IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 50 Original

STATE OF VERMONT, A sovereign state,
Montpelier, Vermont, *Plaintiff,*

v.

STATE OF NEW YORK, A sovereign state,
Albany, New York

and

INTERNATIONAL PAPER COMPANY, A corporation
existing under the laws of the State
of New York, located at New York, New York,
Defendants.

MEMORANDUM OF THE STATE OF VERMONT ON WHETHER FEDERAL OR STATE LAW GOVERNS SUBSTANTIVE ISSUES

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AUTHORITIES

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QUESTION PRESENTED

Will Federal or State law govern the substantive issues sought to be presented for decision in this original action?

STATEMENT OF THE CASE

The State of Vermont has filed a motion with this Court for leave to file a complaint. The Complaint alleges that Defendants have created and are maintaining a public nuisance, are committing a trespass, and are unlawfully altering an interstate boundary. The same activity constitutes an impediment to navigation

and interferes with the constitutional rights of Vermont citizens to a protected environment (Complaint, pars. XXI, XXII, XXIII, XXV, XXVIII). The Defendants are the State of New York which has a common boundary with the State of Vermont, and International Paper Company which is a New York corporation. The Plaintiff's claims are based upon allegations that Defendant International Paper Company has for many years discharged waste products from its mill at Ticonderoga, New York, causing the formation of a massive sludge bed on the bottom of Lake Champlain, which Lake forms a part of the boundary between the States of Vermont and New York.

ARGUMENT

I. In Original Actions Before This Court Where One State Has Proceeded Against Another, Substantive Issues Are Controlled By Interstate Federal Common Law.

The line of cases most closely analogous to the case at bar are those involving interstate water or boundary disputes. In those cases, this Court has consistently held that there is a "federal common law" which controls substantive issues.

Thus, in the first decision in Kansas' complaint against Colorado over taking water from the Arkansas River, the issue of which law was controlling arose. The Court made it clear that it would be bound by neither state nor federal law stating:

> Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand . . . .
>
> *Kansas v. Colorado,* 185 U.S. 125, 146-47 (1902).

In a subsequent decision in the same case, the Court became troubled by the question — which law applies? The Court stated:

> 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, . . . 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 decisions this court is practically building up what may not improperly be called interstate common law.* (Emphasis added.)
> *Kansas v. Colorado,* 206 U.S. 46, 98 (1906).

Similar principles have been enunciated in *Wyoming v. Colorado,* 259 U.S. 419, 470 (1922); *Connecticut v. Massachusetts,* 282 U.S. 660, 669-71 (1930); and *New Jersey v. New York,* 283 U.S. 336, 342-43 (1931). In the *Wyoming* and *Connecticut* cases, the law in both states was identical. The Court indicated in both cases that it was not bound by state law but in *Wyoming,* it decided that the state law was appropriate and would offer an equitable result. In *Connecticut v. Massachusetts,* on the other hand, this Court decided that the rule of law which prevailed in both states should not be applied to a dispute between states — rather the Court would determine "what is an equitable apportionment of the use of such waters." 282 U.S. at 671.

The "federal common law" referred to in the original actions cited is not the same federal common law which was rejected in *Erie R. R. v. Tompkins,* 304 U.S. 64 (1938). In fact this Court cited a case the same day as *Erie* involving an interstate water dispute in which it said:

> 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.
> *Hinderlider v. La Plata River and Cherry Creek Ditch Co.,* 304 U.S. 92, 110 (1938).

It would appear that this continues to be the law. In *Texas v. New Jersey,* 379 U.S. 674 (1965), this Court was asked to settle an escheat problem with several states claiming the right to escheat. The Court stated:

> Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility in the exercise of our original jurisdiction to

> adopt a rule which will settle the question of which State will be allowed to escheat this intangible personal property. *Id.* at 677; see also, *Nebraska v. Wyoming,* 325 U.S. 589, 610 (1944).

In the case at bar, a dispute has arisen between two states concerning the abatement of a nuisance which crosses the boundary of the two states putting the boundary line into question and causing a trespass. It would be inappropriate to apply the law of either state to the settlement of this dispute in view of the fact that each state stands on the same level, but neither has the right to legislate beyond its borders.

This Court in settling this dispute has the power and ought to look to the law of either state, federal law and the common law in general to find equitable principles which should control the situation. *Texas v. Florida,* 306 U.S. 398 (1939). In that case the Court decided that the legal standard of relief would be:

> Whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decisions of cases within the original jurisdiction of this Court.
>
> *Id.* at 405.

There is a paucity of precedent which would be helpful in determining the law which controls in a case where a state sues a citizen of another state. There is some suggestion in *Pennsylvania v. Wheeling and Belmont Bridge Co.,* 54 U.S. (13 How.) 518 (1851), that state substantive law would control when there is a choice of law rule which is clearly applicable. The *Wheeling* case is somewhat confused in its reasoning and of dubious precedent value in view of *Erie* and the above-cited more recent original action cases.

There seems to be no reason to depart from the state v. state rule when an individual defendant is joined in an original action. The same law should control the disposition of this case as to both defendants.

CONCLUSION

There is a limited amount of substantive law which has developed in this Court pertaining to original actions. This is the case as a result of the fact that there is a limited number of cases which have been brought. In those cases where a rule of law has been enunciated, this Court has consistently held that it will apply State, Federal or International law in order to reach an equitable result based upon the facts presented. This is a sound rule and ought to be followed in this case.

Dated at Montpelier, Vermont, February 17, 1972.

Respectfully submitted,

STATE OF VERMONT

By

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CERTIFICATE OF SERVICE

I, Fred I. Parker, Deputy Attorney General for the State of Vermont, Plaintiff herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of February, 1972, I served copies of this Memorandum of the State of Vermont On Whether Federal Or State Law Governs Substantive Issues by mailing three copies of the same to each

party required to be served in a duly addressed envelope, postage prepaid, in the United States mails, as follows:

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