**Abstracted patent cases, (140), final**

 **The first 2 cases are listed twice, at the outset and later chronologically, because they contain the search term: “not cut off by the subsequent creation of the state”.**

**(Also see search term herein: “It is settled law in this country”)**

**Cases regarding PLEADING** the case are set forth a **second time** on pages 73 – 81.

**Teschemacher case: Good 1861 California case explaining property rights under international law, set forth in full in # 5 font beginning page 81:**

***United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926)**

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Bill in equity to quiet title by the United States against the Holt State Bank and others. Decree of dismissal was affirmed by the Circuit Court of Appeals ( [294 F. 161),](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=348&FindType=Y&SerialNum=1924124153) and plaintiff appeals. Affirmed.

 [When Minnesota was admitted to the Union, May 11, 1858, title to the lake bed passed to it because the lake was navigable and the bed had ***not*** already disposed of it by the United States. Title to lake bed had not passed to Indian tribe at time of creating the reservation].

The defendants insist that the lake in its natural condition was navigable, that the state, on being admitted into the Union, became the owner of its bed, and that under the laws of the state the defendants, as owners of the surrounding tracts, have succeeded to the right of the state.

It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that **where the United\*\*199** **States, after acquiring the territory and before the creation of the state, has granted rights in such lands** by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce **\*55** among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, **such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.**  [Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1876155604&ReferencePosition=338) [Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 14 S. Ct. 548, 38 L. Ed. 331;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1894139328) [Scott v. Lattig, 227 U. S. 229, 242, 33 S. Ct. 242, 57 L. Ed. 490,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1913100506) [44 L. R. A. (N. S.) 107;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=474&FindType=Y&SerialNum=1913100506) [Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 65 L. Ed. 500;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1921113562) [Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 43 S. Ct. 60, 67, L. Ed. 140](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=1922117926&ReferencePosition=67).

The effect of what was done ***was to reserve*** in a general way for the continued occupation of the Indians what remained of their aboriginal territory, ***and thus it came to be known and recognized as a reservation***.   [Minnesota v. Hitchcock, 185 U. S. 373, 389, 22 S. Ct. 650, 46 L. Ed. 954.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1902100402) There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the **\*59** benefit of the future state.

 ***Klais v. Danowski*, 129 N.W.2d 414 (1964) (Supreme Court of Michigan)**

Purchasers' action for specific performance of land contract and other relief. The state intervened. The Supreme Court, Dethmers, J., held that where a patent description contained exact measurements from a fixed point intention to convey the subaqueous portion, if any, was clear, and in any event land was granted to the full extent of the description, **and rights of patentees to the land, whether above or beneath water, were not cut off by subsequent admission of the territory to the union as a state.** **Affirmed insofar as adverse to state.**

Overview: The state appealed a decision which granted the purchasers specific performance of a land contract but denied the purchasers any other relief sought against the sellers on the theory that the sellers had and could convey good and marketable title as against the state and did not, therefore, pay anything to the state or reimburse the purchasers for what they paid to the state for conveyance of the state’s interest in the lots. On appeal, the court affirmed. The court held that the United States conveyed a private claim of specific dimensions at a definite location. Determination of that location was conclusive of the occupant’s rights. **The occupants continued to own, through chain of title, what was granted to the patentees in the first place**.

**p. 419:** We are persuaded that the lots in question lie landward from the easterly boundary line of claim 623 as it existed at the time it was patented.

 In point, then is what this court said in *People, ex rel. Dir. Of Conservation v. Broedell*, 365 Mich. 201, 206, 207: “If lots 36 and 37 were within the confines of private claim 623 as patented to defendant’s predecessors in title, the heirs of James Abbott, on June 1, 1811, no title thereto passed from the United States to the State of Michigan upon its admission into the Union in 1837, even if submerged land at the time, because then it no longer belonged to the United States but to the Abbott heirs or their successors in title. In apparent recognition of this the legislature, in enacting the cited submerged land acts, expressly made them applicable only to ‘unpatented’ lands. See *Knight v. United States Land Association*, 142 U.S. 161; see also *Beard v. Federy*, 3 Wall (70 U.S.) 478. If the lots were within the boundaries of the patented lands, plaintiff’s bill should be dismissed and decree entered for the defendant.”

**‘It is settled law in this country** that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and **subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of \*273** performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, **or carrying out other** **public purposes appropriate to the objects\*\*420 for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.**’ (citing United States v. Holt State Bank, 270 U.S. 49)

This leaves no need for consideration of the question of the power of the United States to convey lake bottom land held in trust. The land was granted to the Abbotts to the full extent of the description **\*275** contained in the patent. **Their rights to the land, whether above or beneath water, were not cut off by the subsequent creation of the State.** United States v. Holt Bank, supra.

**Here the United States conveyed a private claim of specific dimensions at a definite location. Determination of that location, as we have done above, is conclusive of the occupant's rights today. They continue to own, through chain of title, what was granted to the patentees in the first place.**

**Under *Klais* shepardize: 15 Michigan Digest Public Lands § 33:**

**1891**:

A patent of riparian land conveys, where there is no reservation, the land over which the stream flows as far as the middle of the stream, and covers unsurveyed islands between this line and the bank; and the riparian’s title will not be divested by a subsequent survey and grant of such islands. *Butler v. Grand Rapids & I.R. Co.*, 85 Mich. 246, 48 N.W. 569 (1891), aff’d 159 U.S. 87 (1895).

**1972**:

Where United States, as owner of land surrounding a lake, which is at the time a permanent body of water in a defined basin, conveys such land, riparian rights may thereafter be attached to such lands and passed to subsequent grantees. *Booker v. Wever*, 42 Mich. App. 368, 202 N.W.2d 439 (1972).

**II. Patented land cannot be collaterally attacked**.

It is well settled that a patent for lands is conclusive in an action at law; see *St. Louis Smelting v. Kemp*, 104 U.S. 636; *Davis v. Wiebbold*, 139 U.S. 507 (1891); *Beley v. Nephtaly*, 169 U.S. 353 (1898); *Fern v. Holme*, 21 How. 481, 62 U.S. 481 (1859); *Field v. Seabury*, 19 How. 323, 60 U.S. 323 (1857).

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***Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (1795)**

**Very good discussion on the Constitution and unalienable rights which are totally ignored today**.

From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value.

Omnipotence in Legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of Laws, of Courts, of Constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had Constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming act is constitutional, the conditions of it have not been performed; and, therefore, the estate continues in the plaintiff. 3. The confirming act has been suspended and 4. Repealed.

The result is, that the plaintiff is, by law, entitled to recover the premises in question, and of course to your verdict.

***Fletcher v. Peck*, 10 U.S. 87 (1810)***.* [But don’t argue “contract”, but rather rights granted by Congress which adhere to the land and are in force today through mense conveyance]

**Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.**

**\*\*26 When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights;**

 A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

 Since, then, in fact, **a grant is a contract executed**, **the obligation of which still continues**, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. **It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected**.

 Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, **the violent acts** which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination *to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed*. **The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state**.

 **No state shall pass any** bill of attainder, *ex post facto* law, or **law impairing the obligation of contracts**.

***State of New Jersey v. Wilson*, 11 U.S. 164, 167 (1812) (one of the original states)**

[Impairment of contract case] **[Non-taxability is annexed to the land and passed to subsequent purchaser]**

New Jersey, while a colony, on the 12th of August, 1758, passed an act that the government should purchase a tract of land on which the Delaware Indians might reside - in consideration of which they would release their claim to all other lands in New Jersey south of the river Rariton. … This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts **‘that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax,** any law usage or custom to the contrary thereof, in any wise notwithstanding.’ … **The Indians continued in peaceable possession of the lands thus conveyed to them until some time in the year 1801, when, having become desirous of migrating from** **\*166** **the state of New Jersey, and of joining their brethren at Stockbridge, in the state of New York, they applied for, and obtained an act of the legislature of New Jersey, authorizing a sale of their land in that state.** This act contains no expression in any manner respecting the privilege of exemption from taxation… In 1803, the commissioners under the last recited act sold and conveyed the lands to the Plaintiffs, George Painter and others. In October, 1804, the legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. … **The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.**

It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. **The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract.** **This contract is certainly impaired by a law which would annul this essential part of it**.

**Green v. Liter, 12 U.S. 229, (1814)**

Defendant, claiming under a patent, entered and took possession of the land granted. Demandant, claiming under a prior patent to the same lands, subsequently entered and took possession. Held that, as demandant entered under the better title, his seisin is not bounded by his actual occupancy, but is coextensive with his title, except as to such portion of the grant as was actually inclosed by the defendant.

Under the land law of Virginia a patent must be considered as a statute grant having attached to it all the legal effects which the legislature intended

In Kentucky, a patent is the completion of the legal title of the parties and the previous stages of title are merely equitable, which a chancery court may enforce but a court of common law will not entertain, and hence the legal title only can come in controversy in a writ of right.

Under the land law of Virginia, the whole legal estate and seisin of the commonwealth passes to the patentee.

A patent is the completion of legal title, and a writ of right may be maintained thereon without actual possession.

Under Judiciary Act 1789, §§ 11, 20, 1 Stats. 78, 83, the circuit courts have jurisdiction of a writ of right where the value of the property demanded exceeds the sum of $500.

Upon this question we contend that the Demandant can, *upon his patent*, maintain his writ of right; and that actual possession is not necessary.

***Robinson v. Campbell*, 16 U.S. 212 (1818)**

Lawyer’s Edition Headnotes: … it was held that a prior settlement right thereto which would, in equity, give the party a title, could not be asserted as a sufficient title in an action of ejectment brought in the Circuit Court of Tennessee.

Mr. *Law* for the plaintiff in error, argued, 1. That the defendant below ought to have been permitted to give evidence showing that his grant had preference in equity over the plaintiff’s grant [from Virginia]. By the law, as settled in Tennessee, the prior settlement right of the defendant, though an equitable title, might be set up as a sufficient title in an action at law. The opinion of the judge below proceeds on the idea that the Virginia practice must prevail, under which such a title could only be asserted in equity. The acts for carrying into effect the compact settling the boundary, declare that the claims and titles derived from Virginia shall not be affected or prejudiced by the change **\*216** of jurisdiction.

Mr. *Law* for the plaintiff in error, argued, 1. That the defendant below ought to have been permitted to give evidence showing that his grant had preference in equity over the plaintiff’s grant. By the law, as settled in Tennessee, the prior settlement right of the defendant, though an equitable title, might be set up as a sufficient title in an action at law. The opinion of the judge below proceeds on the idea that the Virginia practice must prevail, under which such a title could only be asserted in equity. **The acts for carrying into effect the compact settling the boundary, declare that the claims and titles derived from Virginia shall not be affected or prejudiced by the change \*216 of jurisdiction**. … The present case stands upon **grants** of Virginia, and is not within the purview of the statutes of Tennessee; the titles have all their validity from the laws of Virginia,… The judgment of the circuit court is affirmed, with costs.

**M'Culloch v. State, 17 U.S. 316 (1819) (aka McCulloch v. Maryland)**

… the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.

**The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not.**

The court has bestowed on this subject its most deliberate consideration. **The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.** This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

***Hoofnagle v. Anderson,* 7 Wheat. 212, 20 U.S. 212, (1822)**

[LOCAL LAW. CHANCERY.]

Syllabus: A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.

Courts of equity consider an entry as the commencement of title, and will sustain a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made.

But they never sustain an entry made after the date of the patent.

This case attempted to be taken out of the general rule, upon the ground that the equity of the party claiming under the entry commenced before the legal title of the other party was consummated.

But the circumstances of the case, and the equity arising out of it, were not deemed by the Court sufficient to take it out of the general rule.

**\*\*2** This suit was brought by the appellants, who were plaintiffs in the Circuit Court for the District of Ohio, to obtain a decree for the conveyance of a tract of land of which the respondent has the legal title.

The respondent's patent is dated on the 9th day of October, 1804, and is founded on a warrant for military services, issued from the land office of Virginia, to Seymour Powell, heir of Thomas Powell, on the 29th day of May, 1783, which was entered in the office of the principal surveyor on the 16th of June, 1790, and was surveyed on the 30th of October, 1796. The survey was assigned for a valuable consideration to the appellee, in whose name the patent was issued.

The entry under which the plaintiffs claim was not made till the 28th day of May, in the year 1806; and was consequently eighteen months posterior to the emanation of the defendants grant. They insist, however, that this grant ought not to stand in their way, because it was obtained contrary to law, being founded on a warrant, which was issued by fraud or mistake.

**\*\*3** The title of the respondent to the particular tract included in his patent, was complete before that of the appellants commenced. **It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation.** Courts of equity have considered an entry as the commencement **\*215** of title, and have sustained a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made. But they have gone no farther. They have never sustained an entry made after the date of the patent. They have always rejected such claims. The reason is obvious. A patent appropriates the land it covers; and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself.

***Green v. Biddle*, 21 U.S. 1 (1823)**

…**by the general principles of law, and from the necessity of the case, titles to** **\*12 real estate can be determined only by the laws of the State under which they are acquired. Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries; and this right must remain, until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish, in which it had its origin; for no title can be acquired contrary to those laws: and a title good by those laws cannot be disregarded but by a departure from the first principles of justice.**

The common law of England was, at that period, **\*75** as it still is, the law of that State; and we are informed by the highest authority**, that a right to land, by that law, includes the right to enter on it, when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it**. [(*Altham’s case*, 8 *Co.* 299.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885000342&pubNum=267&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) In [*Liford’s case*, (11 Co. 46.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1888000852&pubNum=267&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) it is laid down, that the regress of the disseisee revests the property in him in the fruits of profits of the land, as well those that were produced by the industry of the occupant, as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee, or disseisor; ‘for,’ says the book, ‘the act of my disseisor may alter my action, but cannot take away my action, property, or right; to that after the regress, the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor, in such case, is to recoup their value against the claim of damages.’ The doctrine laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb* v. *Rawlyns, (Cro. Eliz.* 540.) (See also *Bull. N. P.* 87.)

Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession **\*76** and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.

**A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself.** (*Shep. Touch*. 93. *Co. Litt.* 4*b.*) ‘For what,’ says Lord Coke, in this page, ‘is the land, but the profits thereof.’

Thus stood the common law in Virginia at the period before mentioned; and it is not pretended that there was any statute of that State less favourable to the rights of those who derived title under her than the common law. On the contrary, the act respecting writs of right declares, in express terms, that ‘if the demandant recover his seisin, he may recover damages to be assessed by the recognitors of assize, for the tenant’s withholding possession of the tenement demanded;’ which damages could be nothing else but the rents and profits of the land. (2 vol. *Last, Revisal*, p. 463.) This provision of the act was rendered necessary on account of the intended repeal of all the British statutes, and the denial of damages by the common **\*77** law in all real actions, except in assize, which was considered as a mixed action. (*Co. Litt.* 257.) But in trespass *quare clausum fregit*, damages were always given at common law. ([10 *Co.* 116.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887011293&pubNum=267&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) And that the successful claimant of land in Virginia, who recovers in ejectment, was at all times entitled to recover rents and profits in an action of trespass, was not, and could not, be questioned by the counsel for the tenant in this case.

The exemption of the occupant, by that law, from an account for profits, is strictly confined to the case of a *bonae fidei* possessor, who not only *supposes* himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably, this character cannot be maintained, for a moment, after the occupant has notice of an adverse claim, especially, if that be followed up by a suit to recover the possession. After this, he becomes a *malae fidei* possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land. (*Just.* Lib. 2. tit. 1. s. 35.)

 The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.

Having thus endeavoured to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not less than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken; and that those decisions entirely cover the present case.

 The principles laid down in [*Fletcher* v. *Peck*] are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.

Trespass quare clausum fregit. The common law remedy for the recovery of damages for the wrong of intruding upon the real property of another.

Possessor malae fide. **A possessor who knows that he is not entitled to possession**.

Potheir treatise “Du Droit de Propriete”:

335. A malae fidei possessor is bound to account for all of the fruits of the thing recovered which he has received … which have come to his hands subsequent to his unlawful possession. He is held accountable not only for the natural fruits, but also the civil fruits.

Action of ejectment: to recover possession.

Action of trespass: to recover the mense profit

***Rogers v. Jones*, *Supervisor of the Town of Oyster Bay*. 1 Wend 237**; **1828** N.Y. Lexis 143 (August 1828) Supreme Court of Judicature of New York (the old Supreme Court);

Good history of rights, grants & patents going back to the common law of England and the rights granted by the Crown, And some history of Long Island.

Plymouth was planted in 1620; in 1650 the territory east of the west bounds of Oyster Bay was ceded by the Dutch to the English. Dutch were in possession of New York. In 1664, the colony was surrendered to the English, reconquered in 1673, and yielded up by treaty in 1674. Other interim history of grants by the Crown. In 1677 a patent was issued for the land and the waters in question – the Town of Oyster Bay.

Since the town held the patent, they acquired the right and title to the land under the water and could control its use and exclude nonresidents from oystering or fine them $12.50 for violation of their ordinance.

**Opinion**

**\*237** Where a patent or grant conveys a tract of land by metes and bounds, the land under water as well as other land will pass, if the land under water lies within the bounds of the grant. By the common law, every arm of the sea or navigable river, so high as the sea flows and re-flows, belongs to the king; but by grant or prescription, a subject may have the interest in the water and soil of navigable rivers, and the king may grant fishing within a creek of the sea, or within some known precinct. There is no prohibition in the 16th chapter of *magna charta* to the right of the king to grant a fishery in navigable waters to an individual or body corporate. … **The patent to the inhabitants of Oyster-Bay, conveyed all the lands under water within the bounds of that grant, together with the exclusive right of fishing in the waters within the same.** Such right is part of the common property of the town, and may be regulated by rules and regulations adopted in town meeting. It must, however, be so used as not to occasion an annoyance to the passage of ships or boats, and is subject to the laws of the state for the conservation of fish or fry.

**I deem it unnecessary to cite other authorities. Many more might be adduced, but enough has been shown to satisfy my mind that the patent of Sir Edmond Andross, emanating mediately from Charles the second, did convey to the inhabitants of Oyster-Bay, all the lands under water within the bounds of that grant, together with the exclusive right of fishing in the waters within the same.**

**Weston v. City Council of Charleston, 27 U.S. 449 (1829)**

This subject was brought before the Court in the case of **M'Cullough *vs.* The state of Maryland**[FNb](#Document1zzB001b1800139351), when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that **\*467** which is involved in this. It was discussed at the bar in all its relations, and examined by the Court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that ‘all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation.’ ‘**The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission;’ but not ‘to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States.’ ‘The attempt to use’ the power of taxation ‘on the means employed by the government of the union in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.’**

**The Court said in that case, that ‘the states have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government.’**

***Carver v. Jackson*, 29 U.S. 1 (1830)** [very long case – Jacob Astor heir?]

In the circuit court for the southern district of New York, an action of ejectment was instituted by the defendant in error, for the recovery of a tract of land in the town of Carmel, in the county of Putnam, in the state of New York. The plaintiff claimed title on the demise of John Jacob Astor and others, named in the case. The action was tried by a jury at October term 1829, in the circuit court, in the city of New York, and a verdict and judgment rendered for the plaintiff in the same; a bill of exceptions was tendered by the defendant in the circuit court, who prosecuted this writ of error.

**That on the 22d of October 1779, the legislature of the state of New York, by ‘an act for the forfeiture and sale of the estate of persons who have adhered to the enemies of the state, &c.’ declared Roger Morris and his wife to be convicted and attainted of adhering to the enemy; and all their estate, real and personal, severally and respectively, in possession, reversion, or remainder, was forfeited and vested in the people of the state.**

**But where the state claims title under the deed, or other solemn acts of third persons, it takes it cum onere, and subject to all the estoppels running with the title and estate, in the same way as other privies in estate.**

…whether such improvements can be claimed in this case consistently with the treaty of peace of 1783.

**\*\*65** By the fifth article of that treaty, it is agreed, ‘that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.’ By the sixth article it is agreed, that, ‘there shall be no future confiscations made, nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the war; and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property.’ We think, that the true effect of these provisions is to guaranty to the party all the rights and interests which he then had in confiscated and other lands, in the full force and vigour which they then possessed. He was to meet with no impediment to the assertion of his just rights; and no future confiscations were to be made of his interest in any land. His just rights were at that time to have the estate, whenever it should fall into possession, free of all incumbrances or **\*101** liens for improvements created by the tenants for life, or by purchasers under the state. To deny him possession, or a writ of possession, until he should pay for all such improvements, was an impediment to his just rights, and a confiscation, pro tanto, of his estate in the lands. The argument at the bar supposes that there is a natural equity to receive payment for all improvements made upon land. In certain cases there may be an equitable claim; **but that in all cases a party is bound by natural justice to pay for improvements made against his will, or without his consent, is a proposition which we are not prepared to admit**. **We adhere to the doctrine laid down on this subject in** [Green *vs.* Biddle, 8 Wheat. 1](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1821197855&pubNum=780&originatingDoc=I3ed66f60b5bc11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

***Stringer v. Young’s Lessee*, 28 U.S. 320 (1830)**

In Virginia, the patent is the completion of title, and establishes **\*341** the performance of every pre-requisite. No inquiry into the regularity of these preliminary measures which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud; not legal and technical, but actual and positive, fraud in fact, committed by the person who obtained it; and even this is questioned.

Citing *Hoofnagle v. Anderson,* 7 Wheat. 212, 20 U.S. 212, 214 (1822), This court said, **‘It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all whose rights did not commence previous to its emanation.’**

***United States v. Arredondo*, 31 U.S. 691 (1832)**

**WL Headnotes:**

Act May 26, 1824, was passed to enable claimants to lands in Missouri and Arkansas to institute proceedings to try claims to land prior to the session of the territory acquired by the United States by the Louisiana treaty, and enacted that persons claiming lands by virtue of French or Spanish grants made before March 10, 1804, which might have been perfected in conformity to the laws, usages, and customs of the government under which they originated, might present their petitions to the court setting forth such claims. Held that, in determining such claims, the court was bound to notice and respect general customs and usages as the law of the land equal with the written law.

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The seisin and possession of person having complete title is coextensive with his right and continues till he is ousted thereof by actual adverse possession.

The law deems every man to be in the legal seisin and possession of land to which he has perfect and complete title.

In construing public or private grants court must be governed by clearly expressed manifested intention of the grantor and not the grantee.

**The exemplification** **[authenticated as a true copy]** **of a patent under the seal of the United States or state is a record of absolute verity.**

**A patent under the seal of the United States or a state is conclusive proof of the act of granting by its authority.**

**In action at law or proceeding in equity, court, jury or chancellor must receive public grant, if admitted, as evidence, both of facts it recites and all other facts legally inferrible from what is apparent on its face.**

**A state cannot impose a tax on lands granted with an exemption from taxation or take away a corporate franchise.**

**Mr Justice BALDWIN delivered the opinion of the Court.**

This is an appeal from the decree of the judge of the superior court for the eastern district of the territory of Florida.

After the acquisition of Florida by the United States, in virtue of the treaty with Spain, of the 22d of February 1819, various acts of congress were passed for the adjustment of private claims to land within the ceded territory. The tribunals appointed to decide on them, were not authorised to settle any which exceeded a league square; on those exceeding that quantity, they were directed to report especially their opinion for the future action of congress. The lands embraced in the larger claims, were defined by surveys and plats returned; they were reserved from sale, and remained unsettled until some resolution should be adopted for a final adjudication on their validity, which was done by the passage of the law of **\*707** the 23d May 1828

A grant is void, unless the grantor has the power to make it-but it is not void because the grantee does not prove or produce it. **The law supplies this proof by legal presumption, arising from the full, legal, and complete execution of the official grant, under all the solemnities known or proved to exist or to be required by the law of the country where it is made and the land is situated**.

**\*\*19 A patent under the seal of the United States or a state is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity**. [Patterson v. Winn, 5 Peters, 241.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1831194518)

**\*\*20** It is an universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion; the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, *power in the officer, and fraud in the party*. **All other questions are settled by the decision made or the act done by the tribunal or officer;**

Thus a grant, even by act of parliament, which conveys a title good against the king, takes away no right of property from any other; though it contains no saving clause, **it passes no other right than that of the public**, although the grant is general of the land; [8 Co. 274,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=267&FindType=Y&SerialNum=1885000676) b.; 1 Vent. 176; 2 J. R. 263. **If land is granted by a state, its legislative power is incompetent to annul the grant and grant the land to another**; such law is void, Fletcher v. Peck, 6 Cr. 87, & c. **A state cannot impose a tax on land, granted with an exemption from taxation, New Jersey v. Wilson**, 7 Cr. 164;

**\*\*26 For these reasons and in this conviction, we consider that the grants were confirmed and annulled respectively-simultaneously with the ratification and confirmation of the treaty, and that when the territory was ceded, the United States had no right in any of the lands embraced in the confirmed grants.**

**\*\*31 Being therefore of opinion that the title of the claimants is valid, according to the stipulations of the treaty of 1819, the laws of nations, of the United States, and of Spain, the judgment of the court below is affirmed.**

***Gaines v. Buford,* 1 Dana 481, 31 Ky. 481 (1833)**,[“history” lesson] **Judge Nicholas:**

 The patentee having held the title free from any such condition at the time of the adoption of the federal constitution, no act of either government, or of both of them combined, could, thereafter, superadd that, or any other new term, to the contract growing out of the patent, without the assent of the patentee. The federal constitution, at its adoption, clothed the contract with an inviolable sanctity that could not be infringed by any legislation of either of the states, or by any compact thereafter entered into between them. For nothing can be better settled by authority than that an executed contract, such as a grant, comes as fully within the constitutional protection, as any executory contract, and that it makes no difference that a state is one of the parties to the contract. **Judge Nicholas,** in *Gaines v. Buford*, 1 Dana 481, 31 Ky. 481 (1833).

***Gaines v. Buford,* 1 Dana 481, 31 Ky. 481 (1833)**,  **Judge Underwood:**

 I think no inference drawn from the fourth condition of the compact, can sustain the act in question, when applied for the purpose of forfeiting lands unconditionally granted to individuals in fee simple. **Lands thus granted become the absolute property of the grantee, in virtue of a contract made with the government, of which the patent is the evidence**. I know of no principle which will allow the government, any more than an individual, after fairly selling and conveying land, to take back the land and resume the title, at its own pleasure against the assent of the grantee. Neither am I acquainted with any principle which will allow the government to annex new conditions, unknown at the time of the original contract; and for a violation of them seize the land, divest the citizen of his title, and retain the consideration which the citizen paid or rendered, without remunerating him therefor. Those constitutional provisions, which were intended to secure the inviolability of contracts, apply as well to contracts made between the government of a State and its citizens, as to contracts between individuals. In the nature of things there is as much reason for providing that a State shall not impair the obligation of its own contracts, as to provide that it should not impair the obligation of contracts between individuals. Indeed, there is greater necessity for putting a State under restrictions in regard to her own contracts, than in relation to the contracts of individuals; for as it respects the contracts of individuals, a State may be considered as impartial; but concerning its own contracts, it may be affected by a principle of selfishness. It is enough, however, that the constitution of the United States and of this State makes no distinction between contracts to which the State is a party, and those to which she is not. If, therefore, the grant or patent to Harvie, should be considered in the light of a contract, by which Virginia transferred her title to him, Virginia, and consequently Kentucky, claiming under Virginia, can no more resume the title, without the assent of Harvie, or those claiming under him, than Harvie could take it from Barrett and Duvall, to whom he conveyed, or from those claiming under him, without their assent.

 The patent of Harvie, made the subject of forfeiture in this case, was founded on land office treasury warrants, and these were granted in consideration of money paid into the public treasury. The patent upon its face is unconditional, and purports to grant or convey the land in consideration of land warrants. I think the act in question violates that clause in the constitution of the United States which prohibits every State in the union from passing laws impairing the obligation of contracts, and likewise that clause in our State constitution which declares that no law impairing contracts shall be made. That the steps taken by Harvie to obtain the patent, and the issuing thereof to him, amounted to a contract between him and the State, can admit of no doubt. The point is settled alike by reason and authority. [Fletcher v. Peck, 6 Cranch, 87;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1800116198) 2 Cond. Rep. 308; [New Jersey v. Wilson, 7 Cranch, 164;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1800131952) 2 Cond. Rep. 457; [Town of Pawlet v. Clarke &c. 9 Cranch, 292;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1800133450) 3 Cond. Rep. 422; [Dartmouth College v. Woodward, 4 Wheaton, 518](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1800133620). These decisions of the supreme court fully establish the position, that the modes adopted by the State governments, whether ordinary letters patent, or acts of assembly, for granting titles to the unappropriated public domain, are contracts within the meaning of the constitution of the United States. The contract in the present case, as intended by the parties, was this, that Harvie and his heirs or assigns should enjoy the land granted, forever, in consideration of so much paid to the State for land warrants. **The mode and manner of enjoyment was not prescribed; they were therefore left to the volition of the grantee. His dominion was not limited at the time of his purchase. The use to which he should apply the property, to administer to his happiness, was not then designated. In these matters he was left, by the contract, free. He had as a free man, all those rights and privileges which constitute the birthright of an American citizen**.

I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found any where in our systems of government. *The people possess*, as it regards their governments, *a revolutionary sovereign power*; but so long as the governments remain which they have instituted, *to establish justice and “to secure the enjoyment of the right of life, liberty and property*, and of pursuing happiness;” sovereign power, or, which I take to be the same thing, power without limitation, is no where to be found in any branch or department of the government, either state or national; nor indeed in all of them put together. The constitution of the United States expressly forbids the passage of a bill of attainder, or *ex post facto law,* or the granting of any title of nobility, by the general or state governments. The same instrument likewise limits the powers of the general government to those expressly granted, and places many other restrictions upon the power of the state governments. The constitutions of the different states likewise contain many prohibitions and limitations of power. The tenth article of our state constitution, consisting of twenty eight sections, is made up of restrictions and prohibitions upon legislative and judicial power, and concludes with the emphatic declaration, “that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void.” These numerous limitations and restrictions prove, that the idea of sovereignty in government, was not tolerated by the wise founders of our systems. **“Sovereign state” are cabalistic words, not understood by the disciple of liberty**, who has been instructed in our constitutional schools. **It is an appropriate phrase when applied to an absolute despotism**. I firmly believe, that the idea of sovereign power in the government of a republic, is incompatible with the existence and permanent foundation of civil liberty, **and the rights of property**. The history of man, in all ages, has shown the necessity of the strongest checks upon power, whether it be exercised by one man, a few or many. Our revolution broke up the foundations of sovereignty in government; and our written constitutions have carefully guarded against the baneful influence of such an idea henceforth and forever. **Judge Underwood,** in *Gaines v. Buford*, 1 Dana 481, 31 Ky. 481 (1833).

***Wilcox v. Jackson*, 38 U.S. 498 (1839).**

This is a writ of error to the Supreme Court of the state of Illinois, prosecuted under the 25th section of the judiciary act of 1789. It was an action of ejectment, brought by the defendant in error against the plaintiff in error.

The decision of the Register and Receiver of a land office, in the absence of fraud, would be conclusive as to the facts that the applicant for the land was then in possession, and of his cultivating the land during the preceding year, because these questions are directly submitted to those officers.

Appropriation of land by the government is nothing more or less than setting it apart for some particular use.

Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands: and **no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it**: although no other reservation were made of it.

**p. 516:** **Nothing passes a perfect title to public lands**, with the exception of a few cases**, *but a patent***. The exceptions are, *where Congress* [itself] grants lands, in words of present grant. The general rule applies as well to pre-emptions as to other purchases of public lands.

A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her Courts; and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But Congress are invested, by the Constitution, with the power of disposing of the public land, and making needful rules and regulations respecting it.

Where a patent has not been issued for a part of the public lands, a state has no power to declare any title, less than a patent, valid against a claim of the United States to the land; or against a title held under a patent granted by the United States.

**p. 517:** “We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether the title to property which had belonged to the United States has passed, that question must be resolved by the laws of the United States. But whenever the property has passed, according to those laws, then the property, like all other in the state, is subject to state legislation; **so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States**.

***Bagnell v. Broderick*, 38 U.S. 436 (1839).**

This was an action of ejectment by Broderick against Bagnell, for a section of land lying in Howard county, Missouri; and Peter and Luke Byrne were admitted to come in and defend, under the following circumstances. Morgan Byrne claimed to be the owner of the land, and he was first admitted a co-defendant with Bagnell. **\*447** Byrne died, and Margaret Byrne, his executrix, was admitted as a co-defendant. Then she died; and Peter Byrne and Luke Byrne, executors of the last will of Morgan Byrne, were admitted.

The judgment below is, that the plaintiff recover the land and costs, against Carey Bagnell and P. and L. Byrne, executors of Morgan Byrne.

The presumption is, that the judgment of the Circuit Court is proper, and it lies on the plaintiffs in error to show the contrary. [1 Peters, 23.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1800148177) The executors of Morgan Byrne had no interest in the land by virtue of their letters testamentary, but could well have an interest by the will of their testator. On no other ground could they properly have been permitted to come in and defend in the character of executors. On this ground, therefore, we presume they were admitted; and, like other defendants in ejectment, having failed to show the better title, the recovery was proper; and costs necessarily followed the judgment de bonis propriis. [pay the costs out of their own pockets for wrongfully claiming title]

**The plaintiff Broderick claimed by virtue of a patent from the United States, to John Robertson, Jr., dated June 17th, 1820 and deeds in due form from Robertson and others to himself, proved Carey in possession at the commencement of the suit; and here rested his case.**

the plaintiff below read in evidence a copy of the patent from the United States to John Robertson, Jr. dated 17th June, 1820, [patent issued June 17, 1820 to John Robertson, Jr. John Robertson, Jr. to Augustus H. Evans, November 16, 1830. Evans to Broderick (plaintiff below, now defendant in error) by deed dated June 7, 1831] … The question is, whether in such a case and on such a statement of facts, John Robertson, Jr. the patentee, or George W. Broderick, his assignee, can recover against Morgan Byrne, the locator of the land, or his representatives. The plaintiffs in error, contend that the patentee and his assignee cannot; … Held, that in an action at law the patent from the United States for part of the public lands is conclusive.

**p. 450:** and having obtained the patent, Robertson had the best title, (to wit, the fee,) known to a Court of law.

**Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance, the fee is in the government, which, by the patent, passes to the grantee; and he is entitled to recover the possession in ejectment.**

Nor do we doubt the power of the states to pass laws authorizing purchasers of lands from the United States, to prosecute actions of ejectment, upon certificates of purchase, against trespassers on the lands purchased; but **we deny that the states have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect.**

For the several reasons stated, we have no doubt the judgment of the Circuit Court was correct; and order it to be affirmed.

**[dissent by MCLEAN]** **p. 457:** “**All who claim under a patent are entitled to the same rights as the patentee**.” [Bagnell is the only “hit” when searching this quotation].

***Carroll v. Safford*, 44 U.S. 441 (1845)**

(from the Cir. Ct. of the U.S., dist. Of Michigan, sitting as a court of **equity**)

Michigan became a State of the Union on January 26, 1837.

Patents were issued **after** Michigan became a State.

In 1837, **before** the issue of the patents on August 12, 1837, **but after** statehood, “These lands were assessed at their full value, and as if owned in fee simple, for township, county, and state taxes.

The State of Michigan could rightfully impose the tax. (15 pages of “argument”, only 3 pages of opinion. Appears to be a contrived case. There was no mention of the date of statehood!)

***Cook v. Foster*, 7 Ill. 652 (Dec. 1845)**, (2 Gillman 652, 656. Sup Ct of Illinois)

**\*652** TRESPASS, in the Lake circuit court, brought by the appellee against the appellants, and heard before the Hon. Richard M. Young and a jury at the September term, 1844. Verdict and judgment for the plaintiff below for $45.

**TREAT, J.** This was an action of trespass *quare clausum fregit* brought by Foster against Cook and others.

 The following facts appeared in evidence, on the trial in the circuit court. Cook entered on the *locus in quo,* while the same belonged to the United States, and enclosed a field with rails, built a house, etc.; and continued in possession thereof, until it was purchased of the government by Foster. After the purchase and while in possession, Cook, assisted by the other defendants, removed the house, etc.; for which this action was brought.

The jury found for the plaintiff $45. The defendants moved for a new trial, which the court denied. Judgment was rendered on the verdict, to reverse which, the defendants prosecute an appeal.

The only important question in the case is, whether from the facts disclosed in the record, Foster is entitled to sustain the present action.

**The English doctrine in relation to real estate is, that there can be no adverse possession against the crown, nor against its grantee,** until there be a new entry after the grant. An entry on lands belonging to the crown is held not to be a disseizin, but a mere intrusion on the king’s possession. His possession is not thereby divested, but, in legal contemplation, still continues. The king, not being disseized by the entry, his conveyance of the freehold is good, and his grantee is seized by virtue of it. The grantee succeeds to the rights of the crown, and can not be disseized without another entry after the conveyance. The individual making the original entry acquires no new right by the conveyance, but only continues his old interest, and remains an intruder still, liable to be sued in trespass. This is the doctrine, as distinctly stated in 2 Bacon’s Abridgment, 331, title “Disseizin.”

 **\*\*4** **There can be no doubt but that the same principles are applicable to the government of the United States. It possesses the same rights of sovereignty and prerogative in respect to the public lands. By the right of eminent domain, it is the absolute and exclusive owner of all the public lands which it has not alienated or appropriated.** It is seized of them to as full an extent as the British government can be of its domain. **It can not be disseized; no adverse possession is created by an entry on its lands. The entry is tortious, and confers no right on the person making it.** Possession thus acquired can never ripen into a right, nor authorize any defence against the government. **The government may treat the person thus in possession as an intruder, and sue him in trespass.** **On the sale of the lands by the United States, the patent transfers to the purchaser the entire legal estate and seizin to as full an extent as the government held them.** We hold, therefore, that the action is maintainable.

***Bracken v. Parkinson*, 1 Pin 685 (1846)** **Supreme Court of the Territory of Wisconsin**

*Charles Bracken* filed his bill on the chancery side of the district court against the defendant, *Daniel M. Parkinson,* for the purpose of obtaining a decree to vacate a patent issued by the United States to said defendant.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the government in reference to the public lands, declares the patent to be the superior and conclusive evidence of legal title. **At law, the patent is conclusive**.

***Hopkins v. Walker*, 244 U.S. 486, 489 (1850) (PLEADING)**

This is a direct appeal under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215], from a decree dismissing a suit in equity for want of jurisdiction, the question for decision now being whether the case presented by the bill is one arising under the laws of the United States.

…that the defendants are claiming the ground in controversy under the later lode claims and the certificates before described; that for the reasons indicated these locations and certificates are invalid and the certificates, as recorded, constitute clouds upon the plaintiffs’ title and reduce its market value; and that the determination of the plaintiffs’ rights requires a construction of the mining laws under which the proceedings resulting in the patent were had,

**It is conceded that the plaintiffs, being in possession, have no remedy at law, and that their remedy, if any, is in equity. Our concern is not with this, but with the question whether the case is one arising under the laws of the United States. A case does so arise where an appropriate statement of the plaintiff’s cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress.**  [Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903102063&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [23 Sup. Ct. Rep. 434;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903102063&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&fi=co_pp_sp_780_569&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_569) [32 Sup. Ct. Rep. 704;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Denver v. New York Trust Co. 229 U. S. 123, 133, 57 L. ed. 1101, 1120,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913100620&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&fi=co_pp_sp_780_133&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_133) [33 Sup. Ct. Rep. 657;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913100620&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914100574&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [34 Sup. Ct. Rep. 724.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914100574&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

Assuming that the **allegations of the bill concerning the nature and validity of the plaintiff’s title** and the existence, invalidity and recording of the defendant’s certificates of location constitute a part of the plaintiff’s cause of action, **it is plain that a controversy respecting the construction and effects of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the District Court** …

In both form and substance the bill is one to remove a particular cloud from the plaintiff’s title, as much so as if the purpose were to have a tax deed, a lease or a mortgage adjudged invalid and cancelled. **It hardly requires statement that in such cases the facts showing the plaintiff’s title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff’s cause of action**. Full recognition of this is found in the decisions of this and other courts. *Wilson Cypress Co., v. Del Pozo*, 236 U.S. 635; *Lancaster v. Kathleen Oil Co.*, 241 U.S. 551, 554- 555; *Walton v. Perkins*, 28 Minnesota, 413; *Wals v. Grosvenor*, 31 Wisconsin, 681; *Teal v. Oregon*, 9 Oregon, 89; *Sheets v. Prosser*, 16 N. Dak. 180, 183.

***Holden v. Collins*, 12 F. Cas. 330 (1850) Cir. Ct., D. Illinois; 5 McLean 189**

Plaintiff claims title to the land in controversy through a patent from the United States, dated Dec. 2, 1818. Defendant in possession. Def claims title under a sale made March 4, 1839, for the taxes of 1838, at which sale A. H. Fash was the purchaser. Fash conveyed to a third person May 18, 1839 who conveyed it to defendant March 16, 1840. There was no deed made for the purchaser at the tax sale until June 1, 1850. Judgment for plaintiff.

**Woodworth v. Fulton, 1 Cal. 295 (1850) [Calif S.Ct.]**

By international law private rights are unaffected by conquest. (Wheaton's International Law, 396, Part 4, Chap. 2, Sec. 5.) The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. (Vattel, Book 3, Chap. 13, Sec. 200.) Nor can it make any difference whether the property belonged to a natural person, or to an artificial person. Vested rights in real estate have been respected by all civilized nations ever since the time of the conquest of England by William of Normandy. (Wheaton, 396, *ubi supra.*)

“In general a person in *actual possession* of real property cannot be ousted unless the party claiming can establish some well founded title, for it is a general rule, governing in all actions of ejectment (the proper proceeding to recover possession of an estate), that the plaintiff must recover on the strength of his own title, and of course he cannot in general found his claim upon the insufficiency of the defendant's. For possession gives the defendant a right against every person who cannot **\*309** show a sufficient title, and the party who would change the possession must therefore establish a perfect title;

***Wilcoxon v. McGhee***, **2 Ill 381, 384 (June, 1851)**;

**\*381** *Appeal from Stephenson [Circuit Court].*

**\*\*1** A settler upon the public lands cannot overflow other public lands by dams, or otherwise obstructing a stream, running through lands he may eventually purchase; he does not acquire this right by a subsequent purchase of the land, such a privilege not having been contemplated in making the grant.

The subject matter of the grant is the land, having a fixed and definite description, nothing passes as parcel of the granted premises, beyond what is included within the boundaries expressed in the patent, or such as is necessarily and naturally annexed to the land.

McGhee sued Wilcoxon in the Stephenson Circuit Court, in an action on the case. The declaration contained three counts. The first count charged the defendant with having maintained, kept up and continued a mill dam across Richland creek since the first day of October, A. D. 1846, causing the water to overflow the plaintiff’s land, describing it. The second count charged the defendant with having obstructed the water of Richland creek, causing it to overflow the plaintiff’s land. The third count charged the defendant with having erected a mill dam on his own land across said creek on the first day of October, A. D. 1846, and with having continued it, thereby obstructing the natural course of the water of said creek, causing it to overflow the plaintiff’s land.

**TRUMBULL, J.**

This case presents the single question, of the right of a purchaser of a tract of public land, having upon it, at the time of the purchase, a mill and dam, which cause the water of a stream running through it to flow back upon other public lands, to continue the dam so as to overflow such other lands after they have been entered by individuals.

It does not appear from the record that the person entering the land upon which the mill stood, paid anything additional on account of the mill, or for the privilege of flooding other lands; but he made the entry and received a patent in the usual form.

The subject matter of the grant is the land, having a fixed and definite description, and nothing passes as parcels of the granted premises but what is included within the boundaries expressed in the patent, or is naturally or necessarily annexed to the land: [*Grant v. Chase,* 17 Mass., 443;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1821002666&pubNum=521&originatingDoc=I9547e965cf3311d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) [*Manning v. Smith,* 6 Conn., 289](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1826001133&pubNum=273&originatingDoc=I9547e965cf3311d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)).

Regularly “nothing can be appendant or appurtenant, unless it agree in nature and quality with the thing whereunto it is appendant or appurtenant:” Bac. Ab., tit. Grants, i, 4. The right to overflow adjoining lands is not an appurtenance agreeing in nature or quality with land itself, and though perhaps a convenience, is not absolutely necessary, to the enjoyment of the land; but such an easement more properly appertains to something that has been put upon the land, as in this instance, to the mill.

***Judgment affirmed.***

***Bank of Toledo v. Toledo*, 1 Ohio St. 622 (1853)**

**When property is transferred by conveyance or delivery of possession under authority of a law, the vested right attaches as an incident to the property, and adheres to it and passes with it**.

The general principle that one Legislature is competent to repeal or modify any act which a former Legislature was competent to pass: and that one Legislature cannot abridge the powers of a succeeding Legislature, is distinctly sanctioned as to all general legislation by the Supreme Court of the United States in *Fletcher* v. *Peck*, 6 Cranch's R. 87. **But it is said, that where absolute rights of property have been** **\*641** **acquired and vested by conveyances of the title to, or delivery of the possession of property, under the authority of a law, or where contracts have been made under and in pursuance of the authority of a law, and rights thereby vested, the simple repeal of the law does not divest the rights thus vested. This may be correct as to rights acquired from conveyances or contracts under the law, and pursuant to its authority;** but it cannot be applicable to rights conferred by the law in and of itself, which are inherent in its terms, and can continue only as incidents to the law itself. **When property is transferred by conveyance or delivery of possession under the authority of a law, the vested right attaches as an incident to the property, and adheres to and passes with it.** So also, where a contract is made under the authority of a law, the right of property acquired arises not from the law itself but from the contract to which it pertains as an incident. And in either case, the prospective repeal of the law could not divest the rights thus acquired originating not in the law itself, but in acts done under the law, and which attach as incidents not to the law, but to the property conveyed or contract made, under the law.

***Minter v. Crommelin*, 59 U.S. 87 (1856)**

A verdict and judgment were rendered for the defendant, and the plaintiffs took up the cause to the supreme court of Alabama, where the judgment was affirmed, to bring up which judgment a writ of error was prosecuted out of this court.

The state court in effect pronounced the patent, under which the plaintiffs claimed title, to be void for want of authority in the officers of the United States to issue it, on the supposition that the land was reserved from sale when it was entered and granted. **The presumption is, that the patent is valid, and passed the legal title; and, furthermore, it is *primâ facie* evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent. It has been so held by this court in many instances, commencing with the case of** [Polk *v.* Wendell, 9 Cranch, 98, 99](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105916&pubNum=780&originatingDoc=Ie957d273b5c211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_780_99&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_99).

That such is the effect, as evidence, of the patent produced by the plaintiffs, was adjudged in the case of [Bagnell *v.* Broderick, 13 Pet. 450,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800101785&pubNum=780&originatingDoc=Ie957d273b5c211d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and is not open to controversy anywhere, and the state court was mistaken in holding otherwise.

**\*\*4** The defendant being in possession, without any title from the United States, we deem it unnecessary to discuss the effect of the parol proof introduced in the state circuit court to defeat the patent.

It is therefore ordered that the judgment of the supreme court of Alabama, be reversed.

***Bell v. Hearne*, 60 U.S. 252 (1857)**

Plaintiff John Bell claimed the land by a purchase from the federal government and paid for the land. Land office mistakenly issued patent to James Bell, his brother. Land was sold to defendants at sheriff’s sale under a judgment and execution against the brother. General Land Office cancelled the first patent and reissued a patent to John Bell. Supreme Court of Louisiana erred in denying the validity of the title of John Bell.

**Irvine v. Marshall, 61 U.S. 558 (1857)**

The reception of a certificate of purchase of public land as evidence of title may be regular and convenient as a rule of business, but it is not conclusive evidence and does not exclude proofs of the real and just rights of claimants.

In the case of Wilcox *v.* Jackson … **a patent is necessary to complete the title**. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. … We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to State legislation, so far as that legislation **is consistent with the admission, that the title passed and vested** according to the laws of the United States.’

***Hooper v. Scheimer*, 64 U.S. 235 (1859) (a “summary” of ejectment)**

It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute.

This case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Arkansas. It was an ejectment brought by the Hoopers against Scheimer.

***Lawyer for patent holder [cites omitted]*:**

I affirm that a patent is unimpeachable at law, except, perhaps, when it appears on its own face to be void; and the authorities on this point are so uniform and unbroken in the courts, Federal and State, that little else will be ecessary beyond a reference to them. In ejectment, the rule is universal, that *the plaintiff must show the right to possession to be in himself positively*. A patent is evidence, in a court of law, of the regularity of all previous steps to it, and no facts behind it can be investigated. In actions at law, the legal title must prevail, and there can be no inquiry into the equities of the parties. No equitable title can be set up in ejectment, in opposition to the legal estate. To recover in ejectment, the plaintiff must show a paramount legal title. Apatent is conclusive in a court of law. The legal title must prevail at law. A plaintiff must recover upon the strength of his title, and that must be a legal as contradistinguished from an equitable title. Courts of justice have no authority to disregard surveys and patents, when dealing with them in actions of ejectment. But a patent, being a superior legal title, must, of course, prevail over them; nor would it be competent for any State legislation to give such titles, which are only of an equitable nature, precedence over the legal title.

**Mr. Justice CATRON delivered the opinion of the court.**

*An* action of ejectment was brought in the Circuit Court of the United States for eastern district of Arkansas, founded on an entry made in a United States laud office. This was the only title produced on the trial by the plaintiff. The defendant held- possession under a patent from the United States to John Pope, (Governor, &c.,) with which the defendant connected himself by a regular chain of conveyances.

The Circuit Court held the patent to be the better legal title.

This court -held, in the case of Bagnell et al. *v.* Broderick, (13 Peters, 450,) "that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law." Such is the settled doctrine of this court.

But there is another question, standing in advance of the foregoing, to wit: Can an action of ejectment be maintained in the Federal courts against a defendant in possession, on an entry made with the register and receiver?

It is also the settled doctrine of this court, that no action of ejectment will lie on such an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. Fenn *v.* Holme, (21 How., 482.)

It is ordered, that the judgment be affirmed. [for defendant]

***Singleton v. Touchard*, 66 U.S. 342 (1861)**

p. 344: Two instructions were given by the court to the jury – The court instructed the jury, “**That in the action of ejectment the legal title must prevail; that the plaintiff had the legal title by his patent**, and the defendant’s, if any, was but an inchoate and equitable title, which might avail in a court of chancery, but it could not avail the defendant in an action of ejectment.”

This instruction was in exact accordance with numerous decisions of this court, (see Mezes v. Green, 24 How., 268 (65 U.S. 268) and justified the verdict, even if there had been an error in the other instructions given.

***United States v. Stone*, 69 U.S. 525, 535 (1864)** (referring to courts’ role “after the title had passed from the government, and the question became one of private rights”).

**\*\*1** THE United States, by treaty with the Delaware Indians, in 1818, agreed to provide for them a country to reside in; and in 1829, by supplementary treaty, agreed that the country in the fork of the Kansas and Missouri Rivers, extending ‘up the Missouri TO Camp Leavenworth,’ should be conveyed and secured to them as their said home.

**Mr. Justice GRIER delivered the opinion of the court.**

**A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal.** In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy.

It is contended here, by the counsel of the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the Government, **\*536** and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed.

We are of opinion, therefore,

1st. That the land claimed by appellant never was within the tract allotted to the Delaware Indians in 1829 and surveyed in 1830.

2d. That it is within the limits of a reservation legally made by the President for military purposes.

Consequently, the patents issued to the appellant were without authority and void.**\*538**

***In re Kansas Indians*, 72 U.S. 737 (1866).**

THESE were three distinct cases involving, however, with certain differences, essentially the same question, argued on the same day and by the same counsel.

The specific question was, whether the State of Kansas had a right to tax lands in that State held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes, under patents issued to them pursuant to certain treaties of the United States;… The question was raised on bills filed in equity in the county courts of Kansas, by different Indian chiefs,- … The county court dismissed the bills, conceiving that the lands were rightly taxed, and on an affirmance of such dismissals in the Supreme Court of the State, the cases were brought here. They were, respectively, thus: … The State of Kansas has no right to tax lands held in severalty by individual Indians of the Shawnee, Miami, and Wea tribes, under patents issued to them by virtue of the treaties made with those tribes respectively in 1854, and in pursuance of the provisions of the 11th section of the act of June 30th, 1859

The Ohio Shawnees, when they ceded their lands in Ohio, did it in pursuance of an act of Congress of May 28, 1830,[FN16](#Document1zzB016161800121173) which assured them the country to which they were translated should be secured and guaranteed to them and their heirs forever. … In 1831, the Shawnees in *Ohio* resolved to join their Missouri brethren who had gone to Kansas. **A treaty was accordingly concluded in that year by the United States with the Ohio Shawnees.** By the terms of it the President was to cause the said tribe from Ohio to be protected at their intended residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatsoever, and he was to have the same care **\*739** and superintendence over them in the country to which they were to remove, that heretofore he had over them at their then place of residence. **100,000 acres of land within the 50,000 square miles, above mentioned, were granted to them in fee by patent, so long as they should exist as a nation. These lands were not to be ceded by them except to the United States, and *were never to be included within the bounds of any State or Territory, nor to be subject to its laws*…. In May of the year just mentioned, 1854, Kansas became a ‘Territory’ of the United States, with an organic law from Congress.** By this law, it was ordained ‘that all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced therein should be faithfully and rigidly observed;’ and also that all such ‘territory, as by treaty with any Indian tribe was not to be included within the territorial limits or jurisdiction of any State or Territory should be excepted out of the boundaries and constitute no part of the same until said tribe should signify their assent to the President of the United States to be included therein.’ …**In July, 1859, a constitution was formed for the State of Kansas, in which it was provided that all rights of individuals should continue as if no State had been formed, or change in the government made. In January, 1861, an act for the admission of the State was passed by Congress.**

The case of the WEA tribe: The patents were like those given to the Shawnees.

**‘It is not material to inquire whether the title of the Shawnees would be correctly described by the technical term ‘fee simple.’ The true test is, what was the *intention* of the parties, as derivable from the treaty and the provisions of the patent, all taken together, considered with reference to circumstances existing at the time they were made and issued.**

**It follows, from what has been said, that the Supreme Court of Kansas erred in not perpetuating the injunction and granting the relief prayed for.**

***Beard v. Federy*, 70 U.S. 478 (1866) (PLEADING)**

Overview: Plaintiff based his claim of title to the disputed parcel on a conveyance from a catholic Bishop of Montery, to whom a patent embracing the premises was issued by the United States. … The patent was a deed of the United States, and the patent was a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. – Judgment for plaintiff.

“The plaintiff in the court below deraigned his title by various mesne conveyances from Joseph S. Alemany, Catholic bishop of Monterey, to whom a patent, embracing the premises in controversy, was issued by the United States. The patent is in the usual form, and purports on its face to be **\*487** issued under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California. It recites that the bishop presented his claim to the board of commissioners created under that act, for confirmation; that the board, by its decree, rendered on the 18th of December, 1855, confirmed the claim; that an appeal was taken on behalf of the United States to the District Court; and that the attorney-general, having given notice that the appeal would not be prosecuted, the District Court, by its decree, gave leave to the claimant to proceed upon the decree of the board as upon a final decree.”

**pp. 491-492:** In the first place, a patent is a deed of the United States. As a deed, its operation is that of a quit claim, or rather of **a conveyance of such interest as the United States possessed** in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

 In the second place, **the patent is the record** of the action of the government upon the title of the claimant **as it existed** upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law **\*492** of nations to protection in them to the same extent as under the former government. … The government acts, and issues its patent to the claimant. As against the government this record, so long as it remains unvacated, is conclusive. **And it is equally by title subsequent, parties claiming under the government by title subsequent**. **It is this effect of the patent as a record of the government that its security and protection chiefly lie**. **If parties asserting interests in land** acquired since the acquisition of the country **could deny and controvert this record**, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, **the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor**.

**pp. 492-494:** **[Pleading]**

It only remains to notice the objections taken to the complaint in this case. They are advanced in misapprehension of the system of pleading and practice which prevails in the State of California. The system is there regulated by statute, and differs in many important particulars from the system which existed at the common law. There the ancient forms of action are abolished. **In every case the plaintiff must state, in ordinary and concise language, his cause of action, with a prayer for the relief to which he may deem himself entitled. The fictions of the action of ejectment at common law have no existence. The names of the real contestants must appear in the pleadings. The complaint, which is the first pleading in the action, must allege the possession or seizin of the premises, or of some estate therein, by the plaintiff, on some day to be designated, the subsequent entry of the defendant, and his withholding the premises from the plaintiff.** **No other allegations are required, where possession of the property alone is demanded. But in the same action there may be united a claim for the rents and profits, or for damages for withholding the property, \*494 or for waste committed thereon. The property should be described by metes and bounds, if possible.** This brief statement of the system of pleading and practice existing in California will furnish the answer to the several objections urged. That system, with some slight modifications, has been adopted by rule of the Circuit Court of the United States in common-law cases.

***Marshall v. Ladd*, 131 U.S. 89 (1869) [PLEADING: FATAL ERROR TRAP]**

Syllabus: **The legal title must prevail in ejectment; and neither party can set up facts which go to show that equitably the either party is the rightful owner of the property**. [**YOU CAN NOT STATE ANY EQUITABLE ARGUMENT**] The rulings of the court of Oregon upon the statutes of that state raise no Federal question in this case.

**Opinion** by – Miller:

“… In this case Ladd, the plaintiff, introduced his patent from the United States, and the defendants introduced the certificate of location to Mrs. Thomas, and relied on that and on the facts which went to show that it was rightfully issued, to defeat the recovery under Ladd’s patent. The court refused several instructions prayed for by the defendants, based on that defense, and told the jury that the legal title which passed from the United States to the plaintiff, must prevail over the claim to hold possession under the certificate.

In this the court was undoubtedly correct. It is of the essence of the action of ejectment that the legal title must prevail. **And neither party can set up** **in that proceeding** **facts** **which go to show that,** **equitably**, the other party is the rightful owner of the property. It is the peculiar province of a court of equity to restrain the assertion of a legal title wrongfully held, or to compel its transfer to the person rightfully entitled to it.

***Gibson v. Chouteau*, 80 U.S. 92, (1871)**

As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes.

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right **or embarrass its exercise**; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that **such interference with the primary disposal of the soil of the United States shall never be made**.

In the Federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title.

The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance.

**But, in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.**

So also in the action of ejectment in the State courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail. For, as said in *Bagnell* v. [*Broderick*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1800101785),[FN9](#Document1zzB00991871197210) ‘Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government in reference to the public lands **declares the patent the superior and conclusive** **\*103** **evidence of legal title. Until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.**’

But neither in a separate suit in a Federal court, nor in an answer to an action of ejectment in a State court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the State, be held to constitute a sufficient equity in their favor to control the legal title subsequently **\*104** conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted. [And if it can’t be done BEFORE issuance of the patent, it certainly can’t be done after the patent issues.]

 (Overview: The possessor’s mere occupation of the property was not sufficient equity to control the legal title to such property, and the statute of limitations did not bar the landowner’s ejectment action because the property was formerly public lands.)

**Plaintiff had legal title by mense conveyance. Patent deemed granted when Missouri was a Territory.**

In an action in ejectment in state courts, where the question presented is whether the plaintiff or defendant, has the superior title, from the United States, the patent must prevail.

**HN2**. With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere “with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers.” (cited in *Gile v. Hallock*, 33 Wis. 523 (1873). See also *Farrington v. Wilson*, 29 Wis. 383 (1872)).

***Carpentier v. Montgomery*, 80 U.S. 480 (1871) (**re confirming land in Calif from Mexico**)**

p. 494: that the title of Peralta was an imperfect title, and necessarily required confirmation in order to vest a full legal estate in private parties “But it is contended that the confirmation of the title enured to the benefit of the parties really interested, both at law and in equity, and not merely to the benefit of the confirmees.… but as it regards the legal estate, the confirmation inures to the confirmees alone … “This language is utterly irreconcilable with the hypothesis that the legal estate devolves, upon the confirmation, to any other parties than the confirmees. The patent is to be given to them, and the legal title cannot be separated from the patent.

***Calder v. Keegan*, 30 Wis. 126 (1872) (S. Ct Wis)**

Action of ejectment. Complaint in the usual form. The answer alleged title and possession in defendant under a tax deed. … The position taken by counsel for the defendant with respect to the taxability of the land, is incorrect and cannot be sustained. The land belonged to the United States at the time the supposed taxes were levied, and so was not liable to taxation. It was a case of suspended entry under a spurious land warrant,…

The right of the states to interfere in any manner so as to cut off or defeat the title emanating by patent from the United States in cases like this, has been very emphatically denied by the supreme court in a recent decision, and a printed copy of the opinion is now lying before us. [*Gibson v. Chouteau,* 13 Wallace, 92](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1871197210&pubNum=780&originatingDoc=Ifc891f2201ee11da8ac8f235252e36df&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). We regard that case as decisive of the question here presented, and as showing that the state could not step in and tax the land by anticipation, and that the doctrine of relation by which the supposed holder by tax deed would deprive the purchaser of his title obtained from the United States, is wholly inapplicable and cannot be made to answer any such inequitable and unjust purpose. It is generally enough for people to pay taxes upon land after they have obtained the title, without being compelled to forfeit their estate or to pay those assessed whilst it was owned by the United States and before they had acquired any interest, legal or equitable in it.

***Van Sickle v. Haines*, 7 Nev. 249 (1872)** [Nevada state – October 31, 1864)

PETER W. VANSICKLE, RESPONDENT, v. [JAMES W. HAINES](http://www.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5006813158)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem) et als., APPELLANTS.

**WL Headnotes:** A person taking a patent to land from the United States takes the same title as the United States held, including the right of the use of water thereon.

A patent to land covers all right to the use of water thereon, though another, before the patent, had attempted to divert the water. …As against a patentee of public land, no one can set up an adverse possession of water before the patent was granted.

**\*251** APPEAL from the District Court of the Second Judicial District, Douglas County.

It appears that in 1857, the plaintiff Vansickle diverted, by a ditch for irrigating and domestic purposes, one-fourth of the water of Daggett creek, a small tributary of the Carson river in Douglas County. He made the diversion at a point then on the public land, but which in 1864 was patented by the United States to the defendant Haines. In 1865, Vansickle obtained a patent for his own land where he used the water. In the fall of 1867, Haines and his codefendants, William F. Leet and Charles Vangordor, constructed a wood flume on Haines’ land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. In November, 1870, plaintiff commenced this action, asking for $1,500 damages and an injunction to restrain further diversion of that portion of Daggett creek claimed to have been appropriated by him. There was a decree for plaintiff substantially as prayed for, from which defendants took this appeal. …**Reversed**.

Respondent claims damages against appellants for past diversion of the waters of Daggett creek, and prays an injunction against further continuance of the injury alleged. The district court found for respondent; hence this appeal. Many questions are argued in **\*256** the briefs of respective counsel, which it is believed are not pertinent to the controlling question involved.

The district court finds that the water-course in question, a small non-navigable stream, nowhere in its natural channel runs over the land of respondent; but does so run through the land of appellant Haines. It is also found that the respondent and Haines are the owners in fee of their respective lands, by patents from the government of the United States, that of Haines bearing date December 28th, 1864; that at such date, and long prior thereto, respondent had appropriated and diverted from the natural channel of the creek, for his necessary purposes, a portion of its waters, which appropriation was interfered with by appellants in December, 1867; and that since that time they have used all or nearly all of the waters of the creek, in a flume constructed and worked by them jointly for running wood. The court concludes that respondent acquired such a right by his appropriation, as should be protected in equity.

He acquired no right against Haines prior to the date of the latter’s patent which could affect that grant, because there was no title in Haines to be affected by acts of the respondent. He could acquire no right against the United States, for as to that government he was a trespasser, in that he diverted water from its land not sought to be preëmpted by him. No presumption of grant arises against the sovereign, and no statute of limitation runs, save in some excepted instances, of which this is not one.

**\*\*5** The government of the United States then had, at the date of its patent to Haines, the unincumbered fee of the soil, its incidents and appurtenances; that was passed to Haines, there being no reservation in his patent, and none is suggested. He became the owner of the soil, and as incident thereto had the right to the benefit to be derived from the flow of the water therethrough; and no one could lawfully divert it against his consent. What use he made of it, so that such use did not interfere with the adjoining riparian proprietors, was for him to elect. He had precisely the same right to use it for his flume as for his household, his cattle, or his land.

**From the facts found, it follows that appellant Haines, owner of the soil, has the right to the flow of the water of Daggett creek in its natural channel; what use he may make of it when there is beside the question, so far as respondent is concerned. The right of Haines protects his coäppellants. The decree of the district court is reversed, and the cause remanded, with instruction to enter a decree for appellants.**

**After the rendition of the foregoing decision, a petition for rehearing was presented; in response to which the following opinion was filed at the January term, 1872: [*Rehearing denied* by chief judge Lewis:**

**C.J. Lewis:**

As the appellant here claims the water of Daggett creek **as an incident to the land patented to him by the United States, and as it is admitted that he could get only such title and right as was vested in the United States itself**, it becomes necessary to ascertain what is the nature of the rights of the federal government to the public land; and we propose to show**--1st**, that it has the absolute and perfect title; **2d**, that running water is primarily an incident to, or part of the soil over which it naturally flows; **3d**, that the right of the riparian proprietor does not depend upon the appropriation of the water by him to any special purpose, but that it is a right incident to his ownership in the land to have the water flow in its natural course and condition, subject only to those changes which may be occasioned by such use by the proprietors above him, as the law permits them to make of it; **4th**, that the government patent conveyed to Haines not only the land, but the stream naturally flowing through it; **5th**, that the common law is the law of this state, and **\*261** must prevail in all cases where the right to water is based upon the absolute ownership of the soil.

**\*\*7** **It is a proposition universally admitted, that the United States is the unqualified proprietor of all public land to which the Indian title has been extinguished**.

**\*262** **On the sale of the lands by the United States, the patent transfers to the purchaser the entire legal estate and seizin to as full an extent as the government held them.”** [2 Gilman, 652](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1845006484&pubNum=2370&originatingDoc=Ib3a0e826f95a11d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

**And all the right or title which the United States had in the land of Haines was conveyed to him by patent; and the patent necessarily carried with it the stream running through the land as an incident to it, together with the right to have it returned to its channel if diverted.** Upon the latter proposition, we may be permitted to refer to two or three cases which we recall to mind at present. [*Cook v. Foster,* 2 Gilman, 652;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1845006484&pubNum=2370&originatingDoc=Ib3a0e826f95a11d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) **\*282** [*Wilcoxon v.* *McGhee,* 12 Ill. 381;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1851007826&pubNum=432&originatingDoc=Ib3a0e826f95a11d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Colvin v. Burnett,* 2 Hill. 620](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1842007353&pubNum=2406&originatingDoc=Ib3a0e826f95a11d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

**\*\*23** Being fully satisfied with the former opinion, we must deny a rehearing.

***Thorp v. Freed*, 1 Mont. 651, (August, 1872**, S. Ct. Montana – Territory; statehood Nov. 8, 1889)

*[pre-statehood case, no patent had been issued to either party by the United States]*

This case, in some respects, is anomalous. The plaintiffs assert a right to the waters of Prickley Pear creek, as appropriators thereof for the purposes of irrigation, and complain that the defendants have diverted some of the waters of said creek, and prevented the same from flowing into plaintiffs’ irrigating ditches, and ask for an injunction to prevent the continuance of this breach of their rights.

This assignment of errors is so general that, as has been frequently held by this court, they cannot be considered.

The material issues having been found against the plaintiffs and in favor of the defendants, there certainly was no error in law for the court to refuse to grant the injunction asked for by the plaintiffs

The court refused to grant the injunction prayed for by plaintiffs and gave the defendants judgment for costs.

***Judgment affirmed, with costs.***

**WADE, C. J.** I concur with Justice KNOWLES, that the **\*665** judgment of the court below should be affirmed …

In the case of *Vansickle v. Haines,* before referred to, the court say: “It is a proposition universally admitted that the United States is the unqualified proprietor of all public lands to which the Indian title has been extinguished. Certainly there is none other who has any right to or claim upon it which in any way qualifies the right of the federal government. Although it has sometimes been suggested that the unoccupied lands belonged to the several States in which they may be located, the suggestion has never received the serious sanction of statesmen or the courts of the country. On the contrary, it is the universal language of the judges that the unqualified right of property is in the United States.

**On the sale of lands by the United States the patent transfers to the purchaser the entire legal estate, and seizin to as full an extent as the government held them.**’ [2 Gilman 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=2371&cite=2GILMER651&originatingDoc=I7fa47565f86511d99439b076ef9ec4de&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

Then we are safe in saying that the government of the United States has an absolute property in the soil of the public domain, and in the waters flowing over or upon the same, and has a right to sell both, and the water flowing over, upon, or through such lands passes with the land, as incident thereto, and as a part and parcel thereof, and a **purchaser takes the whole of the grantee’s title, both as to the land and as to the water thereon.**

**Conceding the fact, that the government retains the right to the final disposition of the soil and the waters flowing over the same, and this result must inevitably follow, and each purchaser from the government, of lands along a stream, acquires all the title of the grantor, and this title carries with it property in the soil and waters naturally flowing over the same. If this is not the case the prior appropriator takes title to the water as against the government.**

**What says the government of the United States to the doctrine that renders the public domain of Montana utterly of no value? The doctrine of prior appropriation robs the general government of its property, by making the government lands of no value. And all these consequences, so disastrous in any view, are to be visited upon Montana, that a few individuals may have what does not now, and never did, belong to them.**

***McGarrahan v. New Idria Mining Co.*, 96 U.S. 316 (1877)**

**\*\*1** ERROR to the Supreme Court of the State of California.

This was ejectment by William McGarrahan in the District Court of the Twentieth Judicial District of California in and for Santa Clara County, against the New Idria Mining Company, to recover possession of certain lands in that State known as the Rancho Panoche Grande. He claimed them under a patent therefor which he alleged had been issued by the United States to Vicente P. Gomez, his grantor, under the act of Congress to **\*317** ascertain and settle the private land claims in the State of California, approved March 3, 1851. 9 Stat. 631. The patent was not produced upon the trial; but the plaintiff put in evidence a certified copy of an instrument, as the same was recorded in a volume kept at the General Land-Office at Washington for the recording of patents of the United States for confirmed Mexican land grants in California, being volume 4 of such records, upon pages 312-321 inclusive. The concluding portion of that copy is as follows:--

‘In testimony whereof, I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed.

‘Given under my hand at the city of Washington, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

[L. S.] ‘By the President: ABRAHAM LINCOLN.

By W. O. STODDARD,

‘*Secretary*.

‘*Acting Recorder of the General Land-Office*.’

**As the only question decided by this court is, whether the exemplification admitted on the trial of the cause shows upon its face the execution of a patent sufficient in law to pass the title of the United States, no reference is made to the other points which arose in the court below** and were elaborately discussed by counsel here.

The District Court rendered judgment for the defendant, which was affirmed by the Supreme Court. McGarrahan then sued out this writ of error.

By sect. 8 of the ‘act for the establishment of a general land-office in the Department of the Treasury’ (2 id. 717), it is enacted, that ‘all patents issuing from the said office shall be issued in the name of the United States and under the seal of said office, and be signed by the President of the United States, and countersigned by the commissioner of said office, and shall be recorded in said office in books to be kept for the purpose.’ Thus the patent executed in the prescribed form which issues from the General Land-Office is made the instrument of passing title out of the United States. **The record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent, because, like the patent, it shows that a patent containing the grant has been issued**. **\*\*4** The record called for by the act of Congress is made by copying the patent to be issued into the book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the General Land-Office. If the instrument as recorded is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but if it is not sufficient, no such presumption arises. **In short, the record, for the purposes of evidence, stands in the same position and has the same effect as the instrument of which it purports to be a copy.** The same defences can be made against the record as could be made against the instrument recorded. **The public records of the executive departments of the government are** not, like those kept pursuant to ordinary registration laws, intended for notice, but **for preservation of the evidence** of the transactions of the department.

**Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land-Office, and countersigned by the recorder.** **Until all these things have been done, the United States has not \*321 executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory.**

We are of the opinion that, **because this record does not show a patent countersigned by the recorder, it is not sufficient to prove title in the party under whom McGarrahan claims**. This makes it unnecessary to consider any of the other questions which have been argued; and the judgment is

***Affirmed*.**

***Moore v. Robbins*, 96 U.S. 530 (1877)**

This case is brought before us by a writ of error to the Supreme Court of the State of Illinois.

In its inception, it was a bill in the Circuit Court for De Witt County, to foreclose a mortgage given by Thomas I. Bunn to his brother Lewis Bunn, … **In the progress of the case, the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land; and they were made defendants, and answered.**

**Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, …and had the patent of the United States giving him the title to it**

It will thus be seen, that, while Moore and Davis each assert title to a different forty acres of the land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

**As regards Moore's branch of the case, it seems to us free from difficulty.**

whereupon **Moore** appealed to the Commissioner of the General Land-Office, who reversed the decision of the register and receiver, and **on this decision a patent for the land was issued to Moore, who has it now in his possession.** Some time after this patent was delivered to Moore, Bunn appealed from the decision of the commissioner to the Secretary of the Interior, who reversed the commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the Land Department did not venture to issue another for the same land; and **so there is no question but that Moore is vested now with the legal title \*532 to the land, and was long before this suit was commenced.** Nor is there, in looking at the testimony taken before the register and receiver and that taken in the present suit, any just foundation for Bunn's pre-emption claim.

the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered.

**A patent,’** says the court in [*United States* v. *Stone* (2 Wall. 525),](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1864197479) **‘is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal.** In England, this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy.’

But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer **\*534** can entertain an appeal. He is absolutely without authority. **If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.** If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the Executive Department, it can be exercised at any time, however remote. **It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded.**

The order of the Secretary of the Interior, therefore, in **Moore**'s case, was made without authority, and is utterly void, and he **has a title perfect both at law and in equity**.

**TRANSPORTATION COMPANY v. WHEELING 99 U.S. 273 (1879)**

Beyond question these authorities show that all subjects over which the sovereign power of a State extends are objects of taxation, the rule being that the sovereignty of a State extends to every thing **which exists by its own authority or is introduced by its permission**, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal government, whose laws, made in pursuance of the Constitution, are supreme. [McCulloch v. Maryland, 4 Wheat. 429](https://scholar.google.com/scholar_case?case=9272959520166823796&q=Wheeling&hl=en&as_sdt=400003); [Savings Society v. Coite, 6 Wall. 604](https://scholar.google.com/scholar_case?case=2816602321847631460&q=Wheeling&hl=en&as_sdt=400003).

Legislative power to tax, as a general proposition, extends to all proper objects of taxation within the sovereign jurisdiction of a State; but the power of a State of the Union to lay taxes does not extend to the instruments of the national government, nor to the constitutional means to carry into execution the powers conferred by the Federal Constitution. Tax laws of the State cannot restrain the action of the national government, nor can they circumscribe the operation of any constitutional act of Congress. They may extend to every object of value belonging to the citizen within the sovereignty of the State, **not within the express exemptions of the Constitution,**[**282\*282**](https://scholar.google.com/scholar_case?case=10102442631289786663&q=Wheeling&hl=en&as_sdt=400003#p282)**or those which are necessarily implied as falling within the category of means or instruments to carry into execution the powers granted by the fundamental law.** [Day v. Buffington, 3 Cliff. 387](https://scholar.google.com/scholar_case?about=3459852831913829420&q=Wheeling&hl=en&as_sdt=400003).

Taxation, beyond all doubt, is the exercise of a sovereign power, and it must be admitted that all subjects **over which the sovereign power of a State extends** are objects of taxation; but **it is equally clear that those objects over which it does not extend are exempt from State taxation, — from which it follows that the means and instruments of the general government are exempt from taxation.** [McCulloch v. Maryland; supra](https://scholar.google.com/scholar_case?case=9272959520166823796&q=Wheeling&hl=en&as_sdt=400003).

***Manning v. San Jacinto Tin Co.*, 9 F. 726, 729 (1882)**

*[my note: con man tried to steal land with tin mines from patentee]*

that in 1846 Gov. Pio Pico granted to Maria del Rosario Estudillo de Aguirre 11 leagues of land in what is now San Diego county, under the name of ‘Rancho Sobrante de San Jacinto Viejo y Nievo,‘ … **The patent described in the bill was issued upon a Mexican grant made in 1846, after confirmation by the board of land commissioners, affirmed by the States courts on appeal, in pursuance of the act of congress of March 3, 1851,** ‘to settle private land claims in the state of California.‘ 9 St. 631. The effect of a patent issued upon such confirmation of a Mexican grant of the kind has been settled by the supreme court of the United States as well as by numerous decisions of the supreme court of California. In [Beard v. Federy, 3 Wall. 491,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1865145866&pubNum=780&originatingDoc=I6d900aa8556311d9a99c85a9e6023ffa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the supreme court of the United States states the effect of such a patent in the following language:

**‘In the first place, the patent is a deed of the United States.** **As a deed, its operation is that** of a quitclaim, or rather **of a conveyance of such interest as the United States possessed in the land, and** **it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners.** **In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. … This instrument is, therefore, record evidence of the action of the government upon the title of the claimant.** By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. **As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.**

The complainant, then, has no standing to impeach the record on the ground of having a prior Spanish grant. His rights are subsequent and subject to the grant as located. He is equally without standing on the other ground; he alleges no ‘equitable rights,‘ or ‘rightful claim **\*732** under the title confirmed;‘ he does not claim any interest under the Mexican grant, confirmed and patented, or that the patent was issued to the wrong party; he claims that the grant, though valid, and confirmed to the rightful party, was improperly located. …. The bill is singularly barren of allegations of specific facts, though amply full as to general charges **\*736** of facts and legal conclusions on information and belief. **The complainant** does not state who his grantor is, or who any one of the other locators of some 400 mining claims described as belonging to him is, nor when they, or any of them, were conveyed to him or his grantor, except that they were conveyed to his grantor before October 27, 1867, and to himself after that date. … The survey and the patent are of record, and open to everybody’s inspection and examination. The incorporation of the defendant is a matter of public record.

***St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636 (Oct, 1881, Mar 6, 1882)**

 **(PLEADING)**

This was an action at law brought in one of the courts of Colorado by the St. Louis Smelting and Refining Company, a corporation created under the laws of Missouri, for the possession of a parcel of land in the city of Leadville. On application of the defendants it was removed to the Circuit Court of the United States. **The complaint is in the usual form of actions for the possession of real property** under the practice obtaining in Colorado. It alleges that **the plaintiff was duly incorporated**, with power to purchase and hold real estate; **that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them, to the damage of the plaintiff** of $5,000. … the **plaintiff offered in evidence a patent of the United States to Thomas Starr**, dated March 29, 1879 … The patent also specified the boundaries of the tract according to the field-notes, and contained the recitals and words of grant and transfer usually inserted in patents for place mining land. … **The plaintiff traced title to the land by sundry mesne conveyances from the patentee**.

The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. **It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces**. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. Moore v. Wilkinson, 13 Cal. 478; Beard v. Federy, 3 Wall. 478, 492.

The difficulty with the court below, as seen in its charge, evidently arose from confounding “location” and “mining claim,” as though the two terms always represent the same thing, whereas they **\*649** often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, [The judge screwed up in his instructions to the jury which wrongly decided for defendants, therefore case REMANDED for a new trial], which was ***St. Louis Smelting & Ref. v. Green***, 13 F. 208 (June 19, 1882).

***St. Louis Smelting & Ref. v. Green*, 13 F. 208 (June 19, 1882)**

This is an action of ejectment, and the record shows, and the defendants by their pleadings admit, that the plaintiff claims under a patent of the United States. Some of the questions in the case have been determined heretofore upon demurrers to former answers. The questions now to be considered arise upon demurrer to the third amended answer. By this pleading the defendants seek to attack, in this action of ejectment, the patent **\*209** under which the plaintiff claims. They do so upon two grounds, substantially. The answer is quite voluminous, but its allegations may all be summarized under two heads:

First, that the patent was obtained by the patentee, Mr. Starr, under whom the plaintiff claims, by fraud, conspiracy, bribery, and perjury; second, defendants plead, as an estoppel, certain facts, … **Another action of ejectment, arising upon this identical patent, was brought in this court some time since, and was tried here. The court in that case admitted certain evidence tending to show that the officers of the land department had issued the patent improperly and erroneously. The judgment of the court in that case has been reversed, and an elaborate opinion pronounced by Mr. Justice Field, is now before us. In that opinion, the doctrine is laid down so clearly and emphatically as to leave no room for doubt, that, in an action of ejectment, the defendant cannot be permitted to attack a patent, even upon the ground of fraud. He must resort to a court of equity. …**According to the doctrine thus expressed, and the cases cited in its support,— and there are none in conflict with it,— there can be no doubt that the court below erred in admitting the record of the proceedings upon which the **\*210** patent was issued, in order to impeach its validity, … Without reading further from that opinion, it is sufficient to say that the doctrine is fully and elaborately discussed, and **numerous cases are cited as establishing the doctrine that a patent of the United States, in an action of ejectment, cannot be collaterally attacked.**

***Steel v. St. Louis Smelting & Refining Co*., 106 U.S. 447 (December 18, 1882)**

This was an action by the St. Louis Smelting & Refining Company, a corporation created under the laws of Missouri, against Steel and others, to recover the possession of certain real property…. the title of the plaintiff was derived from one Thomas Starr, to whom a patent was issued by the United States, bearing date on the twenty-ninth of March, 1879, embracing the premises in controversy; and the special defenses set up were that the patent was void; that fraud, bribery, perjury, and subornation of perjury were used to obtain it; and that Starr, the patentee, was estopped by his conduct from asserting title to the premises.

It is among the elementary principles of the law that in actions of ejectment **the legal title must prevail**. **The patent of the United States passes that title**. **Whoever holds it must recover** against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce. However great these may be they constitute no defense in an action at law based upon the patent. That instrument must first be got out of the way, or its enforcement enjoined, before others having mere equitable rights can gain or hold possession of the lands it covers. This is so well established, so completely imbedded in the law of ejectment, that no one ought to be misled by any argument to the contrary.

As we said in the case of *Smelting Co.* v. *Kemp:* **It is this unassailable character (of the patent) which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces**. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence.  [104 U. S. 641](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1881199965).

***Bicknell v. Comstock*, 113 U.S. 149, (1885)**

This is a writ of error to the circuit court for the Eastern district of New York. The action is for a breach of covenants of warranty in a conveyance of land located in Iowa. It is a manifest attempt to obtain the judgment of this court on one of the complicated phases of the disputed titles growing out of the grants of lands on the Des Moines river to aid in improving the navigation of that river, and in constructing railroads through these lands, … The plaintiff below (Comstock) is not the original grantee in the deed on whose covenants he sues. He does not allege that he has been evicted under any judicial proceedings from possession of the land, but, on the contrary, it is one of the agreed facts on which the case was heard by the court without a jury, **\*151** that defendant, Bicknell, and those claiming under his deed, including, of course, the plaintiff, have been in actual possession of the land in question ever since May 23, 1862 … One of the facts admitted in the case stated is that: ‘It is admitted that on the first day of May, 1869, a patent in due form was executed by the president of the United States, conveying to said Bicknell said lots 3 and 4, which patent was duly recorded in the general land-office on the same day at Washington, D. C., and thereupon the original was transmitted to the United States land-office at Fort Dodge, Iowa, for said Bicknell.**’ In June, 1878, the commissioner \*\*400 of the general land-office ordered a return of this patent to his office, and thereupon ‘tore off the seals and erased the president's name front said patent, and mutilated the record thereof in the general land-office, all without the consent, and against the protest, of the grantees of said Bicknell.’** **That this action was utterly nugatory, and left the patent of 1869 to Bicknell in as full force as if no such attempt to destroy or nullify it had been made**, is a necessary inference from the principles established by the court in the case of *McBride* v. [*Schurz*, 102 U. S. 378.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1880197580) T**hat principle is that when the patent has been executed by the president, and recorded in the general land-office, all power of the executive department over it has ceased.** It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States, if it had not been divested before, so that Bicknell or his grantees being in possession under claim and color of title, the statute of limitation began to run in their favor.

**Van Brocklin v. Anderson (Van Brocklin v. Tennessee), 117 U.S. 151 (1886)**

While the power of taxation is one of vital importance, retained by the states, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a state is subordinate to, and may be controlled by, the constitution of the United States. That constitution and the laws made in pursuance thereof are supreme. They control the constitutions and laws of the respective states, and cannot be controlled by them. The people of a state give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular state, but by the people of all the states; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. **All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority,** **\*\*673** **or is introduced by its permission; but does not extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States**. The attempt to use the taxing power of a state on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. **The states have no power, by taxation \*156 or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.** Such are the outlines, mostly in his own words, of the grounds of the judgment delivered by Chief Justice MARSHALL in the great case of [*McCulloch* v. *Maryland*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1800123335), in which it was decided that a statute of the state of Maryland, imposing a tax upon the issue of bills by banks, could not constitutionally be applied to a branch of the Bank of the United States within that [state. 4 Wheat. 316, 425-431, 436](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1800123335&ReferencePosition=425).

***Wright v. Roseberry*, 121 U.S. 488 (1887)**

This is an action to recover possession of a tract of land (ejectment) …

The complaint is in the usual form in such actions, alleging the plaintiff’s seizin in fee of the land, and his right of possession, the unlawful entry thereon of the defendants, and their ousting him therefrom; and their continued withholding of the possession, to his damage of $1,000. It also alleges that the rents and profits of the land are of the value of $560 a year. The prayer is for judgment of restitution of the premises, and for the damages, rents, and profits claimed.

 Plaintiff claimed title under the swamp land act which transferred title to the state of California and defendants claimed title by patent from the United States under the preemption law. Remanded to determine if the land had been swampland and therefore title had transferred to the state. “… **the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp-land act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the state, and, after the segregation map was deposited with the surveyor general of the state, with notice also that they were actually segregated and claimed by the state as such lands.”**

***United States v. Maxwell Land-Grant Co.*, 121 U.S. 325 (1887).**

The case before us is an appeal from the circuit court of the United States for the district of Colorado. The decree from which this appeal is taken dismissed a bill brought in that court by the United States against the Maxwell Land-Grant Company (and other RR) …. It was brought by the attorney general of the United States, and its purpose was to have a decree setting aside and declaring void a patent from the United States granting to Charles Beaubien and Guadalupe Miranda, their heirs and assigns, a tract of land described in a very extensive survey, which is made a part of the patent…. By virtue of certain mesne conveyances, and other transactions not necessary to be recited here, it may be stated that the title conveyed by the patent to Beaubien and Miranda inured, immediately upon its being issued, to the benefit of the Maxwell Land-Grant Company, a corporation which has the beneficial interest in the grant, so far as appears in this record, and the contest is mainly, if not exclusively, between the United States and that company.

The case before us is much stronger than the ordinary case of an attempt to set aside a patent, or even the judgment of a court, because it demands of us that we shall disregard or annul the deliberate action of the Congress of the United States. The constitution declares (article 4, § 3) that ‘the Congress shall have power to dispose of **and make all needful rules and regulations respecting the territory or other property belonging to the United States**.’ At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property, was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress. Certainly the power of the courts can go no further than to make a construction **of what Congress intended** to do by the act, which we have already considered, **confirming this grant** and others.

***Kirby v. Lewis*, 39 F. 66 (1889) Circuit Ct. E.D. Arkansas**

This is an action of ejectment. It was originally brought against numerous defendants to recover 201.52 acres of land, comprising a considerable portion of the city of Texarkana and its suburbs.

The case can best be understood by stating the defendants’ title first. … entered by the Cairo & Fulton Railroad Company at the United States land-office at Washington, Ark., December 6, 1856, and was patented to the railroad company July 1, 1859. **The defendants are the successors and grantees of the Cairo & Fulton Railroad Company, and own all the right and title to the land that passed under the patent of the United States to that company**.

**The practice act of this state requires the plaintiff in an action of ejectment ‘to set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit,’ and to file copies of the same.** In their complaint the *plaintiffs rely for the maintenance of their suit on a deed for the land in controversy, executed to them by the commissioner of state lands [Quit Claim Deed]*.

**As between such a deed and a patent previously issued by the United States, the patent must prevail**. There is no presumption that all the public lands that belonged to the United States on the 28th of September, 1850, were swamp and overflowed lands. In the absence of proof, the contrary presumption must obtain. The grant to the state was of the swamp and overflowed lands. They had to be identified. To perfect the title of the state, or one claiming under her, to land as swamp land, it must be shown to have been such at the date of the grant, in some of the modes prescribed by law and the regulations of the land department, or, in cases where it is admissible, by parol evidence on the trial.

***Wilson v. Fine*, 38 F. 789 (1889) District Court, D. Oregon**

**An action at law is the acknowledged remedy for the recovery of the possession of real property wrongfully withheld from the plaintiff, or to recover damages for a trespass thereon**; while a suit in equity is the proper remedy to compel a conveyance thereof, when wrongfully refused, or to establish or enforce a trust therein.

The law of the state is (section 316, Comp. 1887) that ‘any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law.‘ This is substantially the common-law action of ejectment,

The maxim that the plaintiff must recover on the strength of his own title, not on the weakness of the defendant’s, is applicable to all actions for the recovery of property.

***Redfield v. Parks*, 132 U.S. 239 (1889)**

In the case of [Lindsey v. Miller’s Lessee, 6 Pet. 666,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800122634&pubNum=780&originatingDoc=If333d2129cba11d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the defendants relied upon a patent issued by the commonwealth of Virginia, dated March, 1789, under the survey and entry made in January, 1783, and duly recorded in that year. They then proved possession for up wards of 30 years. The plaintiff introduced a patent from the United States, in which was the legal title, dated December 1, 1824, 35 years after the patent issued by the commonwealth of Virginia…. The title under which the plaintiff in the ejectment claimed emanated from the government in 1824. Until this time there was no title adverse to the claim of the defendants. There can therefore be no bar to the plaintiff’s action.’ “This is a case of great hardship on the part of the defendants below; and regret is felt that the principles of law which are involved in the cause do not authorise a reversal of the judgment" given by the circuit court.” [Judgment for plaintiff on his patent]. *Lindsey v. Miller’s Lessee,* 31 U.S. 666 (1832).

 **The plaintiff relied upon, and introduced in evidence, a patent from the United States**, dated April 15, 1875, conveying the property to the Mississippi, Ouachita & Red River Railroad Company, reciting the purchase by that company of the land in controversy … The plaintiff, Redfield, purchased this land at a judicial sale, on a judgment against that company… and received a deed under that purchase.

The **\*\*84** defendants relied upon a deed made by the county clerk of Lafayette county, Ark. to W. P. Parks and James M. Montgomery, on the 11th day of August, 1871, upon a sale for taxes for the year 1868, and upon adverse possession under the statute of Arkansas of two years in regard to claims under tax-sales, and the general statute of limitation of seven years.

In the courts of the United States, where the distinction between actions at law and suits in equity has always been maintained, the action of ejectment is an action at law, and the plaintiff must recover on the legal title. We think it very clear that the judge was correct in holding this tax-deed to be void. It was not merely void by extrinsic facts shown to defeat it, but was absolutely void on its face. ‘A tax-deed, to be sufficient, when recorded, to set the statute of limitation in operation, must of itself be *prima facie* evidence of title. **judgment for the plaintiff**.

***United States v. Scholl*, 45 F.758 (1891) Circuit Court D. Washington**

This is a suit brought by direction of the attorney general of the United States to obtain a decree canceling a patent for a tract of land issued in the year 1887 to the defendant, John P. Scholl, who made an entry of it as timber land under the act of June 3, 1878, the entry and proofs being made in the year 1883…. Several transfers of the title, however, have been made. **The present owners of the land bought it after the patent had issued. They bought it from the apparent owners of a perfect legal title, and there would be no equity, it seems to me, in imposing upon them the entire loss of the property and the purchase money which they have paid for it.** The statute under which the entry was made contains a provision that, if false representations are made in acquiring title, the entryman shall forfeit the money which he pays, and all his right, title, and interest to the land. It also provides that every conveyance that he makes of the land shall be void, except as against bona fide purchasers, recognizing the principle of equity that the purchaser of a legal title for a valuable consideration, without notice of any outstanding equitable claims against the property, is entitled to protection to the extent that equity will not enforce a merely equitable right against his legal title…. **The patent \*759 recites that the land had been purchased and paid for under the act of April 24, 1820,— the general statute of the United States providing for the sale of public land** under the direction of the president,— and a person who would examine the patent itself **would not be apprised from it that the question of whether the land was agricultural or timber land had anything to do with the title.**

***Packard v. Bird*, 37 U.S. 661 (1891)**

Summary: A patent by the federal government, which in terms bounds the land on the margin of a stream navigable in fact and above tide-water, carries the title only to the water's edge, and not to the center of the stream.

This is an action for the possession of an island, embracing about 80 acres of land, in the river Sacramento… The question presented is whether the patent of the United States... embraces the island ….

It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that, where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark.

Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of the The [Daniel Ball, 10 Wall. 557, 563:](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1870102975&ReferencePosition=563) ‘They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.’

In this case, we accept the view of the supreme court of California in its opinion, as expressing the law of that state, ‘that the Sacramento river, being navigable in fact, the title of the plaintiff extends no further **\*\*212** than the edge of the stream.’

*The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states,* ***subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee.***

**Davis v. Wiebbold, 139 U.S. 507 (1891)**

When the entry of the town-site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, it was not known-at least it does not appear that it was known-that there were any valuable mineral lands within the town-site; and the important question is whether, in the absence of this knowledge, the defendant can be deprived, under the laws of the United States, of the premises purchased and occupied by him because of a subsequent discovery of minerals in them, and the issue of a patent to the discoverer. **After much consideration, we have come to the conclusion that this question must be answered in the negative**.

The land department in this very case, as in cases of patents to pre-emptioners, homestead claimants, and other purchasers of the public lands, have acted, and, I think, correctly, upon the idea that patents to lands, not known to be mineral lands at the time the patent issued, carry the title to all mines subsequently discovered in the lands, notwithstanding**\*521** the reservation from sale of mineral lands in the acts of congress. By the words ‘mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such, **at the time of the grant or patent**.  And the United States courts, which have had occasion to act upon this subject, so far as I am aware, have adopted that idea.   [Milling Co. v. Spargo, 8 Sawy. 645, 16 Fed. Rep. 348.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=348&FindType=Y&SerialNum=1883180765) ‘There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent. The supreme court has not yet had occasion to decide the point as to the effect on a patent of a discovery of a valuable mine in lands subsequently to the issue of a patent. Any other construction would be disastrous in the extreme to the holders of lands in California under United States patents. If land, which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States 15 years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and, a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee or his grantees can rest in security, would be but a delusion and a snare.’

We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in [Smelting Co. v. Kemp, 104 U. S. 636, 640-646,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1881199965&ReferencePosition=640) and in [Steel v. Smelting Co., 106 U. S. 447, 451, 452, 1 Sup. Ct. Rep. 389.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1882180083)

**The laws of congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide, and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of private individuals, can be patented under any proceedings before the land department or otherwise.**

**But it is not perceived where the jurisdiction exists under the laws of the United States to grant a patent for a mine on lands owned by private individuals-which was the case here-**if the lots for which the defendant received a deed were included within the town-site patent and the location of the mining claim was subsequently made.

We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in [Smelting Co. v. Kemp, 104 U. S. 636, 640-646,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1881199965&ReferencePosition=640) and in [Steel v. Smelting Co., 106 U. S. 447, 451, 452, 1 Sup. Ct. Rep. 389.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1882180083)

***Knight v. United States Land Association*, 142 U.S. 161 (1891).**

In error to the supreme court of the state of California. Reversed.

This was an action of ejectment, brought in the superior court in and for the city and county of San Francisco, Cal., by the United Land Association, a corporation of that state, and one Clinton C. Tripp, against Thomas Knight, to recover a block of land in that city bounded by Barry, Channel, Seventh, and Eighth streets, and known as ‘Block No. 40.’ The controversy involves an interesting question of title to the property described, the plaintiffs asserting that the premises were below the line of ordinary high-water mark at the date of the conquest of California from Mexico, and, therefore, upon the admission of the stated into the Union in 1850, inured to it in virtue of its sovereignty over tide-lands; and **\*163** the defendant insisting that the lands are a portion of the pueblo of San Francisco, as confirmed and patented by the United States.

Syllabus: **The patent** of the United States is evidence of the title of the city of San Francisco under Mexican laws to the pueblo lands, **and is conclusive**, not only as **against the United States and all parties claiming under it by titles subsequently acquired**, but also against all parties except those who have full and complete title acquired from Mexico, anterior in date to that confirmed by the decree of confirmation.

***Hardin v. Jordan*, 140 U.S. 371 (1891). (PLEADING)**

**This is an action of ejectment** brought by Gertrude H. Hardin, **the plaintiff in error**, to recover possession of certain fractional sections of land lying on the west and south sides of a small lake in Cook county, Ill., situate about a dozen miles south of Chicago, and two or three miles from Lake Michigan; and also to recover the land under water in front of said fractional sections, and land from which the water retires at low water. The lake is two or three miles in extent, and the main question in the cause is whether the title of the riparian owner on such a lake extends to the center of the lake, or stops at the water’s edge. The court below decided that the plaintiff’s title only extended to low-water mark, and to that extent gave judgment for the plaintiff, but as to all the land under permanent water gave judgment for the defendant. The question is of much importance, and deserves a careful consideration.

**The plaintiff claimed under a patent from the United States, granted to her ancestor, John Holbrook, in 1841.**

**The defendant disclaimed any interest in the fractional quarter sections themselves, but claimed all the land in front of them, whether covered with water or not, by virtue of various patents granted in 1881**. … The physical conditions of the land and water are substantially what they were at the time of the original survey; **that said lake or lakes are not navigable waters**.

**According to the settled course in actions of ejectment, the court did not inquire into the validity of the title claimed by the defendants, as compared with that of the plaintiff, but confined itself to the question of the validity of the plaintiff’s title to the land in dispute, on the assumption that the plaintiff must stand or fall by her own title, and not by reason of any defect in the title of the defendant. Recognizing this as the governing rule in the case, we are called upon to decide whether the title of the plaintiff, under the patent granted to her ancestor in 1841, extended beyond the limits of the actual survey, under the permanent waters of the lake in front of the land described in the patent, and not merely to the line of low-water mark, as held by the court below.**

The consequence of this doctrine is that all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right.

**On the whole, our conclusion is that the court below ought to have given judgment for the plaintiff, as against the defendant, to the center of Wolf lake, instead of to low-water mark, in front of the … and to the middle of the bay or projection of said lake in front of the … The judgment must be reversed, and the cause remanded, with instructions to enter judgment for the plaintiff in conformity with this opinion**.

***Russell v. Maxwell Land Grant Co.*, 158 U.S. 253, 257 (1895)**

**\*253** On May 19, 1888, the defendant in error, as plaintiff, commenced this action in the circuit court of the United States for the district of Colorado to recover the possession of a certain **\*254** tract of land. After answer, the case came on for final trial on October 10, 1890. The verdict and judgment were in favor of the plaintiff, and the defendants allege error.

**255** **The Maxwell land grant is no stranger to this court**. After the issue of the patent a bill was filed by the United States to set it aside on the ground of error and fraud, and after an exhaustive investigation, both in the circuit and this court, a decree was entered, dismissing the bill. [Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887180109&pubNum=708&originatingDoc=I5c047bd69cbd11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Id., 122 U. S. 365, 7 Sup. Ct. 1271;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887180110&pubNum=708&originatingDoc=I5c047bd69cbd11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Interestate Land Co. v. Maxwell Land-Grant Co., 139 U. S. 569, 580, 11 Sup. Ct. 656,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180216&pubNum=708&originatingDoc=I5c047bd69cbd11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) in which it was said:

‘The confirmation and patenting of the grant to Beaubien and Miranda operated to divest the United States of all their rights to the lands embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. And the only way that that grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person.’

The confirmation of this grant was made by act of congress of June 21, 1860 (12 Stat. 71). Whatever doubts might have existed before as to the limits or extent of the grant, were settled by that confirmation. The only claim of the defendants is one under the United States, arising on April 6, 1874, 14 years after the confirmation of the Maxwell land grant. It is therefore inferior and subordinate to that of the plaintiff.

In order to obviate that effect of this, the defendants offered to prove on the trial that the survey described in and upon which the patent was based was inaccurate … This testimony was rejected by the court, and this is the error complained of.

**The case of Beard v. Federy, supra, is in point.** ‘**By it [the patent]** the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. **As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent.** It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor.

**There was no error in the ruling of the circuit court, and its judgment is affirmed**.

***In re Emblen*, 161 U.S. 52 (1896)**

This was a petition of George F. Emblen for a writ of mandamus to the secretary of the interior to hear and decide a contest between Emblen and George F. Weed as to a quarter section of land in Colorado.

In February, 1895, a patent was accordingly issued to Weed;

This is an attempt to use a writ of mandamus to the secretary of the interior as a writ of error to review his acts, and to draw into the jurisdiction of the courts matters which are within the exclusive cognizance of the land department.

The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. **After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee, and cannot be revoked or set \*57 aside, except upon judicial proceedings instituted in behalf of the United States.** The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor.  All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies.    [Johnson v. Towsley, 13 Wall. 72;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1871194387) [Moore v. Robbins, 96 U. S. 530;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1877155348) [Marquez v. Frisbie, 101 U. S. 473;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1879194020) [Smelting Co. v. Kemp, 104 U. S. 636;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1881199965) [Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1882180083) [Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1893180158) [Turner v. Sawyer, 150 U. S. 578, 586, 14 Sup. Ct. 192](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1893180217).

Writ of mandamus denied.

***Kirwan v. Murphy*, 83 F. 275 (1897)**

This was a bill in equity filed by Simon J. Murphy and others, the appellees, for an injunction restraining and **\*276** enjoining P. H. Kirwan and Thomas H. Croswell, the appellants, from making a survey of certain lands surrounding Cedar Island Lake, in township 57 N., of range 17 W. of the fourth Principal Meridian, in St. Louis county, Minnesota, the survey of the lands having been ordered by the land department of the United States. … All of the lands in the township were, according to the government plat, disposed of and patented by the government to divers persons between December, 1879, and March, 1884 [land dept. wanted to resurvey after patents were granted] … Under ordinary circumstances, this court would not grant an injunction to prevent a trespass; but the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States government, acting only in obedience to orders from his superior officers in the Indian department, and for that reason I deem it entirely proper for this court to restrain him from committing a tort while assuming to act in his official capacity.‘

We have already said that the government parted with its title to the lands in controversy when it issued its patents therefor; and in [Moore v. Robbins, 96 U.S. 530,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877155348&pubNum=780&originatingDoc=Iaffd27b4567b11d9bf30d7fdf51b6bd4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Mr. Justice Miller, speaking for the court, said:

‘With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. … And again, in the same case, referring to the power of the secretary of the interior after patent has been issued, at page 534, it is said:

‘He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and, in many cases, unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.‘

In view of these considerations, we are not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed.

***Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897).**

This was an action of ejectment, commenced in the circuit court of the United States for the Eastern district of Michigan, on February 11, 1888. On November 28, 1892, the case came on for trial before the court and a jury. At the close of the testimony, the jury, under the instructions of the court, returned a verdict for the defendant. On May 7, 1895, this judgment was affirmed by the court of appeals ([31 U. S. App. 731,](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=3960&cite=31USAPP731&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [15 C. C. A. 335,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1895143528&pubNum=853&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [68 Fed. 155);](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1895143528&pubNum=348&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and to review such judgment, the case was brought **\*590** here on writ of error.

This case involves questions of the power of the land department over the matter of the identification of the particular lands passing under the swamp land act of 1850, of the finality of the action of the secretary of the interior in approving and certifying to the governor of the state a list of such lands, and of the effect of the confirmatory act of 1857.

The act of 1850 made a grant in praesenti; in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification.

Generally speaking, while the legal title remains in the United States, the grant is in process of administration, and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. **Sometimes an act of congress will pass the fee.**

A warrant and survey authorize the proprietor of them to demand the legal title, but do not in themselves constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.’ [Miller v. Kerr, 7 Wheat. 1, 6.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1822124915&pubNum=780&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_780_6&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_6) **After the issue of the patent, the matter becomes subject to inquiry only in the courts and by judicial proceedings.** [U. S. v. Stone, 2 Wall, 525, 535;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1864197479&pubNum=780&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_780_535&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_535) [Moore v. Robbins, 96 U. S. 530;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877155348&pubNum=780&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [U. S. v. Schurz, 102 U. S. 378-396;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1880197580&pubNum=780&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_780_396&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_396) [Bicknell v. Comstock, 113 U. S. 149, 151, 5 Sup. Ct. 399;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885180145&pubNum=708&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180193&pubNum=708&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Williams v. U. S., 138 U. S. 514, 11 Sup. Ct. 457.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180236&pubNum=708&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

the identification by the surveyor general of the land as swamp land had not been challenged for fraud or mistake, it was binding on the question of title, and the approval by the secretary of the interior **and the issue of the patent were simply ministerial acts.** See, also, [Blanc v. Lafayette, 11 How. 104](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800102087&pubNum=780&originatingDoc=I75a9e20f9cbd11d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

We see no error in the judgment of the court of appeals, and it is therefore affirmed.

***Carter v. Ruddy*, 166 U.S. 493 (1897)**

The mere location of Sioux half-breed scrip, issued under the act of April 17, 1854 (10 Stat. 304), vests in the locator only an equitable title, upon which ejectment cannot be sustained in a federal court prior to the issuance of a patent.

**p. 496:** “**An action of ejectment cannot be maintained in the courts of the United States on a merely equitable title**.” See, Langdon v. Sherwood, 124, U. S. 74, 83; Johnson v. Christian, 128 U. S. 374, 382, and cases cited.

***Beley v. Naphtaly*, 169 U.S. 353 (1898)**

**Plaintiff below** (defendant in error here) **brought ejectment to recover possession of lands described in complaint, and also the value of the rents, issues and profits therefrom.** **He alleged he was the owner in fee of the lands in question and entitled to their possession, and that while such owner the defendants wrongfully entered upon the lands and ousted him therefrom, and have since wrongfully withheld from him the possession thereof. He further alleged that he was the owner of the lands by virtue of a patent duly and regularly issued to him by the United States in the year 1893, under and in pursuance of the provisions of the act of Congress of April 24, 1820, ch. 51, 3 Statt. 566, entitled “An act making further provision for the sale of public lands,”** and the acts supplemental thereto, and also under the provisions of section 7 of the act of Congress of July 23, 1866, c. 219, entitled “An act to quiet titles in California,” and that the defendants denied the validity of that patent.

 **The plaintiff put in evidence the patent** issued to him from the United States for the land described in the complaint, and **proved that while he was in the peaceable and quiet possession of such land the defendants entered upon it and ousted him therefrom, and have ever since detained the land from him. He also proved the rental value**.

 The bill of exceptions contains: It was conceded by defendants counsel that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint, or any part thereof, either by certificate of purchase, patent or anything of the kind.

 The Court affirmed the decision for plaintiff in the suit he brought to recover the land from defendants.

***Thompson v. Los Angeles Farming & Milling Co*., 180 U.S. 71, 79 (1901)**

IN ERROR to the Supreme Court of the State of California to review a decision affirming a judgment in favor of plaintiff in an action for lands. *Affirmed*.

This is an action of ejectment in which defendant in error was plaintiff in the court below, and the plaintiffs in error were defendants. It was brought in the superior court of Los Angeles county, state of California. Besides a prayer for the recovery of the land in controversy an injunction was asked against the commission or repetition of certain described trespasses. The land sued for was the south half of the Rancho ex-Mission de San Fernando, with certain exceptions. The defendant in error relied for title upon a patent of the United States to Eulogio de Celis, dated January 8, 1875, which recited that it was based upon the confirmation of his title as one derived from the Mexican government through a deed of grant made the 17th day of June. 1846, by Pio Pico, the then constitutional governor of the department of the Californias. ..More fully on the point of the effect of the patent it was said in *Beard* v. *Federy:*

‘This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. **And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.** If parties asserting interest in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, **the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor**.

***Barker v. Harvey*, 181 U.S. 481 (1901)**

These cases were brought by defendants in error in the superior court of the county of San Diego, California, to quiet their title to certain premises in that county. Decrees rendered in their favor were carried to the supreme court of the **\*482** state, and by that court affirmed.   [126 Cal. 262, 58 Pac. 692.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=660&FindType=Y&SerialNum=1899004259) To such affirmance these writs of error have been sued out.

For these reasons we are of opinion that there was no error in the rulings of the Supreme Court of California, and its *judgments in the two cases are affirmed*.

The land in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848.

Generally speaking**, the plaintiffs claim title by virtue of a patent issued to John J. Warner** on January 16, 1880, in confirmation of two grants made by the Mexican government. On the other hand, **the defendants do not claim a fee in the premises but only a right of permanent occupancy by virtue of the alleged fact that they are mission Indians**, so called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory;

Undoubtedly by the rules of international law, and in accordance with the provisions of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, **\*487** and to decree that all claims which are not thus presented shall be considered abandoned. ‘Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title.**‘Public domain’ is equivalent to ‘public lands,’** and these words have acquired a settled meaning in the legislation of this country. ‘The words ‘public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal **\*\*694** under general laws.’

***King v. Andrews*, 111 F. 860 (1901)**

George H. King brought an action of ejectment in the circuit court of the United States for the district of South Dakota against M. McAndrews, Charles H. Pease, L.C. Rush, and William Lawson to recover possession of lots 3 and 4 and the S.E. 1/4 of the S.W. 1/4 of section 10, in township 104, of range 71 W., of the fifth principal meridian. He alleged in his complaint that he was the owner and entitled to the possession of the land, and that the defendants wrongfully withheld it from him. The defendants denied the title of the plaintiff, admitted their possession, and alleged that the land was a part of the selected site of a town or city when it first became subject to entry, and that the **plaintiff’s title** consisted of a void **patent** issued to Henry J. King on July 6, 1899.

**p. 864:** But land which the department [Land Department] is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and **its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong**. *Minter v. Crommelin*, 18 How. 87, 89; *United States v. Schurz*, 102 U.S. 378, 401; *Moore v. Robbins*, 96 U.S. 530. 533; *French v. Fyan*, 93 U.S. 169, 172; *Quinby v. Conlan*, 104 U.S. 420; *Refining Co. v. Kemp*, 104 U.S. 636, 645-647; *Steel v. Refining Co.*, 106 U.S. 447, 450, 452; *Lee v. Johnson*, 116 U.S. 48, 49; *Heath v. Wallace*, 138 U.S. 573, 585; *Knight v. Association*, 142 U.S. 161, 212; *Noble v. Railroad Co.*, 147 U.S. 174; *Barden v. Railroad Co.*, 154 U.S. 288, 327.

In the last case cited the Supreme Court said:

 “It is the established doctrine, expressed in numerous decisions of this court, that whenever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.”

The attack upon the patent in the case in hand was indirect and collateral, and it cannot prevail. It was an attempt to interpose an equitable defense to a legal cause of action, which is not permissible in the national courts. In this action at law the patent was conclusive evidence of the title in the patentee, and that effect should have been given to it upon the trial below.

The judgment is reversed, and the case is remanded to the court below, with directions to grant a new trial.

***Board of Comm’rs of Miami County v. Godfrey*, 27 Ind. App. 610 (1901).**

Suit by Gabriel Godfrey against the board of commissioners of Miami county to enjoin taxation of plaintiff’s lands, claimed exempt as Indian lands. From a decree granting an injunction, defendants appeal. Reversed.

**Indian voluntarily became citizen of United States and therefore land was taxable under Act of Feb 8, 1887**. Connected case at: *Swimming Turtle v. Board of County Comm’rs*, 441 F.Supp. 368 (N.D. Ind. 1975), *Swimming Turtle v. Board of County Comm’rs*, 441 F.Supp. 374 (N.D. Ind. 1977)

***Bockfinger v. Foster*, 190 U.S. 116 (1903)**, citing *In re Emblen*, 161 U.S. 52, 56:

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Logan County sustaining a demurrer to and dismissing a complaint in an action to devest town site trustees of the title held by them under the Oklahoma town site act. *Affirmed*.

The decisive question in the case is whether the plaintiff’s claim to the land can be made the subject of a suit against the **\*\*838** town site trustees as such. Upon a careful scrutiny of the provisions of the act of 1890, we are of opinion that this question must be answered in the negative. The plaintiff asked a decree declaring that the title acquired by the trustees under the act of Congress for the use of town site occupants be held in trust for and conveyed to him. But no such relief could have been granted if the title acquired by the trustees was held by them in trust for the purposes of the act of Congress, and if, in every substantial sense, so far as real ownership is concerned, the land still belonged to the United States.

That the title was so held by the town site trustees is, we think, clear. They did not hold an indefeasible title as of private right, with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the town site boundary.

**The patent referred to in the *Emblen Case* was a formal, regular patent, designed to pass the title of the United States, and to invest the patentee with all the rights of the United States in the land**.

***Kean v. Calumet Canal & Improv. Co.*, 190 U.S. 452 (1903)**

Thus case had a 1 page decision and a 20 page dissent. If the state of Indiana got a title, it gave one. There is not much controversy on this point. We should follow the decision of the state court in this case so far as this question is concerned…. The resurvey by the United States in 1874 does not affect the Calumet company’s rights. As the United States already had conveyed the lands, it had no jurisdiction to intermeddle with them in the form of a second survey.

From dissent, quoting *Gibson v. Chouteau* (1872):

In Gibson v. Chouteau, (1872) 13 Wall. 92, a state statute of limitations was held ineffective as against a patent from the United States. The court, speaking through Mr. Justice Field, said (p. 100):

“The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.”

p. 485: “Title passed **and vested** according to the laws of the United States.” *Jackson v. Wilcox*, 13 Pet. 498 (1839)

p. 487: Shively, 152 U.S. 1, 44. *St. Anthony Falls Water Co. v. St. Paul Water Comm’rs*, 168 U.S. 349, 362 (1897) cites this Wisconsin case: *City of Janesville v. Carpenter*, 77 Wisconsin 288, 300 (1890): “It is said of riparian owner … It is his private property under the protection of the constitution.”

***Tegarden v. LeMarchel*, 129 F. 487 (1904)**

Action in Ejectment. On demurrer to answer. The plaintiff brought this suit in ejectment in the usual form, and under the act of March 5, 1875,… stated such facts as show a prima facie title in himself… Goodall in his lifetime entered the land in controversy, and shortly afterwards died, leaving certain heirs at law, who had conveyed all their title to the property to the plaintiff. After such conveyance was made, a patent for these lands was issued, on the 27th of May, 1903, to William Goodall, in lieu of one bearing date July 1, 1850…. The defendant answered in five counts… but the answer continues, and sets out the reasons why he is not entitled to the possession, and those reasons are in the nature of an equitable defense, A general demurrer was interposed to each count in the answer.

p. 488: The question therefore arises w**hether or not, in the federal courts, a defendant in ejectment may set up an equitable title to defeat a legal cause of action**. This question has been settled over and over again by the Supreme Court of the United States. In *Gibson v. Chouteau*, 13 Wall. 102, the court say:

“‘**In the federal courts**, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, **the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title**. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in the action of ejectment in the federal courts the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of the title.‘” [same cite as in Redfield v. Parks] … *Johnson v. Towsley*, 13 Wall. 73 [80 U.S. 72, 73]; Moore v. Robbins, 96 U.S. 530; *Smelting Co. v. Kemp*, 104 U.S. 636. … Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. **No state legislation can interfere with this right or embarrass its exercise**,”

**JOY v. CITY OF ST. LOUIS, 201 U.S. 332 (1906) (PLEADING)**

The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully with-holds such possession, to plaintiff's damage in an amount stated.

in stating plaintiff's cause of action it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy, **as to a right which depends upon** the construction or effect of the Constitution, or **some law** or treaty **of the United States**. … This original jurisdiction, it has been frequently held, must appear by the plaintiff's statement of his own claim,… As has been stated, the rule is a reasonable and just one that the **complainant in the first instance shall be confined to a statement of his cause of action,** leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense.

The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises …

In those cases where the dispute necessarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different. In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land

*…whatever… rights attached…* subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee

***McGilvra v. Ross*, 215 U.S. 70 (1909).**

The fundamental question presented is whether rights below high water mark passed to the patentee as appurtenant to the uplands conveyed to them or whether they vested in the state upon its admission into the Union and are subject to the control of the state.

 **The patent in the McGilvra case was issued in 1866, under the act of Congress of April 24, 1820**, entitled “an act making further provision for the sale of public lands.” 3 Stat.L. 566.

**State of Washington admitted to the Union November 11, 1889**. State asserted ownership in fee of all the waters and lands under the waters of the lakes.

**Overview**: The patent holders alleged federal question jurisdiction in their dispute with the State over title to land bordering two lakes. **The circuit court determined that it lacked jurisdiction because prior decisions had removed the issue from controversy. The court agreed that federal question jurisdiction was lacking. In an earlier decision, the Court ruled that grants by Congress of portions of the public lands within a territory to settlers therein, though bordering on or bounded by navigable waters, conveyed of their own force, no title or right below high water mark, and did not impair the title and dominion of the future state when created**, but left the question … **Because the issue raised by the case had been settled, there was no federal question jurisdiction.** Shively v. Bowlby, 152 U.S. 1 (1891); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1852); United States v. Winans, 198 U.S. 371 (1905); Prosser v. Northern Pac. RR, 152 U.S. 59 (1894); Joy v. St. Louis, 201 U.S. 332 (1906); Scranton v. Wheeler, 179 U.S. 141, 190; United States v. Mission Rock. 189 U.S. 391 (1903); Barney v. Keokuk, 94 U.S. 324, 338 (1876).

***Hobart v. Hall*, 174 F. 433 (1909), affirmed by Hall v. Hobart, 186 F.426 (1911)**

**Very long decision, 43 pages; dozens of cites regarding riparian rights**.

Plaintiff claimed island in Mississippi River, deposited over the years subsequent to issue of patent, pursuant to patent from the United States dated March 24, 1849. This was prior to Minnesota becoming a state on May 11, 1858. Defendant claimed title pursuant to state issued patent in 1902 after the island had become fully formed and vegetated. In 1902 the depth of water between the island and the shore was about 2 feet.

**‘In accordance with the rules of the common law, we therefore hold: That, where a meandered lake is nonnavigable in fact, the patentee of land bordering on it takes to the middle of the lake; that, where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity; and that the riparian patentee takes the fee only to the water’s edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water.‘**

**From the foregoing considerations, it necessarily follows that the plaintiff is entitled to the possession of the portion of the island here in question in front of her riparian premises, and judgment has therefore been ordered accordingly.**

***Montello Salt Co. v. Utah*, 221 U.S. 452 (1911)**

IN ERROR to the Supreme Court of the State of Utah to review a decree … in favor of the state in a suit to establish its title to salt lands. Reversed and remanded for further proceedings.

Attys for plaintiff in error:

“Under the language in the Enabling Act, Congress only meant to grant the State of Utah, for university purposes, one hundred and ten thousand acres of land, any part or the whole whereof could be saline lands.

To hold otherwise would render every title granted to a homesteader or other claimant under the United States laws, of lands in this State, uncertain and of little value; for, under the broad claim made by the State, if a homesteader, after he secured his patent from the United States, should discover a bed of salt under his land, the State could eject him therefrom. *Barden* v. *Nor. Pac. R. R. Co., supra; Shaw v. Kellogg,* 170 U. **S.** 312; *Deffenback* v. *Hawk,* 115 U. **S.** 392; *Morton v. Nebraska,* 21 Wall. 660, and cases therein cited; *Steele v. St. Louis Smelting & Refining Co.,* 106 U. S. 360; *Davis v. Wiebold,* 139 U. **S.** 507.”

A demurrer by the state to the answer was sustained, and, the salt company refusing to proceed further, judgment **\*461** was entered for the state in accordance with the prayer of the complainant, and the injunction was made perpetual. The judgment was affirmed by the supreme court of the state. …

The question in the case is whether § 8 of the enabling act of the state of Utah [28 Stat. at L. 109, chap. 138] granted to the state all of the saline lands within the state, or only enabled them to be selected as part of other lands granted and not specifically located.

It is alleged in the answer that the state has selected and received grants from the United States for the full amount of 110,000 acres, ‘selected and located as provided in §§ 7 and 8 of the enabling act.’ As the state demurred to the answer, the truth of the allegation must be considered as admitted.

Judgment reversed and the cause remanded for further proceedings in accordance with this opinion

***Choate v. Trapp*, 224 U.S. 665 (1912)**

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the Superior Court of Logan County, in that state, sustaining a demurrer to the petition in a suit to enjoin state taxation of Indian allotments. Reversed.

**WL Headnotes:** A tax exemption and not merely a guard against alienation, which would fall when restrictions on alienation were removed, was made by Act June 28, 1898, 30 Stat. 505, under which lands allotted in severalty to members of the Choctaw and Chickasaw tribes were nontaxable while the title remained in the original allottees.

Any doubt as to whether tax exemption in Act June 28, 1898, 30 Stat. 505, allotting lands in severalty to Choctaw and Chickasaw tribes was a personal privilege, or an incident attached to the land, must be resolved in favor of the patentees.

**\*667 Mr. Justice Lamar delivered the opinion of the court:**

The eight thousand plaintiffs in this case are members of the Choctaw and Chickasaw tribes. Each of them holds a patent to 320 acres of allotted land issued under the terms of the Curtis act (30 Stat. at L. 507, chap. 517), which contained a provision ‘that the land should be nontaxable’ for a limited time. Before the expiration of that period the officers of the state of Oklahoma instituted proceedings with a view of assessing and collecting taxes on these lands lying within that state. The plaintiffs' application for an injunction was denied.

The Five Civilized Tribes owned immense tracts of land in territory that is now embraced within the limits of the state of Oklahoma. The legal title was in the Tribes for the common use of their members. But the fact that so extensive an area was held under a system that did not recognize private property in land presented a serious obstacle to the creation of the state which Congress desired to organize for the government and development of that part of the country.

On April 23, 1897, the Dawes Commission and the Choctaw and Chickasaw representatives made what is known as the Atoka agreement. It was incorporated bodily into the Curtis act of June 28, 1898 (30 Stat. at L. 505, chap. 517), and was modified by the act of July, 1902 (32 Stat. at L. 657, chap. 1362).

These two acts, containing what is known as the Atoka agreement and the supplemental agreement, provided that Indian laws and courts should be at once abolished; that there should be an enrolment of all the members of the tribes; and that the members of the two tribes should become citizens of the United States.

It was also provided, as appears from extracts copied in the margin, [FN†](#Document1zzB001_dagger_1912100399) ] that each member of the tribe should have **\*669** allotted to him his share of the land-all of which ‘shall be nontaxable while the title remains in the original allottee;’ that a part of the land could be sold after one year and all of it sold after five years; that the patents issued to the allottee ‘should be framed in conformity with the provisions of the agreement;’ and that the acceptance of such patent should be operative as an assent on his part to the allotment of all land of the tribes, in accordance with the provisions of the agreement, and as a relinquishment of all his interest in other parts of the common property.

**\*\*567** The complainant does not state when the plaintiffs received their patents, but the report of the Dawes Commission**\*670** for the year ending June 1, 1904 (20 H. R. Doc. 27-42), shows that the enrolment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued, and that much of the land was alienable, and all of it was nontaxable when, on November 16, 1907, Oklahoma was admitted into the Union. The Constitution of that state provided that all existing rights should continue as if no change in government had taken place, and that property exempt from taxation by virtue of treaties and Federal laws should so remain during the force and effect of such treaties or Federal laws.

Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him.

But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.

The record contains no copy of any of the patents under which the plaintiffs hold. But the act provided that they should be framed in conformity with the Atoka agreement. Those who signed the patent could not convey more rights than were granted by that part of the Curtis act, nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled. The patent and the legislation of Congress must be construed **\*\*569** together, and when so construed, they show that Congress, in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be nontaxable for **a limited period**. **[If this is true, the Indians got F’kd out of their lands. Again**]

The decree refusing to enjoin the assessment of taxes on the exempt lands of plaintiffs must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

***Scott v. Lattig*, 227 U.S. 229 (1912).**

Plaintiff in error (Scott) applied for a survey for 138 acre island in a navigable river that had not been surveyed previously by the United States. Surveyed, platted, then sold to Scott via patent.

Prior case: Lattig v. Scott, 17 Idaho 506 (1910): Plaintiff claimed a part of the island in the Snake River by reason of owning the upland which meandered the river, and claimed the balance of the island against the owner of the upland by reason of adverse possession. Scott, the defendant, who is appellant in this case, claimed that while the island was public unappropriated lands he entered the same, and that the title to the land is in the United States government, and that the plaintiff has no title or right of possession in or to the property. Idaho statehood 1890, Lattig & Green (riparian owners) patents issued 1894 and 1895 by the United States. Scott settled on the island, as unsurveyed public land in 1904, with purpose of acquiring title under Homestead Law of 1880, 21 Stat. 141. **Scott tendered application and survey; received patent but that was not shown on the record** and may be passed without other notice. (The title to the island in the navigable river did not pass to riparian owners or to State of Idaho.) For the reasons given the decree is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Reversed. [***Scott can then produce his patent on the record***]

***Shultis v. McDougal*, 225 U.S. 561 (1912) (PLEADING)**

APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which affirmed a decree of the Circuit Court for the Eastern District of Oklahoma, dismissing on the merits a bill in equity, together with a petition in intervention in a suit to determine conflicting claims to a tract of land allotted to Creek Indians. **Dismissed for want of jurisdiction**.

1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, **must be determined from the complainant’s statement of his own cause of action, as set forth in the bill**, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings [cites]

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for **jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth.** . [Hanford v. Davies, 163 U. S. 273, 279, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1896180072&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901103991&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Bankers’ Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 383, 385, 48 L. ed. 484, 489, 490, 24 Sup. Ct. Rep. 325](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904100374&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

3. **A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, \*570 as all titles in those states are traceable back to those laws.** [Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877152711&pubNum=780&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180265&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108744&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108662&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Shoshone Min. Co. v. Rutter 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [De Lamar’s Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108761&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes …; **but the bill makes no mention of these statutes or of any controversy respecting their validity, construction, or effect**. **Neither does it by necessary implication point to such a controversy**. True, it contains enough to indicate that those statutes constitute the source of the complainant’s title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain.

… **So, looking only to the bill**, as we have seen that we must, **it cannot be held that the case as therein stated was one arising under the statutes mentioned.**

… “**The admission of Kansas as a State into the Union, and the consequent change** of its form of government, **in no respect affected the essential character of** the corporations or their powers or **their rights.**” [one of the defendants, the Kiefer Oil and Gas Company, is a corporation organized in the Indian Territory under the Arkansas statutes which were put in force therein by an act of Congress – i.e., a **pre-statehood** corporation, with pre-statehood rights].

***Taylor v. Anderson*, 234 U.S. 74 (1914) (PLEADING)**

A case where plaintiff shot himself in the foot (probably thanks to an attorney) by attempting to anticipate and avoid a defense by the defendant.

**p. 74:** “The judgment here under review is one of dismissal for want of jurisdiction. The action was in ejectment. **The petition alleged that the plaintiffs were owners in fee and entitled to the possession. That the defendants had forcibly taken possession and were wrongfully keeping the plaintiff out of possession, and that the latter were damaged thereby in a sum named**. **Nothing more was required to state a good cause of action.”**

[This alone does not invoke the jurisdiction of the federal court, but states the cause of action.]

Snyder’s Comp Laws Okla. §§ 5627, 6122; Joy v. St. Louis, 201 U.S. 332, 340. **But the petition, going beyond what was required**, alleged with much detail that the defendants were asserting ownership in themselves under a certain deed and that it was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaws and Chickasaw Indians. However essential or appropriate these allegations might have been in a bill of equity to cancel or annul the deed, they were **neither essential or appropriate in a petition in ejectment**. Apparently their purpose was to anticipate and avoid a defense which it was supposed the defendants would interpose, but, of course, it rested with the defendants to select their ground of defense, and it well might be that this one would not be interposed. In the orderly course, the plaintiffs were required to state their own case in the first instance and then to deal with the defendants after it should be disclosed in the answer. *Boston &c. Mining Co. v. Montana Ore Co.*, 188 U.S. 632, 639 (1903) **[So they lose]**

**Burke v. Southern Pac. R. Co., 234 U.S. 669, (1914)**

**At the outset it is well to observe that this is not a suit by the government to cancel or annul a patent for fraud practised upon the land officers in its procurement, or for any fraudulent act, error of law, or mistake committed by them in issuing it … On the contrary, the suit is one wherein rights asserted under a patent are called in question by parties whose only claim to the land was initiated more than fourteen years after the date of the patent.**

‘But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for **\*688** lands in fact mineral would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals.

‘The point is also covered by the case of [Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1891180194) where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and **\*\*915** that the provision of the town-site act (Rev. Stat. § 2392, U. S. Comp. Stat. 1901, p. 1459) that ‘no title shall be acquired to any mine of gold, silver, cinnabar, or copper,’ does not apply where the mines were discovered after a patent has been issued.

‘Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in [Cowell v. Lammers, 10 Sawy. 246, 257,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=716&FindType=Y&ReferencePositionType=S&SerialNum=1884189543&ReferencePosition=257) [21 Fed. 200, 206:](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=348&FindType=Y&ReferencePositionType=S&SerialNum=1884189543&ReferencePosition=206) ‘There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.’

The court rejected the contention that the conditions existing at the date of definite location were decisive of whether the land was mineral or nonmineral, and held that the question remained an open one **until the issue of a patent**. …; reaffirmed its ruling in [St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 876, 11](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1881199965&ReferencePosition=640) Mor. Min. Rep. 673, that a patent not only ‘operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the **alienation of the public lands**, under the law, is intrusted, that all the requirements preliminary **\*690** to its issue have been complied with;’

6. **Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof as so alleged in the bill?**

**Answer.-It does.**

**the patent passes the title and is not open to collateral attack, or to attack by strangers whose only claim was initiated after the issue of the patent.**

***Ward v. Board of County Com’rs of Love County, Okla*, 253 U.S. 17, 22 (1920)**

This is a proceeding by and on behalf of Coleman J. Ward and sixty-six other Indians to recover moneys alleged to have been coercively collected from them by Love county, Oklahoma, as taxes on their allotments, which under the laws and Constitution of the United States were nontaxable. The county commissioners disallowed the claim and the claimants appealed to the district court of the county. There the claimants' petition was challenged by a demurrer, which was overruled **\*19** and the county elected not to plead further. A judgment for the claimants followed, and this was reversed by the Supreme Court. [Board of Comr's of Love County v. Ward, 173 Pac. 1050.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=660&FindType=Y&SerialNum=1918020383) The case is here on writ of certiorari. [248 U. S. 556, 39 Sup. Ct. 12, 63 L. Ed. 419](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1918200826).

[Choate v. Trapp, 28 Okl. 517, 114 Pac. 709.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=660&FindType=Y&SerialNum=1911017755) The cases were then brought here, and this court held that the exemption was a vested property right which Congress could not repeal consistently with the Fifth Amendment, that it was binding on the taxing authorities in Oklahoma, and that the state courts had erred in refusing to enjoin them from taxing the lands. [Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1912100399) [Gleason v. Wood, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1912200274) [English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1912100327)

 … As these claimants had not disposed of their allotments and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in Choate v. Trapp, supra, and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the state and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love county, no matter what was said in local statutes. The county did not respect it, but, on the contrary, assessed the lands allotted to these claimants, placed them on the county tax roll, and there charged them with taxes like **\*22** other property.

The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support [cites omitted]

**To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law.** Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.

***Broadwell v. Board of County Comm’rs*, 253 U.S. 25 (1920).**

Prior case: Broadwell v. Board of Comm’rs, 71 Okla. 162, 1918 Ok. 579

This is a proceeding to recover moneys charged to have been paid under compulsion by a number of Choctaw and **\*26** Chickasaw Indians to Carter county, Oklahoma, as taxes on allotted **\*\*423** lands which were nontaxable. The county commissioners disallowed the claim; the district court of the county to which the claimants appealed sustained a demurrer to their petition and rendered judgment against them, and the Supreme Court affirmed the judgment. [175 Pac. 828.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1918021151&pubNum=660&originatingDoc=Ibd009a8c9cb411d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The total amount claimed is $22,455.99, aside from interest.

 The case as presented here is in all material respects like [Ward v. Love County, 253 U. S. 17, 40 Sup. Ct. 419, 64 L. Ed. 751,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1920117900&pubNum=708&originatingDoc=Ibd009a8c9cb411d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) just decided, and its decision properly may be rested on the opinion in that case.

 Motion to dismiss denied. Judgment reversed.

***United States v. Coronado Beach Co.*, 255 US 472 (1921)**

Syllabus

1. The fifth section of the Mexican Colonization Law of August 18, 1824, which declares the right of the federal government, for the defense or security of the nation, to make use of lands for the purpose of constructing warehouses, arsenals, and other public edifices, cannot be construed as reserving a power of expropriation without compensation over land granted under the act to a Mexican citizen. P. [255 U. S. 485](https://supreme.justia.com/cases/federal/us/255/472/case.html#485). [*Arguello v. United States*](https://supreme.justia.com/cases/federal/us/59/539/case.html)*,* 18 How. 539.

2. The title to tide and submerged lands acquired by the State of California upon her creation was subject to prior Mexican grants, and subject to the jurisdiction of the district court, under the Private Land Claims Act of March 3, 1851, to determine whether such lands, in any case before it, had been granted by the prior sovereignty. P. [255 U. S. 487](https://supreme.justia.com/cases/federal/us/255/472/case.html#487).

3. A decree of the district court construing the boundary calls of a grant as including tide and overflowed lands adjacent to the granted upland, and confirming it accordingly, was a valid exercise of the court's jurisdiction, even if the construction was erroneous, and is not subject to collateral attack upon the ground that the Mexican documents, correctly interpreted, confined the grant to the shoreline. P. [255 U. S. 487](https://supreme.justia.com/cases/federal/us/255/472/case.html#487).

4. In a suit by the United States to condemn rights deraigned under a Mexican grant confirmed, surveyed, and patented under the Act of March 3, 1851, supra, in which the government claimed that adjacent tide and overflowed lands, included in the survey and patent, were not in the original grant or the confirmatory decree, and did not pass, held that the confirmation and patent were conclusive, and that the Mexican map of the boundaries, which, with the other documents of the grant, was referred to in the decree of the district court as defining it, was irrelevant. Pp. [255 U. S. 487](https://supreme.justia.com/cases/federal/us/255/472/case.html#487)-488.

5. Held, further, that the patent could not be collaterally impeached by showing from the field notes that the line including the tide and Page 255 U. S. 473 submerged lands was not surveyed, and that, considered as a direct attack, the suit was barred by the limitation Act of March 3, 1891. P. [255 U. S. 488](https://supreme.justia.com/cases/federal/us/255/472/case.html#488).

6. An expert witness to value in a condemnation case used maps and drawings to illustrate his conception of the possible uses of the land. Held that, if the plan so portrayed was remote and speculative, the objection went to the weight of his testimony, and not to such use of the maps and drawings. P. [255 U. S. 488](https://supreme.justia.com/cases/federal/us/255/472/case.html#488).

7. Under the Act of July 27, 1917, c. 42, 40 tat. 247, providing for the taking of the "whole of North Island" and for "the determination and appraisement of any rights private parties may have in said island," and under the bill in this case following the act, the government took not merely the upland, but the adjacent tide and overflowed land as well. P. [255 U. S. 489](https://supreme.justia.com/cases/federal/us/255/489/case.html). 274 F. 230 affirmed. **END of syllabus**

The title of the Coronado Beach Company is derived from a Mexican grant of May 15, 1846, to one Carillo, a Mexican citizen, the Company having succeeded to his rights. At this point it is necessary to mention only that Carillo is given the right to **\*\*379** enclose the land ‘without prejudice to the crossings, roads, and servitudes.’ The grant was under a law of August 18, 1824, by the fifth **\*486** section of which--

The jurisdiction of the decree and the validity of the patent so far as they cover the tide lands 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 question whether there was such a prior grant and what were its boundaries were questions that had to be decided in the proceedings for confirmation and there was **\*488** jurisdiction to decide them as well if the decision was wrong as if it was right. The title of California was in abeyance until those issues were determined, as the decree related back to the date of the original grant. The petitioner asked a confirmation of the tract conveyed to Carillo. The grant to Carillo was bounded ‘west by the anchorage for ships' and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon **and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States**. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps**. But however arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached.** [Knight v. United Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1892180035) [San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1891180122) [Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1865145866) It was suggested that the bill might **\*\*380** be regarded as a direct attack upon the patent; but this probably was an afterthought and in any event the attack would be too late. Act of March 3, 1891, c. 561, § 8; 26 Stat. 1099 (Comp. St. § 5114); [United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 450, 28 Sup. Ct. 579, 52 L. Ed. 881](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1908100288).

Decree and judgment affirmed

***Brewer-Elliott Oil & Gas Co. v. U.S.*, 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922)**

“A State, upon its admission into the Union, takes sovereignty over the public lands in the condition in which they are at the time; and if the bed of a non-navigable river has then passed into private ownership by grant of the Federal government, it cannot divest the title by declaring the river to be navigable.” [Lexis-Nexis?]

the District Court found that at the place in question the Arkansas river was, and always had been, a nonnavigable **\*80** stream, that **by the express grant of the government, made before Oklahoma came into the Union, the Osage Tribe of Indians took title in the river bed to the main channel and still had it**. It entered a decree as prayed in the bill. The Circuit Court of Appeals held that whether the river was navigable or nonnavigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages. It also concurred in the finding of the District Court that the Arkansas at this place was, and always had been, nonnavigable, and that the United States had the right to part with the river bed to the Osage Tribe when it did so. It affirmed the decree.

The Osage Tribe derived title to their reservation from the Act of Congress of June 5, 1872,

We have no doubt that the title to the river bed is to be determined by the language of the Act of June 5, 1872, **\*83** and that the meaning of the Cherokee deed is to be interpreted not as if its words stood alone but in the light of the acts of Congress in pursuance of which it was made, and especially of the Act of 1872, under which the Osages took possession, and which was enough to vest in them good title to the land described therein without the deed of 1883.

The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property **\*88** of the Osages, **there was nothing in the admission of Oklahoma** into a constitutional equality of power with other states **which required or permitted a divesting of the title**. It is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

 It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; **but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee**.

**pp. 108-109:** The United States has always been both sovereign and proprietor in its territories. As such it has always had the right and power to dispose absolutely of any of its public land therein, high or low, wet or dry, … While it has held … nevertheless it has always possessed and frequently exercised the absolute power to **grant such lands and any interest it had in them irrevocably** whenever it became necessary to do so to perform international obligations or to carry out other public purposes **appropriate to the objects for which it has held the lands in its territories**. Shively 152 U.S. 1, 48; McGilvra, 215 U.S. 70, 79; Goodtitle 50 U.S. 471, 478; San Francisco 138 U.S. 656, 670, 671; Knight, 142 U.S. 161, 183, 184; Winters, 207 U.S. 564, 576, 577; U.S. v. Winans, 198 U.S. 371, 381; U.S. v. Romaine, 255 F, 253, 260 (1914); Alaska Pac. Fish, 298 U.S. 78, 87, 88, 90.

***Brewer-Elliott Oil & Gas Co. v. U.S.*, 270 F. 100 (1920) (Circuit Court)**

Now the right and title of the Osage Tribe to the bed of the river north and east of the thread of its main channel and to the oil and gas therein at the place of the leased premises accrued and vested in its predecessor in interest, the Cherokee Nation, on December 1, 1838, under the patent of the United States of that date and the treaties **\*105** between the United States and the Cherokee Nation of May 6, 1828 (7 Stat. 311), of February 14, 1833 (7 Stat. 414, 415, 416), and of December 29, 1835 (7 Stat. 478), in execution of which that patent was made and delivered. By its express terms the grant of that patent conveyed a tract of land which included within its boundaries both banks of the Arkansas river and the land under it at the place of the leased premises. This right and title of the Cherokee Nation to the portion of the bed of the river here in controversy which lies north and east of the main channel of the river was conveyed and confirmed to the Osage Tribe by the act of Congress of June 5, 1872.

**So it was that the title and rights of the Osage Tribe to the property in controversy accrued and vested in its predecessor in interest more than 70 years before** the local rule of property.

The theory of counsel for the state is that, if this river is navigable, the United States held the title to the bed of the river below high-water mark until the admission of Oklahoma into the Union in 1907, when that title vested in the state, but that, if it was not navigable, the title to the bed in controversy vested in the Osage Tribe. **This theory ignores the grave question whether or not the United States did not by the treaties and grants to which reference has been made vest in the Cherokee Nation in 1838, and thereafter in the Osage Tribe, its successor in interest, the title to this property even if the river was navigable**.

The United States by its patent of 1838, in performance of its treaties with the Cherokee Nation, granted and guaranteed to that nation a tract of land which included the banks on both sides of the Arkansas river at the place of the leased property here in controversy, and that grant conveyed the bed of the river between these banks. [Donnelly v. United States, 228 U.S. 243, 259, 33 Sup.Ct. 449, 57 L.Ed. 820, Ann. Cas. 1913E, 710.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913100403&pubNum=708&originatingDoc=I33e026cc545d11d997e0acd5cbb90d3f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) According to the law applicable to the subject and to this grant when it was made, the test of the navigability of the river was its navigability in fact, and it is not now and never has been so navigable. There was not at the time of the original grant in 1838 or when the title thus granted was vested in the Osage Tribe under the act of 1872 and the deed of 1883 any general or local law conditioning these grants to the effect that the Arkansas river at the place of the leased premises, though unnavigable in fact, was **\*110** navigable in law. **Those grants therefore divested the United States of all right and title to that part of the bed of the Arkansas river here in controversy and vested that right and title in the Osage Tribe. When the state of Oklahoma in 1907 came into the Union the United States had no beneficial right, title, or interest in that portion of the leased premises here in controversy, the state of Oklahoma never received or had any such right or interest,** there was no error of law or of fact in the decision of the court below, and its judgment must be affirmed. It is so ordered.

***United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926)**

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Bill in equity to quiet title by the United States against the Holt State Bank and others. Decree of dismissal was affirmed by the Circuit Court of Appeals ( [294 F. 161),](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=348&FindType=Y&SerialNum=1924124153) and plaintiff appeals. Affirmed.

 [When Minnesota was admitted to the Union, May 11, 1858, title to the lake bed passed to it because the lake was navigable and the bed had ***not*** already disposed of it by the United States. Title to lake bed had not passed to Indian tribe at time of creating the reservation].

The defendants insist that the lake in its natural condition was navigable, that the state, on being admitted into the Union, became the owner of its bed, and that under the laws of the state the defendants, as owners of the surrounding tracts, have succeeded to the right of the state.

It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that **where the United\*\*199** **States, after acquiring the territory and before the creation of the state, has granted rights in such lands** by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce **\*55** among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, **such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.**  [Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1876155604&ReferencePosition=338) [Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 14 S. Ct. 548, 38 L. Ed. 331;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1894139328) [Scott v. Lattig, 227 U. S. 229, 242, 33 S. Ct. 242, 57 L. Ed. 490,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1913100506) [44 L. R. A. (N. S.) 107;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=474&FindType=Y&SerialNum=1913100506) [Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 65 L. Ed. 500;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1921113562) [Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 43 S. Ct. 60, 67, L. Ed. 140](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=1922117926&ReferencePosition=67).

The effect of what was done ***was to reserve*** in a general way for the continued occupation of the Indians what remained of their aboriginal territory, ***and thus it came to be known and recognized as a reservation***.   [Minnesota v. Hitchcock, 185 U. S. 373, 389, 22 S. Ct. 650, 46 L. Ed. 954.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1902100402) There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the **\*59** benefit of the future state.

***Carpenter v. Shaw*, 280 U.S. 363 (1930)**

Action by T. L. Carpenter and another against A. S. J. Shaw, as State Auditor of the State of Oklahoma. Judgment denying recovery was affirmed ( [134 Okl. 29, 272 P. 393),](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=660&FindType=Y&SerialNum=1929120327) and plaintiff brings certiorari. Reversed.

**p. 365:** In Choate v. Trapp, 224 U.S. 665, [(1912)] the history of the Atoka Agreement was reviewed by this court. It was there held that the provision for exemption conferred, upon the allottees, property rights which were within the protection of the Fifth Amendment and hence it was not subject to repeal by later Congressional legislation; that the restriction, being one imposed in the exercise of the plenary power of Congress over the Indian tribes and tribal lands and in the performance of its duty as guardian of its Indian wards, see *Lone Wolf v. Hitchcock*, 187 U.S. 533, 565, and having been accepted by the State of Oklahoma in its constitution upon admission to statehood, was a limitation on the taking power of the state. See also *Ward v. Love County*, 253 U.S. 17; [see also Broadwell v. Board of County Comm’rs, 253 U.S. 25, 26 (1920) – followed *Ward*]

**p. 367:** **Whatever was the meaning of the present exemption clause at the time of its adoption must be taken to be its effect now**, since it may not be narrowed by any subsequently declared intention of Congress. *Choate v. Trapp*, supra. **Having in mind the obvious purpose of the Atoka Agreement to protect the Indians from the burden of taxation** with respect to their allotments and this applicable principle of construction, we think that the provision that **“the lands allotted shall be non-taxable while the title remains in the allottees” cannot be taken to be restricted only to taxes commonly known as land or real estate taxes,** but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, acquired or retained by them by virtue of their ownership.

**p. 367:** “**Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted**.” *Choctaw Gulf R. Co., v. Harrison*, 235 U.S. 292; Galveston, H&S A.R. Co., v. Texas, 210 U.S. 217, 227 (1908); see also Ward v. Love County, 253 U.S. 17 (1920).

We think it plain that the tax imposed on the royalty interest of the present petitioner is not a tax on oil and gas severed from the realty, but is, by its very terms **a tax upon the right reserved in them** as lessors and owners **of the fee**.

***Gable v. Angle*, 7 F.Supp 967 (7/19/1933) (followed Brewer-Elliot case)**

**In Equity**. Suit by Cora M. Gable and others against J. B. Angle and others. **Suit dismissed**.

Plaintiff Cora M. Gable, and thirty-six coplaintiffs, bring this action against defendant J. B. Angle, and ninety codefendants, alleging in substance that plaintiffs are the owners of certain real estate in Oklahoma county, Okl., through which the North Canadian river flows and has formed a new channel; that prior to the formation of the new channel the said North Canadian river flowed through the lands of the defendants; and that said channel through the lands of the defendants was the original channel of the North Canadian river; that the said original channel has been abandoned by said river and the new channel formed by the river is wholly upon the lands of the plaintiffs. … The plaintiffs invoke a statute of the state of Oklahoma which was enacted by the territorial Legislature of the territory of Oklahoma, and later adopted by the Legislature of the state of Oklahoma. The statute in question is as follows: ‘If a stream forms a new course, abandoning its ancient bed, the owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived. ‘ … the only question to be determined here is whether or not the statute above quoted is repugnant to the Organic Act of Congress of May 2, 1890 (26 Stat. 81), the public land laws of the United States, and to the Constitution of the state and of the United States.

The lands constituting Oklahoma were public lands and the property of the United States prior to the formation of Oklahoma Territory, and the particular lands in question were filed upon by settlers at the opening of the territory in 1889, the titles thereto acquired by the settlers under grants or patents from the United States government

Louisiana Purchase lands – territory of Oklahoma – North Canadian river changed its course. Plaintiff’s land was overflowed by river when a new channel was created. Plaintiff wanted the old river bed from the defendants as indemnity per Oklahoma statute 1891 § 4293.Title 43 § 931 (from May 18, 1796 (sec 9) [1 Stat 468]). When territory, title to all navigable rivers and streams vested in the United States and upon admission to the Union vested in the State. North Canadian river was non-navigable, **so title vested in private owners when granted** without reservation **by the United States to settlers**.

**p. 970:** “Immediately following the opening of the territory of Oklahoma, the lands containing the river beds now in question were granted to individual settlers, and these settlers, **on taking title to their lands, took the riparian rights to non-navigable river beds on or adjacent to said lands under the then existing laws of the United States and those rights are fully protected by Clause 2, Art 6 of the Constitution** of the United States, which reads as follows: “This Constitution … not withstanding.” [**Supremacy Clause**]

Chief Justice Taft in *Brewer-Elliot* said: ‘Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title. It is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

‘It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee.‘

And the sixth syllabus of this opinion states: ‘A grant of land in the bed of a non-navigable river made by the United States while holding complete sovereignty over the locality including it, cannot be divested by a retroactive rule or declaration of the State subsequently created out of that territory, classifying the river as navigable.‘

**\*971** This court, therefore, is of the opinion that the section of the statute relied upon by the plaintiffs is clearly unconstitutional and void; that its enactment was beyond the legislative power of the territory of Oklahoma; and that its enactment by the Legislature of the state of Oklahoma was clearly beyond the power of the Legislature and therefore is void. The court further is of the opinion that the title to the river bed of the original channel vests in the defendants and that a change in the river channel did not affect their title to the property.

The further conclusion is that the bill is without equity and that the various motions to dismiss should be, and are hereby, sustained

***Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933)** **(federal nature of the right)**

**p. 483:** The suit was brought to recover assessments levied under the Act of the Puerto Rican legislature, **but not to enforce a right created by a law of the United States**.

The suit was brought to recover assessments levied under the act of the Puerto Rican Legislature, **but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be \*\*450 invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is nonfederal, merely because the plaintiff’s right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive - not the source of the authority to establish it.** [Shoshone Mining Co. v. Rutter, 177 U.S. 505, 20 S.Ct. 726, 44 L.Ed. 864;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=708&originatingDoc=If24db3a49cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Blackburn v. Portland Gold Mining Co., 175 U.S. 571, 20 S.Ct. 222, 44 L.Ed. 276;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108744&pubNum=708&originatingDoc=If24db3a49cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Little York Gold Washing & Water Co. v. Keyes, 96 U.S. 199, 203, 24 L.Ed. 656;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877152711&pubNum=780&originatingDoc=If24db3a49cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_203&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_203) see **\*484** [McGoon v. Northern Pacific Ry. Co. (D.C.) 204 F. 998, 1001;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913101021&pubNum=348&originatingDoc=If24db3a49cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_348_1001&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_348_1001) compare [Swafford v. Templeton, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1902100374&pubNum=708&originatingDoc=If24db3a49cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) **The case is analogous to those involving rights to land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of the plaintiff’s title, the case is not one within the jurisdiction of the federal courts**.

***Borax Consol. Ltd. V. Los Angeles*, 296 U.S. 10 (1935)**

The city of Los Angeles brought this suit to quiet title to 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 legislative grant by the state. The Circuit Court of Appeals … held that the federal government had neither the power nor the intention to convey tideland to Banning, and that his rights were limited to the upland. … **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;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1842194146&pubNum=780&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_410) [Pollard v. Hagan, 3 How. 212, 229, 230, 11 L.Ed. 565;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105920&pubNum=780&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_780_229&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_229) [Goodtitle v. Kibbe, 9 How. 471, 478, 13 L.Ed. 220;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1850303720&pubNum=780&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_780_478&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_478) [Weber v. State Harbor Commissioners, 18 Wall. 57, 65, 66, 21 L.Ed. 798;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1873139117&pubNum=780&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_780_65&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_65) [Shively v. Bowlby, 152 U.S. 1, 15, 26, 14 S.Ct. 548, 38 L.Ed. 331.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1894139328&pubNum=708&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) This doctrine applies to tidelands in California. Weber v. State Harbor Commissioners, supra; [Shively v. Bowlby, supra, 152 U.S. 1, pages 29, 30,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1894139328&pubNum=780&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_780_29&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_29) [14 S.Ct. 548, 38 L.Ed. 331;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1894139328&pubNum=708&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [United States v. Mission Rock Co., 189 U.S. 391, 404, 405, 23 S.Ct. 606, 47 L.Ed. 865.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903100331&pubNum=708&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) 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 Association, 142 U.S. 161, 183, 12 S.Ct. 258, 35 L.Ed. 974.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180035&pubNum=708&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) 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 (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, 11 S.Ct. 364, 34 L.Ed. 1096;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180122&pubNum=708&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) **\*16** Knight v. United Land Association, supra, Shively v. Bowlby, supra. That limitation is not applicable here, as it is not contended that Mormon Island was included in any earlier grant. See [De Guyer v. Banning, 167 U.S. 723, 17 S.Ct. 937, 42 L.Ed. 340](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180124&pubNum=708&originatingDoc=I090ddec69cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

**p. 22:** “Petitioners claim under a federal land patent. … There is no question that the United States was free to convey the upland, and **the patent affords no ground for holding that it did not convey all the title that the United States had in the premises**. **The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland,** **is necessarily a federal question**. **It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law**. *Packer v. Bird*, 137 U.S. 661, 669; Brewer-Elliot, 260 U.S 77, 87; Holt State Bank, 270 U.S. 49, 55, 56; *United States v. Utah*, 283 U.S. 64, 75; United States v. Oregon, 295 U.S. 1, 27-28 (1935).

**Prior case**:

***Los Angeles v. Borax Consol. Ltd***, 74 F.2d 901 (1935)

Appellees (Borax) claim under a patent issued to William Banning, Dec. 30, 1881, under the pre-emption laws of the United States (enacted April 24, 1820) [3 Stat. 566]

discussing a different situation in the Knight case: *Knight v. United Land Ass’n*, 142 U.S. 161: If the Mexican grant conveyed tidelands, the title thereto was vested in the grantee regardless of the fact that such land would otherwise belong to the state by virtue of its sovereignty … the lines of the United States patent confirming and delimiting the Mexican grant were conclusive.

***Romero v. Janss*, 84 F.2d. 332 (1936) (9th Cir, Ct of Appeals)**

This is an appeal from a judgment in an action at law in ejectment in which the appellant, administrator of the estate of Maria Dorotea Alanis de Romero, seeks to establish his right to possession of land situated in the county of Los Angeles, state of California. Appellant’s case rests upon a claimed Mexican title vesting in his intestate… The title of the appellee, defendant below, rests upon a patent from the United States made to certain persons, Wilson and Sanford, who had acquired a Mexican title to the property prior to March 3, 1851. They had had it adjudicated as conveying a valid title to them under the Land Commission Act of that date, the patent being issued pursuant to the provisions of the statute after the adjudication….This contention has been disposed of adversely to appellant’s argument by the Supreme Court in the case of [Carpentier v. Montgomery, 13 Wall. (80 U.S.) 480, 494, 20 L.Ed. 698.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1871148131&pubNum=780&originatingDoc=I3782f03c548211d9a99c85a9e6023ffa&refType=RP&fi=co_pp_sp_780_480&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_480) That was a suit in ejectment, where the right to possession was asserted, and a claim to no more than an equitable interest in the land was shown …. In the Carpentier Case those deraigning title from the daughters and grandchildren commenced an action in ejectment against those deraigning title from the four sons. It was admitted that the legal title rested in the four sons, …” as it respects the legal estate, the confirmation inures to the confirmees alone. …The patent is to be given to them, and the legal title cannot be separated from the patent.”

p. 334: cites Carpentier, p. 494, above

p. 335: The Carpentier case establishes the law for California, at least concerning the necessity that **the claim of right to possession in an ejectment suit shall rest on the legal title**. [cases cited]

***United States v. Powers*, 94 F.2d 783 (1938); aff: United States v. Powers, 305 U.S. 527 (1939).**

This suit was brought by the United States to enjoin the defendants, residing within the Crow Indian Reservation in Montana from diverting any of the waters of Lodge Grass creek or Little Big Horn river and their tributaries….The plaintiff asked in its prayer to the bill of complaint that ‘a permanent injunction issue, enjoining \* \* \* defendants, \* \* \* from maintaining or using said dams and ditches \* \* \* and from diverting any of the waters from Lodge Grass Creek or Little Big Horn River and their tributaries. \* \* \*‘ The above is all the relief specifically asked.

Answers were filed which, in general, denied the allegations of the bill, admitted ownership in land within the reservation, admitted the diversion of the waters of the rivers for irrigation purposes, and alleged that the defendants were successors in interest to the original patentees, Indians of the Crow Tribe. The lands had been acquired by purchase, some from the government at public sale, after the decease of the original allottees, and some by purchase from the original patentees. The defendants further alleged that the lands had been allotted to the Indians as irrigable lands and that these lands were purchased as such and with all rights.

; that the patents issued by the government to the original allottees, in addition to conveying the described lands, contained the following language: ‘Together with all rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging‘; that there was no reservation of water rights in any of these patents or deeds; that the Indian allottees conveyed to the defendants, or their predecessors, or lessors, by warranty deeds, conveying the premises, ‘together with all tenements, hereditaments and appurtenances ‘;…**Appellees are patentees, or successors in title of patentees, to whom appellant conveyed allotted lands, in fee, pursuant to the Acts of April 11, 1882, and February 8, 1887, supra. These patents conveyed to the patentees the lands therein described, ‘together with all rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging.‘**

**The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case.**

What right, if any, appellant and appellees, or any of them, may have to divert or use the waters of Lodge Grass creek, Little Big Horn river, and their tributaries, cannot be determined in this suit. Such a determination would directly and materially affect all owners of lands within the reservation, many of whom are not parties to this suit. In attempting by its decree to determine appellees’ rights, in the absence of these necessary parties, the trial court erred.

**Appellant United States was not entitled to an injunction, or to any relief in this case.**

***United States v. Champlin Refining Co.*, 156 F.2d 769 (7/29/1946)** (affirmed 331 U.S. 788) citing Brewer-Elliot

***United States v. Champlin Refining Co.***, 156 F.2d 769 (7/29/1946) (affirmed 331 U.S. 788) citing Brewer-Elliot

Action by United States of America against Champlin Refining Company to enjoin defendant from trespassing on a river bed and drilling for oil and gas thereunder and for a decree canceling oil and gas lease executed by State of Oklahoma in favor of the defendant and quieting the title in the United States, its allottees, and heirs, wherein the State of Oklahoma on the relation of the Commissioners of the Land Office intervened. From an adverse decree, the plaintiff appeals.

 Reversed and remanded.

**The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions.** As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title. It is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked. \* \* \*

**p. 774:** **Question here is what title, if any, the Osages took in the river bed in 1872 when the grant was made, and that was thirty-five years before Oklahoma was taken into the Union (Nov. 16, 1907).**

Four trust patents were issued in Oklahoma Territory 2/8/1887 **prior to statehood**.

United States as trustee for Osage Tribe.

7/20/1942 State of Oklahoma executed 2 oil and gas leases to Champlin Refining Co. in the river bed. 7/13/1943 United States commenced the suit against Champlin to enjoin it from trespassing on the river bed and drilling for oil and gas. State of Oklahoma came in as intervener. **Stipulated river was non-navigable**.

In [United States v. Elliott, 10 Cir., 131 F.2d 720, 723,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943119608&pubNum=350&originatingDoc=I1b02fe84549d11d9a99c85a9e6023ffa&refType=RP&fi=co_pp_sp_350_723&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_723) the court said: ‘ \* \* \* At the time the United States made the grant to the Seneca and Shawnee Indians, the lands granted were not within a state or other local jurisdiction. The grant, therefore, was not subject to local law. It must be construed in accordance with the principles of the common law and the decisions of the United States Supreme Court. \* \* \* Under the common law and the decisions of the United States Supreme Court, a grant of land bounded on a **\*775** nonnavigable river carries the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river.’

[**[6]**](#co_anchor_F61946115461_1) **We conclude that when the trust patents were issued, they conveyed the title to the center of the Arkansas River and that the State of Oklahoma could not, by legislative fiat or judicial decision, take from the Indian allottees what the United States had conveyed to them before statehood.****[25](#co_footnote_B025251946115461_1) …** The judgment is reversed and the cause remanded with instructions to enter a judgment as prayed for in the complaint of the United States.

**ALADDIN PETROLEUM CORPORATION et al. v. STATE ex rel. COMMISSIONERS OF LAND OFFICE et al. OLDHAM et al. v. SAME.** **(1948)** **Supreme Court of Oklahoma**.

***\*\*225*** *Syllabus by the Court*.

**\*134** 1. Upon admission of Oklahoma into the Union, the title to the beds of the streams within its borders passed to and became the property of the State of Oklahoma by operation of law where the stream was navigable. And, where not navigable, the title to the bed did not pass.

2. Where previous to and on the admission of Oklahoma into the Union the title to the bed of any stream was in the United States or another as its grantee, the question of the navigability of such stream so far as it is determinative of or relates to the title of the United States or of its grantee presents a Federal question.

3. Under the Federal law the word ‘navigable’ means navigable in fact.

4. A decision of the Supreme Court of this State that a specified river within the limits of the State is navigable is not binding upon the United States Government if it is not a party to the suit in which the decision is made.

5. The judgment of a state court as to the navigability of a river within the limits of the state is not binding on the Federal courts in determining whether or not title to the bed of the river passed with a Federal grant made long prior to the organization of the state.

6. It is proven in this cause that, at the time of the grant by the United States of the riparian lands here involved, the Arkansas river opposite such grants was, in fact, non-navigable. Therefore, under the applicable and controlling law, as declared by the Supreme Court of the United States, the river, so far as the question of its navigability is pertinent to the issues herein, is non-navigable in law, notwithstanding any decision of this court to the contrary, in any action to which the United States was not a party.

**\*\*226** 7. A state, upon its admission into the Union, takes sovereignty over the public lands in the condition in which they are at that time; and if the bed of a non-navigable river has then passed into private ownership by grant of the Federal government, the state cannot divest the title by declaring the river to be navigable.

8. The Act of the Oklahoma Legislature (Laws 1919, ch. 206, p. 293 sec. 1, Tit. [64 O.S.1941, sec. 290](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000165&DocName=OKSTT64S290&FindType=L)) was and is ineffective to disturb the title, if any, of the riparian **\*135** owners herein to the bed of the Arkansas River which passed to them under Federal grants executed prior to statehood.

9. Under application of the common law rule which was then recognized by the United States as operative in Oklahoma Territory and applicable thereto, the patents of the United States, executed prior to statehood, and conveying Lots 6 and 7 of Section 23 and Lot 8 of Section 24, all in Township 23 North, Range 3 East, now in Pawnee county, carried title to the center line of the river opposite said lots.

**\*\*232**

[Citing Brewer-Elliot, 260 U.S. 77] As to such a grant, the judgment of the state court does not bind us, for **the validity and effect of an act done by the United States is necessarily a Federal question**. The title of the Indians grows out of a Federal grant when the Federal government had complete sovereignty over the territory in question. Oklahoma when she came into the Union, took sovereignty over the **public** lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or **permitted** a devesting of the title. It is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under Federal law and grant or would enlarge what actually passed to the state at the time of her admission, under the constitutional rule of equality here invoked.’

Our conclusion accords in all respects with that reached in United States v. Champlin Refining Co. et al., supra, which was affirmed by the Supreme Court of the United States in [Champlin Refining Co. v. United States et al., 329 U.S. 29, 67 Sup.Ct. 1,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1946113104) [91 L.Ed. 9,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=470&FindType=Y&SerialNum=1946113795) on authority of State of Oklahoma v. State of Texas, supra, and Brewer-Elliott Oil & Gas Co. v. United States, supra.

In either case the decision must rest upon whether the title to the middle of the stream did or did not pass at the time of the Federal grant and subsequent transfers could not alter such fact.

***Bolshanin v. Zlobin*, 76 F.Supp. 281 (1948)** ( one of 84 hits on search: ejectment and “land patent”)

WL Headnote: “Where Treaty of Cession of Alaska of 1867 recognized ownership of churches built in ceded territory by the Russian government and a possessory right in the lands occupied thereby in members of the Greek Oriental Church resident in the territory, but lands described were not capable of location nor subject to a grant of the previous sovereign, and the Archbishop of the church, as trustee, claimed title under a United States patent following the treaty, representative members of the church at large did not have requisite legal title to maintain an action to recover possession of the property from the Archbishop. Treaty of Cession with Russia, art. 2, 15 Stat. 539, 541.”

Defendants … claim title under the patent of July 27, 1914, issued to the archbishop of the church, ‘his successors and assigns, forever, trustee‘, and contend that at most the treaty provision quoted recognized the ownership of the churches only and a mere possessory right in the land occupied thereby, and that, therefore, legal title in plaintiffs, a prerequisite to an action of this kind, is lacking.

Contemporaneously with the transfer of Alaska to the United States, inventories were prepared by the Commissioners appointed for that purpose, in which the properties to be transferred to the United States and those to be retained by private individuals were separately listed, the latter class was further divided into (1) property of the Greco-Russian Church, (2) property held under fee simple title, with the names of the owners, and (3) property held by possessory rights only. …

 Further support for this view may be found in the decisions of the Supreme Court upon similar questions arising under treaties with other nations ceding territory to the United States. **At the outset it may be noted that private rights of property, whether absolute or merely equitable, are not effected by a change in sovereignty**. *Soulard v. United States*, 4 Pet. 511, 29 U.S. 511. But the United States has always maintained that, although a title to land that was perfect and complete at the time of the cession would be fully protected by the treaty, yet, as to land which the claim rested on an imperfect or incomplete title, the legal title remained in the United States until confirmed or patented. *Ainsa v. New Mexico & A.R. Co.*, 175 U.S. 76.

But before a patent could be issued, it was necessary for the Land Department to determine what lands were subject to disposal, the extent of use and occupancy for church purposes, to make a survey thereof, and fix the boundaries. Incidentally, it may be observed that the **\*\*288** pleading **\*554** of the patent issued to the defendants’ predecessor, instead of a record of the alleged grant, would appear to be inconsistent with the theory of a grant. **The patent that was issued** to the archbishop of the church was, therefore, not merely confirmatory of a previously existing complete title, but **was the grant of a fee simple title of the land described therein**. [Langdeau v. Hanes, 21 Wall. 521, 531, 22 L.Ed. 606](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1874192083&pubNum=780&originatingDoc=If59ccc09549e11d9a99c85a9e6023ffa&refType=RP&fi=co_pp_sp_780_531&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_531). …

Conveyance of the legal title to the spiritual head of the church is a fairly common practice and appears to be in vogue in the case of the Moravian and the Roman Catholic Churches…. that **plaintiffs do not have the requisite legal title to maintain this action**. … It follows **\*556** that the demurrer to the complaint must be sustained, and it is so ordered.

**U.S. v. City of Kodiak, 15 Alaska 566, 132 F.Supp. 574 (1955)**

**[District Court, Territory of Alaska, Third Division][State – Jan 3, 1959]**

This is an action brought by the United States Government on behalf of certain Indian and Eskimo Natives, residents of the city of Kodiak, in equity, seeking to enjoin the city of Kodiak from foreclosing certain alleged tax liens on the real property of said Indian and Eskimo Natives lying within the corporate limits of the city of Kodiak.

The title to the real property here in question was acquired by the natives by way of restrictive deed from the townsite trustee.

The restrictive deeds were issued under the authority of title 48 U.S.C.A. § 355a which provides as follows:

‘355a. Indian or Eskimo lands set aside on survey of townsite. Where, upon the survey of a townsite pursuant to section 355 of this title, and **\*570** the regulations of the Department of the Interior under said section, a tract claimed and occupied by an Indian or Eskimo of full or mixed blood, native of Alaska, has been or may be set apart to such Indian or Eskimo, the town-site trustee is authorized to issue to him a deed therefore which shall provide that the title conveyed is inalienable except upon approval of the Secretary of the Interior: Provided, that nothing herein contained shall subject such tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the patentee, or to any claims of adverse occupancy or law of prescription: Provided further, That the approval by the Secretary of the Interior of the sale by an Indian or Eskimo of a tract deeded to him under this section and section 355c of this title shall vest in the purchaser a complete and unrestricted title from the date of such approval.’

Granting that the parcels of land in question were public lands, with fee simple title vested in the United States of America at the time Alaska was ceded to the United States of America, it is indisputable that the United States of America could deal with the lands in any manner it saw **\*571** fit through acts of Congress, [Utah Power & Light Co. v. United States, 243 U.S. 389, 404, 37 S.Ct. 387, 61 L.Ed. 791](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1917100411)

The Congress, desiring to protect and benefit the Indians and Eskimos in the newly-acquired territory, passed the act of May 25, 1926, sec. 355a, Title 48 U.S.C.A. supra. In that act it specifically provided, in order to guarantee that the lands would remain in the possession and beneficial use of the Indian or Eskimo, that they would be nontransferable without the approval of the Secretary of the Interior, and also specifically provided that they could not be taxed or taken through taxation procedures, and could not be taken for debts or through execution procedures until after the title had passed to someone else upon approval of the Secretary of the Interior.

A provision somewhat similar to 48 U.S.C.A. § 355a is found in [25 U.S.C.A. § 412a](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=25USCAS412A&FindType=L). This provision was upheld against attack by the taxing authority of the State of Oklahoma, [Board of Commissioners of Creek County, Okl. v. Seber, 1943, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1943116418)

‘The government of the territories of the United States belongs, primarily, to Congress; and secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political power exercised therein is derived from the General Government.’ [Snow v. U.S., 1873, 18 Wall. 317, 319-320, 85 U.S. 317, 319-320, 21 L.Ed. 784](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1873191530&ReferencePosition=319).

**\*576** ‘It possesses only such powers as are granted by the Congress of the United States. Its revenues, its property, and its very existence depend upon the will of Congress. It can be enlarged or annihilated at the will of Congress.’ [Wickersham v. Smith, 1927, 7 Alaska 522, 536](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=126&FindType=Y&ReferencePositionType=S&SerialNum=1927001455&ReferencePosition=536).

Thus, it can be seen that the government of the Territory of Alaska is but an arm of Congress, to be controlled by Congress.

Defendant further contends that as to some of the property, the government had no title to convey. … **\*\*580** From this it is apparent that property which could be classed as ‘private individual property’ did not pass as public lands. Thus, such land as was ‘private individual property’ at the time of the Treaty of Cession and has continued to be such would not be within the jurisdiction of the townsite trustee. [King v. McAndrews, 8 Cir., 1901, 111 F. 860, 863-864](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=348&FindType=Y&ReferencePositionType=S&SerialNum=1902100767&ReferencePosition=863).

‘Territory ceded. His Majesty the Emperor of all the Russias agrees to cede to the United States …‘Public property ceded. In the cession of territory and dominion made by the preceding article, are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices **which are not private individual property**. … The cession of territory and dominion herein made is hereby declared to be free and unencumbered… **except merely private individual property-holders**; … as between the parties, a treaty takes effect, in the absence of any provision to the contrary, from the time it is signed, with its subsequent ratification relating back to that date; but **in its application to private rights**, a treaty is effective only from the exchange of ratifications. [87 C.J.S., Treaties, § 14, p. 941](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0158311&FindType=Y&SerialNum=0289699398)

In conclusion, I find that the defendant is without power to tax the parcels of land here in question, and that the plaintiff is entitled to the equitable relief prayed for in its complaint. I, therefore, order that the parcels of land conveyed by restrictive deeds to certain residents in the city of Kodiak by the township trustee, and which are on the city of Kodiak's petition for sale pending before this court for their failure to pay the taxes assessed by the city of Kodiak thereon, **be stricken from said petition of sale, and, further, order that the defendant, city of Kodiak, its agents, employees and officers be permanently enjoined and restrained from placing such parcels of land as are held by such restrictive deeds upon any future tax rolls**.

***Klais v. Danowski*, 129 N.W.2d 414 (1964) (Supreme Court of Michigan)**

Purchasers' action for specific performance of land contract and other relief. The state intervened. The Supreme Court, Dethmers, J., held that where a patent description contained exact measurements from a fixed point intention to convey the subaqueous portion, if any, was clear, and in any event land was granted to the full extent of the description, **and rights of patentees to the land, whether above or beneath water, were not cut off by subsequent admission of the territory to the union as a state.** **Affirmed insofar as adverse to state.**

Overview: The state appealed a decision which granted the purchasers specific performance of a land contract but denied the purchasers any other relief sought against the sellers on the theory that the sellers had and could convey good and marketable title as against the state and did not, therefore, pay anything to the state or reimburse the purchasers for what they paid to the state for conveyance of the state’s interest in the lots. On appeal, the court affirmed. The court held that the United States conveyed a private claim of specific dimensions at a definite location. Determination of that location was conclusive of the occupant’s rights. **The occupants continued to own, through chain of title, what was granted to the patentees in the first place**.

**p. 419:** We are persuaded that the lots in question lie landward from the easterly boundary line of claim 623 as it existed at the time it was patented.

 In point, then is what this court said in *People, ex rel. Dir. Of Conservation v. Broedell*, 365 Mich. 201, 206, 207: “If lots 36 and 37 were within the confines of private claim 623 as patented to defendant’s predecessors in title, the heirs of James Abbott, on June 1, 1811, no title thereto passed from the United States to the State of Michigan upon its admission into the Union in 1837, even if submerged land at the time, because then it no longer belonged to the United States but to the Abbott heirs or their successors in title. In apparent recognition of this the legislature, in enacting the cited submerged land acts, expressly made them applicable only to ‘unpatented’ lands. See *Knight v. United States Land Association*, 142 U.S. 161; see also *Beard v. Federy*, 3 Wall (70 U.S.) 478. If the lots were within the boundaries of the patented lands, plaintiff’s bill should be dismissed and decree entered for the defendant.”

**‘It is settled law in this country** that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and **subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of \*273** performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, **or carrying out other** **public purposes appropriate to the objects\*\*420 for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.**’ (citing United States v. Holt State Bank, 270 U.S. 49)

This leaves no need for consideration of the question of the power of the United States to convey lake bottom land held in trust. The land was granted to the Abbotts to the full extent of the description **\*275** contained in the patent. **Their rights to the land, whether above or beneath water, were not cut off by the subsequent creation of the State.** United States v. Holt Bank, supra.

**Here the United States conveyed a private claim of specific dimensions at a definite location. Determination of that location, as we have done above, is conclusive of the occupant's rights today. They continue to own, through chain of title, what was granted to the patentees in the first place.**

**Under *Klais* shepardize: 15 Michigan Digest Public Lands § 33:**

**1891**:

A patent of riparian land conveys, where there is no reservation, the land over which the stream flows as far as the middle of the stream, and covers unsurveyed islands between this line and the bank; and the riparian’s title will not be divested by a subsequent survey and grant of such islands. *Butler v. Grand Rapids & I.R. Co.*, 85 Mich. 246, 48 N.W. 569 (1891), aff’d 159 U.S. 87 (1895).

**1972**:

Where United States, as owner of land surrounding a lake, which is at the time a permanent body of water in a defined basin, conveys such land, riparian rights may thereafter be attached to such lands and passed to subsequent grantees. *Booker v. Wever*, 42 Mich. App. 368, 202 N.W.2d 439 (1972).

**II. Patented land cannot be collaterally attacked**.

It is well settled that a patent for lands is conclusive in an action at law; see *St. Louis Smelting v. Kemp*, 104 U.S. 636; *Davis v. Wiebbold*, 139 U.S. 507 (1891); *Beley v. Nephtaly*, 169 U.S. 353 (1898); *Fern v. Holme*, 21 How. 481, 62 U.S. 481 (1859); *Field v. Seabury*, 19 How. 323, 60 U.S. 323 (1857).

***Hughes v. Washington*, 389 U.S. 290 (1967). (PLEADING)**

The question of the extent of a federal grant is a federal question.

**NOTICE: It was NOT the PATENT that Hughes used, it was the Act of Congress and the law that existed at the time the property was conveyed**. **(prior to statehood)**

**The patent does NOT CREATE your property rights, it’s the laws that existed at the time the patent issued – it’s** **the legislative Act**.

Summary/Syllabus: **The owner of ocean-front property** in the state of Washington, **who traced her title to a federal grant prior to statehood**, instituted an action against the state in the Superior Court of Pacific County, Washington, to determine whether the adjoining property owner’s right to accretions **which existed under federal law prior to statehood** was abolished by the state constitution. **The trial court held that the right to accretions remained subject to federal law**, and that the plaintiff was the owner of accreted lands, **but the Supreme Court of Washington reversed**, holding that state law controlled and interpreting the state’s Constitution as denying the owners of ocean-front property in the state any further rights in accretions.

 On certiorari, **the Supreme Court of the United States reversed**. It was held that **the question was governed by federal, not state, law, and that under federal law the property owner, who traced her title to a federal grant prior to statehood, was the owner of accretions**.

 Opinion, p. 290: (Mr. Justice Black):

**The question for decision is whether federal or state law controls the ownership of land**, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. **Prior to 1889 all land** in what is now the State of Washington **was owned by the United States, except land that had been conveyed to private parties**. **At that time owners** of property bordering the ocean, **such as the predecessor in title of Mrs. Stella Hughes**, the petitioner here, **had under the common law a right to include within their lands any accretion** gradually built up by the ocean. Washington became a State in 1889, and Article 17 of the State’s new constitution, as interpreted by its Supreme Court, denied the owners of ocean-front property in the state any further rights in accretion that might in the future be formed between their property and the ocean. **This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee**, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. **The trial court upheld Mrs. Hughes’ contention that the right to accretion remained subject to federal law**, and that she was the owner of the accreted lands. **The State Supreme Court reversed**, holding that state law controlled and that the state owned these lands, 67 Wash. 2d 799; 410 P.2d 20 (1966). We granted certiorari, 385 U.S. 1000 (1987). **We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions**.

 At Shepards #170: 1 Geo. J.L. & Pub. Pol’y 77; The Georgetown Journal of Law and Public Policy, Winter 2002, by Steven J. Eagle seagle@gmu.edu

**Article:** ***The Development of Property Rights in America and the Property Rights Movement***

**FN8:** from *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall) 304, 310 (1795): Supreme Court Justice William Patterson: “It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of men … ***No man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property then is a primary object of the social compact.***

N 31: James W. Ely, Jr. The Guardian of Every Other Right: A Constitutional History of Property Rights II (1992)

A. The Nature of “Property”

1. Property is a Set of Rights with Respect to Others. … it denotes the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” The constitutional provision is addressed to every sort of interest the citizen may possess. [re: takings clause] Pruneyard Shopping Ctr. V. Robins, 447 U.S. 74, 83 n.6 (1980) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945).

 2. **Property Rights Include Possession, Disposition, and Use**

 **The principal rights are the right to exclusive possession, the right to use and enjoy, and the right to dispose of one’s interest through devise, sale, or gift**.

 Government taking for a trail case: *Preseault v. United States*, 52 Fed.Cl. 667, 670 (2002)

**Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)**

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which **\*\*1330** **the State had leased oil and gas and other mineral rights**. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had been since 1835 the absolute fee owner of certain land below the mean high water level of the Arkansas River. Subsequently, petitioners Choctaw and Chickasaw Nations sought and were granted leave to intervene in the case in order to present their claims that part of the river bed belongs to them.

After pre-trial proceedings in the District Court, a judgment on the pleadings was entered against petitioners and in favor of the State. The District Court held that land grants made to petitioners by the United **\*622** States conveyed no rights to the bed of the navigable portion of the Arkansas River. The court thus held that title to the river bed remained in the United States until 1907, when it passed to the State upon Oklahoma’s admission to the Union. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court. **We granted certiorari** [cite] **to consider petitioners’ claims that they received title to the land in question by treaties with the United States in 1830 and 1835.**

**The history behind these treaties goes back at least to the period immediately after the Revolutionary War and prior to the adoption of the Constitution**—a time when petitioners and other Indian Nations occupied much of what are today the southern and southeastern parts of the United States. **In 1785**, in the Treaty of Hopewell, November 28, **1785**, 7 Stat. 18, the United States entered into a treaty of peace and friendship with the Cherokee Indians which established the boundaries of the Cherokee Nation and in which the Indians acknowledged themselves to be under the protection of the United States. The next year, a similar treaty was concluded between the Choctaws and the United States. Treaty of Hopewell, January 3, **1786**, 7 Stat. 21.

The Choctaw treaties preceded any grant to the Cherokee Nation; and, under them, petitioners Choctaw and Chickasaw Nations claim the entire bed of the Arkansas River between its confluence with the Canadian River and the Oklahoma-Arkansas border. The Cherokees, however, also have a claim to this part of the river, based on the language setting out the southern border of the **\*630** land granted them in the Treaty of New Echota: From a point on the Canadian River, ‘thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river \* \* \*.’ 7 Stat. 480.

According to the Cherokee Nation, the United States thereby conveyed to it the north half of the Arkansas River from its junction with the Canadian to the eastern Oklahoma border. Petitioners thus are in disagreement about the effect of the words in the treaties and patents with regard to this lower portion of the river.[7](#co_footnote_B00771970134218_1)

**The courts below did not resolve the dispute between petitioners, and we likewise do not pass on that question [See Choctaw Nation V. Cherokee Nation, 393 F.Supp. 224 (1975)]**

Together, **petitioners were granted fee simple title** to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers. To the extent that the documents speak to the question, they are consistent with and tend to confirm this natural reading. Certainly there was no express exclusion of the bed of the Arkansas River by the United States as there was to other land within the grants.

**\*635** As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See [Atlantic & Pacific R. Co. v. Mingus, 165 U.S. 413, 435—436, 17 S.Ct. 348, 354, 41 L.Ed. 770 (1897)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180097&pubNum=708&originatingDoc=I0a40905e9bf011d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_708_354&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_354). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive **\*\*1337** changes of the river’s course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. [Pollard v. Hagan, 3 How. 212, 229, 11 L.Ed. 565 (1845)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105920&pubNum=780&originatingDoc=I0a40905e9bf011d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_780_229&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_229).

Finally, it must be remembered that the United States accompanied its grants to petitioners with the promise that ‘no part of the land granted to them shall ever be embraced in any Territory or State.’ In light of this promise, **it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.**

We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within in the present State of Oklahoma in the grants it made to petitioners. **\*636** The judgments of the Court of Appeals are therefore **reversed, and the cases are remanded for further proceedings** consistent with this opinion. It is so ordered.

***Romart Properties, Inc. v. City of New Rochelle*, 324 N.Y.S.2d 277 (1971)**; 67 Misc.2d 162.

Claiming title from a royal patent of 1666, **plaintiffs, in an attempt to construct a multi-family apartment house by filling in this approximately 11-acre pond**, have brought a declaratory judgment action to declare the zoning classification permitting one-family dwellings as unconstitutional **as it applies to plaintiffs' property.** The City moves for summary judgment claiming that plaintiffs do not own the fee to the bed of the pond, either by tracing their title to the royal grant or by adverse possession.

In 1666, King Charles II, through Richard Nicholls, the first English governor of New York, confirmed Pell's treaty of 1654 with the Siwanoy by issuing to Pell a royal patent. At Pell's death in 1669, the land obtained by royal patent was bequeathed to his nephew, John, who received a confirmatory grant by patent from Governor Dongan in 1687.

**Through mesne conveyances from predecessors in title, the title to the land under the pond is now allegedly in the present owner. [a corporation .. Thomas Pell’s title to the 11 acre has become vested, by mense conveyances, in plaintiff corporation]**

The grant of 1666 from Governor Nicholls really confirmed the purchase by Pell from the Indians in 1654.

There is no dispute over the existence or authenticity of any of the above-described grants. It is only what was a part of these grants and in particular the Titus Mill Pond that is at issue.

In the common law, the king owned the arms of the sea and the navigable rivers wherein the tide flowed. Hale, de Jure Maris, Chap. IV, as set forth in Moore, Foreshore and Seashore, 3rd Ed. at pp. 370—413; [Rogers v. Jones, 1 Wend. 237 (1828)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=2807&FindType=Y&SerialNum=1828005584). The king could divest himself of this right to lands under water by royal charter or grant or a subject could acquire lands under water by custom or prescription.

**‘It cannot be doubted, that when a patent or grant conveys a tract of land by metes and bounds, the land under water \*168 lies within the bounds of the grant.’**

**\*172** Motion for summary judgment by the City and by the intervenor State on its counterclaim is denied. **Summary judgment is granted to plaintiffs declaring them to have good and valid title.**

***Romart Properties, Inc. v. City of New Rochelle*, 40 A.D.2d 987, (1972).**

We agree with the determination by the learned Justice at Special Term that the subject property was included within the 1666 Nicholls Patent and the 1687 Dongan Patent to the Pells and that **plaintiffs' chain of title back to those patents gives them good title** to the subject property. And if we were to assume the contrary, we would nevertheless find that they have good title thereto based upon almost 250 years of adverse possession by their predecessors in title.

***Booker v. Wever*, 42 Mich.App. 368, 202 N.W.2d 439 (1972).**

Plaintiffs and defendants are neighbors owning adjoining lake lots on Wolf Lake in Muskegon County, Michigan. The plaintiffs purchased their lot in 1966, defendants in 1962.

**\*370** Through the course of events over the years prior to and including the aforementioned dates, the level of Wolf Lake has been dropping, leaving lands uncovered by reliction in front of the lots owned by the parties…. Plaintiffs commenced a declaratory judgment action against the defendants in Muskegon County Circuit Court on May 15, 1970, seeking a determination of the location of the common boundary line between the adjoining lake lots.

**pp. 371-372:** “It is clear that where the United States, as owner of land surrounding a lake, which is at the time a permanent body of water in a defined basin, conveys such land, riparian rights may thereafter be attached to such lands **and passed to subsequent grantees**. *Lee Wilson & Co. v. United States*, 245 U.S.24 (1917), *United States v. Hale*, 7 F.2d. 882 (CA8, 1925); *United States v. Rhodes*, 3 F.2d. 771 (CA8, 1925); 67 CJ § 276, p. 850; 112 ALR 1114; 23 ALR 783.

If a lake was a permanent body of water in a defined basin at the time the United States parted with its title to the land surrounding it, and if the meander line was properly run, riparian rights attach under state law, and become vested in the patentees and their grantees. *United States v. Rhodes*, supra.

The proper shoreline herein is ascertained by determining the shoreline at the time that the lake and surrounding land was patented by the United States Government to the State of Michigan. The common boundary between plaintiffs and defendants is the only boundary to **\*376** be determined in this case

***Oneida Indian Nation v. County of Oneida***, 414 U.S. 661 (1974) **(PLEADING)**

[good for treaty, Indian possession rights, etc.] Indian nations brought action seeking to recover from counties in New York state the fair rental values of certain lands ceded in 1795 by Indians to the state, on theory that the cession was invalid under treaties and laws of the United States.

A possessory right is a federal right – in *The New York Indians*, 72 U.S. 761

**p. 675:** The **complaint** in this case **asserts a present right to possession under federal law**.

**p. 676:** Here, the right to possession itself is claimed to arise under federal law in the first instance.

**pp. 677-678:** In the present case however, the assertion of a federal controversy does not rest solely on a claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, **it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles** which normally and separately protect a valid right of possession.

**p. 677:** “‘The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules **do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee**.’ …” citing *Packard v. Bird*, 37 U.S. 661, 669 (1891)

As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in Taylor v. Anderson, 234 U.S. 74, (1914) …Thus, this Court’s decisions have established a strict rule that mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case…. The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor

***United States v. Reiman*, 504 F.2d 135 (1974) (10th Cir.)**

Prior to title passing from the United States, it is undisputed that the Government has the power to survey and resurvey, establish and re-establish boundaries on its own lands. [Lane v. Darlington, 249 U.S. 331, 39 S.Ct. 299, 63 L.Ed. 629 (1919)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1919149838&pubNum=708&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [43 U.S.C.A. 772](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=43USCAS772&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). **But once patent has issued, the rights of patentees are fixed and the government has no power to interfere with these rights,** as by a corrective resurvey. Cragin v. Powell, supra; [United States v. State Investment Company et al., 264 U.S. 206, 44 S.Ct. 289, 68 L.Ed. 639 (1924)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924120909&pubNum=708&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [Ashley v. Hill, 150 Colo. 563, 375 P.2d 337 (1962)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1962126970&pubNum=661&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [43 U.S.C.A. 772](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=43USCAS772&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The government has no power to control ‘previously disposed of lands.’ [Moore v. Robbins, 96 U.S. 530, 24 L.Ed. 848 (1877)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877155348&pubNum=780&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [Hardin v. Jordan, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180153&pubNum=708&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960120760&pubNum=661&originatingDoc=I21037e7e905411d9a707f4371c9c34f0&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

The government retains no power to nullify a patent, nor the survey upon which it is based, once patent has issued. As stated in Moore v. Robbins, supra: . . . in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. **He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title**. … T**he existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded**.

***Choctaw Nation v. Cherokee Nation*, 393 F.Supp. 224 (1975)**. E.D. of Oklahoma.

Jurisdiction given to this Court by Congress by P.L. 93-193, 93rd Cong., HR 5089 wherein it gave the consent of the United States to the Choctaw Nation, The Chickasaw Nation, and the Cherokee Nation to bring suit against each other to quiet title in and to the bed of the Arkansas River.

**This Court must rely upon the same treaties which were considered by the Supreme Court** in [Choctaw Nation v. Oklahoma, *supra*](https://scholar.google.com/scholar_case?case=12269431332914062858&q=393+F.Supp.+224&hl=en&as_sdt=400003)*,* **wherein it was determined that the river bed belonged to these Indian Nations and not to the State of Oklahoma. [Treaties & patents set forth in this decision]**

Patent issued to Choctaws in 1842.

It was stated by Chief Judger Phillips in United States v. Elliot, 131 F.2d. 720 (C.A. 10, 1942) that insofar as non-navigable rivers are concerned, when the United States disposes of riparian land it may intend to restrict the conveyance to lands ending at the bank. When such an intent is not shown, then if, as here, **the lands were not within a state**, what the grant conveys is a matter of common law principles and Supreme Court decisions. The common law and decisional rule was that a grant bounded by a non-navigable stream carried right and title to the center of the stream, unless there was a clear intention otherwise shown. *Bratschi v. Loesch*, 330 Mo. 697, 51 S.W.2d 69 (1932) held that a description beginning at the bank and running the boundary line “thence down said creek” does not show an intention to place the boundary line elsewhere than at the center of the stream. “Thence down said river” includes land to the middle of the stream. *Drake v. Russian River Land Co.,* 10 Cal.App. 654, 103 P. 167 (1909). “Thence up said river” is held to extend to the center of the stream. *Hanlon v. Hobson*, 24 Colo. 284; 51 P. 433 (1897).

**Opinion: South portion of the Arkansas River (as described) belonged to Choctaw Nation and Chickasaw Nation in fee simple, to the exclusion of the Cherokee Nation, and north portion belonged to the Cherokee Nation in fee simple, to the exclusion of the Choctaws and Chickasaws.**

***Swimming Turtle v. Board of County Com’rs of Miami County*, 441 F.Supp 374 (1977).**

SWIMMING TURTLE, a/k/a Oliver Godfroy, Plaintiff, v. The BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, Earl Yoars, Individually and in his capacity as Commissioner of Miami County, Thomas Denton, *Individually* *and* in his capacity as Commissioner of Miami County (and others likewise)

Action was brought against board of county commissioners to enjoin assessment and collection of taxes on real estate. The District Court, Allen Sharp, J., held that: (1) plaintiff who was great grandson of war chief of Miami Indian Tribe and who had made every reasonable effort consistent with realities of modern society to maintain his status as an Indian was an “Indian” as defined in Article III of the Northwest Ordinance which exempts Miami Indian land from taxation by state or its political subdivision; that (2) tax-exempt status of plaintiff was vested right which could not be taken by state of Indiana or its political subdivisions without just compensation and that (3) plaintiff was therefore entitled to an injunction enjoining assessment and collection of taxes. Judgment for plaintiff.

The Northwest Ordinance is a part of the basic organic law of The United States of America enacted by a national legislative body before the existence of The Constitution of the United States. The Northwest Ordinance was re-enacted by the First Congress of the United States and is therefore a part of the federal statutory law which this Court has jurisdiction to interpret. See 1 Stat. 50, ch. 8 (1789). In re-enacting Article III of the Northwest Ordinance the First Congress clearly exercised its power under Article I, Section 8(3) of the Constitution of the United States.

The word “Indians” in Article III of the Northwest Ordinance does not refer merely to Indian Tribes. The term “Indians” there must be given its plain meaning and construed liberally. The immunity conferred by Article III is not limited to Indian Tribes but may, in appropriate cases, apply to individual Indians as well. There is no strict need to show tribal relations. The word must be given a racial meaning.

[[8]](#Document1zzF81977126989) The tax exempt status of the plaintiff is a vested right which cannot be taken by the State of Indiana or its political subdivisions without just compensation.   [Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1912100399). See also, [Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1930122166), and [Ward v. Board of County Commissioners, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1920117900).

[[9]](#Document1zzF91977126989) Since **we are here dealing with a nationally created right in a unique setting the defendants' argument as to exhaustion of state remedies and reference to the state statute of limitations are of no avail here.**

[[10]](#Document1zzF101977126989) The **plaintiff is therefore entitled to a permanent injunction from assessing and collecting taxes on the subject real estate and the same is hereby GRANTED. The plaintiff is also entitled to recover the taxes** specified in Joint Exhibit 2 and judgment for same is entered accordingly.

***Oregon ex rel. State Land Bd. V. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 380 (1977)**. [good example of Justices being “bought off” and ruling against long-standing federal law]

p. 380, citing Packer v. Bird: “whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, **subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment by the grantee**.”

***United States v. Bouchard*, 464 F.Supp. 1316, 1335 (1978) (U.S. Dist. Ct., W.D. of Wis.)**

Assuming that the Chippewa ceded all their rights in the navigable waterways within the boundaries of the ceded area to the United States by the 1842 treaty, it is well settled that the government’s title to the beds of navigable waterways was held in trust for the future State, and upon statehood passed to Wisconsin in trust for the public. [cites omitted]

“This principle was explained in United States v. Holt, 270 U.S. 49 (1926)

[citing Holt]:

“It is settled law in this country that lands … subject to the qualification that **where the United States, after acquiring a territory and before the creation of the State, has granted rights in such land … such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state by virtue of its admission into the Union are restricted or qualified accordingly** …

 “The State of Minnesota was admitted to the Union in 1858 … and under the constitutional principle of equality among the several states, the title to the bed of Mud Lake then passed to the state, if the lake was navigable, and if the bed had not already been disposed of by the United States.”

 “The ‘disposal’ of a navigable waterway which prevents a state from obtaining fee simple title to the water and the land beneath it may either be a transfer of legal ownership, such as the fee title given to the Indians in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).”

 There were three cases combined in Bouchard – “These 3 cases all require a determination of the property interests and hunting and fishing rights of the Chippewa Indians in northern Wisconsin. The United States prevailed in all 3 cases.

 On August 6, 1846 Congress enacted a law to enable Wisconsin to form a constitution and establish a state government. Wisconsin was admitted to statehood by an Act of Congress in 1848. (22 further proceedings and cases.) Reversed by: Lac Courte Orielles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (1983) (7th Cir.) Decision reached on appeal by, Remanded by: “ v. Wisconsin, 769 F.3d 543 (2014)

***Leo Sheep Co., et al. v. United States*, 440 U.S. 668 (1979)**

Corporate owners of land which had been granted by Congress to a railroad in 1862 brought suit against the United States for declaratory and injunctive relief under the **Quiet Title Act.** The landowners claimed that the United States had unlawfully entered their property. The United States District Court for the District of Wyoming, Ewing T. Kerr, J., ruled in favor of the landowners. The United States appealed, and the Court of Appeals for the Tenth Circuit, [570 F.2d 881,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977125005&pubNum=350&originatingDoc=Id4be5b939c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) reversed. On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that the Government has no implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862, a grant that was part of governmental scheme to subsidize construction of transcontinental railroad. Reversed.

This case is the modern legacy of these early grants. Petitioners, the Leo Sheep Co. and the Palm Livestock Co., are the Union Pacific Railroad’s successors in fee to specific odd-numbered **\*678** sections of land in Carbon County, Wyo. These sections lie to the east and south of the Seminoe Reservoir, an area that is used by the public for fishing and hunting. Because of the checkerboard configuration, it is physically impossible to enter the Seminoe Reservoir sector from this direction without some minimum physical intrusion upon private land. In the years immediately preceding this litigation, the Government had received complaints that private owners were denying access over their lands to the reservoir area or requiring the payment of access fees. After negotiation with these owners failed, the Government cleared a dirt road extending from a local county road to the reservoir across both public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

 Petitioners initiated this action pursuant to [28 U.S.C. § 2409a](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2409A&originatingDoc=Id4be5b939c1d11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to quiet title against the United States. The District Court granted petitioners’ motion for summary judgment, but was reversed on appeal by the Court of Appeals for the Tenth Circuit. [570 F.2d 881.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977125005&pubNum=350&originatingDoc=Id4be5b939c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The latter court concluded that when Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government. Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari, [439 U.S. 817, 99 S.Ct. 78, 58 L.Ed.2d 108,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979229574&pubNum=708&originatingDoc=Id4be5b939c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and now reverse.

Case summary: **Petitioner landowners, who were a railroad’s successor in fee, filed an action to quiet title** against respondent government. The district court granted summary judgment in favor of the landowners. The United States Court of Appeals for the tenth Circuit reversed and held that, when Congress granted land to the railroad, it reserved an implicit easement. Landowner appealed.

The Supreme Court reversed the judgment holding that Congress reserved an implicit easement in favor of the government when it granted land to the railroad **that was the landowner’s predecessor in title**.

***Andrus v. Utah*, 446 U.S. 500 (1980)**

Northwest Ordinance of 1787 (1 Stat. 50) Article IV. provided that legislatures in the region could not “tax … the property of the United States” or interfere with the federal government’s disposal of the public lands.

As consideration for each new State’s pledge not to tax federal lands, Congress granted the State a fixed portion of the lands within its borders for the support of public education. E.g., Act of April 30, 1802 §7, 2 Stat. 175 (Ohio); see *United States v. Morrison*, 240 U.S. 192, 201 (1916). Northwest Ordinance banned State taxes on federal lands. “The inhabitants of said Territory shall always be entitled to the benefits of the writs of habeas corpus, and of trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law.”

***Montana v. United States*, 450 U.S. 544 (1981)**

This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, [445 U.S. 960, 100 S.Ct. 1645, 64 L.Ed.2d 234](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980235010&pubNum=708&originatingDoc=Ic1dbcde59c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River.[1](#co_footnote_B00211981112836_1) The question **\*\*1251** is whether the United States **\*551** conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union.  [*Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627–628, 90 S.Ct. 1328, 1332–1333, 25 L.Ed.2d 615](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134218&pubNum=708&originatingDoc=Ic1dbcde59c1e11d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_708_1332&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_1332)

Treaties with Crow Tribe of Montana did not pass title of navigable Big Horn River to Crow, title passed to Montana upon admission to the Union. Also, Crow Tribe did not have the power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe. Federal trespass statute 18 U.S.C. § 1165 deliberately excluded fee-patented lands from the statute’s scope.

***Caifornia. ex rel. State Lands Com’n v. United States*, 457 U.S. 273, 282 (1982)**

California filed suit to quiet title to oceanfront land. The Supreme Court, Justice White, held that the United States, not California, has title to oceanfront land created through accretion, resulting from construction of jetty, to land owned by United States on coast of California. Ordered accordingly.

**\*\*2433** ***Syllabus*****[\*](#co_footnote_B0011982127299_1):** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. **\*273** *Held:* The United States, not California, has title to oceanfront land created through accretion, resulting from construction of a jetty, to land owned by the United States on the coast of California. Pp. 2436–2441. (a) A dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law.  [*Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129580&pubNum=708&originatingDoc=I618fbef49c1f11d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979135152&pubNum=708&originatingDoc=I618fbef49c1f11d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Under federal law, accretion, whatever its cause, belongs to the upland owner. Pp. 2436–2438. (b) This is not a case where, as a matter of choice of law, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue. (c) Only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine, [*United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947117398&pubNum=708&originatingDoc=I618fbef49c1f11d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and hence California cannot properly claim that title to the land in question here was vested in the State by that doctrine and confirmed by the Submerged Lands Act.

**Recognizing that the choice-of-law issue was clearly drawn, California moved for summary judgment and the United States moved for judgment on the pleadings. No essential facts being in dispute, a special master was not appointed and the case was briefed and argued. We conclude that federal law governs the decision in this case and that the land in dispute is owned by the United States.**

***Hilgeford v. People’s Bank*, 776 F.2d 176 (1985, 7th Cir.)** **(PLEADING)**

(cited *Wisconsin v. Baker*, 698 F.2d 1323 (1983)

Hilgefords have not included a copy of the statute nor have they alluded to its content in their brief.

… based upon a purported land patent which indicates *on its face* that it is a self-serving document, drafted by the plaintiffs to grant themselves title to land, and which does not invoke any federal law or constitutional provision precisely because it is a blatant attempt by private landowners to improve title by personal fiat.

**p. 1327**, *Baker*: **Only if federal law continues to govern the right, or if the suit is to decide whether the United States did, in fact, originally convey it, does an action to enforce that right arise under federal law. The federal nature of the right to be established is decisive** – not the source of the authority to establish it. [*State of Wisconsin v. Baker,* 698 F.2d at 1327](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983104989&pubNum=350&originatingDoc=Ib998d1f394b211d9a707f4371c9c34f0&refType=RP&fi=co_pp_sp_350_1327&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_1327) (citations omitted).

See Oneida Indian Nation, 414 U.S. 661 at 676-677 (1974); Joy v. City of St. Louis, 201 U.S. 332 at 342-343 (1906). (The federal nature – Puerto Rico v. Russell & Co., 288 U.S. 476, 483.) **Neither the federal constitutional and statutory provisions cited, nor the existence of title derived from a land patent raises a sufficient federal claim or issue upon which to base the jurisdiction of the district court.** The instant case does not require the interpretation or construction of these alleged bases of jurisdiction. Rather, the action involves only mortgage foreclosure, proper for state court determination, not federal court. Land title and possessory actions are generally not the business of federal courts,

[ Especially important if the rights vested (adhered to the land) prior to statehood; they must be properly plead in the complaint.]

***Wisconsin v. Baker*, 698 F.2d 1323 (1983) (PLEADING)**

**That a right of property was at one time governed by federal law or first conveyed by the United States does not render a suit to enforce that right one “arising under” federal law.** [*Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 676–677, 94 S.Ct. 772, 781–82, 39 L.Ed.2d 73;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127116&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_781&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_781) [*Shulthis v. McDougal,* 225 U.S. 561, 569–570, 32 S.Ct. 704, 706, 56 L.Ed. 1205;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_706&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_706) [*Joy v. City of Saint Louis,* 201 U.S. 332, 341, 26 S.Ct. 478, 480, 50 L.Ed. 776;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1906100246&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_480&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_480) [*Shoshone Mining Co. v. Rutter,* 177 U.S. 505, 507–508, 20 S.Ct. 726, 727, 44 L.Ed. 864.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_727&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_727) **Only if federal law continues to govern the right**, see [*Oneida Indian Nation,* 414 U.S. at 676–677, 94 S.Ct. at 781–82,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127116&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_781&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_781) [*Joy,* 201 U.S. at 342–343, 26 S.Ct. at 481,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1906100246&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_481&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_481) **or** if the suit is to decide whether the United States did, in fact, originally convey it, see [*Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123857&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_29&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_29) [*Smith v. Kansas City Title and Trust Co.,* 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921116204&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) **does an action to enforce that right “arise under” federal law.** **“The federal nature of the right to be established is decisive—not the source of the authority to establish it.”** [*Puerto Rico v. Russell & Co.,* 288 U.S. 476, 483, 53 S.Ct. 447, 449, 77 L.Ed. 903.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933126096&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_449&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_449) W**ere it otherwise, anyone claiming title to real estate in the western United States could bring suit in federal court since title to all lands in those parts of the nation is traceable to a federal grant or law.** [*Shoshone Mining Co. v. Rutter, supra,* 177 U.S. at 507, 20 S.Ct. at 726](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=0000708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_726&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_726).

**The State asserts that defendants have no right under the 1854 treaty** to regulate public fishing and hunting in any navigable Wisconsin lakes. Complaint ¶¶ 19, 22. **There is no question that this claim “arises under” federal law. The State relies directly upon a federal treaty to defeat a federal right**—the right to prevent the general public from fishing and hunting in navigable lakes—asserted by the Band in its constitution and 1976 Code and by defendants in enforcement of that Code against the general public. **Federal interest in providing a federal forum for a claim that denies the existence of a right founded upon federal law is no less than for a claim that asserts the existence of such a right.** The rationale for providing federal tribunals for the adjudication of federal rights—that state tribunals might treat federal rights ungenerously—applies equally to both types of claim. **That rationale is especially applicable in the case before us where the State in effect claims that its state-created property interests are superior to an Indian tribe’s federally-created property interests.** See [*United States v. Kagama,* 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1886180093&pubNum=0000708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_1113&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_1113) (“Because of the local ill feeling, the people of the States where they [Indian tribes] are found are often their deadliest enemies”).

***Summa Corp.***

***Summa Corp. v. California*, 466 U.S. 198, 104 S.Ct. 1751 (1983, decided April 17, 1984)**

**[Summa: privately held interconnected corporations]**

Certiorari was granted to review decision of the California Supreme Court, [31 Cal.3d 288, 182 Cal.Rptr. 599, 644 P.2d 792,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1982121245)vacating [117 Cal.App.3d 335, 172 Cal.Rptr. 619,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1981113434) affirming a decision of the Superior Court, Los Angeles County, Samuel Greenfield, J., allowing the State to assert public trust easement over property.

The Supreme Court, Justice Rehnquist: We hold that **California cannot at this late date assert its public trust easement over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings** taken pursuant to the Act of 1851. **The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest,** like the Indian claims made in Barker and in United States v. Title Ins. & Trust Co., **must have been presented in the patent proceeding or be barred.** Accordingly, the judgment of the Supreme Court of California is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion. Reversed and remanded.

Cf. [Barker v. Harvey, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1901103974) [United States v. Title Ins. & Trust Co., 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1924120911) [United States v. Coronado Beach Co., 255 U.S. 472, 41 S.Ct. 378, 65 L.Ed. 736.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1921113833) Pp. 1755–1758.

**Prior cases:**

***City of Los Angeles v. Venice Peninsula Properties*, 644 P.2d 792 (1982).** [Calif. Supreme Court. This was reversed in favor of Summa Corp.]

“California did not acquire title of patented lands.”

***Los Angeles v. Venice Peninsula Properties*, 117 Cal.App. 3d 335 (1981)**

“Thus California acquired title to navigable waterways and tidelands by virtue of its sovereignty when admitted to the Union in 1850. This exercise of sovereignty was as a trustee for the public rather than in a proprietary [an owner] capacity.”

**p. 624:** The patent of the government is evidence of the title and is conclusive against the government and all persons claiming under it. The patent is a deed of the United States and operates as a quit claim of any interest the United States may have reserved in the land. **It establishes in the grantee full and complete title**. *Beard v. Federy*, 70 U.S. 478 (1866); Teschemacher v. Thompson, 18 Cal. 11 (1891).

***Summa Corp.***: **Opinion by Rehnquist:** “We granted certiorari, 460 U.S. 1036 (1983), and now reverse that judgment, holding that even if it assumed that the Ballona Lagoon was part of tidelands subject to Mexican law to the servitude described by the Supreme Court of California, **the State’s claim to such a servitude must have been presented in the federal patent proceedings in order to survive the issue of a fee patent**.

**HN5:** State’s public trust powers and duties were limited to the lands it owned in its sovereign capacity. *Kemp v. Leahy*, 328 P.3d 172, Colorado Supreme Court., 6/30/2014.

**HN8:** **Even “sovereign” claims such as those raised by the state must, like other claims, be asserted in the patent proceedings or be barred.**

**HN9:** **A state cannot assert its public trust easements over an owner’s property when the owner’s predecessors-in-interest had their interest confirmed without any mention of such an easement** in the proceedings taken pursuant to the Act of Congress of March 3, 1851. The interest claimed by the state is one of such substantial magnitude that regardless of the fact that the claim is asserted by the state in its sovereign capacity, this interest, like the Indian claims in Barker [*Barker v. Harvey*, 181 U.S. 481 (1901)] and in *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924), must have been presented at the patent proceeding or be barred.” *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) [State’s interest had to be reserved expressly on the federal patent to survive. Wisconsin had no interest to reserve as patents were pre-statehood]

Summa: Patents confirmed under the authority of the Act of 1851 are issued pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect **to land which, although tideland, had not passed to the state**. But the controversy in the present case turns on the proper construction of the Act of March 3, 1851. Thus, our jurisdiction is based on the need to determine whether the provisions of the 1851 Act operate to preclude California from now asserting its public trust easement.

 Significantly, the federal patent issued made no mention of any public trust interest such as the one asserted by California in the present proceedings. (California became a state in 1850).

**pp. 245-246** says about *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921): “The Court expressly rejects the Government’s argument, holding that the patent proceedings were conclusive on this issue, and could not be collaterally attacked by the Government. The necessary result of the Coronado Beach decision is that even “sovereign” claims such as those raised by the State of California in the present case must, like other claims, be asserted in the patent proceedings or be barred.”

**#1: *Reply Brief of Petitioner***: (1982 U.S. Briefs 707 (2/13/1982):

The issue here is whether the state, in any capacity, owns an interest in petitioner’s land. The case turns on whether California received any interest in Mexican land grants upon admission to the Union. This is a classic federal question: “Federal law governs the scope of title initially vested by the equal footing doctrine. Calif ex rel. … 457 U.S. 273, 286 n. 14 (1982)

1. The 1851 patent is controlling and precludes any silent reservation of a “public trust” property interest for California.

 A. Patent issued to Petitioner’s Predecessors Does Not Reserve a “public trust” interest. The absence of the so-called “express reservation” from the decree and patent is conclusive. N8 *Beard v. Federy*, 70 U.S. 478, 491-492 (1865).

 B. Assertion of “Public Trust” is barred. *Barker v. Harvey*, 181 U.S. 481 (1901); *Title Ins. Co*.. 265 U.S. 472 (1924); *Pumpelly v. Green Bay Co*., 80 U.S. 166 (1871); *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); United States v. Rindge, 208 F. 611 (S.D. Calif, 1913).

The questions presented are:

1. May the state now assert a “public trust” property interest in the confirmed Mexican rancho grant, even though the federal patent was issued without qualification or reservation?

2. May the state collaterally attack the General Land Office’s 1873 factual determination that the rancho land involved was not tidelands?

p. 7: The “public trust” interest is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership.

p. 12: The State’s response is to reject the applicability of the Act of 1851 and such cases as *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance Co.*, 265 U.S. 472 (1924); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); and *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913) on the ground that they dealt only with property rights.

**#3.** ***Brief for Respondent State of California***. [Expect them to twist the truth into a lie] Slimeball legalese verbiage and dolus: “ … as this court has repeatedly ruled that the determination of the *incidents* of such a title does not provide a basis for the application of federal law.

**#6.** **State’s Opposition to Motion For Leave To File Amicus Curiae of Pacific Legal Foundation and Strike Portions of Proposed Brief of California Land Title Association**.

… this court confines itself to the grounds upon which the writ of certiorari was asked or granted, the review being no broader than that sought by petitioner.

Petitioner did not raise the “taking” issue since the state court undertook to articulate the nature and quality of title always possessed by petitioner, not to cause a change or diminution of that title.

**#7.** **Brief of Petitioner**. The questions presented are:

1. When the United States pursuant to its treaty obligation confirmed a Mexican land grant and patented the land to private parties without qualification, did it silently reserve a “public interest” property interest, to which the State of California succeeded?

2. May State collaterally attack a factual determination made in an 1851 Act patent proceeding?

Patent issued by United States did not reserve. 1851 Act for speedy and final separation of private property from the public domain.

**#9.** ***Amicus Curiae for United States.*** Brief urging reversal.

“It seems to us that once again this stands for the proposition that a claim of less than full fee title is one which if not preserved in these confirmation proceedings is indeed lost to the claimant, and that claimant is anyone who claims derivatively from the United States, here the state of California.”

 “… that one exception to the rule that water bottoms inure to the state is where in pursuance of international obligations, referring to the Mexican treaty, those water bottoms had been previously alienated to a private grantee.” (see *United States v. O’Connell*, 303 U.S. 501 (1936?) {Conclusion: no reservation of interest by the United States when granting patent to private purchasers – it would have largely destroyed the value of the affected land.)

p. 23: There are, moreover, indications that Mexico intended to hold nothing back.

p. 24: no firm basis for concluding that Mexico retained a pervasive easement

 “vested property rights would be “inviolably respected”

p. 25: It is extravagant to suppose that the Ballona Lagoon was tacitly preserved for public use **after it was included in a private grant**.

**#11.** ***Memorandum For the United States as Amicus Curiae***.

If this was an exercise of police power – it could be challenged under the 5th and 14th Amendments as a “taking” of private property without compensation.

p. 8. In this action the question presented concerns **the fullness of the title to land confirmed by the federal patent, an issue of federal law**.

p. 12: But when such lands were never in State ownership – because alienated before statehood – it is difficult to appreciate how California can claim the same interest in them or treat them as equally subject to the public trust doctrine.

**Although lands underlying navigable waters normally inure to the State upon its admission to the Union, it is firmly established that this constitutional principle … is inapplicable when the lands were previously alienated by the United States**. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); *Montana v. United States*, 450 U.S. 544, 551-552 (1981).

Montana v. United States, p. 552: “**unless the intention was definitely declared or otherwise made very plain or was rendered “in clear and especial words**”

p. 14: what is perfectly clear – California claimed no interest in the tidelands and the patent ultimately issued withheld no pervasive easement. That is the end of the matter. (cites) (get cites).

**#15.** ***Brief of Amicus Curiae California Land Title Association***.

By existence of public trust easement the California court has virtually nullified the conclusive effect of patents issued pursuant to the 1851 Act. Conclusive title encumbered by public trust easement is no title at all. **Effectively destroys private ownership** of encumbered lands.

p. 13: The patentees title would be made to depend … on the fluctuating prejudices of different juries … decisions of the General Land Office in general, and patents issued pursuant to the 1851 Act in particular are conclusive and invulnerable to collateral attack. *Beard v. Federy*, 70 U.S. 478, 491-493 (1866); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. 447, 451 (1882)

#17: Appendix to Petition For Writ of Certiorari to the Supreme Court of California.

 Appendix A-1: Opinion in 644 P.2d 792

 Appendix A-4: In the Court of Appeal of the State of California Second Appellate District

Appendix B-1: Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico.

 Appendix B-2: Act to Ascertain and Settle private land claims in the State of California

 Appendix C-1: Patent for Rancho La Ballona

 Appendix C-2: Plat of Rancho La Ballona

 Appendix D-2: Surveyor General’s Opinion: survey should be approved by this office

***Oral Argument*:** 1984 U.S. Trans. Lexis 66, No. 82 – 708 (2/29/84)

**p. 8:** The clearest cut federal question before this court is whether the State of California received anything pursuant to the equal footing clause when California entered the Union. What the state initially receives under the equal footing clause is a federal question. (Humbolt Light Case, California Land Commission, Justice White in a footnote).

**p. 9:** You certainly had to decide that … the treaty was intended to protect the rights of Mexicans. That is a federal question.

**p. 13:** Claiborne, amicus curiae for US: cites Coronado Beach Company, 255 U.S. 472 and Title Insurance Company, 265 U.S. 472 (these were cited in all of the briefs).

***Friends of Martin’s Beach v. Martin’s Beach I, LLC.,*** 201 Cal Rptr.,3d 516, 246 Cal. App. 4th 1312. (2016) **[Summa explained]**

**p. 526:**

Summa contended: 1) …, 2) …, 3) that in any event any such servitude was forfeited by the failure of the state to assert it in the land patent proceedings. The United States Supreme Court agreed: “whether a property interest so substantially in derogation of the fee interest patented to petitioner’s predecessors can survive the patent proceedings conducted pursuant to the statute implementing the Treaty of Guadalupe Hidalgo.”

Re: The Act of 1851: “It was essential to determine which lands were private property and which were in the public domain in order that interested parties could determine what land was available from the Government. The 1851 Act was intended “to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of this country, in a manner and form that will prevent future controversy.” (Summa, 206).

**p. 531:** **Neither the United States nor California acquired a public interest in the land, including under the public trust doctrine, because neither asserted any such interest during the patent proceedings**. (Summa, pp. 206-209).

***W. Indian Co. v. Gov’t of V.I.*, 643 F.Supp 869 (1986)** **[Explaining Summa]**

**Question: was the grant in perpetuity or did it have a termination point?**

**p. 876:** **When such lands have been so freed, they may be irrevocably conveyed into absolute private ownership**. *City of Long Beach v. Mansell*, 3 Cal.3d 462, 466, 476 P.2d 423, 437-38.

**HN11.** **In general a statute is considered a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against a state**.

re: Summa: The precise issue before the court was **whether** (Public Trust Doctrine) **“a property interest** [public trust easement] **so substantially in derogation of the fee interest patented to petitioner’s predecessors can survive the patent proceedings** conducted pursuant to the statute implementing the Treaty of Guadalupe Hildalgo.” (Summa, p. 205)

 **In holding it could not**, the Court stated: “Patents confirmed under the authority of the 1851 Act were issued pursuant to the authority reserved to the United States to enable it to discharge its international duty **with respect to land which**, although tideland, **had not passed to the State**.” (Summa, p. 205).

As we hope is by now obvious, the Supreme Court has approved recognition, by a government, of title in private lands to trust lands. WICO’s original rights, like the original grants in Summa, accrued under the auspices of a foreign government and were subsequently recognized in a treaty with the United States. **Both treaties predated that point in time when California and the Virgin Islands had control over the respective tidelands**.

**The grants, therefore, occurred prior to the existence of the public trust doctrine**. Pursuant to international agreements, they should be upheld in the face of a challenge based on this doctrine.

***Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987)**

Following issuance by **Department of Interior of oil and gas leases for lands underlying Utah Lake, state of Utah brought suit against United States for injunctive relief and declaratory judgment that Utah was owner of bed of that Lake** and natural resources associated therewith. The United States District Court for the District of Utah, Bruce S. Jenkins, Chief Judge, [624 F.Supp. 622,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986100802&pubNum=345&originatingDoc=Ic1e36f059c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) entered summary judgment quieting title in United States to Lake bed, and Utah appealed. The United States Court of Appeals for the Tenth Circuit, Holloway, Chief Judge, [780 F.2d 1515,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985163151&pubNum=350&originatingDoc=Ic1e36f059c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) affirmed. Certiorari was granted. The Supreme Court, Justice O’Connor, held **that title to Lake bed had passed to Utah under equal-footing doctrine upon its 1896 entry into statehood**, notwithstanding 1889 selection of that Lake and adjacent land as reservoir site in accordance with 1888 reservation statute.

After the Federal Government, in 1976, issued oil and gas leases for lands **\*\*2319** underlying Utah Lake, a navigable body of water located in Utah, the State brought suit in Federal District Court for injunctive relief and a declaratory judgment that it, rather than the United States, had title to the lakebed under the equal footing doctrine. Under that doctrine, the United States holds the lands under navigable waters in the Territories in trust for the future States, and, absent a prior conveyance by the Federal Government to third parties, a State acquires title to such lands upon entering the Union on an “equal footing” with the original 13 States.

citing *Shively v. Bowlby*, 152 U.S. 1 (1894) @ 48:

“By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the territories, so long as they remain in territorial condition …

“We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligation, or to effect the improvement of such lands, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.” *Shively* @ 48.

**Thus, under the Constitution, the Federal Government could defeat a prospective State’s title to land under navigable waters by a prestatehood conveyance of the land to a private party for a public purpose appropriate to the Territory**.

***Alaska v. Ahtna Inc.*, 891 F.2d 1401 (1989)**

State of Alaska challenged Bureau of Land Management’s conveyance of submerged lands of river to native regional corporation. The United States District Court for the District of Alaska, Laughlin E. Waters, J., [662 F.Supp. 455,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987080460&pubNum=345&originatingDoc=Ic475eeaf971911d993e6d35cc61aab4a&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) entered summary judgment in favor of Alaska, and native regional corporation appealed. The Court of Appeals, Leavy, Circuit Judge, held that: (1) river was navigable at statehood and, thus, title to submerged lands passed to Alaska at statehood, absent some reservation, and (2) Congress did not reserve title to submerged lands at statehood.

Affirmed.

***Kraft v. Burr*, 476 S.E.2d 715 (1996).**

The issue does not turn on the interim conveyances after the Crown patents, but solely on the patents themselves.

Plaintiff property owners brought suit in the Circuit Court of Allegheny County (Virginia) against defendant fishing guide to enjoin him from wading and fishing in a river running over their land. The property owners also sought a judicial declaration of their ownership of the subaqueous land and their exclusive fishing rights in the river. The chancellor enjoined the guide from wading and fishing in the river. The Supreme Court of Virginia affirmed.

**Opinion:** In this appeal, the primary issues are whether **letters patent** from two English Monarchs, acting through their royal governors, could and did grant exclusive fishing rights **in a navigable river**, and if so, whether the complainants are the successors in title to the patentees and can assert those rights to prohibit the public from fishing in the part of the river running over their land. 18th century crown patents conveyed lands on both sides of the river and included the stream beds in the metes and bounds descriptions to their predecessors in title. **Fishing rights expressly conveyed in 1750 patent from George II to William Jackson, a predecessor in title to Burr** [and other land owners]. …

[[4]](#Document1zzF41996208581) Kraft admits that the Lovings and the Witts were in possession of the premises and he has not contested the chancellor's finding that they hold such possession under “a current deed conveying ownership of a portion of the Jackson River streambed.” Hence, he recognizes their prior possession under color of title.

Therefore, the property owners were not required to trace title back to the patentees from the Crown. Such tracing is unnecessary when an allegedly trespassing defendant, such as Kraft, does not claim title to the property and merely relies upon the alleged weaknesses in the title of the plaintiff who was in prior possession of the property under color of title. [*Perkinson,* 146 Va. at 709-10, 132 S.E. at 857.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=710&FindType=Y&ReferencePositionType=S&SerialNum=1926104174&ReferencePosition=857)

The issue does not turn on the interim conveyances after the Crown patents, but solely on the patents themselves. If, as we have held, the fishing rights were validly conveyed in those patents, Kraft trespassed on the lands of the parties in possession which are the lands described in the patents.[FN6](#Document1zzB00661996208581)

***Virgin v. County of San Luis Obispo*, 201 F.3d 1141 (2000)**

Landowners challenged county’s denial of their application for a lot line adjustment. The District Court for the Central District of California, [Audrey B. Collins](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0120862201&originatingDoc=I50299426795a11d99c4dbb2f0352441d&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), J., dismissed for lack of jurisdiction, and landowners appealed. The Court of Appeals held that mere fact that landowners’ predecessors had received title via federal land patents did not create federal-question jurisdiction.

Federal land patents and acts of Congress do not provide bases for federal question jurisdiction. The Supreme Court has clearly stated that: [a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a **dispute or controversy** respecting the validity, **construction or effect of such a law**, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws.

[*Shulthis v. McDougal,* 225 U.S. 561, 569–70, 32 S.Ct. 704, 56 L.Ed. 1205 (1912)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=708&originatingDoc=I50299426795a11d99c4dbb2f0352441d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

***Shulthis* established that an arising-under case must substantially involve a dispute respecting the construction or effect of a federal law** and that land acquired through an act of Congress does not confer federal question jurisdiction. *See* [*Shulthis,* 225 U.S. at 569–70, 32 S.Ct. 704](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=708&originatingDoc=I50299426795a11d99c4dbb2f0352441d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

***High Country Citizens Alliance v. Clarke***, 454 F.3d 1177 (10th Cir. Colo 2006).

p. 1186: As early as 1881, the Supreme Court held that an issued patent:

not merely operates to pass the title, but is in the nature of an official declaration by that branch of government to which the alienation of the public lands, under the law, is intrusted (sic), that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. **It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces.** If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.

[*Smelting Co. v. Kemp,* 104 U.S. 636, 640–41, 26 L.Ed. 875 (1881)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1881199965&pubNum=0000780&originatingDoc=I722638d5190511db80c2e56cac103088&refType=RP&fi=co_pp_sp_780_640&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_640)

**p. 1188:** “Moreover, as recently as 1999, the Ninth Circuit relied on Smelting Co. to define a patent as “an official declaration of title which is, with limited exceptions, **unassailable and not rebuttable.**” *United States v. Shumway*, 199 F.3d 1093, 1096 (9th Cir. 1999).

***Fidelity Exploration and Production Co. v. United States*, 506 F.3d 1182 (2007)**

**Quiet title act – dismissed** as it was filed after the 12 year statute of limitations.

p. 1184: Montana joined the Union in 1889. By virtue of the enabling Act of Feb. 22, 1889, 25 Stat. 676, it did so on an equal footing with the original states … Id at 679. Accordingly, **Montana along with all the new states held title to the land that lay under navigable waters at the time of statehood; this title could however be defeated by a “prestatehood conveyance of the land to a private party for a public purpose appropriate to the Territory**[,] *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987) or by a reservation of submerged lands to keep them “under federal control for an appropriate public purpose.” *United States v. Alaska*, 521 U.S. 1, 33-34 (1997).

***PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012).** Many, many headnotes.

Justice [KENNEDY](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0243105201&FindType=h) delivered the opinion of the Court.

This case concerns three rivers which flow through Montana and then beyond its borders. The question is whether discrete, identifiable segments of these rivers in Montana were nonnavigable, as federal law defines that concept for purposes of determining whether the State acquired title to the riverbeds underlying those segments, when the State entered the Union in 1889. Montana contends that the rivers must be found navigable at the disputed locations. From this premise, the State asserts that in 1889 it gained title to the disputed riverbeds under the constitutional equal-footing doctrine. Based on its title claims, Montana sought compensation from PPL Montana, LLC, a power company, for its use of the riverbeds for hydroelectric projects. The Montana courts granted summary judgment on title to Montana, awarding it $41 million in rent for the riverbeds for the period from 2000 to 2007 alone. **That judgment must be reversed**.

In 1842 The United States Supreme Court declared that for the 13 original States, the people of each State, based on principle of sovereignty, held the absolute right to all their navigable waters and the soils under them, subject only to rights surrendered and powers granted by the Constitution to the federal government. In later cases the courts applied the same principle to States later admitted to the Union. These cases are the basis for the equal-footing doctrine. Navigability by segment. “Navigability in fact” rule – the Daniel Ball case. The Montello case – navigable for title purposes. Navigability must be assessed at the time of statehood.

**p. 591:** “The title consequences of the equal footing doctrine can be stated in summary form: Upon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced, see Phillips, 484 U.S. 469 (1988). It may allocate and govern those lands according to state law subject only to the permanent power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.” *Oregon*, 295 U.S. 1 @ 14 (1935); see *Montana*, 450 U.S. 544, 551; *Holt*, 270 U.S. 49, 54 (1926).

**p. 591:** The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses. See *United States v. Utah*, 283 U.S. 64 @ 75; *United States v. Oregon*, 295 U.S. 1 @ 14.

**pp. 592-593:** “For state title under the equal-footing doctrine, navigability is determined at the time of statehood, see Utah @ 75, and based on the “natural and ordinary condition” of the water, see Oklahoma v. Texas, 258 U.S. 574 @ 591. In contrast, admiralty jurisdiction [United States] extends to water routes made navigable even if not formerly so. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. And, of course, the commerce power extends beyond navigation. In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel.

**p. 594:** A segment approach to riverbed title allocation under the equal-footing doctrine is consistent with the manner in which private parties seek to establish riverbed title.

**p. 598:** Here, by contrast, the question regards ownership of the bed under river segments that the Montana Supreme Court … acknowledges were not navigable.

**p. 600:** A 1910 Federal District Court decree – adjudicated a title dispute between two private parties over the riverbed near and under Thompson Falls and declared the river at that place “was and is” a non-navigable stream …

While the ultimate decision as to this and the other disputed river stretches is to be determined, in the first instance, by the Montana courts upon remand, the relevant evidence should be assessed in light of the principles discussed in this opinion.

**p. 604:** Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

The Montana Supreme Court’s ruling that Montana owns and may charge for use of riverbeds across the state was based upon an infirm legal understanding of this Court’s rules of navigability for title under the equal-footing doctrine. As the Court said in Brewer-Elliot: “It is not for a state by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which … would enlarge what actually passed to a state, at the time of her admission, under the constitutional rules of equality here invoked.” 260 U.S. 77 @ 88.

The judgment of the Montana Supreme Court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

1-10 Powell on Real Property § 10.04. II. Capacity to Hold and Deal With Interests in Land (chs 6 – 10 B). § 10.04 State’s Land Capacity Concerning River and Lake Beds.

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**p. 2:** **Title to lands beneath waters that are not navigable at the time of statehood, however, is not affected by a state’s entry into the Union**. ***United States v. Utah***, 283 U.S. 64, 75 (1931).

**n1:** **Lands beneath navigable rivers do not transfer at statehood if the United States reserves such lands or grants them to others**. See, e.g. ***Idaho v. United States***, 533 U.S. 262, 272-273 (**2001**)

PLEADING CASES

***Hopkins v. Walker*, 244 U.S. 486, 489 (1850) (PLEADING)**

This is a direct appeal under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215], from a decree dismissing a suit in equity for want of jurisdiction, the question for decision now being whether the case presented by the bill is one arising under the laws of the United States.

…that the defendants are claiming the ground in controversy under the later lode claims and the certificates before described; that for the reasons indicated these locations and certificates are invalid and the certificates, as recorded, constitute clouds upon the plaintiffs’ title and reduce its market value; and that the determination of the plaintiffs’ rights requires a construction of the mining laws under which the proceedings resulting in the patent were had,

**It is conceded that the plaintiffs, being in possession, have no remedy at law, and that their remedy, if any, is in equity. Our concern is not with this, but with the question whether the case is one arising under the laws of the United States. A case does so arise where an appropriate statement of the plaintiff’s cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress.**  [Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903102063&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [23 Sup. Ct. Rep. 434;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903102063&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&fi=co_pp_sp_780_569&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_569) [32 Sup. Ct. Rep. 704;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Denver v. New York Trust Co. 229 U. S. 123, 133, 57 L. ed. 1101, 1120,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913100620&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&fi=co_pp_sp_780_133&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_133) [33 Sup. Ct. Rep. 657;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913100620&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914100574&pubNum=780&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [34 Sup. Ct. Rep. 724.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914100574&pubNum=708&originatingDoc=Ib942844c9cb811d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

Assuming that the **allegations of the bill concerning the nature and validity of the plaintiff’s title** and the existence, invalidity and recording of the defendant’s certificates of location constitute a part of the plaintiff’s cause of action, **it is plain that a controversy respecting the construction and effects of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the District Court** …

In both form and substance the bill is one to remove a particular cloud from the plaintiff’s title, as much so as if the purpose were to have a tax deed, a lease or a mortgage adjudged invalid and cancelled. **It hardly requires statement that in such cases the facts showing the plaintiff’s title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff’s cause of action**. Full recognition of this is found in the decisions of this and other courts. *Wilson Cypress Co., v. Del Pozo*, 236 U.S. 635; *Lancaster v. Kathleen Oil Co.*, 241 U.S. 551, 554- 555; *Walton v. Perkins*, 28 Minnesota, 413; *Wals v. Grosvenor*, 31 Wisconsin, 681; *Teal v. Oregon*, 9 Oregon, 89; *Sheets v. Prosser*, 16 N. Dak. 180, 183.

***Beard v. Federy*, 70 U.S. 478 (1866) (PLEADING)**

Overview: Plaintiff based his claim of title to the disputed parcel on a conveyance from a catholic Bishop of Montery, to whom a patent embracing the premises was issued by the United States. … The patent was a deed of the United States, and the patent was a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. – Judgment for plaintiff.

“The plaintiff in the court below deraigned his title by various mesne conveyances from Joseph S. Alemany, Catholic bishop of Monterey, to whom a patent, embracing the premises in controversy, was issued by the United States. The patent is in the usual form, and purports on its face to be **\*487** issued under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California. It recites that the bishop presented his claim to the board of commissioners created under that act, for confirmation; that the board, by its decree, rendered on the 18th of December, 1855, confirmed the claim; that an appeal was taken on behalf of the United States to the District Court; and that the attorney-general, having given notice that the appeal would not be prosecuted, the District Court, by its decree, gave leave to the claimant to proceed upon the decree of the board as upon a final decree.”

**pp. 491-492:** In the first place, a patent is a deed of the United States. As a deed, its operation is that of a quit claim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

 In the second place, **the patent is the record** of the action of the government upon the title of the claimant **as it existed** upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law **\*492** of nations to protection in them to the same extent as under the former government. … The government acts, and issues its patent to the claimant. As against the government this record, so long as it remains unvacated, is conclusive. **And it is equally by title subsequent, parties claiming under the government by title subsequent**. **It is this effect of the patent as a record of the government that its security and protection chiefly lie**. If parties asserting interests in land acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, **the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor**.

**pp. 492-494:** **[Pleading]**

It only remains to notice the objections taken to the complaint in this case. They are advanced in misapprehension of the system of pleading and practice which prevails in the State of California. The system is there regulated by statute, and differs in many important particulars from the system which existed at the common law. There the ancient forms of action are abolished. **In every case the plaintiff must state, in ordinary and concise language, his cause of action, with a prayer for the relief to which he may deem himself entitled. The fictions of the action of ejectment at common law have no existence. The names of the real contestants must appear in the pleadings. The complaint, which is the first pleading in the action, must allege the possession or seizin of the premises, or of some estate therein, by the plaintiff, on some day to be designated, the subsequent entry of the defendant, and his withholding the premises from the plaintiff.** No other allegations are required, where possession of the property alone is demanded. **But in the same action there may be united a claim for the rents and profits, or for damages for withholding the property, \*494 or for waste committed thereon. The property should be described by metes and bounds, if possible.** This brief statement of the system of pleading and practice existing in California will furnish the answer to the several objections urged. That system, with some slight modifications, has been adopted by rule of the Circuit Court of the United States in common-law cases.

***Marshall v. Ladd*, 131 U.S. 89 (1869) [PLEADING: FATAL ERROR TRAP]**

Syllabus: **The legal title must prevail in ejectment; and neither party can set up facts which go to show that equitably the either party is the rightful owner of the property**. [**YOU CAN NOT STATE ANY EQUITABLE ARGUMENT**] The rulings of the court of Oregon upon the statutes of that state raise no Federal question in this case.

**Opinion** by – Miller:

“… In this case Ladd, the plaintiff, introduced his patent from the United States, and the defendants introduced the certificate of location to Mrs. Thomas, and relied on that and on the facts which went to show that it was rightfully issued, to defeat the recovery under Ladd’s patent. The court refused several instructions prayed for by the defendants, based on that defense, and told the jury that the legal title which passed from the United States to the plaintiff, must prevail over the claim to hold possession under the certificate.

In this the court was undoubtedly correct. It is of the essence of the action of ejectment that the legal title must prevail. And neither party can set up in that proceeding facts which go to show that, equitably, the other party is the rightful owner of the property. It is the peculiar province of a court of equity to restrain the assertion of a legal title wrongfully held, or to compel its transfer to the person rightfully entitled to it.

***St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636 (PLEADING)**

**(Oct, 1881, Mar 6, 1882)**

This was an action at law brought in one of the courts of Colorado by the St. Louis Smelting and Refining Company, a corporation created under the laws of Missouri, for the possession of a parcel of land in the city of Leadville. On application of the defendants it was removed to the Circuit Court of the United States. **The complaint is in the usual form of actions for the possession of real property** under the practice obtaining in Colorado. It alleges that **the plaintiff was duly incorporated**, with power to purchase and hold real estate; **that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them, to the damage of the plaintiff** of $5,000. … the **plaintiff offered in evidence a patent of the United States to Thomas Starr**, dated March 29, 1879 … The patent also specified the boundaries of the tract according to the field-notes, and contained the recitals and words of grant and transfer usually inserted in patents for place mining land. … **The plaintiff traced title to the land by sundry mesne conveyances from the patentee**.

The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. **It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces**. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. Moore v. Wilkinson, 13 Cal. 478; Beard v. Federy, 3 Wall. 478, 492.

The difficulty with the court below, as seen in its charge, evidently arose from confounding “location” and “mining claim,” as though the two terms always represent the same thing, whereas they **\*649** often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, [The judge screwed up in his instructions to the jury which wrongly decided for defendants, therefore case REMANDED for a new trial], which was ***St. Louis Smelting & Ref. v. Green***, 13 F. 208 (June 19, 1882).

***Hardin v. Jordan*, 140 U.S. 371 (1891). (PLEADING)**

**This is an action of ejectment** brought by Gertrude H. Hardin, **the plaintiff in error**, to recover possession of certain fractional sections of land lying on the west and south sides of a small lake in Cook county, Ill., situate about a dozen miles south of Chicago, and two or three miles from Lake Michigan; and also to recover the land under water in front of said fractional sections, and land from which the water retires at low water. The lake is two or three miles in extent, and the main question in the cause is whether the title of the riparian owner on such a lake extends to the center of the lake, or stops at the water’s edge. The court below decided that the plaintiff’s title only extended to low-water mark, and to that extent gave judgment for the plaintiff, but as to all the land under permanent water gave judgment for the defendant. The question is of much importance, and deserves a careful consideration.

**The plaintiff claimed under a patent from the United States, granted to her ancestor, John Holbrook, in 1841.**

**The defendant disclaimed any interest in the fractional quarter sections themselves, but claimed all the land in front of them, whether covered with water or not, by virtue of various patents granted in 1881**. … The physical conditions of the land and water are substantially what they were at the time of the original survey; **that said lake or lakes are not navigable waters**.

**According to the settled course in actions of ejectment, the court did not inquire into the validity of the title claimed by the defendants, as compared with that of the plaintiff, but confined itself to the question of the validity of the plaintiff’s title to the land in dispute, on the assumption that the plaintiff must stand or fall by her own title, and not by reason of any defect in the title of the defendant. Recognizing this as the governing rule in the case, we are called upon to decide whether the title of the plaintiff, under the patent granted to her ancestor in 1841, extended beyond the limits of the actual survey, under the permanent waters of the lake in front of the land described in the patent, and not merely to the line of low-water mark, as held by the court below.**

The consequence of this doctrine is that all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right.

**On the whole, our conclusion is that the court below ought to have given judgment for the plaintiff, as against the defendant, to the center of Wolf lake, instead of to low-water mark, in front of the … and to the middle of the bay or projection of said lake in front of the … The judgment must be reversed, and the cause remanded, with instructions to enter judgment for the plaintiff in conformity with this opinion**.

**JOY v. CITY OF ST. LOUIS, 201 U.S. 332 (1906) (PLEADING)**

The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully with-holds such possession, to plaintiff's damage in an amount stated.

in stating plaintiff's cause of action it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy, **as to a right which depends upon** the construction or effect of the Constitution, or **some law** or treaty **of the United States**. … This original jurisdiction, it has been frequently held, must appear by the plaintiff's statement of his own claim,… As has been stated, the rule is a reasonable and just one that the **complainant in the first instance shall be confined to a statement of his cause of action,** leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense.

The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises …

In those cases where the dispute necessarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different. In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land

*…whatever… rights attached…* subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee

***Shultis v. McDougal*, 225 U.S. 561 (1912) (PLEADING)**

APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which affirmed a decree of the Circuit Court for the Eastern District of Oklahoma, dismissing on the merits a bill in equity, together with a petition in intervention in a suit to determine conflicting claims to a tract of land allotted to Creek Indians. **Dismissed for want of jurisdiction**.

1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, **must be determined from the complainant’s statement of his own cause of action, as set forth in the bill**, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings [cites]

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for **jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth.** . [Hanford v. Davies, 163 U. S. 273, 279, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1896180072&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901103991&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Bankers’ Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 383, 385, 48 L. ed. 484, 489, 490, 24 Sup. Ct. Rep. 325](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904100374&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

3. **A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, \*570 as all titles in those states are traceable back to those laws.** [Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877152711&pubNum=780&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180265&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108744&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108662&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [Shoshone Min. Co. v. Rutter 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [De Lamar’s Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108761&pubNum=708&originatingDoc=I090a5c569cc311d991d0cc6b54f12d4d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes …; **but the bill makes no mention of these statutes or of any controversy respecting their validity, construction, or effect**. **Neither does it by necessary implication point to such a controversy**. True, it contains enough to indicate that those statutes constitute the source of the complainant’s title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain.

… **So, looking only to the bill**, as we have seen that we must, **it cannot be held that the case as therein stated was one arising under the statutes mentioned.**

… “**The admission of Kansas as a State into the Union, and the consequent change** of its form of government, **in no respect affected the essential character of** the corporations or their powers or **their rights.**” [one of the defendants, the Kiefer Oil and Gas Company, is a corporation organized in the Indian Territory under the Arkansas statutes which were put in force therein by an act of Congress – i.e., a **pre-statehood** corporation, with pre-statehood rights].

***Taylor v. Anderson*, 234 U.S. 74 (1914) (PLEADING)**

A case where plaintiff shot himself in the foot (probably thanks to an attorney) by attempting to anticipate and avoid a defense by the defendant.

**p. 74:** “The judgment here under review is one of dismissal for want of jurisdiction. The action was in ejectment. **The petition alleged that the plaintiffs were owners in fee and entitled to the possession. That the defendants had forcibly taken possession and were wrongfully keeping the plaintiff out of possession, and that the latter were damaged thereby in a sum named**. **Nothing more was required to state a good cause of action.”**

[This alone does not invoke the jurisdiction of the federal court, but states the cause of action.]

Snyder’s Comp Laws Okla. §§ 5627, 6122; Joy v. St. Louis, 201 U.S. 332, 340. **But the petition, going beyond what was required**, alleged with much detail that the defendants were asserting ownership in themselves under a certain deed and that it was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaws and Chickasaw Indians. However essential or appropriate these allegations might have been in a bill of equity to cancel or annul the deed, they were **neither essential or appropriate in a petition in ejectment**. Apparently their purpose was to anticipate and avoid a defense which it was supposed the defendants would interpose, but, of course, it rested with the defendants to select their ground of defense, and it well might be that this one would not be interposed. In the orderly course, the plaintiffs were required to state their own case in the first instance and then to deal with the defendants after it should be disclosed in the answer. *Boston &c. Mining Co. v. Montana Ore Co.*, 188 U.S. 632, 639 (1903) **[So they lose]**

***Hughes v. Washington*, 389 U.S. 290 (1967). (PLEADING)**

The question of the extent of a federal grant is a federal question.

**NOTICE: It was NOT the PATENT that Hughes used, it was the Act of Congress and the law that existed at the time the property was conveyed**. **(prior to statehood)**

**The patent does NOT CREATE your property rights, it’s the laws that existed at the time the patent issued – it’s** **the legislative Act**.

Summary/Syllabus: **The owner of ocean-front property** in the state of Washington, **who traced her title to a federal grant prior to statehood**, instituted an action against the state in the Superior Court of Pacific County, Washington, to determine whether the adjoining property owner’s right to accretions **which existed under federal law prior to statehood** was abolished by the state constitution. **The trial court held that the right to accretions remained subject to federal law**, and that the plaintiff was the owner of accreted lands, **but the Supreme Court of Washington reversed**, holding that state law controlled and interpreting the state’s Constitution as denying the owners of ocean-front property in the state any further rights in accretions.

 On certiorari, **the Supreme Court of the United States reversed**. It was held that **the question was governed by federal, not state, law, and that under federal law the property owner, who traced her title to a federal grant prior to statehood, was the owner of accretions**.

 Opinion, p. 290: (Mr. Justice Black):

**The question for decision is whether federal or state law controls the ownership of land**, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. **Prior to 1889 all land** in what is now the State of Washington **was owned by the United States, except land that had been conveyed to private parties**. **At that time owners** of property bordering the ocean, **such as the predecessor in title of Mrs. Stella Hughes**, the petitioner here, **had under the common law a right to include within their lands any accretion** gradually built up by the ocean. Washington became a State in 1889, and Article 17 of the State’s new constitution, as interpreted by its Supreme Court, denied the owners of ocean-front property in the state any further rights in accretion that might in the future be formed between their property and the ocean. **This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee**, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. **The trial court upheld Mrs. Hughes’ contention that the right to accretion remained subject to federal law**, and that she was the owner of the accreted lands. **The State Supreme Court reversed**, holding that state law controlled and that the state owned these lands, 67 Wash. 2d 799; 410 P.2d 20 (1966). We granted certiorari, 385 U.S. 1000 (1987). **We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions**.

 At Shepards #170: 1 Geo. J.L. & Pub. Pol’y 77; The Georgetown Journal of Law and Public Policy, Winter 2002, by Steven J. Eagle seagle@gmu.edu

**Article:** ***The Development of Property Rights in America and the Property Rights Movement***

**FN8:** from *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall) 304, 310 (1795): Supreme Court Justice William Patterson: “It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of men … ***No man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property then is a primary object of the social compact.***

N 31: James W. Ely, Jr. The Guardian of Every Other Right: A Constitutional History of Property Rights II (1992)

A. The Nature of “Property”

1. Property is a Set of Rights with Respect to Others. … it denotes the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” The constitutional provision is addressed to every sort of interest the citizen may possess. [re: takings clause] Pruneyard Shopping Ctr. V. Robins, 447 U.S. 74, 83 n.6 (1980) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945).

 2. **Property Rights Include Possession, Disposition, and Use**

 **The principal rights are the right to exclusive possession, the right to use and enjoy, and the right to dispose of one’s interest through devise, sale, or gift**.

 Government taking for a trail case: *Preseault v. United States*, 52 Fed.Cl. 667, 670 (2002)

***Oneida Indian Nation v. County of Oneida***, 414 U.S. 661 (1974) **(PLEADING)**

[good for treaty, Indian possession rights, etc.] Indian nations brought action seeking to recover from counties in New York state the fair rental values of certain lands ceded in 1795 by Indians to the state, on theory that the cession was invalid under treaties and laws of the United States.

A possessory right is a federal right – in *The New York Indians*, 72 U.S. 761

**p. 675:** The **complaint** in this case **asserts a present right to possession under federal law**.

**p. 676:** Here, the right to possession itself is claimed to arise under federal law in the first instance.

**pp. 677-678:** In the present case however, the assertion of a federal controversy does not rest solely on a claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, **it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles** which normally and separately protect a valid right of possession.

**p. 677:** “‘The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules **do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee**.’ …” citing *Packard v. Bird*, 37 U.S. 661, 669 (1891)

As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in Taylor v. Anderson, 234 U.S. 74, (1914) …Thus, this Court’s decisions have established a strict rule that mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case…. The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor

***Wisconsin v. Baker*, 698 F.2d 1323 (1983) (PLEADING)**

**That a right of property was at one time governed by federal law or first conveyed by the United States does not render a suit to enforce that right one “arising under” federal law.** [*Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 676–677, 94 S.Ct. 772, 781–82, 39 L.Ed.2d 73;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127116&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_781&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_781) [*Shulthis v. McDougal,* 225 U.S. 561, 569–570, 32 S.Ct. 704, 706, 56 L.Ed. 1205;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912100401&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_706&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_706) [*Joy v. City of Saint Louis,* 201 U.S. 332, 341, 26 S.Ct. 478, 480, 50 L.Ed. 776;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1906100246&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_480&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_480) [*Shoshone Mining Co. v. Rutter,* 177 U.S. 505, 507–508, 20 S.Ct. 726, 727, 44 L.Ed. 864.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_727&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_727) **Only if federal law continues to govern the right**, see [*Oneida Indian Nation,* 414 U.S. at 676–677, 94 S.Ct. at 781–82,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127116&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_781&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_781) [*Joy,* 201 U.S. at 342–343, 26 S.Ct. at 481,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1906100246&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_481&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_481) **or** if the suit is to decide whether the United States did, in fact, originally convey it, see [*Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123857&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_29&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_29) [*Smith v. Kansas City Title and Trust Co.,* 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921116204&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) **does an action to enforce that right “arise under” federal law.** **“The federal nature of the right to be established is decisive—not the source of the authority to establish it.”** [*Puerto Rico v. Russell & Co.,* 288 U.S. 476, 483, 53 S.Ct. 447, 449, 77 L.Ed. 903.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933126096&pubNum=708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_449&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_449) W**ere it otherwise, anyone claiming title to real estate in the western United States could bring suit in federal court since title to all lands in those parts of the nation is traceable to a federal grant or law.** [*Shoshone Mining Co. v. Rutter, supra,* 177 U.S. at 507, 20 S.Ct. at 726](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108711&pubNum=0000708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_726&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_726).

**The State asserts that defendants have no right under the 1854 treaty** to regulate public fishing and hunting in any navigable Wisconsin lakes. Complaint ¶¶ 19, 22. **There is no question that this claim “arises under” federal law. The State relies directly upon a federal treaty to defeat a federal right**—the right to prevent the general public from fishing and hunting in navigable lakes—asserted by the Band in its constitution and 1976 Code and by defendants in enforcement of that Code against the general public. **Federal interest in providing a federal forum for a claim that denies the existence of a right founded upon federal law is no less than for a claim that asserts the existence of such a right.** The rationale for providing federal tribunals for the adjudication of federal rights—that state tribunals might treat federal rights ungenerously—applies equally to both types of claim. **That rationale is especially applicable in the case before us where the State in effect claims that its state-created property interests are superior to an Indian tribe’s federally-created property interests.** See [*United States v. Kagama,* 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1886180093&pubNum=0000708&originatingDoc=Id0a8273693f211d9bc61beebb95be672&refType=RP&fi=co_pp_sp_708_1113&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_1113) (“Because of the local ill feeling, the people of the States where they [Indian tribes] are found are often their deadliest enemies”).

***Hilgeford v. People’s Bank*, 776 F.2d 176 (1985, 7th Cir.)** **(PLEADING)**

(cited *Wisconsin v. Baker*, 698 F.2d 1323 (1983)

Hilgefords have not included a copy of the statute nor have they alluded to its content in their brief.

… based upon a purported land patent which indicates *on its face* that it is a self-serving document, drafted by the plaintiffs to grant themselves title to land, and which does not invoke any federal law or constitutional provision precisely because it is a blatant attempt by private landowners to improve title by personal fiat.

**p. 1327**, *Baker*: **Only if federal law continues to govern the right, or if the suit is to decide whether the United States did, in fact, originally convey it, does an action to enforce that right arise under federal law. The federal nature of the right to be established is decisive** – not the source of the authority to establish it. [*State of Wisconsin v. Baker,* 698 F.2d at 1327](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983104989&pubNum=350&originatingDoc=Ib998d1f394b211d9a707f4371c9c34f0&refType=RP&fi=co_pp_sp_350_1327&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_1327) (citations omitted).

See Oneida Indian Nation, 414 U.S. 661 at 676-677 (1974); Joy v. City of St. Louis, 201 U.S. 332 at 342-343 (1906). (The federal nature – Puerto Rico v. Russell & Co., 288 U.S. 476, 483.) **Neither the federal constitutional and statutory provisions cited, nor the existence of title derived from a land patent raises a sufficient federal claim or issue upon which to base the jurisdiction of the district court.** The instant case does not require the interpretation or construction of these alleged bases of jurisdiction. Rather, the action involves only mortgage foreclosure, proper for state court determination, not federal court. Land title and possessory actions are generally not the business of federal courts,

[ Especially important if the rights vested (adhered to the land) prior to statehood; they must be properly plead in the complaint.]

**Teschemacher: Good 1861 California case explaining property rights under international law, set forth in full in # 5 font:**

**Teschemacher v. Thompson, 18 Cal. 11 (1861),** 79 Am.Dec. 151

18 Cal. 11, 1861 WL 742 (Cal.), 79 Am.Dec. 151

TESCHEMACHER et. al., EXECUTORS,

v.

THOMPSON et. al.

Supreme Court of California.

April Term, 1861.

**\*11** WHERE a patent of land was issued by the United States to executors, and an executrix of the last will and testament of one H. in trust for the heirs and devisees of the said H., and the executrix subsequently intermarried with one of the executors: *Held,* that under the statute of this State the authority of the executrix ceased by her marriage, and that ejectment based upon the patent was properly brought in the name of the executors.

By the designation “usual” or “ordinary high water mark,” as applied to tide waters, is meant the limit reached by the neap tides--that is, those tides which happen between the full and change of the moon twice in every twenty-four hours.

By the law of nations, independent of treaty stipulations, the cession of territory from one government to another does not impair the rights of the inhabitants to their property. They retain all such rights, and are entitled to protection in them to the same extent as under the former government. Public property and the sovereignty over the territory are only considered as passing by the cession.

When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations, those rights were sacred and inviolable, and the obligation passed to the new government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new government, and to be executed by proper legislative action, when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals, or **\*12** by existing legislation; and independent of the obligation arising from the law of nations, the United States, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants of the ceded territory.

The term property as applied to lands, embraces all titles, legal or equitable, perfect or imperfect.

Assuming that the Mexican grant, upon which the patent of the plaintiffs in this case was issued, conveyed only an interest requiring further action of the government, and that such action was not had previous to the cession; in other words, that it conferred a merely equitable title, which was never perfected under the former government; the title still constituted property, and as such the government of the United States was under obligation to protect it by the law of nations and by the stipulations of the treaty. This protection it could extend in its own way. To protect an equitable title is to perfect it, or to afford the means of its perfection. By the Act of March 3d, 1851, the government has afforded such means. It has there provided for protecting all titles, legal or equitable, acquired previous to the cession.

Its power to thus provide results from the fact that it is sovereign and supreme as to all matters connected with the treaty, and the enforcement of the obligations incurred thereunder, or cast upon it, independent of the treaty, by the law of nations upon the cession of the country. It must determine for itself what claims to property existed at that date, which it is bound to protect, and the lands to which they apply, and the parties by whom they were then held.

Subsequent claimants take in strict subordination to the action of the government, and they are not entitled to any notice of its proceedings. Whatever interests they may possess were acquired with full knowledge of the treaty, and of the obligations and powers of the new government.

The patent is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located or might have been located by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by title subsequent.

The patent, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the Board of Land Commissioners. But as the record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant--such title depending, up to the issuance of the patent, upon the character of the grant and the proceedings of the former government in reference to it; whether it were of a specific tract separated from other lands by defined boundaries, or were only of a specific quantity lying within an area of **\*13** larger extent; and in the latter case, whether or not the quantity had been located by official authority.

Assuming that the grant upon which the patent to the plaintiffs was issued was one of quantity only, requiring at the cession the action of the government to give it location, the duty devolved upon the new government to make the location. This was essential to perfect the equitable title of the grantees. The duty of the government attaching at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. The patent, therefore, to the plaintiffs, considered as issued upon a grant of that character, is evidence that the grantees possessed at the date of the cession a vested interest in the quantity of land mentioned in the grant--a right to so much land to be afterwards laid off by official authority; that the premises in controversy were then subject to appropriation in satisfaction of the quantity granted; and that the government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees and attached it to the tract as surveyed.

The “third persons” against whose interests the action of the government and patent in this case are not conclusive--under the fifteenth section of the Act of March 3d, 1851,--are those whose title accrued before the duty of the government and its rights under the treaty attached.

In the present case the United States, upon the cession of the country, took the premises in controversy charged with the equitable claim of the Mexican grantees, and have since perfected the claim into a perfect title. But for such equitable claim the United States would have held the title in trust for the new State, but the claim existing, the State and all other parties hold in subordination to the action of the government respecting it. The right and power of the government to protect and thus perfect the equitable claim were superior to any subsequently acquired rights or claims of the State or of individuals. Subsequent events, not originating with the grantees, can have no effect upon the validity of their claim, or the duty of the government respecting it.

The cases of *Pollard’s Lessee v.* [*Hagan,* (3 How. 212)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105920&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Goodtitle v. Kibbe,* (9 How. 471)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1850303720&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) commented upon, and distinguished from the case at bar.

APPEAL from the Twelfth District.

This is an action of ejectment to recover a tract of land situated in San Mateo county. On the trial it was admitted that the patent of the United States embraced that part of the demanded premises which was in the possession of the defendants, as stated by them in their amended answer. All other material facts of the case are stated in the opinion of the Court. The defendants had judgment and plaintiffs appeal.

*Sidney L. Johnson,* for Appellants.

I. The patent of the United States could not be impeached **\*14** collaterally by the defendants. They do not connect themselves in any manner with the title which they allege to be outstanding in the State of California. They are mere intruders, and the patent and the survey it embraces are conclusive evidence against them. ([*Moore v. Wilkinson,* 13 Cal. 478;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=13CAL478&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Yount v. Howell,* 14 Id. 465;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=14CAL465&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Stark v. Barrett,* 15 Id. 362;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=15CAL362&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Doll v. Meador,* 16 Id. 296;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=16CAL296&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Ely v. Frisbie,* 17 Id. 250](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=17CAL250&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

No attempt is made by the counsel for the defendants to question the correctness of these decisions; his endeavor is to show that this case is not within their purview. The case of *Doll v. Meador,* he says, is the principal one, but that there the defendants’ claim of title was from the same source as that of plaintiffs’; whereas, in this case, the defendants seek to avail themselves of a title springing from a different source than that of the appellants.

But the doctrine in that case in no manner depends upon the source of the supposed outstanding title. The offer of the assailants in that case and in the one at bar is to prove a *superior* outstanding title; in the former case, by showing that the title had never passed from the United States to the State whose patent was relied on; in the latter, by showing that the title had passed from the United States, whose patent was relied on, before the patent was issued. The one offer was as good as the other, as exclusive under the one patent as under the other.

In *Doll v. Meador* the absence of all privity between the defendants and the title set up as paramount, the absence of any action on the part of the government, in which the paramount title was asserted to be, questioning or authorizing any one to question the validity of the patent, are among the grounds assigned for holding it conclusive. Those reasons can be given with at least equal force in the case before the Court. The question is not one of estoppel founded on some privity of the parties with a common source of title, but one of the effect of record evidence, complete and unquestioned in itself, upon an attempt to attack it collaterally, made by one who neither sets up nor shows any privity with our own, or with the alleged paramount title.

In *Doll v. Meador* it was said of the State patent that: “It is **\*15** the record of the State that the land was subject to location under the grant of the United States, and has been located through her officers in pursuance of the terms of the donation, and as against parties who have no higher right than that which arises from mere occupation, it imports absolute verity.” With the like reason and truth may it be said that our patent is the record of the United States, that the land in question was granted to us by the government of Mexico, and that it has been correctly surveyed and located by the officers of the United States in pursuance of the terms of the grant to us, and that, as against the defendants, who have no higher right than that which arises from mere occupation, it imports absolute verity.

II. The amended answer of the defendants shows that they are unlawfully in possession of said land, both as to the State of California and as to plaintiffs, their defense amounting to the averment of a purpresture as to the former, and of a private nuisance as to the latter, which were unlawful acts and could not be pleaded.

The patent of the United States shows the premises to be land granted to us by Mexico, confirmed and adjudged to us by a tribunal appointed by law to be sole judge of the question, measured off and set apart to us by the proper department of the government as the identical land so granted and confirmed to us, fronting on the bay and on the creek of San Mateo. The defendants call upon you to go behind this patent. You have said that the law does not allow these solemn records to be impeached by proof of facts, dehors the record, at the suggestion of mere intruders. Still less can it be done by intruders who plead their own wrong.

III. The verdict of the jury was clearly against the evidence. The jury were evidently mistaken in the meaning of the language used in the instruction: *““““usual* high water mark.”

*W. T. Gough,* for Respondents.

The defense in this case is that the land in controversy belongs to the State of California, and that the origin of the title of the State thereto is different from that of appellants. Two preliminary questions arise:

1st. Can such a defense against appellants’ patent be set up in **\*16** any case? 2d. If so, can the respondents avail themselves thereof without showing a connection with such title?

The answer to the first question is found in the fifteenth section of the Act of Congress of March 3d, 1851, entitled “An Act to ascertain and settle the Private Land Claims in the State of California,” providing that patents issued under the provisions of that act shall not affect the rights of third parties. Such patents are conclusive only on the patentees, and the United States and all claiming under the United States, which does not meet the proposition, as we do not claim by title under the United States. The owner of the title under which we claim is a third party.

On the second proposition there seems to be some controversy. It is strenuously contended by appellants that in no case can a defendant avail himself of an outstanding superior title, unless he shows himself in privity with that title, or at least holding under some color from it. Several cases are cited in support of this position, but the case of [*Doll v. Meador* (16 Cal. 296)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=16CAL296&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is especially relied upon. The doctrine of that case upon this point we think the counsel of the appellants has totally mistaken. The defendants there undertook to show title in the United States to the lands in controversy, although not connected therewith, against a patent from the State for lands donated to her by the United States. This Court decided it could not be done, because the United States and the State, as to such lands, stood in the relation of donor and donee, as to the grant; and principal and agent, as to the selection of the lands; and such being the case, a mere possessor, without any other title, was estopped from making a defense to the patent which the donor and principal had refused to make. If the donor and principal refused or neglected to make such opposition and permitted the donee and agent to make such selection, no third party not connected with either had the right to complain. There was no adverse outstanding title in the United States to such lands. Here we contend title in the State is adverse and outstanding.

The defendant may bar the plaintiff’s recovery by showing a clear subsisting title in a stranger. ([*Hall v. Gittings,* 2 Harr. & J. 112;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1807023931&pubNum=384&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Colman v. Talbot,* 2 Bibb, 129](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1810025865&pubNum=2178&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

And so by showing an elder outstanding patent for the land. **\*17** ([*Colston v. McVay,* 1 A. K. Marsh, 250;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1818025663&pubNum=102&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Thomas v. Head,* Id. 450;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1819020454&pubNum=102&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Voorhees v. Bridgford,* 3 Id. 26;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1820006576&pubNum=102&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Price v. Evans,* 4 B. Monroe, 386;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1844005783&pubNum=2163&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) *Gurno v. Jones,* 6 Miss. 330; [*Peck v. Carmichael,* 9 Yerg. 325;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1836001572&pubNum=2835&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))*Love v. Gates,* 4 Dev. & Batt. 363; [*Connolly v. Doe,* 8 Black, 320;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=780&cite=8BLACK320&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Wolfe v. Dowele,* 13 S. & M. 103](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1849002451&pubNum=2729&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

In the latter case, the defendant was permitted to set up an outstanding title in a stranger as a first defense, although he claimed also from the same source as the plaintiff.

The doctrine of the above cases is sustained in this State in the cases cited below.

Again, the above authorities are conclusive upon the point that, if the outstanding title is from a common origin, yet the defendant, although unconnected with it, may set it up if it is then in a stranger.

There is, however, a well defined exception to this general doctrine, which, perhaps, is applicable in both cases--that is, in case of a mere intruder or trespasser. He cannot protect himself by setting up an outstanding title in a stranger. ([*Jackson v. Harder,* 4 Johns. 202](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1809027406&pubNum=2451&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

In [*Welch v. Sullivan,* (8 Cal. 511)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=8CAL511&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the Court says that the plaintiff never was in the actual possession, and defendant was; then plaintiff can only recover upon his strict legal title, and defendant, although not connected with the outstanding title, can still show where the true title is, plaintiff’s title being not simply *prima facie* but conclusive, if it exists at all.

In [*Bird v. Lisbros,* (9 Cal. 1)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=9CAL1&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the same doctrine is held, in the following language:

“But when the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession, having a good *prima facie* right, may set up and show the true title to be in another party. By showing this fact, he proves that the plaintiff has no title with which to overcome that which the law presumes to exist in the defendant by virtue of his actual possession.”

We are neither intruders nor trespassers. We are in actual possession--having, in virtue thereof, a good *prima facie* right; and appellants rely solely on their strict paper title. We never actually ousted or interfered with appellants’ actual possession. We **\*18** then set up title in the State of California, and show such to be the case by proving the premises in controversy to be below the ordinary high tide water mark of the bay of San Francisco at the date of the admission of the State into the Union, or rather between the ordinary ebb and flow of the tide at that time. The jury, under the charge of the Court, having found such to be the fact, the question then is, to whom do such lands belong? We maintain, to the State of California, and never were granted to the appellants or their grantor; and that the United States could give no title thereto, neither by a patent confirming a grant, nor in any other way. In this controversy we entirely reject and do not claim under the swamp and overflowed land acts. The Act of Congress of twenty-eighth of September, A. D. 1850, granting the swamp lands, etc., in Arkansas to that State, relates simply to fresh water overflows, for there is no ebb and flow of the tide in that State; and the act of the third day of March, A. D. 1857, simply extends the benefits of the Act of twenty-eighth of September, 1850, to the other States--in other words, granting them all the swamp and overflowed land within their borders overflowed by fresh water.

When the revolution took place, the people of each State became sovereign, and in that character hold the absolute right to the navigable waters and the soils under them for their own common use, subject only to the rights by them since surrendered by the Constitution to the General Government. ([*Martin v. Waddell,* 16 Pet. 369](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1842194146&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

Has the fee in such soil ever passed to the General Government? 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 over the subject as the original States. (*Pollard’s Lessee v.* [*Hagan,* 3 How. 212](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105920&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

This is the controlling authority on this subject, and the facts in that case and this are precisely similar. There, as here, the plaintiff claimed under a patent from the United States, and defendants setting up title in the State at the date of her admission into the Union, without showing any connection with that title. The prayer, also, in this case, asked for by the respondents and given by the **\*19** Court, was taken *verbatim* from the charge of the Court in *Pollard’s Lessee v. Hagan.*

The case does not stand alone, but has since been approved of in several decisions. (See [*Goodtitle v. Kibbe,* 9 How. 477,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1850303720&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Doe v. Beebe,* 13 How. 25](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1851193144&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

California came into the Union on equal footing with the other States.

It has been suggested that there may be a distinction between the cases in Howard’s Reports and this, since the grants in those cases were confirmed by Congress direct, and here by the Land Commission and the United States Courts. We can see no force in the distinction: the Land Commission was not solely a judicial body, but in fact acted under Congress, with partly political as well as judicial powers. But were it otherwise, it would make no difference, since no Court can conclude the right of a party not before it. The State, as we claim, is a third party, within the meaning of the Act of Congress before cited.

Again, it is contended that Mexico, by the grant upon which the patent of the appellants is founded, ceded this land to the appellants’ grantor. But even if we concede that she did, it is earnestly insisted that since the admission of this State into the Confederacy, the grant is void to the extent of these lands, and under our form of government can never be perfected by a patent. If the doctrine of the above cases is correct, what matters it if even the Mexican Government granted the whole bay of San Francisco to the appellants?

Could any treaty which the United States might make with Mexico, guaranteeing property to Mexican citizens in the territory ceded to the United States by such treaty, protect such an individual right, which would interfere with the whole form of our Confederacy? Take away from one State a right and sovereignty which another State enjoys? We think not. We give the answer to the proposition in the clear and concise language of the Supreme Court of the United States:

“It cannot be admitted that the King of Spain could by treaty or otherwise impart to the United States any of his royal prerogatives, and much less can it be admitted that they have the capacity **\*20** to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own Government, and not according to those of the Government ceding it.”

**FIELD, C. J. delivered the opinion of the Court-- COPE, J. concurring**.

This is an action of ejectment to recover the possession of certain premises situated in San Mateo county, being part of a tract known as the “San Mateo Rancho.” The plaintiffs are the executors of the last will and testament of W. D. M. Howard, deceased, and base their claim to a recovery upon a patent of the rancho, issued to them as such executors, and Agnes Howard, executrix, by the United States, bearing date in November, 1857. The patent is based upon a grant of the former Mexican Government, in which one of the boundaries of the rancho is designated as the bay of San Francisco, and it conveys the premises in controversy in fee, in the usual form of patents, to the executors and executrix, in trust for the heirs and devisees of the said Howard. Since the issuance of the patent, the executrix has intermarried with one of the plaintiffs, and by the marriage, her authority as such executrix ceased. (See Act concerning Estates of Deceased Persons, sec. 44.) The action therefore is properly brought in the name of the plaintiffs. ([*Curtis v. Sutter,* 15 Cal. 259](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=15CAL259&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).)

The record does not contain a copy of the Mexican grant, or of the patent of the United States, but we infer from the argument of counsel that the grant was one in colonization and in the ordinary form--subject to the approval of the Departmental Assembly, and requiring juridical possession from the magistrate of the vicinage; and that the patent of the United States was issued under the Act of March 3d, 1851, after the usual proceedings before the Land Commission, and the tribunals of the United States, and the official survey of the premises. It is upon this view we have considered the questions argued by counsel.

The defendants, in their answer as amended, admitted that they were in possession of a part of the demanded premises, and set up in bar of the action, title in the State of California, alleging, in substance,**\*21** that the land thus possessed by them was below the ordinary high tide water mark of the bay of San Francisco at the time of the admission of the State into the Union, and has been thus situated ever since, with the exception of that portion occupied by their buildings, which they allege has since been reclaimed from the waters of the bay by them, or by parties through whom they claim. On the trial they introduced evidence, against the objection of the plaintiffs, in support of the allegations of the answer, and the Court instructed the jury that if the premises were below the usual high water mark at the time the State was admitted into the Union, the Act of Congress and the patent gave the plaintiffs no title, whether the water had receded by the labor of man only, or by alluvion. The jury found for the defendants, and it is from the judgment entered upon their verdict, and from the order refusing the motion made for a new trial, that the appeal is taken.

We are satisfied that the verdict is not justified by the evidence. No instructions were given as to the meaning of the language, “usual high water mark,” and the jury evidently fixed it at the limit which the monthly Spring tides reach--tides which occur only at the full and change of the moon. The term “usual,” employed by the Court, is ambiguous. The limit of the monthly Spring tides is, in one sense, the usual high water mark; for, as often as those tides occur, to that limit the flow extends. But it is not the limit to which we refer when we speak of “usual” or “ordinary” high water mark. By that designation we mean the limit reached by the neap tides; that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours. Yet the jury, from want of proper instruction, must have taken a different view, and considered the language as referring to the limit which the monthly Spring tides attained, or else have acted, in rendering their verdict, in mere caprice, as there was no evidence before them, so far as the record discloses, that the neap tides ever covered the land in controversy. (Lord Hale’s Treatise De Jure Maris, 26; [*Lowe v. Govett,* 3 Barn & Adol. 862;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=3516&cite=3BARNADOL862&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=IC&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Angell on Tide Waters, Ch. 3; Hall on Rights to the Sea.)

We do not intend, however, to determine the appeal in this way. We prefer to place our decision upon grounds which will finally dispose**\*22** of the controversy between the present parties, and furnish a rule for the settlement of other controversies of a similar character. For that purpose, we shall assume that the land occupied by the defendants, and constituting a part of the demanded premises, was, at the date of the admission of California as a State into the Union, below the ordinary high water mark of the bay of San Francisco; in other words, was covered by the flow of the ordinary or neap tides of the bay. Upon that assumption, the land thus occupied belonged at that date to the State, unless it had been the subject of a previous grant by the Mexican Government, which the United States, upon the acquisition of the country, were bound to protect, and which they have since recognized and confirmed. Until the acquisition of the country, the land was of course under the jurisdiction, control and disposition of the former Government, and the rights acquired by the United States were in subordination to the action of that Government, so far as such action was entitled to consideration either from the law of nations or the stipulations of the treaty of cession. In that respect the land under the tide waters of the bay between low and high water mark stood in no different position from that of any other land over which the former Government possessed the power of disposition.

By the law of nations, independent of treaty stipulations, the cession of territory from one Government to another does not impair the rights of the inhabitants to their property. They retain all such rights, and are entitled to protection in them to the same extent as under the former Government. Public property and the sovereignty over the territory are only considered as passing by the cession. Thus in [*United States v. Percheman,* (7 Pet. 86)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1833196846&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the Supreme Court said: “Had Florida changed its sovereignty by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new Government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. \* \* \* A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he has granted were not his to cede. Neither party could so understand the **\*23** cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood *to pass the sovereignty only, and not to interfere with private property.”* And again in [*Strother v. Lucas,* (12 Pet. 435)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1838132436&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) which was an action of ejectment for certain real estate in Missouri, the same Court said: “The State in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it, ([2 Pet. 301,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800103492&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) etc.) by which the Government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants. ([4 Pet. 513;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800106633&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [9 Id. 734;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1835195099&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [10 Id. 330, 335, 726, 732, 736](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1836191447&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_780_335&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_335).) Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect.--” When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations those rights, in the language of the Supreme Court, were “sacred and inviolable” and the obligation passed to the new Government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new Government, and to be executed by proper legislative action when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals, or by existing legislation.

But independent of the obligations arising from the law of nations, the United States, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants of the ceded territory. By the eighth article they provided that Mexicans established in the territory might remain there or remove to the Mexican Republic, and retain their property, or dispose of the same and remove the proceeds. This provision**\*24** for the retention of the property was an idle and deceptive one, if it did not carry with it a corresponding obligation of the new Government to protect the property thus retained. Such obligation it did in fact imply, and this obligation was as sacred and binding as if it were stated in express terms.

The term property as applied to lands, embraces all titles, legal or equitable, perfect or imperfect. Such was held by the Supreme Court to be the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of the ceded territory should be protected in their property. It “comprehends,” said the Court, in *Soulard v. The United States,* “every species of title, inchoate or complete. It is supposed to embrace those rights which are executory, as well as those which are executed. In this respect the relation of the inhabitants to their Government is not changed. The new Government takes the place of that which has passed away.” ([4 Peters, 511](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800106633&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).) And the same Court, in a subsequent case, after referring to the same stipulation in the Louisiana treaty, observed that, “No principle is better settled in this country than that an inchoate title to lands is property.” ([*Delassus v. The United States,* 9 Peters, 133](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1835190876&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).) It matters not, therefore, whether the Mexican grant, upon which the patent of the plaintiffs was issued, passed a perfect title to the premises, or only an interest which required further action of the Government for its perfection. We are not informed by the record whether it was of a specific tract with defined boundaries, or was only of a specific quantity lying in a area of larger extent. We shall assume for the purposes of the present appeal that it was of the latter character, and conveyed only an interest requiring further action of the Government, and that such action was not had previous to the cession--in other words, that it conferred a merely equitable title, which was never perfected under the former Government. The title still constituted property within the decisions of the Supreme Court, which we have cited, and as such the Government of the United States was under obligation to protect it by the law of nations and by the stipulations of the treaty. This protection it could extend in its own way. But to protect an equitable title is to perfect it, or to afford the means of its perfection. By **\*25** the Act of March 3d, 1851, the Government has afforded such means. It has there provided for protecting all titles, legal or equitable, acquired previous to the cession. Its power to thus provide cannot be questioned. The power results from the fact that it is sovereign and supreme as to all matters connected with the treaty, and the enforcement of the obligation incurred thereunder, or cast upon it, independent of the treaty, by the law of nations upon the cession of the country. It must determine for itself what claims to property existed at that date, which it is bound to protect, and consequently the lands to which they apply, and the parties by whom they were then held. In protecting those claims it must necessarily make them good as against others asserting interests from events subsequently transpiring, otherwise its power to carry out the stipulations of the treaty and the obligations imposed by the law of nations would be limited and dependent, and not sovereign and supreme. Subsequent claimants must therefore take in strict subordination to its action. And such subsequent claimants are not entitled to any notice of its proceedings. The sovereign power can, as we have already observed, afford the requisite protection in its own way; it can do so by a direct legislative Act perfecting at once the equitable title, or by authorizing proceedings to be taken before its tribunals and officers; and it is under no more obligation to give notice to parties asserting subsequently acquired interests in the one case than in the other. Nor can subsequent claimants have any just grounds of complaint, for whatever interest they may possess were acquired with full knowledge of the treaty, and of the obligations and powers of the new government.

By the Act of March 3d, 1851, the Government has established a tribunal for the investigation of the validity of the titles asserted to have existed previous to the cession; required evidence to be presented respecting the same; designated law officers to appear and litigate the matter on behalf of the United States; authorized appeals, first to the District and then to the Supreme Court; and appointed surveyors to survey and measure off the land, when once the title has been recognized and confirmed. By the various proceedings required, numerous securities are afforded against imposition and fraud. As the last act in the series of proceedings, a **\*26** patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the Government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located by the former Government, and is correctly located by the new Government so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the Government itself cannot question its verity, nor can parties claiming through the Government by title subsequent.

The patent, it is true, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the Board of Land Commissioners. ([*Moore v. Wilkinson,* 13 Cal. 485;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=13CAL485&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Yount v. Howell,* 14 Id. 469;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=14CAL469&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [*Stark v. Barrett,* 15 Id. 361;](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=15CAL361&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Ely v. Frisbie,* 17 Id. 250](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=220&cite=17CAL250&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).) But as the record of the Government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant-- such title depending, up to the issuance of the patent, upon the character of the grant and the proceedings of the former Government in reference to it; whether it were of a specific tract separated from other lands by defined boundaries, or were only of a specific quantity lying within an area of larger extent; and in the latter case, whether or not the quantity had been located by official authority. (*Stark v. Barrett.*) The grant upon which the patent to the plaintiff was issued is not set forth, as we have stated, in the record, and we are left in ignorance whether it is of a specific tract or only of a specific quantity. If it be of the former character, it passed to the grantees, upon its issuance, a present and immediate interest in the premises. If it be of the latter character, it passed a like interest in the specific quantity designated, to be afterwards located within the general tract by the authority of the Government. If such location were made under the former Government, the interest of the grantees became thereby, from its date, attached **\*27** to the particular tract assigned to them. But if no such proceeding were had under the former Government, the right to determine the location passed upon the cession of the country, with all other public rights, to the United States. The interest therefore held under the grant, at the date of the cession, must have been either in a specific tract, made so by the terms of the grant itself, or by subsequent location under the former Government, or in a specific quantity to be laid off by the new government. We have assumed that the grant was one of quantity only, requiring at the time the action of the Government to give it location, as this view is the one most favorable to the defendants. Such being the case, the duty devolved upon the new Government to make the location. This was essential to perfect the equitable title of the grantees, and thus give it the protection for which the Government in effect stipulated by the treaty, and which it was bound to give independent of the treaty, by the law of nations. The duty of the Government attaching at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. The patent, therefore, to the plaintiffs, considered as issued upon a grant of the character which we have assumed it to be, is evidence that the grantees possessed at the date of the cession a vested interest in the quantity of land mentioned in the grant--a right to so much land to be afterwards laid off by official authority; that the premises in controversy were then subject to appropriation in satisfaction of the quantity granted; and that the Government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees and attached it to the tract as surveyed. The “third persons” against whose interest the action of the Government and patent are not conclusive--under the fifteenth section of the Act of March 3d, 1851--are those whose title accrued before the duty of the Government and its rights under the treaty attached.

The views we have thus expressed dispose of the present appeal. The United States, upon the cession of the country, took the premises charged with the equitable claim of the Mexican grantees, and have since perfected the claim into a perfect title. But for such **\*28** equitable claim the United States would have held the title in trust for the new State, but, the claim existing, the State and all other parties must hold in subordination to the action of the Government respecting it. The right and power of the Government to protect and thus perfect the equitable claim were superior, as we have shown, to any subsequently acquired rights or claims of the State or of individuals. Immediately upon the cession of the country, the Government could have complied with its obligations, and at once have perfected the claim. Subsequently events not originating with the grantees can have no effect upon the validity of their claim, or the duty of the Government respecting it.

There is nothing in the decisions of the Supreme Court of the United States in *Pollard’s Lessee v.* [*Hagan* (3 How. 212)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105920&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Goodtitle v. Kibbe,* (9 Id. 471)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1850303720&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) which in any respect militates against these views. The first case was an action of ejectment to recover certain premises situated in the city of Mobile, State of Alabama, constituting part of the shore of a navigable tide water river, lying below high water mark, when the State was admitted into the Union in 1819. The plaintiffs relied upon an act of Congress, passed subsequently to the admission of the State--in July, 1836, and a patent of the United States issued in pursuance thereof. It was held that the State, upon her admission into the Union, became entitled to the soil under the navigable waters within her limits not previously granted, and that the act of Congress and patent were in consequence inoperative to pass any title to the patentees. There was no pretense in the case, as it was presented to the Court, that the patentees had acquired any rights to the demanded premises previous to the admission of Alabama, which the United States were under any obligations, from the law of nations, treaty stipulations or otherwise, to protect. The question as to the right of soil was presented unembarrassed by any proceedings had respecting the same by any authority existing previous to the admission of the State. The second case was also an action of ejectment for premises similarly situated, and the plaintiffs claimed under the same act of Congress and patent, and also an inchoate Spanish grant dated in December, 1809, but the Court affirmed the previous decision in *Pollard’s Lessee v. Hagan,* and observed as to **\*29** the Spanish grant, that it had been repeatedly decided that such grant in that territory, whether inchoate or complete, made after the treaty of St. Ildefonso, in 1800, did not convey any right in the soil to the grantee, referring particularly to a recent decision on that point in the [*United States v. Reynes* (9 How. 127).](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1850307555&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) In that case, thus referred to, it was held that the treaty of Ildefonso deprived Spain of the power to make grants of land in Louisiana, if not after its date, certainly after the twenty-first of March, 1801, and that the stipulation in the treaty of Paris, by which Louisiana was acquired, to protect the inhabitants in the enjoyment of their property, had no application to a grant of land made by the Spanish authorities subsequent to that period, and that such grant was void. And hence the Court very properly remarked, in *Goodtitle v. Kibbe,* that the existence of the imperfect and inoperative Spanish grant, which the plaintiffs in that case produced, 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--in other words, that the existence of a previous void grant did not enlarge the power of the General Government over the premises, and its confirmation by that Government, subsequent to the admission of Alabama, did not impair her rights. The distinction between that case and the one at bar is too obvious to require comment. If the Spanish grant gave any equities to the grantee, as Congress by its legislation appeared to consider it did, as stated in the opinion of the Supreme Court in the case of [*Pollard’s Lessee v. Files* (2 How. 594)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800105926&pubNum=780&originatingDoc=Idfa74571fb0511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))--a case which arose upon the same grant, act of Congress and patent mentioned in *Goodtitle v. Kibbe*--the equities were only considerations addressed to the beneficence of the Government--reasons for the bestowal of its bounty, and were not founded on claims which the Government was under obligation, by treaty stipulations or otherwise, to protect. The claim of the grantees under the grant upon which the patent to the plaintiffs in the case at bar was issued, was not upon the beneficence of the Government, but upon its sense of justice. The grantees did not ask of the Government to confer rights of property, but to respect and settle those already conferred.**\*30** There is no resemblance in the position of the grantees in the two cases.

Judgment reversed, and cause remanded for a new trial.