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IN THE
SUPREME COURT OF THE UNITED STATES

Number 33, Original

STATE OF ARKANSAS,
Plaintiff,

vs.

STATE OF TENNESSEE,
Defendant.

**DEFENDANT'S BRIEF IN SUPPORT OF
MASTER'S REPORT**

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STATEMENT OF THE CASE

This case involves the location of the state line in the area of Cow Island Bend in the Mississippi River between Crittenden County, Arkansas, and Shelby County, Tennessee.

The jurisdiction of the Court to hear and determine the matter is derived from Article III, Section 2 of the Constitution of the United States.

The questions presented for review by the Exceptions of the State of Arkansas are (1) that the Master did not locate the state line in accordance with the version of Arkansas as to the facts; and (2) that the admitted Tennessee accretions are cutting off the access of Arkansas to the river above and below its version of the extent of those accretions.

These questions revolve around the law of avulsion as defined by this Court, as follows:

“ . . . while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.”

Arkansas v. Tennessee, 246 U. S. 158, 173, 38 S. Ct. 301, 62 L. Ed. 638 (1917).

The Exceptions of Arkansas admit that the law of avulsion and its legal consequences apply in this case, admit that the land on the Arkansas side of the new or avulsive river channel is a part of Tennessee, and that the Master correctly so concluded (Exceptions, page 5, 2nd paragraph). The Exceptions further admit that the Master adopted the testimony of Tennessee's witness, O. S. Rodgers (Exceptions, page 6, 5th paragraph), but again argue as to the extent of the Tennessee accretions and the final location of the state line (Exceptions, page 7, 3rd paragraph). The only evidence referred to in support of the Exceptions is Tennessee's Exhibit No. 10, page 59 (R-722; Exhibit File), which shows the Tennessee land and its accretions to be the same as found by the Master (Master's Report, Appendix A-1). The Master found from the evidence that all of the land between the old abandoned Cow Island Bendway Channel and the new avulsive or present main channel were Tennessee lands, and not the tiny area as indicated by the State of Arkansas on its Exceptions, Appendix A-1.

In its original Complaint, the State of Arkansas contended that **no avulsion occurred**, but that the Mississippi River after **migrating** into Arkansas reversed its trend

and migrated back to its present location (Complaint, page 7 at paragraph VI, and page 8, paragraph VII); and that Tennessee had acquiesced in its exercise of sovereignty over the lands thus involved (Complaint, page 8, paragraph VIII).

The State of Tennessee answered and counterclaimed that the Mississippi River did migrate into Arkansas, but that in 1913 an avulsion occurred leaving Tennessee lands on the west side of the new or avulsive river channel and fixing the state line in the abandoned channel of Cow Island Bend (Answer, page 2, paragraph VII), and denied its acquiescence in any alleged sovereignty over said land by the State of Arkansas (Answer, page 3, paragraph VIII).

In the trial of this case before the Honorable Gunnar H. Nordbye as Special Master, the State of Arkansas admitted the migration of the river from 1836 through 1913, admitted that the state line was in the thalweg of that channel, and admitted the location of the then Tennessee accretion lands (Exceptions, pages 4 and 5). However, contrary to their assertion of "no avulsion" and the "reversal of the migration of the river," counsel for Arkansas, in the trial, admitted the avulsion and the location of Tennessee lands on the west side of the avulsive channel (Exceptions, page 5, 2nd paragraph), and contended that the location of the state line was in a different position from that claimed by Tennessee.

The Master heard the testimony of twenty-seven witnesses for Arkansas, twelve witnesses for Tennessee, examined forty exhibits (mostly maps or reports) by Arkansas and fifty-nine exhibits (mostly maps and reports) by Tennessee, heard arguments of counsel for both states and received their briefs and reply briefs, along with the record of 1,353 pages. Then, after considerable study, review and consideration, the Master found from a prepon-

derance of the proof that the state line was located in the abandoned Cow Island Bendway Channel of the Mississippi River, that the land between that line and the present avulsive channel was in Tennessee, and that the State of Arkansas could not claim a right to those lands by prescription (Master's Report, pages 11 and 12).

Although the State of Arkansas excepts to the Master's finding that it had no right of prescription in the lands involved herein (Exceptions, page 2, No. 6), it does not point out any evidence that supports its Exception and makes no argument or conclusion thereon, so that such claim, a fact question, is not properly before this Court. However, its Exceptions do present two points: (1) where and when the Cow Island Bendway Channel, with the state line in it, became fixed; and (2) what is the extent of the land area involved.

ARGUMENT

In support of the findings of the Master, and in order to illustrate the movement of the Mississippi River in the area in controversy, there are attached hereto certain maps or parts thereof and aerial photographs, used in this case, same being identified as follows:

Appendix A-1: Tennessee Exhibit No. 35 (R-767; Exhibit File) Mississippi River Commission Survey Map of **1912-15** (see page A-1).

Appendix A-2: Tennessee Exhibit No. 46 (R-830; Exhibit File) United States Engineers Survey Map of Dec. **1918**-Mar. **1919** (see page A-3).

Appendix A-3: Tennessee Exhibit No. 8 (R-660; Exhibit File) Crittenden County, Arkansas Official Property Map of **1921** (see page A-5).

Appendix A-4: Arkansas Exhibit No. 9 (R-125; Exhibit File) United States Engineers Survey Map of Oct. **1925**-May **1926** (see page A-7).

Appendix A-5: Tennessee Exhibit No. 38-1 and 2 (R-769; Exhibit File) United States Engineers Survey Map of Sept. **1929** (see page A-9).

Appendix A-6: Tennessee Exhibit No. 56-A, B and C (R-944; Exhibit File) United States Department of Agriculture Aerial Photograph of Oct. **1929** (see page A-11).

Appendix A-7: Tennessee Exhibit No. 39 (R-769; Exhibit File) United States Engineers Survey Map of Sept. **1937** (see page A-13).

Appendix A-8: Tennessee Exhibit No. 40 (R-770; Exhibit File) United States Engineers Survey Map of Jan. **1949** (see page A-15).

Much will be said in this case about the fact that during the critical times of the movement of the river channel

in the abandoned Cow Island Bend there were no maps. Aside from the fact that the State of Arkansas did not present, use or consider the 1916-1917, 1918-1919, 1929, 1937, 1939 and 1949 maps of the United States Engineers, or the 1921 map of Crittenden County, Arkansas, or the 1929 aerial photograph of the United States Department of Agriculture, all of which help shed light on those "critical times," the presumption of law is that such movements were the result of erosion and accretion.

"In between two dates in time, where there were no maps or actual evidence of the change of the river channel, the weight of authority, both state and federal, is that there is a presumption, founded on long experience and observation, that such a movement was by gradual erosion and accretion."

Anderson-Tully v. Walls, 266 F. Supp. 804 (N. D. Miss., 1967), citing **Arkansas v. Tennessee**, 269 U. S. 152, 46 S. Ct. 31, 70 L. Ed. 206 (1925).

The first issue raised by the State of Arkansas, by its Exceptions, Nos. 1, 2, 3 and 4, concerning this critical time, is the issue of when the abandoned Cow Island Bendway Channel, with the state line in it, became fixed after the 1913-1915 avulsion.

Arkansas states that this event occurred in 1919 (Exceptions, page 6, 3rd paragraph), and argues that its witness, Mr. Austin Smith, gave the only competent evidence as to when the abandoned channel first stagnated (Exceptions, page 11, 3rd paragraph); and further argues that the Master erred in finding that this event (fixing of the state line in the abandoned Cow Island Bendway Channel) did not occur until its waters ceased to flow at ordinary high water, which it confuses with flood water (Exceptions, page 9, 2nd paragraph).

First

The Master did not rule that the abandoned channel became fixed at **ordinary high water**.

His ruling is a classic application of the law of avulsion as declared by the Court in the case of **Arkansas v. Tennessee**, 246 U. S. 158, 173-175, 38 S. Ct. 301, 62 L. Ed. 638 (1917), and paraphrased by him (Master's Report, page 7, line 22), as follows:

"Under such a change, the boundary follows the thalweg of the river and when the **water becomes stagnant and erosion and accretion no longer occur**, the boundary becomes fixed in the middle of the old channel. And this is the process which establishes the abandoned Bendway Channel as the boundary line between these two States."

The Master further said, at page 8, line 1:

"... the State line continued in the Cow Island Bendway Channel, which with its erosions and accretions, primarily by reason of the subsequent migrations of the river, ultimately became fixed and stagnated, and the abandoned channel, the result of the avulsion of 1913-1915, is now clearly visible and impressed in the earth's surface."

Second

Low water is positioned at 3.1 feet on the Memphis gauge (R-811, line 14).

Ordinary high water is 18 feet on the Memphis gauge (R-962), and is the line where vegetation ceases to grow (R-956, line 13).

Flood water or high water is about 40 feet on the Memphis gauge (R-109, line 1), and is considered the top of the river bank (R-209, line 8).

We submit that the Master did not so interpret the rule or so conclude. Arkansas is apparently confusing a 40 foot stage with an 18 foot stage.

Mid-stage is 21.5 feet on the Memphis gauge (R-108, line 23).

The Memphis gauge is explained at R-808, lines 14-19.

Water up to 40 and 50 feet is still contained within the levees (R-294, line 19).

So, when Arkansas argues (Exceptions, page 9, lines 13-20),

“He interpreted the quoted rule to mean that if the old channel became dry, stagnated and sustained vegetation during the summer or low water month, it had not ceased to be a ‘running stream’, and had not ‘stagnated’ if during the **highwater** or **flood water** seasons the river’s flow again reentered the old abandoned channel. The Master in his ultimate conclusion adopted that same premise.”

And counsel for Arkansas are again confused and misstate the record when they claim (Exceptions, page 10, line 27),

“... The Master commented on Mr. Hurley’s assertion as to the **extreme high** stage of the river ...”

Mr. Harry G. Hurley, Chief of Operations of the United States Engineers (R-1079) said, at R-1084, line 23, then R-1087, line 4:

“Uh, it was, oh I’d say **half** bank full or better.”

“Well—uh, oh, something over twenty feet.”

Third

Arkansas then argues that the stagnation of the river and fixing of the state line in the abandoned bendway channel occurred in 1919 at lower water (Exceptions, page 14, lines 10-11; then lines 17-18), and that its witness, Mr.

Smith, offered the only competent evidence on that point (Exceptions, page 14, line 15).

Aside from considerable testimony on that point by several other witnesses, United States Light List (Tennessee's Exhibit No. 2, R-196; Exhibit File), the Masters and Pilots Reports (Tennessee's Exhibit No. 20, R-748; Exhibit File), and maps not used or considered by Mr. Smith (see Appendix A-2, A-3 and A-4), consider this testimony by Mr. Smith (at R-206, line 17):

"Well, the thalweg is certainly tied to the bed of the river, and is in the deepest part of it. So the stage at which the—the stage has relatively nothing to do with it, as I can see it.

"The stage rises, but unless the bed moves, why, the thalweg would remain. So, I don't believe there is any relation between the thalweg and the stage. I think the relation is the thalweg and the river bed."

Notice here that the Arkansas witness does not claim that low water controls the "stagnation." He says: "The stage rises, but unless the bed moves, why, the thalweg would remain." Compare this with the Master's statement (Master's Report, page 7, lines 22-26):

"... Under such a change, the boundary follows the thalweg of the river and when the water becomes stagnant and erosion and accretion no longer occur, the boundary becomes fixed..."

The bed of the river is moved by erosion and accretion, and, according to Mr. Smith, the stage of the river has nothing to do with it.

Fourth

The competency of Mr. Smith's testimony as to the stagnation and fixing of the state line in the abandoned Cow Island Bendway Channel can be judged from his contradictory and directly opposing statements where he said (R-185, lines 21-22; then R-186, lines 5-6):

"I made the statement that there was no avulsion occurred in 1913. And I think that holds true today."

* * * * *

"The adoption of the Pointway Channel was avulsive."

Along with his first contention that there was no avulsion and no pointway or avulsive channel, Mr. Smith testified (R-261, lines 5-7; then R-262, lines 2-5; then R-263, line 1):

"Well, as I said, when we discussed the two cases, in that case I took the position that the river migrated out of the bend."

* * * * *

"It was a position I took with reference to the action of the river, and I have never convinced myself fully that the river didn't migrate out and reform the bar in Cow Island Bend."

* * * * *

"I am not sure but what it is a sound position."

Then, later, he testified to the opposite (R-281, lines 12 through 23):

"Q. Yes, sir. Now, Mr. Smith, I believe you said that what is termed the dead thalweg was active for sometime after 1916; I am talking about in its movements; it did move some direction". What we now call the dead thalweg, that is, the Old Cow Island Bendway Channel?

"A. I didn't say that.

"Q. What did you say?

"A. I showed on my exhibit that it died sometime between 1915-1916.

"Q. Yes?

"A. I didn't say it remained active. I said it died."

These opposing and confusing views of Mr. Smith, made without reference to any map, report or light list, are in

contrast to Mr. Rodgers' testimony (R-835, lines 3 through 7):

"The 1929 base map (see Appendix A-5) was the result of an overland survey by the Memphis District Corps of Engineers and, along with this, **on that map they show** the well defined traces of the 1913 river as it migrated, which they have called out as simply chute."

From the above it can be easily seen that Mr. Smith's **"only competent evidence"** first says that the Cow Island Bendway Channel **was not abandoned** but continued as the **only** channel and migrated back to where it is today; then, second says this same Cow Island Bendway Channel **was abandoned** and did not migrate back to the present location of the new or avulsive channel but died (became fixed) in 1916; then, third says **he is not sure** which of the two above "theories" is the better.

One reason he is not sure is because he did not look at and did not use the 1929 U. S. Engineers' survey map (see Tennessee's Appendix A-5) which shows the 1916 new or avulsive pointway channel running through the middle of his alleged 1916 Arkansas accretions as shown on his Exhibit No. 7 (R-111; Exhibit File). To emphasize this point we have placed a heavy black circle, with an arrow pointing to it, around the "1916" pointway channel **mile 245** on the 1929 map at Appendix A-5.

Further, it is submitted that the 1929 aerial photograph of the United States Department of Agriculture (Appendix A-6) actually picturing the abandoned Cow Island Bendway Channel and the present new or avulsive main channel (which Mr. Smith did not use) clearly refutes both "theories" that (1) Cow Island Bendway Channel **migrated** out to its present position, and (2) that it did not migrate but **died** at Smith's Scour. The location of "Smith's Scour" has been marked on the aerial photograph (Appendix A-6) with white lines.

From the above it plainly appears why the Master rejected Mr. Smith's "only competent evidence" and found that the state line became fixed in the abandoned channel of Cow Island Bend, and that the land between that channel and the present new or avulsive channel was in Tennessee (Master's Report, Appendix A-1).

The Master began his findings on this point at page 5 of his report by referring to United States Engineers' maps of 1916-1917 (Tennessee's Exhibit No. 45, R-830; Exhibit File), 1918-1919 (Tennessee's Exhibit No. 46, R-830; Exhibit File), 1929 (Tennessee's Exhibit No. 38-1 and 38-2, R-769; Exhibit File), 1937 (Tennessee's Exhibit No. 39, R-770; Exhibit File), and 1949 (Tennessee's Exhibit No. 40, R-770; Exhibit File); also, a 1921 Crittenden County, Arkansas official property map (Tennessee's Exhibit No. 8, R-660; Exhibit File), a 1929 aerial photograph of the United States Department of Agriculture (Tennessee's Exhibit No. 56-A-BOC, R-944; Exhibit File); also testimony of United States Engineer H. G. Hurley, who rode a boat through Cow Island Bend in 1931 (R-1080-1085), and a survey of R. L. Cooper in 1953 (Tennessee's Exhibit No. 52, R-904; Exhibit File).

Then, at page 8 of his report, the Master said:

" . . . but that the Bendway Channel, with its erosions and accretions, continued to remain the boundary line between the two States is based upon the clear weight of **convincing** testimony."

Then, beginning at the bottom of page 9 and continuing through all of page 10 of his report, the Master gives consideration to the Arkansas position and to Mr. Smith's **unsupported** testimony (he referred to **no maps**, ignored and did not use the U. S. Engineers maps of 1917, 1918, 1919, 1929, 1937 and 1949 or the 1921 Arkansas Official Map), and made the following finding (page 10):

“ . . . The theory advanced by the State of Arkansas that after the avulsion the river's westerly migration continued and that Scanlan's Landing Bar grew and accreted downstream, moving the State line so that the boundary line between the two States became fixed at an area called Smith's Scour (by the witness Austin B. Smith) is contrary to the clear weight of the record herein.”

In addition to the above, the State of Arkansas contends that between 1913 and 1925 the river eroded away all but a minute portion of the Tennessee accretions which it designates “Cow Island Peninsula, that survived the 1925 erosion.” (Exceptions, page 6, last paragraph; also top of page 7). It also pictures this minute portion on its Appendix A-1. This theory and its pictured area on its map, Appendix A-1, are not supported by any evidence and are contrary to all of the oral and map evidence, and are incorrect.

To begin with, the curved part of “their area” is the 1913 flood water line of 54 feet on the Memphis gauge (Tennessee's Exhibit No. 10, pages 24-25). The **actual 1913 area** is shown on the 1912-1915 United States Engineers survey map (Tennessee's Appendix A-1). The flood line of 1913 shows only **that part** of the actual area above those flood waters, and even that part is many times larger than “Arkansas's area” (see Tennessee's Exhibit No. 10, page 25, R-722; Exhibit File). This “many times larger area” is not cut off at the bottom by the 1925 line, as is incorrectly done on Arkansas's Appendix A-1.

By 1925 the correct Cow Island Peninsula area had accreted and “grown” larger. **The correct 1925 “Peninsula” is shown** on the 1929 U. S. Engineers survey map (Tennessee's Appendix A-5) by diagonal long dashed black lines, and extends between the 1925 new or avulsive channel and the abandoned Cow Island Bendway Channel as they were in 1925.

At 1925 it was admitted by the State of Arkansas that the state line came out of the old abandoned Bendway Channel at point A as marked on the 1929 map (Tennessee's Appendix A-5), and continued southward to the point X in a circle as also marked on that 1929 map. To see this admission see Arkansas's Exhibit No. 9 (Tennessee's Appendix A-4).

Between 1925 and 1929 **only the new avulsive or Pointway Channel** migrated southward, and its bank line on the admitted Tennessee Peninsula accretions resulting from that migration is marked on the 1929 map **by the United States Engineers**. We have pointed out that line on this 1929 map (Appendix A-5) by large black arrows and the figure 1929.

However, it was the contention of the State of Arkansas that the state line, between 1925 and 1929, moved out from its 1925 location at point A (see Appendix A-5) and across the admitted Tennessee accretions to point C, then up to point B, as shown by the small dashed black lines on the 1929 map (Appendix A-5).

Counsel for Arkansas attempt to buttress this theory (which is contrary to the law as laid down by this Court) by another unsupported theory that where a dead or abandoned channel meets a live channel, the state line is projected out into the live channel on a line drawn at a ninety degree angle to the bank line of the live channel. They thus marked this ninety degree line on the 1929 aerial photograph (see Appendix A-6). Both of their theories are unsupported by any fact and are contrary to the law.

To begin with, their own Exhibit No. 9 (Appendix A-4) shows the state line coming out of the abandoned channel in a straight southerly line, contrary to the above theory. Also, this part of the state line is shown by the Engineers as coming out of the abandoned channel in a

straight southerly direction on their maps of 1937, 1939 and 1948-1949 (see Appendix A-7 and A-8).

That their theories are contrary to law is shown in this Court's ruling in the following cases:

“. . . the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.”

Arkansas v. Tennessee, 246 U. S. 158, 173, 38 S. Ct. 301, 62 L. Ed. 638 (1917).

“The rule (thalweg) yields to the doctrine that a boundary is unaltered by an avulsion.”

Arkansas v. Tennessee, 310 U. S. 563, 571, 60 S. Ct. 1026, 84 L. Ed. 1362 (1940).

“In boundary disputes between nations the same rules will be applied as apply between individuals.”

Nebraska v. Iowa, 143 U. S. 359, 361, 12 S. Ct. 396, 36 L. Ed. 186 (1892).

“. . . that is to say, every gradual increase of soil, every addition the current of the river may make to its banks on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner.”

Nebraska v. Iowa, 143 U. S. 359, 365, 12 S. Ct. 396, 36 L. Ed. 186 (1892).

“How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state . . .”

Arkansas v. Tennessee, 246 U. S. 158, 175-176, 38 S. Ct. 301, 62 L. Ed. 638 (1917).

Thus it is shown on the 1925-1926 survey map (Appendix A-4) and 1929 survey map (Appendix A-5) of the United States Engineers that **only the new avulsive or Pointway Channel moved. The abandoned channel did not move**, but remained as it was and with its state line running in a straight southerly course. So that, under the above quoted law, the state line **remained** in the old abandoned channel, irrespective of the **changes of the new channel**.

Also, the 1929 U. S. Engineers map and the 1929 aerial photograph (Appendix A-6) both clearly show that the accretions were added **only** to the "Tennessee Peninsula." And those exhibits and **all subsequent maps** (see 1937, Appendix A-7, and 1948-1949, Appendix A-8) very clearly show that none of these added accretions ever formed on the Arkansas side of the state line after 1925 (or after 1913).

The remainder of these forming Tennessee accretions are shown on the 1937 survey map of the United States Engineers (Appendix A-7), the 1948-1949 survey map of the United States Engineers (Appendix A-8), and on the 1967 Hydro map of the United States Engineers (Tennessee's Exhibit No. 41, R-770; Exhibit file).

All of these maps and photographs up through the year 1937 show the old abandoned Cow Island Bendway Channel as an open waterway from its upper end near the old Harris Light down past 96 Chute. And none of these maps or photographs shows that the abandoned bendway channel ever moved from this 1937 location.

The State of Arkansas contends (Exceptions, page 5, last paragraph) that:

"After 1925 the river (now running only through the 'Pointway Channel') reversed its direction and began a migration southeastwardly **eroding into the Tennessee Cow Island Shore** and laying down new

lands on the west side of the 'Pointway Channel'. This migration has continued to the present time."

The emphasized part of this contention is incorrect. After 1925 the **Pointway Channel** reversed its trend, but it did not erode Tennessee's Cow Island shore. It added accretions and added them **only to the Tennessee shore**. The "Pointway Channel" referred to by the State of Arkansas is the new or avulsive channel.

Aside from the fact that the migrations of the **Pointway Channel** do not affect the state line as ruled by this Court in the **Arkansas v. Tennessee** case at 246 U. S. 158, 175, may we further point out that Arkansas's assertion at the bottom of page 5 of its Exceptions admits that the new lands were laid down on the west side of the "Pointway Channel."

The land on the west side of the Pointway Channel is in Tennessee and was so admitted by Arkansas (Exceptions, page 5, 2nd paragraph), as follows:

"It was conceded by both parties, and the Master correctly concluded, that this action of the river carried with it the legal consequences of an avulsion and that the severed portion of the 'Cow Island Peninsula', **though it now lay on the west of the main channel**, retained its identity as part of Tennessee."

Here the State of Arkansas has used the terms "Pointway Channel" and "main channel" as referring to **the new or avulsive** channel. The Master fully established these terms in his report at page 4, beginning with line 27, as follows:

". . . The scour across Cow Islands became the locale of the subsequent avulsion in the river which occurred during 1913 to May, 1915, when the river shortened its path and a channel burst through the scour area, leaving Cow Islands Point Bar to the

north and west, and resulting in the main shipping channel after May, 1915, in the new Pointway Channel, although the old channel commonly called Cow Island Bendway Channel or Bendway Channel remained . . .”

These features are pointed out because Arkansas does not show or even claim that any of these accretions formed on the Arkansas side of the old Cow Island Bendway Channel or in any Arkansas territory. Indeed, every map and every photograph plainly shows that no accretions formed to the Arkansas shore or in the old or new channel on the Arkansas side of the state line.

In the case at bar, the rule of avulsion applies to the “area” between the old and the new channels, and the rule of the thalweg with its basis of a state’s right of access to the river has yielded and does not apply.

The State of Arkansas concedes that this rule of avulsion applies and that the severed land, though west of the new avulsive or now main channel, retained its identity as a part of Tennessee (Exceptions, page 5).

Therefore, the new accretions to the severed Tennessee land **on its side of the state line** belong to Tennessee. And the extent of those lands **is the area in between** the old abandoned Bendway Channel and the new avulsive or Pointway Channel.

Thus, the State of Arkansas’s assertion that its riparian shore lands “above and below” **that area** have been cut off from the river **is incorrect**.

The Master’s ruling did not affect any Arkansas land “above and below” **that area** (see Master’s Report, Appendix A-1).

This being so, the case of **St. Louis Land Company v. Rutz**, 138 U. S. 228, 11 S. Ct. 336, cited and referred to by Arkansas in its Exceptions at page 16, **has no application**.

That case is based on the "island rule," and Arkansas has never asserted or claimed that any of the involved lands ever originated as an island, or that such land, as an island, ever originated on the Arkansas side of the state line.

By its pleadings, the State of Arkansas said the involved lands **were accretions to its riparian shore**; therefore, not an island (Arkansas Complaint, page 8, paragraph VII); and it admits **now** that these lands lie in Tennessee between the old abandoned channel and the new avulsive or Pointway Channel (Exceptions, page 5, 2nd paragraph).

All of the maps from 1912-1915 on up to date show that the thalweg in Cow Island Bend, from Scanlan's Landing at the upper end to Beard's Landing at the lower end, was in close to the Arkansas shore. This follows a well known and long established principle that when going around a bend the water is swifter along its outside edge, in much the same manner as the rim of a wheel moves much faster than the hub, so that the deeper part of the river in the bend is in that swifter water or thalweg where the boats run.

In the case at bar, the old abandoned bendway channel begins (at the top of the old Cow Island Bend) a short way above old Scanlan Landing (near old Harris Light) and terminates near Beard Landing at the bottom of the old Cow Island Bend. Thus, this large curve or bend is like the rim of a wheel.

All of the severed Tennessee lands involved in this matter are located between the above described new avulsive or Pointway Channel (now main channel) and the old Cow Island Bendway Channel as it became fixed after the avulsion.

And no lands, above or below this area, have been extended lengthwise in the river and excluded Arkansas from

access to the river, as contended by Arkansas's Exception No. 5.

Therefore, the State of Tennessee urges that the Master's location of the state line between Arkansas and Tennessee and his finding that the lands involved are located in Tennessee, are abundantly supported by the record, and the Master's Report should be confirmed and a decree entered as he has recommended.

Although the State of Arkansas has not made any real issue in this Court of its claimed sovereignty and control over the lands involved, may we point out some of the evidence that supports the Master's findings shown on pages 11 through 13 of his report.

First, the rule of law as to sovereignty over another state's territory has been before this Court many times and is well settled. That rule is:

"The rule, long settled and never doubted by this court, is **that long acquiescence** by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it, is conclusive of the latter's title and rightful authority."

Michigan v. Wisconsin, 270 U. S. 295, 308, 46 S. Ct. 290, 70 L. Ed. 595 (1926).

"Both by virtue of her position as complainant and on the facts, Kansas has the burden of proof in this case."

Kansas v. Missouri, 322 U. S. 213, 64 Sup. Ct. 975, 88 L. Ed. 1234 (1944).

One of the essential requirements of dominion and sovereignty is the above emphasized phrase—long acquiescence. On this essential point the Master found (Master's Report, page 12, lines 9-12):

". . . But there is a total lack of evidence that the State of Tennessee as a sovereign State has ever

recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents.”

The Master then noted that **to the contrary**, there was evidence that the State of Tennessee had not only not acquiesced in Arkansas’s claim of dominion or sovereignty, but had entertained litigation of its citizens where Tennessee’s sovereignty was recognized and ruled upon (Master’s Report, page 12, lines 12-19), and that the State of Arkansas had acquiesced in the claim of Tennessee’s sovereignty and dominion (lines 19-23).

The Tennessee litigation referred to by the Master is a part of the record herein, being:

1. **Moore v. Farris** (1932), a Federal District Court action (Tennessee’s Exhibit No. 50, R-902; Exhibit File)
2. **Russell v. Brown** (1949), 195 Tenn. 482 (Tennessee’s Exhibit No. 51, R-903; Exhibit File)
3. **Brown v. Brakensiek** (1954), 48 Tenn. App. 543 (Tennessee’s Exhibit No. 55, R-943; Exhibit File)
4. **Brown v. Brakensiek** (1965) (Tennessee’s Exhibit No. 52, R-904; Exhibit File)

There is an abundance of evidence in this record that clearly demonstrates that the State of Arkansas did not exercise the required dominion and sovereignty over the lands involved, but that the State of Tennessee did. However, the above detailed evidence shows that Tennessee has never relinquished its claim of sovereignty or acquiesced in any alleged such claim by Arkansas.

CONCLUSION

Therefore, the State of Tennessee respectfully urges this Court to overrule the Exceptions of the State of Arkansas, and to enter a decree in this case (1) confirming and approving the Master's Report, (2) fixing the state line between Arkansas and Tennessee as recommended by the Master, (3) appointing a Commission to supervise the marking of that state line on the ground, and (4) declaring the lands on the Tennessee side of that state line to be in the State of Tennessee.

Respectfully submitted

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Nashville, Tennessee

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Assistant Attorney General

Supreme Court Building
Nashville, Tennessee

HARRY W. LAUGHLIN

JAMES L. GARTHRIGHT, JR.

J. MARTIN REGAN

HEARD H. SUTTON

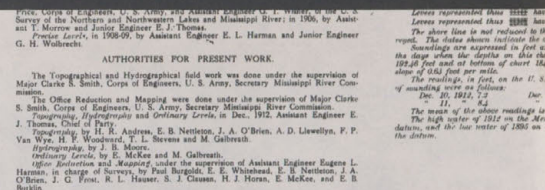
Special Counsel

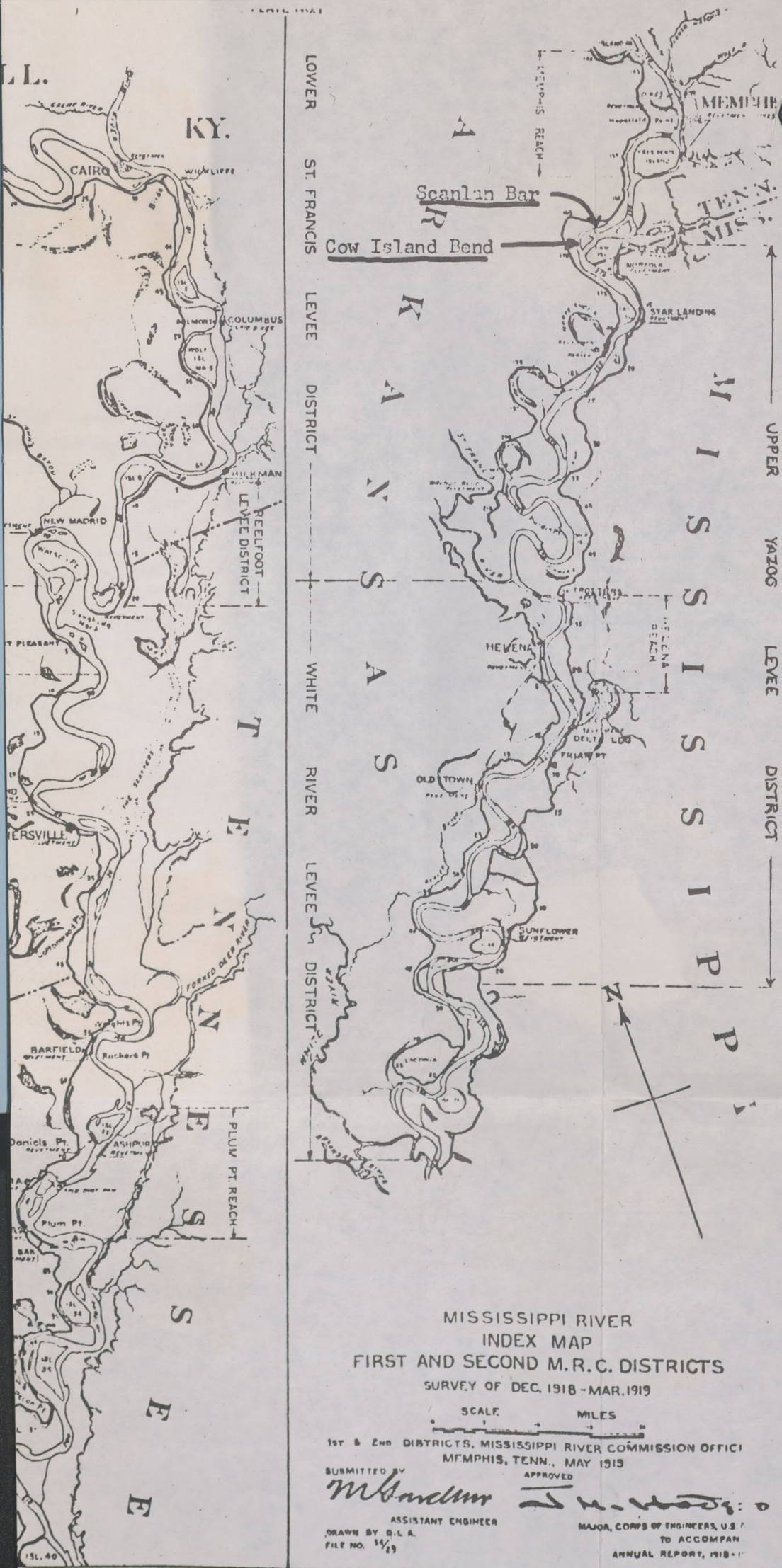
First National Bank Building
Memphis, Tennessee

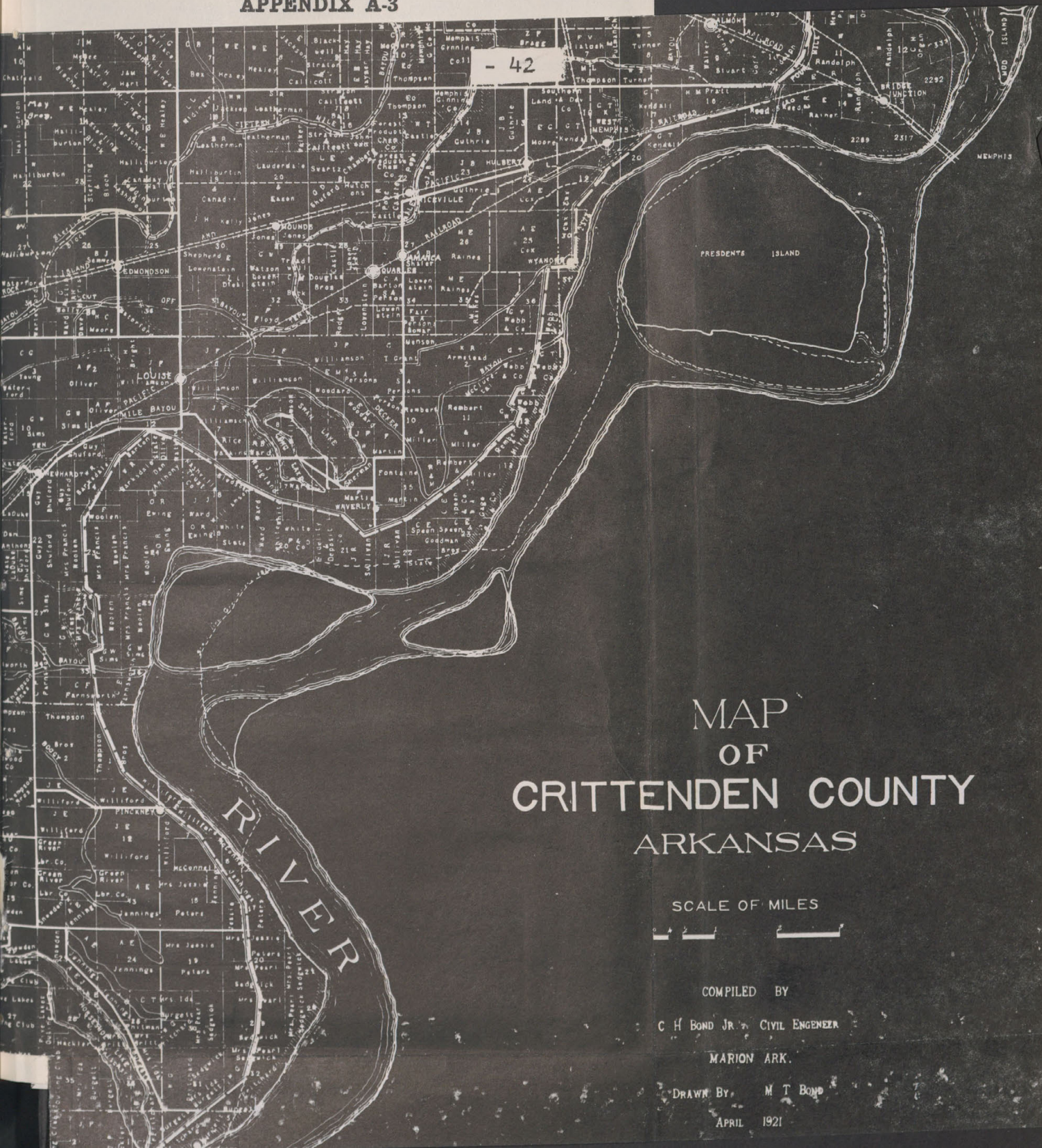
Attorneys for the State of
Tennessee

APPENDIX.

APPENDIX A-1







MAP OF CRITTENDEN COUNTY ARKANSAS

SCALE OF MILES



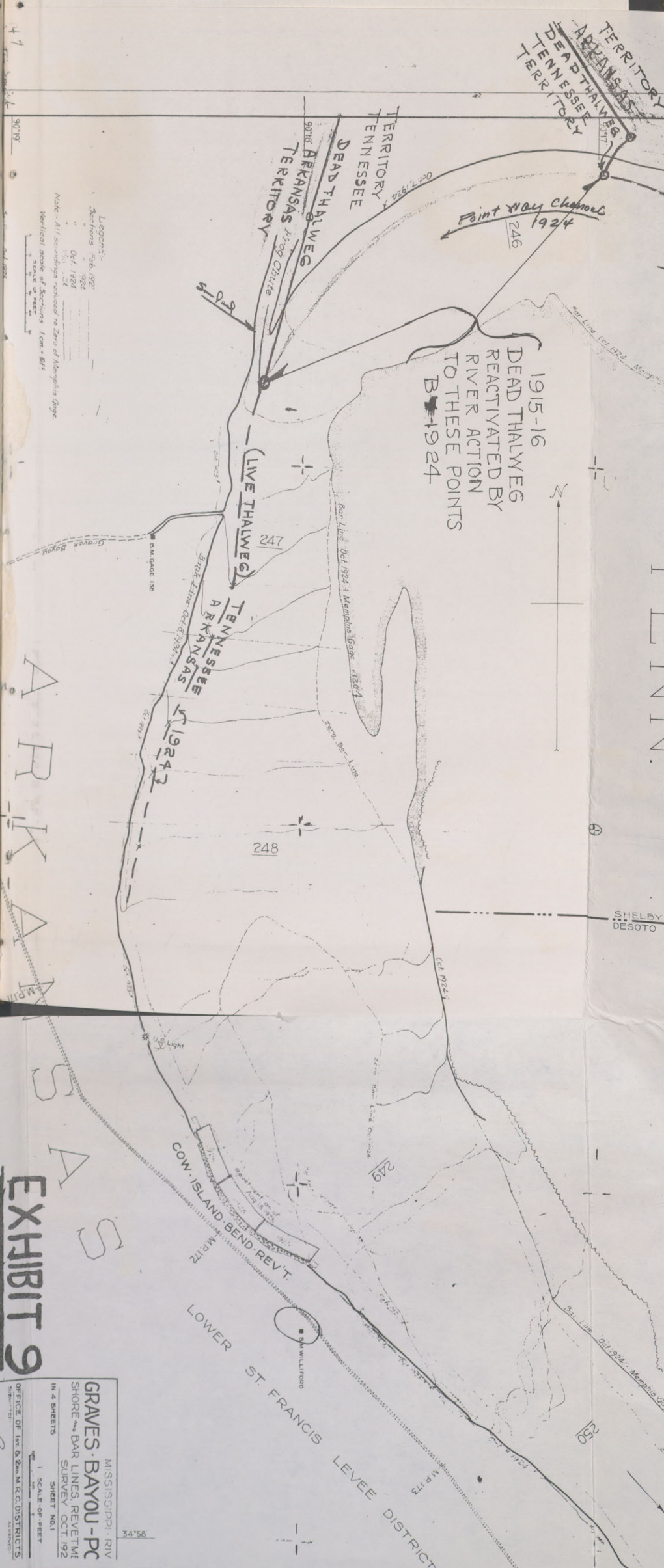
COMPILED BY

C H BOND JR. CIVIL ENGINEER

MARION ARK.

DRAWN BY M T BOND

APRIL 1921



LEGEND:
Sections 26, 1921
Oct. 1924
Oct. 1924
Oct. 1924
Note: All soundings reduced to Zero of Memphis Gauge
Vertical scale of Sections 1 cm. = 10 ft.
Scale of Feet

AR-KA-MP
S
A
S

EXHIBIT 9

MISSISSIPPI RIV
GRAVES - BAYOU - PC
SHORE BAR LINES REVEYME
SURVEY OCT 192
SHEET NO. 1
SCALE OF FEET
OFFICE OF INV. & S.M. R.C. DISTRICTS
REVISION 03 01/06/2007 1925
FILE 1618361

APPENDIX A-5





10/25/29

10/25/29

