Part 1.

Supreme Court of the United States

October Term, 1950.

No. 7, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING ON DECREE.

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Supreme Court of the United States

October Term, 1950.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING ON DECREE.

Comes now the State of Louisiana and petitions the Court for a rehearing of its decree herein entered December 11, 1950.

Point One.

This Court Assumed Jurisdiction of This Case Without Right or Authority Under the Constitution.

The Attorney General and Solicitor General have summarily dragged the Sovereign State of Louisiana before the bar of this Court seeking to deprive Louisiana of the lands under navigable waters within Louisiana's boundaries to which Louisiana has had undisputed title, possession, and physical control since 1812.

Louisiana contested the jurisdiction of the Court on two grounds, (a) that Louisiana was a Sovereign State and had

not consented to be sued, and (b) that this Court had no controversy over a suit between the United States and a State.

The jurisdictional question was extensively briefed and orally argued by both sides, on the Motion for Leave to File a Complaint against Louisiana. But this momentous question was passed on by the Court with the single word that the motion was "granted". Subsequently, in its opinion of June 5, 1950, the Court said that Louisiana contended that she had "not consented to be sued by the Federal Government", and reaffirmed *United States* v. *Texas,* 143 U. S. 621 as having held that Article 3, Section 2, Clause 2, of the Constitution included "cases brought by the United States against a State".

But nowhere has this Court ever indicated a reason why Louisiana should be summarily dragged before the bar of this Court when she has not consented to be sued. *Kansas* v. *United States,* (1904) 204 U. S. 331 held that Kansas could not drag the United States before the bar of this Court without its consent to be sued; and what applies to the one must apply to the other. Why indeed should the United States be able to summarily hale a State before the bar of this Court if, in turn, the State may not do the same thing with the United States? Perhaps it was the intention of this Court to overrule *Kansas* v. *United States;* but it has given no reason for its decision.

The record of the Constitutional Convention shows that on June 7, on August 20, on August 22 and on August 30, 1787, proposals were submitted to the Convention to grant this Court original jurisdiction in controversies between the United States and an individual State and that no vote or action was taken on these propositions. (H. Doc. 398, 69th Cong., 1st Session, pp. 769, 973, 572, 595, 644; 1 Elliott's Debates pp. 177, 180; and the Madison Papers, Vol. 3, pp. 1366, 1399, 1465, 1466).

However, that on August 30, 1787, when the proposition was lastly submitted to the Convention that claims to terri-

tory or other property by the United States or any particular State should be examined into and decided upon by the Supreme Court of the United States, this motion was peremptorily rejected by vote of 8 States against and only 2 States for the motion. (H. Doc. 398, p. 645; 1 Elliott's Debates pp. 275, 276).

Also, while this Court stated that the *Texas* case had held that this Court had original jurisdiction of cases brought by the United States against a State, it made no mention of *Florida* v. *Georgia,* (1854) 17 How. 478, in which the Attorney General of the United States stated that "The Court is not empowered by the Constitution to entertain an original suit between the United States and a state or the United States and two states".

Louisiana is not an ordinary litigant. She is a Sovereign in her own right and a State of the Union. And the question whether the United States may summarily drag her before the bar of this Court without her consent, so far as we can see, is an important question. It concerns not only Louisiana, but our whole balance of government.

When Mississippi was sued by the Principality of Monaco in 1933, extensive consideration was given to the question of jurisdiction, and a comprehensive opinion was written discussing the rights of the State, and the balance of our constitutional system. 292 U. S. 313.

Point Two.

There Is No Legal Basis for Discussing or Deciding "Paramount Rights, Power and Dominion" in This Case and Paragraph 1 of the Decree Should Be Stricken.

In our Second Petition for Rehearing, pages 7, 8, we pointed out that California had argued to this Court that the United States had no "power or jurisdiction" over the marginal seabed off California and that "the state alone had jurisdiction to regulate" that area; but that in the *California* case this Court had held that the area there

involved could not be "blocked off" or "set apart" for exclusive use by California.

Louisiana, however, has never made any such contention. She has never denied the "paramount rights, power and dominion", the political sovereignty, to the extent that the Constitution confers it, of the United States over the marginal sea within Louisiana's boundaries. Indeed, all that was freely admitted in Louisiana's Answer and argument. We challenge and defy the Solicitor General to produce the slightest indication anywhere that Louisiana has ever "denied" such "paramount authority" of the United States.

As a consequence, there never has been any issue in this case with respect to the "paramount rights, power, and dominion" or the "paramount authority" of the United States over the area in question. There being no such issue, this Court is not empowered by the Constitution to purport to adjudicate it. Yet, when we read this Court's opinion of June 5, 1950, we find a most remarkable and disturbing sentence. We find the Court suddenly stating, like a bolt out of the blue, that "The question here * * * is the power of a State to deny the paramount authority which the United States seeks to assert over the area in question". That statement is sheer error—wholly unfounded, utterly without basis, and contrary to the pleadings. It seeks to inject a wholly non-existent issue. And the further language in the Court's opinion to the effect that protection and control of the marginal sea are functions of national external sovereignty; that the marginal sea is a national, not a State concern; and that national rights must therefore be paramount in that area, are wholly irrelevant to this litigation. They have the effect of setting up a straw man which can be easily demolished, but who never existed in real life.

This Court, therefore, is not empowered to make a decision or to render a decree with respect to the "paramount rights, power and dominion" of the United States over the

marginal sea, for that subject is not in controversy. Accordingly, Paragraph 1 of the decree is wholly improper and should be stricken out.

Point Three.

In Now Stating That Louisiana Does Not Have Fee Simple Title to the Area Involved and in Entering the Balance of the Decree, Without a Trial of the Issue of Fee Simple Title or Giving Louisiana Her Day in Court, This Court Has Committed Serious Error, Amounting to Confiscation by Judicial Decree.

From April 8, 1812 to December 11, 1950, the Sovereign State of Louisiana had fee simple title to and physical possession and control of the marginal seabed within its boundaries. And, unlike California, during the intervening decades Louisiana and her lessees have been taking sand, gravel, shell and shellfish, and more recently oil, out of that marginal seabed. Louisiana's rights to do so were clearly established and nobody disputed it for 136 years. It long since became routine and standard practice, and Louisiana can prove it, if given a chance.

Moreover, so far as fee simple title is concerned, it has been settled law for more than a century that the contiguous States have fee simple title to lands under navigable waters, and Louisiana's marginal seabed is very definitely land under navigable waters.

As was said in the classic case of *Martin* v. *Waddell* (1842), 16 Pet. 367,

> "For when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." (p. 410).
>
> "At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like

> rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders." *Shively* v. *Bowlby,* 152 U. S. 1.

By the Treaty of Independence with the British Crown in April, 1783, the British Crown relinquished to the 13 Original States by name "all claims to the government, proprietary and territorial rights of the same, and every part thereof"; and fixed the boundary of the coastal states into the Atlantic Ocean; "comprehending all islands within twenty leagues of any part of the shores of the United States."

To secure the rights of the Original States under this Treaty, it was made the supreme law of the land by Article VI, Clause 2, of the Constitution. (69th Congress, 1st Session; H. D. No. 398, p. 618)

The Articles of Confederation, Article IX, provided that:

> "No state shall be deprived of territory for the benefit of the United States."

In *Harcourt* v. *Gaillord,* 12 Wheat. 523 (1827), the U. S. Supreme Court held:

> "There was no territory within the United States that was claimed in any other right than that of some one of the Confederate States; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states."

Later, this Court held:

> "When the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin* v. *Waddell,* 16 Peters (41 U. S.) 367, (1842).

In *Pollard* v. *Hagen* (1845), 3 How. 212, this Court held that:

> "whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders and they, and the original states, will be upon an equal footing in all respects whatever."
>
> "By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the states respectively; Secondly, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States."

And, again, this Court held in *Memford* v. *Wardwell,* (1867), 6 Wall. 423, 436, that:

> "Settled rule of law in this Court is, that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several states and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."

And, again, this Court held in *McCready* v. *Virginia,* (1876), 94 U. S. 391, that:

> "The principle has long been settled in this court, that each State owns the beds of all tidewaters within its jurisdiction, unless they have been granted away. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Citing *Martin* v. *Waddell,* (1842), *supra.* The title thus held is subject to the *paramount right of navigation,* the regulation of which in respect to foreign and interstate commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries.*

> These remain under the exclusive control of the State. . . . 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."

And, again, this Court held in *Illinois Central R. Co.* v. *Illinois,* (1892), 146 U. S. 435:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard* v. *Hagan,* 44 U. S. 3 How. 212 (11:565); *Wever* v. *Board of State Harbor Comrs.,* 85 U. S. 18 Wall. 57 (21:798).
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> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And in *Scott* v. *Lattig,* 227 U. S. 229, 242-243 (1913), this Court again held:

". . . Besides, it was settled long ago by this court, *upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution,* that lands underlying *navigable waters within the several States* belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, *subject always to the rights of the public* in such waters *and* to the *paramount power* of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. (Citing other cases)

Hale, in *de Jure Maris,* relied on in *Martin* v. *Waddell,* and a host of subsequent, powerful cases have all reaffirmed the same rule—that the States have fee simple title to lands under navigable waters within their boundaries. So far as *fee simple title* is concerned, there never was any "inland water" rule. The rule described concerned "soils" or "land under navigable waters", and as Hale points out, started with the sea and branched inland.

So, in the Old English common law, the rule that fee simple title to lands under navigable waters was vested in the King, started with the sea itself. See Digges (1568 or 1569) *"Arguments Proving the Queenes Maties Propertye in the Sea Landes and Salt Shores thereof",* quoted in appendices to California's Brief, p. 39; and *The Case of the Royal Fishery of the River Banne* (1610), Dav. 55, 80 Eng. Rep. 540.

In the *River Banne* case, the Court relied upon the Crown's title to the seabed as the basis for holding that the Crown also owned the beds of navigable rivers branching off from the sea, saying:

"The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it

flows; 22 Ass. p. 93, 8 Ed. 2, Fitz. Coron. 399, and the sea is not only under the dominion of the king (as is said 6 R. 2, Fitz. Protect. 46. *The sea is of the ligeance of the king as of his Crown of England;* but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, Dyer 15 Eliz. 226, b. 22 Ass. p. 93 . . . . And that the King hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath in alto mari, is manifest by several authorities and records." (Emphasis the Court's.)

Louisiana's Answer, therefore, set up Affirmative Defenses establishing her century-old fee simple title and rights to possession. Her First Affirmative Defense set up her chain of title; and her Second Affirmative Defense (which was not at all accurately summarized in this Court's opinion herein) set up title by Prescription, using the very language of Oppenheim's Classic work on International Law describing that principle.

The question of who has fee simple title to real estate is a triable question of fact. See Louisiana's Second Petition for Rehearing (on Proposed Decree), pages 5, 6. **But this Court refused to let Louisiana offer evidence of her fee simple title, and of her undisputed physical possession and control and her exercise of sovereignty over the marginal seabed since 1812,** which are of such long standing as clearly to establish title by Prescription. *Arkansas* v. *Tennessee,* (1940) 310 U. S. 563, 570-1. **Louisiana has never had her day in court.**

This Court in its opinion never even discussed the subject of title. Indeed, it specifically eliminated the issue of fee simple title, and then in the Decree proposed by the United States, the Solicitor General did not even dare to suggest that fee simple title could be vested in the United States. He there abandoned the very claim to fee simple title which he had made in his complaint. See Louisiana's

Reply on Proposed Decree, Pages 2, 3. All these things were perfectly consistent.

Now, however, like a bombshell out of nowhere, comes the decree of December 11, 1950, with the startling statement that Louisiana "has no title . . . or property interest" in the marginal seabed. And, the Decree does not state that the United States has any title or property interest therein.

What can be the basis of such a decree? If the foregoing is correct, there is no basis whatever. It is sheer confiscation. Moreover, unless fee simple title and property interests are to be arbitrarily transferred, without a trial but subtly and by indirection, it seems plain also that nobody now has fee simple title in or property rights to the marginal seabed. For this honorable Court now says Louisiana does not have such rights; but it does not say that the United States has them.

Point Four.

This Court Has No Right or Authority to Attach Powers of Confiscation of Property to "Paramount Rights, Dominion and Powers" of the United States.

As far back as in 1819, this Court through Chief Justice Marshall, in *McCullough* v. *Maryland,* 4 Wheat. at 403, held that:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action."

Such paramount power and dominion of the government in this case was not questioned by the State of Louisiana. As the Court stated, it was not questioned in *Illinois Central R. Co.* v. *Illinois, supra,* and other cases there cited.

However, if fee simple title and property rights can be freely transferred as some mysterious incident of the "paramount rights, dominion and power", that is, the political

sovereignty, of the United States, then the day of private rights, indeed of free enterprise, is gone. Then private property of any state or of any individual can be summarily confiscated, without a trial, through the device of mere verbal assertion by the United States of its constitutional powers.

The decree of December 11, 1950, is utterly without precedent in the tradition of Anglo-Saxon jurisprudence. It completely denies that trial or "fair hearing" which is the prime requisite of Procedural Due Process. It is sheer confiscation by judicial decree. Indeed, if such a decision arbitrarily transferring property had been made by an administrative agency or lower court, we have no doubt that this honorable Court would reverse it in a twinkling. Unless different considerations are to prevail here, the decree should be vacated and the cause restored to the docket for reargument.

Point Four.

In Any Event, No Accounting Should Be Ordered for the Period Prior to the Date of Decree, December 11, 1950.

Passing over the unsupportable character of the decree as a whole, and assuming that it is this Court's purpose to take title from Louisiana, no accounting should be ordered for the period prior to the date of decree, December 11, 1950, for the following reasons:

A. *Rights established by courts are established by judgment or decree, not opinion.*

A judgment or decree, not the opinion, constitutes the "judicial determination" or "adjudication" of a Court. 49 C. J. S. 25, 26, "Judgments", Section 1, *Samuel Goldwyn, Inc.* v. *United Artists Corp.* (CCA Del.) 113 F. (2d) 703, 706. "A judgment is the judicial act of a court by which it accomplishes the purpose of its creation". 49 C. J. S. 26, "Judgments", Section 2.

Moreover, "A judgment generally takes effect on the rights and titles of the parties to the action as they exist

at the time of the rendition of the judgment", 49 C. J. S. 876, Section 446, "Judgments".

And the opinion of a court is not a judgment or decree. It does not create rights. It does not have the definitive character of a judgment. 49 C. J. S. "Judgments", Section 4. "The rights of the parties are adjudged * * * solely by the decretal portion of the decree". *McGhee* v. *Leitner* (D. C. Wis. 1941) 41 F. Supp. 674, 676.

B. *Moreover, this Court did not even discuss the subject of fee simple title and property rights prior to December 11, 1950.* Its opinion herein of June 5, 1950 simply said "the issue in this case of litigation does not turn on title or ownership in the conventional sense". If that sentence did not mean that this honorable Court thereby specifically eliminated the issue of title from the case, why, indeed, was the statement made? Now, reversing itself, however, on December 11th, this Court entered a decree which suddenly states that "The State of Louisiana has no title thereto or property interest therein".

December 11, 1950, therefore, is the first day on which this Court had anything to say on the subject of fee simple title and property rights. If this honorable Court is going to take her century-old title away from Louisiana, it certainly did not express that purpose prior to December 11, 1950. Since the whole subject of accounting depends, among other things, basically upon fee simple title and proprietary rights, there can be no possible basis for an accounting for any period prior to December 11, 1950.

The United States waited from 1812 to 1948—136 years—before getting around to bringing this lawsuit. Should Louisiana now not only have her title and property taken away from her without a trial or a day in court, but also be directed to pay money to the United States before a

judgment or decree is entered? We see no basis for such a result.

Respectfully submitted,

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