Denver Law Review

Volume 30 | Issue 6 Article 4

June 2021

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THE "TIDELANDS" PROBLEM

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Few controversies have been so hotly contested as the matter of the socalled tidelands. The stakes are high. The origin of the claims of the federal government and of the states are obscure and contradictory, presenting a complicated field for legal and political analysis of problems which may be classified as legal-political and to which legal theory alone cannot provide a satisfactory answer.

In order to understand the proper classification of the fundament and the terminology of the physical environment wherein resources of oil, gas and sulphur are found under the sea water, it is well to examine the physical terminology and description first and then to superimpose on the physical description the legal description of these submerged lands.

These disputed resources are found in the Continental Shelf off the coasts of California, Texas and Louisiana. The continental shelves are the margins of the continental masses. At a depth of about 100 fathoms, the slope of the shelf which up to this depth has been rather gentle, abruptly increases and plunges into the deep sea basins. In the Gulf of Mexico, the Continental Shelf extends in some areas 150 miles from the coast. Off the coast of California, the Continental Shelf extends but a short distance from the coast and it plunges rather abruptly into the deep sea basins. The shelves vary in width, the edge being discerned approximately by the one hundred fathom measure of depth. Today the ocean basins are slightly overfilled and are flooding these shelves, these platforms of the continents. The area embraced in these shelves is estimated to be one-tenth the size of the land area of the continental United States, and this vast area contains an estimated two and one-half billion barrels of oil yet to be discovered in addition to the 235,000,000 barrels of oil that have already been recovered from lands beneath the seas.[1] Twenty-two miles off the coast of Louisiana a well has been drilled and is producing.

For purposes of this paper, lands below sea water are divided into the following physical classifications.

1. Tidelands: the land between the mark of high tide and low tide.

2. Continental Shelf: the land under the seas beyond low tide mark to the edge of the Continental Shelf.

3. Deep Sea Basin lands: the lands beyond the edge of the continental shelves, beyond the 600 fathom mark, and which extend under the oceans to the edge of the continental shelves of the other continents.

Superimposed on this physical description, the following legal

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[1] Tidelands Bill Veto, U. S. Code Congressional Service, 1952, p. 2176.

description is set forth for comparison.

1. Lands beneath the inland waters of the states. This classification includes the land beneath the sea waters of bays, harbors, and sounds which have been declared to be inland waters.[2]

2. Tidelands: the land between the mark of high tide and low tide. Here the legal and physical description are the same. These lands belong to the respective states that have sea coasts.

3. Lands below low tide mark seaward to a distance of three miles from shore: These lands include part of the Continental Shelf and may include land of part of the Deep Sea Basin. In the Gulf of Mexico, the Continental Shelf extends out to 150 miles from the coast. Off the coast of California, land three miles from shore would be land in the Deep Sea Basin. Therefore, lands under the sea extending three miles from shore off the California coast would include lands of the Continental Shelf and of the Deep Sea Basin.

4. Lands under the sea beyond the three mile belt to the edge of the Continental Shelf.

5. Lands under the sea beyond the edge of the Continental Shelf. These are the Deep Sea Basin lands which as yet are so remote from human affairs as to be not in controversy. However, if the Deep Sea Basin begins within the three mile limit, these lands appertain to the bordering country.

To further complicate the physical, legal descriptions, land in the legal sense is permanent. Land can always be found by reference to mathematical surveys even though the character of the land may have changed and be unrecognizable. If land is flooded it can still be found; if the land has eroded away it can still be found. Along the sea coasts, the physical permanence of land is of a lesser degree than of the physical permanence elsewhere. The constant pounding of the seas has changed the character of the land in recorded history. The island of Helogoland in 800 A.D. had a circumference of about 120 miles. The present day circumference is less than three miles. The Yorkshire coast since 1066 A.D. has receded in places more than a mile. Parts of the New Jersey coast are receding at about five feet a year.[3] In addition to erosion, changes are caused by vast deposition of delta materials, by the processes of accretion and reliction[4] and by adjustments in land and sea levels. Along the coasts dynamic physical forces are in play and are discernable by their effects upon the fundament of coastal regions.

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[2] Examples of which are Long Island Sound, Mobile Bay, Mississippi Sound, San Francisco Bay, Puget Sound, Chesapeake Bay, Delaware Bay, New York Harbor and Boston Harbor. Tidelands Bill Veto, supra.

[3] Geology for Engineers, Trefethen, Joseph M., D. Van Nostrand Company, Inc., N. Y., 1949, p. 468.

[4] Blackstone assigned to the King, as lord of the sea, the lands which it leaves when it suddenly recedes. Blackstone's Com. 261.

Admittedly the question of who "owned" the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there.[5] When oil began to be produced in substantial quantities about twenty years ago, then the question as to who owned these lands which formerly were for practical purposes without value became an important question of first magnitude. The states are concerned with an interest in royalties. The federal government is concerned not only with royalties, but also it is concerned with the efficient development and conversation of these reserves of oil and gas from the standpoint of national interest and security. Since oil was discovered in these lands, great political, economic and social changes both nationally and internationally have occurred, and since power has more and more become centralized in the federal government, as a natural consequence of these catalyzing forces, a more insistent demand that the lands beyond low tide mark belonged to the federal government grew in some areas.[6] No bill with such a declaration was ever passed.

Culmination of the Legal Controversy

In 1945, the President issued a proclamation [7] declaring that the natural resources of the subsoil and the sea bed of the Continental Shelf beneath the high seas appertain to the United States and are subject to its jurisdiction and control. This proclamation asserted the interests of the United States in the land and resources under the sea well beyond the international three mile limit of territorial waters. The Supreme Court has subsequently reinforced the national claims [8] by asserting that the right of the United States and the duty imposed on the national government by the federal system of government transcend those rights of a mere property owner, and the property rights as to lands under the marginal sea, are so subordinated as to follow sovereignty. The Supreme Court held that the crucial issue was not merely one of who owns the bare legal title to these lands. Rather the issue was whether the capacities of the United States in the exercise of power and dominion to protect the people in their security, and the national government's responsibilty for conducting relations with other nations, as an incident to the fact that the United States is located adjacent to the ocean, were to be affected by

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[5] Bulletin No. 321, United States Geological Survey.

[6] In 1937, Senator Nye introduced a bill for such a declaration. Government and Business, Mund, Vernon A., Harper and Brothers, Publishers, New York, 1950, p. 603.

[7] U. S. Code Congressional Service, 1945, p. 1199. Executive order No. 9633, U. S. Code Congressional Service, supra, p. 1315. reserved and placed the resources of the bed of the Continental Shelf under the control and jurisdiction of the Secretary of the Interior.

[8] United States v. State of California, 332 U. S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889. Decided June 23, 1947. United States v. State of Louisiana, 339 U. S. 699, 70 S. Ct. 914. Decided June 5, 1950. United States v. State of Texas, 339 U. S. 707, 70 S. Ct. 918. Decided June 5, 1950.

the claims of the states. The court held that the proper exercise of these constiutional powers requires that the national government have power unencumbered by state commitments. The court therefore did not determine the issue of ownership, but in a round about fashion declared that the states' claim of ownership of the traditional three mile limit was a claim not justified by law and that the states could not interfere with the claims of the national government in this area. The United States was granted injunctions against the states without a finding by the court that the national government has a proprietary interest in the area. Normally, an injunction against trespassers presupposes property rights. The court adopted the theory that where low water mark is passed international domain is reached and property rights must be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. Legal opinion as it is, this decision smacks of a political assertion; and in our system of government political decisions are presumably for the Congress, and not for the judiciary.

HISTORICAL BACKGROUND

Early writers thought with respect to property, that the sea was not subject to the exclusive dominion of any nation, and could not be apportioned by law.[9] As nationalism developed, as sea power increased, ambitious men began to claim that the sea might might be property,[10] and that such property was vested in the Crown.[11] The Englishmen of the sixteenth and early part of the seventeenth centuries were zealous in claiming for their King the dominion of the seas all around the British Isles.[12] The abstract idea of dominion flows from the creation, in fact, of a strong navy, a power which could enforce the claim of dominion. Without sea power, claim of dominion of the sea is a nullity. Neighboring nations were compelled to acknowledge the supremacy of English Kings in order to have any use of the sea. As international law developed, by general consent territorial waters have been regarded as capable of appropriation, and of being held by a kind of possession. Upon the grounds of self protection and of mutual advantage to maritime counties, such dominion has been acknowledged to carry with it the control of the contiguous seas, and the exclusive right to enjoy whatever of value may be acquired therefrom. By the law of nations, the territorial waters extend only to such distance as is capable of command from the shore, or the

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[9] Vattel, Sec. 299, Grotius, Bk. 2, Sec. 3, 7, Cooper's Justinian 67, Sec. 1; 1 Phil. Int. Law, Ch. 5.

[10] Even Selden, who wrote his Mare Clausum (published 1635) to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all.

[11] According to Selden and his contemporaries, the King is lord of the great waste, both land and water. Gould on Waters, p. 19.

[12] Selden claimed the seas which washed the shores of Great Britain and Ireland were subject to the sovereignty of England even as far as the North Pole.

presumed range of cannon, which for purposes of certainty is regarded as one marine league.[13] The extravagant claims of England have been modified and now the Crown claims only to the three mile limit which has generally been adopted by other nations.

The abstract idea of sovereignty was not perceived with sufficient clarity to enable those claiming that the seas were under dominion of the English King, to claim the sea without basing it upon title. The reasoning of zealots seems to have been that since the title to the land covered by the sea was not in the subject, it must be in the King. As the title was placed in the King, dispute arose as to whether the King held the lands beneath the sea in his governmental right or in his private right.[14] The idea of sovereignty rather than title seems to have been dominant. But when the question arose as to the right between the King and his subjects the idea of the King's sovereignty prevailed, and the title was placed in him.

Prior to the decision in *Regina v. Keyn*, 2 Ex. D. 63,[15] the open seas around the coasts of the British Isles were considered to be the property of the Crown. It was said that the sea is not only under the dominion of the King, but that it was his own proper inheritance. According to Selden and the writers of his time [16] the King is lord of the great waste, both land and water.

As to lands between high and low water mark the dicta generally accepted has been that the Crown holds this property as trustee for the public, and cannot since the Magna Carta [17] convey such lands to a subject. It has been broadly laid down that: "The soil of the seashore to the extent of the three miles from

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[13] Three and one-half land miles.

[14] See: Gould on Waters, pp. 34-36.

[15] Case involved charge of manslaughter against captain of the German vessel, Franconia, which negligently ran against an English vessel at a distance less than three miles from the English coast, resulting in the death of a passenger upon the English ship. Defendant was found to be not subject to the jurisdiction of the English admiralty. The dissenting judges were of the opinion that the territory of England and the jurisdiction of the Crown and the Admiral included the waters within the three mile belt. Court declared the territory of England extended only to low water mark. This case marks the extreme point of retreat from Selden's theory. The decision evidently has no effect on the Crown's claim to mineral resources. The Crown owned the sea-bottom adjoining the coasts and that part of the seashore from low water mark to the line of the neap tide. "Mines underneath the seashore belonged prima facie to the littoral owner or to the Crown as the superjacent soil belonged to one or the other." Quotation from Lindley on Mines, who cites Mac Swinney on Mines, pp. 30-31; Bainbridge on Mines, 4th ed., p. 171; Rogers on Mines, p. 178.

[16] In so far as there was occasion to assert Selden's doctrine in treating of the common law, it was accepted by Bacon, Coke, Hale and Staunford.

[17] The Great Charter of English liberties (but which was really a compact between the king and his barons, and almost exclusively for the benefit of the barons, though confirming the ancient liberties of Englishmen in some few particulars) was wrung from King John by his barons assembled in Arms June 19, 1215. Bouvier's Law Dictionary.

the beach, is vested in the Crown".[18] The claim of private title of the King has given place to a representative title by which he holds for the people.

Sir Mathew Hale [19] wrote, in his De Juris Maris,[20] concerning the Crown's interests in navigable waters that this interest is of a two fold nature. He defined these interests: a jus publicium as a right of jurisdiction and control for the benefit of its subject and a jus privatum as a right of private property which is subject to the jus publicium, and which cannot be used by the Crown or conveyed to a subject discharged of this public trust, or so as to justify any interference with the public rights of navigation and fishing. Under the fiction of the feudal laws by which all lands were derived from the king as lord paramount, and held by his bounty, the bed of tidewaters having no other acknowledged owner are said to remain vested in the King in all cases where he has not granted these lands away. So it came to pass that the Crown owned the sea bottom adjoining the coasts of the British Isles and that part of the seashore between high and low water mark.[21]

In a dispute between the Queen and the Prince of Wales, as Duke of Cornwall concerning mineral rights, arbitrators [22] decided that all the mines and minerals lying under the seashore between high and low tide marks, and under the estuaries, tidal rivers, and other places beyond low water mark that were within the county belonged to the Prince as part of the territorial possessions of the Duke of Cornwall. The right to all mines and minerals beyond low tide was vested in the Queen, although won by workings commenced above low water mark and extended below low water

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[18] Quotation from opinion of Erle, C. J., from case of The Whitstable Free Fisheries v. Gann, 11 H. L. Cas. 192, 20 C. B. N. S. 1, 35 L. J. C. P. N. S. 29, 12 L. J. N. S. 150, 13 Week. Rep. 509.

[19] Hale died in 1676. His treatise was not published until 1787. Gould on Waters, p. 37.

[20] Sergeant Merewether alleged that this document was not with good reason ascribed to Lord Hale, and the use of Hale's name had given undue weight to the statements therein made. Merewether argues that Hale would have cited the case of Johnson v. Barrett, Aleyn 10 (1646) in which he was counsel if he were the author of De Juris Maris, or that the case not being referred to, it was decided against him. Rolle, the presiding justice, stated that if a wharf were erected between the high and low water mark it belonged to the owner of the adjoining land, while Hale, earnestly affirmed that it belonged to the Crown of common right. It was agreed that if the wharf were erected beyond the low water mark, it belonged to the King. Gould on Waters, p. 37.

[21] "The narrow sea adjoining the coast of England is part of the waste and the demesnes and dominions of the King of England whether it lie in the body of any county or not." Hale, De Juris Maris, Chap. 4.

"So, the King hath the propriety as well as the jurisdiction of the narrow seas for he is in a capacity of acquiring the narrow and adjacent seas to his dominion by a kind of possession that is not compatible to a subject, and accordingly 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 that the King hath because without a regular power he cannot possibly possess it." Hale, De Juris Maris, Chap. 6.

[22] Arbitration is reviewed in Reg. v. Keyn, 2 Ex. D. 63.

mark. The arbitrators recognized that there were places beyond low water mark [23] which were within the county and belonged to the Prince as part of his territorial possessions. The law of mining declares that one can follow the strike of a lode that apexes within the claim to the end lines [24] and follow the dip extra-laterally beyond the side lines. Evidently low tide mark, in this case, was taken as the limit of extra-lateral right by operation of the law due to the ownership in the Crown, of the lands beyond.

The common law, so far as it is not repugnant to the institutions and laws of the particular state, has become, either by right of discovery or by statute, the fundamental law throughout the country except in Louisiana which follows the civil law. The doctrine of jus privatum, was not fully recognized in England. The American colonies were settled from England at the time the doctrine was being established. The arguments of those of the minority opinion appear to have had a significance in this country, unknown to the common law of England. Ancient usage of most of the original thirteen states allow to the owner of the adjoining lands rights in the lands and soil below the high water mark of tidewater.[25] The opinions and dicta of the English decisions were to the effect that the proposition had been generally accepted that the Crown held this property subject to public usages. The Crown appears never to have claimed any exclusive rights in the tide water or in the land under them.

The argument of Sergeant Merewether, who challenged the doctrine of jus privatum, had its effect in the American colonies, and the law deviated from the common law of England. The King had vast new dominions to dispose of in the fifteenth century. The establishment of complete though subordinate sovereignties had caused a different rule to be applied to the tidelands. This difference naturally resulted where the intent of the grants of the Crown was not merely to vest the Crown's right of property in the grantees, but also to invest them with civil and political powers.

The royal grant [26] of James I in 1620 to the Council of Ply-

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[23] It is recognized, in the United States, that certain areas below low tide are inland waters of the states, examples of which are sounds, inland bays, and harbors. Tidelands Bill, Veto, supra. See: United States v. Mission Rock Co., 189 U. S. 391, 23 S. Ct. 606, 47 L. Ed. 865.

[24] In mining law, the end lines of a claim, as platted or laid down on the ground are those which mark its boundaries on the shorter dimension where it crosses the vein, while the side lines are those which mark its longer dimension where it follows the course of the vein. But with reference to extra-lateral rights, if the claim as a whole crosses the vein, instead of following its course, the end lines will become side lines and vice versa. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., C. C. Cal., 63 F. 549.

[25] Colonial Ordinance of 1647 (Mass.). See: Home for Aged Women v. Com., 202 Mass. 422, 89 N. E. 124, 24 L. R. A. N. S. 79 (1909). Tiffany v. Town of Oyster Bay, 209 N. Y. 1, 102 N. E. 585 (1913).

[26] This grant was the basis on which most of the other grants were framed. See: Lewis v. Utica, 145 N. Y. S. 346, 159 App. Div. 160 (1913); Towle v. Remson, 70 N. Y. Reports 303 (1877).

mouth included in the grant the lands described and also "All bays, ports, rivers, fishings, mines, etc., and all and singular other commodities, jurisdictions, royalties, privileges, franchises, and pre-eminances both within the tract of land upon the main, and within the islands and seas adjoining". The words employed in connection with the manifest purpose of the grant were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the land beneath such waters, and to invest these newly created governments with the powers of administration and legislation as were necessary to advance the well being and prosperity of the Colony.

English power and dominion was, at the times, also being extended to Asia. In a case involving the East India Company, the Company, as representing the Indian government, was conceded to have a freehold in the shores and bed of the navigable rivers of India,[27] and upon this same principle, the Colony of Massachusetts, in an ordinance passed in 1647, invested in the littoral proprietor the lands down to low tide mark or to a point not exceeding 100 rods from high tide mark. The people became sovereign in 1776, and the respective states succeeded to the title of the Crown in the tidewaters within their territorial limits, and to such rights as had been previously granted to the local governments established under royal approbation. The general assembly of Massachusetts extended the territorial limits of the commonwealth one marine league from seashore at low water mark.[28] The boundaries of counties bordering on the sea were extended to the line of the State.[29] The boundaries of the cities and towns bordering upon the sea were co-extensive to the State line.[30] In Pennsylvania and Virginia the division between private and public ownership was fixed at ordinary low water mark.[31] The California Constitution [32] and its Political Code [33] affirmed the state line extending westward three miles from the shore.[34] But as states were by statute or constitution affirming that their jurisdiction extended to the three mile limit, concurrent federal jurisdiction had become implanted in the same areas. In 1794, Congress recognized the three mile rule by authorizing the district courts to take cognizance of complaints in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.[35] Justice Story held that as a principle of public law the waters within the three mile belt form part of the nations' territory.[36]

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[27] Doe v. East India Co., 10 Mo. P. C. 140.
[28] St. 1859, Ch. 289; Gen. Sts. (1860) Ch. 1, Secs. 1, 2.
[29] St. 1859, supra.
[30] St. 1881, Ch. 196.
[31] Black v. American International Corp., 264 Pa. 260, 107A. 737 (1919).
[32] Art. 21, Sec. 1.
[33] Sec. 33.
[34] In re Humboldt Lumber M. Ass'n, 60 Fed. Rep. 428 (1894).
[35] Stats. at Large, Ch. 50, Sec. 6, 384.
[36] Case of the Brig Ann, 1 Gall. 62, citing Church v. Hubbart, 2 Cranch 187, 234 (1812).

The Republic of Texas defined its borders claiming three leagues from land from the mouth of the Sabine River to the mouth of the Rio Grande River. After annexation, the State of Texas reaffirmed this right of jurisdiction. The admission of this claim by other nations was admitted to depend on the power of the state to enforce it, but as between citizens of Texas the boundary was conclusive.[37] The treaty between the United States and Mexico provided that the boundary line between the two countries should commence in the Gulf of Mexico three leagues from land opposite the mouth of the Rio Grande River, and run northward with the middle of the river.[38]

As there have been changes of sovereignty, such of the tidelands that were not previously granted passed to the new governments. In the original states and in Texas, the transfer from foreign government was direct so that there never was any title in the federal government. In the other states the title passed to the United States, and then to the state as they were from time to time created. The United States maintained the policy of holding lands under these public waters for the ultimate benefit of future states and accordingly refrained from making any disposal of tidelands.[39] The states do not have absolute power to dispose of these titles. Such right is limited by rights existing under the commerce clause of the Federal Constitution and by the paramount rights of the public to use the water for navigation or other public purpose. In some cases, state law or the state constitution limits the right of the state to dispose of its tidelands. Subject to these limitations, each state has the power to dispose of its lands under public waters.

STATE CLAIMS

As to lands beyond high tide mark, the state bordering upon the sea was the owner of all lands extending seaward to the limits of its municipal dominions: these lands included those in landlocked bays and from the ordinary high tide on the shore of the open oceans seaward to the three mile limit.[40] This rule applied

[37] Galveston v. Menard, 23 Texas 349.

[38] 9 St. at Large 926, Sec. 5.

[39] With reference to the class of lands occupying this status, the Supreme Court of the United States has expressed itself as follows:

"The United States, while they hold the country as a territory, having all the powers both of national and municipal government, may grant for appropriate purpose titles and rights in the soil below high water 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 interests 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 state, respectively, when organized and admitted into the Union." Shively v. Bowlby, 152 U. S. 1, 58, 14 Sup. Ct. Rep. 548, 38 L. Ed. 331 (1893). San Francisco Savings Union v. R. G. R. Petroleum & M. Co., 144 Cal. 134, 103 Am. St. Rep. 72, 1 Ann. Case 184. 77 Pa. 823, 66 L. R. A. 242 (1904).

[40] Lindley on Mines, Vol. 2, 3rd ed., p. 1015. The recent opinions of the Supreme Court has nullified this statement as to the lands under the open oceans seaward to the three mile limit.

to islands off the coast which were within the control of the state. When a new state was admitted to the Union, it became, by virtue of its sovereignty, the owner of sea lands contiguous to it in the same measure as the other states. The federal government held tidelands of the territories for the benefit of such states as would be ultimately carved out of them.[41] Such lands were not capable of being acquired in private ownership under any of the general laws providing for the disposal of public lands.[42] A mining claim could not be so located as to extend below the line of ordinary high tide.[43]

In 1898, gold-bearing sands were discovered on the southern shore of the Seward Peninsula, Alaska. Federal mining law had been extended to this Territory, but the gold stands extended below the line of ordinary high tide. No existing law permitted the mining below high tide mark.[44] Permission was sought in some cases from the Secretary of War, whose permission was necessary as a prerequisite to the maintenance of structures in navigable waters of the United States. Such licenses conferred no rights except immunity from prosecution from carrying on mining operations in navigable waters. Due to geographic location, lack of harbors, and lack of hazards to shipping entailed by the mining operations permits were granted whenever applied for. Subsequently, Congress recognized these conditions. Provisions were inserted in the Alaska Code governing the exploration and mining of these beach deposits between low and ordinary high tide, on the shore, bays, and inlets of the Bering Sea. Congress authorized mining below the line of low tide under such regulations as might be issued by the Secretary of War. Such beach claims could not be patented. The code merely gave a privilege for exploration for and mining of gold. When petroleum wells were drilled in the ocean below the line of ordinary high tide off California, the Secretary of War granted the same class of permits as in the mining areas on and off the coasts of Alaska. These permits were ineffec-

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[41] Note that benefit is not necessarily equivalent to a trust. The United States may sell or otherwise dispose of tidelands bordering the coast of a territory, subject to the jus publicium of the future state. When the state is admitted, it acquires the control as sovereign over all its shores and is proprietor over all lands, not previously granted away. See: Shively v. Welch, 20 Fed. Rep. 28 (1884); Case v. Toftus, 39 Fed. Rep. 730 (1889). Pollard v. Hagan, 3 How. 212 (1845), was concerned with disposition of certain lands held by the United States under an express trust. The headnote states: "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; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." The case is of no authority for the proposition, that in absence of such an express trust, the government may not dispose of tidelands in a territory merely because the territory may subsequently become a state.

[42] Not because of any express prohibition. The theory of holding for benefit of future states was dominant.

[43] In re Logan, 29 L. D. 395.

[44] Miners are prone to make their own law where there is a vacuum.

tual as conferring any rights against littoral owners.[45] The title, in that day, was thought to be in the state. Legislation was passed whereby lands between high and low water mark were withdrawn from sale.[46] State legislation was then thought a requisite to regulate all industrial activities in tidal waters and in lands out to the marine league.[47] The coastal states asserted and assumed regulating control over the shell fisheries, sponges, and other kinds of marine life within the three mile limit.[48] Such regulation, once thought to be as to property of the state, is now mere exercise of the police power.

As more oil was discovered and produced, states were led to reaffirm their ownership claims to lands out to three miles seaward from high tide mark and beyond.[49] The states desired to reinforce claims which were already theirs. In 1938, Louisiana, by statute affirmed ownership of land twenty-seven miles from shore. In 1947, Texas extended its boundary to the outer limits of the Continental Shelf. The controversy culminated in October 1945 when the Attorney General of the United States filed suit against California claiming the title of the United States to the lands under the sea out to three miles from the shores. The Supreme Court did not expressly hold that the United States owned the submerged lands, but held that the national government's interest in defense, international affairs, and commerce gave the United States a paramount control over those lands which made it unlawful for the states to lease or exploit these lands. The Court did not expressly withdraw from its earlier holding that the tidelands are state property.[50] Admittedly the ownership of the states to the land between high and low tides is more firmly implaced in history and in law than is the ownership of lands by the states out to the three mile limit.

The government denied that the original states, either as colonies or states ever had any ownership in the marginal seas, alleging that such ownership came wholly as the result of the assertion of national authority by the federal government in its international relations.[51] The theory or at least the behavior of the federal government in response to the proposition that it held tidelands and lands out to the three mile limit for the benefit of future states was nullified by the California decision. Custom and usage here did not have the force of law. Texas, as an inde-

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[45] San Francisco Savings Union v. R. G. P. Petroleum Co., 144 Cal. 134, 103 Am. St. Rep. 72, 1 Ann. Cas. 182, 77 Pa. 823, 66 L. R. A. 242 (1904).

[46] By act of the legislature of California, passed March 25, 1909 (Pol. Code, Sec. 3443a).

[47] San Francisco Savings Union v. R. G. P. Petroleum Co., supra.

[48] Robert E. Hardwicke, "The Tidelands and Oil". Atlantic, June 1949, pp. 21-22.

[49] See: Skirotes v. Florida, 313 U. S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1941).

[50] Borax, Ltd. v. Los Angeles, 296 U. S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935).

[51] Tom C. Clark, "National Sovereignty and Dominion over Lands Underlying the Ocean", Texas Law Review, December 1948, pp. 153-157.

pendent nation, had a three league boundary in the Gulf of Mexico. The government alleged that when Texas was accepted as a state she came into the Union on an equal footing [52] with the other states and thus surrendered her former proprietorship in the submerged gulf lands. This position was upheld by the Supreme Court, holding that this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty.

The theory now is that low water mark is passed international domain is reached [53] and property rights must be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. Such a theory destroys the concept of the three mile belt of water as the territorial limits of the nation. International domain is not reached within the three mile belt of waters, but is reached beyond this limit. The President, by proclamation, has extended de facto the limits of territorial waters to the edge of the Continental Shelf, declaring that subsoil and sea bed beneath the high seas appertain to the United States and are subject to its jurisdiction and control. It is inconceivable to assert jurisdiction and control of the bed of the sea of the Continental Shelf without the assertion of some measure of dominion and control over the waters above the submerged lands.

The framers of the Constitution regarded the states as sovereign and independent. Everything possible was done to give recognition to that knowledge, by the fear that if the Constitution was ratified by the legislatures of these sovereign and independent states, it would be a mere treaty and not a constitution. Therefore ratification was proposed and secured at state conventions composed of delegates elected by the people. All powers not expressly delegated to the federal government were reserved to the states, or to the people.[54]

PRIVATE RIGHTS

Private rights of the shore owner include the right to wharf out to the point of practical navigability subject, of course, to federal and state laws enacted to aid or protect commerce and navigation. The states appear to have the power to convey to the owner of the wharf a fee to the land under it,[55] despite the fact that the wharf extends beyond low tide mark. In absence of conveyance, the wharf owner merely has an easement over state land where construction of the wharf is a matter of right. The wharf owner has merely a license when the construction is in pursuance of a statute.

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[52] "Equality of states that they are not less or greater, or different in dignity and power." United States v. State of Texas, supra.

[53] Such a theory is in accord with Regina v. Keyn, supra, but has not until the recent decision of the Supreme Court been accepted in the United States. The Court impliedly reversed Justice Story who held that waters within the three mile belt form part of the nation's territory.

[54] U. S. Constitution, Article X.

[55] Patton on Titles, Sec. 168.

Title to land, by reclamation of submerged lands, was recognized as a common law right, but today such rights are usually covered by statute. Upon completion of reclamation of the submerged lands, these new lands become a part of the owner's adjoining land and title is invested in the owner of the adjoining land. Title gained in this manner will not be lost by subsequent submergence of the land.[56]

At common law, where tidewater is made a boundary of land it is presumed that the high water mark was intended as the boundary line.[57] At common law where the description in a grant or conveyance of land simply designates tidewater as the boundary, without further indicating the location of the boundary line in relation to the water, it is presumed that the high water mark was intended as the boundary line, and if the intent is to include land under the water within the boundary, other words clearly indicating such purpose must be employed.[58] Where such a body of water is designated as a boundary, the body of water proper, and not the shore line of a harbor or bay opening into it, is the boundary.[59]

Conclusions and Continuing Problems

As the continents become more exploited, man has turned increasingly to the sea for resources whenever technologically possible.[60] The oceans, covering two-thirds of the surface area of the world, are international domain beyond the three mile limit. The three mile limit is unrealistic in modern times, in that when that limit was adopted three miles was the extreme range of cannon. With modern weapons, a powerful nation could control millions of square miles of ocean. International considerations demand restraint in asserting national claims beyond the three mile limit. If one nation asserts claims, other nations will assert claims and eventually frontiers would be drawn hundreds if not thousands of miles beyond the three mile limit. Such a situation would be catastrophic as the trend of civilization must be away from nationalism if world tensions are to be lessened. For this reason, claims of Texas and Louisiana beyond the three mile limit must be examined in the international perspective. The claims of the federal government out to 150 miles or more to the edge of the Continental Shelf also must be examined in the international perspective. If the United States asserts such control other nations will assert control in the same measure. The asserting of

[56] Patton on Titles, Sec. 169.
[57] C. J. S. 11, Sec. 27.
[58] Shively v. Bowlby, supra.
[59] Tiffany v. Oyster Bay, supra.
[60] A striking example of mining activity under the bed of the sea is the hematite mines off the north shore of Bell Island, Newfoundland, which extend two miles slant distance from the shore and 1,200 feet under the bottom of the bay. Wabona Mines of the Dominion Steel and Coal Corp. Ltd. produce about 5,300 gross tons per day from three sloping submarine ore beds. "Newfoundland, Canada's New Province," Brown, Andrew H., Sisson, Robert F., The National Geographic Mazagine, June 1949, p. 788.

jurisdiction and control of the bed of the sea without the assertion of dominion and control over the surface of the sea contiguous with the edge of the continental shelves present a nice problem of concurrent use, which will not be solved by mere policy assertions. For the practical reason that no other nation has the power or industrial capacity to develop oil resources in the continental shelves bordering the United States, perhaps this issue of international law is a moot question.

Questions concerning jurisdiction of states as to crimes in airspace over the territorial waters of the United States were clouded by the recent decisions affecting the tidelands.[61] The federal government was given jurisdiction July 12, 1952, over acts of violence on American aircraft flying over the high seas or within the maritime limits of the country. A bill for this purpose was signed by the President. This legislation was necessary because a New York Federal Court held that aircraft were excluded from existing laws covering such offenses.[62]

The national government claims land under the sea beyond low water mark. Under present theory, if the sea retreated from the land, the coastal states would hold title to land between high and low tide. The private littoral owner would have his land extended seaward to the high water mark. The federal government's interests would be lessened by the amount of land left dry above the low tide mark where the land had been once submerged. If the seas invaded the lands would property rights be subordinated as to follow sovereignty? [63] The sea is impliedly an agent of sovereignty. As to whether such agency can destroy title, there can be reasonable doubt. The court has said that the states never had title to the three mile belt. The court's statement that international domain is reached at low tide mark is obviously defective both from a physical sense and from an international sense. The territorial waters of the United States extend three miles from shore. International waters are beyond the three mile limit.

Before the assertion by the national government, state ownership had generally been assumed, but no square ruling of the Supreme Court has determined the ownership of the lands under the marginal sea. The tone of decisions dealing with similar problems indicate state ownership had been assumed.[64] The states were thought to have dominion while the national government

[61] "Crimes Aboard American Aircraft; Under What Jurisdiction are They Punishable," Cooper, John C., American Bar Association Journal, Vol. 37, No. 4, April 1951.

[62] United States v. Cordova, 89 F. Supp. 298. Decided March 17, 1950.

[63] The union and exercise of all human power possessed in a state: it is a combination of all power; it is the power to do everything in a state without accountability, to make laws, to execute and apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations and the like. Story, Const. Sec. 207.

[64] Pollard v. Hogan, 3 How. 212, 11 L. ed. 565; State of Louisiana v. State of Mississippi, 202 U. S. 1, 52, 26 S. Ct. 408, 422, 50 L. ed. 913. The Abby Dodge, 223 U. S. 166, 32 S. Ct. 310, 56 L. ed. 390. State of New Jersey v. State of Delaware, 291 U. S. 361, 54 S. Ct. 407, 78 L. ed. 847.

had imperium over the submerged lands. Dominion relates to property rights and not political rights. Imperium relates to political sovereignty. As the Supreme Court has not definitely decided who "owns" the bed of the Continental Shelf, it is difficult to perceive how Congress can "give" the bed of the marginal sea to the states. Congress has the power to dispose of the property of the United States, but no property rights have been expressly declared upon by the court. To resolve the problem upon equitable consideration Congress should assert that the lands within the traditional three mile limit are under the jurisdiction of the states, except for Texas and Florida where the limit should be the traditional three leagues from shore. The dominion of these lands beyond these limits should be declared in the national government. The political sovereignty of the national government modified by international obligations should be declared to extend over the surface of these waters to the edge of the Continental Shelf. The court has not expressly withdrawn from its earlier holding that the tidelands, the lands between high and low tide, are state property.[65]

[65] Borax, Ltd. v. Los Angeles, 296 U. S. 10, 56 S. Ct. 23, 80 L. ed. 9 (1935).

ABOUT TIME

Inspired by a letter in the American Bar Association Journal, Mr. Arthur Kramer of the New York Bar contributed the following to *The Record* of the Association of the Bar of the City of New York which we herewith print with permission and with full knowledge that this issue of *Dicta* will be distributed on the eve of the Annual Picnic of the Denver Bar.

"Opposes Intoxicants at
Bar Meetings—"
Caption in the A.B.A. Journal

Little know the laity
Of their lawyers' gaiety—
How, beneath the gravity,
Portliness and suavity,
Pullulates depravity.
O, their inebriety
In their own society!
O, with what rapidity
Founders their solidity!
O, the ribald raillery
Marking their cocktailery!
O, the rakish revelry,
O, the tipsy devilry—
Tearing up the napery,
Tearing down the drapery,
Rivaling in japery
Voyagers to Gay Paree.
And let's not merely jaw about it—
There ought to be a law about it.