No. 10 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 1958

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AND FOR LEAVE TO PROCEED EX PARTE AND SUPPORTING BRIEF

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Now comes the State of Louisiana through undersigned counsel and shows that Plaintiff's motion for entry of default and for leave to proceed ex parte should be denied for the reason that the Plaintiff by requesting and obtaining two separate continuances for the purpose of answering the Defendant's motion to dismiss herein filed on June 22, 1956, has waived its rights, if any it has, to secure a default judgment against the Defendant.

The State of Louisiana further opposes Plaintiff's motion to enter a default against the Defendant and to proceed ex parte for the reason that the Defendant has, within the period of time fixed by the Court for making its answer to the complaint, filed a motion to dismiss the complaint on the ground that this Court is without jurisdiction on the subject matter

of this suit, and is without jurisdiction over the Defendant personally.

The State of Louisiana shows that the motion to dismiss which it has filed herein is permitted by Rule 9 of this Court and Rule 12 of the Federal Rules of Civil Procedure to be filed and disposed of by the Court prior to the filing of an answer on the merits; that the said motion to dismiss on jurisdictional grounds was filed in good faith and not for any purpose of delay and presents serious questions concerning the authority of this Court to hear and determine this cause.

Defendant further shows that in the event that the said motion to dismiss on jurisdictional grounds should be over-ruled by the Court, the State of Louisiana desires to make a full and complete answer to the allegations of the complaint and to make affirmative defenses based upon treaties entered into by the United States, Acts of Congress, and historical facts in support of its claims to the properties described in the complaint; that this controversy involves lands and minerals of great value and raises important questions of law and fact which should not be decided in any ex parte procedure before this Court; and that if the Court should rule that Defendant's motion to dismiss is not in compliance with the orders of this Court, then the Defendant should be afforded an opportunity to file

a formal answer to the complaint on the merits within a reasonable time, following such a ruling by the Court.

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BRIEF IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT

JURISDICTION

The State of Louisiana denies that this Court has original jurisdiction of this controversy for the reasons set forth in its motion to dismiss on jurisdictional grounds.

STATEMENT

The statement contained in Plaintiff's brief outlines in chronological order the proceedings that have been had in this controversy up to the present time. However, there are certain statements made by Plaintiff's counsel to which Defendant takes exception.

Louisiana does not claim that it has received any grant from the United States Government under the terms of the Submerged Lands Act. It is Louisiana's contention that the Submerged Lands Act nullified the theory on which the opinions and decrees of this Court were based in the California, Texas and Louisiana

Tidelands Cases and merely recognized the title and right of possession which the coastal states have always had to the submerged lands seaward of their shores and coast lines.[1] In section 3 (b) (1) of the Submerged Lands Act "the United States releases and relinquishes unto said states . . . all right, title and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;"[2] such a disclaimer of title can hardly be considered as a grant or assignment of title by the United States.

Plaintiff calls attention to the fact that on June 20, 1956, the State of Louisiana filed a proceeding against the Humble Oil and Refining Company in the Civil District Court of the Parish of Orleans for an accounting for certain royalties. While this is irrelevant to the matter now presented to the Court, we may state that this was a suit brought by the State of Louisiana for an accounting under the terms of an oil and gas lease which it executed in favor of the Defendant. The Defendant sought to remove the case to the United States District Court for the Eastern Dis-

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[1]Superior Oil Co. v. Fontenot, 213 F.2d 565, Cert. Den. 348 US 837, 99 L.Ed. 660;
Legislative History of the Submerged Lands Acts; House Report #215 83d Cong., 1st Sess. pages 14, 15, 26, 33, 34, 43-47;
Senate Report #133, 83d Cong., 1st Sess. pages 5, 8, 54, 56-59, 64-68.

[2]Submerged Lands Act May 22, 1953 c. 65, Title II § 3, 67 Stat 30, 43 U.S.C. 1311.

trict of Louisiana on the ground that a Federal question is involved, but the Federal Court remanded the case to the State Court on the ground that the complaint presented no question of title to lands covered by the controversy now pending in this Court.

ARGUMENT

I

PLAINTIFF HAS WAIVED RIGHT TO OBJECT TO MOTION TO DISMISS.

As set forth in Plaintiff's preliminary statement, the State of Louisiana filed its motion to dismiss on jurisdictional grounds on June 22, 1956, which was within the period of time fixed by this Court for answering. Thereafter Plaintiff's counsel requested the Attorney General of Louisiana to agree on a delay of 30 days within which Plaintiff might answer this motion to dismiss. This delay was agreed to and on August 3, 1956 one of the Assistants to the Solicitor General addressed a letter to the Clerk of this Court advising him that the Government had obtained a delay until August 13, 1956 for making its response to Defendant's motion to dismiss and desired an additional delay until August 27, 1956 within which to make such response. The Clerk was advised that the Attorney General of Louisiana had consented to this continuance. Having thus sought and obtained delays within which to respond to the Defendant's motion, the Government has waived any right which it might have to object to the filing of the motion, and has no right to enter the default.

In *Ciccarello v. Schlitz Brewing Company*, 1 F.R.D. 491, 493, the United States District Court for the Southern District of West Virginia held that under

similar circumstances the Plaintiff would waive its right to object to the filing of this motion. In that case the Court said:

> " . . . if the motion were otherwise well founded, it could not be sustained in view of plaintiff's consent to the several continuances, and other proceedings without objection by plaintiff, which were had, constituting a waiver of any right to a default judgment. James' Sons & Co. v. Gott & Ball, 55 W. Va. 223, 57 S.E. 649; Pollard and Haw v. American Stone Co., 111 Va. 147, 68 S.E. 266. . . . It would not be in accord with the theory of default judgments, as stated in Keeler Bros. v. Yellowstone Valley National Bank, D.C., 235 F. 270, to permit plaintiff to take a default judgment by reason of any technical failure of defendants to plead when it is clear from the record that plaintiff has not been prejudiced by defendants not having pleaded and that it might work grave injustice to enter such judgment; nor would it be within the intent and spirit of the new rules to permit it."

II

MOTION TO DISMISS WAS PROPERLY FILED BY LOUISIANA BEFORE ANSWER ON THE MERITS.

Rule 9 paragraph 2 of this Court states that the Federal Rules of Civil Procedure may be taken as a guide to procedure in original actions in this Court, and paragraph 8 of the Rule 9 states that if the De-

fendant shall not *respond* by the return date, the Plaintiff shall be at liberty to proceed ex parte.

Rule 12 (a) of the Federal Rules of Civil Procedure requires a Defendant to serve his *answer* within 20 days after the service of the summons and complaint upon him, unless the Court directs otherwise. In the instant case, the Court directed the Defendant to answer on or before June 28, 1956 and the State of Louisiana responded by filing its motion to dismiss on jurisdictional grounds, on June 22, 1956, which was within the period of time prescribed by the Court for the Defendant's answer.

Although the Defendant is required by Rule 12 (a) to answer within the time directed by the Court, Rule 12 (b) permits the pleader to raise questions regarding lack of jurisdiction over the subject matter and lack of jurisdiction over the person by motion prior to answering on the merits. The service of this motion alters the period of time for answering and grants to the Defendant a delay following the ruling of the Court within which to file an answer (Rule 12 (a)). All of the text-writers agree that this Rule means what it says. Moore in his work on Federal Practice, Volume 2, page 2220 says:

> "Obviously a defendant would quite often prefer to raise certain objections which he believes will be sustained before resorting to the trouble of pleading and answer. This he may do. Under subdivision (b) (Rule 12) he may raise any or all of the following defenses which he may have by

motion; (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person . . . ".

Further commenting on Rule 12 Moore states in Volume 2, page 2235-6:

"Both the original summons and the third-party summons state that the defendant must serve an answer within 20 days after service of the summons, and subdivision (a) contains much the same language. It is clear, however, that the defendant or third-party defendant is not obliged to comply literally with the summons. Rule 12 (a) provides that the service of a motion permitted under the rule alters the periods of time prescribed in Rule 12 (a). Defendant may, if he wishes, present every defense that he has in his answer. If this course is followed the answer must be served within the time discussed below. Obviously in many cases the defendant will desire to raise some defenses or objections prior to answer. As heretofore outlined he may do this pursuant to subdivision (b), (e) and (f), subject to subdivisions (g) and (h), which govern the consolidation of motions and waiver of defenses."

Barron & Holtzoff on their work on Federal Practice and Procedure, Volume 1, Page 595, state:

"Service of a motion permitted by Rule 12 may enlarge the periods of time for serving the answer or other responsive pleading."

The same authorities say on Page 596 of Volume 1:

> "The grant of an extension of time to answer will also extend the time for filing and serving any preliminary motion."

The same authorities also state in Volume 1, Page 630:

> "Indeed, motion to dismiss for suggestion of want of jurisdiction is the appropriate method of attacking want of jurisdiction .... jurisdiction is to be determined from the allegations of the complaint, and has nothing to do with the merits."

The foregoing authorities are supported by numerous Court decisions including the following:

Universal Rim Company v. General Motors Corp., (CA6) 20 F. 2d 967, 31 F. 2d 969;
Blanton v. Pacific Mutual Life Insurance Co. (CA4) 4 F.R.D. 200, 146 F. 2d 725;
Faske v. Radbill (E.D.Pa.), 7 F.R.D. 234;
Orange Theatre Corp. v. Rayherstz Amusement Corp., (CA3), 139 F. 2d 871;
Auler v. Melrose, 102 F. Supp. 28;
National Distillers Products Corp. v. Hindeck, 10 F.R.D. 229.

In the case of *Universal Rim Company v. General Motors Corporation*, 20 F. 2d 966, 31 F. 2d 969, the parties had stipulated for an extension of time for the purpose of filing an answer and the Plaintiff took exception to the fact that the Defendant, instead of answering, filed a motion to dismiss. The Court of Ap-

peals for the Sixth Circuit passing upon the matter said:

> "There is no merit in the contention that the court should not have permitted the defendants to file a motion to dismiss, but should have required the filing of an answer. The term 'answer,' as used in the stipulation giving defendants additional time for filing answer, is to be construed, we think, to include a motion to dismiss. New Jersey v. New York, 31 US (6 Pet.) 323, 8 L. Ed. 414; Martin v. Baltimore & O. R. Co., 151 US 673, 14 S. Ct. 533, 38 L. Ed. 311."

The rules of this Court do not provide for any restriction of or limitation on the right of the Defendant to file a motion to dismiss and to have that motion passed on before an answer to the merits is filed. If this Court intended that all objections to the complaint and all questions as to jurisdiction should be raised either in opposition to Plaintiff's motion or leave to file the complaint, or in the answer to the merits, the Rules of this Court would have said so, but instead of making such a requirement, this Court states in its rules that the Federal Rules of Civil Procedure "may be taken as a guide to procedure in original actions in this Court." This Court has held that its order for the filing of an answer in any case is satisfied by the filing of a demurrer, or motion to dismiss. The case of the *State of New Jersey v. State of New York*, 6 Pet. 323, 31 US 323, 8 L. Ed. 414 is ample authority for this statement. The first opinion in this case is reported in 5 Pet. 284,

28 US 461, 8 L. Ed. 127, and at the end of that opinion Chief Justice Marshall issued the following order:

> " . . . the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered that the complainant be at liberty to proceed ex parte; and it is further decreed and ordered that unless the defendant, being served with a copy of this decree sixty days before the ensuing August Term of this court, shall appear on the second day of the next January Term thereof and answer the bill of the complainant, this court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill."

After the Defendant had been served with the foregoing order, it appeared and filed a demurrer. The Plaintiff objected that the order of the Court required an answer and that the filing of the demurrer was not in compliance with the Order. The Chief Justice dismissed this objection in his opinion which is reported in 6 Pet. 323, 31 US 323, 8 L. Ed. 414, saying:

> "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 of the last term. In that order the word 'answer' is not used in a technical 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."

In matters involving valuable properties and property rights, default judgments should be avoided and any doubt should be resolved against such procedure so that cases may be decided on their merits.

Tozer v. Charles A. Krause Mill Co., 189 F. 2d 242;

Henry v. Metropolitan Life Insurance Co., 3 F.R.D. 142.

III
NO DEFAULT SHOULD BE ENTERED

Rule 55 (a) of the Federal Rules of Civil Procedure provides for the entry of a default only where the Defendant has failed to plead or otherwise defend. The rule reads as follows:

> "(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default."

It is apparent from the statement of the rule that an entry of default cannot be made so long as Defendant's motion to dismiss is pending.

Plaintiff's counsel suggests that the Defendant has had ample time to prepare its answer and infers that the only conclusion to be drawn from Defendant's failure to answer to the merits is an inference that the motion was filed for the purpose of delay. Government counsel states that this inference is "strongly supported by the insubstantiality of the grounds on

which the motion is made." In view of the authorities which have been cited in this brief, Defendant would be entitled to ignore these conclusions drawn by Plaintiff's counsel. However, we feel that the Court should be informed that the motion to dismiss was filed in good faith and not for any purpose of delay and is, we believe, based on very substantial grounds. It is difficult to believe that counsel have much faith in their conclusions on this subject. If the motion to dismiss is so unsubstantial, as suggested by Government counsel, it would not require 60 days for their response to the motion to dismiss.

The mere fact that this Court overruled a plea to the jurisdiction in *United States v. Louisiana*, 338 US 806, 94 L.Ed. 488 is no bar to the presentation of the motion to dismiss on jurisdictional grounds now. The present plea differs in a number of respects from that which was overruled by the Court in the original case, and additional reasons and additional authorities are cited in support thereof. The Court cannot read our original brief in support of the motion to dismiss and conclude that there are not substantial grounds for maintaining this motion. The mere fact that the Court has overruled a plea in one case is no reason why another plea on the same subject should not be entertained in another case. Although the Court does not frequently reverse itself, it has in recent years rendered a number of far-reaching decisions which have changed a jurisprudence that has been followed for

many decades of time. Those who have implicit faith in a principle of law certainly have a right to insist on that principle whenever occasion for it arises. Louisiana does not believe that this Court should exercise original jurisdiction in this case.

Plaintiff suggests that the State took occasion to oppose the Government's motion for leave to file the complaint in this case on several grounds but did not then assert jurisdictional grounds which it now urges. Answering this, we would call the Court's attention to Louisiana's opposition to the motion for leave to file the complaint. The very first paragraph of this opposition states that Louisiana does not waive "its right to object to the jurisdiction of this Court." It was our belief then and it is our opinion now that the motion to dismiss on jurisdictional grounds was properly filed after the Court had granted leave to file the complaint.

Government counsel states that "Louisiana appears to have no desire to develop the facts." This statement by plaintiff's counsel carries reverse English. Plaintiff has never desired to develop the facts in its controversy with Louisiana. The original tidelands case against Louisiana was decided on the pleadings alone, although Louisiana asked for a hearing to develop the facts. In the present proceeding the United States insisted in its brief in support of its motion for leave to file the complaint that the controversy "will not require the taking of any evidence." (Orig. Br.,

p. 15); and that "no helpful purpose would be served by having the case come before this Court on findings of fact made by a lower court." (Orig. Br., p. 17). Plaintiff accordingly suggests in its original brief that this Court determine certain questions of law, and that the questions of fact be made the subject of supplemental proceedings before a Special Master as in *United States v. California.* (Orig. Br., p. 17). The United States, therefore, seeks to go the long way around in a controversy which it now states should be decided without delay.

Again we call attention to our opposition to Plaintiff's motion for leave to file the complaint and brief in support thereof. In the brief in support of this opposition, Louisiana devoted some 30 pages to a statement of its claims to submerged lands in the Gulf of Mexico and urged that the taking of evidence was necessary and desirable not only to prove the width of the marginal belt claimed and owned by the State, but to demonstrate also the landward and seaward location of the lines which mark this belt. In the opposition and in the brief Louisiana urged that there were many questions of fact which could not be conveniently and fully presented in an original proceeding in this Court and that it would be a matter of great expense and inconvenience to the State to transport its witnesses and documentary evidence to Washington for a hearing of this cause. That opposition as well as the present motion have been filed and urged by the

State of Louisiana because we believe that a more complete development of facts can be made through a trial in a District Court and that the ends of justice can best be served thereby. It was for this reason that Louisiana filed its injunction suit in the Fourteenth Judicial District Court in the Parish of Calcasieu, referred to on Page 6 of the Plaintiff's brief. The State of Louisiana is most anxious to develop the facts and desires to proceed in a way whereby these facts can be fully developed.

CONCLUSION

For the foregoing reasons the motion for entry of default should be denied.

In any event the State of Louisiana, if it be required to answer on the merits, should be granted ample time within which to draft and print its answer and send it through the mails to the Clerk of this Court.

Respectfully submitted,

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August, 1956.

PROOF OF SERVICE

I, ..., one of the attorneys for the State of Louisiana, defendant herein, and a member of the Bar of the Supreme Court of the United States, certify that on the ..... day of ....., 1956, I served copies of the foregoing Opposition to Plaintiff's Motion For Entry Of Default and For Leave to Proceed Ex Parte, And Supporting Brief, by leaving copies thereof at the offices of the Attorney General and of the Solicitor General of the United States, respectively, in the Department of Justice Building, Washington, D. C.

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