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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 8, Original

UNITED STATES OF AMERICA
Plaintiff

v.

STATE OF TEXAS
Defendant

MOTION TO PASS THE HEARING SET FOR MARCH 27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA
Plaintiff

v.

STATE OF TEXAS
Defendant

MOTION TO PASS THE HEARING SET FOR MARCH 27

Comes now the State of Texas, by its Attorney General, and respectfully prays that the Court remove plaintiff's motion for judgment on the pleadings from the docket for Monday, March 27, 1950, and pass the hearing until Monday, May 1, or as soon thereafter as counsel may be heard.

Statement in Support

This motion is not made for delay. It is made in complete good faith and with the sincere conviction that it is necessary in order that defendant may have a fair opportunity properly to oppose the motion for judgment on the pleadings.

It is made because the time allowed after receipt of plaintiff's brief within which defendant must prepare, print, and file its reply thereto *(27 days as compared with 77 days for plaintiff)* is wholly insufficient.

Plaintiff filed its 102-page brief in this case (as compared with 27 pages in its brief in the Louisiana case, No. 14 Original) on February 20, 1950. This was 77 days after its motion for judgment on the pleadings was set down for hearing. (Dec. 5, 1949)

The hearing was originally set for February 6, 1950, but was reset *sua sponte* for March 13. Instead of filing its brief within the time allowed by the original setting (on or before January 16), plaintiff either used or waited the additional time of 35 days before filing its brief on the last day permitted for the then pending March 13 setting.[1] We do not suggest that plaintiff was not within its rights in so doing. But the fact is that *plaintiff has had an additional 35 days, or a total of 77 days,* since the motion was originally set for hearing within which to file its brief.

On the other hand, *defendant will have had only 27 days* within which to write, print, and file its reply thereto.

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[1] The resetting *sua sponte* for March 27 was made after plaintiff's brief was filed.

We assume that plaintiff's brief, after its preparation, was not withheld from filing and, in that event, plaintiff needed 77 days to accomplish it. Obviously, the major portion of the time, was needed to deal with the special defenses of the State of Texas, not considered or ruled on at all in the *California* decision. Because of the nature of plaintiff's brief, much of which could not be anticipated, this motion to pass is made because

(1) the time presently allowed defendant is wholly insufficient, and

(2) unless granted, grave injustice will be done.

Preliminary, however, to the development of these points an analysis of the nature of the pending hearing, in the light of its background, is in order.

Nature of the Pending Hearing Set for March 27

The hearing set for March 27 is not on the merits of the case. It is only a hearing on plaintiff's motion for judgment on the pleadings.

Considering the nature of the pending hearing, the wholesale departure therefrom in plaintiff's brief, and the time heretofore consumed by plaintiff in this case, the motion to pass is entirely reasonable and necessary.

As is apparent from plaintiff's brief, no federal claim was made against Texas to the lands involved herein until this suit was filed 103 years after Texas entered the Union. This Court's decision in *United States v. California*, 332 U.S. 19, which plaintiff calls a "prima facie postulate" for the present case, was rendered on June 23, 1947. Plaintiff waited 18

months thereafter before presenting a motion for leave to file the complaint herein. Within the time allowed by the Court, the State of Texas filed its answer November 9, 1949, in which it in good faith raised certain fact issues in support of its defenses to plaintiff's claim. Simultaneously therewith the State of Texas requested appointment of a special master to hear the evidence if the Court could not do so *en banc*. The State also requested permission to take the oral depositions of several aged witnesses.

Since then the State of Texas has been, and is now, ready to proceed to develop the evidence on the merits and thereby expedite the final and proper disposition of this case.

On the other hand, plaintiff opposed the appointment of a special master and the granting of permission to take oral depositions. It proceeded to renew a previously unsuccessful motion for disposition of the case on the harsh and technical proceeding of motion for judgment on the pleadings. This, despite the fact that it knew, or should have known, what is now obvious from its brief, that every conclusion of law asserted against Texas' rights, title, and special defenses, is conditioned upon or intermingled with fact issues. The hearing of such a motion in advance of a trial on the merits is seldom allowed when it would delay the trial or when it would itself involve the merits of the case.[2] However, plaintiff has insisted on its preliminary hearing on the motion in spite of the apparent fact issues and in spite of the fact that never in its history has this Court proceeded in such summary fashion

[2] Federal Rules of Civil Procedure, 12(c).

against a State or individual who sought ample opportunity for full and coherent development of the issues of fact and of law.[3]

The foregoing background and statement of what has transpired thus far in this case is not for the purpose of discussing the merits of the plaintiff's motion for judgment on the pleadings. It has been mentioned only for the purpose of showing the nature of the proceeding, its effect upon the time required for final disposition of the case, and the resulting effect which the departure of plaintiff's brief from the scope of the proceeding has had upon the time required for the defendant's reply.

The Time Presently Allowed Defendant Is Wholly Insufficient

Considering the time permitted to plaintiff, whose counsel alone knew the theory of their case against Texas' special defenses to which its brief is devoted,

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[3] We have found only four original proceedings involving States which went to judgment without a trial for the purpose of taking evidence. *United States v. North Carolina*, 136 U.S. 211 (1890); *Iowa v. Illinois*, 202 U.S. 59 (1906); *United States v. Minnesota*, 270 U.S. 181 (1926) and *United States v. California*, 332 U.S. 19 (1947). In the foregoing cases a trial for that purpose was unnecessary because of stipulations or agreements as to facts and there was no objection or intimation by the defendant State that it desired a hearing for the purpose of taking evidence. For instance, *United States v. California* was disposed of on the pleadings because neither party "suggested any necessity for the introduction of evidence." (*United States v. California*, 332 U.S. 19, 24). In its own words, California included within its brief "a presentation of its entire case, both upon the law and the facts" (Foreword, defendant's brief, *United States v. California*), a feat which, because of the extent and nature of its evidence, the State of Texas has insisted from the beginning that it cannot accomplish.

defendant will not be allowed comparable or sufficient time within which to reply unless the hearing is passed for at least 30 days.

Again, alone knowing and planning the theory of its case against Texas' defenses, plaintiff has been able to work directly on points to be presented in its brief. Defendant has not been wanting in diligence. It has had a staff of six lawyers working full time for the past year in preparation for this case. In the light of plaintiff's brief, all of the material must be, and is being now, revised. The selection and elimination of the material will unavoidably consume considerable time. The new research suggested by plaintiff's brief must be completed; all matters on which defendant must rely to combat what it regards as plaintiff's unwarranted departure from the proper scope of the pending motion, as well as a complete argument in opposition to the motion, must be assembled and printed—*all within 27 days.* The time is wholly inadequate. It would impose a physically impossible task.

This physical impossibility, as well as the injustice of its requirement, is no doubt apparent to the Court and we had hoped that it also would be recognized by counsel for plaintiff. This detailed statement of the present motion is necessary because, although requested, the Solicitor General of the United States refused to agree to a resetting and promptly lodged his objections thereto with the Clerk for presentation to the Court. Whether he realizes it or not, the Solicitor General is seeking to force an undue advantage over defendant.

Whether 77 days were required to prepare his brief, or whether it had been previously prepared

and withheld from filing until that time, defendant is justly entitled to more than 27 days to assemble, write, and print a reply which necessarily will be longer than plaintiff's brief. This is true because plaintiff devoted less than 4 pages in its brief to its own claim of title and directed the balance thereof to attempted anticipation of, and argument against, the title and special defenses of the State of Texas, none of which was involved in the *California* case or is involved in the pending case against Louisiana.

Plaintiff devotes only two and one-half pages of its brief to the law of the *California* case and then admits that it is not applicable if, in the case of Texas, "special reasons for different treatment" exist. Plaintiff's brief then proceeds to recognize that "special defenses" do exist in the case of Texas, and the remainder of the brief is devoted to them. Solicitor General Perlman has pointed out the existence of these special defenses and the difference between this case and the *California* case[4] as follows:

> "As you know, Texas has special defenses that it is entitled to make that did not apply in the case of California."[5]

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[4] Hearings Before Subcommittee No. 1, House Judiciary Committee, 81st Cong., 1st Sess., on H.R. 5991 and H.R. 5992, Aug. 29, 1949, Reporter's Transcript, v. III, p. 373.

[5] The relevancy of Texas' previous status as an independent nation has been recognized by other executive officials as follows: President Harry S. Truman, "Texas is in a class by itself; it entered the Union by treaty." (Speech at Austin, Texas, September 27, 1948.) Harold L. Ickes: "Parenthetically, Texas may have a legal right to its tidelands because it came into the Union voluntarily and as an independent country." (Address by Harold L. Ickes over ABC Network, October 14, 1948.)

Therefore, even to complete its brief in opposition to the motion for judgment within 30 additional days will require the entire time of the available staff of the Attorney General of Texas. Defendant's regular staff assigned to this case has been at work on a 16-hour schedule since receiving plaintiff's brief. An equal number of additional assistants were promptly assigned to the case with instructions to all to do everything possible to meet the deadline for the printer. It is now ever more apparent, as heretofore expected, that this deadline cannot be met and that the rights of this State to a full and fair hearing on the motion for judgment on the pleadings will be prejudiced if this motion to pass is not granted.

Unless the Motion to Pass Is Granted, Grave Injustice Will Be Done

Having claimed and possessed the lands and minerals in controversy for over 100 years, the State of Texas has many more State and Federal decisions, treaties, contracts, agreements, maps, and other materials than the plaintiff was able to present in support of its motion. These will demonstrate the need for full development of the evidence as opposed to final disposition on the pleadings alone. It would be ironical if a court procedure were followed in this case which would cause the overwhelmingly larger volume of law and evidence in favor of defendant to result in a handicap to it because of the physical impossibility of properly calling attention to it in a brief within the time allowed.

Such a procedure would be quite contrary to the consideration previously allowed States of the Union in litigation before this Court, and quite contrary,

we feel, to the Court's sense of fairness and justice to any litigant, much less to a State, involved in a controversy of this magnitude.

From the earliest times this Court has recognized the grave public importance inherent in original actions involving a State and has proceeded with the utmost care and deliberation. In *Rhode Island v. Massachusetts* the Court said:

> "From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern courts of equity in suits between individuals."[6]

and in *Iowa v. Illinois* the Court said:

> "In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this Court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."[7]

The issues raised in the present case are equally serious and the problem presented is even more complex than in any of the cases in which this or similar language has been used.

We respectfully remind the Court that in original proceedings, this Court acts as a trial court of last resort rather than as an appellate Court.

This Court's Rule 27 governing the time for filing briefs is directly applicable only to cases on the

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[6] 13 Pet. 23, 24 (1839).
[7] 151 U.S. 238, 242 (1893).

Court's appellate docket. Under Rule 5, which deals with original actions, Rule 27 governs "as far as may be." As this Court knows, the customary practice of trial courts is to allow both sides an equal time within which to file their briefs directed to preliminary motions such as the one for judgment on the pleadings.

This Court's rules applicable to appellate cases are written to cover situations in which the parties already have prepared a record to which they can readily refer. In the appellate case a record has been available to, and the precise facts and legal theories relied on by each party have been known by, both parties in the lower court and usually in at least one intermediate appellate court. The preparation of respondent's brief in such a case is largely a process of revising a brief already prepared for the lower courts so as to put it in the proper form for presentation to this Court.

How different the situation that faces the State of Texas here! There is no record. The State's effort to obtain a more definite statement of plaintiff's claims and thus narrow the possible issues has been denied. In the situation now presented in this original action, the Court's rules of time governing its appellate docket should not be applied; Rule 5 so recognizes; and the Court has consistently applied its appellate rules to original actions in which the United States or States were parties in such a manner as to promote complete fairness to all parties.

Moreover, we think that it is proper, if indeed it is not incumbent upon us, to say to the Court that we have enlisted the aid of some of the most highly respected living experts in the field of international

law, including Charles Cheney Hyde, Hans Kelsen, William E. Masterson, C. John Colombos of London, and Gilbert Gidel of Paris. Also Felipe Sanchez Roman of Mexico, former Spanish Minister of Justice and professor of civil law at the University of Madrid, has been engaged for more than a year in research in Spanish and Mexican law applicable to the ownership of these lands and minerals by the Republic of Texas. If the Court permits us to do so, we plan to present their testimony. As matters now stand (and if introduction of evidence is not allowed) we shall be remitted to their services in the capacity of advisory counsel, possibly supplemented by special memoranda to be submitted to the Court as prepared by them. But in fairness to these eminent authorities and to the Court, as well as to the parties, they should be allowed to deal specifically and directly with the contentions relied upon and advanced by the plaintiff. To this end, upon receipt of plaintiff's brief, we supplied each of them with a copy, *via* airmail. However, as the Court will understand, an exchange of communication with them, especially those resident abroad, requires a minimum of six days. And, obviously, they cannot be expected to speak until after being afforded a reasonable time in which to consider the brief, and to prepare with care their statements in reference to it. We apprehend that unless the extension herein requested is granted, the light that we have a right to expect from this source cannot be focused on the precise issues presented.

This Court has acknowledged the grave responsibility resting upon it in an original proceeding in which a State is a party, where the Court is per-

force cast in the role of trier of the facts and arbiter of the law, without appeal.

The statement from *Rhode Island v. Massachusetts* and *Iowa v. Illinois* above quoted and the deliberation with which the Court there proceeded are typical of the Court's judicial attitude in all such cases. Indeed, this Court's willingness to hear oral argument on the motion for leave to file the complaint in the present case was another manifestation of the judicial attitude to which we have referred. It is hardly necessary to suggest that the present emergency is fraught with consequences far more serious than those which existed at that preliminary stage.

With a due sense, we trust, of our responsibility at once to the Court and to our client, The State of Texas, we respectfully say to the Court that in the interest of justice the present motion should be granted.

Wherefore, defendant respectfully prays that plaintiff's motion for judgment on the pleadings be removed from the docket for Monday, March 27, 1950, and that the hearing be passed until Monday, May 1, or as soon thereafter as counsel may be heard.

Respectfully submitted.

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March 9, 1950.