Title to Lands Under Navigable Waters

Herbert H. Naujoks

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Herbert H. Naujoks, Title to Lands Under Navigable Waters, 32 Marq. L. Rev. 7 (1948).
Available at: http://scholarship.law.marquette.edu/mulr/vol32/iss1/3

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
I. IN GENERAL.

The recent decision of the United States Supreme Court in the so-called "California Tidelands Case"\(^1\) has settled in part though not wholly the question of the respective rights of the Federal Government and the several states in the submerged lands lying beyond and seaward of the ordinary low tide water mark in the two oceans. Many individuals, corporations and even municipalities who own property with riparian rights upon the shores of an inland waterway feel that they have no interest in this decision. However, when one studies the history of the long-established rights of the various States to the lands underlying the ocean waters off the shores, and then considers how the United States Supreme Court has now denied paramount rights to the State of California in its tidelands and in the rich minerals and oils lying under such lands, one must wonder what may happen in the future to all water front rights if the California Tidelands decision remains the law.

The California Tidelands case arose in an original action brought in the United States Supreme Court by the United States against the State of California for a decree declaring paramount rights in the United States as against the State of California in lands underlying the Pacific Ocean and extending seaward three nautical miles from the ordinary low water mark on the coast of California and outside of the inland waters of the State. This action also sought to enjoin the State of California and all persons claiming under it from continuing to trespass upon such area in violation of the claimed rights of the United States. The Government's complaint alleged that the United States

"is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California."

The Government's complaint further alleged that California, pursuant to its State Statutes, but without authority from the United States, had negotiated and executed numerous leases with persons and corporations purporting to authorize them to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and that the

---

\(^1\) United States v. California, 322 U.S. 19 (1947).
lessees have done so, paying to California huge sums of money for the petroleum products so taken.

California filed an answer admitting that persons holding leases from California have been extracting petroleum products from the land under the three mile ocean belt immediately adjacent to California. California asserted ownership to the lands underlying the ocean bed extending three English miles from the low water mark within the original boundaries of the State, and asserted further that the original 13 States acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three mile belt in adjacent seas, and that since California was admitted as a State on an equal footing with the original States, California at that time became fixed with title to all such lands. California set up further several affirmative defenses including title under a doctrine of prescription because of long Congressional acquiescence in California's asserted ownership, and because of an *estoppel* and *laches*, and finally by application of the rule of *res judicata*.

The majority of the United States Supreme Court, in an opinion written by Mr. Justice Black, held that the State of California is not the owner of the land and minerals therein lying off the coast of California in a three mile belt seaward from ordinary low water mark, and that the Federal Government has paramount rights in such tidelands. Mr. Justice Reed, dissenting, was of the opinion that the original States as sovereignties in their own right owned the lands under the seas adjoining their coasts to the three mile limit, and that California having been admitted to the Union on an equal footing with the original 13 States had the same right. Mr. Justice Frankfurter, dissenting, was of the opinion that it did not necessarily follow from the holding of the majority of the court that the State of California was not the owner and was without any possessorry interest, and that the United States was the owner of the disputed tidelands. Justice Frankfurter thought further that injunctive relief against trespass could not properly be based on the existence of paramount rights in the United States incidental to its political sovereignty.

The majority of the court in considering this matter said in part:

"* * *The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the

---

2 332 U.S. 19, 29, 38, 40. California's claim of title through laches, acquiescence, or by prescription was rejected, the Court stating that ordinary court rules designed for private disputes will not bar the Federal Government from asserting its claims. 322 U.S. 19, 39, note 1.
security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.

* * *

It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. Cf. United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 316, 81 L. ed. 255, 260, 57 S. Ct. 216.

* * * The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See Chy Lung v. Freeman, 92 U.S. 275, 279, 23 L. ed. 550, 551. 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. Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government’s paramount rights in and power over this area. Consequently, we are not persuaded to transplant the Pollard rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. If this rationale of the Pollard case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt. Cf. United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 316, 81 L. ed. 255, 260, 57 S. Ct. 216; United States v. Causby, 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062.

* * * Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.
Nor can we agree with California that the Federal Government's paramount rights have been lost by reason of the conduct of its agents.

* * *
We have not overlooked California's argument, buttressed by earnest briefs on behalf of other states, that improvements have been made along and near the shores at great expense to public and private agencies. And we note the Government's suggestion that the aggregate value of all these improvements are small in comparison with the tremendous value of the entire three-mile belt here in controversy. But however this may be, we are faced with the issue as to whether state or nation has paramount rights in and power over this ocean belt, and that great national question is not dependent upon what expenses may have been incurred upon mistaken assumptions. Furthermore, we cannot know how many of these improvements are within and how many without the boundary of the marginal sea which can later be accurately defined. But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. See United States v. Texas, 162 U.S. 1, 89, 90, 40 L. ed. 867, 902, 903, 16 S. Ct. 725, Lee Wilson & Co. v. United States, 245 U. S. 24, 32, 62, L. ed. 128, 134, 38 S. Ct. 21.

We hold that the United States is entitled to the relief prayed for.

A petition by the State of California for a rehearing was denied on October 13, 1947.

On October 27, 1947, the United States Supreme Court approved a proposed decree setting forth paramount rights of the Federal Government to the oil rich submerged lands lying between the low water mark and the three-mile limit off the California coast. The court made but one change in Attorney General Clark's proposed decree before approving it. The proposed decree had provided in one place: "The United States of America is now, and it has been at all times pertinent hereto, possessed of paramount rights (of proprietors) in, and full dominion and power over, the lands, minerals and other things", underlying the submerged lands. The high court struck out the words "of proprietors." In so doing the court refused to say that the Federal Government has actual ownership of the submerged lands, and limited the decree to proclaiming merely that the Government has "paramount rights" in such lands.

At the same time the court refused to approve two stipulations entered into by the Justice and Interior Departments of the Federal Government with the State of California. One of these stipulations provided for continued and expanded state operation of oil leases on the submerged lands until Congress could set up the machinery for
Federal operation. The other stipulation waived any rights that the Federal Government had to lands lying under certain specified bays and harbors on the California coast. The court declared that neither one of these stipulations was relevant to any issue that was before the court, and ordered that both stipulations "be stricken as irrelevant to any issues now before the Court."

In its October 27, 1947, memorandum opinion, the Court further declared that for the purposes of carrying out the conclusions of the Court as stated in its opinion of June 23, 1947, it was ordered, adjudged and decreed as follows:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

"2. The United States is entitled to the injunctive relief prayed for in the complaint.

"3. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree."

An examination of the court's opinion of June 23, 1947, and of its memorandum opinion and decree of October 27, 1947, discloses the strange absence of any mention by the court of ownership in the United States to the tidelands in question. The court merely says that "California is not the owner of the three mile marginal belt along its coast and that the federal government rather than the state has paramount rights in and powers over that belt, an incident of which is full dominion over the resources of the soil under the water area, including oil." (Italics added)

The reluctance of the court to attribute full ownership in the tidelands to the United States does not change the situation very much. Dominion over and paramount rights in and power over the lands in question gives to the Federal Government all of the necessary incidents of complete ownership. Small wonder then that the other riparian states, including the Great Lakes States, feel that the Tidelands decision has cast a cloud upon all titles to improvements and property located on lands under navigable waters.
Thereafter, a petition was filed with the court urging that the decree be changed to read that the United States is "the owner of and is possessed of paramount rights" in the submerged lands to the end that almost certain future litigation be prevented. On November 24, 1947, the United States Supreme Court refused to declare officially that the United States is the "owner" of the oil rich tidelands off the California coast in which the court on June 23, 1947, decreed that the Federal Government is "possessed of paramount rights."

The California Tidelands decision has aroused a storm of protest. Many bills have been introduced in Congress seeking to have the Federal Government return to the states their traditional and long recognized rights in such submerged lands.

Walter S. Hallanan, President of the Plymouth Oil Company and Chairman of the National Petroleum Council, charged before the annual meeting of the American Petroleum Institute at Chicago that:

"It requires no stretch of the imagination to see that the Supreme Court has opened the door to confiscation at any time, of almost any kind of property, whenever those in authority can make out a case that the Federal ownership is necessary or advisable in connection with the national defense or the conduct of international relations."

Senate Bill 1988 was introduced by Senator Moore for himself and nineteen other Senators whose names appear on it, and is a bill to confirm and establish the titles of the States to lands and resources in and beneath navigable waters within State boundaries. This is the bill sponsored by the National Association of Attorneys General.

An examination of this bill discloses that it fails to protect adequately the interests of the original thirteen States and perhaps of some other coastal and Great Lakes States. If enacted and approved in its present form, Senate Bill 1988 might leave certain of the states' titles to submerged lands within the three-mile belt open to attack upon the ground that such lands were not within the boundaries of the respective states. The United States Supreme Court used certain language in its opinion in the "California Tidelands Case" which raised a question as to whether the boundaries of the original thirteen states extended out to the three-mile limit as was generally assumed in the past.

The United States Supreme Court said in the "California Tidelands Case" that in 1776 there was no settled international custom or

7 A number of similar bills have been introduced, all apparently in the same form, including the following: H. R. 499—introduced by Mr. Bradley of California; H. R. 5010—introduced by Mr. Fletcher of California; H. R. 5099—introduced by Mr. McDonough of California; H. R. 5105—introduced by Mr. Bramblett of California.
8 332 U.S. 19, 32 (1947).
understanding that each nation owned out to the three-mile limit, and
that neither the English Charters nor the Treaty of Peace with England
nor any other document showed a purpose to set aside a three-mile
belt for colonial or state ownership. While the Court didn't directly say
so, it at least inferred that the boundaries of the original thirteen States
along the ocean extend out only to low water mark.

This situation, however, does not appear to be applicable to the
State of California since her boundaries were established by her Con-
stitution at the time of her admission to statehood as extending out
to the three-mile line. The same is true of Texas whose boundaries
were established six miles out by her treaty of Independence with
Mexico. The boundaries of the Great Lakes States and the other coastal
states would depend upon their own peculiar circumstances. Wiscon-
sin's boundaries as fixed by the Enabling Act of Congress, dated
August 6, 1846, and by Art. II of the 1848 constitution of the state of
Wisconsin extend to the "centre of Lake Michigan" and to the "centre
of Lake Superior." If, at the time of their admission, the lakeward
boundaries or the ocean boundaries of the particular state were fixed
at three miles or some other distance out, such state would be in the
same class with California and Texas. Otherwise the state would be
in the same situation with the original thirteen States.

The only way that Congress can fully protect the original thirteen
States and certain other states is to specifically affirm and recognize
that the state's ownership and control to the navigable waters and the
lands thereunder extends at least three miles seaward. Whether Con-
gress will do this is problematical.

Attorney General Tom C. Clark has taken two steps to insure to
the Federal Government full and final authority over the California
tidelands. First, Attorney General Clark has filed with the United
States Supreme Court a brief defining the geographical boundaries of
the land involved in the controversy between the United States and
California and has asked the Court to recognize the Federal Govern-
ment's control over this area. Second, Attorney General Clark has
drafted legislation which would authorize the Federal Government to
manage and lease the California tidelands. Secretary of Interior Krug,
with Secretary of Defense Forrestal advising, worked out the details
of and then filed with both Houses of Congress a bill designed to im-
plement the court's decision giving paramount rights to tidelands to the
Federal Government.

The government bill provides that no rights or claims to mineral
deposits, regardless of how filed in the past, shall be recognized except
in accordance with the new act. The President, under this bill, is em-

powered to withdraw any land in the marginal area from public leasing and to designate it as a mineral reserve of the United States.

The bill refuses to recognize any merit to the contention that substantial equity now exists which would warrant giving any application preferential consideration in issuing oil and gas leases.

In war the federal government can refuse at market price all or any oil and gas produced from the submerged lands. This, in effect, according to Secretary Krug, gives the government a continuing option at a fair price ahead of other possible purchasers.

Other sections of the government bill give the Secretary discretion as to leasing, except for lands reserved by the President and in the interest of national security.

Submerged coastal lands not within any known geological structure of a producing oil and gas field, as well as those within, may be leased after competitive bidding to the highest bidder. Leases in untried geological structures may not exceed 64,000 acres.

Under the government bill acreage limitation in general is more generous than under the mineral leasing act, to stimulate exploration and development in water areas, which are more costly and complex than on dry land.

Royalty to be paid both for structure and off structure leases is not less than 12½ per cent of the amount or value of the oil or gas produced.

The bill recommended that the United States pay 37½% of income to states within whose boundaries the activities take place, to be used for public roads, parks or education. The government would pay 52½ per cent of it into reclamation funds of tide water states.

The chief theme of the government's bill is national defense, with the Secretary given the right to regulate the rate of prospecting and development, and the quantity and rate of production from leases. Under the bill the Secretary is authorized to fix rates without strict regard for conservation or engineering practices. The Secretary also may terminate any lease in a national emergency.

Whether Congress will adopt the government bill or one of the bills which would vest ownership of tidelands in the states remains to be seen. If the Attorney General's bill passes both houses it may still face the hurdle of a Presidential veto.

While the particular lands involved in the California Tidelands case are all located along the California coast, many lawyers who have been studying this decision are of the opinion that the effect of the decision is to cloud the title to lands lying within the three-mile belt all along the United States coast lines, and that titles to docks, piers, wharves, warehouses and the like that have been built on property purchased or leased from the states located on tidelands within the three-mile belt
might be confiscated. The California Tidelands decision, if applied generally, could also invalidate or cloud the titles to improvements located on navigable waters all along the Great Lakes area.

It will be recalled that when this question was first raised by Harold Ickes as Secretary of the Interior, a bill was introduced in Congress and passed by both the House and Senate disavowing federal rights to such lands and affirming the traditional rights of states. However, this bill was vetoed by President Truman.

If the bill sponsored by the National Association of Attorneys' General, Senate Bill 1988, 80th Congress, 2nd session, is enacted into law, the claim of the Federal Government to paramount rights in tidelands would finally be denied. Any such decision of Congress to vest in and affirm to the States their traditional right in and title to lands under navigable waters within their boundaries, would probably be upheld by the United States Supreme Court inasmuch as Article Four of the United States Constitution specifically gives Congress "power to dispose of * * * the territory or other property belonging to the United States." On the other hand, if the bill sponsored by United States Attorney General Tom C. Clark to implement the decision of the Court in the California Tidelands case becomes law, such action probably would settle and establish for all time the Federal Government's claim to paramount rights in the oil and mineral rich tidelands lying within the boundaries of the coastal states in America.

The critical situation that has arisen because of the California Tidelands decision has aroused considerable interest in the study of this phase of the law of waters. For many years widely divergent views were held with respect to the nature and extent of the rights of the Federal Government, the states, and of private individuals to lands under navigable waters. However, in recent years (but before the California Tidelands decision), it had been thought that the United States Supreme Court decisions had settled authoritatively the long-established rights of the various states to the lands underlying the ocean waters off their shores. It was thought further that the nature and extent of the title and rights of the several states and of private individuals to lands under the Great Lakes and under inland lakes and rivers were likewise well established. The many decisions of the United States Supreme Court which held that the several states had paramount rights in and title to the submerged lands underlying the tidal waters adjacent to their shores now have all been overruled by the California Tidelands decision.

Attorneys representing many private interests agree with the position of the National Association of Attorneys General that intervened
in the California Tidelands case that the high court had previously settled the issue concerning the ownership of lands under navigable waters in favor of the states and against the Federal Government.

In order to determine rightly the correct rule of law concerning the ownership of lands under navigable waters as it was understood before the California Tidelands decision, a study of the origin and of the historical development of this phase of the law of waters is essential. Many students of this subject believe the Court was wrong in affirming paramount rights to lands under navigable waters in the Federal Government. If the California Tidelands decision is wrong, why did the United States Supreme Court decide as it did? If the decision is correct, is it based on precedent and does it rest on sound legal principles? The answer can be found only in an examination of the common law principles, and in a study of the numerous court decisions on this subject.\(^{11}\)

II. ORIGIN AND DEVELOPMENT OF THE COMMON-LAW RULE OF TITLE TO LANDS UNDER NAVIGABLE WATERS.

In tracing the sources of the common law rule concerning the title to lands under navigable waters,\(^{12}\) it is found that the law of real property in England, in Bracton's day, was crude and fragmentary. The number of legal ideas was small, with scarcely any conception of public law.\(^{13}\) The English law was affected to a certain extent by the Roman Law. Bracton's treatise\(^{14}\)—which was written at some period before the year 1256—contains both English and Roman elements.\(^{15}\) The law of real property was confined almost exclusively to the retention of what was acquired by conquest or grant. At this period the claims of the Crown to real property and to submerged lands were not generally pressed with the vigor and enthusiasm this movement later developed. No well recognized distinction was perceived as yet between private rights and governmental powers.\(^{16}\) However, even now the beginnings of the doctrine of Crown ownership of lands under navigable waters

\(^{11}\) The federal and state court decisions involving title to lands under navigable waters are numerous. Obviously, in a paper of this length it would be impossible to comment upon or quote from all of these decisions. The author has therefore, selected those cases—mainly the ones decided by the United States Supreme Court—that he believes to be the most important ones for consideration and discussion.

\(^{12}\) Gould, Law of Waters; and Moore, History of the Foreshore, contain much excellent source material.

\(^{13}\) Pollock & Maitland, History of English Law, (2d ed.), p. 526.

\(^{14}\) "DeLegibus et consuetudinibus Angliae."

\(^{15}\) The extent of the Roman Law to be found in Bracton's treatise has been variously estimated. Maine says that one-third of Bracton is pure Roman Law; while Reeves states that the Roman law in Bracton would not fill three pages. Maine, Ancient Law (1864) ch. iv.; 2 Reeves, History of English Law (1787) ch. viii at p. 89; 31 Yale Law Journal 827, Roman Element in Bracton, by George E. Woodbine. Holdsworth's History of English Law, vol. II, p. 244 et seq.; Digby, History of the Law of Real Property, p. 120.

\(^{16}\) Maitland's Domesday, p. 170.
were manifest. The governmental power was vested in the King and he assumed the right to do as he pleased with the land over which his power extended. He gave it away, bartered it, or bestowed it upon his barons as reward for their support. There was no line drawn between the lands which the King held as King, or Sovereign, and those which he held in his private capacity. The state or nation was not personified and there were no lands which belonged to the state or nation as such; that is, no lands to which the subjects could assert a common right. What lands the King held, he could dispose of or keep, according to his wishes, and no one could question his will.

The several Kings made numerous grants of both dry and submerged lands, and of exclusive fishing rights. Mr. Moore says: “The Crown had parted with almost all the sea-coast by grants to its subjects before the end of the reign of King John.” No right or interest in the shore or space between high and low-water marks was retained in grants of lands bordering on tidal streams or on the sea.

At a later period but at a time when the common law of England was still in a formative stage, the Crown of England finally began to maintain as a right its claims to lands under navigable waters and to assert its full title and complete ownership to all the submerged lands and to the beds of the seas extending to and even beyond the three-mile limit around Great Britain and the Colonies of the Crown. Still later, the claims of the Crown to the title and ownership of the submerged lands and bed of the sea were modified so as not to apply to tidelands extending beyond the three mile limit. By the end of the Eighteenth Century the Crown’s title and ownership to tidelands and the bed of the sea was definitely limited to the three mile belt.

Moore, in his famous book “History and Law of the Seashore,” refers to the Crown’s ownership of the lands under navigable waters in the following language.

“Lord Hale, in the treatise ascribed to him aptly compares the King’s property in the sea and tiderivers, creeks, etc. to the

---

27 It is of interest to note that at an early period because of England’s growing naval power England claimed dominion over the four seas (and, of course, to the bed of the seas) surrounding the coasts of England, Scotland and Ireland. Gould, Law of Waters, (2d ed.) p. 5, et. seq.
28 Maitland’s Domesday, p. 241.
30 Moore, History of the Foreshore, p. 27.
31 “Instead of it being true that the Crown retained the foreshore when granting out its dominions, it is more probably true that the Crown did actually grant it out by its original grants of almost every manor in the Kingdom . . .” Moore, History of the Foreshore, p. 29.
32 Hurst, “Whose is the Bed of the Sea?” (1923); International Year Book, pp. 7, 10: “To sum up: so far as Great Britain at any rate is concerned, the ownership of the bed of the sea within the three mile limit is the survival of more extensive claims to the ownership of the sovereignty over the bed of the sea.”
33 (1888) p. 667, et. seq.
ownership of the lords of manors in the common or waste lands of the manor.* * *"

And before the end of the eighteenth century, due to the writings of Selden and other English writers, and to Lord Chief Justice Hale's authoritative manuscript on the law of the sea, it was quite generally recognized and conceded that the Crown of England in his sovereign capacity held title to and was the acknowledged absolute owner of all tide and submerged lands extending out at least three miles seaward.24 The Crown's ownership of submerged lands extended to all lands under navigable waters within navigable rivers, bays, harbors and lakes as well as to submerged lands lying adjacent to the shore upon the open coast.

England's claim of exclusive jurisdiction over persons and vessels navigating the British seas appears to have been very ancient. Sir Travers Twiss points out that the British seas under the name of "quartor maria" are three times mentioned by Bracton and are designated as "les quatre mers d'Angleterre"25 in four places in the Domus Day of Gipeswich.26 The theory of jurisdiction preceded the doctrine of property as maintained by Selden and others in the seventeenth century.

Selden's Mare Clausum, published in 1635, sought to establish: First, that the sea might be property, and second, that the seas surrounding England, Scotland and Ireland were subject to the sovereignty and ownership of the Crown of England. The doctrine maintained by Selden was accepted quite generally by Selden's contemporaries, Bacon, Coke, Hale and Staunford, insofar as there was occasion to assert it in treating of the common law.27

Lord Hale says:28

"The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly

27 1 Bacon, Abr. tit. Prerogative, 640; Coke, Littleton, 107; Hale, De Jure Maris, chapters 4 and 6; and Pleas of the Crown; Selden Mare Clausum, chapters 22 and 24.
regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, as the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz., of a districtus maris, a place in the sea between such points, or a particular part contiguous to the shore, or of a port or creek or arm of the sea. These may be possessed by a subject, and prescribed in point of interest both of the water, and the soil itself covered with the water within such a precinct; for these are manorial, and may be entirely possessed by a subject.”

Gould, in his authoritative textbook dealing with the law of waters, discusses the history of the rule of the common law respecting the Crown’s ownership of land under tidewaters and navigable rivers and bays, and says in part:29

"* * *At an early period England claimed dominion over the four seas which surround her coasts, including the right to prohibit foreign vessels from passing over them, and the right of property in them, and in the controversy as to the freedom of the seas in the seventeenth century, the English writers and lawyers, under the lead of Selden, strenuously maintained the right of the crown of England to these waters, insisting that the title to the sea and to the fundus maris, or bed of the sea - tam aquae quam soil - was in the king. This is the doctrine of the ancient municipal law of England, under which the Crown had a property in the adjacent seas both as against foreign nations and its own subjects."30

Gould further notes that:31

"* * *according to Lord Cranworth, Judge Story and Chief Justice Shaw, the right of soil in the sea as well as the shore was in the Crown by the common law.”

Other authorities—including leading English and American decisions—likewise agree that at common law it was settled that prior to the American Revolution the Crown of England possessed full proprietary rights in the tidelands and other lands under navigable waters lying within the jurisdiction of England or her Colonies.

In the leading case of The Company of Free Fishers and Dredgers of Whitestable v. Gann,32 the court said:

"The soil of the seashore to the extent of three miles from the beach is vested in the crown.”

---

30 The words “infra quatuour maria” are said to mean, within the kingdom of England, and the dominions of the same kingdom. Co. Litt. 107.
31 The Law of Waters, p. 22.
32 House of Lords, 144 English Reports, 1003 (1865).
And in *Lord Fitzhardinge v. Purcell*, it was noted that:

"Clearly the bed of the sea, at any rate for some distance below the low water mark, and the beds of tidal navigable rivers are, *prima facie*, vested in the Crown."

In *Lord Advocate v. Wemyss*, it was said:

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

In *Angell, Right of Property in Tide Waters*, the author points out that:

"The King of England is, therefore, not only assigned the sovereign dominion of the sea adjoining the coasts* but in him is also vested the right of property in the soil thereof."

The United States Supreme Court has also recognized the rule that the Crown of England is the absolute owner and proprietor of all tidelands and lands under navigable waters within the jurisdiction of the Crown. In *Shively v. Bowlby*, the court said:

"By the common law, both the title and dominion of the sea, and of rivers and arms of the sea where the tide ebbs and flows and of all lands below the high water mark, within the jurisdiction of the Crown of England, are in the King.

* * * *

"In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or by usage."

In *Weber v. Board of Harbor Commissioners*, the court notes that:

"By that law (common law), the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewater, is in England, in the King."

In *Martin v. Waddell*, the court, in touching upon this subject, stated:

"According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is deemed to reside in the crown, as a branch of the royal prerogative. It has been held then, that this principle was as fully recognized in America as in the island of Great Britian."

---

33 *99 Law Times*, 154, 164 (1908).
34 *House of Lords, A. C.* 48 (1900).
35 *pp.* 19-20, 2d. ed. (1847).
36 *152 U.S.* 1, 11, 13 (1894).
37 *85 U.S.* 57, 65 (1873).
38 *16 Pet.* 367, 410 (1842).
Other courts, too, have recognized this rule. In *Armour & Co. v. City of Newport*, the state court said:

"During the time that Rhode Island was a colony of Great Britain, the fee to the land within the colony below low water mark was in the Crown."

And, in *The Tinikum Fishing Co. v. Hartley*, it was noted:

"The bed and channel (of the Delaware River) remained in the British Crown."

Thus, as appears from the foregoing authorities, it was settled, prior to the American Revolution in 1776, that at common law the Crown of England had full proprietary rights and interest in the tidelands out to the three mile limit and to all other lands under navigable waters lying within the boundaries of England, as well as to those submerged lands located adjacent to the shores of her colonies.

The preceding historical account of the common law rule in force prior to the American Revolution as recognized and accepted by the authorities, including the United States Supreme Court, demonstrates the error of the Court's pronouncement in the "California Tidelands case" in rejecting the accepted views with respect to the common law rule respecting the Crown's ownership of tidelands out to the three-mile limit.

III. TITLE TO LANDS UNDER NAVIGABLE WATERS AS INTERPRETED BY THE UNITED STATES SUPREME COURT.

At the time of the American Revolution, the English law concerning title to lands under navigable waters was, in general, well settled. The Crown of England had claimed the vast territories in America as part of the estate of the King, by right of discovery. The first proprietors held the lands under grants from the Crown. Such grants included the ownership and dominion of lands under tide waters and of lands under other navigable rivers and under navigable lakes. Under charters from the King, the patentees held title to such lands in the same character and capacity as they had been held theretofore by the Crown and Parliament. When the Revolution took place the people of each state themselves became sovereign and in that capacity held the absolute right in all navigable waters and soils thereunder for their own common use. After the United States Constitution was adopted

---

39 R.I. 211, 110 Atl. 645, 646 (1920).
40 61 Pa. 213 (1869).
41 The decisions in *Attorney General v. Richards*, 2 Anstruther 603 (1795), and *Parmeter v. Gibbs*, 10 Price 412 (1813), came after the American Revolution, although the rule laid down in those cases was already a part of the common law before 1777.
such right became subject only to the paramount right of Congress to regulate commerce.45

One of the leading cases on this subject is the early case of Martin v. Waddell.46 The facts in this case were briefly these: The King of England, Charles II, had granted to his brother, the Duke of York, certain territory in the new continent, which included the present state of New Jersey, together with all “lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishing, hawkings, hunttings, and fowlings and all other royalties, profits, commodities, and hereditaments to said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim and demand, of; in or to the said land or premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders,” etc. Under this grant in addition to other lands, certain lands below tide waters became vested in one Waddell. Oysters were planted upon such lands. Waddell brought an action of ejectment in the Circuit Court of the United States against one Martin and others who appeared to be interfering with his oyster fishery. This case involved title to 100 acres of land lying beneath “the navigable waters of the Raritan River and Bay.” The plaintiff had verdict and judgment in the lower court, but upon appeal the Supreme Court of the United States reversed the judgment on the ground that the original grant to the Duke of York had not conveyed both the private interest and the public rights of the King but had conveyed merely his prerogative or governmental interest which was to be held on the same trust as formerly held by the Crown; that is, the rights claimed by the plaintiffs were public rights which had been surrendered by the Duke to Queen Anne, and these were the only rights involved in the grant by the King to the Duke.

Chief Justice Taney, speaking for the Court, stated:

“The country mentioned in the letters patent was held by the King in his public and regal character as the representative of the nation and in trust for them. The discoveries made by persons acting under authority of the government were for the benefit of the nation, and the Crown, according to the principles of the British Constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent.”

45 Shively v. Bowlby, 152 U.S. 1 (1893); Gibbons v. Ogden, 9 Wheat. 1 (1824); United States Constitution, Article I, section 8, par. 3; Congress may not arbitrarily destroy or substantially impair the rights of riparian owners where the legislation has no real or substantial relation to navigation; Port of Seattle v. Oregon & Washington RR., 255 U.S. 56 (1921); United States v. River Rouge Imp. Co., 269 U.S. 411 (1925).

The court refused to consider whether the King had the power to grant an exclusive right of fishery in public waters and held further that:

"the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England and the soils under them are held by the Crown."

The court held that the King had granted merely his governmental or prerogative, and not his proprietary, right to the lands in question. It considered the case as if the public rights, the *jus publicum*, were the only possible uses of such land and overlooked entirely the *jus privatum*, or private ownership of the soil. It is quite evident that the learned court misconstrued the nature of the King's title to land under water; for it was settled law in England that the King possessed the right to grant the private title, *jus privatum*, in soils under water, subject to and charged with the public uses, *jus publicum*. Such lands were held by the King subject to the public right of navigation,\(^{47}\) and of fishing,\(^{48}\) but they were not subject to the public right of bathing,\(^{49}\) nor of fowling,\(^{50}\) nor of holding public meetings thereon\(^{51}\) and, regardless of whether such lands were held by the King or by a subject, the trust impressed thereon in favor of the public continued to attach and was not released or extinguished by a transfer of title.

When the King made the grant of lands in America to the Duke of York it would appear that he intended to transfer all of his right and dominion in such lands to the grantee, including the *jus privatum*. However, Chief Justice Taney ruled otherwise and held that such lands were held by the King "in his public and regal character as the representative of the nation and in trust for them", and that such lands were to be held by the grantee in the same manner as they were held by the Crown.

The opinion of the Court further holds that when the proprietors surrendered their letters patent back to the Queen of England in 1702, the title to the lands under the navigable waters within the boundaries of New Jersey revested in the Crown of England and that upon the Revolution said lands under navigable waters vested in the People of the State of New Jersey, the Court saying:

"And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the powers and regalities which before belonged

\(^{48}\) Malcomson v. O'Dea, 10 H. L. Cas. 593 (1863); Duke of Somerset v. Fogwell, 5 B.&C. 875 (1826).
\(^{49}\) Blundell v. Caterall, 5 B.&Ald. 268 (1821).
to the crown or the Parliament, became immediately and right-
fully vested in the State."

Here the United States Supreme Court decided unequivocally that
title to lands under navigable waters vested in the state upon the Revo-
lution when the Colonies broke away from England.

Three years after the decision in *Martin v. Waddell* the Supreme
Court of the United States was again called upon to determine the
question of title to submerged tidelands. *Pollard's Lessee v. Hagan*,
involved the question of ownership of lands below tidal waters in states
once territories of the United States. When Alabama was admitted to
statehood in 1819, the Federal Government reserved title to the public
lands in the state. Subsequently, when Alabama was a state, the United
States attempted to grant to private persons lands which were covered
by the tidal waters of Mobile Bay. The court held that title to these
lands was no longer in the Federal Government and that title to such
lands had passed to Alabama upon its admission into the union. The
Court further held that the new states have the same rights, interest
and sovereignty over the soil under navigable waters as the original
states have. Mr. Justice McKinley, speaking for the Court, cited the
following oft-quoted phrase from *Martin v. Waddell*, and stated as
follows:

"'When the Revolution took place, the people of each state
themselves became sovereigns; 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.'"

* * * *

"Then to Alabama belong the navigable waters, and soils under
them, in controversy in this case, subject to the rights surren-
dered 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."

The rule laid down in *Pollard v. Hagan*, namely, that the United
States has no proprietary or paramount interest in the lands beneath
navigable waters was affirmed in many subsequent decisions and was
the settled law until the decision in *United States v. California*.

---

53 *Pollard v. Hagan*, (1845), 3 How. (U.S.) 212, 11 L. Ed. 565. For the previous
history of this litigation see: *Hagan v. Campbell*, (1838), 8 Port. (Ala.) 9, 33
Am. Dec. 267; *Pollard's Heirs v. Kibbe*, (1839), 9 Port. (Ala.) 712, re-
versed (1840), 14 Pet. (U.S.) 353, 10 L. Ed. 490; *Mayor, etc. of Mobile v.
(U.S.) 261, 10 L. Ed. 958; *Mobile v. Emmanuel*, (1843), 1 How. (U.S.) 95,
11 L. Ed. 60; *Pollard's Lessee v. Files*, (1841), 3 Ala. 47, reversed (1844),
212, 11 L. Ed. 565.

54 3 How. 212, 229.

Goodtitle v. Kibbe, was an action of ejectment brought to recover a lot in Mobile, Alabama. Plaintiff claimed title under an inchoate Spanish grant, dated December 12, 1809, and an Act of Congress confirming this title passed July 2, 1836, and a patent from the United States dated March 15, 1837, issued pursuant to the Act of Congress. The validity of this title was disputed by the defendant upon the ground that the premises were a part of the shore of a navigable tide water river lying below high water mark when Alabama became a State in 1819 and that, therefore, at the time of the adoption of the Act of Congress in 1836, the sovereignty and dominion over the premises were in the State of Alabama and not in the United States.

The United States Supreme Court held that the patent from the United States conveyed no title, saying:

"The question decided in the State court cannot be regarded as an open one. The same question upon the same act of Congress and patent was brought before this court in the case of Pollard v. Hagan, at January Term, 1845, reported in 3 Howard, 212. That case was fully and deliberately considered, as will appear by the report, and the court then decided that the act of Congress and patent conveyed no title. The decision of the Supreme Court of Alabama, from which this case has been brought by writ of error, conforms to the opinion of this court in the case of Pollard v. Hagan. And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court. But, upon a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced.

"* * * Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State."

Goodtitle v. Kibbe, supra, is another one of the early decision so frequently cited with approval by the Courts in cases involving questions relating to ownership of and title to lands under navigable waters.

In Den. ex Dem. v. Jersey Co., an action of ejectment was brought by plaintiff in error against the defendants to recover a parcel of land formerly located under the tide waters of the Hudson River below low

---

55 9 How. 471, 478 (1850).
56 15 How. 426, 432 (1853).
The land in question had been reclaimed from the water by defendants under authority of the New Jersey legislature. The plaintiff claimed the land under mesne conveyances from the Proprietors of East New Jersey. The court held for the defendants on the ground that the lands under the navigable water of East New Jersey belonged to the state and not to the Proprietors for the reasons set out in *Martin v. Waddell*.

The Court, in touching upon this point said:

"The counsel for the plaintiff, however, endeavor to distinguish the case before us from the former one, upon the ground that nothing but the right of fishery was decided in *Martin v. Waddell*; and not the right to the soil. But they would seem to have overlooked the circumstance that it was an action of ejectment for the land covered with water. It was not an action for disturbing the plaintiff in a right of fishery; but an action to recover possession of the soil itself. And in giving judgment for the defendant the court necessarily decided upon the title to the soil.

* * *

"Nor do we see anything in the opinion delivered on that occasion, in relation to the rights of fishery, further than they contributed to illustrate the character and objects of the charter to the Duke of York; and to show that the soil, under public and navigable waters, was granted to him, not as private property, to be parcelled out and sold for his own personal emolument, but as a part of the jura regalia with which he was clothed, and as such was surrendered by the proprietors to the English crown, when they relinquished the powers of government, and consequently belonged to the State of New Jersey when it became an independent sovereignty.

"There being nothing in the title now claimed for the proprietors to distinguish this case from that of *Martin v. Waddell*, it is not necessary to examine the other and further grounds of defense taken by the defendants."

The foregoing decision followed the rulings made in the earlier cases on this subject. The facts involved were almost identical with the facts in *Martin v. Waddell* and hence required a ruling in conformity with the principles of law laid down in *Martin v. Waddell* and *Pollard v. Hagan*. As the Court well said: "There being nothing in the title now claimed to distinguish this case from that of *Martin v. Waddell*", there was nothing else for the Court to do but to reaffirm the principles laid down in the earlier cases.

*Smith v. Maryland*, was an action by the owner of a vessel employed in the coasting trade and in fishing to replevin the vessel which had been seized while engaged in dredging for oysters in Chesapeake

---

57 16 Pet. 367 (1842).
58 18 How. 71, 74-75 (1855).
Bay and condemned and forfeited to the State of Maryland for violation of the state law forbidding the taking of oysters by a scoop. The Supreme Court, in affirming the decree of forfeiture, said in part:

“Whatever soil below low water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence. "Pollard's Lessee v. Hagan, 3 How. 212; Martin v. Waddell, 16 Pet. 367; Den v. New Jersey Co. 15 How. 426.

“But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish.”

In Mumford v. Wardwell, an action of ejectment was brought to recover a certain tract of land located in the City of San Francisco. Judgment was rendered for defendant. The United States Supreme Court, in considering the case, stated:

“4. California was admitted into the Union September 9, 1850, and the act of Congress admitting her declares that she is so admitted on equal footing, in all respects, with the original states. (9 Stat. at L. 452.) The settled rule of law in this court is that the shores of navigable waters and the soils under the same in the original states were not granted, by the Constitution, to the United States, but were reserved to the several states; and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders. Pollard v. Hagan, 3 How. 212.

“When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution. Martin v. Waddell, 16 Pet. 410.

“5. Necessary conclusion is that the ownership of the lot in question, when the state was admitted into the Union, became vested in the state as the absolute owner, subject only to the paramount right of navigation.”

The court again reaches the “necessary conclusion” that under settled principles the absolute ownership of the tideland in question became vested in the State of California upon her admission to statehood.

In Weber v. Harbor Commissioners, an action was brought by an individual to abate and remove a structure which had been erected in the harbor at San Francisco, California, by the defendant Board of

59 6 Wall. 423, 435-436 (1867).
60 18 Wall. 57 (1873).
Harbor Commissioners. A judgment in favor of defendants was affirmed by the United States Supreme which said, in part:

"Upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tide-waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states the regulation of which was vested in the general government. Pollard v. Hagan, 3 How. 212; Mumford v. Wardwell, 6 Wall. 436, 18 L. ed. 761."

In the case of County of St. Clair v. Lovingston, an action of ejectment was brought to recover certain land in St. Clair County, Illinois that bordered on the Mississippi River. The Court, in its opinion, said in part:

"By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. Martin v. Waddell, 16 Pet. 367; Russell v. Jersey Co. 15 How. 426. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones."

In Barney v. Keokuk, an action of ejectment was brought by the plaintiff against the City of Keokuk, Iowa, and several railroads and a Steam Packet Company to recover certain premises occupied by them with railroad tracks and buildings and sheds on the banks of the Mississippi River. The Court, in holding against plaintiff, reaffirmed the principles laid down in the earlier cases, in the following language:

"**In our view of the subject, the correct principles were laid down in Martin v. Waddell, 16 Pet. 367, Pollard v. Hagan (supra), and Goodtitle v. Kibbe, 9 How. 471. These cases related to tidewater; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of Genesee Chief v. Fitzhugh, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its sur-
vey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

This case, which enunciated and reaffirmed the original and historical principles relating to state ownership of tidelands, is of special interest and importance in view of Mr. Justice Bradley's pronouncement that the correct principles with respect to lands under tide-waters, as laid down in the early cases of Martin v. Waddell, Pollard v. Hagan and Goodtitle v. Kibbe, are equally applicable "to all navigable waters"—including the navigable non-tidal waters of the new states.

City and County of San Francisco v. Le Roy,63 was an action in equity to quiet title of plaintiff Le Roy and others to certain real property, and from a decree in the lower federal court affirming the title of the plaintiffs an appeal was taken. The United States Supreme Court modified the decree and pointed out that:

"**As to tide-lands, although it may be stated as a general principle—and it was so held in Weber v. Board of Harbor Comrs., 85 U.S. 18 Wall. 57, 65 (21:798 802)—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way.**

In Hardin v. Jordan,64 an action of ejectment was brought to recover certain fractional sections of land lying on the south and west sides of a small lake, Wolf Lake, in Cook County, Illinois, and lying two or three miles from Lake Michigan, and also to recover the land under water in said fractional sections and land from which the water retires at low water. In considering this matter, the United States Supreme Court said:

"With regard to grants of the government for lands bordering on the tide-water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and

64 140 U.S. 371, 381-382 (1891).
cannot be retained or granted out to individuals by the United States. *Pollard v. Hagan*, 44 U.S. 3 How. 212 (11:565); *Good-title v. Kibbe*, 50 U.S. 9 How. 471 (13:220); *Weber v. Board of Harbor Comrs.* 85 U.S. 18 Wall. 57 (21:798). Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See *Manchester v. Massachusetts*, 139 U.S. 240 (35:159); *Smith v. Maryland*, 59 U.S. 18 How. 71 (15:269); *McCready v. Virginia*, 94 U.S. 391 (24:248); *Martin v. Waddell*, 41 U.S. 16 Pet. 367 (10:997); *Den v. Jersey Co.*, 56 U.S. 15 How 426 (14:757).

“This right of the States to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas, and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.”

In *Knight v. United Land Assoc.*, an action of ejectment was brought to recover a block of land in the city of San Francisco. Plaintiffs asserted the premises were below the high water mark at the date of the conquest of California from Mexico and, therefore, upon admission of California to the Union inured to the state by virtue of her sovereignty over tidelands. The defendant argued that the lands were portions of the pueblo of San Francisco, as confirmed and patented by the United States. Judgment was rendered in the United States Supreme Court for defendant. In the course of its opinion, the court stated:

“It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states 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. *Martin v. Waddell*, 41 U.S. 16 Pet. 367, 410 (10:997, 1012); *Pollard v. Hagan*, 142 U.S. 161, 183 (1891).
1948] TITLE TO LAND UNDER NAVIGABLE WATERS 31

quisition of the territory from Mexico the United States ac-
quired the title to tide lands equally with the title to upland;
but with respect to the former they held it only in trust for the
future states that might be erected out of such territory. Au-
thorities last cited. But this doctrine does not apply to lands that
had been previously granted to other parties by the former gov-
ernment, or subjected to trusts which would require their dis-
position in some other way.”

In Illinois Central Railroad Co. v. Illinois,66 it was again recognized
by the United States Supreme Court as settled law of this country that
the full ownership of and dominion and sovereignty over lands covered
by tide-waters or navigable lakes, within the limits of the several lakes,
belong to the respective states in which the submerged lands are found,
with the consequent right to use or dispose of them when that can be
done without any substantial impairment of the interest of the public
in such navigable waters, subject only to the right of Congress to regu-
late commerce under the Commerce Clause of the United States Con-
stitution. The lands herein involved were located along the lake front
of Lake Michigan in the City of Chicago. The Court, speaking through
Mr. Justice Field, said:

“We hold, therefore, that the same doctrine as to the domin-
ion and sovereignty over and ownership of lands under the navi-
gable waters of the Great Lakes applies, which obtains at com-
mon 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)

Here again, the Court points out that the common law rule respect-
ing ownership of lands under tide-waters applies equally to lands under
the waters of the Great Lakes.

Another leading case is that of Shively v. Bowlby,67 which involved
the validity of a grant made by the State of Oregon to lands located
in the Columbia River. By virtue of an Oregon statute, owners of
riparian property fronting upon the shore of the Pacific Ocean or of a
harbor, bay or inlet of the same or of any rivers and bays in which the
tide ebbs and flows, were given the right to purchase all lands of the
state in front of the lands owned by such riparian proprietors within
a certain time and upon failure so to purchase, the lands became open
to purchase by any resident or citizen of the state. The state court

66 146 U.S. 387, 436, 437 (1892). For two views of the “Lake Front case,” see
67 152 U.S. 1, 14-15 (1894).
upheld the validity of a grant by the state, and upon appeal to the United States Supreme Court that Court, in a learned and exhaustive opinion by Mr. Justice Gray, stated in part:

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

"The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the American Revolution all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States."

Mann v. Tacoma Land Co., involved the title to certain tidelands situated in Commencement Bay, near the City of Tacoma, Washington. A decree for defendant was affirmed by the United States Supreme Court. In the course of the opinion, the Court stated:

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

---

the control of the states, respectively, when organized and admitted into the Union."

In *United States v. Mission Rock Company*, an action of ejectment was brought by the United States involving a certain tract of land including the rock known as Mission Rock. Judgment in the Court of Appeals for recovery only of a portion of the property was affirmed in the United States Supreme Court, which Court stated:

"The title and dominion which a state acquires to lands under tide waters by virtue of her sovereignty received elaborate consideration, exposition and illustration in the case of *Shively v. Bowlby*, 152 U.S. 1-58, 38 L. ed. 331-352 14 Sup. Ct. Rep. 548. Prior cases are there collected and quoted, among others, *Weber v. State Harbor Comrs.* 18 Wall. 65, 21 L. ed. 801. From the latter as follows (and the case concerned tide lands in California): Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government. And Mr. Justice Gray said, delivering the opinion of the court in *Shively v. Bowlby*: Each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

* * * *

The decisions cover a period of many years, and have become a rule of property and the foundation of many titles.

*Port of Seattle v. Oregon & Washington R. Co.*, was an action to quiet title to certain lands, brought by the Port of Seattle. Mr. Justice Brandeis, speaking for a unanimous court said:

"First, the right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under the same. *Weber v. State Harbor Comrs.*, 18 Wall 57, 21 L. ed. 798. By Sec. 1 of article 17 of its Constitution the state asserted its own-

---

69 189 U.S. 391, 404, 405 (1903).
70 255 U.S. 56, 63 (1921).
ership in the bed and shore up to and including the line of ordinary high tide in waters where the tide ebbs and flows. The extent of the state's ownership of the land is more accurately defined by the decisions of the highest court, as being the land below high-water mark, of the meander line, whichever of these lines is the lower. The character of the state's ownership in the land and in the waters is the full proprietary right. The state, being the absolute owner of the tidelands and of the waters over them, is free, in conveying tidelands, either to grant with them rights in the adjoining water area, or to completely withhold all such rights."

In the year 1921, the United States of America itself contended before the United States Supreme Court that the state of California had acquired title to all tidelands lying adjacent to her shores. In the case of United States of America v. Coronado Beach Co.,\textsuperscript{7} the court, speaking through Mr. Justice Holmes, stated that:

"The jurisdiction of the decree and the validity of the patent, so far as they cover the tidelands, is denied by the United States, a special reason being found in the fact that California became a state in 1850, and thereby acquired a title to the submerged lands before the date of the decree. But the title of the state was subject to prior Mexican grants."

The position taken by the Federal Government in this case was perfectly consistent with the Federal Government's attitude over a long period of time. During all these years it had never been seriously contended at any time that the Federal Government had any paramount rights in or title to submerged lands lying within the boundaries of the states.

In United States v. Oregon,\textsuperscript{2} an original action was brought by the United States against the State of Oregon to quiet title to certain lands. The decree in the lower court was in favor of plaintiff. The United States Supreme Court, in holding for plaintiff, said in part:

"Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See Massachusetts v. New York, 271 U.S. 65, 70 L. ed. 838, 849, 46 S. Ct. 357. For that reason, upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. But if the waters are not navi-

\textsuperscript{7} 255 U.S. 472, 487-488 (1921).
\textsuperscript{2} 295 U.S. 1, 14 (1935).
gable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new state."

This case is not of any great importance in itself, except that it again restates and emphasizes the common law and United States rule respecting title and ownership of lands under navigable waters.

In *Borax Consolidated v. City of Los Angeles*\(^{23}\) an action was brought to quiet title to certain land claimed to be tideland of Mormon Island situated in the inner bay of San Pedro, now known as Los Angeles harbor. The city asserted title under a grant from the State. Judgment was rendered for Los Angeles, the court saying:

"The controversy is limited by settled principles governing the title to tidelands. The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed.

Martin v. Waddell, 16 Pet. 367, 410, 10 L. ed. 997, 1012;

"This doctrine applies to tidelands in California. *Weber v. State Harbor Comrs.*, 18 Wall, 57, 21 L. ed. 798, supra; *Shively v. Bowlby*, supra (152 U.S. pp. 29, 30, 38 L. ed. 342, 343, 14 S. Ct. 548); *United States v. Mission Rock Co.* 189 U.S. 391 404, 405, 47 L. ed. 865, 869, 23 S. Ct. 606. Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight v. United Land Asso.*, 142 U.S. 161 183, 35 L. ed. 974, 981, 12 S. Ct. 258. There is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties or subjected to trusts which required a different disposition—a limitation resulting from the duty resting upon the United States under the treaty of Guadalupe Hidalgo (Feb. 2, 1848) (9 Stat. at L. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. *San Francisco v. Le Roy*, 138 U.S. 656, 671, 34 L. ed. 1096, 1011 11 S. Ct. 364; *Knight v. United States Land Asso.*, 142 U.S. 161, 35 L. ed. 974, 12 S. Ct. 258, supra; *Shively v. Bowlby*, 152 U.S. 1, 38 L. ed. 331, 14 S. Ct. 548, supra. That limitation is not applicable here, as it is not contended that Mormon Island was included in any earlier

\(^{23}\) 296 U.S. 10, 15-16 (1936).

“It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands which had thus vested in a State was early determined. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565, supra; *Goodtitle ex dem Pollard v. Kibbe*, 9 How. 471, 13 L. ed. 220, supra.”

*United States v. O'Donnell* involved title of the United States to a part of Mare Island in San Francisco Bay which was reserved for public purposes by Presidential Proclamation in 1850 and was selected by the Secretary of Navy as a navy yard pursuant to an Act of Congress, and was reserved for that purpose by Presidential Order in 1853 and since 1854 has been so used. In this case the court observed that the Attorney General of the United States felt duty bound to protect the interests of the United States by an appeal, and then noted that the Attorney General further said:

“After pointing out that the State of California retained title to tide land below high water mark, and that the United States could not enjoy the use of Mare Island as a naval depot while its shores belonged to the state, he concluded with the recommendation that ‘California be invited to relinquish to the United States whatever claim, if any, she may have to the shores of the overflowed land of Mare Island.’”

This is merely another in a long line of official admissions and recognitions by the Federal Government prior to 1947 that California had title to the tidelands lying adjacent to her shores.

The foregoing decisions all affirm a principle of constitutional law respecting state ownership of submerged lands that, before the decision in the California Tidelands Case, had become a rule of property in this country. Prior to 1947, it was universally recognized by the Courts—state and federal—that the original thirteen states and all the new states upon attaining statehood “hold absolute right to all their navigable waters and soils under them.” The early cases upon this subject, principally *Martin v. Waddell* and *Pollard v. Hagan*, had been cited with approval more than fifty times during a period of one hundred years. The principles laid down in those cases had become a rule of property upon which thousands of land titles in America had been predicated. Lower federal and state courts had cited with approval the above early cases hundreds of times. This rule of property had been recognized and applied innumerable times by the executive branch of the Federal Government. The Attorney General of the United States,

---

24 303 U.S. 501, 519 (1938).
26 16 Pet. 367 (1842).
28 3 How. 212 (1845).
in forty or more opinions, had consistently recognized and affirmed the general rule of property that the several states owned all the lands under navigable waters located within the boundaries of the respective states. Secretaries of the Army, Navy, Interior and other executive departments had all acquiesced in those decisions.

Thus, for more than one hundred and fifty years the Federal Government had recognized and acquiesced in the absolute and full ownership of the states in the submerged lands lying within their boundaries.

CONCLUSIONS

In view of the foregoing, the author submits that the United States Supreme Court is wrong in its decision in the "California Tidelands Case" in holding that the Federal Government has paramount rights to the tidelands lying off the California shores and to the minerals thereunder. The Courts' holding, in effect, sanctions the confiscation by the Federal Government of the tidelands oil properties, title to which, historically and by settled rule of property law, was vested in the states.

In summary of the author's views as to the origin and historical development of the law on this subject prior to the 1947 California Tidelands decision, and with particular reference to decisions involving California cases, the following is submitted:

1. Under the common law of England as established prior to 1776, the Crown of England owned all tide and submerged lands extending out to at least the three-mile limit adjoining the Colonies, as well as adjoining England.77

The Crown of England made grants of the tide and submerged lands adjoining the Colonies to certain of the American Colonies prior to the year 1776.78

77 "The soil of the seashore to the extent of three miles from the beach is vested in the Crown." The Company of Free Fishers, etc. v. Gann (House of Lords, 1865), 144 Eng. Reprints 1003. By that law (the Common Law), the title to the shore of the sea, and of the arms of the sea, and in the soils under tide-water, is, in England, in the King." Weber v. Board of Harbor Commissioners (1873), 85 U.S. 57, 65.

"By the common law, both the title and dominion of the sea, and of the rivers and arms of the sea where the tide ebbs and flows and of all the lands below high water mark within the jurisdiction of the Crown of England, are in the King. * * *." Shively v. Bowlby (1894), 152 U.S. 1, 11, 13.

"In this sea, the King of England hath a double right, viz., a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. * * *." Hale, De Jure Maris (1676), Hargrave's Tracts (1787) pp. 10-17. See also Angell, Right of Property in Tide Waters (2d. ed.—1847) pp. 19-20.

78 "The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and dominion of lands under tide water." Shively v. Bowlby (1894), 152 U.S. 1, 14. See also: Martin v. Waddell (1842), 16 Pet. 367, 411; 2 Poore, Federal and State Constitutions of the United States (1878), pp. 1379-1382.
2. When the American Revolution took place, all of the rights of the Crown of England and of its Parliament, except those theretofore granted to the Colonies, vested in the several States, and each of the original thirteen States thereby became the owner of the land under all navigable waters within its boundaries, including all adjacent tidelands situated within at least three miles of its coast.  

And, in the Treaty of Peace between the King of England and the original thirteen colonies, the King of England expressly relinquished all his right and title in the lands of the several states to the thirteen original States.

3. Upon the formation of the federal government in 1789, the lands under all of the navigable waters within the respective thirteen original States were reserved to those states and were not granted by the United States Constitution to the United States of America.

4. Then, upon admission to statehood, each of the several new states admitted to the Union since its formation in 1789 were admitted upon an equal footing in all respects and with the same rights, sovereignty and jurisdiction as the original thirteen states.

5. Upon admission of the State of California to statehood in 1850, it was settled law that the new states came into the Union possessed of exactly the same rights, sovereignty and jurisdiction over navigable

---

79 "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." Martin v. Waddell (1842), 16 Peters 367, 410. Accord: Pollard's Lessee v. Hagan (1845), 3 How. 212, 229; Mumford v. Wardwell (1867), 6 Wall. 423, 426; Shively v. Bordby (1894), 152 U.S. 1, 15-16. See also M'Ivaine v. Cox's Lessee (1805), 8 U.S. 209, 210.

80 See Definitive Treaty of Peace between the King of England and the original thirteen States, dated September 3, 1783, Articles 1st and 2nd. (2 Miller, Treaties and other International Acts of the United States of America, pp. 152-153).

81 "The shores of the navigable waters, and the soils under them, were not granted by the Constitution of the United States but were reserved to the states respectively." Pollard's Lessee v. Hagan (1845), 3 How. 212, 229. Accord: Mumford v. Wardwell (1867), 61 Wall. 423, 436. Borax Consolidated Ltd. v. Los Angeles (1935), 296 U.S. 10, 15.

82 "By the preceding course of reasoning we have arrived at these 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. The new states have the same rights, sovereignty and jurisdiction over this subject as the original states. ** ** Pollard's Lessee v. Hagan (1845), 3 How. 212, 230.

** ** and the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf (to the navigable waters and the lands thereunder) as the original States possessed within their respective borders." Mumford v. Wardwell (1867), 61 Wall. 423, 436.
waters and the lands under such waters within the boundaries of the state as the original thirteen States. Prior to the "California Tidelands" decision, no one doubted but that each new state, as it attained statehood, had vested in it all the rights, title and sovereignty previously acknowledged as having vested in the original states. In fact, after September 9, 1850, and prior to 1947, the United States Supreme Court ruled on numerous occasions that the State of California became the owner of lands under navigable waters within its boundaries upon its admission into the Union as a result of Congress admitting California on an equal footing with the original thirteen States.

In the year 1867, the United States Supreme Court, in the case of *Mumford v. Wardwell*,83 decided that:

"California was admitted into the Union September 9, 1850, and the Act of Congress admitting her declares she is so admitted on an equal footing, in all respects, with the original States. (9 Stat. at L. 452.) Settled rule of law in this court is that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution, to the United States, but were reserved to the several States."

Then in 1783, the same Court, in *Weber v. Board of Harbor Commissioners*,84 held that:

"Although title to the soil under the tide waters of the Bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon an equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper* * *". (Italics added)

The cases of *Pollard's Lessee v. Hagan*85 and *Mumford v. Wardwell*86 were cited by the Court to sustain its decision on this point.

In *San Francisco v. Le Roy*,87 the Court determined that:

"As to tide-lands, although it may be stated as a general principle—and it was so held in *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 65,—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union,* * *."

---

83 6 Wall. 423, 435 (1867).
84 85 U.S. 65 (1871).
85 3 How. 212.
86 6 Wall. 436.
87 138 U.S. 656, 670 (1891).
In *Knight v. U. S. Land Association,*88 the Court determined that:

"It is the settled rule in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States 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. *Martin v. Waddell,* 16 Pet. 367, 410; *Goodtitle v. Kibbe,* 9 How. 471, 478; *Mumford v. Wardwell,* 6 Wall. 423, 436; *Weber v. Harbor Commissioners,* 18 Wall. 57. 65. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory."

In *United States v. Mission Rock Company,*89 it was held by the United States Supreme Court that:

"The title and dominion which a State acquires to lands under tidewaters by virtue of her sovereignty received elaborate consideration, exposition and illustration in the case of *Shively v. Bowlby,* 152 U.S. 1, 58. Prior cases are there collected and quoted, among others, *Weber v. Commissioners,* 18 Wall. 57, 65. From the latter as follows (and the case concerned tide lands in California): 'Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper* *.*" (Italics added)

In 1921, the United States of America itself contended before the United States Supreme Court that the State of California acquired title to all tidelands lying adjacent to her shores in the case of *United States of America v. Coronado Beach Company,*90 where Mr. Justice Holmes stated that:

"The jurisdiction of the decree and the validity of the patent, so far as they cover the tidelands, is denied by the United States, a special reason being found in the fact that California became a state in 1850, and thereby acquired a title to the submerged lands before the date of the decree. But the title of the state was subject to prior Mexican grants." (Italics added)

---

88 142 U.S. 161, 183 (1891).
89 189 U.S. 391, 404 (1903).
In the case of *Borax Consolidated, Ltd. v. Los Angeles*, it was held that:

"The controversy is limited to settled principles governing the title to tidelands. The soils under the tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard v. Hagan*, 3 How. 212, 229, 230; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, 66; *Shively v. Bowlby*, 152 U.S. 1, 15, 26. This doctrine applies to tidelands in California. *Weber v. Harbor Commissioners*, supra; *Shively v. Bowlby*, supra, pp. 29, 30; *United States v. Mission Rock Co.*, 189 U.S. 391, 404, 405. Upon the acquisition of the territory from Mexico, the United States acquired title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight v. United States Land Assn.*, 142 U.S. 161, 183. There is the established qualification that this principle is not applicable to lands which had previously been granted to Mexico to other parties or subjected to trusts which required a different disposition,—a limitation resulting from the duty resting upon the United States under the treaty of Guadalupe Hidalgo (9 Stat. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. *San Francisco v. Le Roy*, 138 U.S. 656, 671; *Knight v. United States Land Assn.*, supra; *Shively v. Bowlby*, supra. That limitation is not applicable here, as it is not contended that Morman Island was included in any earlier grant. See *DeGuyer v. Banning*, 167 U.S. 723.

"It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. *Pollard v. Hagan*, supra; *Goodtitle v. Kibbe*, supra. In those cases, involving tidelands in Alabama, the plaintiffs claimed title under an inchoate Spanish grant of 1809, an Act of Congress confirming that title, passed July 2, 1836, and a patent from the United States, dated March 15, 1837. The Court held that the lands, found to be tidelands, had passed to Alabama at the time of her admission to the Union in 1819, that the Spanish grant had been ineffectual, and that the confirming Act of Congress and the patent conveyed no title. The Court said that 'The right of the United States to the public lands, and the power of Congress to make all needful rules for the sale and disposition thereof, conferred no power to grant to the plaintiff's the land in controversy.' *Pollard v. Hagan*, supra. See also *Shively v. Bowlby*, supra, at pp. 27, 28; *Mobile Transportation Co. v. Mobile*, 187 U.S. 479, 490; *Donnelly v. United States*, 228 U.S. 243, 260-261."

And, again in the year 1938, in *United States v. O'Donnell*, the Court observed that:

"After pointing out that the State of California retained title to tide land below high water mark, and that the United States could not enjoy the use of Mare Island as a naval depot while its shores belonged to the state, he concluded with the recommendation that 'California be invited to relinquish to the United States whatever claim, if any, she may have to the shores or the overflowed land of Mare Island.'"

The foregoing then was settled law on this subject before the decision in the "California Tidelands Case."

In fact, the Court once stated that prior decisions over a period of many years had established a rule of property upon this subject. Thousands of titles have been predicated upon the above decisions, and the suit decided by the Supreme Court on June 23, 1947, in effect takes the lands away from the States and holds such lands belong to the Federal Government.

It should be noted that the Court in the California Tidelands case avoids any direct statement that the Federal Government has full ownership of the oil rich tidelands lying adjacent to California. The Court merely holds that:

"* * * the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water, including oil."

The Court in its opinion and upon rehearing refused to modify the above language to include full ownership rights. However, the language is still so broad that many students of the subject feel that it could be held to apply to other state-owned property, if not to private property. The decision of the Court is based not upon precedent, nor upon specific sections of the United States Constitution, but upon an entirely new legal theory. The Court says:

"The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner."

These two rights are said to be national defense and the conduct by the United States of international affairs. The Court states the controlling question as follows:

---

92. 303 U.S. 501, 519 (1938).
93. In *United States v. Mission Rock Co.* (1903), 189 U.S. 391, 406, the Court said: "The decisions cover a period of many years and have become a rule of property and the foundation of many titles."
95. 332 U.S. 19, 29 (1947).
96. 332 U.S. 19, 29 (1947).
"In the light of the foregoing, our question is whether the State or the Federal Government has the paramount right to determine in the first instance when, how and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited."

The decision of the Court is based squarely on only two rights and no others, namely, national defense and conduct of international affairs. However, these claims by the Federal Government are wholly irrelevant, as Mr. Justice Frankfurter well points out in his dissenting opinion:97

"The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part."

Carried to its logical conclusion, this doctrine of national ownership could be applied to almost any kind of property—state or privately owned—deemed essential for "national defense" or for the conduct of "foreign affairs." This decision is but another in the long line of steps taken by the Federal Government to encroach upon state rights. Here by Court decree, the Federal Government has again obtained additional powers and rights at the expense of the states. The steady whittling away of the rights of the states is cause for concern to everyone. If the historical division of powers between the Federal Government and the states is to survive, it is time to call a halt to the Federal Government's persistent demands for more and more power and dominion over property and affairs properly and traditionally belonging to or controlled by the states.

The decision of the Court in the "California Tidelands Case" is wrong and should be rectified. The Federal Government has ample power to conserve vital war materials in an emergency without taking over, without compensation, lands belonging to the states. If the national defense or the conduct of foreign affairs requires more control by the Federal Government over oil properties or over our ocean shore lines or over foreign affairs, this control could be obtained in other ways than through judicial legislation. The only fair thing for Congress to do is to adopt, at an early date, one of the several bills that have been introduced which affirm the historical and traditional rights and title of the states to the lands under navigable waters lying within the boundaries of the several states.

97 332 U.S. 19, 44 (1947).