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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - Plaintiff,

versus

COMMONWEALTH OF KENTUCKY, - Defendant.

PETITION FOR REHEARING

STEVEN L. BESHEAR

Attorney General
Capitol Building
Frankfort, Kentucky 40601

JAMES M. RINGO

Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Defendant

Of Counsel:

GEORGE F. RABE

First National Building, Suite 1004
Main and Upper Streets
Lexington, Kentucky 40507

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COMMONWEALTH OF KENTUCKY, - - *Defendant.*

PETITION FOR REHEARING

Kentucky petitions for rehearing in this case because the Court has completely overlooked one of the rules of river boundaries — an oversight which confuses and intermingles controlling principles in a way which will plague the Court in boundary cases for years to come.

OVERLOOKING THE ISLAND RULE WHICH APPLIES WHEN AN ISLAND CHANNEL SHIFTS HAS RESULTED IN IRRECONCILABLE CONFUSION OF THE ENTIRE FEDERAL COMMON LAW OF RIVER BOUNDARIES.

Both the majority (page 3) and the dissenting (pages 4 and 5) opinions refer to the cardinal river boundary principles of accretion and avulsion. Both *overlook* the equally important but infrequently involved island rule. Failure to recognize this rule so confuses river boundary law that the majority and

dissent have read quite reconcilable century-old cases in opposite or conflicting ways. This case will perpetuate such confusion unless the island principle is taken into consideration.

The Island Rule

The two cardinal principles — that *gradual* changes of accretion and erosion so change the boundary and that *sudden* and perceptible changes, called avulsion, do not — are axiomatic. It is a principle akin to avulsion — that some *gradual* changes of river channels do *not* effect a boundary change — which has been overlooked in the consideration of this case. This principle is well explained in *Omaha Indian Tribe v. Wilson*, 575 F. 2d 620 (8th Cir. 1978), vacated on other grounds, 99 S. Ct. 2529, 99 S. Ct. 3092, where the Court stated at page 637, footnote 34 (emphasis ours) :

Both state and federal case law also recognize an exception to the accretion rule where a stream moves gradually around or jumps across land area, thereby markedly altering the river's channel. The rule in these cases, sometimes known as "the island rule," has not been confined to islands. In *Davis v. Anderson-Tully Co.*, 252 F. 681, 685 (8th Cir. 1918), the court applied the principle to a peninsula and observed:

To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the

new one, but by jumping over them or running around them and making or adopting a new course, *the boundary remains in the old channel* subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, *notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years* by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation.

See also *Washington v. Oregon*, 211 U. S. 127, 134-36, 29 S. Ct. 47, 53 L. Ed. 118 (1908); *Missouri v. Kentucky*, 78 U. S. (11 Wall.) 395, 403-11, 20 L. Ed. 116 (1870); *Commissioners of Land Office v. United States*, 270 F. 110, 113-14 (8th Cir. 1920), appeal dismissed, 260 U. S. 753, 43 S. Ct. 14, 67 L. Ed. 497 (1922); *State v. Ecklund*, 147 Neb. 508, 23 N. W. 2d 782, 789-90 (1946).

In discussing a gradual change in the course of a river around an island, in *Hogue v. Stricker Land and Timber Co.*, 69 F. 2d 167 (5th Cir. 1934), the Court stated:

Glasscock Island did not disappear and reappear as the results of erosion and accretion. It remained unaffected by either. It is true also that strictly speaking there was no true avulsion, since the channel of the river did not suddenly leave its old bed and form a new one. The old channel remained where it was and the new one was formed

gradually. But, where the main channel changes from one side of an island to the other, it seems that the same rules as to boundary govern as are applied in cases of avulsion, at least to the extent that the filling up of the old channel is considered as attributable, not to accretion, but to the change of conditions wrought by the new channel. In *Missouri v. Kentucky*, 11 Wall. 395, 401, 20 L. Ed. 116, the channel of the Mississippi river gradually changed from the west to the east side of Wolf Island. . . . [B]efore the change of channel, Wolf Island was on the Kentucky side. In holding that the boundary line was not changed, the Supreme Court said:

“If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner.”

In *Indiana v. Kentucky*, 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329, it was held that the boundary line remained as it was north of Green River Island, although the channel of the river had long since changed to south of that island. It therefore appears to be settled law that the old channel remains the boundary in the case of an island as well as in that of an avulsion.

In view of the foregoing Supreme Court decisions, it is clear, as it seems to us, that Glasscock Island remain in Louisiana. . . . A boundary line which remains in the old channel until its bed becomes empty of water does not then or thereafter

jump overground from the bed of the old channel to the middle of the new channel of the river.

We conclude that, as the island separated and kept distinct the two channels of the river, the boundary remained as it was in the beginning. 69 F. 2d at 168, 169.¹

State courts have enunciated the same rule. For instance, see *Randolph v. Hinck*, 277 Ill. 11, 115 NE 182 (1917); *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437 (1907).

***Handly's Lessee v. Anthony* and *Indiana v. Kentucky* Are Complementary Expressions of the Accretion and Island Principles.**

The discussions of these cases make it abundantly clear that *Indiana v. Kentucky*, 136 U. S. 479 (1890) is neither a novel pronouncement of an immutable river boundary (majority opinion in this case) nor an inexplicable departure from accepted principles (dissent in this case), but rather a very sound application of the logical exception to the accretion rule that when a stream moves gradually around an island it does not change the boundary or the ownership of the island.² Contrary to the majority and dissenting opinions in this case, *Handly's Lessee v. Anthony*, 18 U. S. (5

¹While the island channel in *Indiana v. Kentucky* was not the main or navigational channel, as in the quoted cases, its significance is that it was the boundary channel.

²The majority's reliance on *Perks v. McCracken*, 169 Ky. 590, 184 S. W. 891 (1916) is equally confused and misplaced, as that case, like *Indiana v. Kentucky*, was simply an application of the island rule.

Wheat.) 374 (1820), and *Indiana v. Kentucky* are quite complementary, consistent and reconcilable applications of two different principles.³ *Handly's Lessee* refers to the traditional rule of accretion. *Indiana v. Kentucky* is the well recognized exception of a gradually abandoned or filled channel, sometimes called the island rule, which has the same legal effect as an avulsion.⁴

Under Precedents of This Court, General Rules Clearly Apply To Kentucky's Ohio River Boundary

The Court concludes that the Ohio River boundary of Kentucky is not the "usual" or "customary" situation of river boundaries and that well recognized rules of accretion and avulsion do not apply (Opinion, pp. 2, 3). The sole reason given for this conclusion is Virginia's retention of the entire river by its cession "of the territory to the northwest of the river Ohio". That conclusion is in direct conflict with decisions of this Court in which it has ruled categorically that traditional rules of accretion and avulsion do apply when the boundary is on one side of a river as well as when it is the thalweg.

³The failure of both the majority and dissent to discern the rule of *Indiana v. Kentucky* may be attributable to the fact that neither cited *Missouri v. Kentucky*, apparently the first American island rule case (without naming it such), which is the sole authority for the "precisely" controlling principle in *Indiana v. Kentucky*. 136 U. S. at 508.

⁴The island rule, like the avulsion rule, applies to a perceptible change of channel around land not destroyed by the change, and differs from the avulsion rule only in the gradualness of the change. As in the case of avulsion, a boundary does not change when the island rule is applied.

The boundary between Vermont and New Hampshire is the low-water mark on the Vermont side of the Connecticut river. *Vermont v. New Hampshire*, 289 U. S. 593 (1933) and 290 U. S. 579 (1934) (decree). The decree expressly provided that the boundary so established was "subject to such changes as may hereafter be effected by erosion or accretion". 290 U. S. at 580, 583.

The boundary between Oklahoma and Texas is the south bank of the Red River. *Oklahoma v. Texas*, 260 U. S. 606 (1923) and 268 U. S. 252 (1925). The Court held that the rules of accretion and avulsion applied to the Red River. 260 U. S. at 636 and 268 U. S. at 256.

Texas v. Louisiana, 410 U. S. 702 (1973), cited by the majority (Opinion, p. 3), in no way bears on the situation in this case. The statutes involved in that case described the boundary as "a line to be drawn along the middle of" the Sabine River. 410 U. S. at 704, 707. The issue concerned the geographic middle as opposed to the middle channel (the thalweg). Nothing in that case supports the majority's conclusion that the rules of accretion and avulsion do not apply to the boundary created by Virginia's 1784 cession "of the territory northwest of the river Ohio".

Nor does *Indiana v. Kentucky* stand for a "flat pronouncement" of an immutable 1792 line and a rejection of Kentucky's present contentions (Opinion, pp. 4, 5). This conclusion, as noted above, is based on a misreading of *Indiana v. Kentucky* by overlooking the

island rule which it applied.⁵ It is of great significance that the low-water mark of the river had no monuments or other artificial markings in 1784. It is inconceivable that Virginia intended as its boundary an immutable line at the low-water mark along the 900 mile length of the river as it then existed. Quite obviously the 1784 Cession must be viewed in the setting of its time. One of the reasons for the cession was the fact the territory was unsettled. Undoubtedly, the natural boundary intended by Virginia was where the Indians, frontiersmen and settlers saw it, and later generations would see it, wherever it might be at any given time. It was a natural monument and artificial ones did not exist and were not contemplated.

Similarly, the twentieth century "damming of the river and consequent rise of its waters" (Opinion, p. 2) cannot negate Virginia's intent in a cession made in the eighteenth century. Moreover, Kentucky's answer denied that the dams affected the expanse of the river to any appreciable extent, and in the absence of proof or judicial notice, of which there has been none in this case, whatever effect the dams may have had on the river cannot be a basis for ruling Kentucky out of court on the pleadings before the taking of any proof (Answer of Kentucky, pp. 1, 2).

The "Kentucky sources" cited at the conclusion of the Court's Opinion (p. 6) in support of a 1792 mark have not been adopted by the legislature or courts of

⁵Federal and state courts have consistently cited *Indiana v. Kentucky* as a leading island rule case. See for instance, *Hogue v. Stricker Land and Timber Co.*, *supra*; *State v. Muncie Pulp Co.*, *supra*.

the State and are not authority for its position. Furthermore, the Court's quote from a research report is improperly taken out of context. It was only a historical reference in the narrative portion of the three page article from which it was lifted. The clearly stated conclusion of that article directly contradicts the majority opinion, Kentucky Legislative Research Commission, Information Bulletin No. 93, p. 4:

In conclusion, from examination of the historical documents, the statutes of the various states, the constitutions of the states, and the physical evidence we can only conclude that the boundary of Kentucky is as it has always been claimed; that the entire river Ohio for the 664 miles that it flows past Kentucky belongs to Kentucky. . . .

That conclusion reflects the official position consistently enacted by Kentucky's legislature. As noted in *Ohio v. Kentucky*, 410 U. S. 641, 650 (1973), as early as 1810, Kentucky enacted a statute claiming the entire river within its boundary. This was reaffirmed more recently with the concurrence of Indiana in the Compact agreeing to the boundary between Kentucky and Indiana as the abandoned-channel boundary fixed at Green River Island in *Indiana v. Kentucky* and "thence upstream" and "thence downstream" respectively with the low-water mark of the Ohio River on that side. 1942 Ky. Acts, Ch. 116; 1943 Ind. Acts, Ch. 2; 57 Stat. 248 (1943). This language reflects a natural boundary subject to accretion and erosion. See *Oklahoma v. Texas*, *supra*, 268 U. S. at 255, 256 ("thence up the river").

Kentucky's Defense of Acquiescence Cannot Be Denied On The Pleadings Without Proof

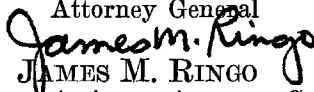
In its answer, Kentucky raises the defense of acquiescence by Ohio in the current low-water mark as the boundary (Answer of Kentucky, p. 3). The instant submission was on the pleadings and without evidence. Acquiescence is a factual issue and Kentucky must be afforded an opportunity to present evidence of this defense.

CONCLUSION

A rehearing should be granted in this case because the Court has clearly overlooked a material rule of law relating to interstate river boundaries which, if not corrected, will perpetuate the oversight and cause confusion and uncertainty in controlling principles of state boundary disputes for years to come.

Respectively submitted,

STEVEN L. BESHEAR
Attorney General


JAMES M. RINGO

Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Defendant

Of Counsel:

GEORGE F. RABE
First National Building
Suite 1004
Main and Upper Streets
Lexington, Kentucky 40507

CERTIFICATE OF COUNSEL

As counsel for the Commonwealth of Kentucky, I hereby certify that this petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.



JAMES M. RINGO

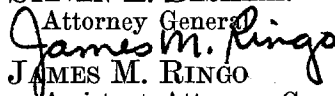
*Assistant Attorney General
Counsel for Defendant*

CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for defendant, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1980, I served the foregoing brief on the Special Master and the plaintiff by depositing in the U. S. Mail, first class postage prepaid, three copies each addressed to Judge Robert Van Pelt, Special Master, 566 Federal Building, Lincoln, Nebraska 68508; Michael R. Szolosi and Steven C. Fitch, Special Counsel to the Ohio Attorney General, Szolosi and Fitch, 155 East Broad Street, Columbus, Ohio 43215; and Counsel for the plaintiff Howard B. Abramoff, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215.

STEVEN L. BESHEAR

Attorney General



JAMES M. RINGO

Assistant Attorney General

Capitol Building

Frankfort, Kentucky 40601

Of Counsel:

Counsel for Defendant

GEORGE F. RABE

First National Building

Suite 1004

Main and Upper Streets

Lexington, Kentucky 40507

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