

DEC 23 1971

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

—VS—

STATE OF OHIO,

Defendant.

EXCEPTIONS TO REPORT AND
RECOMMENDATIONS OF SPECIAL MASTER

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**TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES**

The State of Michigan, Plaintiff, by Frank J. Kelley, its Attorney General, excepts to the Report of Albert B. Maris, *Special Master*, dated June 30, 1971, and the Recommended Decree therein included, filed in the above entitled action, in the particular respects and as to the specific points as follows:

I

That the Special Master erred in failing to recommend a definition of the boundary line between Point 71, a granite post which is the easterly terminus monumenting the land boundary between Michigan and Ohio, the easterly terminus of the land monumentation of the Michigan-Ohio boundary, and the proper relocation of the north cape of the Maumee

Bay as it existed in 1836. This point was pleaded and proved by the State of Michigan. In its brief and argument in support of the findings by the State of Michigan, the State of Michigan requested a boundary line to be adopted in its conclusion and relief desired. The Special Master erred by failing to grant paragraph numbered forty-four, Michigan Finding of Fact:

“44. From the Post 71 to the original 1835 position of the north cape of Maumee Bay, there is an undefined gap which can be located by the use of accurate instruments. This arc may be different from the arc which extends from the south bend of Lake Michigan to the north cape of Maumee Bay and on to the international boundary line. Parts I, II and Appendix of Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary, 1915, (Mich. Exh. 30), Tr 63—71.”

II

The Special Master erred in Recommended Decree, paragraph 2:

“2. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn north $87^{\circ} 49' 44''$ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.”

and by failing to grant Michigan's requested Findings of Fact Nos. 40, 41, 43 and 44:

“40. In 1961, a geodetic determination by the United States Lake Survey for the position of Turtle Island lighthouse was:

Latitude (North): $41^{\circ} 45' 08''.740$

Longitude (West): $83^{\circ} 23' 28''.213$

From this position applying the data of Captain Andrew Talcott, the north cape of Maumee Bay can be computed. The computation results in the north cape of Maumee Bay being defined as:

Latitude (North): $41^{\circ} 44' 02''.004$

Longitude (West): $88^{\circ} 24' 56''.923$

These locations are listed in the transcript, Tr 55.

“41. Pursuant to the statutory direction, Captain Andrew Talcott used accurate instruments, made multiple observations on numerous stars and made a careful mathematical analysis of the results. He then concluded that the latitudes of the several points that he was required to find would be true to the nearest second. Talcott's Report on January 17, 1834, (Mich. Exh. 24); Talcott's Report November 23, 1835, Rept. No. 380, p. 75, 24th Cong., (Mich. Exh. 8), Tr 44, 49.

“43. In 1915, the legislatures of both Michigan and Ohio appropriated funds for the survey of the common land boundary and formed a joint commission. With the uncertainty caused by the disappearance of all original monuments, there was uneasiness among the citizens, especially in the vicinity of Toledo, where land was rapidly assuming a much higher value. Because of the disappearance of the monuments and the inade-

quacy of funds, it was agreed that the line would not necessarily be straight from end to end, although the surveyors would try to relocate the original staked line; existing monuments, fences, highways or other marks agreed to by land owners on both sides as being the state line would constitute monuments for the state line and these monuments would be acceptable to the Commission to constitute the state line. There is no direct evidence of recovery of any point staked out by the Harris survey. The eastern terminus of the north cape was declared as washed away and the western terminus was established through the ancestry of an old rotted stake near some pilings. No effort was made to see, if the line were extended, whether it would be a tangent to the southern extreme of Lake Michigan. Because of the desire to have this a practical line and agreeable to the citizens of both states, it is subject to error with regard to the Acts of Congress of 1836. The commission established that the boundary line with the eastern terminus located at Post 71 on the west shore of Maumee Bay is approximately two miles from the original position of the north cape which was called for by the Harris line. It would not appear at all certain that the continuation of the line from Post 70 to Post 71 would necessarily strike the north cape of Maumee Bay as determined by Captain Andrew Talcott and as computed today. Tr 64, 65 et seq.

“44. From the Post 71 to the original 1835 position of the north cape of Maumee Bay, there is an undefined gap which can be located by the use of accurate instruments. This arc may be different from the arc which extends from the south bend of Lake Michigan to the north cape of Maumee Bay and on to the international boundary line. Parts I, II and Appendix of Report on Retracement and Permanent Monumenting of the

Michigan-Ohio Boundary, 1915, (Mich. Exh. 30), Tr 63—71.”

Finding of Fact requested by Michigan is stated in full under paragraph I.

III

The Special Master erred in his Finding No. 41. There is absolutely no evidence that a line drawn at Post 71 with a true bearing of S 87° 49' 44" W would ever strike the southerly extreme of Lake Michigan at present, in 1916 or in 1817:

“41. From the report of Engineer Gannett to the joint commissioners, dated November 30, 1915, it appears that the easternmost monument set on the boundary line, Post 71, was set in swampy ground about 900 feet west of the shore of Maumee Bay. That monument was set in latitude 41° 43' 56.63" N and longitude 83° 27' 16.97" W. The next monument to the west is Post 70 which was set in latitude 41° 43' 55.78" N and longitude 83° 27' 47.17" W. From Post 70 to Post 71 the true bearing is N 87° 49' 44" E and the distance 2,291.2 feet. The next monument to the west of Post 70 is Post 69 which was set in latitude 41° 43' 54.63" N and longitude 83° 28' 27.59" W. From Post 69 to Post 70 the true bearing is N 87° 49' 34" E and the distance 3,066.8 feet. Report of Commissioners on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary, July 1, 1916, pages 81-82.

The foregoing geodetic positions of Posts 71, 70 and 69 were, obviously, not determined with reference to the presently current North American datum of 1927.

If such a determination of the positions of these fixed monuments should be needed in connection with the determination with reference to the North American datum of 1927 of the geodetic position of the north cape of Maumee Bay as it was in 1836, it can readily be made by the appropriate agency of the United States government."

From the Special Master's Finding No. 41, the Special Master must have found Finding No. 47, on which paragraph two of the Recommended Decree is based:

"47. The location of the north cape of Maumee Bay which Harris in 1817 determined to be the easterly terminus of the Ohio-Michigan land boundary as it existed in 1836, as closely as it can be now ascertained, is the point now in the bed of Maumee Bay where a line drawn South 45° West through the center of the existing circular concrete sea wall on Turtle Island intersects a line drawn North 87° 49' 44" East from Post 71, the easternmost existing monument on the Ohio-Michigan land boundary line, both bearings being measured from a true meridian."

Further, the Special Master erred in failing to grant Michigan's Finding Nos. 53, 54, 55 and pertinent portions of 56:

"53. In view of the lack of original monuments, it was agreed by the joint group that:

'(1) As nearly as may be line to be relocated as originally staked out on the ground, and not necessarily run as a straight line from end to end.

'(2) Existing monuments, fences, highways or other marks, when agreed to by land owners on both

sides as being on the State line, are to be so accepted. (p. 61)'

"The line was, in fact, run between points established in accordance with these stated principles. Tr 65

"* * *

"54. This survey was official . . . and the following points should be noted with regard to its influence on the present proceedings:

1. It seems to have been based on the assumption that the Harris line truly represented the line intended to be defined by Congress in the act providing for the admission of Michigan into the Union.

2. There is no direct evidence of recovery of any point of the Harris survey. The report states (p. 55) that 'The eastern terminus of the line, originally the most northerly cape of Maumee Bay, has been washed away for many years and did not furnish a definite starting point; neither were there other permanent or semi-permanent marks near the eastern terminus . . .' Tr 66"

"55. There is serious doubt that the 1915 survey was, in any accurate sense, an actual retracement of the Harris line.

- (a) 'There is no direct evidence of recovery of any point of the Harris survey. The report states (page 55) that "The eastern terminus of the line, originally the most northerly cape of Maumee Bay, has been washed away for many years and did not furnish a definite starting point; neither were there

other permanent or semi-permanent marks near the eastern terminus . . . ’ . . .

(b) There is no reference in the 1915 report to any effort made to ascertain if the line actually run tended, if extended westwardly, to terminate in a tangent to the southern extreme of Lake Michigan.

“56. . . . On Map No. 9 of the 1915 report a dotted line extends eastwardly from the plotted position of Post 71, with the note ‘Toward original position of northernmost cape of Maumee Bay.’ Since the original position of the northernmost cape was neither physically recovered nor dimensionally referenced by the 1915 survey, this note is subject to error . . .”

IV

The Special Master erred by including in paragraph I of the Recommended Decree the monument Turtle Island. Neither the Michigan Enabling Act, Act of June 15, 1836, c. 99, 5 Stat. 49, nor the Act to settle and establish the northern boundary line of Ohio, Act of June 23, 1836, c. 117, 5 Stat. 56, contained any reference to Turtle Island.

V

The Special Master erred in not finding the pertinent portion of Michigan’s Request for Finding of Fact No. 34. Such pertinent portions are quoted as follows:

“34. In the 20th Congress, the House Committee on Territories . . . , under date of March 18, 1828, stated:

‘From the time the State of Ohio was admitted into the Union, . . . it seems to have been supposed that the existing maps of that part of the country might be . . . erroneous . . .’

‘Your committee recommended to the House, that . . . before any definitive legislation be had upon the subject, namely: The latitude of the southerly extreme of Lake Michigan, and where the same parallel of latitude crosses the Miami . . . River; and also, where it intersects the shore of Lake Erie; the latitude of the south point of North Cape, in Miami [Maumee] bay and the latitude 42° 30’ N., where it intersects the western shore of Lake Michigan. . . .

‘It is also proposed that the intermediate lines between certain points shall be traced and marked. . . . these lines shall be run without the aid of the compass; . . .

‘And as science and skill alone will not do, without the aid of the best instruments, it is proposed to authorize the President of the United States to employ two or more of the Topographical Engineers to perform the work.’

“... the Ohio legislature presented a memorial. . . . The date of the memorial is March 12, 1831. . . . Among other things, the memorial deals directly with the bearing across Lake Erie to its intersection with the northern boundary line of the United States. . . .”

‘. . . This act is respectfully submitted to the consideration of Congress, and with it, the suggestion, that the Territorial line is still the northern

boundary of Ohio, in terms, after intersecting it—not by a due east and west line, (for that is impossible) but—by an *easterly and westerly line, drawn through the southerly extreme of Lake Michigan, intersecting the Territorial line at its most southerly approximation in Lake Erie.*'

'The understanding and intention of the people of Ohio have been uniform on this subject. . . . the northern boundary shall be established as far north as the most northerly Cape of Miami Bay.'

VI

The Special Master erred in the Recommended Decree, paragraph one:

"1. The boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836 on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada."

VII

The Special Master erred in his declaration beginning on page 27:

"The Act of June 15, 1836 in addition to defining and settling the land boundary between Ohio and

Michigan from the Indiana line to the north cape of Maumee Bay also determined the boundary between the two states through the waters of Lake Erie easterly of the north cape of Maumee Bay. This it did by the language '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.' [Finding 34]. The land portion of the line was early established and accepted, having been defined as a direct line between two observable physical features which served as monuments, namely, the southern extremity of Lake Michigan and the most northerly cape of Maumee Bay. But since the Lake Erie portion of the line was defined in the statute merely by its bearing, 'northeast,' from a single monument, the most northerly cape of Maumee Bay, to an undefined point in another line, the international boundary line in Lake Erie, its exact location was never settled between the states. The question apparently remained dormant until about 1933 when the State of Ohio enacted the joint resolution of June 8, 1933, to which I shall later refer, which expressly described this portion of the boundary as having a bearing of North 45° East [Finding 42]. Michigan now seeks by the present suit a determination of the precise bearing of the line which is called for by the statutory word 'northeast.' "

Further, the Special Master erred in his Finding No. 46, and his discussion about said finding on page 29, et seq, of the report of the Special Master:

"... It is also suggested by the fact that later maps have likewise indicated the boundary is the lake as running North 45° East. Thus, the map of the Erie Quadrangle of the topographical map of the United States published by United States Geological Survey

in 1952 with the collaboration of the State Highway Commission of Michigan [Finding No. 46; Appendix E], shows the boundary between the States of Ohio and Michigan as following a true northeast course in Lake Erie.”

VIII

The Special Master erred in his Finding No. 38, page 18, Special Master’s Report. This finding states:

“38. A map in the official files of the United States Lake Survey, Corps of Engineers, United States Army, embodying the results of a survey made in 1844 of Maumee Bay under the direction of Captain W. G. Williams, of the United States Topographical Engineers, shows the boundary line between Ohio and Michigan as beginning a course of North 45° East at the point described on the map as “NORTH CAPE”. The boundary line shown on the map following that course from North Cape bisects Turtle Island, and is shown as either passing through the lighthouse on this island or very near to it. A reproduction of a portion of this map is annexed as Appendix D.”

In addition, the Special Master erred in failing to find the requested Findings of Fact of the State of Michigan, Nos. 45, 47, 48 and 49:

“45. The Ohio Governor’s representative designated to inspect the topographic survey made by the United States Geological Survey in cooperation with the State indicates the uncertainty of the line as it proceeds from his assumed north cape to Turning Point 160 of the international boundary line. The bearing given on the survey was N 63° 45’ E and Professor

Sherman, the Governor's representative, concluded it should be a nautical 'northeast', that is, N 45° E. Volume 4 of the Ohio Topographic Survey, 1933. The maps were compiled in 1910 and 1911, and from the evidence, no one complained about an incorrect line until 1933. (Mich. Exh. 9)

“47. To make a direct connection from the North Cape of Maumee Bay to the international boundary line the azimuth is 268° 58' 55".2 at the 1835 position of the North Cape of Maumee Bay. Map examining the position of several boundary lines connected with the settlement of the Ohio boundary question (Mich. Exh. 18). Tr 57

“48. The extension of the line from the North Cape as computed from the Talcott figures of 1835 to the international boundary line results in the intersection of the line from the south bend of Lake Michigan through the North Cape of Maumee Bay northeast to the international boundary at latitude (North) 41° 44' 25".220, longitude (West) 82° 48' 43".659 (Act of Congress, June 15, 1836, Mich. Exh. 10 and Rept. No. 380, Mich. Exh. 8, page 132) Tr 57

“49. Captain Talcott used accurate instruments, made multiple observations on numerous stars and finally made a careful mathematical analysis of his results before he concluded that ‘. . . the latitudes of the several points are true to the nearest second.’ With these observations at hand, he calculated ‘The arc joining the South bend of Lake Michigan, with the North Cape of the Maumee Bay’ and found its azimuth at the South bend of Lake Michigan to be 266° 24' 32".6, whereas it was 268° 58' 55".2 at the North Cape. Tr 61.”

RELIEF

Wherefore, it is prayed that recommendations of the Special Master be rejected or modified in accordance with exceptions set forth above.

Respectfully submitted,

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