

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, ~~1957~~ 1958

11  
No. 12, Original

COMMONWEALTH OF VIRGINIA,  
*Complainant,*  
v.  
STATE OF MARYLAND,  
*Defendant.*

ON THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

**OPPOSITION OF THE STATE OF MARYLAND  
AND BRIEF IN SUPPORT THEREOF**

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# INDEX

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## TABLE OF CONTENTS

	PAGE
OPPOSITION OF THE STATE OF MARYLAND .....	1
BRIEF IN SUPPORT THEREOF .....	5
Statement of the Case .....	5
Questions Presented .....	5
Statement of Facts .....	6
Argument:	
I. The Bill of Complaint on its Face does not state a "Case" or "Controversy" within the Meaning of Article III, Section 2, of the Constitution of the United States sufficient to give this Honorable Court Jurisdiction over either the Parties or the Subject Matter .....	7
II. The Commonwealth of Virginia does not have a Direct and Substantial Property Interest in these Proceedings .....	11
III. This Proceeding is being Prosecuted in the Name of the Commonwealth of Virginia for a Limited Group of Citizens of the said Commonwealth of Virginia .....	12
IV. The Bill of Complaint does not Allege any Facts to show that the Action of the State of Maryland in Enacting Chapters 766 and 770 of the Laws of 1957 invades any Vested Property Right of the Commonwealth of Virginia .....	14
Conclusion .....	16
PROOF OF SERVICE .....	17



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**OPPOSITION OF THE STATE OF MARYLAND**

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To the Honorable, The Chief Justice and Associate Justices  
of the Supreme Court of the United States:

Now comes the State of Maryland, Defendant in the above entitled matter, by its Attorney General, and without waiving its right to file an appropriate answer to the Bill of Complaint, files this, its Opposition to Complainant's Motion for Leave to File Bill of Complaint against the State of Maryland, and for cause of Opposition shows:

*First*, that this Honorable Court has no jurisdiction over either the parties to or the subject matter of this suit because it appears from the face of the Bill of Complaint that the matters complained of do not constitute, within the meaning of Article III, Section 2, of the Constitution of the United States, any "case" or "controversy" between the Commonwealth of Virginia and the State of Maryland;

*Second*, that the allegations of the Bill of Complaint affirmatively show that the only issues, if any, presented by said bill arise between the State of Maryland or her officers and certain persons residing in the Commonwealth of

Virginia primarily engaged in fishing or oystering in the Potomac River, and do not in any manner concern the Commonwealth of Virginia as a State.

*Third*, that the said Bill of Complaint shows upon its face that this suit is in reality for and on behalf of certain individuals or groups of individuals engaged in the fishing and oystering business, and while the suit purports to be prosecuted for and in the name of the Commonwealth of Virginia, said State is in effect lending its name to said individuals or groups of individuals and therefore the Commonwealth of Virginia is only a nominal party, the real parties in interest being the aforementioned individuals or groups of individuals.

*Fourth*, that it affirmatively appears from the face of the Bill of Complaint and exhibits attached thereto that the Commonwealth of Virginia has no property right in the Potomac River beyond low water mark of the south or Virginia shore, nor does the Compact of 1785 grant any property right to the Commonwealth of Virginia in the Potomac River beyond low water mark of the south or Virginia shore, nor is any property right involved in this suit, so as to give this Court original jurisdiction in this cause.

*Fifth*, that it appears upon the face of the said Bill of Complaint (Paragraph VI) that the State of Maryland is the sole and undisputed owner of the Potomac River to the low water mark of the south or Virginia shore thereof; and incidental to said ownership the State of Maryland has title to the bed of said Potomac River as well as ownership of all fish, oysters and crabs therein, and that as the sovereign owner of these natural resources, the State of Maryland has not only the right but the duty to enact such legislation as is necessary in its judgment to protect and conserve these natural resources.

*Sixth*, that in its Statement in Support of Motion for Leave to File a Bill of Complaint, the Complainant states that Chapter 766 of the Laws of Maryland of 1957 (effective June 1, 1957) is "an attempt to deny to the Commonwealth of Virginia and its citizens the fishing, oystering, crabbing and property rights vested in the Commonwealth of Virginia and its citizens by the Compact of 1785"; whereas, in fact, the State of Maryland by the provisions of Chapter 770 of the Laws of Maryland of 1957 (effective June 1, 1957) grants to citizens and residents of the Commonwealth of Virginia equal privileges with the citizens of Maryland for the use and enjoyment of the Potomac River for the taking of fish, oysters and crabs from the waters thereof, and therefore no resident or citizen of Virginia has been deprived of the privilege of fishery in the Potomac River.

WHEREFORE, the State of Maryland submits herewith a brief in support of this Opposition and respectfully moves that the Motion for Leave to File a Bill of Complaint and the Opposition thereto be set for oral argument, and subsequently that the Opposition be sustained and the Motion of the Commonwealth of Virginia be denied.

Respectfully submitted,

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ON THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

---

**BRIEF FOR THE STATE OF MARYLAND  
IN OPPOSITION**

---

**STATEMENT OF THE CASE**

The Commonwealth of Virginia has filed a Motion for Leave to File a Bill of Complaint, with Bill of Complaint attached thereto, which Bill of Complaint would seek to have declared invalid Chapters 766 and 770 of the Laws of Maryland of 1957. The State of Maryland has filed its Opposition to said Motion and has requested oral argument on the Motion and Opposition thereto.

**QUESTIONS PRESENTED**

The Motion for Leave to File a Bill of Complaint and Opposition thereto present the following issues:

1. Does the Bill of Complaint on its face state a "case" or "controversy" within the meaning of Article III, Section

2, of the Constitution of the United States sufficient to give this Honorable Court jurisdiction over either the parties or the subject matter?

2. Does the Commonwealth of Virginia have a direct and substantial property interest in these proceedings?

3. Is this proceeding being prosecuted in the name of the Commonwealth of Virginia for a limited group of citizens of the said Commonwealth of Virginia?

4. Does the Bill of Complaint allege any facts to show that the action of the State of Maryland in enacting Chapters 766 and 770 of the Laws of 1957 invades any vested property right of the Commonwealth of Virginia?

### STATEMENT OF FACTS

The events leading to the adoption of the Compact of 1785 between the State of Maryland and the Commonwealth of Virginia, while extremely important, are not relevant to the Motion before this Court and, therefore, will not be fully recited at this time. It will be observed that the Compact of 1785 was promulgated while the Articles of Confederation, adopted by the States in 1778, were in force.

The Compact of 1785 was not intended to nor did it adjust any boundary dispute or line between Maryland and Virginia, but rather it contained provisions concerning jurisdiction over and navigation of the Potomac and Pocomoke Rivers and certain parts of the Chesapeake Bay, and also certain provisions as to the privilege of fishery.

The State of Maryland, being the undisputed owner of the Potomac River to the south or Virginia shore thereof, has endeavored to preserve the natural resources of the said River and in the exercise of that duty the General

Assembly of Maryland enacted Chapters 766 and 770 of the Laws of Maryland of 1957.

The General Assembly of Maryland, in the preamble to Chapter 766, *supra*, recited certain findings of fact to the effect that the Commonwealth of Virginia, through its officers and agents, and its citizens, had intentionally flouted and disregarded the conservation laws existing on the Potomac River, and therefore as a matter of legislative policy it declared that it was necessary to repeal the former consent given to the Compact of 1785 for the mutual benefit of all persons who have the privilege of fishery in the Potomac River, and to promote conservation of the natural resources therein.

Since the passage of Chapters 766 and 770, *supra*, citizens of Maryland and Virginia have been licensed without discriminations to extract fish, oysters and crabs from the Potomac River. (See affidavit of John P. Tawes, Chairman of the Commission of Tidewater Fisheries of the State of Maryland dated the 4th day of October, 1957, and attached to the Answer to the Motion for Temporary Restraining Order heretofore filed in this cause.)

## ARGUMENT

### I.

**The Bill of Complaint on its Face Does Not State a "Case" or "Controversy" Within the Meaning of Article III, Section 2, of the Constitution of the United States Sufficient to Give This Honorable Court Jurisdiction Over Either the Parties or the Subject Matter.**

The gravamen of the Bill of Complaint sought to be filed in these proceedings is that the action of the General Assembly of Maryland, in enacting Chapters 766 and 770 of the Laws of Maryland of 1957, denies to the Commonwealth

of Virginia and its citizens the fishing, oystering, crabbing and property rights vested in the Commonwealth and its citizens by the Compact of 1785.

The Commonwealth of Virginia, by its own legislative act, has declared Articles 1 through 6, 9 and 12 of the Compact to be null and void in that they have been superseded by the provisions of the Constitution of the United States. (See Revised Code of Virginia, 1819, and subsequent Codes.)

By Paragraph XII of the Bill of Complaint, the Commonwealth of Virginia recites statistics as to the number of Virginians engaged in fishing, oystering and crabbing activities and the volume of their hauls. Nowhere is there any fact or allegation showing that any citizen of the Commonwealth of Virginia has been deprived or threatened to be deprived of the privilege of fishery in the Potomac River.

Article III, Section 2, of the Constitution of the United States, in granting judicial powers upon original jurisdiction to this Court, restricts that power to "cases" or "controversies". In construing what is a "case" or "controversy" within the meaning of this Constitutional inhibition, this Court has consistently and uniformly adhered to the rule that a real issue must be presented to the Court as contrasted with speculative, abstract, hypothetical or moot cases. See *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 89 L. Ed. 1725; *United Public Workers of America v. Mitchell*, 330 U. S. 75, 91 L. Ed. 754; *New Jersey v. Sargent*, 269 U. S. 329, 70 L. Ed. 289.

In the exercise of original jurisdiction arising out of an alleged controversy between two states, this Court has applied the same rule. In *New York v. Illinois*, 274 U. S. 487, 71 L. Ed. 1164, this Court sustained a motion to strike from a bill of complaint to enjoin the diversion of waters from

Lake Michigan a paragraph alleging interference with the complainant's right to use the waters thereof for the development of power. The Court there concluded:

"But it does not show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected. \* \* \* The suit is one for an injunction, a form of relief which must rest on an actual or presently threatened interference with the rights of another. Plainly no basis for such relief is disclosed in what is said about water power development. *At least, the paragraph does no more than present abstract questions respecting the right of the plaintiff state and her citizens to use the waters for such purposes in the indefinite future. We are not at liberty to consider abstract questions.*" (Emphasis supplied.)

The Bill of Complaint, in the first and primary prayer for relief, asks this Court to declare the Compact of 1785 between the Commonwealth of Virginia and the State of Maryland to be "*forever binding*" on the parties to this cause, subject only to modification, alteration or repeal by the joint action of both states. Although the Bill of Complaint does not allege in any way what vested rights of the Commonwealth of Virginia are impaired by the aforementioned Acts of the Maryland General Assembly, it nevertheless seeks to have this Court prohibit the sovereign State of Maryland from protecting its property not only in the present but also *in futuro*. This prayer presents no more than an abstract question respecting the privileges of Virginians to fish in the Potomac River in the indefinite future.

Again, in *Arizona v. California*, 283 U. S. 423, 75 L. Ed. 1154, this Court refused to grant a declaratory decree to judicially establish certain water rights where the bill of

complaint did not affirmatively show that the local waters had been or were threatened to be wrongfully appropriated. This Court stated at page 1170 (75 L. Ed.):

“\* \* \* There is no occasion for determining now Arizona’s rights to interstate or local waters which have not yet been, and which may never be, appropriated. *New Jersey v. Sargent*, 269 U. S. 328, 338, 70 L. ed. 289, 294, 46 S. Ct. 122. This court cannot issue declaratory decrees. Compare *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 S. Ct. 261; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74, 71 L. ed. 541, 544, 47 S. Ct. 282; *Willing v. Chicago Auditorium Asso.*, 277 U. S. 274, 289, 290, 72 L. ed. 880, 884, 885, 48 S. Ct. 507.”

Subsequently, in *Alabama v. Arizona*, 291 U. S. 286, 78 L. Ed. 798, this Court, in refusing to grant leave to file a bill of complaint, again restated the well-cited rule that the state seeking to prevent the enforcement of the laws of another state must show facts that clearly call for a decree in its favor. This Court concluded:

“\* \* \* Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri v. Illinois*, *supra* (200 U. S. 521, 50 L. ed. 579, 26 S. Ct. 268). In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade*, 289 U. S. 444, 458, 77 L. ed. 1311, 1315, 53 S. Ct. 682. The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut v. Massachusetts*, 282 U. S. 660, 669, 75 L. ed. 602, 607, 51 S. Ct. 286.”

The Acts of Maryland of 1957 governing fishery in the Potomac River do not deprive the citizens of Virginia of the privilege of fishing, oystering and crabbing but merely establish a uniform plan of conservation for the resources of the Potomac River for the mutual benefit of all persons enjoying the privilege of fishery in the Potomac River. Potential future invasions of any privileges of Virginia citizens are not a sufficient basis to present a justiciable "case" or "controversy" to this Honorable Court.

## II.

### **The Commonwealth of Virginia Does Not Have a Direct and Substantial Property Interest in These Proceedings.**

It is respectfully submitted that the Commonwealth of Virginia does not have a substantial and direct property interest in the subject matter of this suit. By Paragraph VII of the Bill of Complaint, the Complainant alleges that the Compact, as now constituted, embraces merely Articles 7, 8, 10, 11 and 13, although in its original form it embraced a total of 13 articles. The Commonwealth of Virginia, by its own unilateral action has found that the other sections were superseded by the adoption of the Federal Constitution and therefore are no longer recognized by Virginia.

Articles 7 and 8 of the Compact, upon which the Complainant relies, do not grant to the Commonwealth of Virginia any direct or property interest in the Potomac River. Neither of said Articles grants to the Commonwealth of Virginia or its riparian property owners any property right in the Potomac River. See *Bostick v. Smoot Sand & Gravel Corp.*, .... Fed. Supp. ...., U. S. D. C., (Md.) (1957).

In *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, this Court determined that a bill of complaint framed to restrain cer-

tain officials from carrying into effect the provisions of a Congressional enactment was outside its jurisdiction in that considerations to be justiciable must raise issues of rights of persons or property and not political rights. It is respectfully urged that the rights claimed by the Commonwealth of Virginia are in the nature of political rights and not the rights of persons or property. This rule has been applied and elaborated upon in *Massachusetts v. Mellon*, 262 U. S. 447, 67 L. Ed. 1078. This Court disposed of that suit for want of jurisdiction. The Court, quoting from the case of *Georgia v. Stanton*, *supra*, concluded at page 1083 (L. Ed.):

“\* \* \* For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.”

The Commonwealth of Virginia, at most, has alleged in its Bill of Complaint that it is entitled to have protected its political rights rather than the rights of persons or property.

### III.

**This Proceeding is Being Prosecuted in the Name of The Commonwealth of Virginia for a Limited Group of Citizens of the Said Commonwealth of Virginia.**

While the Bill of Complaint is filed in the name of the Commonwealth of Virginia, the parties in interest, as shown on the face of the Bill of Complaint (Paragraph XII), appear to be a limited group of approximately 800 Virginia fishermen (including oystermen). The bill (Paragraph



XIII) avers that as a result of the enforcement of Chapter 770 of the Acts of Maryland of 1957, there would result "untold hardship" to approximately 200 citizens of Virginia who annually engage in tonging for oysters in the Potomac River as a means of livelihood.

The gravamen of the Bill of Complaint is not a direct and substantial injury to the Commonwealth of Virginia as a sovereign or state, but rather the Commonwealth presents herself as a representative of the alleged rights of this limited group of individuals engaged in fishing and oystering. Recently, in the case of *Arkansas v. Texas*, 346 U. S. 368, 98 L. Ed. 80, this Court said:

"In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction, we of course look behind and beyond the legal form in which the claim of the State is pressed. We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest."

Again, in the case of *Oklahoma ex rel. Johnson v. Cook*, 304 U. S. 387, 82 L. Ed. 1416, this Court stated the principle that the interest of the State in its sovereign capacity must be paramount, and that this Court will not invoke its original jurisdiction for the mere protection of a group of citizens, even though the State asserts an economic interest.

In *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347, this Court held that in order to maintain an action upon original jurisdiction, the controversy must arise directly between the State of Louisiana and the State of Texas, and must not be a controversy in vindication of the grievances of particular individuals. This rule has been applied in *Massachusetts v. Missouri*, 308 U. S. 1, 84 L. Ed. 3, as well as in *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656, where in each

case the Court refused to invoke its original jurisdiction when a state in fact sued for the benefit of its citizens or to enforce the individual rights of its citizens.

It is, therefore, respectfully urged that this Court will not permit the Commonwealth of Virginia to proceed since it clearly appears that the Commonwealth of Virginia is actually suing on behalf of private interests and individual citizens rather than as a sovereign entity.

#### IV.

**The Bill of Complaint Does Not Allege Any Facts to Show That the Action of the State of Maryland in Enacting Chapters 766 and 770 of the Laws of 1957 Invades Any Vested Property Right of the Commonwealth of Virginia.**

The boundary between Maryland and Virginia has now been established as the low water line on the Virginia shore of the Potomac River. *Maryland v. West Virginia*, 217 U. S. 577, 54 L. Ed. 888; *Washington Airport v. Smoot Sand & Gravel Co.* (4th Cir.) 44 Fed. 2d 342; reversed on other grounds, 283 U. S. 348, 75 L. Ed. 1109; *Miller v. Commonwealth*, 159 Va. 924, 166 S. E. 575; *Barnes v. State of Md.*, 186 Md. 287, 47 A. 2d 50; cert. den. 329 U. S. 754, 91 L. Ed. 650. The soil below low water mark is the subject of exclusive property and ownership of the state on whose maritime border and within whose territory it lies. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Den v. Jersey Co.*, 15 How. 426, 14 L. Ed. 757. This soil is held by the state subject to the enjoyment of certain privileges, among which is the common liberty of taking fish. In *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269, this Court had before it a conservation act of Maryland relating to the taking of oysters in any waters of the State of Maryland. Its purpose was to prevent the taking of oysters with any instrument other than tongs or rakes, similar to the provision of present

Sub-section (d) of Section 306 of Article 66C of the Annotated Code of Maryland (1957 Supp.) and part of Chapter 770 of the Acts of Maryland of 1957. This Court held at page 271 (L. Ed.):

“The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held.”

The State of Maryland, by virtue of the Compact of 1785, never relinquished the trust imposed upon it to conserve the public right of fishery on the Potomac River. The concession granting unto the Commonwealth of Virginia the right to unite in legislation was for the purpose of preserving friendship and harmony between the two states in the field of preservation and conservation of natural resources. However, as the preamble of Chapter 766 of the Laws of Maryland of 1957 recognizes, friendship and harmony have not existed in the enforcement of the conservation laws on the River, and that it thus became necessary for the State of Maryland to protect its property. In *Illinois Central Railroad Company v. People of the State of Illinois*, 146 U. S. 1018, 36 L. Ed. 387, this Court has recognized that navigable waters are property held by the State by virtue of its sovereignty in trust for the people, and that this trust cannot be alienated or transferred to others. It is thus clear that the concession to Virginia was never to be in perpetuity, but rather to exist only so long as the purposes for which it was enacted, namely the preservation and conservation of fish, were fulfilled.

The State of Maryland, acting in its sovereign capacity, had the right to protect its property without the concurrence of the Commonwealth of Virginia, in light of the failure of the Commonwealth of Virginia to act for the purpose of proper conservation of the natural resources of the Potomac River.

### CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Court should deny the Complainant's Motion for Leave to File its Bill of Complaint.

Respectfully submitted,

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**Proof of Service**

I, C. Ferdinand Sybert, Attorney General of the State of Maryland, Defendant herein, and a member of the Bar of the Supreme Court of the United States, certify that on this 12th day of November, 1957, I personally mailed copies of the foregoing Opposition to Plaintiff's Motion for Leave to File its Bill of Complaint, and Brief in support thereof, to Kenneth C. Patty, Esq., Attorney General of the State of Virginia, State Capitol, Richmond, Virginia.

C. FERDINAND SYBERT,  
Attorney General of Maryland.





