NO. 12—ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF CALIFORNIA.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE.

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TABLE OF CASES.

Treaty, Constitutions and Statutes.

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The Attorney General for the Commonwealth of Pennsylvania joins in the brief of the National Association of Attorneys General, *amici curiae.*

This additional brief is filed for the purpose of presenting the facts existing and the questions involved in relation to the title to lands under navigable waters of Pennsylvania.

The principal bodies of water involved are the Delaware River and Lake Erie.

Our position is that the Commonwealth of Pennsylvania has title to these lands and such title cannot be divested by such an extension of federal authority as the Government brief advocates.

The Government brief states (p. 2) that this suit was instituted for the purpose of establishing the rights of the United States to the portion of the Pacific Ocean beginning at low water mark and extending seaward for three miles.

In spite of this definition of position, the Government brief advances arguments which, in our opinion, might militate against the title of Pennsylvania to the submerged lands which we have mentioned.

Delaware River.

By a Royal Charter dated March 4, 1681, Charles II, King of England, granted to William Penn, his heirs and assigns, the territory which became the Colonies of Pennsylvania, describing it as follows:

> "* * * all that tract or part of land in America, with all the islands therein contained, as the same is bounded on the east by Delaware river, from 12 miles distance northwards of New-Castle town unto the three and fortieth degree of northern latitude, if the said river doth extend so far northward; but if the said river shall not extend so far northwards, then by the said river so far as it doth extend; and from the head of the said river the eastern bounds are to be determined by a meridian line, to be drawn from the head of the said river unto the said three and fortieth degree. The said lands to extend westwards five degrees in longitude, to be computed from the said eastern bounds; and the said lands to be bounded on the north by the beginning of the three and fortieth degree of northern latitude, and on the south by a circle drawn at

12 miles distance from New-Castle northwards; and westwards unto the beginning of the fortieth degree of northern latitude, and then by a straight line westwards to the limits of longitude, above mentioned.

"Sect. II.

"We do also give and grant unto the said William Penn, his heirs and assigns, the free and undisturbed use and continuance in, and passage unto, and out of all and singular ports, harbours, bays, waters, rivers, isles and inlets, belonging unto, or leading to and from the country or islands aforesaid, and *all* the soil, lands, fields, woods, underwoods, mountains, hills, fens, isles, *lakes, rivers, waters, rivulets, bays* and inlets, situate or being within, or *belonging unto the limits and bounds aforesaid,* * * *." (5 Smith's Laws of Pennsylvania, Appendix, p. 406)

The concluding paragraph of the Declaration of Independence contains this declaration:

"We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, that these United Colonies are, and of Right ought to be *Free and Independent States;* * * *" (Italics ours)

This declaration, to which England later acceded by the Treaty of Peace, made the colonies sovereign states and with the same rights of ownership in sub-

merged lands that any other state or country would have.

The Articles of Confederation adopted on July 9, 1778 defined the status of the individual states as follows:

> "Article II. *Each State retains* its sovereignty, freedom and independence, and *every* power, jurisdiction and *right,* which is not by this confederation expressly delegated to the United States, in Congress assembled.
>
> "Article III. The said States hereby severally enter into a *firm league of friendship* with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever." (Italics ours)

By these articles the individual states clearly did not surrender any rights of property.

By the Divesting Act of November 27, 1779 (1 Smith's Laws, p. 480), the Legislature provided that every estate, title or interest of the heirs and devisees of William Penn, as proprietaries of Pennsylvania should be vested in the Commonwealth of Pennsylvania (Sec. V), and further provided that the sum of one hundred thirty thousand pounds should be paid to such proprietaries (Sec. XIII), and this sum was accepted by the proprietaries as full compensation. (See *Wallace v. Harmstad,* 44 Pa. 492, 500 (1863).)

The Treaty of Peace with Great Britain, signed on September 3, 1783, provided in Article I, as follows:

> "His Britannic Majesty acknowledges the said United States, viz. New Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, *relinquishes all claims to the government, proprietary and territorial rights* of the same, and every part thereof." (8 U.S. St. L., p. 81) (Italics ours)

It is noteworthy here that the Treaty of Peace was made with the thirteen original *states* as such, and not with the Continental Congress or any other authority representing the states as a whole.

By Article I therefore Great Britain relinquished to each state the property and territory which Great Britain had formerly owned, and which was comprised within the boundaries of the particular state.

Article II defined the boundaries of the thirteen states as a whole, describing such boundaries as extending along the middle line of rivers or lakes which lay between the thirteen states and Canada.

Thus the description runs—

> "* * * thence along the middle of said river into lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and lake Erie; thence along the middle of said communication into lake Erie, through the

middle of said lake until it arrives at the water-communication between that lake and lake Huron * * *." etc. (81)

Article II concluded with the words:

"* * * comprehending all islands within twenty leagues of any part of the shores of the United States, * * *." (82)

The effect of the Treaty was to relinquish any rights of the Crown in the bed of the Delaware River so that thereafter the States of Pennsylvania and New Jersey each owned to the middle line of the river.

This conclusion was adopted in several early decisions in the Federal courts.

In *Corfield v. Coryell,* 4 Wash. C. C. 371, 6 Fed. Cas. No. 3,230 (1823), Circuit Justice Washington, sitting in the Circuit Court for the Eastern District of Pennsylvania, held that the State of New Jersey could prohibit by statute a nonresident from dredging oysters below the low water mark of a bay near Cape May.

In the opinion, Circuit Justice Washington said:

"* * * The grant to congress to regulate commerce on the navigable waters belonging to the several states, renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. But *this grant contains no cession, either express or implied, of territory, or of public or private property.* The jus privatum which a state has in the soil covered by

its waters, is totally distinct from the jus publicum with which it is clothed. * * *" (551) (Italics ours)

Again, speaking of the title of New Jersey, the court said:

"* * * And we are strongly inclined to think that, if the right of the former of these states to the bay of Delaware, was founded on no other title than that of appropriation, by having used it for purposes of navigation and fishing, *the effect of the Revolution, and of the treaty of peace, was to extend the limits of those states to the middle of the bay, from its mouth upwards.* * * *" (555) (Italics ours)

In *Bennett v. Boggs,* Baldw. 60, 3 Fed. Cas. 1,319 (1830), Circuit Justice Baldwin sitting in the Circuit Court for the District of New Jersey, said:

"* * * The rights of the crown being extinguished by the treaty of peace, those claimed by New Jersey to the river and bay were thereby confirmed, unless a better title should be found to exist in other states. But these rights accrued to the state in its sovereign capacity, and not to the proprietaries; they claiming only by grant, must be confined to its boundaries; an acquisition after its date could not pass under the charter to the proprietors; it was territory newly acquired, under the operation of the treaty, by New Jersey and Pennsylvania, and by them made the subject of the compact between the two states. * * *" (227)

In *The Tinicum Fishing Co. v. Carter,* 61 Pa. 21 (1869), Mr. Justice Sharswood said:

"The bed and channel of the Delaware river ad medium aquae filum belong respectively to the

states of New Jersey and Pennsylvania. The grants both to the proprietaries of the former and to William Penn, were bounded on each side by the river: Bennett v. Boggs, Baldw. 72. The bed and channel remained in the British crown, but by the revolution and the acknowledgment of the independence of the colonies by the treaty of peace, all the rights and sovereignty of the crown were transferred to and vested in the several states. The Delaware being a navigable co-terminous stream between New Jersey and Pennsylvania, the title of each to the bed extended from their respective shores to the middle of the river, according to the well established principle of universal public law: Vattel, § 266. * * *" (30)

In *Mumford v. Wardwell,* 73 U. S. (6 Wall.) 423 (1867), Mr. Justice Clifford said:

"* * * Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States, * * *.

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

Again in *County of St. Clair v. Lovingston,* 90 U. S. (23 Wall.) 46 (1874), Mr. Justice Swayne said:

"By the American Revolution the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters and

the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. * * *" (68)

In *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212 (1845), this court said:

"* * * The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the States respectively. * * *"

In *Shively v. Bowlby,* 152 U. S. 1 (1894), Mr. Justice Gray said:

"* * * The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States. * * *"

In *Martin v. Waddell,* 41 U. S. (16 Pet.) 367, Chief Justice Taney said:

"* * * For when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the right since surrendered by the constitution to the general government. * * *"

In *Howard v. Ingersoll,* 54 U. S. (13 How.) 380 (1851), Mr. Justice Wayne said:

> "The rule jure gentium, to which we refer, is not now for the first time under the consideration of this court. We are relieved, then, from its discussion, by citations from Vattel and other writers upon the laws of nations, to show what it is; but it will be found in the 22d chapter of Vattel. Among the writers after him it is not controverted by any one of them. Besides, it is according to what had been anciently the practice of nations, substantiated by an adherence to it down to our own times. In Handley's Lessee v. Anthony, 5 Wheat., 379, this court said, by its organ, Chief Justice Marshall, 'when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. * * *' " (412)

The rule is stated by Mr. Justice Field, in *Iowa v. Illinois,* 147 U. S. 1 (1893), as follows:

> "When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the

adjoining States up to which each State will on its side exercise jurisdiction. * * *" (7-8)

This language is quoted with approval by Mr. Justice Day in *Arkansas v. Mississippi,* 250 U. S. 39, 43 (1919).

The Constitution of the United States is not a document of title, but an instrument of Government. It is not a conveyance of property, but a grant of enumerated powers to the Federal Government. The grantor was the people, not the states. The *property* rights of the states were not affected.

The Government brief (p. 72) argues that tide lands and inland water decisions are inapplicable because the original states individually made no claim on the marginal sea at the time of the formation of the Union.

But why should they? The states existed before the adoption of the Constitution of the United States. There is no occasion for them to make any claim because:

(1) Under the authorities quoted above, they already owned the land beneath the marginal sea.

(2) The Constitution conveyed no title to property to the Federal Government.

(3) As the preamble shows, it was the people, and not the states, who ordained the Constitution and granted the powers therein conferred.

The Government brief (p. 72) also argues that the rule that the ownership of submerged lands is an attribute of sovereignty of a state, is erroneous. The Gov-

ernment further asks that this rule be not extended to lands below low water mark.

Even though no case decided by this court has involved title to land below low water mark, as the Government contends, this court has consistently declared that the title to lands between navigable waters belongs to the states, and not to the Federal Government.

The Government is here asking this court to draw a distinction that has never been made in its decisions, and to set aside a law—a rule of property—which has been in force for more than a century and in reliance upon which titles have been acquired and moneys invested.

The decision and the language of the court in *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, quoted on page 76 of the Government brief, merely holds that an "external sovereignty" and "international powers" passed from Great Britain to the colonies in their collective capacity. This case decides nothing as to ownership or title of property.

The Government brief (pp. 127, 128) also argues that Article II of the Treaty of Peace describes the boundary as extending—

> "* * * 'to the Atlantic ocean * * * comprehending all islands within twenty leagues of any part of the shores of the United States,' but made no mention of the sea adjoining the coast or such islands (8 Stat. 80, 81-82). Likewise, the treaty of 1795 with Spain (Art. II) described our southern boundary as extending merely 'to the Atlantic ocean' (8 Stat. 138, 140)." (127-8)

It cannot be seriously argued that the territory ceded by the Treaty was to terminate at the *water's edge.*

Having ceded the dry land, Great Britain could have no interest in retaining title to the submerged land distant three thousand miles from her shores. A country whose territory extended only to the water's edge, and which possessed no rights in the submerged lands, would furnish an anomaly unheard of in the law of England or the law of nations.

Lake Erie.

The description of the northern boundary of the thirteen original states, as contained in the Treaty of Peace with Great Britain has already been quoted.

That under this treaty Pennsylvania received title to the middle line of Lake Erie is clearly shown by this excerpt from the description in the treaty:

> "* * * thence along the middle of said river into lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and lake Erie; thence along the middle of said communication *into lake Erie, through the middle of said lake* * * *."

The title of Pennsylvania to the middle line of Lake Erie has been twice confirmed by acts of Congress.

The enabling Act of June 15, 1836, 5 U. S. Stat. L. 49, under which the territory of Ohio was admitted to statehood, described the northern boundary of the new state of Ohio as extending:

> "* * * northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania."

Since the boundary line between United States and Canada, as defined in the Treaty of Peace is the middle line of lake Erie, the western boundary line of the State of Pennsylvania would have to extend to the middle line of lake Erie or the northern boundary line of Ohio, as described in this Act of Congress, would not intersect this western boundary line of Pennsylvania.

Again the Act of Congress of August 19, 1890, 26 Stat. L. 329 ratified a compact between Pennsylvania and New York fixing the boundary line between these states. This boundary compact is set forth in full in the Act of June 6, 1887, page 353 of the Pamphlet Laws of the Legislature of Pennsylvania. Paragraph III of the second recital of the boundary compact defines the line between the western boundary of New York and the eastern boundary of the northwestern corner of Pennsylvania as follows:

> "* * * which *said line,* and its prolongation due north *into the waters of Lake Erie until it intersects the northern boundary of the United States* aforesaid, have since been acknowledged and recognized by the said two States, as a part of the limit of their respective territory and jurisdiction. * * *"

The boundary so described was agreed to in the compact between Pennsylvania and New York and was ratified by the Act of Congress thereby definitely estab-

lishing that the title of Pennsylvania extended to the middle line of Lake Erie. Unless such title did extend so far, it could not intersect the northern boundary of the United States as fixed by the Treaty of Peace.

This presentation of the facts relating to the title of Pennsylvania to the bed of the Delaware River and of Lake Erie illustrates the danger of any reversal of the long established rule that the states own the lands beneath navigable waters.

If this rule were to be abrogated, scores of complicated questions of title would arise along the Atlantic seaboard, some in which Congress has expressly authorized conveyances or confirmed transfers of lands under navigable waters.

The power of congress to regulate commerce embraces the authority to remove obstructions to navigation or to the freedom of commerce, but does not include power to uproot land titles.

Respectfully submitted,

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