

FILE COPY

Supreme Court, U.S.
FILED

OCT 23 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27 Original

STATE OF OHIO ----- PLAINTIFF

V.

STATE OF KENTUCKY ----- DEFENDANT

BRIEF IN OPPOSITION TO MOTION FOR
LEAVE TO FILE AMENDED COMPLAINT

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

GEORGE F. RABE
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR DEFENDANT

INDEX

	Page
QUESTION PRESENTED	1
STATEMENT	1
ARGUMENT	2-4
CONCLUSION	5
CERTIFICATE OF SERVICE	6

ARGUMENT

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR LEAVE TO FILE SHOULD BE DENIED.	2-4
--	-----

CITATIONS

Cases:

Booth v. Shepherd, 8 Ohio St. (Critchfield) 243 (1858)	3
Commonwealth v. Henderson County, Ky., 371 S.W.2d 27 (1963)	3
Georgia v. Pennsylvania R. R. Co., 324 U.S. 439, 445 (1945)	5
Handly's Lessee v. Anthony, 18 U.S. 374 (1820)	2, 3, 4
Henderson Bridge Co. v. City of Henderson, 173 U.S. 592, 613 (1899)	3
Indiana v. Kentucky, 136 U.S. 479 (1890)	3
Utah v. United States, 394 U.S. 89, 95 (1969)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27, Original

STATE OF OHIO ----- *Plaintiff*

V.

STATE OF KENTUCKY ----- *Defendant*

QUESTION PRESENTED

**WHETHER THE MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT SHOULD BE DENIED
FOR FAILURE OF THE AMENDED COMPLAINT
TO STATE FACTS UPON WHICH RELIEF CAN
BE GRANTED.**

STATEMENT

The State of Ohio instituted this proceeding in 1966 by filing its complaint in which it requested a declaration as to the location of the low water mark on the north shore of the Ohio River between Kentucky and Ohio, conceding that the low water mark on the north shore had been previously adjudicated as the boundary between the two states. Ohio has now moved the Court for leave to file an amended complaint, which is for all practical purposes an entirely new complaint, in which Ohio seeks to withdraw its previous concession that the low water mark of the Ohio River on the north shore is the boundary between the two states and seeks to establish the middle of the Ohio River as the boundary between the two states on the basis of matters allegedly occurring prior to the American Revolution.

ARGUMENT

**THE AMENDED COMPLAINT FAILS TO STATE
A CLAIM UPON WHICH RELIEF CAN BE
GRANTED AND MOTION FOR LEAVE TO FILE
SHOULD BE DENIED.**

It is true as plaintiff suggests that some of the rules relating to practice are not as strictly applied in original actions between states in this Court as in ordinary litigation in the district courts. See *Utah v. United States*, 394 U.S. 89, 95 (1969). Nevertheless, it should be pointed out that this original action has been pending for a period which is now in its sixth year and that the amended complaint seeks relief which is not only significantly greater in amount than that sought in the original complaint, but is also based on an entirely new and different ground. The first complaint in this boundary dispute sought merely to establish the location of the low water mark on the north shore of the Ohio River, which was conceded to be the boundary between the states of Kentucky and Ohio. The amended complaint seeks to establish the middle of the river as the boundary on the basis of events which allegedly occurred prior to the American Revolution.

Plaintiff candidly recognizes the concession made in the original complaint that the north shore low water mark as the boundary between the states was settled by a series of cases in this Court (Brief in Support of Amended Complaint, page 14), but has now so substantially changed its position as to argue that the evidence that the boundary lies in the middle of the river is "overwhelming." (Id. p. 17) Kentucky submits that this contention is legally baseless.

As we pointed out in our Brief in Opposition to the motion for leave to file the original complaint, the low water mark on the north shore of the Ohio River was judicially established as the boundary of the states bordering the river commencing with the opinion of Chief Justice Marshall in *Handly's Lessee v.*

Anthony, 18 U.S. 374 (1820). The reasoning of that case was followed in *Indiana v. Kentucky*, 136 U.S. 479 (1890). In both of these cases this Court pointed out very clearly that the territory now comprising Ohio was originally a part of territory of the Commonwealth of Virginia which was ceded to the United States at the behest of Congress and subsequently divided into Ohio and other states. The basis for the low water mark on the north side as the boundary was the language of Virginia's cession of "the territory northwest of the river Ohio." In *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 613 (1899), this Court stated:

"[I]t must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river."

Both Kentucky and Ohio courts have recognized the reasoning of those cases. See for instance *Commonwealth v. Henderson County*, Ky., 371 S.W.2d 27 (1963); *Booth v. Shepherd*, 8 Ohio St. (Critchfield) 243 (1858).

Ohio now argues that certain alleged treatments of subject territory by the British Crown and others prior to the American Revolution indicate that the territory was not a part of Virginia and that the reasoning of the Supreme Court cases referred to above is therefore unsound. However, assuming for the sake of argument that it could be contended that the subject territory was not a part of Virginia prior to the American Revolution, that would not detract from the reasoning of the decisions referred to above. After the American Revolution, all of the territory involved in this controversy was a part of the whole territory of the sovereign United States of America. It was pursuant to congressional action of the sovereign United States of America and the action of the Commonwealth of Virginia included within it that the subject territory was ceded to the United States Government and subsequently became in part the State of Ohio. The State of Ohio was created by law of the sovereign United States of America. That law clearly recognized the north-

ern shore of the Ohio River as the boundary between the states on the river. It is that law pursuant to which the contested territory was created which must govern and not the contentions of other political entities prior to the American Revolution.

Ohio stresses that she was not a party to the decisions involving the boundary. It is true that she may not be bound in that sense as a party, but that fact scarcely detracts from the stark reality that the law is nevertheless what this Court said it was in those cases. Moreover, more than 150 years had passed since the decision in *Handly's Lessee v. Anthony* before Ohio first made claim in its amended complaint herein that its boundary extends to the middle of the river, and she is in no position to claim she was unaware of the previous adjudications, especially since it has been more than five years from the filing of her complaint herein in which those adjudications were expressly recognized.

In short, there is simply no legal basis for a holding that the laws of the United States pursuant to which the State of Ohio was created are to be disregarded, and that the boundary between Ohio and Kentucky should be adjudicated as the middle of the river on the basis of alleged dispositions of the subject territory prior to the American Revolution.

CONCLUSION

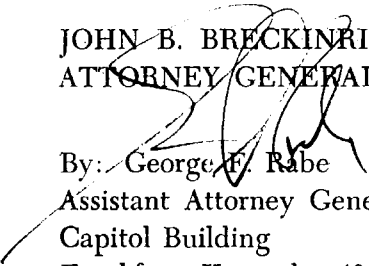
In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 445 (1945), this Court stated:

“Leave to file should of course be denied if it is plain that no relief may be granted in the exercise of the original jurisdiction of this Court.”

The motion for leave to file the amended complaint should be denied.

Respectfully submitted,

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

By:  George E. Rabe
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, George F. Rabe, one of counsel for defendant herein and a member of the bar of the Supreme Court of the United States, hereby certify that service of the foregoing Brief in Opposition was made by depositing three copies each thereof in the United States mail, first class U.S. postage prepaid, addressed to William J. Brown, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215; Donald B. Leach, Executive Assistant to the Attorney General, State House Annex, Columbus, Ohio 43215; Joseph M. Howard, Assistant Attorney General, State House Annex, Columbus, Ohio 43215, Counsel for Plaintiff, State of Ohio.

This 22nd day of October, 1971.

A handwritten signature in dark ink, appearing to be 'G. F. Rabe', written over a horizontal line.

Assistant Attorney General

