Supreme Court of the United States

OCTOBER TERM, 1950

No. 12 ORIGINAL

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

BRIEF OF AMICUS CURIAE ON MOTION FOR REHEARING.

FRANK J. LOONEY

LECOMTE, SHREVEPORT, LOUISIANA

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The purpose of this brief is to call to the attention of the Court authorities not noticed by the Court in its decisions in the suits brought by the United States against the State of Louisiana.

Justice Story in 1812, in the case of *The Ann. F. C. 397* wrote: "*All the writers* upon public law *agree* that *every* nation has *exclusive jurisdiction to the distance of a cannon shot* over the waters adjacent to its shores." (All emphasis herein is that of this writer.)

He cited Bynkershoek (whom Justice Iredell, in Ware v. Hylton, called "a great authority").

He published the book quoted by Justice Story in 1737, fifty years before our Constitution was written and forty, less one, before the Declaration of Independence.

Justice Story quoted Azuni. Azuni quotes Bynkershoek as declaring the marginal belt to be one league. Azuni himself advocates extending this to two leagues.

Azuni cites treaties entered into many years before 1794, (the date given in the California Case, for establishment of the 3 mile limit) in which the Marine league was acknowledged.

The Supreme Court, in its note No. 10, in the California Case, gives Azuni as an authority for its holding that the Treaty between the U. S. and Great Britain in 1794 first established the 3 mile belt, naming an edition of 1806. Since this date is prior to 1812 when The Ann was decided, Justice Story must have known of that edition but he makes no mention of the authority of a treaty of 1794.

Justice Story does cite, however, the decision of Chief Justice Marshall in Church v. Hubbart, 2 Cranch 187, 237, which held, "The authority of a Nation within its own territory is absolute and exclusive. The seizure of a vessel within *the range of its cannon shot* by a foreign force is *an invasion* of that territory, and is an hostile act which is its duty to repel."

We find the Attorney for Church arguing (p. 199) as follows: "*By the law of Nations* territorial jurisdiction *can extend only to the distance of a cannon shot* from the shore." Vattel b. 1, c. 23, s. 280, 89."

Counsel for defendant (2 Cr. 226) said "But every nation has a right to appropriate *to her own* use a portion

of the sea about her shores." And Chief Justice Marshall said p. 234 "The authority of a nation within *its own territory* is absolute and exclusive. Etc."

In an opinion which evidenced great study the District Court in the case of "The Grace and Ruby" in 283 Fed. on pp. 477-8 said: "Church v. Hubbart has never been overruled" — (This was before the California decision).

In Corfield v. Coryell, FC 3,230, decided by Justice Washington, that the marine belt belonged to New Jersey is clearly and tersely stated in these words: "If the Bay, Delaware, was not granted by the Duke of York to Lord Berkeley and Sir George Curtis, then it remained in the grantor, and became vested in him as King, upon his accession to the Crown, and by the revolution, one half, *or at least* to the extent of *a league from the Coast*, became vested in New Jersey."

It will be noted — this is to be found in the grant of Charles II to his brother the Duke of York — and it is recited in the Corfield Case in 6 Fed. Cases p. 553 — the grant included "is lands, soils * * waters * * and *all other royalties* x x to the same belonging and appertaining."

Corfield v. Coryell has been cited times innumerable by the Supreme Court and other Federal Courts and this applies especially to that section reported 6 Fed. Cas. 551 in these words "The grant to Congress to *regulate commerce* on the navigable waters belonging to the several states, renders these waters the *public property* (i. e. *The*

paramount right) 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 closed."

This decision was rendered 39 years after the treaty with Great Britain, by a Justice who sat on the Court from 1798 and was thoroughly familiar with the construction and effect of the treaty signed in 1794, but never once mentioned it in his opinion.

II

These decisions have concluded the right of the United States to raise a question as to the sovereign rights of the original States to the Marine League limit.

However, other decisions rendered by the Court when Marshall was Chief Justice fortify this right.

In Rose v. Himely, 4 Cranch 241, 273-4, the Supreme Court of the United States recognized French decrees as to the seizure of "vessels * * at a less distance than *two leagues* from the Coast," in the words of Chief Justice Marshall on p. 274 "*Nothing can be more obvious* than that these are *strictly territorial regulations* proceeding from the Sovereign power of San Domingo, and *intended to enforce Sovereign rights.*" He continues: "Seiz-

ure for a breach "of this law is to be made only within those limits over which the Sovereign claimed a right to legislate, *in virtue of that exclusive dominion which every nation* possesses within its own territory and *within such a distance from the land as may be considered a part of its territory.* This power is the same in peace as in war."

In Hudson v. Guestier, 6 Cranch 281, 284 — Justice Livingston said, "Considering, then, as settled that the French tribunal had jurisdiction of property seized under a Municipal regulation, *within the territorial* jurisdiction of the Government of San Domingo, it only remains, etc."

In another case with a similar name to that decided by Justice Story but spelled "The ANNE, Barnabeau — Claimant" 3 Wheaton 435, Claimant's counsel, Harper on p. 437, argued, "The text writers affirm the immunity of the neutral territory from hostile operations in its ports, bays and harbors, and within range of cannon-shot along its coasts," citing (in A. D. 1818) Vattel, Bynkershoek, Martens, and Azuni (It is significant that 24 years after the British Treaty it was not referred to, as it was not in the other cases). Justice Story as the organ of the Court, said, p. 445 — "and without entering into a minute examination, in this conflict of testimony, we are of the opinion that the weight of the evidence is, decidedly that the capture was made *within the territorial limits of Spanish San Domingo.*"

Thus it is clearly demonstrated that the marginal belt *to the* distance *of a cannon shot* or reasonably further

was and *is the exclusive territory* of the adjacent Coastal Nation or colonial possession.

III

The Supreme Court, in the California Case, referred to the letters of Jefferson of date Nov. 8, 1783, and the brief of the State of Louisiana opposing "The Motion for Judgment" called attention in a note numbered 7, page 64 of brief to the language of the letters addressed to the British and French Ministers. This reference being "to the distance of one sea league" of which Jefferson wrote on Nov. 8, 1783, "*This distance can admit of no opposition* * * it is as *little, or less than is claimed by any of them on their own Coasts.*"

> "Hence resulted the principles laid down in Harcourt v. Galliard, 12 Wheaton 526, that *the boundaries of the United States were the external boundaries of the States;* and that *the United States did not acquire any territory by the Treaty of Paris in 1783.*" (R. I. vs. Mass., 12 Peters 729).

Under note 16 of the California Case we read, "Secretary of State Jefferson in a note to the British Minister, in 1783, pointed to the nebulous assertion of territorial rights in the marginal belt."

Was the letter which Jefferson wrote to Governor Morris, our Minister to Great Britain, of an earlier date, viz — Aug 16, 1783, nebulous? Referring to the three vessels captured by the French from the British, he wrote:

"The Williams is said to have been taken within 2 miles of the United States * * * The Brig Fanny was alleged to have been taken within 5 miles of our shore; The Catherine within 2 miles and ½." It is an essential attribute of every country to preserve peace, to punish acts in breach of it, and restore property taken by force, *within its limits.*"

2 miles; 2½ miles; and 5 miles, Jefferson held to be within our limits.

In that same letter of Aug. 16, 1783, he wrote "Accordingly, this right of protection *within its waters and to a reasonable* distance on the Coasts, has been *acknowledged by every nation* and *denied* by none."

IV.

BOUNDARY

Throughout the trial the Solicitor General insisted that the United States v. Louisiana was not in any way a boundary suit. In his appearance before the Committee considering Senate Res. 185 he stated that this act must be passed to cover the interim until the Supreme Court would decide *the question of boundaries* of the littoral States, which was to be done as a result of the Court's decision and in the same proceedings without the necessity of filing a boundary suit.

All admit that the submerged lands involved in the suits against Louisiana and Texas are in the Gulf of Mexico.

All must admit that the boundaries of Louisiana and Texas as claimed by those States extend into the Gulf of Mexico.

The government would place the submerged lands of the Gulf of Mexico, as far as they may be described in the respective suits, in the United States, but out of Louisiana and Texas.

The Court, in the Louisiana Case states, "We intimate no opinion on the power of a State to extend, define or establish its external territorial limits or on the consequence of such an extention vis a vis persons other than the United states or those acting on behalf of or pursuant to its authority. *The matter of State boundaries has no bearing on the present problem.*"

If the State has the power to extend its littoral boundaries, by doing so its extends the boundaries of the United States; for the Supreme Court has held in Harcourt v. Galliard, 12 Wheaton 526 and in Rhode Island v. Massachusetts, 12 Peters, that "The boundaries of the United States were the external boundaries of the States," and that the United States did not acquire any territory by the Treaty of Paris in 1783." 12 Peters 729. And "No State should be deprived of property for the benefit of the United States, 1 Laws US 17."

V.

We ask the attention of the Court to the first article of the Treaty of Cession from France to the United States.

It recites that the Treaty of St. Ildephonso required the retrocession by Spain to France of "the Colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other States."

"The first consul of the French Republic (Napolean Bonaparte) doth hereby cede to the United States, in the name of the French Republic, for ever and *in full sovereignty*, the said territory, *with all its rights and appurtences.*"

The Southern portion of this territory became the Territory of Orleans and then the State of Louisiana. Whereupon Congress definitely described the State as bounded by the Gulf of Mexico, following the Language of the Louisiana Constitution, which in Louisiana and Mississippi 202 U. S., was interpreted by the Supreme Court as "*the open Gulf*" and distinguished from the "maritime belt."

VI.

1. Louisiana was ceded by France "in full sovereignty," in 1803.

   This was 9 years after 1794.

2. The Republic of Texas was recognized by the United States in 1837; that as a Republic it extended its territory 3 leagues into the Gulf of Mexico.

   This was 43 years after 1794.

3. California was a part of Mexico until 1848, or 54 years after 1794.

If the Marine League was established in 1794 as integral territory it was part of the territory and within the external boundaries of the 3 States, before they were admitted.

4. The treaty of Guadalupe—Hidalgo agreed that the territorial limit of Mexico was 3 leagues in the Gulf.

This was an admission on the part of the United States as were Great Britain's admissions in the Treaty of Peace.

The boundaries admitted by Great Britain in the provisional treaty of 1782 and the definitive treaty of 1783, were not created by the treaty, but were those of sovereign States existing in 1776; whose boundaries on the sea were only limited by international law.

By the admission of that treaty all islands within 20 leagues of the shore belonged to the individual States, which comprised the Confederation, which in 1783 was about as nebulous as any union of sovereign states could be.

Surely no action taken by the United States and Great Britain could create an "ownership in the federal union of a strip of submerged land between an island and the State to which it was apurtenant, in fact an integral part — for instance Long Island, of New York.

VII

The case of Skiriotes v. Florida, 313 US 69 was referred to in United States v. California.

The doctrine of this case furnishes a solution which would avoid all the evil consequences which arise and will flow from the present situation. On page 73 we find "Aside from the question of the extent of control which the United States may exert in the interest of self protection over waters near its borders, although beyond its territorial limits, the United States is not debarred by any rule of International Law from *governing the conduct of its* own citizens upon the high seas * when the *rights* of other nations and their nationals are not infringed."

Among citations in note 2 are Church v. Hubbart, and "The Grace and Ruby." Chief Justice Holmes wrote the opinion — By exerting its right of defense the United States may keep all foreigners a distance from its shores; and by imposing conditions which must be complied with it may control the operations of its own citizens.

313 US p. 78 cites from "The Hamilton 207 US 403" as follows: "The bare fact of the parties being outside the territory *in a place belonging to no other sovereign* would not limit the authority of the State."

Whatever might be the high seas would fall under the regulations of Congress whether on the surface or under the surface of the sea. In other words "ALL PARAMOUNT RIGHTS" of the United States are unrestrictedly within the power of Congress.

These are the right to regulate commerce and navagation, and the right to establish lines of defense in the open ocean for the purpose of protecting the United States and its citizens from foreign invasion or other interference with common welfare

It is respectfully submitted that a rehearing should be granted.

FRANK J. LOONEY
As Amicus Curiae

APPENDIX

In addition to cases heretofore cited, recognition of the principle that the 3 mile marginal belt is within the territorial limits of a State is to be found in the following cases:

The Delaware, 161 US 469;

Manchester v. Massachusetts, 139 US 240;

McReady v. Virginia, 94 US 291;

Skiriotes v. Florida, 313 US 691;

In re Devoe, 108 US 401;

Hamburg American S.S. Co. v. Grube, 196 US 407, 413-4;

Lowndes v. Hunting, 153 US 1;

Findley v. The William, FC 4790;

Maxon v. The Fanny, FC 9095;

United States v. Kessler, FC 15,528;

United States v. New Bedford, FC 15607;

The Wave, FC 17297;

United States v. Newark Meadows, 173 Fed. 426;

Middleton v. Transatlantique, 100 Fed. 866 — certiorari denied 178 US 683.

Carlson v. Pilots Ass'n, 93 F. 468, 472;

Re Humboldt Mfg. Co.; 161 Fed. 364;

Humboldt v. Christophenson, 72 Fed. 329;

The Norma, 32 Fed. 411;

The Rose Mary, 23 Fed. 103.

See also Chase v. American S. S. Co., 9 Rhode Island 419, 1 Am. Rep. 374, citing 6 Dana Abridgement 359 showing 3 mile maritime belt in Massachusetts Charter of 1691.