

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

October Term, 1965
No. 27, Original

THE STATE OF OHIO,

Plaintiff

v.

THE COMMONWEALTH OF KENTUCKY,

Defendant

**REPORT OF THE SPECIAL MASTER UPON
MOTION OF THE STATE OF OHIO FOR
LEAVE TO FILE AMENDED COMPLAINT**

PHILLIP FORMAN
Special Master

April 10, 1972

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To the Chief Justice and Associate Justices of the Supreme
Court of the United States:

On March 31, 1966, the plaintiff, State of Ohio, instituted an original action to locate the boundary between the States of Ohio and Kentucky on the Ohio River (River). The complaint recognized the northern boundary of the State of Kentucky as being "the low water mark on the northerly side of the Ohio River as it existed in the year 1792,"¹ but alleged that a series of dams constructed in 1910 and thereafter had caused the waters of the river to rise and inundate areas of Ohio, permanently raising the low water mark in areas along the northern shore of the River. It was further alleged that the State of Kentucky claimed ownership of the River to the new low water mark resulting from the higher level of its waters and exclusive jurisdiction over the entire River. The complaint prayed

1. Complaint, para. 6.

for an order and decree declaring that the boundary between Ohio and Kentucky be fixed at the low water mark on the northern side of the Ohio River as it existed at the time Kentucky was admitted to the Union in 1792, and that both States have equal and concurrent jurisdiction over the waters of the River between its northern and southern shores.

By the Court's order of October 10, 1966, I was appointed as special master in this controversy.² Pretrial hearings with counsel for both parties were held on November 28, 1966, April 4, 1967, September 20, 1967, and May 27, 1969. During these sessions there were discussions concerning the manner of proof of the low water mark as it existed in 1792, and the possibility of an amicable settlement. It was further revealed that the controversy centered around conflicting claims to jurisdiction on the River.

As a result of requests for postponements by counsel for both parties, the proceedings lay dormant until August of 1971, when the State of Ohio sought leave to amend its complaint in order to introduce an alternative cause of action: that the true boundary between the States is in the middle of the Ohio River.^{2a} A hearing on the motion to amend was held on December 14, 1971, during which counsel for the State of Ohio indicated that it would rely primarily on the proposed amendment in pursuing relief, and would consider the rationale of the original complaint—that the northern boundary of Kentucky is the low water mark on the northern shore of the River as it existed in 1792—as an alternative ground for relief. Counsel argued that proof of Ohio's new claim of ownership to the middle

2. 385 U.S. 803 (1966). The order provided for authority in the special master "to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings . . . to summon witnesses, issue subpoenas, take such evidence as may be introduced and such as he may deem it necessary to call for," and "to submit such reports as he may deem appropriate."

2a. The motion was referred to me on November 9, 1971. 404 U.S. 933 (1971).

of the River lies in Pre-Revolutionary historical documents which were said to be not prohibitively difficult to obtain for judicial scrutiny. At the same time, counsel for the State of Kentucky intimated that if permitted, the proposed amendment would necessitate the filing of a counterclaim for heavy expenditures made since 1792 north of the mid-point of the River. The propriety of permitting the proposed amendment to the complaint is the sole subject of this Report.

Shortly after this country won its independence, it became apparent that several states, including Virginia, claimed title to lands north and west of the Ohio River, from which the State of Ohio was later created. Fearing that a legislative attempt to resolve the conflict would severely threaten the newly formed bonds of union, Congress suggested that the states involved cede the disputed lands to the United States to become additional states. All of those states eventually complied with this request. Virginia did so in 1784, surrendering to the United States "all right, title and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio . . .," on the condition only that the land be formed into states.³ The State of Ohio was established from this ceded territory pursuant to Article 5 of the Ordinance of 1787, which provided for the government of the northwest territories.⁴ When admitted to the Union in 1802,⁵ her southern boundary was described simply as bounded "on the south by the Ohio river, to the mouth of the Great Miami River.

3. 1 Laws of the United States 472, 474 (B. & D. ed. 1784).

4. 1 Laws of the United States, 475, 480 (B. & D. ed. 1787).

5. Although Ohio was officially admitted to the Union on November 29, 1802, the state government did not begin to operate until March 1, 1803, and in 1953 Congress fixed the later date as the official day of admission. Aumann, Francis R., and Harvey Walker, *The Government and Administration of Ohio*, (1956), p. 27.

...”⁶ By the Virginia-Kentucky Compact,⁷ the State of Kentucky was created in 1789 and was said to be bordered on the north by the Ohio River. The only reference in the Compact to the boundaries of the new state involved the line between Virginia and Kentucky.⁸ Kentucky was admitted to the Union “according to its actual boundaries” by Act of Congress in 1792.⁹

Since Kentucky was formed out of land which had belonged to Virginia, she succeeded to whatever title on the Ohio River Virginia had possessed. It is apparent from the language of the state and federal enactments involved—the Cession of Virginia, the Virginia-Kentucky Compact, the Ordinance of 1787, the Acts of Congress admitting Ohio and Kentucky to the Union—that neither Ohio’s nor Kentucky’s extent of title on the Ohio River was specifically defined and the question became the subject of judicial resolution.

In 1820 the issue of title to the river as between Ohio’s western neighbor, the State of Indiana, and the State of Kentucky came before the Supreme Court in *Handly’s Lessee v. Anthony*,¹⁰ and it was resolved by the Court’s reference to and reasoning from the land transactions and legislative acts discussed above.

Handly was an action for ejectment brought by a citizen of Kentucky against a citizen of Indiana. The disputed land was ground that was separated from Indiana by a channel or “bayou” through which water of the River flowed during certain times of the year when it was high and which was dry at other times. The plaintiff claimed under a grant from the State of Kentucky, while the defendant claimed the land as being in Indiana under a grant from the United

6. 2 Stat. at Large 173 (1802).

7. 13 Hening’s Stat. at Large 17 (1789).

8. Section 5 of the Compact stated that “the boundary between the proposed state and Virginia, shall remain the same as at present separates the district.” 13 Hening’s Stat. at Large at 18.

9. 1 Stat. at Large 189 (1791).

10. 5 Wheat. 374 (1820).

States. The court was thus called upon to settle the conflict of boundary between Kentucky and Indiana on the Ohio River. It held that resolution of the issue turned on the extent of land retained by Virginia after her cession of the territory north and west of the Ohio, from which Indiana as well as Ohio was formed, to which Kentucky succeeded as proprietor, reasoning as follows:

“ . . . it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory ‘situate, lying and being to the north-west of the river Ohio.’ And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

“When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only.” (Emphasis added).¹¹

Reasoning that Virginia was the original proprietor of both sides of the River, the Court held that after its cession of the northwest territory, Virginia retained title to the River up to the low water mark on the north shore, and that Kentucky, therefore, succeeded to the same rights when she became a state in 1792. Thus the land in question was held to lie within the State of Indiana.

This holding is now challenged by the State of Ohio on the grounds that (1) the reasoning of the Court was in

11. *Id.* at 379.

error, (2) Ohio was not party to the proceedings, and (3) Ohio has always contested the placement of Kentucky's boundary at the low water mark on the northern shore. Basically, Ohio argues that Virginia never held good title to the lands she surrendered to the United States and therefore Virginia, and her successor, Kentucky, never had title to more than the middle of the River.

In the more than 150 years since the Court's decision in *Handly*, Kentucky has consistently claimed ownership to and exercised dominion over the Ohio River to the low water mark on the northern shore. Ten years before *Handly* was decided, the Kentucky Legislature enacted a statute to quiet questions over the extent of its ownership on the Ohio River which clearly set forth its claim of sovereignty over it. The act stated:

"Whereas doubts are suggested, whether the counties, calling for the River Ohio as the boundary line, extend to the state line, on the north west side of said river, or whether the margin of the south east side, is the limit of the counties, to explain which

"Sec. 1 *Be it enacted, by the General Assembly,* That each county of this Commonwealth, calling for the river Ohio, as the boundary line, shall be considered as bounded in that particular by the state line on the north west side of said river, and the bed of the river and the islands, therefore shall be within the respective counties, holding the main land opposite thereto, within this State, and the several county tribunals, shall hold jurisdiction accordingly."¹²

Similar language by the Revisor of the Kentucky Statutes in 1944 contained the comment:

"The boundary with Ohio, Indiana, and Illinois begins at a point where a line running through the center of

12. 1 Statute Law of Kentucky 268 (1834), Sess. Laws of Kentucky 100 (1810).

the Big Sandy River intersects the low water mark on the northern shore of the Ohio River; thence it runs in a westerly direction along the northern or northwestern shore of the Ohio, to a stake on the bank of the Ohio river . . .”¹³

Decisions of the Kentucky courts, however, demonstrate her continuing claim to the waters of the Ohio River.¹⁴

During the long period following *Handly*, the Court on several occasions affirmed and followed its holding in that case. In *Indiana v. Kentucky*¹⁵ a dispute between the States of Kentucky and Indiana over a claim of ownership to an island on the north side of the Ohio River again raised the question of the limits of Kentucky’s sovereignty over the River. After reviewing the events surrounding Virginia’s claim to the northwest territory, and the cession of Virginia in 1784, the Court, relying on *Handly*, concluded that Kentucky “succeeded to the acient right and possession of Virginia”¹⁶ and that its boundary extended to the low water mark on the northern shore of the River.

Henderson Bridge Co. v. Henderson City,¹⁷ decided nine years after *Indiana v. Kentucky*, involved a determination of the extent of power of a Kentucky municipality to tax a railroad bridge spanning the river between Kentucky and Indiana, which raised the issue of the extent of dominion Kentucky possessed over the River. After dis-

13. Notes and Annotations to the Kentucky Revised Statutes (1944), Title I, Chapter I, p. 2.

14. *Commonwealth v. Henderson County*, 371 S.W.2d 27 (1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W.2d 119 (1954); *Shannon v. Streckful Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939); *Church v. Chambers*, 3 Dana 279; *McFarland v. McKnight*, 6 B. Mon. 500, 510; *Fleming v. Kenny*, 4 J. J. Marsh 155, 158; *McFall v. Commonwealth*, 2 Met. (Ky.) 394.

15. 136 U.S. 479 (1890).

16. *Id.* at 508.

17. 173 U.S. 592 (1899).

cussing *Handly*, *Indiana v. Kentucky*, and their historical background, the Court held that:

“Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River.”¹⁸

Also, in a memorandum decision, the Court in *Nicoulin v. O'Brien*,¹⁹ held that Kentucky could prohibit citizens of Indiana from seining for fish in the River south of the low water mark on the northern shore, stating that the “territorial limits of Kentucky extend across the river to low-water mark on the northerly shore.”²⁰ Other cases which involved the location of state boundaries and the sharing of jurisdiction on River waters, have also discussed and followed the reasoning in *Handly*.²¹

Despite the long passage of time, the legislative and judicial pronouncements of the State of Kentucky, and the decisions of the Supreme Court, holding Kentucky's boundary at the low water mark on the northern shore, Ohio only now asserts the claim that its dominion extends to the middle of the River. As a defense to this extended period of inaction, the petition to amend alleges, as mentioned above, that Ohio is not bound by the decisions of the Supreme Court because it was not a party to those proceedings and has always protested the presently fixed boundary of Kentucky. Ohio cites several cases to support this position. Yet, they only strengthen the contrary conclusion, that the Ohio courts have, for many years, followed the reasoning of *Handly* and accepted Kentucky's territorial limits as being at the low water mark on the northern shore of the River.

18. *Id.* at 613.

19. 248 U.S. 113 (1918).

20. *Id.* at 114.

21. *Wedding v. Meyler*, 192 U.S. 573 (1904); *Alabama v. Georgia*, 23 How. 505, 514 (1859).

Booth v. Hubbard,²² one of the cited cases, was a wrongful death action brought after the drowning of plaintiff's decedent in the Ohio River. It was argued that the decedent had died within the territorial limits of Kentucky and, therefore, the action could not be maintained in the Ohio courts. The Supreme Court of Ohio, in discussing where the boundary lay between Kentucky and Ohio, stated that:

"For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784."²³

The court went on to discuss the interpretation of the Cession of Virginia in *Handly*, stating further that:

"... the construction thus given to the Virginia deed of cession has been uniformly sanctioned and affirmed by the courts of this state. In *Lessee of McCulloch v. Aten*, 2 Ohio Rep. 308, the court say: 'The state is bounded by the Ohio River; but it can scarcely be supposed that the beach, below the break of the bank, is not within her jurisdiction. In the case of *Handly's Lessee v. Anthony*, this doctrine is distinctly recognized by the supreme court of the United States, as being a rule of boundary. And it is one to which this court have always adhered.'"

* * *

"The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

22. 8 Ohio St. 243 (1858).

23. *Id.* at 245.

“In point of fact, dominion has never been exercised by Virginia on this side of the river, since her deed of cession, but has uniformly been exercised by this state, to the line of low-water, during the whole period of her existence, and the question should now be regarded as settled.”²⁴

Although not cited by Ohio, *Blanchard v. Porter*,²⁵ decided more than 25 years earlier than *Booth v. Hubbard*, contained similar reasoning. There the issue before the Supreme Court of Ohio was whether a citizen of Ohio could convey by deed the land between the high and low water marks on the Ohio River. In the course of its reasoning the court stated:

“Nor is it a question, whether the deed to the plaintiff conveys the land and water, to the centre of the river, since Virginia only granted the territory on the northern bank of the river, to low water mark; although, by the compact of 1792, between Virginia and Kentucky, a *concurrent jurisdiction* over the river is accorded to Ohio and Kentucky.” (Emphasis in original).²⁶

And, citing this case and others in *Wedding v. Meyler*,²⁷ the Supreme Court observed that “In the Ohio decisions, it is apparent that the jurisdiction exercised by the State over the Ohio River is based on the Virginia compact.”²⁸

In two other cases introduced by Ohio, the first, *Sebastian v. Covington & Cincinnati Bridge Co.*,²⁹ involved a question of the extent of Ohio’s power to tax a bridge which had been built by a Kentucky corporation chartered by the State of Ohio for that purpose, and the

24. *Id.* at 247-48.

25. 11 Ohio 138 (1841).

26. *Id.* at 142.

27. 192 U.S. 573 (1904).

28. *Id.* at 576-77.

29. 21 Ohio St. 451 (1871).

second, *Covington & Cincinnati Bridge Co. v. Mayer*,³⁰ raised the issue of the extent of Ohio's taxing power over the same bridge pursuant to a revised Ohio statute which had altered the property base for taxation. In both cases counsel argued that Ohio's southern boundary lay at the middle of the river and its power to tax was coextensive thereto. The decisions of the Supreme Court of Ohio, however, concluding respectively that Ohio could tax the bridge to the middle of the River, and determining the appropriate property base for the tax, relied on provisions in the Ohio charter which granted permission for the building of the bridge. The court did not reach the question of where the boundary lay between the states. The other cases cited by Ohio to support the contention that it has always protested the placement of Kentucky's boundary at the low water mark on the northern shore also rely merely on counsels' arguments not reflected in the decisions of the courts.³¹

The acceptance by the Ohio courts of the Supreme Court's decisions in *Handly* and *Indiana v. Kentucky* setting the boundary of Kentucky at the low water mark on the northern shore undermines its contention that it is not bound by them because they involved conflicts between Indiana and Kentucky wherein Ohio was not a party. In addition, Ohio's assertion that those decisions were intended to locate the northern boundary of Kentucky on the Ohio River only as between Indiana and Kentucky assumes that the cession of the northwest territory and the Ordinance of 1787 contemplated different boundaries for the states to be carved on the north-

30. 31 Ohio St. 317 (1877).

31. Ohio refers to the brief for the State of Indiana in *Indiana v. Kentucky*, 136 U.S. 479 (1890) wherein it was "pointed out that . . . Ohio claimed that its boundary . . . lay in the middle of the Ohio River, and that Ohio regarded . . . language on that aspect of the *Handly* case as *dicta*." Ohio also refers to the argument for the State of Ohio in *Commonwealth v. Garner*, 44 Va. 655 (1846). Plaintiff's Brief in Support of Amended Complaint at 16-17.

ern shore. Such a plan would have resulted in a checkered River border for Virginia, and later Kentucky. Aside from the sheer difficulty and practical unmanageability inherent in governing a boarder such as Ohio's argument suggests, this contention appears to be contrary to the intentions of the Congress and the states which participated in planning for the division of the northwest territory into states. It must be assumed that the adjudications in *Handly* and *Indiana v. Kentucky*, although resolving conflicts only between the States of Indiana and Kentucky, were intended to locate the boundary of Kentucky along its entire northern border. At the very least, Ohio was put on notice of the practical intent and consequences of these decisions and the jeopardy they posed to its claim of dominion on the River.

In holding that Kentucky was the rightful owner of the island in dispute in *Kentucky v. Indiana*, the Court reasoned:

" . . . above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be . . . On that day, and for many years

afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. . . .”

“This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation’s title and rightful authority.”³²

The Court concluded by stating that:

“The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it.”³³

32. 136 U.S. at 509-510.

33. 136 U.S. at 518.

The practical events involved in the daily course of dealings in and between the states and their citizens to which the Court so responded in *Indiana v. Kentucky* upon a lapse of something over seventy years, are even more compelling in the present case involving a lapse of more than 150 years. The counterclaim which Kentucky intimated it would present provides but one example of the infinite elements of proof the proposed amendment to Ohio's complaint would invite. Moreover, the reasoning and principles expressed in *Indiana v. Kentucky* have been followed by the Supreme Court to deny relief in cases of long delayed state claims to territory in a line of decisions. Thus, in *Michigan v. Wisconsin*,³⁴ the Court refused to correct a mistake in a boundary description which had deprived Michigan of her rightful territory on the grounds that Michigan had known of the error for some sixty-four years and had stood by without objection while Wisconsin exercised dominion over the land. The Court stated that:

" . . . it is contended that the State of Michigan through all these years labored under a mistake in respect of the real facts and that this was the result of excusable ignorance on her part. The contention is devoid of merit. The material facts, since at least the date of the Wisconsin Enabling Act, [1836] have been so obvious that knowledge of them on the part of the Michigan authorities, if it were not shown, as it is shown, by the evidence, must necessarily be assumed.

"Notwithstanding, the State of Michigan at this late day insists that the boundary now be established by a decree of this court in accordance with the description contained in her Constitution of 1908. Plainly, this cannot be done. That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued

34. 270 U.S. 295 (1926).

and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, [citations omitted] and, *a fortiori*, to the quasi-sovereign states of the Union. The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."³⁵

In the cases where the Court did not find acquiescence in state claims to disputed territory, the conflict over the boundaries was both obvious and of long standing.³⁶

In light of the decisions of the Supreme Court and those of the Ohio Supreme Court recognizing and accepting the northern boundary of Kentucky at the low water mark on the northern shore of the River, and on the basis of Kentucky's open and continuous assertion and exercise of dominion to that point without formal objection by Ohio for more than 150 years, it is my opinion that the pronouncement of the Court in *Indiana v. Kentucky* applies equally to Ohio, and it has for all practical purposes acquiesced in Kentucky's claim of sovereignty over the River to the low water mark on the northern shore.

It seems clear that Ohio, in its present posture, harking back to an alleged ancient defect in Virginia's title to the northwest territory in order to vacate the decision in *Handly* and Kentucky's historically fixed boundary, is attempting to challenge a settled rule of law which has been accepted by it for a century and a half. Recognizing that great latitude is to be extended in cases

35. *Id.* at 307-308. *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Maryland v. West Virginia*, 217 U.S. 1, 42-44 (1910); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 523 (1893); *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846).

36. *New Jersey v. Delaware*, 291 U.S. 361, 376-77 (1934); *Oklahoma v. Texas*, 272 U.S. 21, 46-47 (1926); *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

involving litigation between the sovereign states,³⁷ it is nevertheless my opinion that the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action.³⁸ I therefore recommend that an order be entered denying the petition to amend the complaint of the state of Ohio.³⁹

37. *Virginia v. West Virginia*, 234 U.S. 117, 121 (1913).

38. 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§1215, 1216, 1357 (1969); 2A MOORE, FEDERAL PRACTICE §12.08 (2d ed. 1968).

39. Such a disposition of the petition to amend the complaint will not terminate this litigation since it contemplates but an alternative request for relief. Ohio intends to pursue its original cause of action to locate the boundary between the states at the low water mark on the northern shore of the River as it existed in 1792.

The necessity for a definitive resolution of the petition for leave to amend at this point, interlocutory though it may be, appears justified from the standpoint of economy of time and expense as in the situation of the application of 28 U.S.C. §1292(b) dealing with appeals of certain interlocutory orders.

Respectfully submitted,

/s/ PHILLIP FORMAN
Special Master

April 10, 1972

