EXHIBIT O

Steven Alan Magritz
C/o Notary, P.O. Box 342443
Milwaukee, Wisconsin 53234

district court of the united states District of Columbia

Steven Alan Magritz, Complainant

Against

Ozaukee County, a public corporation, etc., et al.

Respondents.

MEMORANDUM OF LAW

IN SUPPORT OF

VERIFIED COMPLAINT FOR: DECLARATORY JUDGMENT; IMPOSITION OF A CONSTRUCTIVE TRUST; AN ACCOUNTING; BREACH OF FIDUCIARY DUTY BY PUBLIC OFFICERS / BREACH OF THE PUBLIC TRUST; QUO WARRANTO; AND, REVOCATION OF CORPORATE CHARTER

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INTRODUCTION

The individual Respondents are public officers and as such are fiduciaries of the Public Trust(s) created by the Constitution of the United States of America and the Constitution of The state of Wisconsin. As fiduciaries of the Public Trust, public officers owe loyalty to the Constitutions which created the Public Trust(s) and are required to be bound by oath to said Constitutions. Respondents have a fiduciary duty to display honesty, integrity, and good faith to the beneficiaries of the public trust(s), who are the sovereign people they serve. As fiduciaries of the Public Trust, Public Officers must at all times, without exception, display honesty, integrity, and good faith toward the beneficiaries.

Fiduciaries have the duty to bear the utmost fidelity to the Public Trusts created by the Constitutions that were created, ordained, and established by the people, who are the grantors and the beneficiaries of the Public Trust. The limitations placed upon the actions of the fiduciaries by the Trust Instruments, the Constitutions, are absolute. These limitations include, but are not limited to:

a. **The prohibition against impairing the obligation of contracts,**
b. **The prohibition against the taking of private property for public use without just compensation, and,**
c. **In general, the prohibition against trespass of another man's rights, liberty, or property.**

Fiduciaries who, by acts of commission or omission, impair the obligations of contracts, especially contracts between the people and the United States of America, denigrate the good name of the state, instill reproach among the people for all men who occupy public office, are disloyal to the Constitutions, act dishonestly, lack integrity, act in bad faith, and are in breach of their fiduciary duty.

Fiduciaries who, by acts of commission or omission, take private property for public use without just compensation, denigrate the good name of the state, instill reproach among the people for all men who occupy public office, are disloyal to the Constitutions, act dishonestly, lack integrity, act in bad faith, and are in breach of their fiduciary duty.

Fiduciaries have a duty of full disclosure to beneficiaries. To conceal, or fail to disclose, that corporate statutes do not apply to the people in their private capacity exercising inherent rights is deceit, dishonesty, bad faith, and a breach of fiduciary duty. To conceal, or fail to disclose, that registration of private property with the corporate State, such as registering a private automobile or recording a deed to private land, presumptively grants the corporate State control over the private property is deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To conceal, or fail to disclose, that registering or recording private property with the corporate State creates an hypothecation to the corporate State of the private property which the corporate State then uses to make profits therefrom, such as using the private property as collateral for the issuance of bonds, the proceeds of which run the corporation's operations, is deceit, dishonesty, bad faith, and breach of fiduciary duty.

To conceal, or fail to disclose, that registration of private property with the corporate State, such as registering a private automobile or recording a deed to private

land, is voluntary, and threatening to penalize those who "fail" to "volunteer" is deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To require private men and women exercising inherent property rights to register or record their private property with the corporate State, and then requiring them to pay for the "privilege" of the registration or recordation is extortion, deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To require those exercising inherent property rights to register or record their private property with the corporate State, and then not paying said "persons", i.e., beneficiaries of the Public Trust, the income or profits generated from said hypothecated private property is theft or stealing, deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To impose, or attempt to impose, penal statutes of the corporate body politic against a private man exercising inherent rights who is not a member of the corporate body politic, especially when said imposition or attempt to impose is politically motivated or retaliatory against a victim and witness of crime, is misconduct in public office, deceit, dishonesty, bad faith, a criminal act, and breach of fiduciary duty.

Acts in breach of fiduciary duty by public officers give rise to personal liability of the public officer(s). Acts of public officers, fiduciaries, which unjustly enrich said officers or a third party give rise to a constructive trust in favor of the beneficiaries or cestui que trust for restoration and restitution. Acts in breach of fiduciary duty are cause for removal from office. Further, pursuant to Section 4 of the 14th Amendment, assumption or payment of any debt, obligation, or claim, such as wages or pensions, by any State to a fiduciary in insurrection or rebellion against the Constitution is illegal and void.

I. Individual Respondents Are Public Officers

Individual Respondents named in Complainant's Complaint are public officers.

"[O]ne who holds a public office is a **public officer**".

63C Am. Jur. 2d *Public Officers and Employees* § 9 (Online Edition November 2011). *Murach v. Planning and Zoning Com'n of City of New London*, 196 Conn. 192, 491 A.2d 1058 (1985); *Raduszewski v. Superior Court In and For New Castle County*, 232 A.2d 95 (Del. 1967); *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W.2d 100, 88 A.L.R. 1099 (1933); *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952).

A member of the General Assembly is, of course, a **"public officer"** within the meaning of the Constitution. "Certainly, where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a **public officer**." (citations omitted): "An office is a public station or employment conferred by the appointment of the government. **And any man is a public officer who is appointed by government, and has any duty to perform concerning the public; nor is he any the less a public officer because his authority or duty is confined to narrow limits.**"

When our Constitution declares that "[p]ublic officers are the trustees and servants of the people," we interpret that declaration to mean that **public officers** are the trustees and **servants of the people.**

***All* public officers**, within **whatever branch and at whatever level** of our government, and whatever be their private vocations, **are trustees of the people**, and do accordingly labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts.

Nor are the proscriptions of the law confined to legislators who are lawyers. They extend to every public officer.

Georgia Dept. of Human Resources v. Sistrunk, 249 Ga. 543, 546-547, 291 S.E.2d 524, 528 (1982).

II. Individual Respondents, As Such Public Officers, Are Fiduciaries

Individual Respondents named in Complainant's Complaint are public officers and as such are defined as fiduciaries.

"'**Fiduciary**' includes a trustee under any trust, …[a] **public officer**…"
Uniform Fiduciaries Act, Section 1. www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufa22.pdf

"'**Fiduciary**' includes a trustee under any trust, …[a] **public officer**…"
Wisconsin Statutes § 112.01(b).

Register of deeds was "**fiduciary**" under Wisconsin law, for purpose of determining dischargeability of debt arising from misappropriation of collected fees, where Wisconsin statutory definition specifically included "**public officer**[s]," plain meaning of statute seemed to include any public officer. *Matter of Loken*, 32 B.R. 205, Bkrtcy.Wis.,1983.

"… a **public officer**, in holding a position of public trust, stands in a **fiduciary** relationship to the citizens that he or she has been elected to serve."
("See *Trist v. Child*, 88 U.S. (21 Wall.) 441, 450, 22 L.Ed. 623 (1874).") *Felkner v. Chariho Regional School Committee*, 968 A.2d 865, 874, R.I., 2009.

'It should not be forgotten that '**a public office is a public trust**,' and all public officers should so conduct their official duties as to be like Caesar's wife, 'above suspicion' of irregularities in the administration of their offices, even though such irregularities may not, under the law, constitute such wilful misconduct, corruption, or maladministration as to merit removal from office.' *Parsons v. Steingut*, 185 Misc. 323, 327, 57 N.Y.S.2d 663, 666 (1945).

The statute is unique because only **public officials** can violate its provisions. **These officials are held in public trust and owe a fiduciary duty to the people they represent.** The high standard of conduct demanded of public officers, coupled with the broad sweeping language of the statute, permits no other interpretation as to its intent and meaning.

People v. Savaiano, 66 Ill.2d 7, 15, 359 N.E.2d 475, 480 (1976).

Syllabus by the Court:

1. The **sheriff** as the chief peace officer of his county is responsible both by common and statutory law to keep and conserve peace and good order within his county.

2. Neglect of official duty may consist of careless or intentional failure to exercise reasonable diligence in its performance.

3. **Duties imposed upon a public officer** are functions and attributes of the office to be performed by the incumbent.

4. A sheriff's official duty implies alertness and initiative to enforce the laws enacted by the people for their protection and well-being. Relator, who failed to meet these requirements, ***held*** **properly removed from office.**

A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent. *In re Olson*, 211 Minn. 114, 118, 300 N.W. 398, 400 (1941).

One is said to act in a '**fiduciary** capacity' or to receive money or contract a debt in a 'fiduciary capacity,' when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to which he stands in a relations implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation, and a **public officer**. (Emphasis added)

Ducote Jax Holdings, L.L.C. v. Bradley, 2007 WL 2008505 (E.D.La.), (citing *State of Louisiana v. Hagerty*, 205 So.2d 369, 374-75 (La.1967) (internal citations omitted).

III. Individual Respondent Public Officers Are Fiduciaries of the Public Trust

Individual Respondents named in Complainant's Complaint are public officers, as such are defined as fiduciaries, and are fiduciaries of the Public Trust, and must observe the utmost loyalty to the Constitutions that created or erected the Public Trust(s).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be **the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, **both of the United States and of the several States**, **shall be bound** by Oath or Affirmation, **to support this Constitution**; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. *The Constitution for the United States of America, Article VI.*

Members of the legislature, and **all officers**, executive and judicial, except such inferior officers as may be by law exempted, **shall** before they enter upon the duties of their respective

offices, take and subscribe an oath or affirmation to **support the constitution of the United States and the constitution of the state of Wisconsin**, and faithfully to discharge the duties of their respective offices to the best of their ability.

The Constitution of The state of Wisconsin, Article IV, Section 28.

The legislature hereby reaffirms that a state public official holds his or her position **as a public trust**. *Wisconsin statutes § 19.45(1).*

Public service is a public trust, requiring employees to place **loyalty to the Constitution**, the laws and ethical principles above private gain.

5 USC Sec. 7301, Section 101. (a), Part I, Ex. Ord. No. 12731, Oct. 17, 1990, 55 F.R. 42547.

The fundamental principle of supremacy of law, the crux of our constitutional government, requires that all public officials obey the mandates of the Constitution and the lawful enactments of the Congress. **See U.S.Const. art. VI**; United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882).[FN2]

FN2. In the Lee case, the son of General Robert E. Lee sued successfully for the recovery of property of the Lee family against the commandant of Fort Myer and the superintendent of the national cemetery at Arlington. Mr. Justice Miller proclaimed the principle of supremacy of law in the following imperishable language: "**No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.** It is the only supreme power in our system of government . . . . Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government ... ."

106 U.S. at 220, 1 S.Ct. at 261. *C.B.S. Imports Corp. v. U. S.*, 450 F.Supp. 724, 728 (1978).

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that **all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane.** …. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments. *Trist v. Child*, 88 U.S. 441, 450 (1874).

"The members of the board of chosen freeholders and of the bridge commission are **public officers holding positions of public trust**. **They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve."**

Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474, 86 A.2d 201, (1951), citing: *Rankin v. Board of Education*, 135 N.J.L. 299, 303, 51 A.2d 194 (E. & A.1947); *Trist (Burke) v. Child*, 21 Wall. 441, 88 U.S. 441, 450, 22 L.Ed. 623, 625 (1875); *Edwards v. City of Goldsboro*, 141 N.C. 60, 53 S.E. 652, 653, 4 L.R.A.,N.S., 589 (Sup.1906); *Tuscan v. Smith*, 130 Me. 36, 153 A. 289, 294, 73 A.L.R. 1344 (Sup.Jud.1931); *State ex rel. Fletcher v. Naumann*, 213 Iowa 418; 239 N.W.

93, 99, 81 A.L.R. 483 (Sup.1931); *In re Marshall*, 363 Pa. 326, 69 A.2d 619, 625 (Sup.1949); 42 Am.Jur., Public Officers, s 8, p. 885; 43 Id. s 260, p. 77-78; 67 C.J.S., Officers, s 6, p. 118.

A public office is a public trust. Borough councilmen, as fiduciaries and trustees of the public interest, must serve that interest with the highest fidelity. The law tolerates no mingling of self interest; it demands exclusive loyalty. (citations omitted). The theory is that a **public officer assumes the same fiduciary relationship** toward the citizens of his community **as a trustee bears to his Cestui que trust.** (citations omitted). They have the right to expect that in everything that appertains to their business or welfare, he will exercise his best judgment, unaffected and undiluted by anything which might inure to his own interest as an individual.

Aldom v. Borough of Roseland, 42 N.J.Super. 495, 501, 127 A.2d 190, 193 (1957).

"**Public officers** hold positions of **public trust**, and stand in a **fiduciary** relationship to the people whom they have been appointed to serve."

State v. Markt, 156 N.J.Super. 486, 384 A.2d 162, 166 (N.J.Super.Ct.App.Div.1978) (citing *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201, 221 (N.J.1952)).

"They must serve the public with the **highest fidelity**." *Id.*

"The citizen is **not** at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution." *Driscoll*, 86 A.2d at 222. Whenever the acts of **public officers** fail to conform to the standard imposed by the **fiduciary** relationship in which they stand to the public, relief will be available in the civil courts.

Id. Marjac, L.L.C. v. Trenk, D.N.J., 2009 WL 2143686.

"The theory of our government is, that all **public stations are trusts**, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of **right, justice**, and the public good. They are *never* to descend to a lower plane."

Trist v. Child, 88 U.S. 441, 450, 1874.

Of course, **a public office is a public trust**:

Constitution of Pennsylvania, Article VI, Section 3; *Taylor v. Beckman* (No.1), 178 U.S. 548, 577, 20 S.Ct. 1009, 44 L.Ed. 1187; *Commonwealth v. Gamble*, 62 Pa. 343, 349, 1 Am.Rep. 422; *Commonwealth v. Kirk*, 141 Pa.Super. 123, 145-146, 14 A.2d 914;

and **the occupant of such an office is a fiduciary**. Like any other fiduciary or trustee, he is required to exercise common skill and prudence, and when his conduct of the trust is not marked by these qualities, there is mismanagement. *In re Marshall*, 363 Pa. 326, 336, 69 A.2d 619, 625.

Jersey City v. Hague:

In *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, at page 474 et seq., (1952), this court said without dissent:

'**The members of the board of chosen freeholders** and of the bridge commission **are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve.** (citations omitted); 42

Am.Jur., Public Officers, s 8, p. 885; 43 Id. s 260, p. 77-78; 67 C.J.S., Officers, s 6, p. 118. **As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity.** In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, **and above all to display good faith, honesty and integrity.** (citations omitted); 43 Am.Jur., Public Officers, ss 260-261, pp. 77-78; 43 Id. s 267, p. 82; 67 C.J.S., Officers, s 114, p. 402. They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. **When public officials do not so conduct themselves** and discharge their duties, **their actions are inimicable to and inconsistent with the public interest, and not only are they individually deserving of censure and reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties.** (citations omitted); 43 Am.Jur., Public Officers, s 291, p. 101.

'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. **The enforcement of these obligations is essential** to the soundness and efficiency of our government, **which exists for the benefit of the people who are its sovereign.** Constitution of 1947, art. I, part. 2. The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in the civil courts either through an action brought in his own name, (citations omitted), or through proceedings instituted on his behalf by the Governor, Constitution of 1947, art. V, sec. I, par. 11, or by the Attorney General, (citation omitted). Under the former practice the great prerogative writs, especially Certiorari, were generally available to the aggrieved citizen, but by art. VI, sec. V, par. 4 of the Constitution of 1947 the relief theretofore granted in such matters as a matter of judicial discretion became a matter of right, see (citation omitted). **Nonfeasance, misfeasance, malfeasance and corruption in public office cannot prevail against an aroused citizenry who have it in their power to end the misconception of some public officials that their obligations are fully met so long as they obey the letter of the law and avoid its penal sanctions.** That the shortcomings of some public officers may not make them accountable in our criminal courts does not mean that their nefarious acts cannot successfully be attacked through the processes of the civil law. * * * It is the potential for evil and not the actual financial loss or other injury incurred that renders a transaction illegal because of an abuse of discretion, (citations omitted)'

Manifestly the instant case falls within the pattern of the Driscoll case.

Restitution was likewise invoked in such cases as *United States v. Carter*, 217 U.S. 286, (1910), where the defendant, an army officer in charge of procurement, entered into an arrangement with two contractors by which he exercised his official discretion in such a way as to give them more contracts and more profits. The court traced his share in this enterprise into the hands of other defendants, who were not purchasers in good faith, and subjected the money to a constructive trust, saying:

'It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

'The doctrine is well established and has been applied in many relations of agency or trust. The disability results not from the subject-matter, but from the fiduciary character of the one against whom it is applied. It is founded on reason and the nature of the relation, and is of paramount importance. 'It is of no moment,' said Lord Thurlow, in *The York Bldgs. Co. v. Mackenzie*, 3 Paton, 378, 'what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches. " *United States v. Carter*, supra, 217 U.S. at page 306.

The other Massachusetts case, *City of Boston v. Dolan*, 298 Mass. 346, 10 N.E.2d 275, 277, 281 (Sup.Jud.Ct.1937), is to the same effect:

'But as city treasurer the defendant was a fiduciary. As such he could be compelled to account in equity like a trustee, regardless of a possible remedy at law, and could not be permitted to retain a secret profit made in transactions conducted for the city. The saying, '**Public office is a public trust,' is more than mere rhetoric.** (citations omitted)

Lord Porter also based the case on the additional ground of a fiduciary relationship:

'**As to the assertion that there must be a fiduciary relationship, the existence of such a connection is, in my opinion, not an additional necessity in order to substantiate the claim, but another ground for succeeding where a claim for money had and received would fail**. In any case, I agree with Asquith, L.J., in thinking that the words 'fiduciary relationship' in this setting are used in a wide and loose sense and include, Inter alios, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.' (p. 620)

This view of the law is borne out by the American Law Institute Restatement on Restitution:

'Section 190, General Rule: **Where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as a fiduciary, he holds it upon a constructive trust for the other.'**

As these decisions and the Restatement show, the development of the principle of restitution, both at law and in equity, as a remedy for breach by a public official of his fiduciary obligations has obviously been salutary. Restitution, by virtue of its adaptability to individual cases on equitable principles may, as we have seen, reach situations beyond the grasp of other civil or criminal remedies and do justice on equitable principles; see (citation omitted) where various alternatives were weighed with a view to working out justice so far as possible to all concerned, but always on the fundamental basis of preventing the unfaithful public official or public body profiting from his or its wrongdoing. See 65 Harv.L.Rev. 502 (1952); Lenhoff, the Constructive Trust as a Remedy for Corruption in Public Life, 54 Col.L.Rev. 214 (1954).

END of citations from: *Jersey City v. Hague*, 18 N.J. 584, 593-596, 115 A.2d 8, 13-15 (1955).

The courts of this State are committed to the principle that **public officials hold positions of public trust**; they are under an **inescapable obligation to serve the public with the highest fidelity, good faith, and integrity.** (citations omitted). Such required conduct demands undivided loyalty and compels public officers to refrain from outside activities which interfere with proper discharge of their duties, or which may expose them to the temptation of acting in any manner other than in the best interests of the public. ….

These principles are imposed by law on all public officers and become effective upon their entering public office. If it be determined that such a conflict of interest exists, their agreements are against public policy and may be declared void; and this is so even though there is no proof of fraud, dishonesty, loss to the public or whether in fact they were influenced by their personal interest. *Newton v. Demas*, 107 N.J.Super. 346, 349, 258 A.2d 376, 378 (1969).

IV. Individual Respondent Public Officers Have Fiduciary Liabilities

Individual Respondents named in Complainant's Complaint are public officers, as such are defined as fiduciaries, and are fiduciaries of the Public Trust, and as fiduciaries assume greater liabilities upon themselves than do other persons. Public officers are required to serve with the highest fidelity and to display good faith, honesty and integrity toward beneficiaries of the Public Trust. Public officers are subject to compensatory *and* punitive damages for breach of fiduciary duty.

A. In General

In *Pressley v. Township of Hillsborough*, 37 N.J.Super. 486, 117 A.2d 646 (N.J.Super.Ct. App.Div.1955), the Appellate Division set forth the duty owed by a public official:

"As fiduciaries and trustees of the public weal they (municipal 3 officers) are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, **and above all to display good faith, honesty and integrity.**" Under New Jersey law, **breach of fiduciary duty is a tort claim** requiring a showing of duty, breach, injury, and causation.

Marjac, L.L.C. v. Trenk, D.N.J., 2009 WL 2143686.

As **fiduciaries and trustees of the public weal** they are under an inescapable obligation to serve the public with the **highest fidelity.** In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and **above all to good faith, honesty and integrity.** citing:

City of Newark v. N.J. Turnpike Authority, 7 N.J. 377, 381-382, 81 A.2d 705 (1951); *Ryan v. Paterson*, 66 N.J.L. 533, 535-536, 49 A. 587 (Sup.Ct.1901); *Schefbauer v. Board of Township Committee of Kearney*, 57 N.J.L. 588, 601, 31 A. 454 (Sup.Ct.1895); *Ames v. Board of Education*

of Montclair, 97 N.J.Eq. 60, 65, 127 A. 95 (Ch. 1925); *United States v. Thomas*, 15 Wall. 337, 82 U.S. 337, 342, 21 L.Ed. 89, 91 (1873); *Paschall v. Passmore*, 15 Pa. 295, 304 (Sup.1850); *Inhabitants of Cumberland County v. Pennell*, 69 Me. 357, 365, 31 Am.Rep. 284 (Sup.Jud.1879); *Speyer v. School Dist. No. 1*, 82 Colo. 534, 261 P. 859, 860, 57 A.L.R. 203 (Sup.1927); 43 Am.Jur., Public Officers, ss 260-261, pp. 77-78; 43 Id. s 267, p. 82; 67 C.J.S., Officers, s 114, p. 402. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 475, 86 A.2d 201, (1951).

They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves and discharge their duties, their actions are inimicable to and inconsistent with the public interest, and not only are they **individually deserving of censure and reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties.** citing:

Brooks v. Cooper, 50 N.J.Eq. 761, 26 A. 978, 21 L.R.A. 617 (E. & A. 1893); *Cameron v. International, & c., Union No. 384*, 118 N.J.Eq. 11, 176 A. 692, 97 A.L.R. 594 (E. & A.1935); *Girard Trust Co. v. Schmitz*, 129 N.J.Eq. 444, 20 A.2d 21 (Ch.1941); *Allen v. Commercial Casualty Insurance Co.*, 131 N.J.L. 475, 477-478, 37 A.2d 37, 154 A.L.R. 834 (E. s A.1944); *Stone v. William Steinen Mfg. Co.*, 133 N.J.L. 593, 595, 45 A.2d 486 (E. & A.1946); *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 500, 47 S.Ct. 416, 71 L.Ed. 734, 745 (1927); *Mammoth Oil Co. v. United States*, 275 U.S. 13, 48 S.Ct. 1, 72 L.Ed. 137 (1927); Edwards v. City of Goldsboro, supra, 141 N.C. 60, 53 S.E. 625, 4 L.R.A.,N.S., 589 (Sup.1906); *Tuscan v. Smith*, supra, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344 (Sup.Jud.1931); 43 Am.Jur., Public Officers, s 291, p. 101. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 475, 86 A.2d 201, 221, (1951).

A person may act in his own right from any motive if his act is lawful, but a public officer must act without malice or at least must in good faith pursue a right purpose.

The authorities are numerous: citing: *Jones v. Cody*, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160; *Lamb v. Redding*, 234 Pa. 481, 83 A. 362; *Moore v. Porterfield*, 113 Okl. 234, 241 P. 346; *Yealy v. Fink*, 43 Pa. 212, 82 Am. Dec. 556; *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036; *Wall v. McNamara*, cited and quoted in *Johnstone v. Sutton*, 1 T. R. 493, 536; *Black v. Linn*, 17 S. D. 335, 96 N. W. 697, citing many cases; *State v. Thornton*, 136 N. C. 610, 48 S. E. 602; *Kansas City v. Hyde*, 196 Mo. 498, 96 S. W. 201; *Fertich v. Michener*, 111 Ind. 472, 486, 11 N. E. 605, 60 Am. Rep. 709. See, also, *Smith v. Board*, 10 Colo. 17, 13 P. 917. *Speyer v. School Dist. No. 1, City and County of Denver*, 82 Colo. 534, 261 P. 859, 861, 57 A.L.R. 203 (1927).

It is unnecessary to discourse on **the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforceable, and will be canceled by a court of equity.**

Tuscan v. Smith, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344 (1931).

"[I]f the law claimed to have been violated was clearly established, the qualified immunity defense ordinarily fails, 'since **a reasonably competent public official should know the law governing his conduct.**' " *Bearden v. Lemon*, 475 F.3d 926, 929 (2007).

A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he **is required to respect the established constitutional rights of others.** His qualified immunity is not available to him if he does not do that. *Bever v. Gilbertson*, 724 F.2d 1083, 1088 (1984).

In an early case in this court (Crocker v. Brown County, 35 Wis. 284), it was said that **public officials take their offices cum onere**; that is, they take them with all the responsibilities attached. *Forest County v. Poppy*, 193 Wis. 274, 213 N.W. 676, 677 (1927).

As already pointed out, the charges made by plaintiffs against the trustee are centered in the claim that the interests of the trustee conflict with the duties it owes to the beneficiaries. It is a cardinal rule that **the welfare of the cestui que trust is the focal point of every consideration of duty and loyalty of the trustee**. ….
'Since **a trustee is a fiduciary of the highest order** and is **charged with the utmost fidelity to his trust**, he must refrain from creating situations where his own interests are brought into conflict with those of the trust, and from doing those things which would tend to interfere with the exercise of a wholly disinterested and independent judgment. **In accepting a trust, the trustee is presumed to know the obligations and limitations connected with his high office and, if he transgresses, must abide the consequences.'**
Manchester v. Cleveland Trust Co., 95 Ohio App. 201, 210-211, 114 N.E.2d 242, 247-248 (1953).

B. Punitive Damages

In *Lane County v. Wood*, 298 Or. 191, 200, 691 P.2d 473, (1984) regarding punitive damages against public officers: McCormick on Damages sets forth additional sources from which to glean the meaning of the Restatement comments regarding public officials:

"Historically, oppressive conduct by public officers was the situation where early judges were most prone to sanction exemplary damages, and by which they justified and rationalized the doctrine."

The legal doctrine of punitive damages is founded on the theory that certain intentional acts should be punished or deterred. Punishment and deterrence concern behavior that society finds undesirable. Punishment and deterrence are not related to actual or compensatory damages. **Punitive damages are** not to compensate an injured party, but **to give bad actors a legal spanking**.

The jury in Clackamas County chose to punish the behavior of defendant Wood as a **public officer** for official misconduct. It also chose to punish the behavior of Safley for inducing Wood to breach his official duties. We believe that the acts, as found by the jury-of Wood as a public servant attempting to make a personal profit from the sale and exchange of public lands in breach of Wood's fiduciary duty to the citizens who elected him, and of Safley in intentionally inducing a public official to **breach his fiduciary duties** - are so **egregiously culpable** that an award of nominal damages is sufficient to support the **awards of punitive damages** against them. *Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473, (1984).

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V. Individual Respondents Fiduciary Duty To Beneficiaries

Individual Respondents, Public officers, as fiduciaries of the Public Trust, have fiduciary duties to the beneficiaries of the Public Trust, who are the sovereigns and who are the Grantors / Beneficiaries of the Public Trust. As fiduciaries of the Public Trust, Public Officers must at all times, without exception, display honesty, integrity, and good faith toward the beneficiaries. Fiduciaries have a duty of full disclosure to beneficiaries. To conceal the fact that corporate statutes do not apply to the people in their private capacity exercising inherent rights, or to conceal the fact that registration of private property with the corporate State, such as recording a deed to private land, creates an hypothecation to the corporate State of the private property which the corporate State then profits therefrom, such as using the private property as collateral for the issuance of bonds, is dishonest, bad faith, and breach of fiduciary duty.

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, **which exists for the benefit of the people who are its sovereign.** Constitution of 1947, art. I, par. 2. **The citizen is not at the mercy of his servants holding positions of public trust** nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. **He may secure relief in the civil courts either through an action brought in his own name.** citing:

> *Tube Reducing Corp. v. Unemployment Compensation Commission*, 1 N.J. 177, 181, 62 A.2d 473, 5 A.L.R.2d 855 (1948); *Waszen v. City of Atlantic City*, 1 N.J. 272, 276, 63 A.2d 255 (1949); *Haines v. Burlington County Bridge Commission*, 1 N.J.Super. 163, 170-173, 63 A.2d 284 (App.Div.1949). *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 476, 86 A.2d 201, (1951).

Nonfeasance, misfeasance, malfeasance and corruption in public office cannot prevail against an aroused citizenry who have it in their power to end the misconception of some public officials that their obligations are fully met so long as they obey the letter of the law and avoid its penal sanctions. That the shortcomings of some public officers may not make them accountable in our criminal courts does not mean that their nefarious acts cannot successfully be attacked through the processes of the civil law.

> *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 476, 86 A.2d 201, (1951).

… but the atmosphere of this case prompts us to direct attention to the integrity demanded of those who accept responsibility as public officials. It cannot be too often restated. The Administration of Government ought to be directed for the good of those who confer and not of those who receive the trust. **The officers of Government are Trustees and both the trust and trustees are created for the benefit of the people.**

> *Rankin v. Board of Educ. of Egg Harbor Tp.*, 135 N.J.L. 299, 303, 10 Abbotts 299, 51 A.2d 194, 197.

Although the general rule is that "one party to a transaction has no duty to disclose material facts to the other," **an exception to this rule is made when the parties are in a fiduciary relationship with each other.** *Klein v. First Edina National Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). " 'A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority on the other; and the relation and duties in it need not be legal but may be moral, social, domestic, or merely personal.' "

Kennedy v. Flo-Tronics, Inc., 274 Minn. at 331, 143 N.W.2d at 830 (quoting *Stark v. Equitable Life Assurance Society*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939)). *Midland Nat. Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (1980).

"Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.' (citation omitted). We have often announced the rule that, 'the burden of proof is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy and equity of a transaction with the party with whom he holds such relation; * * *.' (citation omitted). **'But where a fiduciary relation exists between the parties to a transaction the burden of proof of its fairness is upon the fiduciary.'**

Rettinger v. Pierpont, 145 Neb. 161, 197, 15 N.W.2d 393, 412 (1944).

Nondisclosure is tantamount to an **affirmative misrepresentation** where a party to a transaction is duty-bound to disclose certain pertinent information (24 N.Y.Jur., Fraud and Deceit, § 107, at 161 [1962]). **Such duty to disclose may arise where a fiduciary** or confidential **relationship exists** or where a party has superior knowledge not available to the other (Fraud and Deceit, §§ 106-109, at 159-164 [1962]).

Even if a case of actual fraud has not been presented for lack of the element of scienter, or actual awareness on Wein's part that false representations were made, the allegations do establish a **breach of duty actionable as constructive fraud.** To recover for **constructive fraud**, plaintiff need not prove actual knowledge of falsity, but only **that a fiduciary or confidential relationship existed** between herself and Wein

(*id.; see*, 24 N.Y.Jur., Fraud and Deceit, §§ 2, 17, 109, at 35, 52-53, 163-164 [1962]). *Callahan v. Callahan*, 127 A.D.2d 298, 300-301, 514 N.Y.S.2d 819, 821-822 (1987).

It has long been the rule in this state that the **trustee has a duty to fully inform the beneficiary** of all material facts so that the beneficiary can protect his own interests where necessary. *St. Paul Fire and Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 157, 296 N.W.2d 479, 483 (1980).

***State ex rel. Nebraska State Bar Ass'n v. Douglas*:**

[R]espondent was the elected Attorney General of the State of Nebraska. … The charge in count I embodies, in part, an allegation that respondent engaged in conduct which involved "dishonesty, fraud, deceit, or misrepresentation."

"Although the general rule is that 'one party to a transaction has no duty to disclose material facts to the other,' and [sic] exception to this rule is made when the parties are in a fiduciary relationship with each other."(citations omitted) When a relationship of trust and

confidence exists, **the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud.** See 37 C.J.S. *Fraud* § 16d (1943).

Regarding the law of trusts and **disclosure by a fiduciary**, we have said: **"It is the duty of a trustee to fully inform the cestui que trust [beneficiary] of *all* facts relating to the subject matter of the trust which come to the knowledge of the trustee and <u>which are material to the cestui que trust to know for the protection of his interests</u>."** (Emphasis supplied.) (citations omitted).

Throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties. See, (citations omitted). See, also, (citation omitted) **(member of county board; public officials "owe a fiduciary duty to the people they represent")**; (citation omitted) (state land commissioner; "The relationship between a state official and the state is that of principal and agent **and trustee and cestui que trust**"); (citation omitted) (sheriff; "A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent").

"An affirmative statement is not always required, however, and **fraud may consist of the omission or concealment** of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak." (citations omitted). See, also, (citation omitted) (fraud may arise not only from misrepresentation but from concealment as well, where there is suppression of facts which one party has a legal or equitable obligation to communicate to another). **"Concealment" means nondisclosure** when a party has a duty to disclose. See (citation omitted). "*Conceal* means to hide, secrete, or withhold from knowledge of others...." (citation omitted). See, also, (citations omitted). "The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact...." *State v. Copple*, *supra.*

It is a general principle in the law of fraud that where there is a duty to speak, the disclosure must be full and complete. **It is firmly established that a partial and fragmentary disclosure, accompanied with the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is. Telling half a truth has been declared to be equivalent to concealing the other half. Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all, he must make a full and fair disclosure. Therefore, if one wilfully conceals and suppresses such facts and thereby leads the other party to believe that the matters to which the statements made relate are different from what they actually are, he is guilty of a fraudulent concealment. 37 Am.Jur.2d *Fraud and Deceit* § 151 at 208-09 (1968).**

Moreover, where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation.

See, *Security St. Bk. of Howard Lake v. Dieltz,* 408 N.W.2d 186 (Minn.App.1987); *Callahan v. Callahan,* 127 A.D.2d 298, 514 N.Y.S.2d 819 (1987); *Holcomb v. Zinke,* 365 N.W.2d 507 (N.D.1985); *Anderson v. Anderson,* 620 S.W.2d 815 (Tex.Civ.App.1981); 37 C.J.S. *Fraud* § 16a

(1943).

In passing upon the propriety of action by a commission council, the Supreme Court of Louisiana, in (citation omitted), stated: **"Public officials occupy positions of public trust.... The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests."**

As expressed in (citation omitted): **"A public official is a fiduciary toward the public ... and if he deliberately conceals material information from them he is guilty of fraud."**

"To reveal some information on a subject triggers the duty to reveal all known material facts." (citations omitted): "As expressed in 37 Am.Jur.2d, *supra*, § 150 at 207-08: A party of whom inquiry is made concerning the facts involved in a transaction **must not**, according to well-settled principles, **conceal or fail to disclose** any pertinent or material information in replying thereto, **or he will be chargeable with fraud**. The reason for the rule is simple and precise. Where one responds to an inquiry, **it is his duty to impart correct information**. **Thus, one who responds to an inquiry is guilty of fraud if he denies all knowledge of a fact which he knows to exist; if he gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though they are literally true as far as they go; or if he fails to disclose the whole truth.**"

State ex rel. Nebraska State Bar Ass'n v. Douglas, 227 Neb. 1, 23-26, 416 N.W.2d 515, 529-531, (1987)

End of citations from: *State ex rel. Nebraska State Bar Ass'n v. Douglas.*

Incident to said trust ["A public office is a public trust"]: 'They stand in a fiduciary relationship to the people (by) whom they have been elected and appointed to serve.' (citation omitted) **The relationship** between a state official and the State is that of principal and agent and **trustee and cestui que trust. The relationship has been described as founded in the common law**. (citations omitted) **'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.'** (citation omitted). *Fuchs v. Bidwill*, 31 Ill.App.3d 567, 570, 334 N.E.2d 117, 120 (1975).

As duly elected public officials serving their constituencies in Plaquemines Parish, Judge Perez, Leander Perez, Jr., and Chalin Perez were **bound to exercise** their official functions with **the utmost degree of honesty and fidelity**. Public officials occupy positions of public trust. **Public offices are created for the purpose of** effecting the ends for which government has been instituted, which are **the protection, safety, prosperity, and happiness of the people;** and not the profit, honor, or private interest of any one man, family, or class of men. And, of course, we subscribe to the principle that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public.

Commenting on the high duty of trust and fidelity owed by public officials, the United States Supreme Court has noted: Law enforcement officials have furthermore been held to a higher responsibility than mere compliance with the law.

A fiduciary relationship has been further described as one that exists "when confidence is reposed on one side and there is resulting superiority and influence on the other."

The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.
Plaquemines Parish Com'n Council v. Delta Development Co., Inc., 502 So.2d 1034, 1039-1040 (1987).

The duty of a fiduciary embraces the obligation to render a **full and fair disclosure to the beneficiary** of all facts which materially affect his rights and interests. 'Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud.'
'Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element 'is supplied by an affirmative obligation to make full disclosure, and the **non-disclosure itself is a 'fraud'**.''
Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 189, 491 P.2d 421, 429 (1971).

(Syllabus by the Court.)
Steinbeck v. Bon Homme Min. Co.:
One who occupies a fiduciary relation to another in respect to business or property, and who by the use of the knowledge he obtains through that relation, **or by the betrayal of the confidence reposed in him under it, acquires a title or interest in the subject-matter of the transaction antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for the benefit of the latter, which the cestui que trust may enforce** or renounce at his option.
The test of such a trust is the fiduciary relation and a betrayal of the confidence reposed, or some breach of the duty imposed under it.
Steinbeck v. Bon Homme Min. Co., 152 F. 333, 334, 81 C.C.A. 441 (1907).

Trice v. Comstock:
Syllabus by the Court. **[A case exemplifying non-disclosure by public officers – fiduciaries of the Public Trust – of the presumptive hypothecation of the beneficiary's private property to the corporate State resulting from registration or recordation of said property with the State with benefits and profits to the State and injury to the beneficiary.]**
Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, **or of the law**, that he becomes interested for him, or interested with him, in any subject of property or business, **he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.**
A violation of this inhibition, and the acquisition by one of the parties, by means of interest or information acquired through the fiduciary relation of any property or interest, which prevents or hinders his correlate in accomplishing the object of the agency, **charges the property thus acquired with a constructive trust for the benefit of the latter**, which may be enforced or renounced by him, at his option.
The test of such a trust **is the fiduciary relation, and a betrayal of the confidence imposed under it to acquire the property.** Neither a legal nor equitable interest by either party,

during the relation, in the property subsequently acquired, nor authority in either to buy or sell it, nor damage to the party betrayed, nor the existence of the fiduciary relation at the time the confidence is abused, is indispensable to the existence and enforcement of the trust. The existence of the relation, and a subsequent abuse of the confidence bestowed under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust.

For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, **the law peremptorily forbids every one who, in a fiduciary relation, has acquired** information concerning or **interest in** the business or **property of his correlate** from using that knowledge or interest **to prevent the latter from accomplishing the purpose of the relation.** If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of the law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, **so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law** although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. **The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation.**

And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law **is a relation of trust and confidence. The relation of trustee and cestui que trust**, principal and agent, client and attorney, employer and an employee, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, **the law both implies a contract and imposes a duty** that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, **the trustee to his cestui que trust**, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. …

But no interest or control of the property to which the agency relates is essential to the raising of the trust. **The fiduciary relation and a breach of the duty it imposes are sufficient** in themselves. ….

The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the

duty of fidelity imposed thereby with **a constructive trust for the benefit of the party whose confidence is betrayed.** It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employe, as completely as the relation of trustee and cestui que trust. In Greenlaw v. King, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: 'The rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser.' In Hamilton v. Wright, 9 Cl. & Fi. 111, 122, Lord Brougham declared that it is the duty of a trustee 'to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust.' And on page 124 he said: 'Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust.' The rule upon this subject was clearly and not too broadly stated in the American note to Keech v. Sandford, 1 White & T. Lead. Case. in Eq. (4th Am. Ed.) p. 62, *page 58, in these words: **'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.'** *Trice v. Comstock*, 61 L.R.A. 176, 121 F. 620, 620-627. 57 C.C.A. 646 (1903).

VI. Taking of private property for public use without just compensation

Private property may not be taken for public use without just compensation. As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and "the self-executing character of the constitutional provision with respect to compensation is triggered." When public officers take private property without just compensation they are acting in violation of both federal and state Constitutional limitations, they are acting outside their delegated authority, they are acting in breach of their fiduciary duty, and, they are acting outside the scope of the limitations placed upon the entity for whom they are acting, therefore with respect to the entity for whom they are acting, such as a municipal corporation or government corporation, their acts are ultra vires.

The Fifth Article in Amendment to the Constitution of the United States of America states, in pertinent part: **"Nor shall private property be taken for public use without just compensation."** *The Constitution of the United States of America, Article in Amendment the Fifth*.

Article I (Declaration of Rights) of the Constitution of The state of Wisconsin states: "Private property for public use. Section 13. **The property of no person shall be taken for public use without just compensation therefor."**

The Constitution for The state of Wisconsin, Article I. Declaration of Rights.

"**Private property**. As protected from being taken for public uses, is **such property as belongs absolutely to an individual**, and of which he has the exclusive right of disposition; property of a specific, fixed and tangible nature, capable of being had in possession and transmitted to another, such as houses, lands, and chattels. Homochitto River Com'rs v. Withers, 29 Miss, 21, 64 Am.Dec. 126, Scranton v. Wheeler, 21 S.Ct. 48, 179 U.S. 141, 45 L.Ed. 126."

Black's Law Dictionary, Revised Fourth Edition, page 1382.

We hold that under the facts alleged the plaintiff has stated a claim for relief under *Art. I, sec. 13 of the Wisconsin Constitution*. … [I]n order to trigger the "just compensation" clause there must be a "taking" of private property for public use. A "taking" in the constitutional sense occurs when the government restriction placed on the property " 'practically or substantially renders the property useless for all reasonable purposes.' " *Howell Plaza, Inc. v. State Highway Comm.,* 92 Wis.2d 74, 85, 284 N.W.2d 887 (1979), quoting *Buhler v. Racine County,* 33 Wis.2d 137, 143, 146 N.W.2d 403 (1966). **A taking can occur short of actual occupation by the government if the restriction "deprives the owner of all, or substantially all, of the beneficial use of his property.**" *Howell Plaza, Inc. v. State Highway Comm.,* 66 Wis.2d 720, 726, 226 N.W.2d 185 (1975). However, "[a] taking can occur absent physical invasion only where there is a legally imposed restriction upon the property's use." *Howell Plaza,* 92 Wis.2d at 88, 284 N.W.2d 887.

Zinn v. State, 112 Wis.2d 417, 424, 334 N.W.2d 67, 70-71 (1983).

Because the DNR's ruling, which was within its statutory authority to make, converted Zinn's private property by operation of law into public lands, there can be no dispute that there was a "taking" within the meaning of Art. I, sec. 13. Contrary to the holding of the court of appeals, we find that this ruling which transferred title to Zinn's land to the state constituted a legally imposed restriction on Zinn's property under this court's decision in *Howell Plaza* (1979). **It is difficult to conceive of a greater restriction on the property, in the absence of actual physical occupancy, than the loss of title to private land.** *Zinn,* 112 Wis2d at 427.

"The language of the Fifth Amendment prohibits the 'tak[ing]' of private property for 'public use' without payment of 'just compensation.' **As soon as private property has been taken**, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, **the landowner has *already* suffered a constitutional violation, and** "**the self-executing character of the constitutional provision with respect to compensation**," *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980), quoting 6 J. Sackman, Nichols' Law of Eminent Domain Sec. 25.41 (rev. 3d ed. 1980), **is triggered.** This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: **once there is a 'taking,' compensation *must* be awarded** ....".

Zinn, 112 Wis2d at 429.

This case involves … an action against the state to receive the "just compensation" that is constitutionally mandated whenever private property is taken for public use. **Once property is taken in the constitutional sense, just compensation is constitutionally required.**

Zinn, 112 Wis2d at 431.

However, sovereign immunity will not bar recovery for a taking, because **just compensation following a taking is a "constitutional necessity rather than a legislative dole.**" In this sense, **Article I, § 13 is a self-executing** constitutional waiver of sovereign immunity. We therefore determine that sovereign immunity does not bar the plaintiffs' claims under Article I, § 13. (citations omitted)

Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd., 207 Wis.2d 1, 28, 558 N.W.2d 83, 95 (1997).

The takings clause is a self-executing constitutional provision.
Wisconsin Retired Teachers, 207 Wis.2d at 29.

It is the property owner's loss that Wis. Const. art. I, § 13 compensates.
Wisconsin Retired Teachers, 207 Wis.2d at 30.

VII. Unjust enrichment and Imposition of a constructive trust

When public officers who are fiduciaries of the Public Trust take private property for public use without just compensation in violation of the Constitutions creating the Public Trust(s) and in breach of their fiduciary duty, said public officers unjustly enrich the entity for whom they have acted, thereby giving rise to a constructive trust in favor of, and for the benefit of, the one whose interest has been taken, and against the entity that has been unjustly enriched.

A constructive trust arises where a person clothed with some fiduciary character, by fraud or other action upon his part, gains something for himself [or another] which, except for his act, he would not have procured and which it is inequitable for him, [or the third party, employer or otherwise,] to retain. **If one obtains property by such arts, acts, or circumstances of circumvention, imposition, or fraud or by virtue of a confidential relationship and influence under such circumstances that he ought not, according to the rules of equity and good conscience, hold and enjoy the beneficial interest, the court, in order to achieve complete equity, will declare a trust by construction and convert the offending party into a trustee and order him to hold the same subject to a lien or direct him to execute the trust so as to protect fully the rights of the defrauded or deceived party.** (Perry on Trusts (6th Ed.) Sec. 166, citations omitted) Courts of equity declare trusts of this character and recognize equitable liens because of what they deem fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations. **The constructive trust may be one resulting from actual fraud or** one in which the existence of confidential relation and subsequent **abuse of the confidence reposed produce a result abhorrent to equity.**

Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank, 87 F.2d 934, 936 (1937).

Restatement, Restitution, § 1 [1937 - 2011] provides: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be

unjustly enriched if he were permitted to retain it, a constructive trust arises." … "A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation. … a quasi-contractual obligation and a constructive trust closely resemble each other, the chief difference being that the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property."

This court has stated that a constructive trust is an implied trust, arising by operation of law to satisfy the demands of justice. *Hall v. Superior Federal Bank,* 303 Ark. 125, 794 S.W.2d 611 (1990). While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, **an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against the other, suffices generally to ground equitable relief in the form of declaration and enforcement of a constructive trust**. *Id.,*

J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 346-347, 836 S.W.2d 853, 20 UCC Rep.Serv.2d 542 (1992).

In 3 Pomeroy, Equity Jurisprudence (4th Ed.) pp. 2397-2401, it is said:

"A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name, or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, *in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come,* except into those of a bona fide purchaser for value and without notice; *and* ***the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded.*** As a necessary consequence of this doctrine, whenever property subject to a trust is wrongfully sold and transferred to a bona fide purchaser, so that it is freed from the trust, the trust immediately attaches to the price or proceeds in the hands of the vendor, whether such price be a debt yet unpaid due from the purchaser, or a different kind of property taken in exchange, or even a sum of money paid to the vendor, as long as the money can be identified and reached in his hands or under his control. *It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner. Whereever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds.*" (Italics ours.)

It appears to us that the foregoing quotation from Pomeroy not only constitutes good logic, but sound law. The court rightly declared a lien upon the property for the amount of the trust fund

actually used either in the purchase or in the improvement of the property. 2 Perry on Trusts (5th Ed.) p. 528. *Warsco v. Oshkosh Savings & Trust Co.*, 190 Wis. 87, 208 N.W. 886, 887 (1926).

***Fuchs v. Bidwill*:**

Since 1871, Illinois has had a statute defining the **fiduciary nature** of public office. (Ill.Rev.Stat.1971, ch. 102, par. 3.) As amended in 1949, it provides: We conclude that the Governmental Ethics Act, effective January 1, 1968, **does not create a new obligation but states more explicitly the fiduciary status of a public official which equity** has long asserted.

'No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name **or in the name of any** other person, association, **trust or corporation**, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * * Nor may any such officer take or receive, or offer to take or receive, Either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. * * *' (Emphasis supplied)

The principles of equity related to fiduciary liability do not require the discovery of actual harm or measurable injury to the public. The Restatement of Restitution, s 197, provides that a fiduciary who received profit in violation of his duty: **'(H)olds what he receives upon a constructive trust for the beneficiary.'**

Comment c explains: 'The rule stated in this Section is applicable although the profit received by the fiduciary is not at the expense of the beneficiary. * * * The rule stated in this Section, like those stated in the other Sections in this Chapter, is not based on harm done to the beneficiary in the particular case, but rests upon a broad principle of preventing a conflict of opposing interests in the minds of fiduciaries, **whose duty it is to act solely for the benefit of their beneficiaries**.'

Fuchs v. Bidwill, 31 Ill.App.3d 567, 571-572, 334 N.E.2d 117, 120 (1975) (citation omitted)

We believe that the amended complaint adequately pleads **the existence of a fiduciary relationship, the subsequent breach thereof, and sufficient facts, if proven, to justify the imposition of a constructive trust.** Even if we were to find that the pleading lacked specific allegations of fraud and the breach of a fiduciary duty, **the imposition of a constructive trust nonetheless would still be proper. …** The particular circumstances in which equity will impress a constructive trust are as numerous as the modes by which property may be obtained **through bad faith and unconscionable acts**. (County of Cook v. Barrett ; 4 Pomeroy's Equity Jurisprudence s 1045, at 97 (5th ed. 1941).) **A constructive trust is imposed** by a court because the person holding title to property would profit by a wrong or **would be unjustly enriched** if he were permitted to keep the property.

To impose a constructive trust, no fiduciary duty or relationship need exist between the person holding the property and the aggrieved party. "Restitution, by virtue of its adaptability to individual cases on equitable principles may * * * reach situations beyond the grasp of other civil or criminal remedies and do justice on equitable principles * * *. (Citation.)"

Village of Wheeling v. Stavros, 411 N.E.2d 1067, 1070 (1980).

***Ross v. Specialty Risk Consultants, Inc.*:**

¶ 13 …. "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form." *Warsco v. Oshkosh Savings & Trust Co*., 190 Wis. 87, 90, 208 N.W. 886 (1926) (quoting 3 POMEROY, EQUITY JURISPRUDENCE § 1051, at 2397-2401 (4th ed.1918)). It is an equitable device employed to prevent fraud or abuse of a confidential relationship and is implied to accomplish justice. *See In re Massouras' Estate*, 16 Wis.2d 304, 312, 114 N.W.2d 449 (1962).

¶ 14 "In the constructive trust case, the defendant has legal rights in something that in good conscience belongs to the plaintiff." 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(1), at 587-88 (2d ed.1993). "The property is 'subject to a constructive trust,' and the defendant is a 'constructive trustee.' " *Id.* "The defendant is thus made to transfer title to the plaintiff who is, in the eyes of equity, the true 'owner.' " *Id.* **"When equity imposes a constructive trust upon an asset of the defendant, the plaintiff ultimately gets formal legal title."** *Id.* at § 4.3(2), at 589.

¶ 15 A constructive trust will be imposed only in limited circumstances. **Legal title must have been obtained by means of fraud, commission of wrong or by any form of unconscionable conduct** and must be held by someone who in equity should not be entitled to it. *See Wilharms v. Wilharms*, 93 Wis.2d 671, 678-79, 287 N.W.2d 779 (1980). It is not necessary that the person against whom the constructive trust is to be imposed be the wrongdoer or know of wrongdoing initially. If other elements for imposing a constructive trust have been satisfied and **the holder of legal title is not a bona fide purchaser**, a constructive trust may be imposed. *See id.*

¶ 16 **A constructive trust imposed on wrongfully obtained property follows the property or its proceeds.**

If one person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name, ... equity impresses a constructive trust **upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a bona fide purchaser for value and without notice; and** the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded**. ...** Wherever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds.

Warsco, 190 Wis. at 90, 208 N.W. 886; *see also Truelsch v. Northwestern Mut. Life Ins. Co.*, 186 Wis. 239, 202 N.W. 352 (1925).[FN7]

FN7. In *Truelsch v. Northwestern Mut. Life Ins. Co.*, 186 Wis. 239, 252, 202 N.W. 352 (1925):

> It would be a signal failure of justice if one who has become a constructive trustee by reason of wrongfully receiving or securing the property of another could escape the consequences of his acts by changing the form of the property thus acquired. Hence, as between him and the *cestui que trust*, the latter may pursue the funds into the new investment and charge that investment with the trust. He may also assert and enforce the same right against third parties to whom the property has been transferred with

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knowledge of the trust or who have paid no consideration for it, provided the identity of the trust fund can be established.

¶ 17 **An interest in land comprehends "every kind of claim to land which can form the basis of a property right."** *Weber v. Sunset Ridge*, 269 Wis. 120, 126, 68 N.W.2d 706 (1955) (citations omitted). **An action seeking the imposition of a constructive trust may ultimately change legal title.** *See* DOBBS, *supra*, at 587-88. It follows, therefore, that a claim for the imposition of a constructive trust on real estate is an action seeking relief that "might confirm or change interests in the real property," as that term is used in WIS. STAT. § 840.10.

¶ 21 **That the suit for the constructive trust was filed in Illinois and not Wisconsin is of no consequence. A "court outside this state having personal jurisdiction of a party may order that party to execute a conveyance of real property located in Wisconsin."** *Belleville State Bank*, 117 Wis.2d at 577, 345 N.W.2d 405. To be consistent with *Belleville*, we must conclude WIS. STAT. § 840.10 permits a lis pendens to be recorded in connection with an out-of-state suit seeking title or possession of property in Wisconsin by means of a constructive trust. **END:** ***Ross v. Specialty Risk Consultants, Inc***., 240 Wis.2d 23, 621 N.W.2d 669, (2000).

In re Massouras' Estate:

The facts in this case call for the **imposition of a constructive trust. Such a trust is implied by operation of law as a remedial device for the protection of a beneficial interest against one who either by actual or constructive fraud, duress, abuse of confidence, mistake, commission of a wrong, or by any form of unconscionable conduct, has either obtained or holds the legal title to property which he ought not in equity and in good conscience beneficially enjoy.** Joerres v. Koscielniak (1961), 13 Wis.2d 242, 108 N.W.2d 569; Zartner v. Holzhauer (1931), 204 Wis. 18, 234 N.W. 508, 76 A.L.R. 396; Warsco v. Oshkosh S. & T. Co. (1926), 190 Wis. 87, 208 N.W. 886, 47 A.L.R. 366; Bogart, The Law of Trusts and Trustees, 2d ed., ch. 24, pages 3-10, sec. 471; Davitt, The Elements of Law, Ch. 18, Equity, p. 305; 54 Am.Jur., Trust, p. 167, sec. 218; 89 C.J.S. Trusts § 139, p. 1015.

It was pointed out in Masino v. Sechrest (1954), 268 Wis. 101, 66 N.W.2d 740, and in Nehls v. Meyer (1959), 7 Wis.2d 37, 95 N.W.2d 780, that **a constructive trust is a device in a court of equity to prevent unjust enrichment which arises from fraud or abuse of confidential relationship and is implied to accomplish justice.** In those cases, the grantee of property would have been unjustly enriched by a repudiation of an agreement. Similarly, here, the petitioner would be unjustly enriched by repudiation of the property settlement. Dean Pound observed, 'Thus constructive trust could be used in a variety of situations, * * * and sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment.' The Progress of Law, Equity, 33 Harv.Law Rev. 420 (1920). Restatement of Law, Restitution, Constructive Trusts, page 640, sec. 160, states the rule as follows:

'Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.'

In re Massouras' Estate, 16 Wis.2d 304, 312-313, 114 N.W.2d 449, 453 (1962).

"When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." … The constructive-trust device (a legal fiction if ever there was one) is ordinarily used to require a person who has acquired property by fraud or other misconduct to convey it to the true owner. … **But in Illinois, as in many other jurisdictions, constructive-trust principles apply with equal force to public fiduciaries.** *U.S. v. Holzer*, 840 F.2d 1343, 1346-1347 (1988).

VIII. Disgorgement

An accounting is essentially an equitable remedy which is civil in nature. It is an extraordinary remedy, in which the court retains jurisdiction until the final determination, in order to render a comprehensive final judgment. An equitable accounting is a restitutionary remedy, designed to prevent unjust enrichment by requiring the disgorgement of any benefit or profit received as a result of a breach of fiduciary duty. While an accounting for profits is one of a category of traditionally restitutionary remedies in equity, and is often invoked in conjunction with a constructive trust, the two remedies differ, in that one seeking an equitable accounting rather than a constructive trust need not identify a particular asset or fund of money in the defendant's possession to which the plaintiff is entitled. An accounting implies that one is responsible to another for money or property, as a result of a fiduciary relation. The right to an equitable accounting arises generally from the respondent's possession of money or property, which, because of the fiduciary relationship with the complainant, the respondent is obliged to surrender.

"In all of these cases, only full disgorgement satisfies the principle of preventing unjust enrichment, and the remedy, though harsh, **advances the goal of deterring others** from inducing governmental employees to violate their public trust.

A rule of full disgorgement is also supported by these four cases. In *SEC v. Commonwealth Chem. Sec., Inc.,* 574 *F.*2d 90 (2d Cir.1978), Judge Friendly said that "the primary purpose of disgorgement is not to compensate investors. Unlike damages it is a method of forcing a defendant to give up the amount by which he was unjustly enriched...." *Id.* at 102. In *SEC v. Wang*, 944 *F.*2d 80 (2d Cir.1991), the court said that disgorgement "seeks to deprive the defendants of their ill-gotten gains to effectuate the deterrence objectives of the securities laws."

Id. at 85. *County of Essex v. First Union Nat. Bank*, 373 N.J.Super. 543, 552-553, 862 A.2d 1168.

This was not an action at law for conversion. Rather, it was an equity suit *for restitution* … who sought … "disgorgement" of their ill-gotten gains … The object of restitution is to put the parties back into the position in which they were before the tainted transaction occurred. Restitution can be had by harnessing either doctrines that have their origin in the common law or those which spring from the equity side of our jurisprudence. **The unifying theme of various restitutionary tools is the prevention of unjust enrichment. Equity courts have fashioned the fiction of a constructive trust in order to force restitution from one who was unjustly enriched. The Restatement of Restitution also uses the constructive trust device to explain**

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the essence of this relief. It starts with the general principle that restitution will be available whenever one has received a benefit to which another is justly entitled. The inequity of retaining a benefit can spring from a variety of sources, such as fraud or other unconscionable conduct in which the recipient has received a benefit for which he has not responded with a quid pro quo. The remedy in restitution rests on the ancient principles of **disgorgement**. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to **"disgorge" his gains. Disgorgement is designed to deprive the wrongdoer of *all gains flowing from the wrong rather than to compensate the victim of the fraud.*** In modern legal usage the term has frequently been extended to include a dimension of deterrence. Disgorgement is said to occur when a "defendant is made to 'cough up' what he got, neither more nor less." From centuries back equity has compelled a **disloyal fiduciary** to "disgorge" his profits. He is held chargeable as a constructive trustee of the ill-gotten gains in his possession. A constructive trustee who consciously misappropriates the property of another is often refused allowance even of his actual expenses. Where a wrongdoer is shown to have been a conscious, deliberate misappropriator of another's commercial values, gross profits are recoverable through a restitutionary remedy. *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852, 55 USLW 2494, 1987 OK 14.

Restitution based upon **unjust enrichment** cuts across many branches of the law, including contract, tort and fiduciary relationship. See 1 Palmer, The Law of Restitution § 1.1, p. 2 [1978]. *Id.* at 852.

Restatement, Restitution, § 1 [1937 - 2011] provides: "**A person who has been unjustly enriched at the expense of another is required to make restitution** to the other." *Id.* at 852.

Vorlander v. Keyes:

One who, **acting in a fiduciary capacity**, secretly and wrongfully, and therefore fraudulently, uses fiduciary funds to purchase real estate or personal property, including policies of life insurance, for his own benefit and puts it in his own name, **takes the title and interest in it as a trustee ex maleficio for the owner of the misappropriated funds he thus uses, the cestui que trust.** The equitable ownership and title of the misappropriated funds and the fruits thereof remain in the cestui que trust as long as they can be traced, and the trustee holds nothing but the naked title for the exclusive benefit of the cestui que trust.

In equity, not only the property which the trustee acquires with the misappropriated funds, but all its fruits, in every form, its increase, its income, other property acquired by the trustee by the exchange or use of it in any way, become, at the option of the cestui que trust, his property, unless it has passed into the hands of a bona fide purchaser for value without notice of the misappropriation.

In no event is the trustee ex maleficio entitled in equity to any benefit to himself from the use of the trust funds. Public policy forbids that one who has corruptly thrust himself into the position of a trustee shall profit by his fraud.

Nor may another, in this case the wife, now the widow of the trustee ex maleficio, though herself innocent of the fraud, **who has paid no consideration for the property purchased with the misappropriated funds or for their fruits, hold any of them against the cestui que trust, the owner thereof. A third person**, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation **becomes a**

particeps criminis however innocent of the fraud in the beginning. Story's Equity Jurisprudence (14th Ed.) Secs. 1666, 1667, 1668, 1669, 1670; Perry on Trusts, Secs. 127, 166.

Vorlander v. Keyes, 1 F.2d 67, 69-70 (1924).

IX. Value of Private Property

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government; the last (the one in point here) being: 'Nor shall private property be taken for public use without just compensation.' ***Monongahela Nav. Co. v. U S,*** **at 326.**

"The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the `just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such `compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so."

What amount of compensation for each separate use of any particular property may be charged is sometimes fixed by the statute which gives authority for the creation of the property; sometimes determined by what it is reasonably worth; and sometimes, if it is purely private property, devoted only to private uses, the matter rests arbitrarily with the will of the owner.

Monongahela Nav. Co. v. U S, 148 U.S. 312, 328-329, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

X. Quo Warranto

The common-law remedy of quo warranto is employed either to determine the right of an individual to hold public office or to challenge a public official's attempt to exercise some right or privilege derived from the state. It is a legal inquiry into the permission of a public official to perform acts about which complaint is made. It is also used to question the existence of a public corporation or district and its right to act.

When used by a governmental body, quo warranto is a remedy or proceeding by which the sovereign or state determines the legality of a claim that a party asserts to the use or exercise of an office or franchise. It ousts the holder from its enjoyment if the claim is not well-founded or if the right to enjoy the privilege has been forfeited or lost. Quo warranto proceedings are used by the State to protect itself and the good of the public through agents of the state who control the proceedings. Quo warranto demands that an individual or corporation show by what right it exercises some franchise or privilege appertaining to the state that, according to the constitution and laws of the land, it cannot

legally exercise except by virtue of grant or authority from the state. Quo warranto is intended to prevent the exercise of powers that are not conferred by law.

It is an ancient common-law writ and remedy to determine the right to the use or exercise of a franchise or office and to oust the holder from its enjoyment if he or she has forfeited his or her right to enjoy the privilege. Primarily, the remedy of quo warranto belongs to the state, to protect the interests of the people as a whole and guard the public welfare. It is a preventative remedy addressed to preventing a continuing exercise of an authority unlawfully asserted rather than to correcting what has already been done under that authority.

Quo Warranto - Wisconsin:

Such action may be brought in the name of the state by a private person on personal complaint when the attorney general refuses to act or when the office usurped pertains to a county, town, city, village, school district or technical college district. *Wis. Stats. § 784.04*.

When a defendant against whom an action has been brought under this chapter shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from the office, franchise or privilege and that the plaintiff recover costs against the defendant.

Wis. Stats. §784.13, Quo Warranto.

The question presented is one of law: Who, *under the law*, is entitled to hold and exercise the office?

At common law, an officer could only be removed for cause and after a hearing. Throop on Public Officers, sec. 362, p. 358. This was because at common law in England, a public office was considered as an incorporeal hereditament grantable by the Crown in which the holder acquired and had an estate. 42 Am.Jur., Public Officers, sec. 9, p. 886.

That conception of a public office does not obtain in this country. Here a public office is considered a public trust. (citation omitted) 'With us, a public office has never been regarded as an incorporeal hereditament, or as having the character or qualities of a grant. That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country, and at issue with that universal understanding of the community which is the result of those institutions. With us, public offices are public agencies or trusts, and **the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them. The right**, it has been said, **is** not the right of the incumbent to the place, but **of the people to the officer.** * * * The incumbent has no vested right in the office which he holds, * * *' 42 Am.Jur., Public Officers, sec. 9, pp. 886, 887. **'Public officers, in other words, are but the servants of the people, and not their rulers.'** 42 Am.Jur., Public Officers, sec. 8, p. 885.

State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 122 Mont. 464, 470, 206 P.2d 166, 169 (1949).

Chief Justice Vanderbilt described **the role of public officers holding positions of public trust** in *Driscoll v. Burlington-Bristol Bridge Co.*, 8 *N.J.* 433, 86 *A.*2d 201 (1952):

> **They stand in a fiduciary relationship to the people** whom they have been elected or appointed to serve. (Citations omitted.) **As fiduciaries** and trustees of the public weal they are under an inescapable obligation to **serve the public with the highest fidelity**. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and **above all to display good faith, honesty and integrity**. [at 474-475, 86 *A.*2d 201] (citations omitted.)
>
> And, at 476, 86 *A.*2d 201, said:
>
> These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; **they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign.**
>
> Recently that language was referred to by Judge Baime in *State v. Gregorio*, 186 *N.J.Super.* 138, 451 *A.*2d 980 (Law Div.1982), who further stated:
>
> **Perhaps it bears repeating that our government is founded upon trust.** We entrust those who govern with broad powers to formulate and implement public policy and **"we have faith that they will properly perform their obligation."** Hyland, "Combatting Official Corruption in New Jersey", 3 *Crim.J.Q.* 164 (1975).... These principles are not mere platitudes. They represent the first rule of good government. [at 143, 451 *A.*2d 980]. ….

…. For all of the foregoing reasons the court has concluded that defendant has failed to show good cause why the forfeiture of his offices should be stayed. Accordingly, a **judgment will be entered in favor of plaintiff declaring that defendant** Robert C. Botti **forfeited his office** …. *State v. Botti*, 189 N.J.Super. 127, 140, 458 A.2d 1333, 1340-1341 (1983).

XI. Constitution As the Enduring Foundation of Law

In England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and,

therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.

Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act devesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.

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!" *VanHorne's Lessee v. Dorrance*, 2 U.S. 304 (1795).

XII. Origin of Complainant's Private Land

In 1776 when our American Founding Fathers threw off the yoke of tyranny from the Old World and declared freedom in the New World they gave recognition to the truth that men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and Property. And, that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Definitive Treaty of Peace signed September 3, 1783 contains recognition of the independence of the states of the United States of America as declared in 1776, and in Article II declares the geographical boundaries of the United States. Complainant's private land is situated within those geographical boundaries, and more specifically within the territory governed under the *Ordinance of 1787: The Northwest Territorial Government*, established prior to the adoption of the Constitution for the United States of America.

The unappropriated lands recognized by the Definitive Treaty of Peace were held **in trust** by the United States *for the people* of the United States, the majority of which was subsequently sold to the people.

Article II of the "Northwest Ordinance" states, in pertinent part, "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any

person's property, or to demand his particular services, full compensation shall be paid for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed."

On August 7, 1789, in the First Session of Congress, in 1 Stat. 50 ch. 8, Congress adopted the "Northwest Ordinance" in an Act titled "*An Act to provide for the Government of the Territory North-west of the river Ohio."* Thus, immediately after the adoption of the Constitution for the United States of America, Congress proclaimed that a man's property could not be taken for public use without **full compensation**, and, that **no law** could ever be enacted or enforced that would interfere with or affect *private contracts*. **Complainant's private land was sold and conveyed out of the public domain by the United States of America in just such a private contract, *termed a Land Patent,* which can never be interfered with, without violating 1 Stat. 50 and Article I, Section 10, Clause 1 of the Constitution for the United States of America which prohibit impairing the Obligation of Contracts.**

On April 24, 1820, the Congress of the United States enacted "*An act making further provision for the sale of public lands*" which set forth the terms and conditions for the sales. Complainant's private land was part of the public lands sold by the United States of America pursuant to the Act of April 24, 1820. Land Patents for the lands, of which Complaint's private lands are a subset, were issued by the United States of America on August 10, 1837 and December 10, 1840. *Both Land Patents were issued prior to the incorporation of Wisconsin into the Union in 1848.* Both Land Patents, of which Complainant is "heir" or assignee, are contracts executed, and are protected by the constitutional prohibition against the impairment of the obligation of contracts.

The relevant and operative provisions of both of the Land Patents of which Complainant is heir or assignee are as follows:

> *"**NOW KNOW YE**. That the **United States of America**, in consideration of the Premises, and in conformity with the several acts of Congress, in such case made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said [Grantees named William Jones and George Chamberlain, respectively] and to his heirs, the said tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said [respective Grantee] and to his heirs and assigns forever."*

As evidenced by an Abstract of Title, by and through the Land Patent bearing Certificate No. 1435 dated August 10, 1837 issued to William Jones by the United States of America, Complainant is heir and assignee as follows:

> The United States of America to William Jones; William Jones and Anna, his wife, to Joseph. H. Dwight; Joseph H. Dwight to John P. Huntington; William H. Huntington as Administrator of the estate of John P. Huntington to Charles Walker; Charles Walker and Nancy B., his wife to Rufus Washburn; Rufus Washburn to William B. Walker; William B. Walker to John Jacob Graf and Margaretta Graf, his wife; John

Jacob Graf et al. heirs of Margaretta Graf, deceased to Chas. G. Meyer, administrator of said Estate; Chas. G. Meyer Administrator of the estate of Margaretta Graf, deceased, to Philipp Greeneisen; Philipp Greeneisen to Michael E. Harrington and Helen I. M. Harrington, his wife; Michael E. Harrington and Helen I. M. Harrington, his wife to Harry W. Bolens; Harry W. Bolens to Ella Hill Bolens; Ella Hill Bolens to Gilbert M. Schucht and Virginia Schucht, his wife; Gilbert M. Schucht and Virginia Schucht, his wife, to Dolores Fischer; Dolores Fischer to Virginia Schucht; Gilbert M. Schucht and Virginia Schucht, his wife, to Chester W. Browne and Edith A. Brown, his wife; Virginia Schucht to Chester W. Browne and Edith A. Brown, his wife; Chester W. Browne and Edith A. Brown, his wife to Alfred S. Magritz and Betty Jane Magritz, his wife; Betty Jane Magritz to Steven Alan Magritz, Complainant.

The relevant pages of the aforesaid Abstract are an exhibit to, and are incorporated by reference in, Complainant's Affidavit in Support of Complaint.

XIII. The Intent of Congress – Public Land Sales

The intent of Congress is the controlling factor in interpreting any legislation, especially in areas regarding the rights of the people in and to property. It must be presumed that Congress intended to fully comply with all restrictions and prohibitions placed upon it by the Constitution of the United States of America.

The Senate of the United States set forth the intent of Congress prior to the enactment of 3 Stat. at L. 566, chap. 51, April 24, 1820, titled "*An act making further provision for the sale of public lands*."

The senate debate of March 6, 1820 recorded in *The Debates and Proceedings in the Congress of the United States* reports the following:

> "Mr. [Senator] King, of New York, observed that, if the change of system were favorable to speculators, he should be found in the negative. But, so far from this being the fact, he considered the change as highly favorable to the poor man; and he argued at some length, that it was calculated to plant in the new country a population of **independent**, unembarressed **freeholders**; that by offering the lands in eighty-acre lots, it would place in the power of almost every man to purchase a **freehold**, the price of which could be cleared in three years; that it would cut up speculation and monopoly; that the money paid for the lands would be carried from the State or country from which the purchaser should remove; that it would prevent the accumulation of an alarming debt, which experience proved never would and never could be paid." (emphasis added)

As evidenced by the statements of Senator King, it was the intent of Congress to enable the men in America, who recently had thrown off the yoke of tyranny to become free men, to further become independent landowners free from the bondage of debt as well as free from the feudal obligations and tenures which existed in the Old World. Congress recognized that the free

men, the sovereigns on the land, had *the right of property*, in and of themselves, *with no feudal obligations to the state that they had created by and through their own sovereignty*.

FREEHOLD, estates. [Definition] An estate of freehold is an estate in lands or other real property, held by a free tenure, for the life of the tenant or that of some other person; or for some uncertain period. It is called liberum tenementum, frank tenement or freehold; it was formerly described to be such an estate as could only be created by livery of seisin, a ceremony similar to the investiture of the feudal law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient.

2. There are two qualities essentially requisite to the existence of a freehold estate. 1. Immobility; that is, the subject-matter must either be land, or some interest issuing out of or annexed to land. 2. A sufficient legal indeterminate duration; for if the utmost period of time to which an estate can last, is fixed and determined, it is not an estate of freehold. For example, if lands are conveyed to a man and his heirs, or for his life, or for the life of another, or until he shall be married, or go to Europe, he has an estate of freehold; but if such lands are limited to a man for one hundred or five hundred years, if he shall so long live, he has not an estate of freehold. Cruise on Real Property t. 1, s. 13, 14 and 15 Litt. 59; 1 Inst. 42, a; 5 Mass. R. 419; 4 Kent, Com. 23; 2 Bouv. Inst. 1690, et seq. Freehold estates are of inheritance or not of inheritance. Cruise, t. 1, s. 42. Bouvier's LAW DICTIONARY, 1856.

FREEHOLD. [Definition] An estate in land or other real property, of uncertain duration ; that is, either of inheritance or which may possibly last for the life of the tenant at the least, (as distinguished from a leasehold;) and ***held by a free tenure***, (***as distinguished from copyhold or villeinage***.) Black's Law Dictionary, page 520, WEST PUBLISHING CO. 1891.

XIV. Right of Property is in the People

Sovereignty, and thus the right of property, resides in the people.

There is a natural order of things in the universe. Our Creator created man. Man formed or established the state (often incorrectly "the government") for the protection of himself and his property. Everything in the natural order of things is subservient to the being who created it. There can be *no exceptions*. In these United States, both the state and federal entities were created by the People. The People themselves retained "sovereignty" under the true Sovereign, our Creator, even though they delegated some of their power to their creatures for the purpose of protecting their rights.

The people created constitutional republics via the founding documents called constitutions. "*All that government does and provides legitimately is in pursuit of its duty to provide protection for private rights*."

(*Wynhammer v. People*, 13 N.Y. 378.)

"Sovereignty itself is, of course not subject to laws for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, *sovereignty itself remains with the people, by whom and for whom all government exists and acts*. And the law is the definition and limitation of power."

(*Yick Wo v. Hopkins*, 118 U.S. 356 (1886))

"…at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are *sovereigns without subjects* - with none to govern but themselves …"

(*Chisholm v. Georgia*, 2 Dall 419 (1793)). (emphasis added)

President James Monroe, in his Second Inaugural Address, March 5, 1821 stated: "…a government which is founded by the people, who possess exclusively the sovereignty…" "In this great nation there is but one order, that of the people, whose power, by a peculiarly happy improvement of the representative principle, is transferred from them, without impairing in the slightest degree their sovereignty, to bodies of their own creation, and to persons elected by themselves, in the full extent necessary for all the purposes of free, enlightened and efficient government. The whole system is elective, the complete sovereignty being in the people, and every officer in every department deriving his authority from and being responsible to them for his conduct."

In Europe, the Executive is almost synonymous with the Sovereign power of a State; … Such is the condition of power in that quarter of the world, where it is too commonly acquired by force, or fraud, or both, and seldom by compact. In America, however, the case is widely different. Our government is founded upon compact. Sovereignty was, and is, in the people.

The Betsey, 3 U.S. 6, 13 (1794).

[T]hen the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We the people of the United States, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. …

If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in Europe, …

It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; …The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may

be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

Chisholm v. Georgia, 2 U.S. 419, 470, 471, 472 (1793).

These references clearly show the right to dispose of real estate, by will in *England,* previous to the statute of *Henry* the eighth. And it is worthy of remark, that while this right continued, the tenure by which lands were held in *England* was allodial; the precise tenure by which they are held here.

All tenures of land granted by the people of this state, &c. shall be and remain allodial and not feodal. (1 *R. L.* 71.)

Allodium, as defined by *Blackstone,* is the land possessed by a man in his own right, without owing any rent or service to any superior. (2 *Bl. Com.* 104.)

The absolute rights of each individual are the right of personal security, the right of personal liberty, and the right of private property. (3 *Bl. Com.* 119.)

It is the last, that of private property, which has been invaded by the exception in the statute concerning wills.

The very definition of municipal law limits the power of the legislature to commanding what is right, and prohibiting what is wrong.

If the legislature can restrain us as it respects our charitable donations, they may also compel us to make them; for whatever is a subject of legislation may be commanded as well as prohibited.

And if the legislature can declare a devise to the *Orphan Asylum* invalid, they may, upon the same principle, make us pay tithes of all we possess.

This is a free representative government; and one of the prominent features by which it is distinguished from a despotic one is, the preservation and protection of individual right; for it can make no difference with the citizen what the form of government is that oppresses him, and deprives him of his right; whether it consists of one tyrant or 160, if his suffering and deprivation are the same.

It is difficult to conceive on what principle men elected by the people for public purposes, can limit and restrain individuals in the exercise of their legitimate rights.

If individuals give up any part of their rights by becoming members of society, it is that they may obtain protection for such as remain; and on the same principle that allegiance is demanded by the government, protection is claimed by the citizen; and if not granted, the original compact is broken.

If courts of justice have occasion to advert to first principles, the object should be the protection of individual right; and not to confirm legislative usurpation. And in a government founded on principle, it is the duty of the judiciary department to decide in favor of individual right, when it is required to be done, on fundamental principles, though it should be to declare invalid an act of the legislature. **The contest which ended in the separation of these *United States* from *Great Britain*, was a contest for individual right, intended to be secured by the constitution of the *United States***. But of what avail is it, that no law shall be passed impairing the obligation of a contract, or that private property shall not be taken for public use, without a just compensation, if the paramount right to dispose of our property by will is denied us?

McCartee v. Orphan Asylum Soc., 9 Cow. 437, (1827). (emphasis added).

The people of this state, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the king by his prerogative.

Lansing v. Smith, 4 Wend. 9, 20 (1829).

Gaines v. Buford, 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). (emphasis added)

Gaines v. Buford, 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; 2 Cond. Rep. 308; New Jersey v. Wilson, 7 Cranch, 164; 2 Cond. Rep. 457; Town of Pawlet v. Clarke &c. 9 Cranch, 292; 3 Cond. Rep. 422; Dartmouth College v. Woodward, 4 Wheaton, 518. 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). (emphasis added)

The sovereignty of a state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments. *Spooner v. McConnell*, 22 F.Cas. 939, 943 (1838).

The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights. *Hale v. Henkel*, 201 U.S. 43, 74 (1906).

XV. Prohibition Against Impairing the Obligation of Contracts, and, The Inviolability of Land Patents Issued by The United States of America

Complainant's private land and private property does not belong to the body politic of the State of Wisconsin. A Land Patent is an express contract, and when granted by the United States of America prior to statehood, is enforceable against the subsequent State. Any subsequent restriction imposed by the State on the use or possession of said private property constitutes an absolutely prohibited impairing of the Obligation of Contracts.

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**. *Fletcher v. Peck*, 10 U.S. 87 (1810). (emphasis added).

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.

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 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.

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.

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

In Virginia, the patent is the completion of title, and establishes 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.

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.'** *Stringer v. Young's Lessee*, 28 U.S. 320 (1830). (emphasis added).

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 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 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; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 14 S. Ct. 548, 38 L. Ed. 331; Scott v. Lattig, 227 U. S. 229, 242, 33 S. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 65 L. Ed. 500; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 43 S. Ct. 60, 67, L. Ed. 140.

U.S. v. Holt State Bank, 270 U.S. 49, 54, 55 (1926.)

Still, we are of opinion the patent would have been the better legal title … 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.

All who claim under a patent are entitled to the same rights as the patentee.

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

A legislative act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act. Such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

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.**

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. *State v. Wilson*, 11 U.S. 164 (1812). (emphasis added).

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.

Nothing passes a perfect title to public lands, with the exception of a few cases, *but a patent*. The exceptions are, where Congress 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.

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

The subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are exempt from taxation. *McCulloch* v. *The State of Maryland*, 4 Wheat., 316. The power of legislation, and consequently of taxation, operates on all the persons and property ***belonging*** **to the body politic**. Citing *Providence Bank* v. *Billings & Pitman*, 4 Pet., 563.

The exemption extends to the lands in controversy, unless the inchoate title acquired by the applicant for the purchase of them subjects them to taxation.

The patents issued by the United States for the public lands contain the words 'give and grant.' **These words imply a warranty**. See Cai. (N. Y.), 188; 7 Johns. (N. Y.), 258; 8 Cow. (N. Y.), 36; 1 Co., 384 a; 4 Kent Com. (ed. of 1844,) 474, and cases there cited. **If the complainant can be compelled to pay these taxes, he has a right to be reimbursed by the United States**.

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

The power of legislation, and consequently of taxation, operates on all the persons and property **belonging to the body politic.** This is an original principle, which has its foundation in society itself.

The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally. This principle was laid down in the case of M'Cullough *vs.* The State of Maryland, and in Osborn et al. *vs.* The Bank of the United States. Both those cases, we think, proceeded on the admission that an incorporated bank, **unless its charter shall express the exemption,** is no more exempted from taxation, than an unincorporated company would be, carrying on the same business. [A Land Patent is an express contract, and when granted before statehood, is enforceable against the State].

Providence Bank v. Billings, 29 U.S. 514 (1830). (emphasis added).

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. [Lands held in severalty by individual Indians under patents issued under the treaties of 1854, 10 Stat. 1053, 1082, 1093, with the Shawnee, Miami, and Wea tribes are not taxable by the state.]

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

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**.

Packer v. Bird, 137 U.S. 661 (1891). (emphasis added).

WHEELER v. United States:

The Brewer-Elliott Oil & Gas Company Case and Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331, are cited with approval in United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465, for the holding that:

> '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 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 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.'** *Klais v. Danowski*, 129 N.W.2d 414 (1964). (emphasis added).

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.

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**. Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77 (1922). (emphasis added).

First, in 1891, the court concluded that title to an unsurveyed 80- acre island in a navigable river remained in the United States even after the government transferred title to the adjacent riparian tracts. *Packer v. Bird,* 137 U.S. 661, 673, 11 S.Ct. 210, 213, 34 L.Ed. 819 (1891). The court found that state law applies to "whatever incidents or rights attach to the ownership of property conveyed by the government ... **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.**"

WHEELER v. United States, 770 F.Supp. 1205 (1991). (emphasis added).

It is very clear, that in the form in which this case comes before us (being a writ of error to a state court), the plaintiffs, in claiming under either of these rights, **must place themselves on the ground of contract**, and cannot support themselves upon the principle, that the law divests vested rights. It is well settled, by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, **unless it also impairs the obligation of a contract**. In *Satterlee* v. *Matthewson*, 2 Pet. 413, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the states to pass laws impairing the obligation of contracts, uses the following language: 'It (the state law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument' (the constitution of the United States).

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837). (emphasis added).

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. … 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.

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

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.

St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636 (1881). (emphasis added).

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.

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.

Steel v. St. Louis Smelting & Refining Co., 106 U.S. 447 (1882). (emphasis added).

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.

U.S. v. Maxwell Land-Grant Co., 121 U.S. 325 (1887). (emphasis added).

An act of the state of Maine, which so changes the law of disseisin as to bar a legal title which was good and valid at the time of the passage of the act, is inoperative as against such title, since it takes away a vested right.

The Supreme Court of Maine held, that so far as this act attempted to change the law of disseisin in respect to titles existing when it was passed, the act was inoperative and void, because in conflict with the constitution of that State. … The result of the decision is, that the constitution of the State has secured to every citizen the right of 'acquiring, possessing, and enjoying property;' and that, **by the true intent and meaning** of this section, property cannot, by a mere act of the legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect.

According to this decision, the act now in question is inoperative, as respects this action.

Webster v. Cooper, 55 U.S. 488 (1852). (emphasis added).

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; Gleason v. Wood, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949.

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 other property. …

The right to the exemption was a federal right, …

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.

Ward v. Board of County Com'rs of Love County, Okl., 253 U.S. 17 (1920). (emphasis added).

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.

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, 324 N.Y.S.2d 277 (1971). (emphasis added).

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.

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

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.

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). See also, Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930), and Ward v. Board of County Commissioners, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920).

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

The issue does not turn on the interim conveyances after the Crown patents, but solely on the patents themselves.

Kraft v. Burr, 476 S.E.2d 715 (1996).

The constitution does not prohibit a State from impairing the obligations of a contract unless compensation be made; **but the inhibition is *absolute***. So that **all acts coming within the prohibition are unconstitutional**.

Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 687 (1853).