IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 8, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

REPLY IN OPPOSITION TO MOTION FOR JUDGMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 14, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its reply to the motion for judgment filed herein by the United States of America on September 27, 1949.

PRICE DANIEL
Attorney General of Texas

REPLY IN OPPOSITION TO MOTION FOR JUDGMENT

Preliminary Statement

As we understand it, the basis of the motion of the United States, filed herein on September 27, 1949, is that the State should be proceeded against summarily because it filed motions to dismiss and for more definite statement or bill of particulars instead of answering to the merits of the controversy before the return day, September 1, 1949.[1] Admitting that the defendant is "not . . . technically in default"[2] in failing to answer, plaintiff contends the State should nevertheless be denied the right to answer to the merits. Thus the plaintiff asks an early argument on the "issues raised" by the complaint alone.

This request for such drastic action under these circumstances is unparalleled in the history of original proceedings in this Court. Counsel for the State of Texas, having searched every original proceeding hitherto entertained by this Court, have found no instance in which the Court has been importuned in this way to foreclose the defendant's right to proceed in an orderly manner in accordance with customary and orthodox rules of pleading.

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[1]The order of the Court granting plaintiff leave to file was in the following terms:

> "The motions for leave to file complaints are granted and process is ordered to issue returnable on or before September 1, next." 17 *U.S.L. Week* 3341 (U.S. May 17, 1949).

[2]Plaintiff's Motion for Judgment, p. 3.

Plaintiff's motion erroneously assumes that the defendant is not entitled to file motions to dismiss and for more definite statement or bill of particulars, instead of an answer to the merits, on the return day. No authority is cited for this assumption. We think that the authorities are unanimously to the contrary. The right of a litigant in an original proceeding to follow the customary practice of directing preliminary motions to the sufficiency of the complaint before answering to the merits has long been recognized by this Court.[3]

No motion for rehearing was filed in the present case after the decision of the Court granting leave to file, because the State of Texas thought that the objections presented by it had received adequate hearing in that preliminary stage of the proceeding. Thereafter, on August 27, 1949, prior to the return date fixed by the Court, the defendant filed its motion to dismiss the complaint on the ground that the allegations of the bill did not place it within the original jurisdiction of this Court under Article III, Section 2, Clause 2 of the Constitution. As hereinafter shown, this specific ground had not been raised in any previous written objection either by Texas or by Louisiana. Subject to this motion, defendant on the same day also moved for a more definite statement or a bill of particulars on the ground that the complaint was so indefinite and uncertain that defendant could not frame its responsive pleadings,

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[3]*New Jersey v. New York*, 6 Pet. 323 (1832); *Louisiana v. Texas*, 176 U.S. 1 (1900); *Georgia v. Pennsylvania Ry.*, 324 U.S. 439 (1945); *see: Rhode Island v. Massachusetts*, 15 Pet. 233, 272 (1841).

prepare for trial, or take advantage of the defenses which might be available to it. The customary motion for an extension of time was made in connection with the latter motion.

For the reasons hereinafter stated, it is respectfully submitted that these motions were properly presented, that they were filed in good faith and not for purposes of delay, and that in filing them defendant was entirely within its rights as a litigant in this Court.

Defendant's Motion to Dismiss

The United States apparently has confused the ground of the motion of the State of Texas to dismiss the complaint with the ground relied upon by the State of Louisiana in its objections to granting leave to file. The nature of the objection of Louisiana was that Louisiana, being a sovereign State, must give its consent to be sued, and not having given its consent in that case, the Court had "no jurisdiction over the State of Louisiana for purposes of this suit."[4] That objection rested upon a basis entirely different from that of the motion to dismiss filed by the State of Texas. The basis of the latter is that this Court does not have original jurisdiction over a controversy between the United States and a State under Article III, Section 2, of the Constitution, this type of case not being one of the categories of cases declared by

[4]Objections to Motion for Leave to File Complaint by the United States against State of Louisiana, No. 13, Original, October Term, 1948, p. 2.

Article III, Section 2, Clause 2, to be within the original jurisdiction of this Court.

Although in the oral argument on motion for leave to file the complaint Louisiana touched on this latter objection, the specific objection was not raised in any written argument by either State prior to the motion to dismiss by Texas. This precise question was raised for the first time by certain members of the Court during oral argument of the *Louisiana* case and they evinced considerable interest concerning it.

The action of the Court in granting leave to file the complaint against Texas did not clearly indicate that the Court had no doubts about its jurisdiction in this type of case. The Court merely entered an order granting leave to file without a written opinion relating to its jurisdiction. This was interpreted by the State of Texas, reasonably we believe, as meaning that the Court would pass upon objections to jurisdiction interposed by motion to dismiss after leave to file had been granted. This has been the practice of the Court in a number of cases. For example, in *Louisiana v. Texas*, 176 U.S. 1 (1900), "argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs."[5] The Court in that case sustained the demurrer and dismissed the bill.

In *Washington v. Northern Securities Co.*, 185 U.S. 254 (1902), notice was given to the proposed defendants and argument was had in support of and

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[5]176 U.S. at 2.

against the motion for leave to file the complaint. The Court, in granting leave, said:

> ". . . among other objections to granting leave, it is urged that the court would have no jurisdiction over the subject-matter because, as contended, the bill does not present the case of a controversy of a civil nature, which is justiciable under the Constitution and laws of the United States, in that the suit is purely a suit for the enforcement of 'the local law and policy of a sovereign and independent State, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory.'
>
> "In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in *Louisiana v. Texas*, that is, without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice."[6]

We think that the above reasoning conclusively demonstrates that the State of Texas acted in good faith and within its rights as a litigant in filing its motion to dismiss. It is to be noted that no extension of time to answer was requested in connection

[6] 185 U.S. at 256.

with the motion to dismiss, and plaintiff is not warranted in charging that it was "filed for purposes of delay."

Defendant's Motion for More Definite Statement

Subject to its motion to dismiss, the defendant filed a motion for a more definite statement of the nature and extent of the claim of the United States. Its right to do so is securely founded in both English and American equity practice and is expressly recognized in Rule 12(e) of the Federal Rules of Civil Procedure.[7] Although this Court has not adopted detailed rules governing its procedure in cases on the original

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[7]Rule 12(e) provides that "if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading."

This Rule is a continuation in revised form of old Federal Equity Rule 20, which provided that "a further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just."

Old Equity Rule 20 of the Federal Equity Rules was in turn derived from, and was in fact almost identical with, one of the English "Rules of the Supreme Court, 1883," adopted under the Judicature Act of 1873 (Statutory Rules and Orders Revised Dec. 31, 1903, Supreme Court, Eng., 1904). This was Rule 7, Order XIX, which provided as follows: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." These rules were applicable in the High Court of Justice, which included both the Chancery Division and the King's Bench Division. See cases cited, *post*, p. 14.

docket, it has followed, by analogy, the Federal Rules of Civil Procedure when appropriate. This was conceded by the United States in *United States v. California*, where the plaintiff said that "although the Federal Rules of Civil Procedure are not controlling, they nevertheless furnish a sound guide for all proceeding throughout the Federal judicial system."[8]

The State of Texas, by specific analogy to Rule 12(e) of these Rules, has here moved for a more definite statement. A similar motion in *Georgia v. Pennsylvania Ry.*[9] was recognized and accepted as entirely proper in that original action and was in part granted by this Court. There is a striking similarity between the accepted procedure in that case and the procedure followed by defendant in this case. In that case, rule to show cause why leave to file the amended bill of complaint should not be granted was issued by this Court.[10] Argument was had on the rule, and in a written opinion this Court granted leave to file.[11] Process was issued, returnable May 28, 1945. Instead of answering to the merits, the defendant railroads, on May 26, filed motions for more definite statement or bill of particulars. These motions were granted in part, the Court ordering the bill of particulars to be served and filed on or before August 15, 1945, and extending defendant's time to answer the complaint to October 1, 1945.[12] The State

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[8]Memorandum in Support of Motion to Strike Answer, United States v. California, No. 12, Original, October Term, 1945, pp. 8-9.

[9]324 U.S. at 439 (1945).

[10]65 S. Ct. 110 (1944).

[11]324 U.S. 439 (1945).

[12]65 S. Ct. 1560 (1945).

of Texas is asking no more in this case than the Court properly granted to the defendant railroads in *Georgia v. Pennsylvania Ry.* The Court there followed the practice of the Federal district courts under similar circumstances.

In *Blanton v. Pacific Mutual Life Ins. Co.*,[13] the Court said:

> "I understand the effect of the rule to be that where a party is required or permitted to file a response (such as an answer) to a pleading previously filed and desires a bill of particulars as to the allegations of the previous pleading, the motion for the bill of particulars must be made before he files his response. . . . The time within which a party is required to answer determines the time within which he may move for a bill of particulars. . . . In other words, if the defendant had the right to answer at any time up until May 31st, it had the right to do anything else which the rules permit to be done previous to answering."

And this Court in *New Jersey v. New York*,[14] in holding that a demurrer (which at that time served the purpose of a motion for a bill of particulars) was regularly filed, said:

> "The demurrer, then, being admitted as containing an appearance by the State, the court is of opinion that it amounts to a compliance with the order at the last term. In that order, the word 'answer,' is not used in a technical

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[13]8 Fed. Rules Serv. 6b.51, Case 1; 4 F.R.D. 200 (W.D. N. C. 1944); app. dism. 146 F. 2d 725 (W.D. N. C. 1944).
[14]6 Pet. 323 (1832).

> sense, as an answer to the charges in the bill under oath; but an answer, in a more general sense, to the bill. A demurrer is an answer in law to the bill, though not in a technical sense an answer according to the common language of practice."

The right of defendant in a proper case to move for more definite statement of plaintiff's allegations before answering to the merits being clear, it only remains to determine whether the motion of the defendant in this case is, as the United States claims, "insubstantial and frivolous" and is therefore interposed merely "to achieve further delay."[15]

The complaint in the present case is, as the United States says, "patterned closely after the Complaint filed in *United States v. California*,"[16]—so closely, in fact, that, so far as the principal allegations are concerned, only a word here and there has been changed. The re-presentation of the California complaint without regard to the effect of the subsequent decision in that case on the possible issues in the present case, has produced allegations which are vague, uncertain and indefinite as to the State of Texas. Particularly is this true when the special historical claim of Texas is considered.

The plaintiff has failed to take into account the fact that the decision actually rendered by the Court in the *California* case did not hold that the United States "owned" the disputed land, but said only that the United States had certain paramount rights and powers over the area, the scope of which rights and

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[15]Motion for Judgment, p. 4.
[16]*Ibid.*

powers were not so clearly defined in the opinion as to be automatically applicable to the distinguishable case against Texas. The complaint as to ownership and paramount rights and powers claimed as to the Texas area is therefore much broader than the Court's decision relating to the California area. As aptly remarked by Judge Brown in *Curtis v. Metcalf*,[17] "no mode of pleading is just to a defendant which charges him with more than is intended to be proved against him."

It is the breadth of possible controversy under the allegations of the complaint viewed in present perspective that defendant has sought to circumscribe so that clear, distinct and succinct issues will be presented for the Court's determination.

The necessity for such delimitation of the area of controversy has long been recognized both in England and the United States. As said by Cotton, L. J., in *Spedding v. Fitzpatrick*, 38 Ch. D. 410, 413 (1888):

> "The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise."[18]

In stating that "none of the matters called for by the State is essential to the adjudication of the basic issues in this case on the merits,[19] plaintiff has

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[17]265 F. 293, 296 (D. R.I. 1918).

[18]Quoted with approval by District Judge Trieber in *United States v. United Shoe Machinery Co.*, 234 F. 127, 138 (E.D. Mo. 1916).

[19]Motion for Judgment, p. 4.

suggested an improper test of the sufficiency of the complaint as against a motion for more definite statement. The correct test is not whether the complaint, in the absence of objection, is sufficient to support a judgment but rather whether the complaint is sufficient, over objection, to apprise the defendant with definiteness and particularity concerning the case it must meet at the trial and hence to enable it properly "to frame a responsive pleading."[20] In order fairly to protect its interests by its pleading, defendant must be in a position to take advantage of all available defenses. In *Walling v. West Virginia Pulp & Paper Co.*,[21] the Court said:

> "It cannot be overlooked that *a primary function of a bill of particulars is to furnish relevant details in amplification of a pleading, to avoid surprise, narrow the controversy and expedite the trial.*
>
> ". . . A complaint might be drawn with such generality of expression as to comprehend a dozen or a hundred transactions, all within the knowledge of the defendant, but that would not deprive the defendant of the right to know which one or more of the possible transactions the plaintiff bona fide referred to and intended to rely upon. It is hardly reasonable to believe that the rules were intended to put a responsive pleader to a distinct disadvantage, to force him to plead in ignorance of what was intended by his adversary, and then resort to the cumbersome methods of discovery, depositions or interrogatories to ascertain what factual and legal

[20]Rule 12(e), Rules of Civil Procedure.
[21]2 F.R.D. 416, 419-421 (E.D. S.C. 1942).

issues he would be called upon to meet on the trial of the case.

". . . True, the defendant can answer by saying that it has no knowledge or sufficient information to form a belief as to the truth of the allegations made, but what of it? Is it not entitled to know what it is to meet in court before trial time arrives? *Is it not entitled to frame its answer in contemplation of the issues the plaintiff intends tendering? And what is the objection to informing the defendant just what the controversy is about?* Why deny the potency of Rule 12(e), and force the defendant to resort to more cumbersome and less expeditious methods to ascertain what he is to be called upon to answer for?" (Emphasis supplied.)

To the same effect is *United States v. Griffith Amusement Co.*,[22] where it was said:

"This rule has to do with the pleadings alone, and the purpose of the bill of particulars is to make the petition sufficiently definite to enable a defendant to know what he or it is alleged to have done. It is no defense, therefore, to a motion for a bill of particulars to say that the information which the defendants seek is within their knowledge. A demurrer or a motion to dismiss might be good as against a complaint and whether or not a complaint states a cause of action is to be determined by its contents and not by what the defendants may know. The complaint is the basis of the action and from it the court must determine whether or not a cause or causes of action are actually stated."

[22] 1 F.R.D. 229, 231 (W.D. Okla. 1940).

A further and most important purpose of a motion for more definite statement from the point of view of fairly and expeditiously conducted litigation is pointed out in *McComb v. Hardy*:[23]

> "Moreover, such general averments do not permit the elimination through the answer of any important factual issues. The defendants cannot make the admissions which they might readily be willing to make if they were apprised of specific charges."

The desire of the defendant in this case to narrow the issues by appropriate admissions wherever possible is made one of the bases of its requests for more definite statement.[24]

It is not surprising that, where the necessity for their use arises, such motions are considered entirely proper in English and American practice. They fill a gap which the most abbreviated system of pleading cannot ignore. Thus under the English Rule[25] as well as under Equity Rule 20 of the Federal Equity Rules,[26] the courts have required a pleader

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[23]11 Fed. Rules Serv. 12e.244, Case 1; 8 F.R.D. 28 (E.D. Va. 1948).

[24]Motion for More Definite Statement or Bill of Particulars, pp. 8 and 19.

[25]Examples under the English Rule are to be found in the following: *Blackie v. Osmaston*, 28 Ch.D. 119 (1884); *Newport Slipway Drydock and Engineering Co. v. Paynter*, 34 Ch. D. 88 (1886); *Spedding v. Fitzpatrick, ante.*

[26]Examples under old Federal Equity Rule 20, including cases under the anti-trust laws, may be found in the following: *Locker v. American Tobacco Co.*, 194 F. 232, 200 F. 973 (S.D. N.Y. 1912); *Patterson v. Corn Exchange of Buffalo*, 197 F. 686 (W.D. N.Y. 1912); *Williams v. Pope*, 215 F. 1000 (W.D. N.Y. 1914); *Whitaker v. Whitaker Iron Co.*,

to amplify with a further and better statement or bill of particulars, whenever it appeared the pleading did not allege facts with sufficient particularity to enable the opposing party to know what case he had to meet and to plead responsively or otherwise prepare to meet that case.

Similar practice has been regarded as correct under the express provisions of Rule 12(e) of the Rules of Civil Procedure.[27] Thus the motion for more definite statement seeks to achieve that clarity, distinctness and succinctness of issues which is the basic purpose of orderly pleading.

That such was its purpose, irrespective of the identity of the parties, was clearly recognized and strongly urged by the Government in the *California* case. The Memorandum in Support of Motion to Strike Answer said in part:[28]

> "The Court has apparently had little occasion to pass on the matter of improper pleadings in original cases. However in other cases before it, the Court has left no doubt as to its rules in regard to this subject. In *McFaul v. Ramsey*, 20 How. 523, 524, it was declared that plead-

238 F. 980 (N.D. W. Va. 1916); *St. Louis Car Co. v. J. G. Brill Co.*, 249 F. 502 (E.D. Pa. 1918); *Curtis v. Metcalf*, 265 F. 293 (D. R. I. 1918); *Universal Oil Products Co. v. Skelly Oil Co.*, 12 F. 2d 271 (D. Del. 1926); *Harry Prochaska, Inc. v. Consolidated Lithographing Corp.*, 51 F. 2d 362 (S. D. N. Y. 1931); *Stanley Co. of America v. American Telephone & Telegraph Co.*, 5 F. Supp. 380 (D. Del. 1933).

[27] *Faske v. Radhill*, 9 Fed. Rules Serv. 6b.12, Case 1 (E.D. Pa. 1946); *F. E. Myers & Bros. Co. v. Goulds Pumps, Inc.*, 10 Fed. Rules Serv. 15a.21, Case 6, 7 F.R.D. 416 (W.D. N.Y. 1947); *McComb v. Hardy*, 11 Fed. Rules Serv. 12c.244, Case 1, 8 F.R.D. 28 (E.D. Va. 1948).

[28] At p. 6.

> ings should 'clearly, distinctly and succinctly state the nature of the wrong complained of, the remedy sought and the defense set up. The end proposed is to bring the matter of litigation to one or more points simple and unambiguous.' "

The motion for more definite statement in this case was filed in accordance with these well-recognized canons of orderly pleading and within the spirit and intent of the Federal Rules of Civil Procedure. The carefully stated reasons (following each request for more definite statement) for desiring the requested particulars negate any desire on the part of defendant to delay unnecessarily the decision of the present matter. We believe our former statement of these reasons in the motion for more definite statement or bill of particulars, to which we now call attention, is clear and that they need not here be repeated. Plaintiff's characterization of this motion as "insubstantial and frivolous" either overlooks or ignores the validity of the reasons there given. It is respectfully submitted that the defendant's motion fairly calls for a more direct and specific response. Indeed the filing of a motion for judgment, rather than a request that the motion for more definite statement or bill of particulars be denied, strongly indicates that plaintiff could find no valid reason why the motion of the defendant should not be granted. If any objections were available, the resort to a motion invoking the drastic remedy of judgment without permitting the defendants to answer appears intemperate in the extreme.

Plaintiff's suggestion that the same objections to the language of the complaint here raised were interposed in the *California* case completely ignores the distinction between that case and the present one. In the *California* case, the State of California filed no motion for more definite statement or bill of particulars. Instead it filed an exhaustive answer in response to the complaint. In paragraph II of this answer the State alleged that it could not determine the meaning of certain allegations in the complaint, but it immediately followed these allegations with a denial and affirmative defenses thus traversing all of the allegations of the complaint. The same allegations as to indefiniteness, followed by denials and defenses, appeared in the shortened answer subsequently filed by California.[29] That the issues were then joined on the pleading was admitted by both parties.[30] The case was argued and decided upon motion for judgment on the pleadings.[31] In opposition to the motion for judgment California raised the question of the indefiniteness of the complaint only in connection with its argument that no case or controversy was presented under Article III, Sec-

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[29]Motion Pursuant to Pre-Trial Conference for Leave to File Answer and Answer, *United States v. California*, No. 12, Original, October Term, 1945, pp. 3-6.

[30]Brief of the State of California in Opposition to Motion to Strike Answer, p. 5. Motion Pursuant to Pre-Trial Conference for Leave to File Answer and Answer, *supra*, p. 2.

[31]Motion for Judgment filed June, 1946; *See:* Brief of the United States in Support of Motion for Judgment, California's Brief and Appendices in Opposition to the Motion for Judgment, and *United States v. California*, 332 U.S. 19 (1947).

tion 2, of the Constitution.[32] The language which plaintiff quotes from the opinion of the Court[33] was addressed to that point only, the Court merely deciding that the objection of indefiniteness "presents no insuperable obstacle *to the exercise of the highly important jurisdiction*" of the Court. (Emphasis supplied.)

Here a much earlier state of pleadings is in question. Defendant has not answered. Indeed, it has moved for a more definite statement of plaintiff's claim in order to permit it to narrow the issues to be heard by the Court.[34] The question is thus not one of jurisdiction but rather as to the right of the defendant to attack by proper and timely motion the sufficiency of the complaint to apprise the defendant of the precise allegations which it must admit or deny and which it must prepare to meet at the trial. On this question the *California* case is therefore not in point.

The suggestion that Texas should be charged with notice of and be bound by what occurs in the case of Louisiana is nothing more than an attempt to confuse distinct situations arising from different orders of the Court. The State of Texas was served with process returnable on a certain day. Under accepted standards of proper pleading, the State, prior to that time, filed an appropriate motion for more definite statement. For so doing, the State of Texas

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[32]Brief in Opposition to the Motion for Judgment, *United States v. California*, No. 12, Original, October Term, 1946, pp. 11-14. Appendices A to I of the same brief, pp. 12-31.

[33]Motion for Judgment, p. 5.

[34]*See: Third National Bank of Louisville v. Stone*, 174 U.S. 432, 434 (1899).

should not be penalized in so summary and drastic a fashion for doing what the lowliest litigant in the Federal Court is always entitled to do for the purpose of narrowing the issues before the Court.

With reference to plaintiff's charges of "delaying tactics," Texas would point out that plaintiff itself failed to file this suit for 17 months after the *California* decision and has not yet filed suit against 19 other coastal States to which the Justice Department claims the California decision is applicable.[35] It ill-behooves the plaintiff to complain of necessary delay incident to customary pleading in the case against Texas while it is furnishing indefinite delay to other States which are daily using the resources of their submerged coastal areas.[36]

Objections to the Form of Plaintiff's Motion

Recognizing the great public importance of the present case, we have, in all of the foregoing discus-

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[35]Attorney General Clark (now Mr. Justice Clark) testified at the 1948 Joint Hearings: "It is my present intention to file a suit against every State that I think is affected by the decision. . . . We have a group of boys working on all the States. . . . I rather think that there is argument for saying that it applies to all of the coastal States of the United States." Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, pp. 616, 699, 703.

[36]See the testimony of various State representatives as to the natural resources being taken or used from the coastal submerged lands of their respective States. *Ibid.*, pp. 816-817, 1371 (Alabama), 401-402 (Delaware), 38 (Florida), 1045 (Maine), 428-429 (Maryland), 355 (Massachusetts), 93 (New Jersey), 99-100 (New York), 195 (North Carolina), 937-938 (Oregon), 359-360 (South Carolina), 800 (Washington).

sion, dealt with matters of substance rather than of form. However, with all justice it may be pointed out, that a motion for judgment in the form presented is improper at this time.

The plaintiff admits[37] and it is apparent from the foregoing argument that the defendant is not actually in default. Therefore a motion for judgment by default is not in order. Moreover, since only the pleadings are now before the Court, the "motion for judgment" must be intended as a motion for judgment on the pleadings. Rule 12(c) of the Rules of Civil Procedure provides that such a motion may not be filed until after the pleadings are closed.[38]

It is evident that the issues raised by the pleadings, if any, must be determined before the Court can render a decision on the merits. They cannot, as the plaintiff erroneously assumes, be raised by the complaint alone. The motions to dismiss and for more definite statement or bill of particulars not only do not determine the issues, but, on the contrary, raise preliminary objections to the jurisdiction of the Court and to the sufficiency of the complaint. They have here been seasonably filed and, according to plaintiff's own admission, defendant is not in default as a result. Thus the pleadings are not closed within the meaning of Rule 12(c) and no judgment on the

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[37]Statement with Respect to Motion for Judgment, pp. 3 and 5.

[38]Rule 12(c) "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." See *Interstate Commerce Commission v. Daley*, 26 F. Supp. 421 (D.C. Mass. 1939), where the Court held plaintiff is not entitled to a judgment on the pleading where an answer has not been filed.

pleadings is proper at this time. It follows that, in view of the entire circumstances of the present case, the granting of a motion for judgment or even the setting of such a motion for argument on the merits would be entirely improper at this time. Moreover, it would work a great injustice to the defendant.

In such a situation the rules of pleading must be applied so as to work injustice to neither litigant. As the United States so clearly argued in its Memorandum in Support of Motion to Strike Answer in the *California* case:[39]

> "The circumstances that the answer in question has been filed by a State of the Union [or the United States] rather than by a private litigant in no sense requires a different result. To be sure there may be appropriate occasions for the relaxation of technical rules in favor of a sovereign where there is 'no injustice to the opposing' sovereign and where such relaxation 'but affords an additional opportunity to guard against the possibility of error.' *Virginia v. West Virginia*, 234 U.S. 117, 121. *But the situation herein involves more than mere technical rules. Far from being a safeguard against error the relaxation of accepted standards here will promote confusion that would enhance the 'possibility of error.'* Surely it is a matter of high public importance that the United States, no less than an individual state, *be not placed at a disadvantage in the conduct of its litigation;* and where such a serious departure from accepted standards on the part of the State [or the United States] threatens the orderly progress of this case, *there is no basis for the abandonment of such standard merely because one*

[39]At p. 8.

> *of the litigants is a State* [or the United States]. Particularly is it important that these standards be observed in a case of such great public significance so that the issues 'involved may be clearly understood.' " (Emphasis and bracketed phrases supplied.)

The same considerations are precisely applicable in the present case and call for a denial of plaintiff's motion.

Therefore, it is respectfully submitted that plaintiff's motion for judgment is without merit and should be denied.

Respectfully submitted,

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