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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1966

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

**BRIEF OF THE STATE OF MICHIGAN IN SUPPORT
OF MOTION FOR LEAVE TO FILE COMPLAINT**

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feelings between the people of the Territory of Michigan (at that time voiceless and voteless in the halls of Congress) and the State of Ohio became so charged with emotion that at one time it seemed war might be waged between them. In fact, in the pages of history it has taken on the name of the "Toledo War." Although in retrospect historians depict the "Toledo War" as having its overtones of comic opera, nevertheless, in those days it was real serious business. An actual armed conflict was averted only by the intervention of the President of the United States and the Congress.

The states of Ohio and Michigan were carved out of the northwest territory which was brought into being by the Virginia cession on condition that it would be used for the formation of new states. The result was the adoption by the Congress of the Ordinance of 1787 providing that not less than three nor more than five states should be formed in this large expanse of land lying northwest of the river Ohio. In this ordinance Congress reserved the authority at its discretion to form "one or two states in that part of said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan." This imaginary "east and west" line has since been known as the Ordinance Line. At this early time knowledge of geography was imperfect, no actual land surveys had been made and it was believed that the

Anna May Soule	The Southern and Western Boundaries of Michigan, Mich. Pioneer and Historical Collections, XXVII (1896), pp. 346-390.
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“southerly bend or extreme of Lake Michigan” lay considerably to the north of its true location. Based on this premise it was apparently assumed that the Ordinance Line when projected eastward from the southerly bend of Lake Michigan would strike the west shore of Lake Erie near or north of Maumee Bay.

In 1802^[2] Congress authorized the people of Ohio to draft a constitution preparatory to applying for statehood. A doubt arose in the minds of the framers of the constitution of Ohio whether, in fixing the boundaries of the new state, the use of the Ordinance Line as a boundary description would assure to Ohio the mouth of the Maumee River and its outlet in Maumee Bay. Delegates to the Constitutional Convention of Ohio inserted in the boundary descriptions of their proposed constitution a proviso that if it should be found that the Ordinance Line would not intersect Lake Erie, or that it would intersect the Lake east of the mouth of the Maumee River, then with the “assent of Congress” the northern boundary of the state should be a direct line drawn from the southerly extreme of Lake Michigan to the northern cape of Maumee Bay.^[3]

In January 1805 Congress in creating the Michigan territory specified the Ordinance Line as the territory’s southern boundary.^[4]

Further controversy was halted by the War of 1812. Early in that year Congress authorized the President to cause a survey to be made of the northern and western boundaries of Ohio.^[5] But the work was not undertaken until 1816 when Edward Tiffin, Surveyor General of the

[2] Act of April 30, 1802, 2 Stat. 173

[3] Ohio Const. of 1802, Art. VII, Sec. 6.

[4] Act of Jan. 11, 1805, 2 Stat. 309

[5] Act of May 20, 1812, 2 Stat. 741

United States and formerly Governor of Ohio, was ordered to proceed. He commissioned his deputy, William Harris, to lay out the boundary line and commanded him to establish it in accordance with the provisions of the Ohio Constitution of 1802. The line so surveyed ran from the southern extreme of Lake Michigan to the northern cape of Maumee Bay and became known as the Harris Line. This survey put Toledo in Ohio. Governor Cass of Michigan protested the Harris survey and President Monroe ordered a new survey which was made by John A. Fulton in 1818. This survey established the Fulton Line, running below Toledo and putting that city in Michigan. The land between the Harris Line and the Fulton Line was a wedge-shaped tract, five miles wide at the Indiana border and eight miles wide at Lake Erie. It was soon known as the "Toledo Strip." Michigan was satisfied with the Fulton survey but Ohio was not.

In order to assist it in resolving the controversy the Congress by Act of July 14, 1832, 4 Stat. 596 directed the President of the United States to do the following:

"That the President of the United States cause to be ascertained by accurate observation, the latitude and longitude of the southerly extreme of Lake Michigan; and that he cause to be ascertained, by like observation, the point on the Miami of the Lake which is due east therefrom, and also, the latitude and longitude of the most northerly cape of the Miami bay, also, that he cause to be ascertained, with all practicable accuracy, the latitude and longitude of the most southerly point in the northern boundary line of the United States in Lake Erie; and also, the points at which a direct line drawn from the southerly extreme of Lake Michigan to the most southerly point in said northern

boundary line of the United States, will intersect the Miami river and bay; and also, that he cause to be ascertained by like observation, the point in the Mississippi which is due west from the southerly extreme of Lake Michigan, and that the same observation be made, and the result thereof returned, to the proper department within the current year.”

By Act of March 2, 1833, c. 54, sec. 5, 4 Stat. 628 the time for taking the observations was extended to December 31, 1835.

Captain Talcott of the Corps of Engineers was the officer charged with executing this Act. A copy of his report was transmitted to the 24th Congress (Doc. 7, page 2, Executive Doc., 24th Cong. 1st Sess.). His drawings illustrating the position taken for determining the latitude and longitude of the different points specified by law, together with a general map showing the relative positions of each of the several lines and points specified in the law were sent by the President to the Congress (Doc. 54, Executive Documents, 24th Cong. 1st Sess. vol. 2). We have appended to the complaint a reproduction of the general map prepared pursuant to this Act.

In none of these surveys or observations nor on any map or drawing prepared and submitted either to the President or to the Congress, can there be found any line drawn from the north cape of Maumee Bay across Lake Erie to the boundary between the United States and Canada.

With the death of Territorial Governor Porter in 1834, Stevens T. Mason became Acting Territorial Governor and initiated a campaign to change the Territory of Michigan to a state. Mason insisted that Michigan now met the

population requirements of the Ordinance of 1787 and was entitled as a matter of right to enter the Union, subject only to the adoption of a state constitution and the establishment of state government. Mason called attention to the Ordinance Line fixed in the Ordinance of 1787 as giving Michigan a clear title to the Toledo Strip. He called a constitutional convention to meet in May of 1835. Governor Lucas of Ohio was not unaware of Mason's activities. In April of 1835, in a determined effort to re-mark the Harris Line and to subject the Toledo Strip to Ohio law, he ordered out the militia to protect his surveyors. As a part of the scheme, Ohio courts were surreptitiously convened in the Toledo Strip. Governor Mason countered by ordering General Brown to Monroe to assemble the militia and there Mason joined him on April 1, 1835 to direct operations. Serious conflict was averted by President Jackson's removal of Mason as territorial governor and the disbanding of the militia.

In 1835 the people of the Territory of Michigan assembled in constitutional convention in the City of Detroit and on the second Monday of May of that year adopted the Constitution of Michigan of 1835. In its constitution it embraced the Ordinance Line of 1787 and thus injected this explosive issue into the debates of Congress by presenting this constitution to the Congress for approval. But this effort was unsuccessful and Congress, in an Act of June 15, 1836, established the boundaries for the State of Michigan and conditioned her admission into the Union upon the acceptance of the boundaries so established.

During the course of the controversy ex-President John Quincy Adams, favoring the cause of the Territory of Michigan, is reported to have said:

“Never in the course of my life have I known a controversy of which all of the right was so clear on one side and all the power so overwhelmingly on the other, never a case where the temptation was so intense to take the strongest side at the duty of taking the weakest was so thankless.”^[6]

The Michigan legislature called a convention for assenting to the conditions for admission to meet at Ann Arbor on September 26, 1836. When convened it promptly rejected the proffered boundaries by a decisive vote and adjourned. Political leaders rallied a second convention which met at Ann Arbor on December 14, 1836 and gave its “assent” on December 15 to the Act of Congress. President Jackson reported this fact to Congress on December 27, 1836 and a bill was passed which admitted Michigan into the Union on January 26, 1837.

THE BOUNDARY INVOLVED

The act enabling Michigan to be admitted into the Union (the Act of June 15, 1836, c. 99, 5 Stat. 49) describes the common boundary between the states of Michigan and Ohio as follows:

“A direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake

[6] George J. Miller, *The Establishment of Michigan's Boundaries*, *supra*.

Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania.” (Emphasis supplied)

The Act of June 23, 1836, c. 117, 5 Stat. 56 (an act to settle and establish the northern boundary line of the State of Ohio) describes the northern boundary of Ohio to be:

“A direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; *thence, northeast*, to the northern boundary line of the United States; thence, with said line, to the Pennsylvania line.”

The judiciary committee of the House reporting on a bill which finally became the Michigan Enabling Act of June 15, 1836 apparently understood that the line from the north cape of Maumee bay would be extended direct to the international boundary line from the southern extreme of Lake Michigan through the north cape of Maumee, since the committee in its report to the House stated:

“That it is expedient to establish the northern boundary of Ohio, by a direct line drawn from the southern extreme of Lake Michigan, after intersecting the eastern boundary of Indiana, to the most northerly cape of the Maumee; *thence, direct to the territorial line in Lake Erie, and by the said territorial line to the Pennsylvania line.*”[7]

Officials representing Ohio before the committees of Congress at that time claimed that the northern boundary of Ohio should be drawn on a course beginning at the southern extreme of Lake Michigan to the north cape of the Maumee

[7] Rep. No. 380, Report of Committees 24th Cong. 1st Sess. p. 18.

bay, and thence through Lake Erie to the international boundary line. It is apparent from the report filed by the Judiciary Committee of the Senate that the north cape of the Maumee bay was the "most northern point contended for by Ohio." (Report 211, page 14, Sen. Doc. 24th Cong. 1st Sess.)

It can be seen from an examination of the general map of Talcott attached to the complaint that the line set by Congress in 1836 from the southern extreme of Lake Michigan to the north cape of Maumee bay runs in a northeasterly direction. There is nothing in the legislative history indicating that this line should run on a different bearing in its extension from the north cape to the international boundary line.

The boundary question remained in a state of quiescence from these early years until 1915-1917 when the land boundary between Michigan and Ohio was ascertained and monumented by a joint survey which ended at post 71 which is located 900 feet west of the shore of Lake Erie.[8] No question at that time arose with respect to the location of the boundary extending across Lake Erie to the international boundary line.

As is alleged in paragraph 5 of the complaint, reference is made to a base map of Ohio printed by the United States Department of the Interior, Geological Survey, in 1910-1911 showing the Lake Erie segment of the boundary as connecting the north cape with turning point 160 of the international boundary on a bearing of approximately

[8] "Biennial Report of the Director 1914-1916 and Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary," 1916 Pub. 22, Michigan Geol. Series 18, Mich. Geol. and Biol. Survey.

N 63° 45' E; and that in 1922 Professor C. E. Sherman, an official of Ohio, apparently drew the line on the same bearing on topographical survey maps. Later, however, Professor Sherman asserted that this was an error and in Vol. IV of the Final Report of Ohio Cooperative Topographical Survey, 1933, on p. 43 he states that the line in Lake Erie between Ohio and Michigan is not settled. He said:

“In conclusion it should be noted that the Lake portion of the Ohio-Michigan boundary is erroneously shown on the two maps in envelope on the rear cover of this book. The line as shown on these two maps connects North Cape with International boundary turning point 160, and has a bearing of approximately N 63° 45' E. The law prescribes a line bearing *northeast* from North Cape. In nautical language this is a specific direction meaning N 45° E. Therefore the area of Ohio, if scaled only to such boundaries as are shown on the two maps just mentioned will be too small by the triangle included between the two foregoing lines and the international boundary. The error thus introduced would be about 70.6 square miles.”

On June 8, 1933 the 90th General Assembly of Ohio^[9] passed the following joint resolution relative to this segment of the boundary line:

“WHEREAS, *Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie*, due to the omission of this portion of the boundary on some maps and its incorrect position on others, and

“WHEREAS, The easterly terminal monument of the Ohio-Michigan land boundary line set in 1817 by

[9] 115 Ohio Laws 685, G C § 13855-1

Andrew Harris has disappeared, due to the washing away of North Cape at the place where the monument originally stood, and

“WHEREAS, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S. 45° W.) through the center of Turtle Island which is located at latitude 41° 45' 08.8" and longitude 83° 23' 28.8" according to primary triangulation of the United States lake survey published in 1882, and

“WHEREAS, The center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U. S. lighthouse service, which wall is still standing; therefore,

“Be it resolved by the General Assembly of the State of Ohio, that with the concurrence of the legislature of Michigan, the boundary line between the two states in Lake Erie shall be a line passing through the center of the aforesaid circular wall and bearing south forty-five degrees west (S. 45° W.) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle Island.”
(Emphasis supplied)

In 1945 a concurrent resolution relative to this segment of the boundary line identical with the 1933 Ohio resolution was adopted by the Senate and House of the State of Michigan.^[10]

In 1947 a House Concurrent Resolution^[11] of the Michigan legislature rescinded the 1945 resolution and requested the Governor of the State of Michigan to confer with the Governor of the State of Ohio with a view to requesting the legislatures of the two states “to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie,” copy of which is set forth in the appendix hereto.

As alleged in our complaint no definitive action has been taken by either state to settle this disputed segment of the boundary. That there exists uncertainty as to its location even on the part of officials of Ohio is indicated by the language in the first recital contained in the Ohio resolution of June 8, 1933.

Resolutions of the legislature of Michigan under its Constitution of 1908 are not binding upon the state and do not have the effect of law. In *Boyer-Campbell Co. v. Fry*, 271 Mich. 282, page 296, the Michigan Supreme Court ruled:

“Legislative resolutions are not law, although they are entitled to respectful consideration (*Becker v. Detroit Savings Bank*, 269 Mich. 432).”

The most that can be said for the resolutions passed by the legislatures of both states is that they express the un-

[10] 1945 House Journal pp. 591, 807, 1945 Senate Journal pp. 291, 619

[11] 1947 House Journal pp. 957, 1170, 1947 Senate Journal pp. 971, 1125

certainty which exists as to the proper construction of the congressional acts of 1836 pertaining to the Lake Erie segment of the boundary.

Even if these two states had adopted identical acts with respect to the location of the Lake Erie segment of the boundary amounting to a compact, such compact would not have been valid unless and until approved by the Congress of the United States pursuant to Article I, Sec. 10, Clause 3 of the Federal Constitution providing:

“No State shall, without the Consent of Congress,
* * * *enter into any Agreement or Compact* with
another State, * * *.” (Emphasis supplied)

Boundaries between states can have serious political consequences and any settlement of their location should be submitted to the Congress for its scrutiny and approval. Otherwise, states could swap territory at will and bring about considerable realignment of the political structure not only of the states involved but also of the Congress itself and the federal government.

These implications of the compact consent clause in the federal constitution were set forth with eloquence by this court in the early case of the *State of Rhode Island v. State of Massachusetts*, 12 Pet. (37 US) 657. Unless the operative effects of this clause to boundary agreements or compacts between states were made applicable, the court stated at pages 725 and 726:

“* * * it would render the clause a perfect nullity for all practical purposes; especially the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts. Not to prevent the states from settling their own boundaries, so far

as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other states of the Union and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure.”

Following the decisions of this court in *Michigan v. Wisconsin*, 272 US 398, and *Wisconsin v. Michigan*, 297 US 547, involving a dispute regarding the location of certain segments of the boundary between these two states, the states of Michigan, Wisconsin and Minnesota entered into a compact which defined and established other segments of their boundaries in Lake Michigan and Lake Superior by the passage of identical acts. This compact received the approval of Congress June 30, 1948, PL 844, Chap. 757, 62 Stat. 1152.

The Location of the Northerly Cape of the Maumee Uncertain.

The most northerly cape of the Maumee (Miami) bay called for in the boundary description as it existed in 1836 has long since been eroded by the waters of Lake Erie. The geographical location and contour of this cape as it then existed involve matters of proof. The description does not specify the point on this cape to which the line from the southerly extreme of Lake Michigan is to be run. This is a question of congressional intent and requires legal construction and interpretation of this call in the description.

Power of the Court to Decide Boundary Cases.

That this court has jurisdiction under the judiciary clause of the United States Constitution to entertain suits

between states involving their boundaries was firmly established in *State of Rhode Island v. State of Massachusetts*, supra.

It is the position of the Attorney General of the State of Michigan that a genuine dispute exists between these states with respect to the true location of the Lake Erie segment of their boundary, a dispute which this court should decide. Efforts made by officials of these two states to settle this boundary dispute have failed. The terms of the congressional acts describing the northern boundary of the State of Ohio are couched in such general and vague language that their true meaning and intent are not ascertainable from the acts themselves. It is apparent from the history of this boundary, as we have sketched it, that the Lake Erie segment cannot be determined except upon a thorough investigation of all of the legislative history preceding and succeeding the adoption of the description of this boundary by the Congress.

Thus, recourse must be had to the constitutional powers of this court to hear and examine all the evidence and facts which may be presented by both states and under accepted legal principles construe the language which the Congress wrote into the various acts it enacted and render a definitive and binding decision which will put the question to rest for all time.

CONCLUSION

After a painstaking research and investigation, the State of Michigan genuinely believes that the real and true intent of Congress in 1836 was that the Lake Erie segment of the boundary between these two states should be a direct extension of Talcott's line to the international boundary.

Officials of the State of Ohio dispute this contention and now insist that this line should be deflected at 45° beginning at some point on the north cape of Maumee bay, the location of which cape and point are not presently known.

As is set forth in the complaint, the Attorney General of the State of Michigan requested the Governor of Ohio, the Honorable James A. Rhodes, to initiate steps toward forming a joint commission which would be empowered to make a settlement of this dispute. The Governor of Ohio responded by suggesting that the State of Michigan "petition the United States Supreme Court for a declaratory judgment on the matter."

The purpose of this brief is to show that a real and genuine dispute exists between these states and that the court should permit the State of Michigan to file its complaint so that the whole question be heard and decided with finality by this court.

Therefore, the Attorney General of the State of Michigan requests that the motion for leave to file this complaint be granted.

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Dated: ~~October 31, 1966~~

November 21, 1966

APPENDIX

A Concurrent Resolution Relative To The Boundary Line Between The States of Ohio and Michigan In Lake Erie Adopted During The 1947 Session Of The Michigan Legislature.

Whereas, In the 1945 regular session of the legislature of Michigan adopted Senate Concurrent Resolution No. 15 relative to the boundary line between the two states of Ohio and Michigan in Lake Erie; and

Whereas, Said concurrent resolution was presented to the legislature as a part of a proposal to determine the area of the entire state by inclusion of water areas within the total and without any other significance; and

Whereas, Upon subsequent investigation it became apparent that an area of about 70 square miles in Lake Erie was involved in the matter then presented and some question as to the jurisdiction over said water existed between the state of Ohio and the state of Michigan; and

Whereas, The particular area in question became a matter of dispute because of early surveys and maps purporting to determine the boundary line between the states in Lake Erie and showing for a great many years that the said boundary ran from a terminus in Lake Erie from a non-existent boundary marker, which was formerly Grassy Point, to a turning point in the international boundary line between the United States and Canada, said line being at an angle more acute than 45 degrees; and

Whereas, The state of Ohio, by a concurrent resolution adopted several years ago attempted to resolve the stated

uncertainty concerning the boundary line by adopting a point on Turtle Island in Lake Erie as a basis for a line at 45° to intersect the land boundary line between the states and to intersect the international boundary line thereby conforming more closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states; and

Whereas, It is apparent that for many years the state of Michigan has exercised jurisdiction over the area in question and may have established by adverse possession and by consent and acquiescence of the state of Ohio a good title thereto; and

Whereas, Since the action of the two legislatures by concurrent resolution is not sufficient in the law governing the relationship of States to convey title or change boundary line, no settlement of any such dispute can be reached by such method; and

Whereas, If a settlement is to be reached it will, of necessity, require statutory enactment by the two states and should be the subject matter of an investigation by a joint boundary commission; now therefore be it

Resolved by the House of Representatives (the Senate concurring), That the State of Michigan nor any rights of said state concerning the boundary line in Lake Erie between the state of Ohio and the state of Michigan were not affected by the adoption of Senate Concurrent Resolution No. 15 of the 1945 session of the Michigan legislature; and be it further

Resolved, That insofar as said concurrent resolution No. 15 may in any manner be interpreted as determinative of the position of the state of Michigan with regard to the

said boundary in Lake Erie, said concurrent resolution is hereby rescinded; and be it further

Resolved, That the Governor of the state of Michigan is hereby requested to confer with the Governor of the state of Ohio concerning the subject matter hereof with a view to requesting the legislatures to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie; and be it further

Resolved, That a copy of this concurrent resolution be sent to the Governor of this state.

