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IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

No. 49 Original

STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of Illinois,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

PLAINTIFF'S BRIEF REGARDING THE APPLICABLE LAW

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This Honorable Court requested a brief on the question whether federal or state law would govern the substantive issues sought to be presented for decision in the original action involved in the instant proceedings. Plaintiff's unequivocal answer to the question posed is that *federal common law must rule the substantive issues of the case.* Sound and basic principles of legal reason viewed against the background of the constitutional history of this country mandate this answer.

THE REASONS FOR THE APPLICATION OF FEDERAL LAW.

A. The Concept of Sovereignty Involved in the Present Case Demands the Use of Federal Law.

In approaching the problem of the applicable law it must be kept in mind that the present complaint for which leave to file is sought by the State of Illinois is directed against certain Wisconsin municipalities in their capacity as political subdivisions and agencies of the State, carrying out the functions of the State in the field of public health within their boundaries. As stated by respondent, City of Kenosha, in its brief in opposition to plaintiff's motion (p. 3), the municipalities in question operate "in matters pertaining to water pollution occurring in Lake Michigan" under the jurisdiction of a State agency, the Wisconsin Department of Natural Resources. Hence the present proceedings, though pro forma brought against the municipalities causing the pollution charged, are in effect and political reality directed against the State under whose authority these municipalities operate. The complaint, therefore, must be viewed in the light of proceedings instituted by one state against the other.

The United States Constitution (Art. III, §2) invests this Court with original jurisdiction "in all Cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a Party." Thus each state —each member of the Union—is placed in the same category as are ambassadors, public ministers and consuls, in short, representatives of a foreign sovereign. The contextual linking of foreign sovereigns or those representing them with the member states of the Union was obviously not accidental but had a definite purpose. It was designed to treat foreign sovereigns and states in their sovereign capacity alike. Just as the representative of a sovereign power should be subject only to the highest judicial authority of the country, so should a state in its capacity as litigant complaining of infringement of its sovereign rights subject itself only to the country's highest judicial tribunal—a tribunal which by the constitutional plan rises above the parochial concerns and interests of the individual state. Hence, a state invoking original jurisdiction appears before this Court in matters detrimentally affecting its sovereign interests as a sovereign who should not be forced to subject "its dignity . . . to an inferior tribunal," especially if that tribunal were to determine the dispute upon the basis of local law.

This meaning of the constitutional provision is not only derived from the language and the context of the charter but is also corroborated by the explanatory statements of the founding fathers. Alexander Hamilton in The Federalist Papers, No. 81 (Mentor Book, published by The New American Library, 1961, p. 487), speaking of the constitutional provision in question, declared that public ministers of every class are "the

immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation . . . . . In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." Hamilton, following up these statements, forcefully emphasized the sovereignty enjoyed by each member state of the Union.

It flows as a logical consequence from the concept of sovereignty, as envisioned by the founding fathers, that in disputes between states or a state and the citizens of another state, infringing upon a state's sovereign interests, the issues must be determined not by the municipal law of one or the other opposing parties but rather by an "interstate law"—a law which, so to speak, transcends the law of the individual states and does not derive its force from them. Were it otherwise, a state, filing suit in its sovereign capacity and claiming encroachment on its sovereign rights, might be subjected with respect to the determination of its sovereign interests to the municipal law of another state. Such subjection would be indeed intolerable; it would be destructive and in clear contradiction of the very essence of the principle of sovereignty, which, under the constitutional concept, is premised upon the equality of states before this Court. *Kansas* v. *Colorado,* 206 U. S. 46 at 95, 97, 98, 51 L. ed. 956 at 974, 975 (1907). This, in turn, necessitates the application of a law which is not the creature of one state, local in its scope, but rather reaches beyond the state's boundaries, in brief, is "interstate." Thus the

existence and application of "interstate law" to disputes between states and the idea of sovereignty are interrelated and interdependent. "The latter justifies the former; the former is made necessary by the latter." (Note: What Rule of Decision Should Control in Interstate Controversies, 21 Harv. L. R. 132 at 133 (1907)).

B. This Court Has Recognized a Body of Interstate Common Law.

This Court has repeatedly recognized the existence of a body of "interstate common law," made up of a number of components, applicable in the settling of interstate disputes. It has clearly and precisely articulated the principle in *Kansas* v. *Colorado,* 206 U. S. 46 at 98, 27 S. Ct. 655 at 667, 51 L. ed. 956 at 975 (1907). There Mr. Justice Brewer quoted first the words of Chief Justice Fuller that this Court was sitting in interstate disputes as an international, as well as a domestic tribunal, applying federal, state and international law as the exigencies of the particular case might demand. Then he went on to say:

> One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, supra, the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. **In other words, through these successive disputes and deci-**

> **sions, this court is practically building up what may not improperly be called interstate common law.** (Emphasis supplied).

This Court adhered through the years to the principle that in cases in which the sovereign character of the litigating states is affected, such as in interstate water and boundary disputes, federal substantive law will govern the controversy. In *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U. S. 92 at 110, 58 S. Ct. 803 at 811, 82 L. ed. 1202 at 1212, 1213 (1938), this Court articulated these ideas in precise and succinct terms:

> For whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. *State of Kansas* v. *Colorado,* 206 U. S. 46, 95, 97, 98, 27 S. Ct. 655, 51 L. Ed. 956; *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669, 671, 51 S. Ct. 286, 289, 75 L. Ed. 602; *New Jersey* v. *New York,* 283 U.S. 336, 342, 343, 51 S. Ct. 478, 479, 75 L. Ed. 1104, *Washington* v. *Oregon,* 297 U. S. 517, 528, 56 S. Ct. 540, 545, 80 L. Ed. 837. **Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.** (Emphasis supplied).

Significantly, these words were spoken by Mr. Justice Brandeis in a case which was decided by this Court on the same day on which *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, was decided, and in which this Court had not exercised original jurisdiction but which had reached this Court upon certiorari from state court proceedings instituted by a private company against a state water official. Nevertheless, it was recognized that interstate water disputes should be governed and settled by federal law.

C. Since the Sovereign Interests of Two States are Pitted Against Each Other, Federal Law Must Be Applied Regardless of Whether the Action is Directed Against a State or a State Agency.

Though the principle of applicable federal substantive law has been, in general, enunciated by this Court in controversies of states inter *sese,* it applies with full force to the factual and legal situation presented in the instant proceedings. Again it must be emphasized that the present action is in effect directed against a state, pertaining in its real sense to the use of interstate waters; that in itself would be sufficient for the applicability of federal law in the determination of the substantive issues.

But even if form is elevated over substance and the complaint is judged by its face as not directly involving a state, federal law must still govern the dispute. The very nature of the dispute demands that. This is not a controversy between a state and non-resident individuals concerning decedents' estates, motor vehicles, business torts, government contracts or taxes. There state law may well apply. This is a case radically different; it involves the exercise of a state's police power in the field of public health by political subdivisions and agencies of one state to the detriment of the citizens of another state. Such dispute goes to the very core of the relations between two states within the federal-state framework and affects and touches the sovereign rights and powers of both; this is so whether the state against whose agencies the proceedings are directed is an immediate party to the dispute or not. Here the interests of two states are in harsh competition with each other, political subdivisions of one state claiming that they may use, in the exercise

of their public health functions, interstate waters and public water supplies in one way, the other state complaining that such use is inimical to its public health because it contaminates those very waters and constitutes a danger to the life of its citizens. Such conflicting state interests spawning virulent controversies between the antagonists do not lend themselves to, and cannot be settled by, the application of narrow state law principles which by their very nature are fashioned by, and attuned to, the parochial interests of the state whose law is applied. Controversies of that nature must be determined and judged by a law which transcends the local rules of each state and adopts norms that embrace within their purview the sovereign interests of the affected states, viewed in the light of a sound and viable federal system. The interstate federal common law, derived from various sources, federal, state, international "as the exigencies of the case may demand" (*Connecticut* v. *Massachusetts*, 282 U. S. 660 at 670, 51 St. Ct. 286 at 289, 75 L. Ed. 602 at 607). furnishes these state-transcending norms of decision.

D. The Impact of the Present Controversy Upon the Federal Structure Calls for the Application of Federal Law.

There is another reason why federal law must govern the issues raised in the present case. This dispute, though cloaked in the innocuous mantle of a simple tort, affects to a vital degree federal law and has a serious impact on the structure of the federal system.

The various federal laws and regulations covering a number of problems relating to navigable waters involved here, though not governing the situation at hand, must

be taken into consideration in determining the dispute. Federal laws such as those designed to protect the environment (Federal Water Quality Act of 1965, 33 U.S.C.A. §§1151 et seq.) or the fish and wildlife (16 U. S. C. A. §665) or the navigable waters (33 U. S. C. A. §§403 et seq.) give to the case, independent and apart from the problem of antagonistic sovereign interests within the structure of interstate relations, a federal hue and coloration which call forcefully for the application of federal law. The utilization of federal principles alone, applied against the backdrop of these federal statutes in the decision-making process, can assure the proper accommodation and safeguarding of the public policy considerations and legislative aims embodied in these statutes and give them the harmonizing cohesion required by a sound and workable federal system. Again, the law of a state is not equipped to accomplish that task; it is guided, as it necessarily must be, by local interests and policy considerations. Obviously, the resolution of the relative rights of the contending parties respecting the waters in question, viewed under these aspects, should not and could not "depend upon the same considerations and is not governed by the same rules of law that are applied in . . . States for the solution of similar questions of private right." (*Connecticut* v. *Massachusetts,* 282 U.S. 660 at 670, 51 S. Ct. 286 at 289, 75 L. ed. 602 at 607 (1931)).

It should be emphasized in this connection that it would be totally anomalous if federal law were not applied in the present case. It was previously stressed that this Court had repeatedly recognized the applicability of federal common law in the settlement of controversies between states concerning water rights and water usages if this Court's jurisdiction had been invoked. For example,

Mr. Justice Holmes in *New Jersey* v. *New York,* 283 U. S. 336 at 342, 343, 51 S. Ct. 478 at 479, 75 L. ed. 1104 at 1106 (1931), declared:

> We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut* v. *Massachusetts,* 282 U.S. 660, 51 St. Ct. 286, 75 L. Ed. 602, February 24, 1931 (see, also, Id., 283 U. S. 789, 51 S. Ct. 356, 75 L. Ed. ——). Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.

If a conflict regarding water use arises, not between two states, but rather between a state and an agency or political subdivision of another state, should that difference really influence the choice of the applicable law? Should federal law suddenly have to yield to state law, simply because an agency of the state, deriving its power from the state, rather than the state itself, is a party to the suit? This would be indeed a distinction without difference, lacking any sense or reason. The conflicting water use claims put forth by virtue of the right of sovereignty, as expressed in the exercise of police power in the field of public health, would be just as potent and deserving of judicial recognition by this Court in one case as in the other. This holds particularly true in the instant matter, in which the political subdivisions involved represent the largest concentrations of population and industry in the State of Wisconsin.

E. The Constitutional Grant of Jurisdiction Gives to This Court the Authority to Make Its Own Rules of Decision.

Apart from the considerations previously mentioned, it can well be said that the constitutional grant of jurisdiction invests this Court with the power to make its own rules of decision which obviously must conform to and be within the boundaries of the state-federal constitutional structure from which this Court derives its authority. Chief Justice Taney recognized and acknowledged that decisional rule-making power of the Court when he declared (*Kentucky* v. *Dennison,* 24 How. 66 at 98 (U.S. 1859), 18 L. ed. 717 at 726), that insofar as this Court is given original jurisdiction by Article III of the Constitution it has the authority "to exercise it without further Act of Congress to regulate its process or confer jurisdiction; and that the Court may regulate and mold the process it uses in such manner as in its judgment will best promote the purposes of justice." It is respectfully submitted that the decision-making rules adopted by this Court in settling disputes decided under the original jurisdictional power of this Court become, by force of their adoption and application by this Court, federal rules since this Court metes out justice as a federal tribunal. Hence even if this Court were to adopt state law for the settling of a dispute, over which it assumes original jurisdiction, the state law so adopted would become automatically federal law. But be that as it may, the stark fact remains that the interstate ramifications and the conflicting sovereign interests demand clearly the application of true federal principles, unfettered by the confining and stifling tenets of local law which do not focus upon the broad vistas of the federal structure.

F. The Factual and Legal Issues Presented in the Instant Case Differ Widely from Those in Ohio v. Wyandotte Chemicals Corporation.

Ohio v. *Wyandotte Chemicals Corp.*, 91 S. Ct. 1005 (1971), which was decided by this Court after the present application for the exercise of original jurisdiction had been made and which dealt with federal and state jurisdictional problems, can be readily distinguished from the situation presented here. In the first place, *Wyandotte* was a case in which the State of Ohio attempted to invoke this Court's original jurisdiction in an action brought against several *private corporations* charged with the contamination of Lake Erie by having allegedly dumped mercury in the lake's tributaries. Contrariwise, the present proceedings are not directed against private persons but against *political subdivisions and governmental agencies of a state* for their acts and activities in carrying out their governmental functions delegated to them by the state in the field of public health. While *Wyandotte* did not involve any competing issues of sovereignty, the instant case represents a direct clash between vital, conflicting sovereign interests. The *Wyandotte* case pertaining to private defendants only could be readily decided by means of an appropriate long-arm statute in an Ohio state court under Ohio state law. The present case cannot be determined in an Illinois state court. Since the defendants in the case at hand are political subdivisions and public agencies of the State of Wisconsin, they are not amenable to Illinois legal processes; even if, theoretically, under the Illinois long-arm statute, service could be obtained upon these Wisconsin public agencies, there is certainly no legal way of forcing them to comply with any Illinois court decree, especially not

one of an injunctive nature. Nor is there any reason to believe that the Wisconsin public agencies would voluntarily accept and implement the decree of an Illinois court—a decree issued by an out-of-state court, attempting to regulate the intrastate, public functions of governmental agencies. Moreover, the Wisconsin agencies and courts could not be forced under the full faith and credit clause of the Constitution to give recognition to an Illinois decree of such a nature.

The same which holds true of an Illinois court procedure applies with equal force to any action instituted in a federal court, were such jurisdiction to exist at all. Under the present status of the law an action in the federal district court could not be commenced by the State of Illinois since, as indicated by this Court in footnote 3 to the *Wyandotte* decision (91 S. Ct. 1005 at 1009, 1010), the jurisdictional prerequisites for such action would be lacking. Thus, the only judicial recourse—if that appellation can be properly used in this connection—available to the plaintiff, State of Illinois, would be a suit filed in a Wisconsin state court. Apart from the fact that it is rather doubtful whether the State of Illinois, suing in its sovereign capacity, could file such action at all, Illinois would automatically subject itself to the jurisdiction and laws of Wisconsin; yet, that being the case, Illinois, obviously, would have very little chance of success in its quest for legal action against Wisconsin governmental agencies. Moreover, Illinois would have to meekly submit the adjudication of its sovereign rights and interests to the dictates of Wisconsin's tribunals. Thus, contrary to *Wyandotte,* there is in this case no other appropriate judicial tribunal available to the plaintiff State than that afforded by this Court; only in this Court

can plaintiff's sovereign rights be properly recognized, protected, and vindicated. This, in turn, can be achieved only through the application of federal norms.

In *Wyandotte,* contrary to this case, the issues were essentially bottomed on local law; their determination would have had but little effect on federal-state relations. This case, on the other hand, as repeatedly mentioned, raises grave and serious problems concerning sovereign states rights and powers within the federal system; it is, therefore, of national import, and, it is respectfully urged, should be decided by this Court.

In contradistinction to *Wyandotte,* where state courts and other regulatory bodies had dealt with the issues involved and a proliferation of remedial activities had occurred, no judicial action was ever taken in the present case nor could it be appropriately taken by any other tribunal than by this Court.

CONCLUSION

It was pointed out throughout this brief that the present case represents in effect and political reality a confrontation of sovereign interests within the constitutional framework. The impact upon the federal structure is obvious. It demands a solution on the basis of federal principles which transcend the local laws and parochial concerns of the individual states.

Respectfully submitted,

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