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**IN THE  
Supreme Court of the United States**

October Term, 1969

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No. 18 Original

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STATE OF ILLINOIS,

*Plaintiff,*

vs.

STATE OF MISSOURI,

*Defendant.*

— o —

**REPORT OF SPECIAL MASTER**

— o —

HARVEY M. JOHNSEN  
Special Master



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**I.**

**NATURE AND BASIS OF THE CONTROVERSY**

This case is admittedly one within the original jurisdiction of the Court, under Article III, sec. 2, cl. 2 of the Constitution and the provisions of 28 U. S. C. § 1251, as a suit permitted to be filed by the State of Illinois against the State of Missouri for a determination as to a portion of the boundary line between the two States related to the Mississippi River.

The extent of boundary and the amount of territory involved in the sovereignty dispute are relatively small. The amended complaint had alleged that an area of some

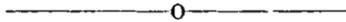
17,500 acres of land was involved, but the answer of Missouri made disclaimer as to a major portion of the area and limited its claim of sovereignty to a part located at one end thereof consisting, as estimated by counsel, of approximately 1,000 to 1,200 acres. This limitation by Missouri was reaffirmed in pretrial conference, and it has been made absolute by the scope of the evidence offered at the hearings.

The parties are agreed that the area in dispute consisted prior to 1881 of land which had its location in the State of Illinois. They further agree that such land was, however, destroyed or washed away by an avulsionary breakthrough made by the Mississippi River in 1881 and by the continued cutting of a resulting bank for a number of years thereafter. The avulsionary breakthrough was one made eastward, over a distance of some 400-500 feet, across into the bed of the Kaskaskia River, an Illinois stream, at a point several miles above where the Kaskaskia previously had been emptying into the Mississippi near Chester, Illinois. The controversy here arises out of the situation that the destroyed area has since been rebuilt and occupied by new land, created by deposits of sand, spreads of alluvium and solidification from cottonwood growths.

Illinois claims sovereignty inherently over the rebuilt land on the basis of the area having had its original location in that State. Missouri claims sovereignty on the basis of the rebuilt land having been formed as accretionary extension to existing Missouri territory, and of there also being involved a determinative prescription

and acquiescence against Illinois from exercise of jurisdiction and dominion by Missouri over the rebuilt area.

A map has been inserted at the front of this Report for general impression as to the location and nature of the situation. The map is a reduced composite of parts of some official charts prepared in 1940 by the Corps of Engineers of the United States Army (as operating force of the Mississippi River Commission, 33 U. S. C. § 647). The 1940 charts were utilized at the hearings, because they constituted the last ones thus officially prepared of the area in relation to the old Mississippi channel. The rebuilt area is located in the upper right hand corner of the map. It consists of three tracts or bodies of land given designation in the testimony as the "Cottonwoods", "Roth Island", and "Beaver Island". The letters "C", "R", and "B" have been inscribed on the map for symbolic identification. The tracts respectively contain approximately 700 acres, 200 acres, and 220 acres.



## II.

### CONTENTIONS AND ISSUES INVOLVED

1. Illinois' primary contention, as indicated, is that, since the area was located in Illinois at the time of the avulsion, and since the avulsion could not legally affect the boundary line between the States, the land subsequently created or rebuilt in the area necessarily constitutes a part of Illinois. Illinois thus seeks to have the boundary between the States confirmed at its pre-1881 location.

2. Missouri's primary contention, as also noted, is that while the area admittedly constituted a part of Illinois both before and immediately after the avulsion, the land which has subsequently been rebuilt therein consists of accretionary extensions made to Missouri territory, with such processive additions operating under the law of accretion to effect a change in the boundary line between the States.

In subsidiary aspect, Missouri contends that the avulsionary breakthrough of the Mississippi into the channel of the Kaskaskia did not produce an abandonment by the Mississippi of its previously existing channel; that it merely resulted in the Mississippi thereafter having and utilizing two channels for the flow of its waters from the place of the breakthrough southward toward Chester, Illinois,—the new shorter direct course down the captured Kaskaskia channel and the older longer looped course around by way of St. Marys, Missouri,—[Chester, Illinois, is located just below the lower right hand corner of the map set out, and St. Marys, Missouri, immediately off of about the middle of the left hand side of the map]; that this dual channel situation obtained and was necessary for carrying the heavy volume of Mississippi waters until the captured Kaskaskia channel had become, years later, widened and deepened enough to be able to take care of the regular flow; that the volume of Mississippi River water thus carried by the old channel was such as to cause it to remain a navigable stream until at least the year 1898, and as thereafter still to maintain it as a continuously flowing stream until around 1907; that in

this quarter-century period of active flowing status the old channel had continued to engage in the characteristic Mississippi River incidents of erosion and deposition as to parts of its course; and that it was these natural stream actions and processes with accompanying movements of the old channel bed which had caused the land to be created as accretionary formation to Missouri territory.

3. Illinois counters these contentions with a claim that the avulsion and the widespread flood following it had precipitated such immediate deposits at the head of the old channel as to have produced a blocking thereof and to have forced a shifting of its junctural position; that this relocating of the channel head was a change produced by the avulsion, which created a new course for this segment and thereby caused the segment to be without status as a part of the old channel; and that since the rebuilding of the land was asserted by Missouri to have occurred within and from this channel segment, no boundary change was able to be claimed on the basis thereof.

4. In further counter to Missouri's contentions, Illinois alternatively claims that if it should be determined that no such relocation of the upper segment or head of the old channel had in fact occurred in connection with the avulsion, it would still have to be held that there had been involved in the rebuilding of the land subsequent movements or shiftings of such an extent to this part of the channel, varyingly estimated in the testimony from a little over a mile up to two and one-half miles in dis-

tance, through the 25-year post-avulsion period, that the progressions would in themselves have to be regarded as being of an avulsionary character and so not representing general channel processes and actions. On this basis Illinois argues that Missouri equally is precluded as a matter of avulsion to claim boundary change from the rebuilding of the land.

5. The parties agree that the character of the old channel bed has not essentially changed since 1907. Missouri admits that the channel has not been a continuously flowing course since about that time. The evidence shows undisputedly that a shrinking and drying up of the channel has occurred, with stagnant waters or sloughs existing at various places from seepage or as residuals of drainage into its bed. Some minor flows of varying extent have continued to occur in parts of the channel from tributary creeks. And during periods of seasonal floods or high waters, there have been flows of water for a time throughout the entire course of the channel.

In probative basis for the boundary change claimed, Missouri has relied heavily on the Corps of Engineers' 1940 plat, in the indication of the position or location of the channel made thereon and in the official designation made thereof as "Old River". This plat appears in evidence as Defendant's Exhibit 1, and it has been utilized as the upper half of the reproduced map at the front of this Report. [Counsel have confusingly referred to the plat as Exhibit 3 in connection with some of the testimony, but such references should be treated in any reading of the record as having relation to Exhibit 1.]

Illinois, while recognizing the prima-facie force of the plat from its official status, makes challenge nevertheless to its accuracy in respect to the location shown and the designation made of "Old River" insofar as the upper part of the channel is concerned. It contends that this segment has cartographically been given location further southeastward than it actually existed, in that the plat has used as a portion of such channel the course of an old slough, known as Idlewild Chute or Slough, which Illinois says lay beyond where the thread was of whatever channel existed and had become fixed by 1907.

6. The evidence on the hearings has given rise to a question also on the unitariness or separateness involved as to the alleged accretion formations in such significance as that aspect might possibly have in the situation. Missouri's claim is a unitary one in relation to all the land-rebuilding which has occurred in the area. It has made no distinction in respect to the formation of the three tracts—the Cottonwoods, Rath Island and Beaver Island. It has treated them as all having identical basis and as thus being aggregately subject to its general proof that the location of the old channel was that shown on the Corps of Engineers plat of 1940 (Deft's. Ex. 1); that the existence of this channel location was not in anywise a product of the 1881 avulsion nor of any avulsionary occurrences thereafter; that it merely represented such processive movements in the bed thereof as have traditionally been recognized as natural and characteristic incidents of Mississippi River actions; and that these actions had occasioned or been

accompanied by accretionary additions to Missouri territory, such as would legally give rise to boundary change.

From testimony, however, which developed on the part of some of the witnesses as to the time and manner of the formation of Roth Island and Beaver Island, and from indications appearing on some of the maps, charts and aerial photographs as to the aspects of the building of these two bodies, the question of their status as accretionary additions to Missouri territory calls for a consideration beyond Missouri's treatment of them in common with the Cottonwoods. The significance of this has relation to whether Missouri can be said to have sustained its probative burden as to the whole of the boundary change claimed by it or to only a part thereof.

7. Missouri, as previously noted, further claims the right of acquired sovereignty to all of the rebuilt lands on the basis of there also having been such an exercise of dominion and jurisdiction by it thereover and for such a period of time as legally to give rise to a prescription and acquiescence against Illinois. Illinois counters that neither such actions nor such a period of time have been involved as to be able to effect a loss of sovereignty against it. Illinois additionally contends that it has itself engaged in acts of sovereignty as to the rebuilt area sufficient to refute any acquiescence on its part to whatever dominion and jurisdiction Missouri has purported to exercise thereover.

**III.****FINDINGS AND CONCLUSIONS AND  
BASIS THEREFOR**

A few matters of incidental information ought perhaps to be stated preliminarily.

The record of the hearings which have been held consists of three volumes of reporter's transcript containing approximately 1,250 pages. Some 40 exhibits of substantially equal division between the parties, comprising primarily plats, charts, maps and aerial photographs, have been placed in evidence, but these are of such size and character that it has not been possible to incorporate or make reproduction of them in the transcript and they have therefore been assembled and transmitted to the Clerk's office in a separate case.

The conferences and hearings held were centered at St. Louis, Missouri, except that one testimonial stage was engaged in at Ste. Genevieve, Missouri, because of there being a number of "old-timer" witnesses from the general locality who the parties felt were of such age or condition that they could not be asked to travel to St. Louis. I desired to see and hear personally all witnesses on area traditions and community beliefs, rather than have such testimony presented to me in deposition form, so that I could have the benefit of such impressions as the witnesses themselves might create.

I have permitted to be included in the transcript, at the parties' desire, both the opening statements and the closing arguments of counsel. It also may be noted that at the suggestion of the parties I have engaged

in an airplane viewing of the area in controversy, accompanied by counsel for both sides.

The holding of the hearings in stages has occasioned some dragging out of the proceedings, more than if a unitary trial had been engaged in. It has resulted also in the transcript containing at places alternating testimony instead of a straight sequence of the witnesses of each party. From the nature of the case, however, this should not give rise to confusion or other difficulty in any reading and consideration of the record. Some further substantial delay has been permitted to occur in seeking to work out accommodatively the filling of a material probative gap, which had been left by the parties, but which escaped me until I engaged in a reading of the transcript for preparation of my Report.

I found that such descriptions as had been put into the record by the parties had not been broken down into segmentary identifications and separations so as to be capable of being used in a definitive boundary description as to the results which might be varyingly possible in the situation. I asked counsel to see if they could work out this deficiency, by having their engineers make divisions in their respective descriptions and attempt reconciliations between them, inasmuch as this appeared to be primarily a matter of professional technicalities. To avoid the need for a testimonial reopening of the case in this respect, the parties, with (perhaps too liberal) an accommodation to the convenience of their engineers, have worked out a stipulation of separational and terminative scope, and this stipulation has been made to

constitute a part of the record as a supplement to the transcript. While the matter thus has dragged unduly, it has resulted in the record finally containing descriptions which will enable the Court to fix any other dispositive boundary line in its decree which it might deem necessary, should it disagree with my result. Thus it will be unnecessary, no matter what result is reached by the Court, to make any appointment of a Commissioner or Commission (such as has been done in earlier cases) in order to be able to effect a final disposition of the litigation.

The findings and conclusions at which I have arrived follow, with an indication of my reasons and basis therefor.

1.

I find that the 1881 avulsion did not produce an abandonment by the Mississippi River of its old looped channel, nor did it occasion a blocking at the head thereof such as to have caused the previous junctural position of the old channel to become shifted and thereby to have made this segment not capable of effecting a boundary change on its processive actions.

The parties have had copied into the transcript (Vol. II, pp. 681-751) an account of the events and conditions of the 1881 avulsion as recorded in the 1914 Transactions of the Illinois Historical Society (Joint Exhibit 17, pp. 95-112). They both accept this account as being accurate together with the statements made by the historian on the activity of the old channel in the years preceding

the avulsion and on the situation which developed thereafter up to the year 1913, when the article was apparently written. In fact, the engineer-witnesses for both parties have relied materially upon this paper as part of the basis for the expert opinions and conclusions expressed by them in regard to the situation.

From the historical account, the avulsion was one of the extremely dramatic episodes in recorded Mississippi River history. The land which was immediately washed away had constituted the neck of a bulbous peninsula of Illinois territory which extended between the looped channel of the Mississippi River and the channel of the Kaskaskia River. The avulsion severed this neck and converted the peninsula into an island which was encircled by the old and the new Mississippi channels and which has since that time borne the name of Kaskaskia Island.

The Island consists of the large body of land appearing in the center of the map at the front of this Report and identified with the letter "K". Its original peninsular status is reflected by the map appearing opposite page 102 of the Historical Society account (Joint Ex. 17). In the northeastern part thereof was located the old town of Kaskaskia, which constituted one of the earliest settlements and mission sites in Illinois. Old Kaskaskia is described in the account as having been "a populous town long before LeClede landed at St. Louis"; as having been "captured from the British during the Revolution by George Rogers Clark"; and as constituting "once the capital of Illinois and the metropolis of the Northwest Territory". It became the capital of the

State upon the admission of Illinois into the Union in 1818. The old Capitol Building stood on what now has been rebuilt into Beaver Island.

All of the old town had been washed away by the avulsion and by the bank cutting which continued in the new channel for a period of time thereafter. The land which adjoined the old townsite now has proximity to rebuilt Beaver Island.

It is Kaskaskia Island as presently existing to which the disclaimer of any sovereignty right on the part of Missouri has been made.

The lengthy historical paper provides fascinating general reading, but only such parts thereof as have immediate pertinency to or provide some of the basis for the findings made will be adverted to hereafter.

As to the finding above that the avulsion cannot be said to have occasioned a blocking and a shifting of the head of the old channel, my persuasion against Illinois' contention derives in part from the extensive detailing contained in the historical paper of the various events which occurred and the conditions which followed, with the total absence in all of this of any indication of a blocking of the head of the old channel having been involved. The scope of the aspects thus gone into by the statements of the various eye-witnesses in the historical report leaves me unable to believe that if such a piling up of materials as to dam the old channel and to force it to engage in a relocation had occurred, this would not equally have been noted and related by them or some of them in the

meticulous and comprehensive account which they gave of the events.

But beyond this negative aspect, the matters which were detailed seem to me also to be affirmatively refutative of the contention. They show that a drop-off of 6 to 8 feet occurred at the point of the breakthrough (Ex. 17, p. 106). Scouring to a depth of 66 feet was said to have been immediately occasioned to the alluvial bottom of the Kaskaskia (p. 108). The force of the current was described as "terrific", with the pressure therefrom into the Kaskaskia bed being such as to cause the water of that river to be backed upstream, not merely within the channel but over its Illinois banks. Deposits in connection with this eastward push were described as having been made on the Illinois side to "such an extent that many acres of trees [on the uplands in that State] died" (p. 102). In contrast, as to the Missouri side of the stream, it was stated that "the greater width and depth of the old channel was taking care of much the larger share of the onrushing flood". (*Ibid.*)

To me this seems a depiction of previously existing old-channel situation, with no marked changes being involved to attract attention, such as were being wrought by that portion of the water which was surging eastward and exerting its force into the Kaskaskia channel, both downstream toward Chester and upstream into the basin of that river. I regard all the many things detailedly related, in conjunction with what was said of the part being played by the old channel, as affirmatively indicative that there had not occurred a damming up and closing of its

head which had disrupted its course and required it to seek a new mouth location in order to carry on its flow.

Indeed, Illinois, is without any basis for its contention except the testimony of its expert witness, who was the Chief Waterway Engineer for its Department of Public Works and Buildings. He expressed the opinion that there "must have" been deposits escaping into the upper end of the old channel and fillings occasioned by flood-plain sprays which naturally would be of such extent as to cause it to be dammed and to necessitate a changing and reopening of its course (Tr. pp. 596, 632, 644, 654). But with no objective basis for this opinion either in the descriptions of the historical account, or from the composite indications of channel position made by an 1889 official chart (Chart 110) of the Mississippi River Commission (Deft's. Ex. 19), or from any testimony of the locality witnesses as to community repute, I am unable to accord this opinion testimony, despite its professional sincerity, a preponderant weight over the probativeness of the elements discussed above and the opposing opinion, with the basis therefor, expressed by the engineer witness for Missouri.

## 2.

On Illinois' alternative contention as to subsequent avulsionary aspect, I find that the extent of the post-1881 to 1907 movements made by the old channel in the relationship thereof to the rebuilding of the land was not such as inherently to establish or probatively to persuade that these movements had themselves consisted of avulsionary events. To the contrary, the situation shown, read

in the light of general Mississippi River history, seems to me convincingly to entitle the movements involved to be regarded as having constituted natural channel actions such as to be subject to the operation of the law of accretion and to the effecting of boundary change therefrom.

Like the one precedingly discussed, this contention of Illinois is predicated on the opinion of its expert witness, that the extent of the difference in position of the upper part of the old channel between 1881 and 1907 was such that it must have been the product of avulsionary forces and actions.

The distance which the thread of this channel portion had moved during the post-1881 quarter-century period was, as previously mentioned, varyingly estimated in the testimony from a little over a mile to two and one-half miles in extent. These were approximations made from general observation of the plats and charts and not calculations arrived at from scaled measurements. The only actual measurement appearing in the testimony was one which Illinois had Missouri's expert witness make on the stand of the difference between "mid-point" of the old channel in 1881, as indicated on Chart 110 of the Mississippi River Commission (Ex. 19) and its "mid-point" as shown on a 1908 chart—which distance the witness stated checked out on measurement by him to be about 1.06 miles (Tr. Vol. II, p. 895). No challenge was made to the accuracy of the process of this measurement—although I may add, as later discussed herein, that I do not regard the exact distance which the channel had

moved as being of determinative significance in the situation.

The argument of Illinois has been given three facets: (a) that movements or shiftings in a river channel totaling 1.06 miles or more in a 25-year period would inherently have to be regarded as not capable of being general channel processes and action and hence could only involve avulsionary events; (b) that further, even if the movements here were not technical avulsions, the deposits which occurred in relation to them were of such extent that they could not represent gradual and imperceptible formations and so would be unable to constitute accretions within the definition of that term; and (c) that in any event, the movements and deposits had occurred in connection with high waters and flood stages upon which actions accretion claims and rights can not be predicated.

As indicated by my finding above, I am convinced that no avulsion as such occurred in the old channel during the quarter-century period in question. There was nothing in the testimony of the witnesses on community traditions as to any avulsionary events having occurred in relation to the old channel after 1881. To illustrate, one "old-timer" named Ziegler (Tr. Vol. I, pp. 231, et seq.), who testified to personal recollections dating back to the early 1900's, impressed me as having such familiarity with the region and knowledge of its history that if any sudden sweeping changes in the channel course had occurred beyond those normally occasioned by regular floods and high waters, this would not have eluded the scope of his interest and information. But beyond this, I regard as

persuasive against any avulsionary incidents or changes having been involved, the demonstration made by Missouri's expert witness, from the series of official charts of the Mississippi River Commission on the old channel situation from 1881 to 1908, that in the movements thereof which the charts progressively reflected there had always been present as between each earlier and later chart an overlapping in the locational position of the head of the old channel (Deft's. Ex. 22).

As to the argument that the erosions and depositions occurring in connection with high waters and flood stages can not be recognized as a basis of accretion rights along a stream, I know of no such rule of law. These conditions are natural and regular incidents in the history of most midwestern rivers. Notably have they been thus recurrent in the case of the Mississippi River, as the experts of both parties agreed generally in their testimony. The volume and the force of the water during such stages increase of course the actions of erosion and deposition. But neither the acceleration of the stream's processes nor the greater extent of results produced thereby in themselves remove such a situation from the operation of the law of accretion. Erosions and depositions are not on that basis recognized as avulsions. The distinction between accretion and avulsion lies not in the extent of a stream's natural processes, but in the character or type of its actions.

As the Court declared in *Jefferis v. East Omaha Land Co.*, 131 U. S. 178, 191 (1890) in reiteration of its earlier statement in *County of St. Clair v. Livingston*, 23 Wall. 46 (1871), increases in land from erosion and deposition

are "alluvion whether the addition was made on a stream which overflowed its banks or on one which did not".

What has been said also has application to Illinois' further argument that, even if the actions could not themselves be categorized as avulsions, the extent of the additions involved was nevertheless such that they could not be termed gradual and imperceptible formations. The official charts show that the movements and additions made by the old channel subsequent to the avulsion had primarily occurred in the years between 1881 to 1889 and between 1893 to 1907-1908. Only slight changes or shiftings had taken place between 1889 and 1893. Illinois attempts to make the question of imperceptibility as related to accretion a matter of general mathematical quotient. It computes the change of over a mile in distance which had occurred during the periods indicated as amounting to an average of from a foot to two feet per day, and argues that such a change would necessarily be observable.

There are no decisions of the Court that I have been able to find in which the test of perceptibility has been given recognition as a quotient between the time and the scope of an alluvial addition. On the contrary, it has been held that the concept of imperceptibility must have its focus on the process of formation and not on the cumulativeness of the result. Thus the opinion in *County of St. Clair*, supra, declared (23 Wall. at 68): "The test as to what is gradual and imperceptible in the sense of the rule is that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on".

Further, in *Jefferis*, supra, where movements by the Missouri River aggregating a mile in distance between 1853 and 1870 appear to have been involved, but it was alleged that the process itself “could not be observed in its progress, but at intervals of three or more months it could be discerned by the eye that additions greater or less had been made to the shore”, the Court said (131 U. S. at 192):

“The fact, as thus stated, is that the land was formed by imperceptible degrees, within the meaning of the rule of law on the subject, and it is not capable of any construction which would result in the conclusion that the land was not formed by imperceptible degrees.”

It had been urged in that case, as the opinion noted (p. 189), that the doctrine of accretion within its traditional concepts could not properly have application to the Missouri River, “because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid, and the soil a soft, sandy loam, not protected from the action of water by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away”.

The answer which the Court made to this contention was to call attention to its previous recognition of the doctrine as to the actions of the Mississippi River and then to add (*Id.* p. 191):

“The very fact of the great changes in result caused by the imperceptible accretion in the Missouri River makes even more imperative the application to that river of the law of accretion.”

The realities necessary to be recognized as to accretion in relation to such active streams as the Missouri and the Mississippi, with their regular incidents of high waters and seasonal floods, were given more detailed and unmistakable expression by Mr. Justice Brewer in *Nebraska v. Iowa*, 143 U. S. 359, 368-369:

“The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand \* \* \*. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri River, and disclosed by the testimony; that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks,

such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the 'muddy' Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matters of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. \* \* \* There is, no matter however rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto."

I have indulged in setting out this lengthy quotation because I think it provides a full answer to Illinois' contention. As the Historical Society account had noted regarding the area here involved (Ex. 17, p. 95): "The waters of the great Missouri River unite with the mighty Mississippi a few miles above St. Louis, and this magnificent river begins at once to acquire the peculiar characteristics of the Missouri, in that it then flows for the most

of its course through an alluvial valley, from the mouth of the Missouri River to the ledges of rock above Thebes, which valley is known as the American Bottom”.

The rebuilding of the land here, as appearing from the testimony, had in general consisted first in deposits of white sand, followed in high-water periods by spreads of alluvion and then becoming solidified into firm soil by cottonwood and willow-tree growths. As I have indicated, there is no historical proof that there had been any avulsionary actions of the channel which had occasioned or entered into these processes, which I think could reasonably be expected to have existed, at least by repute, if any such events had occurred during the period involved. Within the concept of imperceptibility recognized as to such formations on the part of the Mississippi and Missouri Rivers, there is no basis in the record to regard the rebuilding of the land here as having been other than of that nature. To repeat—the extent of the river movement and land formation here involved does not inherently prove the existence of perceptibility in the process, as related to the character of the stream, the width of one-half mile or more which the old channel provided for the action of high and rapid waters, and the quarter-century period of time which the movements had covered.

On these elements, as I have suggested, it would not make any difference as a matter of law here whether the movements involved were only slightly over a mile or of somewhat greater extent. The river had throughout its existence, as the historical account observed, engaged in such previous extents of movement of its course in “this

soft alluvial soil” as to be “sometimes bathing the eastern shores and at others reaching the foot of the bluffs at the western side”. (Ex. 17, p. 96). The length of time which may have been involved in these various shiftings is not given estimate, but from some of the specific instances which are referred to it seems clear that such movements were recognized as not unnaturally having been rapid and substantial in their extent. For example, the account stated that, while in 1863 “there was a good steamboat landing at Ste. Genevieve” [Missouri], by 1867 “the river channel had then moved away from the town \* \* \*”. (p. 100).

The point of this is that relatively swift extensive channel movements have inherently been characteristic of the natural processes of erosion and deposition in the Mississippi River. The results here involved are not shown to have had any other basis.

### 3.

I find that up until 1907 the old channel had contained such a flow or stream of water as legally to leave it subject to the law of accretion in the actions of its course.

*Arkansas v. Tennessee*, 246 U. S. 158 (1918), made declaration of the rule that after an avulsion, which has given rise to a new channel but not occasioned an abandonment of the old one, so long as the old channel “remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant the effect of these processes is at an end; \* \* \* and the gradual filling up of the bed that ensues is not to be treated as an accretion

to the shores but as an ultimate effect of the avulsion". (p. 175). [This rule, of course has relation only to the boundary situation in respect to the old channel itself; it does not mean that the new channel would be incapable of accretionarily giving rise to territorial and boundary progression in respect to its own banks—for instance here as to such Missouri land as may have constituted a part of the bank of its new channel.]

In the present situation, as the historical paper noted, for a number of years after the avulsion "the old channel carried the most of the Mississippi". (Ex. 17, p. 103). The new channel lacked the capacity to do so, although it began to be utilized almost immediately by the through navigation traffic because of its several-miles shorter course. The old channel, however, was recognized by the Mississippi River Commission as still constituting a navigable course up to 1898, and it was not until that year that the navigation lights were removed by the Commission therefrom. As a matter of fact, there is some testimony that even for a decade or more after 1898 a few river boats had occasionally used the old channel in times of high water.

Treating the channel as having ceased to be a navigable course in 1898, when the lights were removed from it, the evidence is however persuasive that it nevertheless still remained a flowing or running stream throughout its course for approximately a decade thereafter. As could be expected in a situation of this character, the memories of the locality witnesses varied somewhat as to the exact year in which they thought there had no longer been a

continuous flow. Nor is the question capable of accurate determination from the official charts. On the whole of the evidence, however, I regard the year 1907 as being fairly entitled to be so accepted.

Reference has previously been made to the opinion of Illinois' expert witness that the head of the old channel had been caused to be moved and relocated as a result of the avulsion. With the finding made against this contention, the argument of Illinois is left without any basis that the fact that this segment had been a flowing course after the avulsion would not enable it to be tacked to the rest of the old channel for purposes of regarding the actions of the whole thereof as those of a running stream. But Illinois' expert went beyond this and sought to impose a narrow limitation upon the length of time that such flowing course as may have existed in the channel, even with this segment considered as a part thereof, had continued to remain a running stream throughout its course. On cross-examination, however, he admitted that the first year that he would be able to say with absolute professional certainty that there had been a stoppage of flow as to the course of the channel was 1900.

On the basis of the many materials, including gauge readings, sounding records, etc., which had been gathered and studied by him, he admitted that the channel would properly be entitled to be regarded as having been a continuously flowing stream until at least 1897. As to that year he stated that he doubted that it had been so but could not say positively one way or the other. He made a similar statement as to the year 1899, but admitted that there existed no question as to the channel having been

a running stream during 1898. As to the year 1900, however, he was certain that there had occurred at least a period of stoppage in flow, because a stage of "minus 4.0" had for a time been registered on the gauge at Chester, Illinois, as to the main channel of the river. For the years 1901 to 1907 he again merely stated that from the Chester gauge readings he could not say whether there had or had not been a stoppage in the flow during any of those years.

The lack of certainty thus expressed in respect to the years 1897, 1899, and 1901-1907 does not carry any element of persuasion to me. In the character of the situation involved, the testimony generally of locality witnesses to the effect of the channel being reputed and regarded as having constituted a continuously flowing course throughout this entire time carries sufficient weight to cause me to believe that this was the actual fact. Adding force to this persuasion is the circumstance that the Mississippi River Commission had accorded the channel the status of a navigable course until some time in 1898. It does not seem probable to me that such an amount of water would officially have been recognized as existing therein up to that time, if the channel had by then undergone such fluctuability that it could, in either the year before 1898, or in the year immediately following, or in both, have been without current or flow. Nor do any of the official charts appear to me to convey any such implication.

As to the year 1900, in the extraordinary drouth conditions shown by the witness' testimony to have then

existed, I accept as a fact that during the brief period that the gauge at Chester had dropped to a stage of "minus 4.0" reading, there would not have been sufficient water in the Mississippi River to have enabled the old channel to maintain a continuous flow. That reading was, however, the lowest one of record for the river at this point up to that time; it involved, as noted, an extreme drouth period; and the stage itself existed only from January 3 to January 7, 1900, although the gauge had readings of below "0.0" for a period of about 2 weeks.

I am unable to see any reason to hold, and I do not find any authority so requiring, that such a brief and extraordinary stoppage of the flow in a regularly running stream, occasioned by a special and exceptional factor, such as the abnormal drouth condition here involved, causes its character to become legally changed and converts it into the status of a non-running stream, so as to make inapplicable to it thereafter the law of accretion on its inevitable return to its natural situation. Thus, whether the stoppage here was one of only four days or of two weeks, the extraordinary and transient disruption of the channel's regular flowing character would not in my opinion cause it to lose its inherent nature and thrust it into the category of a stream possessed of a stagnant condition or having merely a casual or intermittent flow. Thus, such brief stoppage in flow as resulted from the extraordinary drouth situation in 1900 calls for no distinction here between such alluvial formation as may have occurred in relation to the old channel between 1900 and 1907, and that which had occurred prior to that time.

## 4.

As to that part of the disputed area known as the Cottonwoods, I find that this clearly constitutes accretionary formation to Missouri territory from erosion and deposition processes of the old channel and that Missouri is entitled to sovereignty over it on that basis.

The Cottonwoods represents a continuation or progressive extension of the substantial accretionary area which had been developing on the Missouri side of the Mississippi River, from long before 1881, and to which had been given the name of "Big Field". This relationship is reflected by a comparison of the 1881 map and the 1913 map incorporated in the historical paper (Ex. 17, opposite pages 102 and 104). As one of the community witnesses generally characterized the situation, "Big Field kept going to the old channel".

The finding thus made as to the Cottonwoods rests upon the facts and discussion which have been set out in connection with the preceding findings herein. I deem it unnecessary to restate or summarize these probative aspects any further here.

## 5.

I find that the tracts referred to as Beaver Island and Roth Island cannot be held to constitute additions to Missouri territory as accretionary parts or extensions of the Cottonwoods area, but that they had their origin as sandbar or island structures, which were wholly surrounded by water in the process of their protrusion and development.

The evidence is clear that Beaver Island did not come into existence until the 1920's. It is less clear as to Roth Island, but there is some evidentiary indication, as I shall again mention later, that this structure had commenced to have formation by or before 1907-1908.

In the sandbar or island formation of both tracts there would be applicable generally to each of them the declaration made in *Kansas v. Missouri*, 322 U.S. 213, 229, that "If it was formed as island soil it was not accreted soil". And as related to state boundary change, the structures would not become accretionary parts or extensions of the Cottonwoods area from merely having had their surrounding waters gradually diminish and turn into sloughs, such that at times, as the evidence showed, it was possible in the 1930's and thereafter to make a dry-crossing at places from the Cottonwoods area onto them.

The two bodies, as emphasized, originated as distinct, water-surrounded formations and did not consist of levels of the river bed or bottom which had simply become exposed from the drying up of covering waters. Missouri, therefore, as stated, is not able to contend, for purposes of boundary change, that a subsequent drying up of river bed or shrinkage of the waters surrounding the structures would cause the formations to acquire the status of accretionary parts or extensions of the Cottonwoods. As a matter of fact, the evidence does not establish that any such complete shrinkage or total drying up of waters has occurred, but even if it had, there would be applicable to such aspect the declaration of *Arkansas v. Tennessee*,

supra, 246 U. S. at 175, on post-avulsion channel shrinkage, that “ \* \* \* when the water becomes stagnant [as here occurred by 1907] the effect of these processes [accretion] is at an end; the boundary then becomes fixed \* \* \* and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion”.

With lack of basis on which to claim accretionary sovereignty to Roth Island and Beaver Island, the only other ground on which Missouri could undertake to make a claim of formational sovereignty to them would be upon the basis that the structural development of each of them had occurred and had had its location within the bounds or banks of the old channel as these had come to exist by 1907 and upon such part thereof as would have constituted Missouri's territorial portion of the bed at that time.

Both the Enabling Act of Illinois (1818), 3 Stat. 428, 429, and that of Missouri (1820), 3 Stat. 545, had fixed the boundary between the two States as the “middle” of the Mississippi River. During the time that the old channel remained a navigable stream, this would consist of the thalweg of the channel. *Louisiana v. Mississippi*, 202 U. S. 1, 49. After the channel ceased to be navigable but still remained a running stream and was continuing to engage in accretionary actions and shiftings of its bed, this would consist of the center or thread of its channel waters, as that line varyingly had location while the channel was a running course. With or without the existence of any island formations thereon, each State would respectively have sovereignty right to its territorial

portion of the old channel bed, as the middle thereof had become fixed from the location of the thread of its current in 1907.

Thus the determinative factor of such claim as Missouri here could have to Roth Island and Beaver Island on a formational basis would be whether the structures had had their creation within the bounds or banks of the old channel as these had come to exist by 1907 and upon such part thereof as would have constituted Missouri's territorial portion of such bed.

## 6.

I find that Roth Island had its structural origin within the 1907 bounds or banks of the old channel and upon such part of the bed as properly can be regarded to have constituted Missouri's territorial portion thereof.

As earlier mentioned, while it is not clear as to just when Roth Island had commenced to have its formation, there is indication upon a 1908 official chart (Deft's. Ex. 2) of a sandbar structure having appeared or made protrusion by or before that time within the mouth of the old channel. Although there is no intermediate chart from which an absolute identification can be carried forward to the enlarged tract constituting Roth Island on the 1940 chart (Ex. 1), I accept the professional opinion expressed by Missouri's expert witness that the sandbar structure on the 1908 chart would seem to represent the initial formation of Roth Island—and I am so persuaded because of the apparent naturalness of this relationship and further because there is nothing in the evidence that casts any shadow of improbability upon this reality.

A considerable enlargement had occurred of the island structure between the 1908 and 1940 charts, occasioned primarily, as the evidence generally indicates, by the actions of the dykes, jetties, and other curbing structures which had progressively been placed by the Corps of Engineers in the main channel of the Mississippi River. The fact of this incidental enlargement by the main channel is not contended by either party to be of any effective significance in the situation, nor do I think that it could be, since this channel would legally have the capacity, like any other flowing stream, to engage in subsequent accretionary actions and territorial additions in relation to its own course, as I have previously noted.

On the question of whether the initial formation of Roth Island occurred upon Missouri's portion of the old channel bed or upon that of Illinois, the situation is not one of absolute certainty, but this aspect is to me of sufficient probative substantiality and of the more persuasive probability. I have mentioned that both parties have taken the position in the proceedings that no materially affective change has occurred as to the situation of the old channel since 1907. As one of the experts put it professionally, the channel has probably, or would seem to have, undergone no appreciable change subsequent to that time.

On this basis the matter controllingly calls for a resolution of what in reasonable probability and on probative persuasion can be regarded as having constituted the scope and location of the mouth of the old channel. The 1940 chart (Ex. 1) carries clear cartographical iden-

tification and designation of "Old River" channel to a point above the Old River Triangulation Station located on the northeastern part of Kaskaskia Island, just below Beaver Island. Beyond this point, however, it shows three water passages as then existing leading from the main river channel toward it—one extending from the top and around most of Beaver Island, another extending southeasterly below Beaver Island, and the third around the western and southern sides of Roth Island. The chart does not purport to indicate which, if any, of these three 1940 water passages the Corps of Engineers regarded as having constituted the mouth of the old channel, in its reach beyond the point of the Old River Triangulation Station.

It is obvious, however, from the 1908 chart, with the sandbar formation showing therein, which I regard as the genesis of Roth Island, that the mouth of the old channel had to have an extension beyond the point of the Old River Triangulation Station. It necessarily had to have occupied a position which bore relationship to the location of that formation. On this aspect, the testimony of the old-timer witnesses preponderantly showed that the water passage which extended from the top of and around Beaver Island was the one which in community repute and acceptance had been regarded as constituting the mouth of the old channel, leading from the main channel. Such testimony included that of the witness Ziegler, to which, as I have previously indicated, I accord particular credence.

While this passage, in order to have encompassed Roth Island in its initial formation, would have had to

have either a width or a position that reached to some extent beyond the bounds of its somewhat narrow course as appearing on the 1940 chart, it seems to me that, regardless of which of these alternative realities may have existed, the sandbar or island structure would have to be regarded as having had its location upon Missouri's territorial portion of such mouth or bed. I am unable to see how it would otherwise be possible for it to have position in the 1940 chart on the left side of the shrunken passage.

On all of the foregoing, I regard Missouri on formational and locational basis, as having sovereignty right to Roth Island. It might incidentally be added, although I accord this aspect no probative force on the immediate question which has been dealt with, that the record shows that the United States Department of Agriculture has throughout the period of administration of its Stabilization and Conservation Program treated Roth Island as constituting Missouri territory.

## 7.

I find that Beaver Island had its structural formation outside the bounds or banks of the old channel mouth; that unlike Roth Island, it is not located upon what constituted Missouri territory at the time; that Missouri is without ground for claim of sovereignty to it upon any such basis; that it has its location in what has inherently remained Illinois territorial domain; and that on locational aspect Illinois would be entitled to have its right of sovereignty to the island confirmed against Missouri.

I have in my finding No. 5 rejected Missouri's contention that Beaver Island constituted an accretionary

part or extension of the Cottonwoods. To what was there said on this aspect may be added the further elucidation appearing in the testimony of the old-timer witness Ziegler, previously referred to, who claimed ownership to land in the Cottonwoods area which was located just across from Beaver Island, but who stated as to the relationship between the two tracts: "When I purchased this I didn't have Beaver Island. There's too much water between us."

Ziegler's testimony went further in making it clear that the formation of Beaver Island had not occurred within the old channel but in the waters of the main Mississippi channel. Thus, after stating that Beaver Island had been formed in the 1920's but had not come to have its identificatory name until in the 1950's, he added: "Before that time it was just an island. When they put those long fences in there [dykes, etc., referred to in connection with my finding No. 6], that is when Beaver Island was formed. Before the river was right along the bank of the land I owned. It was east and north of Roth Island." And then as if seemingly not certain that he had made it entirely clear just which waters he was referring to as being "right along the bank of the land I owned", he took occasion to add conclusively, "The main channel of the river".

On this specific testimony (which I particularly credit, both because of Ziegler's direct knowledge and his eminent fairness), considered in relation to the location of Beaver Island shown by the maps and charts and in connection with corroboration provided by the general

testimony as to the proximate relationship of its formation to the action of the dykes, etc., which had been constructed in the main channel, it seems wholly clear to me that Beaver Island had its formation in the main channel of the Mississippi River as an island structure and identity therein, and that this legal status has not become changed by such diminution as may have occurred in the water which was between it and the Cottonwoods shoreline. As a matter of fact, Ziegler testified that even at the present time "the middle part is water the year round".

I have thus held that Beaver Island was not formed in the bed of the old channel, but in the main channel of the Mississippi, and that the island structure therefore could not have had location upon what could be contended to be Missouri's territorial portion of river bed. But if I were to assume, arguendo, that I might be found to be wrong in this appraisal and were to engage in consideration of what the possibility could be in that event of Missouri having a claim to Beaver Island on a river-bed locational basis, I would still have to hold that no such right could at all exist. Even if Beaver Island had been formed within the mouth and bed of the old channel instead of the main channel, it is obvious from the maps and charts that it could not in any event have had location upon such part as would have constituted Missouri's territorial portion thereof. Its location on the maps, charts and aerial photographs is to the right of the water passage which I have found to have constituted the mouth of the old channel. In order to be possible for it to have

been located in Missouri's territorial portion of such channel bed, it would not be able to lie on the right-hand side of such water passage. Hence, neither viewing it as an island formed in the main channel nor hypothesizing it as one formed in the old channel could there be any basis to hold that it had its structural location upon Missouri territory.

## 8.

I find that Missouri would alternatively be entitled to have its claim of sovereignty to the Cottonwoods sustained upon the principle of prescription and acquiescence. Its claim, however, to Roth Island and Beaver Island on this basis cannot be so sustained and is rejected.

The principle of prescription and acquiescence has perhaps had its strongest and most practical emphasis in the opinion of Chief Justice Hughes in *Arkansas v. Tennessee*, 310 U. S. 563. As there quotingly declared, the primary object and underlying basis for recognizing the principle are "the creation of stability of order"; and "there is no controversy in which this great principle may be applied with greater justice and propriety than in a case of disputed boundary". Among the earlier cases which have discussed the principle are *Indiana v. Kentucky*, 136 U. S. 479, 510; *Rhode Island v. Massachusetts*, 4 How. 591, 639.

While the principle is entitled to application only within the conditions of "long possession" and "long acquiescence", the variances which exist in the circum-

stances of individual situations necessarily cause these terms to have a relative and not a fixed content. No decision has presumed to prescribe a specific kind of acts as being necessary to manifest a pre-emption or a specific extent of time as being necessary to effect a prescription and acquiescence. The question is one for realistic determination, on legally proper, equitably just, and environmentally balancing judgment in soundly effecting a stability of order between the disputant States.

Here, Missouri's acts of alleged dominion and jurisdiction over the Cottonwoods area have extended through the course of approximately 50 years. This is a shorter length of time than the periods which appear to have been involved in the situations of the Court's previous reported decisions. But remote or frontier territory was hardly here involved, for the area had constituted one of the early and populous settlement-regions of Illinois. And with the reach and spread which have for a number of decades existed in the sovereign activities of States throughout their territorial domains, it would not seem to be necessary to accord the same extent of deference to provincial consciousness as in an earlier day, and on that basis to feel required to hold that Illinois is here entitled not to just 50 years, but to 100 years or so, in which to have its attention attracted to, take cognizance of, and be spurred to judicial action on such aspects of competing sovereignty as were occurring to its borders.

On the natural realities of what had been happening to the old channel, on the accretionary development which was occurring of the Cottonwoods area in continued extension to earlier formation of Missouri territory, and on the atmosphere of Missouri interest and relationship with which this progression was surrounded, it would seem to me that the somewhat-over 50-year period here involved should in the immediate situation be both legally and equitably sufficient to entitle the doctrine of prescription and acquiescence to be given application, and that, upon the circumstances shown, the sound and practical effecting of stability of order between the two States would appropriately call for this to be done against Illinois as to the Cottonwoods area. (This alternative holding in favor of Missouri on prescription and acquiescence as to the Cottonwoods area does not, of course, call for any consideration by the Court, unless the sovereignty right of Missouri to such area on accretionary boundary change, as determined precedingly, is not upheld.)

As to the nature of the dominion and jurisdiction which has been exercised, Missouri had engaged in a realistic, systematic and progressive scheme of taxation upon the Cottonwoods area, both as the land developed and as its value became enhanced. In contrast, Illinois cannot be said to have exercised or manifested any such revenue interest as to the area. While the plat which had existed of the area before the time of the avulsion was continued to be carried forward upon the records of Randolph County, Illinois, this appears to have been done in courthouse routine and not in any sovereign revenue concern or action as to the rebuilt land. (As to comparing

the realities of the taxation efforts engaged in by two States in respect to a disputed area, see *Vermont v. New Hampshire*, 289 U. S. 593, 615-616.)

No general or schematic taxation efforts can be said to have been engaged in by Illinois as to the Cottonwoods area. To the contrary, it seems to me that its attitude was, if not one of utter indifference, at least one of no more than mere casualness as to the rebuilt land. It is true that there was some testimony by an Illinois witness, whose family originally, and he later as heir, had owned land on the Kaskaskia peninsula of which a part was destroyed by the avulsion, that they had continued to pay taxes through all the succeeding years upon the whole of their previous legal description. Why this had been done by them as to the destroyed portion of the property, or why such taxes had come to be accepted thereon was not explained. In any event, the amount applicable to the destroyed area was so small as to be only nominal and it continued to remain so, so that it could hardly be said to be manifestative of sovereignty concern or effort as to the land after it became rebuilt. Moreover, the instance seems to have constituted an isolated one. And taxes upon avulsionarily destroyed property would seem, in both sovereign and taxpayer incidence to be so unusual as rather to suggest that it probably was due to a lack of checking by the taxpayer, and thus represented a mistake which had simply been perpetuated through the years, and which then was later conveniently seized upon and sought to be magnified in relation to the present action. As the land became progressively rebuilt and its development into productive character continued, such

a casual or carry-over instance of nominal tax payment would not weigh much as a realistic taxpayer exercise against Missouri's contrasting levying of substantial and progressive tax amounts, as the land developed and as it enhancingly passed into farmable stage.

In further actions of dominion and jurisdiction, Missouri had built a public road across the Cottonwoods area in the 1920's. This had been done under a petition of authorization from a Missouri state court, with funds of Ste. Genevieve County being used therefor and with the road being thereafter similarly maintained.

Land in the Cottonwoods area had also through the years been made the subject of transactional dealings by Missouri citizens in bargain and sale and of a recording of the instruments of title in relation thereto on the public records of that State. No such transactional activities or record incidents are shown to have been involved as to the rebuilt Cottonwoods property on the part of anyone, in a treatment of it as constituting Illinois territory.

Further, when some members of the family of the Illinois witness referred to had undertaken in 1933 to block access to and use of the public road which Missouri had constructed in the Cottonwoods, the State of Missouri engaged in exercise of sovereign dominion and jurisdiction by charging the obstructers with criminal offense, issuing warrants, making arrests, holding trial, obtaining conviction and subjecting the defendants to fine for violation of Missouri trespass law.

Again, when these Illinois road obstructers thereafter sought, through suit for damages in the Federal District

Court in Missouri against the Missouri officers and other Missouri citizens responsible for their arrest and prosecution, to have it held that the Missouri criminal proceedings and judgment had been void for lack of subject jurisdiction, in that the area of the road and their arrest was located in Illinois and not in Missouri, the federal court directed a verdict and entered judgment against them on the merits of their claim. No further attempt to interfere with the possession and use of the Cottonwoods as not being Missouri territory has since been made by the Illinois family or any other Illinois citizens. And, incidentally, Illinois was not shown to have lent any sovereignty assistance or manifested any sovereignty concern at the time upon how the basic question underlying these incidents might be resolved in relation to its citizens.

Also, while the Cottonwoods lands from their nature have not been the subject of actual residence thereon, they have been brought by their Missouri title holders under the United States Department of Agriculture's Stabilization and Conservation Program and have been administered in this respect for a period of 13 years by the offices of that agency established for the State of Missouri, as constituting territory of that State. Missouri relies here upon this federal agency recognition as another factor of indication on its claim of prescription and acquiescence against Illinois. In Illinois' basic character as an agricultural state, and on the commonly known nature and scope of this federal program, at least some slight corroboration would be added for these years on Illinois' lack of manifested sovereignty interest or concern as to the area.

In counter to all this and in attempted refutation of such a lack of manifested sovereignty concern and exercise having existed as to indicate acquiescence, Illinois sought to make proof of some elements which I regard as not being of substantial significance or weight in the situation. The tax-payment situation of an Illinois witness has been previously referred to. Some other sporadic tax payments were sought to be shown but the testimonial attempt in this respect was a bit of a struggling effort, and it was without any such substantial content as to be indicative of realistic revenue concern and effort in comparison with Missouri's revenue treatment of the area.

Attempt was also made to show by one of Illinois' conservation officers or game wardens for Randolph County that he had on occasion engaged in some policing for violation of that State's game laws in the Cottonwoods area and on Beaver Island. (Our concern here on this aspect is, of course, only with the Cottonwoods.) The testimony of the witness was not, however, of such locational clarity or recollectional certainty as to be impressive. Beyond this, a general stroll or vicarious chase by an individual game warden into a wooded unpopulated area, as here involved, would not seem to me to weigh much as an asserted refutation of acquiescence against the existing void of such other elements as are more commonly attendant upon an intended sovereignty exercise.

I shall not engage in a discussion of more gossamer elements offered by both parties, which included such items as some general maps, some correspondence and other miscellany, which I regard as having only slight, if any, probative significance in the situation. On a con-

sideration of all the evidence, I am of the opinion that, if it were necessary alternatively to so hold, Missouri would be entitled to have its claim of sovereignty to the Cottonwoods sustained as a matter of prescription and acquiescence against Illinois.

As further indicated, however, I am not able to sustain Missouri's claim to Beaver Island and Roth Island upon such a prescriptive basis. No exercise of sovereignty of such character and for such period of time has been involved as to either of these tracts as to be able to provide basis for recognizing a right in favor of Missouri and against Illinois upon prescription and acquiescence. Illustratively, Missouri did not engage in a taxing program in relation to their formation and development such as had been done in respect to the Cottonwoods. Indeed, Missouri's attention for revenue or other sovereignty purposes seems not to have been at all attracted to these structures until after some land on one of them had become the subject of a private title dispute in one of its courts in 1958. The records put in evidence show that Missouri thereafter, in 1960, first placed Beaver Island upon its tax rolls. There is no proof that any substantially earlier taxation date has existed as to Roth Island. Nor are other elements of dominion and jurisdiction shown to have been exercised such as would even arguably be able to provide any legal or equitable basis for a claim of sovereignty from prescription and acquiescence.

## IV.

**SUMMARY**

The findings and conclusions made above call for a decree which (1) confirms, on Missouri's disclaimer, Illinois' sovereignty and territorial right to Kaskaskia Island as a part of that State's original domain; (2) sustains Illinois' claim to Beaver Island as rebuilt land in a river area lying within that State's original domain; (3) establishes the sovereignty and territorial right of Missouri to the Cottonwoods as an accretionary extension made by the old Mississippi River channel to Missouri soil; (4) establishes Missouri's right to Roth Island as an island structure created within and upon Missouri's territorial portion of the old channel 1907 bed; and (5) makes legal description, upon the basis of the parties' stipulation, of the boundary line which would thus result between the two States (with such description having the capacity under the parties' stipulation to be terminative of the litigation).

In respect to provision (3) above, Missouri would alternatively be entitled to have its right to the Cottonwoods established on the basis of prescription and acquiescence, should the Court deem it necessary to reach that question.

## V.

**RECOMMENDED DECREE**

On the basis of the findings and conclusions made, I recommend a decree in the situation as follows:

(1) The boundary line between the States of Illinois and Missouri for the geographical area involved in this action is hereby determined and decreed to consist of the following legal description:

Beginning at a point in present centerline of the Mississippi River at the intersection of the centerline of the Old Mississippi River said point being designated as the Southeasterly corner of Kaskaskia Island; thence following the centerline of the slough which is the approximate centerline of the old Mississippi River, described more particularly by the following courses and distances: S  $39^{\circ} 30'$  W, 2100 feet; thence S  $55^{\circ} 30'$  W, 900 feet; thence S  $34^{\circ} 30'$  W, 850 feet; thence N  $83^{\circ} 00'$  W, 500 feet; thence S  $61^{\circ} 00'$  W, 1000 feet; thence S  $42^{\circ} 30'$  W, 2500 feet; thence S  $37^{\circ} 00'$  W, 4000 feet; thence S  $45^{\circ} 00'$  W, 2000 feet; thence S  $56^{\circ} 30'$  W, 4600 feet; thence S  $63^{\circ} 00'$  W, 2150 feet; thence S  $79^{\circ} 30'$  W, 1525 feet; thence N  $86^{\circ} 30'$  W, 4500 feet; thence N  $70^{\circ} 00'$  W, 5050 feet; thence N  $57^{\circ} 30'$  W, 3850 feet; thence N  $46^{\circ} 00'$  W, 1550 feet; thence N  $24^{\circ} 00'$  W, 5650 feet; thence N  $39^{\circ} 00'$  W, 1800 feet; thence N  $17^{\circ} 00'$  W, 1900 feet; thence N  $25^{\circ} 30'$  W, 3150 feet; thence N  $32^{\circ} 00'$  W, 1580 feet; thence N  $4^{\circ} 30'$  W, 3250 feet; thence N  $53^{\circ} 45'$  E, 3300 feet; thence N  $69^{\circ} 00'$  E, 1050 feet; thence  $19^{\circ} 00'$  E, 2350 feet; thence N  $75^{\circ} 00'$  E, 350 feet to a point at the northwest corner of Kaskaskia Island; thence S  $47^{\circ} 00'$  E, 250 feet; thence N  $81^{\circ} 00'$  E, 1050 feet; thence S  $78^{\circ} 00'$  E, 600 feet; thence N  $88^{\circ} 45'$  E, 1551 feet; thence N  $70^{\circ} 45'$  E, 709 feet; thence N  $48^{\circ} 30'$  E, 2986 feet; thence N  $51^{\circ} 45'$  E, 627 feet; thence N  $81^{\circ}$

45' E, 990 feet; thence N 62° 45' E, 495 feet; thence N 40° 00' E, 2937 feet; thence N 28° 00' E, 528 feet; thence N 04° 00' E, 429 feet; thence N 12° 00' W, 759 feet; thence N 6° 00' E, 412 feet; thence N 33° 00' E, 264 feet; to a point which intersects the centerline of a slough at the south side of Beaver Island; thence along the centerline of said slough S 85° 00' W, 924 feet; thence S 79° 00' W, 775 feet, thence N 88° 00' W, 1452 feet; thence N 23° 00' W, 825 feet; thence N 20° 00' W, 3000 feet to the centerline of the Mississippi River.

(2) In incidence to the establishment of such boundary line, and upon Missouri's disclaimer herein, the territorial and sovereignty right claimed by Illinois to the body of land given identification in the evidence as "Kaskaskia Island" is hereby confirmed as against Missouri and decreed to exist in Illinois.

(3) In further incidence to the boundary establishment made, the territorial and sovereignty right claimed by Illinois to the body of land given identification in the evidence as "Beaver Island" is hereby confirmed as against Missouri and decreed to exist in Illinois.

(4) In similar incidence, the territorial and sovereignty right claimed by Missouri to each of the two bodies of land given identification severally in the evidence as "Cottonwoods" and "Roth Island" is hereby sustained as against Illinois and decreed to exist in Missouri.

(5) The boundary description decreed in paragraph (1) hereof is taken from Attachment "C" of the parties' stipulation as being agreed upon by them to be appropriate and accurate for dispositional use in the event of and in relation to the result here reached. The bodies of land

as to which Illinois' rights are confirmed in paragraphs (2) and (3) hereof are located on Illinois' side of the boundary line fixed, and those as to which Missouri's rights are sustained in paragraph (4) hereof are located upon Missouri's side thereof, so that no separate description is here necessary as to any of these bodies in order to effectuate the rights decreed in respect to them.

6. The costs of the suit shall be assessed equally against the parties.

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## VI.

### ADDENDUM

As previously mentioned, in case the Court should disagree with any of the territorial determinations arrived at by my findings, the stipulation of the parties provides legal description also for whatever boundary line could thus varyingly result. For the Court's convenience, I enumerate these possibilities here.

1. In the event the Court should disagree with the determination made as to Beaver Island, but agree with those made as to the other tracts involved, the boundary line fixed by the Court's decree should consist of the legal description set out in Attachment "D" of the stipulation.

2. In the event the Court should disagree with the determination made both as to the Cottonwoods and as to Roth Island, but agree with those made as to the other tracts involved, the boundary line fixed by the Court's

decree should consist of the legal description set out in Attachment "A" of the stipulation.

3. In the event the Court should disagree only with the determination made as to Roth Island, but agree with those made as to the other tracts involved, the boundary line fixed by the Court's decree should consist of the legal description set out in Attachment "B" of the stipulation.

Respectfully submitted,

HARVEY M. JOHNSEN

Special Master

*(Senior Judge of the U. S.  
Court of Appeals for the  
Eighth Circuit)*



