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SUPREME COURT, U.S.

No. 54, Original

In The Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF FLORIDA AND TEXAS, DEFENDANTS

REPORT OF SPECIAL MASTER ON MOTION OF
DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

Olin Hatfield Chilson
Special Master
United States Courthouse
Denver, Colorado 80202

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BACKGROUND

By leave of Court, plaintiff filed its complaint alleging jurisdiction pursuant to Article III, Section 2, Clause 2 of the Constitution and stating in pertinent parts:

“II”

“Neither of the defendant States has or has ever had any right to control fishing by foreign vessels or their crews in the sea more than three geographical miles from the coastline of the United States.

“III”

“Each of the defendant States has asserted that it has the right to control fishing by foreign vessels and their crews in some part of the sea more than three geographical miles from the coastline of the United States, and in the exercise of that asserted right each of the defendant States has arrested foreign vessels and their crews for fishing in the sea at points more than three geographical miles from the coastline of the United States.

“IV”

“The exercise of control over fishing by foreign vessels and their crews in the sea more than three geographical miles from the coastline of the United States by the defendant States threatens to interfere with and cause irreparable harm to the foreign policy and conduct of the foreign relations of the United States.

“WHEREFORE, the United States requests that a decree be entered declaring that neither of the defendant States has any right to control fishing ~~for~~ by foreign vessels or their crews in the sea more than three geographical miles from the coastline of the United States.”

Defendants filed their answers in May 1972. In its answer, Texas requested reference to a special master.

In June 1972, Honorable Charles L. Powell, Senior United States District Judge in Spokane, Washington, was appointed Special Master.

In July 1975, defendants filed a joint motion for leave to file a counterclaim which alleges jurisdiction under Article III of the Constitution and states in pertinent parts:

“II”

“Each of the Defendant States has asserted that it has the right to control fishing by foreign vessels and their crews in the sea within nine geographical miles seaward of their coastlines. The United States by its Complaint in this cause has denied the States’ authority to control such fishing in the area more than three geographical miles seaward of their coastlines; the United States through discovery has denied the States’ authority to control fishing by foreign vessels and their crews in the area within three miles seaward of their coastline.

“WHEREFORE, in order to avoid the strong probability of future, unnecessary litigation involving the authority of the States of Florida and Texas to control fishing by foreign vessels and their crews within three geographical miles seaward of their coastlines, the States of Florida and Texas request that a decree be entered declaring that the Defendant States have the right and authority to control fishing by foreign vessels or their crews in the sea within three geographical miles seaward of their coastlines.”

In short, plaintiff seeks to adjudicate the defendants’ rights to control fishing by foreign vessels and their crews beyond but not within three miles seaward from the coastline. By their counterclaim, defendants would enlarge the

litigation to adjudicate the defendants' rights to control fishing by foreign vessels and their crews within three miles seaward of their coastlines.

In the fall of 1975, Judge Powell died. The undersigned, on December 8, 1975, was appointed Special Master to succeed Judge Powell and the defendants' motion for leave to file a counterclaim was referred to him. The Special Master has considered the briefs and oral argument of the parties had on February 17, 1976, and makes this report.

SUMMARY OF DEFENDANTS' POSITIONS

The counterclaim would avoid a multiplicity of litigation. Defendants contend that it is plaintiff's official position that defendants have no right to control fishing by foreign vessels and their crews either within or beyond the three-mile limit, and that unless the defendants' rights within the three-mile limit are adjudicated in this action, future litigation is inevitable to determine the states' rights within the three-mile limit. Justice requires all issues be resolved in this litigation thereby avoiding the expense and other consequences of multiple litigation as well as uncertainty on the part of the defendants as to their rights to control fishing by foreign vessels and foreign crews within as well as beyond the three-mile limit.

Defendants assert that prior to this action the United States never questioned the right of the defendants to control fishing by foreign vessels and their crews within the three-mile limit, but since the institution of this action, plaintiff has denied defendants have such a right. The states are entitled to have their rights adjudicated not only with reference to the area beyond the three-mile limit but also within it.

Defendants further state that refusal to permit the adjudication of their rights to control fishing by foreign vessels and their crews within their three-mile limit will result in irreparable damage to the fishing industry in the defendant states as State participation in regulation and control of fishing by foreign vessels and crews is necessary for the proper

protection of the defendants' fishing industry.

Plaintiff opposes the motion asserting:

- A. Sovereign immunity bars defendants' counterclaim.
- B. The issue which defendants would raise by the counterclaim is not ripe for consideration.

SOVEREIGN IMMUNITY

The Special Master is of the opinion that the proposed counterclaim is barred by the sovereign immunity of the United States for the reasons which follow.

That the United States is not subject to suit by a state without its consent and that such consent can only be given by an act of congress, are doctrines well established by a long line of decisions of this Court. *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609, (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Minnesota v. United States*, 305 U.S. 382 (1939); *Ickes v. Fox*, 300 U.S. 82 (1937); *Arizona v. California*, 298 U.S. 558 (1936); *Kansas v. United States*, 204 U.S. 331 (1907).

This doctrine has been applied by this Court to cross claims and counterclaims as well as to original actions. *United States v. United States Fidelity & Guaranty Corp.*, 309 U.S. 506 (1940). *United States v. Shaw*, 309 U.S. 495 (1940); *Illinois Central Railroad Co. v. State Public Utilities Commission of Illinois*, 245 U.S. 493 (1918).

In their response brief filed October 30, 1975, defendants assert that to employ the doctrine of sovereign immunity in this case, "runs counter to any moral judgment"; "No logical or just, as opposed to dogmatic, justification exists - -" for invoking sovereign immunity and that " - - rationale for invoking sovereign immunity as a bar does not exist [in this case]." Defendants' Response Brief at 2, 3.

To support this argument, defendants cite the following cases.

National City Bank of New York v. Republic of China, 438 U.S. 356 (1955). This involved an action brought by the Republic of China, a foreign government, in the Courts of the

United States to recover \$200,000.00 deposited in the National City Bank of New York. The Bank filed counterclaims seeking an affirmative judgment in excess of one million dollars. The Republic claimed immunity from the counterclaims as a foreign sovereign. This Court permitted the counterclaims to be made and denied the claim of sovereign immunity.

The opinion discusses a trend of waiver of immunity in certain areas by the legislative branches of government but there is no indication that the opinion repudiated or modified the doctrine of sovereign immunity recognized by previous decisions of this Court.

Defendants also refer to *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This Court held that the action was in effect one against the United States, invoked the rule of sovereign immunity, and ordered the action dismissed.

After the *Larson* decision in 1949, this Court in *Dugan v. Rank*, 372 U.S. 609 (1963) and *Hawaii v. Gordon*, 373 U.S. 57 (1963), again applied the doctrine of sovereign immunity.

The defendants cite *United States v. The Thekla*, 266 U.S. 328 (1924) apparently as authority that the doctrine of sovereign immunity is not applicable to a counterclaim.

The Thekla involved the collision of two ships where libel and cross libel of the respective owners had been consolidated. The United States intervened and filed a claim alleging possession and ownership of the libelant's vessel at the time of the collision. Damages were decreed against the United States. The award was sustained by this Court.

In *United States v. Shaw*, 309 U.S. 495 (1940), *The Thekla* case was cited as authority that sovereign immunity did not protect the United States from a cross claim in a probate proceeding wherein the United States had filed a claim against the estate. This Court invoked sovereign immunity as to the cross claim against the United States stating:

"There is little indication in the facts or language

of *The Thekla* to indicate an intention to permit generally unlimited cross claims.”

The Special Master finds the counterclaim is barred by the doctrine of sovereign immunity and recommends that the Court deny defendants’ motion for leave to file the counterclaim.

RIPENESS

Whether or not the counterclaim is or is not “ripe” for determination is a mixed question of law and fact. The plaintiff asserts that there is no substantial likelihood that “- - - a controversy will develop - - -” over the question of the right to control fishing by foreign vessels and foreign crews within the three-mile limit. Defendants assert that unless the counterclaim is permitted, a future law suit by plaintiff to adjudicate this question is “- - - virtually inevitable.”

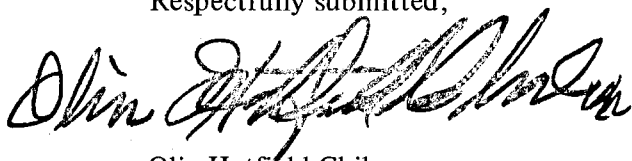
If the Court denies defendants’ motion for leave to file the counterclaim on the grounds of sovereign immunity, the question of “ripeness” of the controversy alleged in the counterclaim becomes irrelevant.

If, however, the Court determines the counterclaim is not barred by sovereign immunity, the question of whether or not a justiciable controversy ripe for adjudication has been alleged by the counterclaim will remain for consideration by the Special Master and ultimate determination by this Court. Additionally, the Special Master and the Court must determine a similar question with reference to the complaint. The defendants have interposed as a defense to plaintiff’s complaint that it does not state a case or controversy ripe for determination. Answer of the State of Texas at 1; Defendants’ Brief in Support of Motion for Leave to File Counterclaim at 9.

The determination of these questions may well involve a determination of factual issues from conflicting evidence. It is the opinion of the Special Master that to provide an expeditious and orderly procedure, in the event the motion for

leave to file the counterclaim is not denied on the ground of sovereign immunity, that the motion for leave to file the counterclaim be granted. Thereby the question of whether or not a justiciable controversy exists with respect to the matters set forth in both the complaint and the counterclaim can be litigated together with the other issues in the case in one unified proceeding. The Special Master so recommends.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Olin Hattfield Chilson", written in a cursive style.

Olin Hattfield Chilson
Special Master
United States Courthouse
Denver, Colorado 80202

March 4, 1976

