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In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF LOUISIANA,

v.

STATE OF MISSISSIPPI, ET AL.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA IN REPLY TO THE ORIGINAL BRIEF OF THE STATE OF MISSISSIPPI

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

CARROLL BUCK,
First Assistant
Attorney General,
State of Louisiana.

EDWARD M. CARMOUCHE,
Assistant Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

JOHN A. BIVINS,
Special Counsel to the
Attorney General,
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THE FIRST EXCEPTION OF THE STATE OF MISSISSIPPI TO THE REPORT OF THE SPECIAL MASTER.

Mississippi first excepts to any finding by the Special Master with respect to the location of the thalweg at any given time. Alternatively, Mississippi takes the position that the actual finding of fact by the Special Master is incorrect.

The decision by the Special Master in the context of his report is not "moot", as claimed by Mississippi. It is moot if this Court upholds Louisiana's position and fixes the boundary as it existed prior to the man-made disruption of the natural action of the river. If, however, these artificial acts are to be ignored, and the boundary is not to be fixed, then the location of the boundary in 1954 is a very pertinent

fact in connection with the disposition of the entire controversy.

What Mississippi wants is not an avoidance of a decision on the location of the thalweg in 1954. Rather, Mississippi wants that decision to be made in another forum, in connection with the Zuccaro's claim for ownership of the oil. As the matter now stands, Mississippi's position would presumably result in that determination being made by a jury drawn from citizens of Mississippi.

Louisiana is unwilling to agree that this is the correct procedure, if Louisiana's primary position is not successful. The 1954 location of the thalweg is a boundary question, and the interests of Louisiana in that boundary question are quite vital. The millions of dollars worth of oil produced from the general area in controversy here, the taxing and regulatory authority over such production, and the actual ownership of producing areas by the State of Louisiana make the entire controversy of grave concern to Louisiana. Further, Louisiana has for almost the entirety of its eastern and western boundaries the Mississippi and Sabine Rivers. Louisiana would very much dislike any ruling in this case which would have the effect of holding that a jury in any other state court could rule on such matters of vital interest to Louisiana. Mississippi may desire to disregard its interest therein, but Mississippi's lack of interest is, we suggest, motivated by concern for the Zuccaros as much as any factor.

Louisiana has taken the position in its pleadings

and throughout these proceedings that the entirety of the controversy between all of the parties should be determined under the control and jurisdiction of this Court. As will appear from Mississippi's discussion of its view of the evidence, and as will appear from the record itself, great amounts of factual data were presented, and that data is almost wholly sufficient for a determination of all questions presented in these proceedings. Common sense, and justice, indicate that the repetition of this lengthy factual presentation in another Court should be avoided if reasonably possible.

Alternatively, Mississippi contends that the finding of the Special Master was incorrect. Louisiana has not undertaken to disagree with this finding. Louisiana has understood that the principal function of the Special Master was to take testimony and make factual determinations, and this the Special Master has done. The slightest perusal of the record indicates that the Special Master had a difficult task, and it is apparent that he resolved it in what he considered the most reasonable manner.

For reasons known to themselves, Messrs. Smith and Geddes, Mississippi's expert witnesses, were quite specific in their conclusions. Mississippi apparently feels that the positive attitude of the witnesses is sufficient without regard to the bases upon which such conclusions rest. In this case, it should be clear to all that it was Mississippi's witnesses who speculated, and that it was Louisiana's witnesses who refused to go beyond the point of reasonable scientific probability. Further, Louisiana does contend that certain of the

documents prepared by those witnesses were not based upon authentic documentary background and that in explaining such charts and maps the witnesses could only indulge in pure speculation. Particular reference is made to cross-sections. Inasmuch as the Special Master expressly observed in his report (SMR 49) that no river surveys existed to cover the years from 1942 to 1951 and from 1952 to 1964, pointing out that such lack of surveys added to the difficulty of "making several critical factual determinations", it is rather strange for Mississippi to say, on page 8 of its brief, that ". . . the uncontradicted evidence, and expert opinion based thereon, in the record . . . shows beyond doubt that the deepest and navigable part, the mid-channel of navigation was west of the well location at the time the well was drilled and at all times thereafter." Since R. A. Latimer, Louisiana's witness, refused to join Smith and Geddes in speculation, the only thing shown beyond doubt is that the speculative phases of the oral testimony given by Smith and Geddes in their testimony on the westward movement of the thalweg was uncontradicted.

Mississippi cannot very well object to the use of a constant rate of westward movement of the thalweg between the years 1952 and 1964. This was precisely the method employed by Mississippi's own witness, Mr. Geddes. The only difference was that the Special Master used a different point of commencement for his constant rate of movement. There are certain other matters which may have also influenced the Special Master in reaching his conclusion. The record reflects

that all through the period of time when the well was being drilled under permit from the State of Louisiana, and completed, and produced, no complaint was made by the State of Mississippi, or by the Zuccaros, the Mississippi landowners, until 1961. Vessels traveled up and down the river during the course of the drilling. Nothing indicated to anyone that the vessels were sailing on the Louisiana side of the proposed bottom hole location. The Zuccaros themselves, in correspondence and conversations, openly considered that the well was bottomed in Louisiana, and took that position themselves until at least 1961. If Mississippi now complains that the judgment of the Special Master is based on lack of factual data, and speculation, then any absence of precise data is due solely to the delay and acquiescence of Mississippi and its citizens.

Mississippi cannot question the profound ability and high integrity of R. A. Latimer, Louisiana's expert witness, now deceased, whose commendable record of experience in Mississippi River engineering projects is high-lighted on page 42 of the Special Master's report. Surely a man receiving the highest civilian award of the Department of the Army, based upon his long career and continuous association with the various flood control programs on the Mississippi River, and who knew from close personal experience the terrific impact of the Glasscock Cutoff on the Louisiana side of the river, should not be chided for refusing to say what neither he nor any other engineer knew enough about, concerning the westward movement of the river during all of the years, 1942 to

1964, to be able to testify factually and dependably on this point.

That which could have been said on the basis of expert extrapolation, had hydrographic surveys been before Mississippi's witnesses in testifying, must be regarded as pure speculation in the absence of same, so far as tracing the westward movement of the thalweg is concerned.

Louisiana also cites *Moore v. Chesapeake & O. R. Co.* 340 U.S. 573, 578, 95 L.Ed. 547; *First National Bank v. Texas*, 20 Wall, 72, 22 L. Ed. 295; and *Moore v. McGuire*, 205 U.S. 214, 27 S. Ct. 483, posed for the court's consideration on page 18 of Mississippi's brief. It is far more appropriate to urge the decisions of those cases in support of Louisiana's objection to the speculative testimony upon which Mississippi relies than to have them considered in relation to the oral testimony given by witnesses for Louisiana.

Actually, Mississippi cites no case or cases at all to support the applicability of the live thalweg rule. Apparently Mississippi relies altogether on the cases cited by the Special Master on pages 12 through 17 of his report. Louisiana made it crystal clear in its original brief; first, that the cases cited by the Special Master were entirely inapplicable to the facts in this case; second, that applicable "case law" on the facts presented in the action at bar does, in fact, exist, and third, that human agencies in diverting river channels may not, through the results of their actions, alter boundaries between states or destroy long vested proprietary rights.

Mississippi commences its exceptions by erroneously asserting that State and Federal Courts have universally followed the position advocated by Mississippi. The statement is simply incorrect. This Court has not faced a situation such as this, but those State and Federal Courts which have discussed the point have almost unanimously rejected the position of Mississippi herein. Such cases, which have been fully discussed in previous briefs, are *Mississippi v. Louisiana* (1955), 350 U.S. 5; *Whiteside v. Norton* (8th Cir. 1913), 205 F. 5, Appeal Dismissed (1915), 239 U.S. 114: *U.S. Gypsum Co. v. Uhlhorn* (E.D. Ark. 1964), 232 F. Supp. 994; *City of St. Louis v. Rutz* (1891), 138 U.S. 226, 34 L. Ed. 941; *State v. Bowen*, (1912), 149 Wis. 203, 135 N.W., *James v. State* (1911), 10 Ga. App. 13, 72 S.E. 600, and *Southwestern Portland Cement Co. v. Kezer*, 174 S.W. 661 (Tex.) Cir. App. 1915, Wr. ref.

THE SECOND EXCEPTION OF THE STATE OF MISSISSIPPI TO THE REPORT OF THE SPECIAL MASTER.

In the decree, recommended by the Special Master herein, it is provided that the costs of this suit be equally divided between the two states (SMR p. 39). Louisiana considers that provision in the decree to be proper, no matter what decision this Court reaches as to the boundary between the two states in the problem area.

Since the parties had, pursuant to conference with the Master and on the recommendations of the Clerk of this Court, contributed equal sums of money

to defray accumulated and anticipated costs, Louisiana had expected to pay one half of the cost of these proceedings, and had assumed that Mississippi had the same expectation. However, such is apparently not the case, for Mississippi now asserts that it should pay no part of the cost.

The decisions of this Court in approximately forty original boundary actions between states, since 1910, have been examined, and in each, if costs were mentioned at all, they were divided equally between the parties, whether the complainant or the defendant prevailed. True, the decree in *Louisiana v. Mississippi* (1906), 202 U.S. 58, 26 S.Ct. 571 imposed all costs on Mississippi, but it is quite apparent that some unusual situation arose in that case which prompted this court to depart from the general rule. It was not, as Mississippi states on page 24 of its brief, that Mississippi failed to sustain its claim, for Louisiana brought the suit and had the burden of proof.

In *North Dakota v. Minnesota* (1924), 263 U.S. 583, 44 S.Ct. 208, the Clerk of Court requested instructions concerning taxation of costs. Mr. Chief Justice Taft delivered the opinion of the court, referring to fifteen suits between states instituted to settle boundaries between them. In one of the cases the Chief Justice observed that the bill was dismissed (*Rhode Island v. Massachusetts*, 4 How. 591, 639, 11 L. Ed. 1116), and said that in another case (*Missouri v. Kentucky* 11 Wall. 395), the inference was that the defeated party paid the costs. Referring to the thirteen remaining cases, the Chief Justice expressly

stated that the costs were equally divided between the states in those cases. The following quotation was taken from *Nebraska v. Iowa*, 143 U.S. 359, 370, 12 S.Ct. 396, 400, 36 L.Ed. 186:

> "The costs of this suit will be divided between the two states, because the matter involved is one of those governmental questions, in which each party has a real and vital, and yet not a litigious, interest."

Mr. Chief Justice Taft also quoted from *Maryland v. West Virginia* 217 U.S. 577, 585, 30 S.Ct. 630, 54 L. Ed. 888, as follows:

> "The matter involved is governmental in character, in which each party has a real, and yet not a litigious, interest, the object to be obtained is the settlement of a boundary line between sovereign states in the interest, not only of property rights, but also in promotion of the peace and good order of the communities, and is one which the states have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the state of Maryland as makes provision for the costs of the surveys made under the orders of this court."

In the *North Dakota-Minnesota* case, the court distinguished between nonlitigious and litigious interest and said that in the case then at bar North Dakota had a litigious interest and should pay the costs. The court expressly identified a nonlitigious in-

terest as one in a suit, the settlement of which would be useful to both states, and in which costs should be equally borne by the parties.

The equal division of costs in original boundary actions between states is referred to as the "usual rule" in *Michigan v. Wisconsin* (1926) 270 U.S. 295, 46 S.Ct. 290, 70 L.Ed. 290.

This court, having adopted and pursued its own rule as to costs in original boundary actions between states, is not bound by Rule 54(d) of the Federal Rules of Civil Procedure, which states that "costs should be allowed as of course to the prevailing party unless the court otherwise directs."

Mississippi bases its contentions, regarding costs, on the insupportable inference that Louisiana has instituted an action which it is bound to lose and should be penalized for filing the suit. Mississippi only indulges in wishful thinking and inflated postulations. If there was any merit at all in Mississippi's argument, and in which Louisiana finds none, the proper time to contend that the losing party should pay all the costs is when the court decides who is the prevailing party and who is the loser, and all that Mississippi says on pages 23 through 27 of its brief on the subject of costs is untimely and premature, if propitious at any time.

Compared with the profound economic and governmental issues involved in this action, the question of costs pales into insignificance. Louisiana feels compelled, however, to refute Mississippi's argument

on that subject, for the position taken by it is a revolutionary departure from the rule so long and uniformly followed by this court.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

CARROLL BUCK,
First Assistant
Attorney General,
State of Louisiana.

EDWARD M. CARMOUCHE,
Assistant Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

JOHN A. BIVINS,
Special Counsel to the
Attorney General,
State of Louisiana.

BY: _____
Of Counsel for the State of Louisiana.

PROOF OF SERVICE

The undersigned, of counsel for the State of Louisiana, plaintiff herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the_____day of September, 1965, I served copies of Louisiana's Brief on behalf of the State of Louisiana in reply to the original Brief of the State of Mississippi, by depositing same in a United States

Post Office, with sufficient first class postage prepaid, addressed to:

MR. LANDMAN TELLER,
Special Assistant
Attorney General,
State of Mississippi,
1205 Monroe Street,
Vicksburg, Mississippi.

HONORABLE MARTIN R. McLENDON,
Assistant Attorney General,
State of Mississippi,
State Capitol,
Jackson, Mississippi.

MR. GEORGE W. ROGERS, JR.,
Associate to
Special Assistant
Attorney General,
State of Mississippi,
1205 Monroe Street,
Vicksburg, Mississippi.

Attorneys for State of Mississippi

MR. LANDMAN TELLER,
1205 Monroe Street,
Vicksburg, Mississippi.

MR. JOSEPH S. ZUCCARO,
Berger, Callon, Zuccaro & Wood,
Attorneys at Law,
Natchez, Mississippi.

Attorneys for the Zuccaro Family

MR. EDMUND L. BRUNINI,
P. O. Box 119,
Jackson, Mississippi

MR. RICHARD W. DORTCH,
P. O. Box 119,
Jackson, Mississippi.

MR. BERNARD J. CAILLOUET,
P. O. Box 60626,
New Orleans, Louisiana.

MR. M. M. ROBERTS,
P. O. Box 870,
Hattiesburg, Mississippi.

MR. L. V. RUSSELL,
P. O. Box 1930,
Hattiesburg, Mississippi.

Attorneys for Humble Oil & Refining Company

such being their mailing addresses.

BATON ROUGE, LOUISIANA, SEPTEMBER _____, 1965.

JOHN L. MADDEN,
Of Counsel for the State of Louisiana.

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