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JOHN T. PEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957-1958

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No. 12 ORIGINAL

COMMONWEALTH OF VIRGINIA,

Complainant,

v.

STATE OF MARYLAND,

Defendant.

ANSWER TO BILL OF COMPLAINT

C. FERDINAND SYBERT,

Attorney General of Maryland,

JOSEPH S. KAUFMAN,

Asst. Attorney General
of Maryland,

EDWARD S. DIGGES,

Spec. Asst. Attorney General
of Maryland,

Counsel for Defendant.

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Now comes the State of Maryland, Defendant, by its Attorney General, and for its answer to the Bill of Complaint of the Commonwealth of Virginia filed by leave of this Honorable Court, shows as follows:

I.

That the State of Maryland denies the allegations of Paragraph I of the Bill of Complaint, as it appears from 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.

II.

That the State of Maryland admits the allegations in the first sentence of Paragraph II of the Bill of Complaint, and further states that the State of Maryland is the sole and undisputed owner of the Potomac River and the lands beneath its water, extending to the low water mark of the south or Virginia shore thereof. The State of Maryland emphatically denies the allegations in the second sentence of Paragraph II, and further answering said sentence, states that the Compact of 1785 between the Commonwealth of Virginia and the State of Maryland does not grant unto the owners of the property along the south or Virginia shore of the Potomac River any riparian or property rights whatsoever in the Potomac River or its bed.

III.

The State of Maryland has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph III of the Bill of Complaint, and further states that the allegations are immaterial, unnecessary and irrelevant, as the Bill of Complaint does not pray for an adjustment or modification of the boundaries between the Commonwealth of Virginia and the State of Maryland.

IV.

That the State of Maryland admits the allegations in the first sentence of Paragraph IV of the Bill of Complaint, and is without knowledge of the historical facts averred in the remaining portions of said paragraph, and further states that the said allegations and historical facts are immaterial, unnecessary and irrelevant to the relief prayed by the Commonwealth of Virginia.

V.

That the State of Maryland admits the facts alleged in sub-paragraphs one and two of Paragraph V of the Bill of Complaint and admits the last sub-paragraph thereof, but is without sufficient knowledge of the historical facts averred in the remaining portions of said Paragraph V as to form a belief as to the truth thereof, and further states that the allegations and facts so set forth are immaterial, unnecessary and irrelevant to the relief prayed by the Commonwealth of Virginia.

VI.

That the State of Maryland admits that the Black-Jenkins (Boundary) Award of 1877 firmly established that the boundary line between the State of Maryland and the Commonwealth of Virginia is the low water mark of the south or Virginia shore of the Potomac River, and that the State of Maryland is the sole and undisputed owner of the Potomac River and its bed to the low water mark of the south or Virginia shore thereof. The State of Maryland emphatically denies that the Commonwealth of Virginia has any rights whatsoever in and to the Potomac River or the bed thereof beyond the low water mark of the south or Virginia shore thereof, by reason of the Compact of 1785 or by the Black-Jenkins (Boundary) Award of 1877.

All allegations of Paragraph VI of the Bill of Complaint not specifically admitted are denied.

VII.

That the State of Maryland admits that it entered into a Compact known as the "Compact of 1785" with the Commonwealth of Virginia ". . . to regulate and settle the jurisdiction and navigation of Potowmack (Potomac)

and Pocomoke Rivers and that part of the Chesapeake Bay which lieth within the territory of Virginia". That the State of Maryland admits that all articles of the Compact relating to maritime matters on the waters covered in said Compact of 1785 were superseded by the provisions of the Federal Constitution; and further answering said allegations, the State of Maryland believes and therefore avers that since the ratification of the Federal Constitution of 1789 there has been a total and complete failure of consideration flowing to the State of Maryland as the Compact contemplated that the Commonwealth of Virginia would abolish her asserted right to collect tolls from vessels entering the Chesapeake Bay through the Virginia Capes for Maryland ports. The States, in ratifying the Federal Constitution, relinquished all right to regulate navigation and commerce.

Further answering Paragraph VII of the Bill of Complaint, Article 10 of the Compact of 1785 is no longer operative since that Article by its express provisions is applicable to those portions of territory where the boundary lines of the two states is doubtful, and that the Black-Jenkins (Boundary) Award has established the boundary line between the two states beyond question. (See *Barnes v. State*, 186 Md. 287, 47 A. 2d 50, cert. den. 329 U.S. 754, 67 S. Ct. 95, 91 L. Ed. 650.) Further answering Paragraph VII of the Bill of Complaint, Article 11 of the Compact of 1785 is no longer operative, since that Article has been superseded by the admiralty jurisdiction of the United States contained in Article III, Section 2 of the Constitution of the United States.

Further answering Paragraph VII of the Bill of Complaint, the State of Maryland denies that Article 13 of the Maryland Act (Chapter 1, Laws of Maryland of 1785) is identi-

cal to the Virginia enactment, but, in addition, contains the following important language appearing in italics, namely:

“* * * And whereas this general assembly are of opinion, that the said compact is made on just and mutual principles, for the true interest of both governments, *and if executed with good faith, will perpetuate harmony, friendship and good offices, between the two states, so essential to the prosperity and happiness of their people,*”

Further answering Paragraph VII of the Bill of Complaint, the State of Maryland avers and believes, as indicated in the preamble to Chapter 766 of the Laws of Maryland of 1957, that the condition subsequent requiring that the Compact of 1785 be executed “with good faith” has not been honored by the Complainant as is more fully set forth in Paragraph XI of this Answer.

All averments of Paragraph VII of the Bill of Complaint not specifically admitted are denied.

VIII.

In answering the first sentence of Paragraph VIII of the Bill of Complaint, the State of Maryland admits the adoption of the Compact of 1785, but denies that it has been mutually observed for a period of 172 years, in that the Commonwealth of Virginia has effectively breached the spirit and letter of the Compact of 1785, causing a complete abrogation thereof, and the State of Maryland further alleges that the Commonwealth of Virginia has used the Compact of 1785 as a cloak to cover the illegal depletion of the valuable natural resources of the Potomac River. In answering the second sentence of Paragraph VIII of the Bill of Complaint, the State of Maryland admits that the Compact was entered into with mutual expressions of good

will, faith and honor, and in further answering said allegations the State of Maryland avers that the Commonwealth of Virginia and its citizens have not maintained the good will, faith and honor expressed by their predecessors and have constantly disregarded the sovereign rights of the State of Maryland in the Potomac River.

In answering the third and fourth sentences of Paragraph VIII of the Bill of Complaint, the State of Maryland admits that there have been many concurrent laws enacted over a long period of years, but states that it is now and has been for more than 10 years the policy of the State of Virginia to ignore the previously enacted concurrent legislation and to give legislative sanction to illegal and unlawful methods of acquiring the natural resources of the Potomac River.

All allegations of Paragraph VIII not specifically admitted are denied.

IX.

The State of Maryland admits that there have been mutual legislative enactments by both the Commonwealth of Virginia and the State of Maryland for the regulation of fishing in the Potomac River. The State of Maryland has no knowledge or information as to the averment that where said laws have been divergent the Commonwealth of Virginia has regarded them as invalid and ineffectual.

X.

That the State of Maryland admits that the General Assembly of Maryland on April 23, 1945, passed Joint Resolution No. 17 of the General Assembly of 1945, which resolution authorized and directed the Governor of Maryland to appoint a commission to confer and act jointly with a

similar commission of Virginia for the purpose of re-studying the Compact of 1785 and concurrent legislation respecting the fisheries of the Potomac River and the Chesapeake Bay, and to report as to the need for additional legislation with respect thereto and as to the desirability of creating an interstate authority to consider problems in connection with the fisheries of the Potomac River and the Chesapeake Bay. The portion of the resolution printed as part of the Bill of Complaint was taken out of context.

Further answering said paragraph, the General Assembly of Maryland by Chapter 484 of the Laws of 1948 granted its consent, subject to approval by the Commonwealth of Virginia and the Congress of the United States, to the establishment of a Maryland-Virginia Chesapeake-Potomac Authority by adding fifteen new sections to the Compact of 1785 for the purpose of improving the administration and enforcement of the conservation laws of the Potomac River and the Chesapeake Bay. The Commonwealth of Virginia has never consented to the provisions of Chapter 484 of the Laws of 1949 and, therefore, this act was repealed by Chapter 767 of the Laws of 1957.

The State of Maryland admits the passage of Chapter 52 of the Laws of Virginia of 1952, but denies the conclusions inferred in Paragraph X of the Bill of Complaint. All averments of Paragraph X of the Bill of Complaint not specifically admitted are denied.

XI.

In answering Paragraph XI of the Bill of Complaint, the State of Maryland admits the passage of Chapter 766 of the Acts of 1957 and, as stated in the preamble thereof, the State of Maryland has recognized the breach of and the

disrespect for the letter and intent of the Compact of 1785 by the Commonwealth of Virginia and its citizens and has also clearly recognized the desire of the Commonwealth of Virginia and its citizens to disregard, disobey and interfere with the enforcement of laws regulating the acquisition, preservation and conservation of natural resources in the Potomac River; and that in further answering said Paragraph XI of the Bill of Complaint, it is not only the right but the duty of the State of Maryland, as the sovereign owner of the natural resources of the Potomac River, to enact such legislation as is necessary in its judgment to protect and conserve the natural resources of the State of Maryland.

In further answering said Paragraph XI of the Bill of Complaint, the State of Maryland avers that the Commonwealth of Virginia has effectively breached the letter and spirit of the Compact of 1785 by enacting and operating under laws which are contrary to the laws of the State of Maryland relating to the manner and means of acquiring oysters in the Potomac River. The Commonwealth of Virginia and the State of Maryland by concurrent legislation (Acts of Virginia, 1930, Chapter 301; Acts of Maryland, 1931, Chapter 517) prohibited the dredging of oysters in the Potomac River. Nevertheless, by the provisions of the Acts of Virginia of 1946, Chapter 235, the Commonwealth of Virginia has given its legislative sanction to the exhaustive method of oyster acquisition known as "dredging", which method of acquisition would completely and effectively deplete the oyster beds of the Potomac River. That since the passage of said Act of 1946 the Virginia law enforcement officials have repeatedly hindered and failed to cooperate with Maryland law enforcement officers in attempting to halt illegal dredging and have, on occasions, given sanctuary

to Virginia citizens who engaged in unlawful dredging of oysters.

In further answering said Paragraph XI of the Bill of Complaint, the Commonwealth of Virginia has by legislation attempted to discourage and interfere with the proper enforcement of the anti-dredging laws aforementioned by withdrawing its previous consent, established by concurrent legislation, to law enforcement officers of Maryland to pursue offenders upon the tributaries, inlets and creeks of the Potomac River lying within the Commonwealth of Virginia. By the provisions of Chapter 543 of the Acts of Virginia of 1956, the Commonwealth of Virginia has eliminated the italicized words from Section 28-226 of the Virginia Code.

"Sec. 28-226. RIGHT TO EXAMINE INTO RIGHTS OF PERSONS TAKING FISH, ETC.; ARREST OF OFFENDERS. — The authorities of either state shall have the right to examine into the rights of any person taking fish, oysters or crabs in the Potomac river, or having the same in his possession; and any person taking fish, oysters or crabs in the Potomac river or having the same in his possession shall exhibit his authority for so doing, whenever required by the police or other legal authority of either state. The legal authorities of either state shall have the right to arrest any such offender, *and, if necessary in order to arrest, shall pursue such offender beyond the boundary line of either state upon navigable waters and arrest such offender whenever found upon such waters.*"

Further answering said Paragraph XI, the State of Maryland avers and alleges that the Commonwealth of Virginia has continuously permitted and sanctioned illegal oyster dredging and has continuously refused to effectively cooperate in the enforcement of the concurrent laws relat-

ing to the conservation and preservation of these shell fish, and has continuously failed to meet its obligation to the State of Maryland to preserve the natural resources owned by the State of Maryland; that these defaults on the part of the Commonwealth of Virginia amount to a wilful abrogation by said Commonwealth of the Compact of 1785 and the concurrent laws enacted thereunder.

In further answering said Paragraph XI, the State of Maryland admits that due to said abrogation by the Commonwealth of Virginia, the General Assembly of Maryland passed a uniform system of laws relating to the conservation of its natural resources in the Potomac River, which grants unto 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.

All facts not specifically admitted in Paragraph XI of the Bill of Complaint are denied.

XII.

The State of Maryland has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph XII of the Bill of Complaint, and demands strict proof of the facts alleged.

XIII.

That in answering Paragraph XIII of the Bill of Complaint, the State of Maryland denies that the Commonwealth of Virginia has at all times maintained at least two patrol boats, with five enforcement officers, on the Potomac

River, and that the Commonwealth of Virginia has maintained at least four patrol boats, with at least ten enforcement officers, on the Potomac River during oyster season; and further answering said Paragraph, the State of Maryland avers and alleges that it has been the policy of the Commonwealth of Virginia not to enforce the laws relating to conservation of oysters in the Potomac River.

The State of Maryland has no knowledge of the number of arrests by the Commonwealth of Virginia for violations of the concurrent laws relating to the taking of fish, oysters and crabs in the Potomac River, nor does it have knowledge of the expenditure of sums for the maintenance of patrol boats and law enforcement officers in the Potomac River.

In answering the last sub-paragraph of Paragraph XIII, the State of Maryland denies that as a result of the enactment and operation of Chapter 770 of the Laws of Maryland of 1957, there is any hardship on the citizens of Virginia who annually engage in tonging for oysters on the Potomac River as a means of livelihood, and denies all other matters in said sub-paragraph.

XIV.

That the State of Maryland emphatically denies the allegations of Paragraph XIV of the Bill of Complaint.

And further answering said Bill of Complaint, the State of Maryland believes and therefore avers and alleges that the Compact of 1785 as relied upon by the Complainant lacks consideration to the State of Maryland, lacks mutuality, and is unequitable; and the State of Maryland further states that it would be against the principles of equity to grant the relief prayed by the Commonwealth of Virginia.

WHEREFORE, having fully answered the Bill of Complaint, the State of Maryland prays that the Bill of Complaint be dismissed with appropriate costs.

Respectfully submitted,

C. FERDINAND SYBERT,
Attorney General of Maryland,

JOSEPH S. KAUFMAN,
Asst. Attorney General
of Maryland,

EDWARD S. DIGGES,
Spec. Asst. Attorney General
of Maryland,

Counsel for Defendant.

STATE OF MARYLAND, CITY OF BALTIMORE, To WIT:

Theodore R. McKeldin, being first duly sworn, upon his oath deposes and says, that he is the duly elected and qualified Governor of the State of Maryland; that he has read the foregoing Answer and knows the contents thereof; and that the facts stated therein are true to the best of his information, knowledge and belief.

THEODORE R. MCKELDIN,
Governor of Maryland.

Sworn to before me this 17th day of February, 1958.

.....,
Notary Public.

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 17th day of February, 1958, I personally mailed copies of the foregoing Answer to Bill of Complaint to Albertis S. Harrison, Jr., Esq., Attorney General of the State of Virginia, State Capitol, Richmond, Virginia.

C. FERDINAND SYBERT,
Attorney General of Maryland.

