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FILED
MAR 30 1967
JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1966

No. 30, Original.

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

**BRIEF IN OPPOSITION TO MOTION FOR
LEAVE TO FILE COMPLAINT**

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**BRIEF IN OPPOSITION TO MOTION FOR
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STATEMENT

The State of Michigan has filed with this Court a "Motion For Leave To File Complaint" (hereinafter referred to as the "Motion For Leave"), a "Complaint" (hereinafter referred to as the "Complaint"), and a "Brief Of The State Of Michigan In Support Of Motion For Leave To File Complaint" (hereinafter referred to as the "Brief"), all of which pertain to an alleged controversy between Michigan and the State of Ohio concerning the location of the boundary between said states in Lake Erie. In this brief, it is the sole purpose of the State of Ohio to show the Court that there can realistically be no dispute or controversy concerning the location of the Lake Erie portion of the boundary between these two states, and hence that this Court should deny Michigan's Motion For Leave.

It is not Ohio's position that this Court lacks jurisdiction in a case brought by one state against another to ascertain and establish a boundary between them. However, when the facts presented to the Court in the initial documents filed in an original action exhibit no actual dispute or controversy or when such facts would have to be unreasonably interpreted to render the relief sought by the plaintiff, the Court should utilize its screening authority to deny the plaintiff's motion for leave to file its complaint. It is Ohio's position that the instant case falls within this category of objectionable suits.

To facilitate a thorough understanding of Ohio's position, it is first necessary to distill from the aforesaid items filed by Michigan what they seek to have this Court do.

Initially, it is clear that Michigan is not contesting or calling into question the land portion of the boundary between the two states. Complaint, pp. 2, 6-7. Consequently, the only area of their concern is the Lake Erie portion of the common boundary.

Regarding the lake portion of the boundary, Michigan appears to have two goals, as indicated by their Complaint at pages 4-5, and 12, to-wit: 1) a declaration from this Court establishing the Lake Erie portion of the boundary line between Ohio and Michigan as a straight easterly continuation of the land boundary from the last marker on the land boundary line (Post No. 71) to the international boundary line; 2) a declaration from this Court determining the location of the most northerly cape of the Maumee (Miami) bay to which the Congressional acts establishing the boundary between these two states referred.¹

¹ 5 Stat. 49 (1836); and 5 Stat. 56-57 (1836).

The State of Ohio in this brief will affirmatively show to this Court that the aforesaid determinations sought by the State of Michigan are not in fact necessary as these matters can be, and have been determined with such certainty as to not be reasonably subject to either discussion or debate, and much less judicial inquiry.

ARGUMENT

It is now, and has been, Ohio's claim that the portion of its northern boundary in Lake Erie was clearly and unambiguously settled and established by Congress in the year 1836. See 5 Stat. 49; and 5 Stat. 56-57.

Ohio claims that at the most northerly cape of the Maumee (Miami) bay, the northern lake boundary line of Ohio departs from the direction of the land boundary line and begins the course N 45 degrees E which course is followed the distance from said cape to the international boundary line.

Ohio further claims that although the cape and the monument marking the most northerly cape of the Maumee (Miami) bay have been washed away and lost, that that point can be readily re-established and certainly ascertained by utilizing a point known to have intersected the line departing from said most northerly cape on the N 45 degrees E course and reversing that course by running a line on the course S 45 degrees W from said known point until it intersects the projection of the known and established land boundary line.

Ohio's claimed boundary and the point representing the most northerly cape of the Maumee (Miami) bay, determined as aforesaid, are graphically exhibited by the map which is appended to this brief.

- A. At The Most Northerly Cape Of The Maumee (Miami) Bay, The Northerly Boundary Line Of The State Of Ohio In Lake Erie Departs From The Direction Of The Land Boundary Line And Begins The Course North 45 Degrees East, Which Course Is Followed The Distance From Said Cape To The International Boundary Line.**

The Congressional acts establishing the northern boundary of the State of Ohio were passed in the year 1836, and are found in 5 Stat. 49, and 5 Stat. 56-57. It is Ohio's firm conviction and contention that these two acts can leave no doubt as to the position of its northern boundary in Lake Erie; consequently, both of said statutes will be examined with particularity.

On June 15, 1836, Congress passed an act entitled "An Act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed,"² which act appears in 5 Stat. 49, and provides in pertinent part:

"That the northern boundary line of the State of Ohio shall be established at, and shall be 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 Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania." (Emphasis added.)

² The conditions expressed in 5 Stat. 49 (1836), appear in section 2 thereof and provide that Michigan can gain statehood only upon express condition that she consent to and accept the boundaries set forth in the act, among which is that her southern boundary common with Ohio be the boundary line set forth in the first section of the act as Ohio's northern boundary. Michigan did consent to and accept these boundaries. See 5 Stat. 144 (1837).

The area of examination herein is the call in the description "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 Erie", with scrutiny of the words "from" and "northeast".

On June 23, 1836, eight days after the passage of 5 Stat. 49, *supra*, Congress passed an act entitled "An Act to settle and establish the northern boundary line of the State of Ohio," which act is found in 5 Stat. 56-57. The pertinent portion of this statute reads:

"That the northern boundary of the State of Ohio shall be established by and extend to, 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." (Emphasis added.)

The call in this act which pertains to the question at hand is "thence, northeast, to the northern boundary line of the United States", with special analysis of the words "thence" and "northeast".

Both of the aforesaid acts describe the same line, and in each of them Congress employed plain, clear and unambiguous language to do so. The line described in both of these acts that forms the Lake Erie portion of Ohio's northern boundary, is a line departing from the land boundary line at the north cape of Maumee (Miami) bay on a course N 45 degrees E, which course is followed the distance from said cape to the international boundary line.

Consider initially the actual words utilized by Congress in each of these acts in light of the meaning of those words at the time they were used. In 5 Stat. 49 (1836), Congress first describes the land boundary line, which description terminates at the cape, and Congress then recites the next

call as “*from* the said north cape”. The preposition “*from*” is described in the dictionary of the day as follows:

“The sense of *from* may be expressed by the noun *distance*, or by the adjective *distant*, or by the participles, *departing*, removing to a *distance* . . .”

Webster, American Dictionary of the English Language (1828).

Similarly, in 5 Stat. 56-57 (1836), Congress sets forth the land boundary call to the cape, and then the next call recited is “thence, northeast”. The word “thence” was defined at the time of its usage as: “1. From that place.” Webster, American Dictionary of the English Language (1828).

It is evident from the foregoing that the call following the one describing the land boundary line is a call departing from said land boundary line at its terminus, the cape.

Buttressing the conclusion of departure, and more importantly describing the course of the departing line, is the word “northeast”, which appears in both of said statutes following the words of departure discussed above. Again turning first to the plain meaning of this word, “northeast” had but one defined meaning at the time 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), were passed, to wit: “The point between the north and east, at an equal distance from each.” Webster, American Dictionary of the English Language (1828). Hence, the use of this word in defining the northern boundary of Ohio not only reaffirms the fact that the lake boundary line departs from the land boundary line at the cape, but gives the course of the lake boundary line, which given course is the point equal distance from north and east, or in other words, N 45 degrees E.

Early and continued judicial interpretation of boundary descriptions containing a course of a line going to a com-

pass position, further substantiates the fact that the call "northeast" in the aforesaid statutes means N 45 degrees E.

There are a plethora of cases interpreting a description employing a call to one of the cardinal points of the compass (North, East, South, West), to mean a line running directly in that course, unless qualified or controlled by other words in the description. See, *e.g.*, *Hagan v. Campbell*, 8 Porter's Rep. (Ala.) 9, 31 (1838); *Vermont Marble Co. v. Eastman*, 91 Vt. 425, 443, 101 Atl. 151, 158 (1917); *E. E. McCalla Co. v. Sleeper*, 105 Cal. App. 562, 569, 288 Pac. 146, 148 (Ct. App. 1930). Even when the cardinal point course is qualified by the suffix "ly" or "ward" (*e.g.* northerly, southward), the courts have consistently interpreted the course to be a line directly to the cardinal point (*e.g.* due north, due south), unless controlled by other calls. See, *e.g.*, *Jackson v. Reeves*, 3 Cai. R. (N.Y.) 293, 299 (Sup. Ct. 1805); *Brandt v. Ogden*, 1 Johns. R. (N.Y.) 156, 158 (Sup. Ct. 1806); *Currier v. Nelson*, 96 Cal. 505, 508, 31 Pac. 531, 532 (1892).

Although an exhaustive search has revealed but a few cases defining the course of a line contained in a boundary description to a compass point other than a cardinal point, those few cases are in accord with the cardinal point cases (and each other) in holding that a line following such a call must run directly in that course, unless a different location is required by other words in the description. See, *Moore v. Harris*, 2 Ky. Dec. 18 (1801); *Irwin v. Towne*, 42 Cal. 326, 334 (1871); *Holden v. Alexander*, 82 S.C. 441, 454, 62 S.E. 1108, 1112 (1908). The most succinct statement of this proposition is contained in the case of *Holden v. Alexander*, *supra*:

"While the course 'southwest' called for in the deed without stating degrees is unusual, and possibly might

not have been intended to mean an exact course, yet '*southwest means a course equally diverging from south and west, or south 45 degrees west;*' and when used in a deed a different meaning cannot be given to it by parol testimony." (Emphasis added.)

Neither of the descriptions here in question contain any words or other calls which would qualify or change the course "northeast" to something other than due northeast, N 45 degrees E.

In each of the aforesaid statutes, Congress utilized plain, clear and unambiguous language in describing the northern boundary line of the State of Ohio in Lake Erie. In both of said statutes Congress described the line in question as a line departing from the direction of the land boundary line at the most northerly cape of the Maumee (Miami) bay and beginning at the cape the course N 45 degrees E, which course is followed the distance from said cape to the international boundary line. The course "northeast" and the distance from the cape to the international boundary line are the only description of the Lake Erie portion of Ohio's northern boundary line given in 5 Stat. 49 (1836) and 5 Stat. 56-57 (1836). As was stated by Chief Justice Marshall in *Chinoweth v. Haskell*, 28 U.S. (3 Pet.) 92, 96 (1830):

"The *courses and distances* are less certain and less permanent guides to the land actually surveyed and granted than natural and fixed objects on the ground; but they are *guides to some extent, and, in the absence of all others, must govern us.*" (Emphasis added.)

B. The Most Northerly Cape Of The Maumee (Miami) Bay Can Be Readily Re-established And Certainly Ascertained By Taking A Point Known To Have Intersected The Line Departing From Said Cape On The Course N 45 Degrees E Therefrom, And Reversing That Course By Running A Line On The Course S 45 De-

gresses W From Said Known Point Until The Reverse Line Intersects The Projection Of The Known And Established Land Boundary Line.

At the outset of this facet of the State of Ohio's argument, it is helpful to refer to known propositions concerning the most northerly cape of Maumee (Miami) bay. They are as follows:

1. The most northerly cape of the Maumee (Miami) bay referred to in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), was originally located and monumented in the year 1817 by a surveyor named Harris; however, this monument and said cape were washed away and lost.³
2. The states of Ohio and Michigan jointly resurveyed and marked the land boundary between them, which resurvey terminated at Post No. 71, rather than said cape, due to the fact that the original cape monument could not be found.⁴
3. Post No. 71, which marks the easterly extreme of the jointly resurveyed land boundary line, is basically located near the edge of the water in Maumee bay, and is, of course, readily located.⁵
4. From the preceding section of this brief, it is evident that at the most northerly cape of the Maumee (Miami) bay, as referred to in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), the northern boundary line of the State of Ohio in Lake Erie departs from the direction of the land boundary line and begins the course N 45 degrees E, which course is followed the distance from said cape to the international boundary line.

In addition to the foregoing propositions, it is known that while the most northerly cape of the Maumee (Miami) bay and the monument set thereon by Harris were still in ex-

³ 115 Ohio Laws 685 (1933); Sherman, Ohio Cooperative Topographic Survey, Vol. IV (1933), p. 41.

⁴ See Sherman, "Report of Engineer", Ohio Cooperative Topographic Survey, Vol. I (1916).

⁵ See, *e.g.*, Sherman, *supra*, Vol. I, pp. 54-55, and map No. 9.

istence, a line run from that monumented point on the course N 45 degrees E to the international boundary line ran through a small island in Lake Erie named Turtle Island, the location of which island is fixed and known.⁶

Although the fact that the line on the course N 45 degrees E from said cape point to the international boundary line passes through Turtle Island may be established by a review of old Lake Erie maps and charts,⁷ in the interest of brevity Ohio will refer and defer to obviously long-considered and thorough legislative acts considering this proposition and utilize the fruits of the legislator's labors.

Senate Joint Resolution No. 25, adopted by the Ohio General Assembly in 1933, provides as follows:

"Be it resolved by the General Assembly of the State of Ohio:

"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 Andrew Harris has disappeared, due to the 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

⁶ Professional Paper No. 24, Report upon The Primary Triangulation of the United States Lake Survey (1882), p. 799.

⁷ See, *e.g.*, "Maumee Bay surveyed under the direction of Capt. W. G. Williams, 1844", Map P 45, GSA—National Archives. Referring to it as such, this map shows the boundary line between Ohio and Michigan as beginning a course of N 45 degrees E at the point described on the map as "North Cape". The boundary line shown on the map following the course N 45 degrees E from "North Cape", bisects Turtle Island, and is shown as either passing through the lighthouse on this island, or very near to it. The map shows Turtle Island to have a total area of less than an acre.

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."

115 Ohio Laws 685 (Emphasis added in part.)

After twelve years, the Legislature of the State of Michigan passed a resolution identical with the above-quoted act of the Ohio General Assembly. See 1945 House Journal (Mich.) 591, 807; and 1945 Senate Journal (Mich.) 291, 619.

In the year 1947, the Michigan Legislature supposedly rescinded the aforesaid resolution passed in 1945.⁸ At this stage of the proceedings in the instant case, examination of the effect of this rescission will not be made. Suffice it to say that even in view of the 1947 Michigan resolution, it is obvious that both state legislatures considered that a line following the course N 45 degrees E from the most northerly cape of the Maumee (Miami) bay when that point was

⁸ 1947 House Journal (Mich.) 957, 1170; and 1947 Senate Journal (Mich.) 971, 1125.

known, passed through Turtle Island. A thorough review of the 1947 Michigan rescission resolution does not indicate that Michigan took issue with this proposition, as is evident by the following language therefrom:

“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;*” Brief, pp. 17-18 (Emphasis added.)

From the foregoing legislative pronouncements, it is apparent that in their attempt to re-establish the lake boundary line between them called for in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), the legislatures in both states discovered that when the point of the most northerly cape of the Maumee (Miami) bay was known and monumented, a line run from the known point on a course N 45 degrees E passed through Turtle Island at the point referred to in the previous quote from the joint resolution of the Ohio General Assembly. See 115 Ohio Laws, *supra*.

In summary, then, the following are the “knowns”: 1) the last course of the land line at Post No. 71; 2) the course of the lake boundary line from the most northerly cape of the Maumee (Miami) bay to the international boundary line is N 45 degrees E; 3) the course last referred to passes through Turtle Island; 4) the exact location of Turtle Island; 5) the point at which the lake boundary line passed through Turtle Island. Placing these five known quantities in an equation, the unknown, the point of the most north-

erly cape of the Maumee (Miami) bay, can be indisputedly ascertained.

It is a well established surveying principle that a course may be reversed to establish an unknown point. This principle has also been recognized by this Court. See, *e.g.*, *Ayers v. Watson*, 137 U.S. 584, 590 (1891); *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 432 (1892). Thus, by reversing the known call of N 45 degrees E to S 45 degrees W, and running a line on this latter "reversed" course from the known position of Turtle Island to the point of intersection of that line with a projection of the land boundary line from Post No. 71, the unknown, the most northerly cape of the Maumee (Miami) bay, is determined. The map appended to this brief graphically depicts the procedure outlined above.

CONCLUSION

It is the State of Ohio's strong contention that the boundary line between it and the State of Michigan in Lake Erie is so certain as to not require judicial inquiry. Ohio feels that in view of the foregoing analysis of that portion of her common boundary with Michigan which Michigan seeks to attack in this suit, it is apparent that there is no justiciable dispute or controversy. Therefore, the State of Ohio respectfully urges this Court to deny Michigan's Motion For Leave.

Although we firmly believe in the position that we have presented in this brief, we have a somewhat ambivalent attitude toward this lawsuit in the respect that if the State of Michigan will not accept what we feel is obvious, it would be advantageous to us to have the matter resolved by this Court.

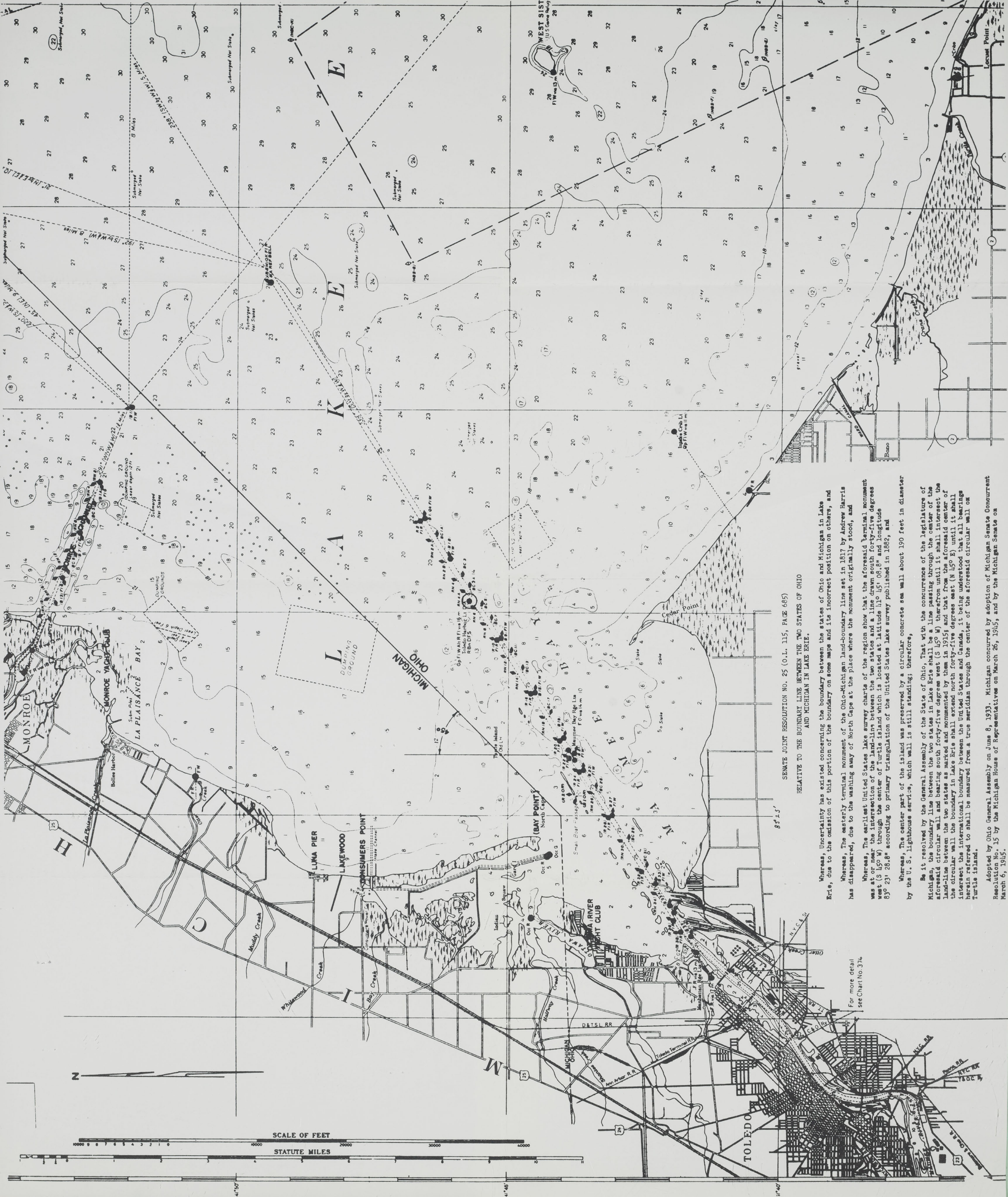
In the event that this Court should grant Michigan's Motion For Leave, it is our feeling that this case can be

adequately and fairly presented as to both states by the filing of briefs with this Court rather than by the more lengthy and expensive procedure of appointing a special master as Michigan prays for in her complaint. We respectfully suggest that this procedure be followed.

Respectfully submitted,

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March, 1967.



SENATE JOINT RESOLUTION NO. 25 (O.L. 115, PAGE 685)

RELATIVE TO THE BOUNDARY LINE BETWEEN THE TWO STATES OF OHIO
AND MICHIGAN IN LAKE ERIE.

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 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-lin 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° 08.8' and longitude 83° 23' 28.8" according to primary triangulation of the United States lake survey published in 1862, 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 east (S 45° E) 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.

Adopted by Ohio General Assembly on June 8, 1933. Michigan concurred by adoption of Michigan Senate Concurrent Resolution No. 15 by the Michigan House of Representatives on March 26, 1935, and by the Michigan Senate on March 6, 1935.

