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JOHN T. FEY, Clerk

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

BRIEF FOR THE COMPLAINANT IN SUPPORT

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No. 12, ORIGINAL

COMMONWEALTH OF VIRGINIA,
Complainant

v.

STATE OF MARYLAND
Defendant

On the Motion for Leave to File Bill of Complaint

BRIEF FOR THE COMPLAINANT IN SUPPORT

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 and unenforceable 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. The Commonwealth of Virginia files this brief in Support of its Motion for Leave to File a Bill of Complaint.

QUESTIONS PRESENTED

The Motion for Leave to File a Bill of Complaint and Opposition thereto, in the opinion of the State of Maryland, presents 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?

“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

In 1785 the Commonwealth of Virginia and the State of Maryland formally adopted the Compact of 1785 and that Compact contains the following provision:

“These Articles shall be laid before the legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed, or altered, by either, without the consent of the other.”

The Compact provides that the citizens of each State shall have full property in the shores of the Potomac River

adjoining their lands, but the right of fishing in the river shall be common to, and equally enjoyed by the citizens of both States. The Compact further provides that all laws and regulations which may be necessary for the preservation of fish, or for performance of quarantine, or for preserving and keeping open the channel and navigation in the Potomac River shall be made with the mutual consent and approbation of both States.

Since the ratification of the Compact of 1785 by the Commonwealth of Virginia and the State of Maryland, fishing, oystering and crabbing in and on the Potomac River have been jointly regulated by the officials of the Commonwealth of Virginia and the State of Maryland acting under authority conferred by and in conformity with concurrent laws enacted by and concurred to by legislatures of both States.

Among the several laws regulating fish and shellfish enacted by and concurred in by the legislatures of both States is one providing that if a citizen of either State has a valid license issued by his State to fish, or oyster, or crab, then that person may fish, oyster, or crab in the Potomac River without having to acquire a license from the other State.

The session of the General Assembly of the State of Maryland begun and held in the City of Annapolis on the 2nd day of January, 1957, and ending on April 1, 1957, enacted an Act designated as Chapter 766 of the Acts of General Assembly of Maryland of 1957, approved by the Governor of Maryland on April 15, 1957, to become effective on June 1, 1957, repealing Chapter 1 of the Acts of Assembly of Maryland of 1785, said Act constituting the ratification by the State of Maryland of the Compact of 1785. At the same 1957 Session of the General Assembly of

Maryland, the General Assembly of Maryland enacted an Act designated as Chapter 770 of the Acts of the General Assembly of Maryland of 1957, which Act by its title is "An act to repeal and reenact, with amendments, * * * the so-called Concurrent Laws concerning the taking of fish, oysters, crabs and clams from the Potomac River in order to vest all the licensing provisions concerning the Potomac River in the State of Maryland and to give to the State of Maryland and its law-enforcement officers complete control and jurisdiction over such fisheries in the Potomac River. * * *"

Since June 1, 1957, any citizen of the Commonwealth of Virginia who wished to extract fish, oysters or crabs from the Potomac River has been forced by Maryland law enforcement officers to purchase a Maryland license in order to prevent being arrested and harassed by Maryland officers, even though the Virginia citizens already had a valid license issued by the Commonwealth of Virginia to extract fish, oysters or crabs from the Potomac River.

ARGUMENT

I.

The Bill of Complaint on Its Face States a "Case" or "Controversy" Within the Scope of Article III, Section 2, of the Constitution of the United States, and, Therefore, This Honorable Court Has Jurisdiction.

Paragraphs XIII and XIV of the Bill of Complaint allege an actual or presently threatened interference with the rights of the Commonwealth of Virginia and its citizens by the State of Maryland, therefore, this Honorable Court has jurisdiction over the parties and subject matter of the suit. *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed 497.

The Compact of 1785 was ratified and approved by both States and among other provisions it contained the following:

“Eighth. All laws and regulations which may be necessary for the preservation of fish, * * * in the river Potowmack [Potomac], * * * shall be made with the mutual consent and approbation of both States.”

“II. BE IT ENACTED, by the General Assembly of Maryland, that the said Compact is hereby approved, confirmed and ratified * * * and the faith and honour of this State is hereby solemnly pledged and engaged to the General Assembly of the Commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by the legislature of this government without the consent of the government of Virginia.”

A compact between two states is a contract, as this Honorable Court held in the case of *Green, et al v. Biddle*, 8 Wheat. 1, 92, 5 L. ed. 547, 570:

“A slight effort to prove that a compact between two states is not a case within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky is a contract. In fact, the terms compact and contract are synonymous; and in *Fletcher v. Peck* the Chief Justice defines a contract to be a compact between two or more parties.”

In the above cited case of *Fletcher v. Peck*, 6 Cranch, 87, 136, 137, 3 L. ed. 162, 178, Chief Justice Marshall, in an unanimous opinion of the Court said:

“Contract is a compact between two or more parties, and either is executory or executed.”

When the Commonwealth of Virginia and the State of Maryland ratified the Constitution of the United States they, by mutual, bilateral action, agreed to and did alter the Compact by agreeing that Articles 1 through 6, 9 and 12 of the Compact were no longer in effect and that the power, authority and right which the two States had reserved unto themselves were from then on conveyed to and vested in the Federal Government. This Court had a similar question presented to it in the case of *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782, 783. This Honorable Court held:

“After the Treaty between the two states was made, both the parties to it became members of the United States. Both adopted the Federal Constitution, and thereby joined in delegating to the General Government the right to ‘regulate commerce with foreign nations, and among the several states.’ Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as between themselves or against others, they both agreed that Congress might thereafter do everything which is within the power thus delegated.”

The altering of the Compact by the mutual action of each State in no way affected, altered or changed the other provisions of the Compact. These were recognized and complied with by both States and also recognized by the

courts. *Wharton v. Wise*, 153 U. S. 155, 38 L. ed. 668; *Barnes v. Maryland*, 186 Md. 287, 47 Atl. 2nd 50; *Biscoe v. Maryland*, 68 Md. 294, 12 Atl. 25; *State v. Hoofman*, 9 Md. 29; *Hendricks v. Virginia*, 75 Va. 834.

In 1957 the General Assembly of Maryland enacted and the Governor approved Chapters 766 and 770 of the Acts of Assembly of Maryland of 1957. The first is an unilateral attempt to repeal the Compact; the second, in the language used by the General Assembly of Maryland in the title amends "the so-called Concurrent Laws concerning the taking of fish, oysters, crabs and clams from the Potomac River in order to vest all the licensing provisions concerning the Potomac River in the State of Maryland and to give the State of Maryland and its law-enforcement officers complete control and jurisdiction over such fisheries in the Potomac River."

The Commonwealth of Virginia is not presenting abstract questions respecting the rights of the Complainant State and her citizens to use the Potomac River in the indefinite future. At present, today, officers of the State of Maryland, acting pursuant to the recently enacted statutes of the State of Maryland, are requiring citizens of Virginia who have been duly licensed by the Commonwealth of Virginia to purchase Maryland licenses before they may take fish or shellfish from the Potomac River. If they do not purchase such licenses, they cannot take fish or shellfish from the Potomac River without being subject to arrest by Maryland officers and formally charged with violating the laws of the State of Maryland regulating fish and shellfish in the Potomac River, which laws have not been consented to or concurred in by the General Assembly of the Commonwealth of Virginia.

This Court in the case of *Green, et al v. Biddle, supra*, in declaring a statute of the State of Kentucky unconstitutional because it was in conflict with the provisions of a Compact between Kentucky and Virginia held:

“Having thus endeavored 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 that case [*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. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that state, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure.” (8 Wheat. 91-93, 5 L. ed. 570)

Chapters 766 and 770 of the Acts of Assembly of Maryland of 1957 not only impair the obligation of a contract, but attempt to completely nullify and destroy a contract which has been in existence for one hundred and seventy-two years. An actual controversy exists between the Commonwealth of Virginia and the State of Maryland and,

therefore, this Honorable Court has jurisdiction over the instant suit and should grant the Commonwealth of Virginia leave to file its Bill of Complaint. *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497.

II.

Virginia Does Have a Direct and Substantial Property Interest in These Proceedings; However, Such Property Interest Is Not Necessary to Maintain This Suit.

Your Complainant admits that the State of Maryland has title to the bed of that portion of the Potomac River which is in the State of Maryland, but, there are other property rights and interests connected with the Potomac River in addition to ownership of the bed of the River. In the case of *Yates v. Milwaukee*, 10 Wall. (77 U. S.) 497, 19 L. ed. 984, 986, this Honorable Court held:

“This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.”

In regard to fishing rights, this Court has held:

“There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people

of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship." *McCready v. Virginia*, 94 U. S. 391, 395, 24 L. ed. 248.

"Evidently the right of fishery, as well as the right to use the water of a stream for mill purposes, is the subject of private ownership, and when held by a good title, the one as much as the other is a vested right, and both alike are entitled to public protection, and are subject, in a certain sense, to legislative regulation and control." *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133, 137.

Section seven of the Compact guaranteed to the citizens of each State full property in the shores of the Potomac River adjoining their lands, emoluments and advantages there unto belonging with the right of fishing in the river common to, and equally enjoyed by, the citizens of both states. Section eight of the Compact contains provisions relating to the requirement for mutual agreement with respect to all laws and regulations affecting fishing rights. The Commonwealth of Virginia has a direct and substantial property right and interest in these proceedings, for Maryland in attempting to unilaterally repeal the Compact of 1785 is interfering with and materially affecting the riparian and fishing rights of the Commonwealth of Virginia and its citizens, both of which rights are property rights.

Although the Commonwealth of Virginia has direct and substantial property rights and interest in these proceedings, such rights and interest are not necessary in order for the Commonwealth of Virginia to invoke the original jurisdiction of this Honorable Court in this suit. In the case of *Missouri v. Illinois*, 180 U. S. 208, 240, 241, 45 L. ed. 497, 512, this Honorable Court held:

“The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which controversies may arise, and for which the Constitution has provided a remedy, and it would be objectionable, and indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

“An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provision we are considering.”

The Commonwealth of Virginia is of the opinion that the above-quoted opinion of this Honorable Court is correct and relieves a state of the necessity to show that it has a direct, substantial property interest or right in the proceedings in order to invoke the original jurisdiction of this Honorable Court.

III.

The Commonwealth of Virginia Is the Real Party in Interest in This Proceeding and the Bill of Complaint Alleges Direct and Substantial Injury to the Commonwealth of Virginia As a State.

Chapter 766 of the Acts of Assembly of Maryland of 1957 constitutes an attempt by the State of Maryland to breach and abrogate a compact between the State of Maryland and the Commonwealth of Virginia. The Commonwealth of Virginia, in its sovereign capacity as a state, is a party to the Compact, not a limited group of individuals who are citizens of Virginia.

Chapter 770 of the Acts of Assembly of Maryland of 1957 constitutes an attempt to take from the Commonwealth of Virginia as a sovereign state, any and all rights, powers, and authority which the Commonwealth has over licensing and regulating the taking of fish or shellfish from the Potomac River "in order to vest all the licensing provisions concerning the Potomac River in the State of Maryland and to give to the State of Maryland and its law-enforcement officers complete control and jurisdiction over such fisheries in the Potomac River." This action by the State of Maryland constitutes a direct and substantial injury to the Commonwealth of Virginia as a sovereign or state. This action by the State of Maryland today, at present, also interferes with the rights of private citizens of Virginia who take oysters from the Potomac River as a means of livelihood.

These oystermen are most affected this fall, since the oyster season commenced on September 15th, 1957. In the spring many more citizens of Virginia will be affected by this action by the State of Maryland when the finfish season reaches its height and when the crab season begins. In invoking the original jurisdiction of this Honorable Court,

a state in addition to allegations alleging injury to its rights and interest as a sovereign and state, may also allege and show how the same act or offense of a sister state inflicts injury upon the rights of its citizens. The attitude of the Commonwealth of Virginia in these proceedings is the same as the complainant states in the case of *Pennsylvania v. West Virginia*, 262 U. S. 553, 591, 592, 67 L. ed. 1117, 1130, where this Court said:

“The attitude of the complainant states is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a twofold interest,—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury. * * *

“The private consumers in each state not only include most of the inhabitants of many urban communities, but constitute a substantial portion of the state’s population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.”

The Commonwealth has a two-fold interest in these proceedings. The first is that it, in its sovereign capacity as a state, is a party to the Compact and now the State of Maryland, the other party to the Compact, seeks to breach and

abrogate the Compact. The second is that as the representative of the public, who as citizens of Virginia, were guaranteed certain riparian and fishing rights in the Potomac River, among which was one which provided that they would only have to comply with those laws and regulations for the preservation of fish which were made with the mutual consent and approbation of both States. Now the State of Maryland is illegally and unlawfully forcing the citizens of Virginia to comply with laws and regulations purportedly enacted for the preservation of fish in the Potomac River which have not been enacted or made with the mutual consent and approbation of the Commonwealth of Virginia.

In discussing this issue in the case of *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. ed. 347, 353, this Honorable Court said:

“But in order that a controversy between states, justifiable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though *they may*, with the consent of Congress, *make compacts and agreements. Where there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained is state action*, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.” (Italics supplied)

In the instant proceedings there is an agreement between the Commonwealth of Virginia and the State of Maryland, the Compact of 1785. There is a breach by the State of Maryland, Chapters 766 and 770 of the Acts of Assembly

of Maryland of 1957; therefore, there is a controversy between Virginia and Maryland.

IV.

The Bill of Complaint Alleges Action by the State of Maryland Which Invades Vested Property Rights of the Commonwealth of Virginia; However, Such Allegation Is Not Necessary to Invoke the Original Jurisdiction of This Honorable Court.

The Compact of 1785 vested in the Commonwealth of Virginia and its citizens, among other things, certain riparian and fishing rights in the Potomac River. These rights, as has been shown by the second point of Argument in this brief, are property rights. In enacting Chapters 766 and 770 of the Acts of Assembly of Maryland of 1957, the State of Maryland is attempting to invade, revoke, and nullify these property rights which have been vested in the Commonwealth of Virginia and its citizens for at least one hundred and seventy-two years. In ratifying the Compact of 1785 the State of Maryland granted to the Commonwealth of Virginia and its citizens certain riparian and fishing rights in the Potomac River. In the case of *Fletcher v. Peck*, 6 Cranch 87, 137, 138, 3 L. ed. 162, 178, this Honorable Court concerning grants by a state, said:

“A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant. * * *

“If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? * * *

“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.”

In *Green, et al v. Biddle*, 8 Wheat. 1, 88, 89, 5 L. ed. 547, 568, this Honorable Court said:

“Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was, that if it be so construed as to deny to the legislature of Kentucky the right to pass the act in question, it will follow that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive why the admission of the conclusion involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement, that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that state, contains a plain, intelligible proposition, about the meaning of which it is impossible there can be two opinions. Can the government of Kentucky fly

from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the state, in some other respect? The court cannot perceive how this proposition could be maintained."

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that a controversy exists between the Commonwealth of Virginia and the State of Maryland which is sufficient to invoke the original jurisdiction of this Honorable Court, and, therefore, the Complainant's Motion for Leave to File its Bill of Complaint should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, C. F. Hicks, Assistant Attorney General of the Commonwealth of Virginia, Complainant herein, and a member of the Bar of the Supreme Court of the United States, certify that on this 27th day of November, 1957, I personally mailed copies of the foregoing brief for the Complainant in Support of Motion for Leave to File Bill of Complaint to Honorable C. Ferdinand Sybert, Attorney General of the State of Maryland, Mathieson Building, Baltimore 2, Maryland.

C. F. HICKS
Asst. Atty. General of Virginia

