSTON,
JAMES MONROE,
BARBÉ MARBOIS