No. 35, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MAINE, ET AL.

BEFORE THE SPECIAL MASTER

RESPONSE OF UNITED STATES TO REJOINDER BRIEF FOR COMMON COUNSEL STATES

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The Rejoinder Brief for the Common Counsel States (hereinafte "C.C. Rej. Br.") consists in large part of further argument concerning the proper interpretation of the testimony and other evidence which has been submitted in this case. See, e.g., C.C. Rej. Br. 13-16, 21-23. Although we disagree with most if not all of defendants' discussion of the evidence in that brief, we believe that most of these differences in opinion or interpretation between the parties are now clear and

can be resolved by the Special Master without further argument. For that reason, we do not offer here a point-by-point response. However, there are some points made in the Rejoinder Brief which, in our view, require correction or clarification, and we discuss those briefly below.

1. C.C. Rej. Br. 7. We failed to indicate in our reply brief (Rep. Br. 13) that our quotation from 1 Nichols (ed.), Britton 68 was based upon our translation of Britton's original, which was in Law French. We had translated the expression "nostre terre" as "our land," in reliance upon standard French dictionaries,[1/] and therefore read Britton as describing royal fish as "sturgeons taken within our land * * *." We believe this interpretation to be correct, notwithstanding the fact that, as defendants point out, Nichols loosely translated "nostre terre" as "our dominions."

2. C.C. Rej. Br. 12-13. Contrary to defendants' reiterated assertion, we have furnished ample evidence showing that English law sharply distinguished, with respect to rights of property, between arms of the sea (i.e., rivers, ports, bays,

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1/ Ranconet, Thesor de la langue francaise (1606); Gattel, Dictionnaire universal de la langue francaise (1819); Quemner, Dictionnaire Juridique (1953).

and other inland tidal waters) and the adjacent seas. We merely summarize that evidence here for reference purposes. On the one hand, there is apparently no dispute that English law has historically recognized property rights in the beds of the arms of the sea. See, e.g., Moore, A History of the Foreshore 111-138 (1888) (cited at Rep. Br. 18). On the other hand, English law during the period of Bracton and Britton viewed the open sea as common to all and not subject to property ownership (see Br. 50 -51; Rep. Br. 13); as Plowden demonstrated in the late 16th century, English law had traditionally denied the existence of property rights--and specifically of crown property rights--in the bed of the adjacent sea (see Br. 51); and even during the 17th century it was generally recognized that not even the crown possessed the submerged seabed as property (see Br. 82-93; Rep. Br. 34-42).

3. C.C. Rej. Br. 17-18. In our reply brief, we inadvertently referred to the 1286 stone-quarrying case as arising in the County of Gloucester; defendants correctly point out that it arose in the County of Dorset. The quarrying took place in the bed of the sea opposite Portland, a port situated on Weymouth Bay. The Times Atlas of the World,

Plate 56 (Times Newspaper Limited, London 1968). It is unclear whether the quarry was in the inland waters of the bay or in the open sea; given the primitive quarrying methods available in the 13th century, the quarry was presumably in very shallow waters close to shore.

4. C.C. Rej. Br. 19. Defendants' unamplified assertion that Regina v. Keyn, L.R. 1 Exch. Div. 63 (1876), was "overruled two years after its promulgation" is inaccurate with regard to the aspect of that decision that is material to this case. That decision held (1) that under common law the territory of England ends at the low-water mark, and therefore the Court of Oyer and Terminer has no jurisdiction over crimes committed in the adjacent sea, and (2) that the jurisdiction of the Admiral did not extend to foreign nationals on foreign ships. It is of course the first holding, which recognized the low-water mark as the seaward boundary of England, that is critical to this case. Although the Territorial Waters Jurisdiction Act in 1878 partially "overruled" the second holding by authorizing the Admiral to assert

jurisdiction over crimes committed by foreigners within 1 marine league of the low-water mark,[2/] it did not affect the continuing validity of the first holding.

5. C.C. Rej. Br. 30-36. Our position, which we believe to be supported by the cases, is that a grant of "royalties" passed nothing in the absence of a specific referent; the necessary specificity could of course be supplied either by express words, custom, or context.[3/] See Doddington Case, 76 Eng. Rep. 484, 489 (1594). Nothing offered by defendants refutes our position.[4/] For example, the language

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2/ Even such limited jurisdiction over foreigners could be asserted only after obtaining the consent of the Foreign Office. See Section 3 of the Act, 41 and 42 Vic. c.73 (1878); Maine Ex. 1.0.

3/ Defendants offer no authority--and we know of none--for their claim (C.C. Rej. Br. 30-31) that this general canon of construction applied only to grants to individuals and not to grants to corporations.

4/ Defendants err in relying (C.C. Rej. Br. 31) on Viner who states only that if the king granted "all mines" in a land, and the only mine therein was royal, the context of the grant provided the necessary specificity to convey the royal mine. This example is not inconsistent with our position.

which defendants quote (C.C. Rej. Br. 33-35) from Dyke v. Walford, 5 Moore's Reports 434 (1846), illustrates that the grant there in question--a grant of jura regalia of a county palatine--denoted known and ascertainable prerogative interests; the holding of Dyke v. Walford is therefore that the reference to "of a county palatine" gave specific content to the otherwise general phrase "jura regalia" and that the specificity provided by that reference was sufficient to pass particular royalties or franchises. Cf. Whistler's Case, 77 Eng. Rep. 1021, 1024 (1613). Thus Dyke v. Walford emphasizes rather than refutes the need for specificity in royal grants. Application of this rule of construction to the colonial grants here in question would not, as defendants seem to suggest, deprive the word "royalties" in those grants of all force; it would simply restrict the grantees to enjoyment of the particular royalties specifically set forth in each grant, such as flotsam, jetsam, and lagan. None of the colonial grants specifies rights to the seabed itself as a royalty.

6. C.C. Rej. Br. 36-38. Defendants' emphasis on the resources of the seabed as a royalty represents a significant retreat from their original claim of ownership of the

seabed. But their amended claim of historic ownership only of the resources of the seabed is as erroneous as their broader original claim. The crown did not have a prerogative interest in the resources of the seabed of even the English sea; for example, as Professor Thorne testified (Tr. 2708), shellfishing was not an incident of the king's prerogative. Moreover, under even 17th and 18th century English law, an exclusive right to the resources of the adjacent sea, could arise only upon appropriation of those resources (see Br. 98-103; Rep. Br. 43-47), and there has been no appropriation of either the seabed or seabed resources off the coasts of the defendant States. We therefore do expressly deny that the crown was possessed of a prerogative interest in the seabed resources in the seas adjacent to the defendant States; furthermore, we believe that, applying the rules of construction appropriate to the period, it is clear that the crown did not intend to convey any such interest as a royalty.

7. C.C. Rej. Br. 39. At page 83 of our reply brief we inadvertently omitted the transcript citation (Tr. 2076) for Professor Kavenagh's statement that a successful assertion of exclusive rights in the adjacent seas would require "positive action" by the sovereign.

8. C.C. Rej. Br. 41. Although the congressional report referred to at page 85, note 36 of our reply brief noted that England by treaty had never claimed exclusive fisheries more than 3 leagues or 14 miles from shore and stressed that Congress intended narrowly to limit exclusive maritime claims, that report was not as explicit in restricting exclusive fisheries to 3 leagues as the slightly earlier congressional report set forth at Tr. 1789-1792 or the congressional instructions (Ex. 745, p. 231) directing John Adams to negotiate for nonexclusive fishing rights "in the American seas anywhere, excepting within the distance of 3 leagues of the shores of the territories remaining to Great Britain at the close of the war, if a nearer distance canno be obtained by negotiation."

9. C.C. Rej. Br. 42-44. The 1646 Massachusetts statute, without making any reference to the 1629 patent, acknowledged that by custom "foreign fishermen" had the right to use certain shorelands in connection with their fishing activities. Defendants apparently suggest that a French or Dutch fisherman, for example, would not have been a "foreign

fisherman" for purposes of that statute. We do not believe any court would have so deviated from the plain language of the statute, especially when defendants' narrower construction finds no support in any pertinent legislative history.[5/]

10. C.C. Rej. Br. 46-47. Defendants apparently now concede that, with the exception of the Plymouth and Cape Cod fisheries, the colonial fisheries were shore fisheries. We believe that the evidence shows that the Plymouth and Cape Cod fisheries were also principally shore fisheries until well into the 18th century. For example, there appears to be no record of any significant use of vessels in the mackerel fishery prior to 1770. See Ex. 742, p. 355. Apparently, before that

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5/ Defendants suggest that the legislative history of the 1646 statute can be supplied by the 1667 order repealing that statute, and that since that order loosely characterized the 1646 statute as being "according to a reservation in the patent," the statute must be construed as conferring only the specific privileges which the 1629 patent preserved for English subjects. But the only reference to the patent in the 1646 statute was to grants of land made pursuant to the patent; the statute stated that "foreign fishermen" had acquired their right to fish in the harbors by custom, not under the patent. In any event, a statute must be construed on the basis of its language and the evident intent of the enacting legislature; the construction allegedly supplied by a subsequent legislature--especially one as remote in time as 21 years--is irrelevant.

time, the only vessels were small open boats, which were used in shallow coastal waters in connection with the shore fishery. Cf. Ex. 719, p. 57.

11. C.C. Rej. Br. 54. We inadvertently stated that the quotations in note 63 at page 126 of our reply brief come from the congressional letters of credence issued to Benjamin Franklin and his fellow Commissioners; those quotations in fact come from the congressional resolutions authorizing those letters. The citation to 5 Journals of the Continental Congress 827 is, however, correct.[6/]

12. C.C. Rej. Br. 57-58. In suggesting that we have partially withdrawn our proposed conclusion of law 16, defendants misconstrue our position. Our argument under that conclusion of law is that if, contrary to our other contentions, it is determined that the separate States possessed seabed rights as of 1789, the ratification of the Constitution nevertheless completed a process of nationalization which vested all external sovereignty in the federal government, which subsequently

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6/ Contrary to defendants' repeated assertions (C.C. Br. 335; C.C. Rej. Br. 54), the letters of credence did in fact refer explicitly to Congress as the issuing body. 5 Journals of the Continental Congress 833.

renounced, for the nation as a whole, all seabed rights beyond the 3-mile limit. Nothing in our discussion of Article IV, Section 3, Clause 2 of the Constitution is incompatible with that argument.

13. C.C. Rej. Br. 63. Alexander Hamilton recognized that a government possesses inherent power to cede a territory for sovereign purposes without first obtaining the consent of the people of that territory. Ex. 698, pp. 59-60. Although he did not refer to the federal government, we believe that the logic of his argument necessarily extends to that government.

14. C.C. Rej. Br. 64-65. Defendants err in stating that we contended "that in the Bering Sea arbitration the United States claimed only that 'prescriptive rights could exist outside the 3-mile limit'" (C.C. Rej. Br. 64; second emphasis added). What we in fact stated was that the Bering Sea Arbitration was "an instance where the United States claimed that prescriptive rights could exist outside the 3-mile limit" (Rep. Br. 170).[7/] In that arbitration the United States also

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7/ The United States' claim of prescriptive right to the seals rested upon an older Russian jurisdictional claim which, it was argued, had been conveyed incident to the cession of Alaska. Henderson, American Diplomatic Questions 34-36 (1901); Stanton, The Behring Sea Controversy (1892) 26-29.

advanced ar alternative theory of estoppel, which itself was based upon an occupation, i.e., development of a commercial seal fishery. It was in discussing the latter theory that the United States' representative to the arbitration denied that "prescriptive" occupation was necessary. Of course, neither the theory of prescriptive occupation nor that of estoppel (which was rejected by the arbitrator) would avail defendants here.

15. C.C. Rej. Br. 65. In note 90 at page 175 of our reply brief we inadvertently referred to a document as being a treaty between Denmark and Norway; it was in fact a Dano-Norwegian decree regarding prize captures. All the statements, decrees, treaties, and so forth listed in that note adhered either to the cannon-shot rule or to its one-league or 3-mile equivalent. There is of course ample other evidence of the use of the cannon-shot as the limit of seaward exclusive jurisdiction. See, e.g., U.S. Ex. 7, p. 26, n. 5.

For the foregoing reasons, and those stated in our opening and reply briefs, the Special Master should find that the United States is entitled as against the defendant States to the natural resources of the seabed underlying the Atlantic Ocean beyond 3 geographical miles from the coastline.

Respectfully submitted.

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