In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLAINT

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COUNTER-STATEMENT OF CASE

For several years the State of Iowa has been quieting title to Missouri River riparian lands involving Iowa citizens in the Iowa courts, and occasionally involving Nebraska citizens in Iowa courts. The controversies have always rested upon the nature of the formation of the land, and have never transcended the Iowa-Nebraska Missouri River Compact of 1943. In essence, the primary questions to be resolved are whether or not the specific land in controversy formed as an island to the bed of the Missouri River on the left bank of the thalweg, remaining there until the Compact of 1943, or did such land form as an accretion to the riparian left bank, and, of prime importance, was there an avulsion at any time which would affect the

state boundary lines' location prior to its establishment by the Compact.

The foregoing questions have always been and should only be resolved by the supporting evidenciary matters before the courts of competent jurisdiction inasmuch as the principles of law are well settled, undisputed and recognized in Nebraska as well as Iowa.

The State of Nebraska asserts that the purpose of this present litigation is to resolve a controversy between the State of Iowa and the State of Nebraska, and with this assertion, we must disagree, as on this point our paths unequivocally divide.

Exhibits C, D, E, F, G, H and I contained in the plaintiff's Motion to File Bill of Complaint demonstrate palpably that the present suit filed by the plaintiff, State of Nebraska, before this Honorable Court is purely and simply an action by the State of Nebraska on behalf of a few Nebraska citizens whose identity is set forth in the foregoing exhibits, and in no sense constitutes a controversy between the states.

In the statement, they provide:

> "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

With this statement, we have no quarrel. However, Nebraska courts certainly recognize that they are absent authority to quiet title to land owned by Iowa, as

well as being without authority to convey by a Nebraska deed, land, which at the time of the conveyance constitutes land owned by the State of Iowa. Thus, we return to the precise evidenciary matters that continually confront courts in actions of this nature, i.e., did the land in question form as an island on the Iowa side of the thalweg, remaining there without an intervening avulsion prior to the 1943 Compact, and situated there at the establishment of said Compact. If so, it becomes cogent that the decrees set forth in Exhibits J and K are without force and effect, and would not be recognized by either Nebraska or Iowa, and the section of the Compact relied upon by Nebraska to assert an alleged controversy between states becomes inapplicable. If, however, the evidence demonstrates the land in Exhibits J and K was in Nebraska at such date and time, the Iowa courts will recognize such decrees and conveyances, (see, Statement of Case, Appendix A.), thus again no violation of the Compact.

Of paramount importance, however, is that in the case of *State of Iowa, v. Henry E. Schemmel,* a Nebraska title to the land in question is not involved other than that the defendant, Henry E. Schemmel, asserts that the land in question constitutes accretion to land which he holds by a Nebraska title. In that case, the State of Iowa fully recognizes the Nebraska title, but disputes that the land in litigation constitutes an accretion to the land which he holds by a Nebraska title.

Thus, the actions of the State of Iowa do not involve quieting title in the State of Iowa to any lands ceded by Nebraska in 1943, and no violation of the Iowa-Nebraska Boundary Compact of 1943 or Article IV, Section 1 of the Constitution of the United States exists.

It is respectfully submitted that the Motion for Leave to File the Bill of Complaint should be denied.

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BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLAINT

ARGUMENT

1. The Bill of Complaint by the State of Nebraska does not establish the existence of a justiciable controversy between the State of Nebraska and the State of Iowa which necessitates an exercise by the United States Supreme Court of its power of original jurisdiction under the Constitution of the United States.

(a) The complaint of the State of Nebraska does not allege a cause of action because it fails in all respects to demonstrate that the State of Nebraska is the real party in interest and has been injured.

(b) It is elementary that a deed can only convey title to land actually owned by the

grantor, and the grantee takes no greater title under deed than the grantor had.

(c) Original jurisdiction of the Supreme Court of the United States cannot be exercised in a suit between states when the citizens of the complainant state are indispensable parties.

It is well established by the decisions that this court will not entertain a proceeding on original jurisdiction by a state on behalf of its citizens or group of citizens, and not in the interest of the state itself.

Mass. v. Mo., 60 S.Ct. 39, 308 U.S. 1, 84 L. Ed. 3;
Ark. v. Texas, 74 S.Ct. 109, 346 U.S. 368, 98 L.Ed. 80;
Okla. v. Gulf, Colorado & Santa Fe R.R. Co., 220 U.S. 290, 55 L.Ed. 469, 31 S.Ct. 437.

Its jurisdiction in respect of controversies between states will not be executed in the absence of necessity.

La. v. Texas, 176 U.S. 1, 15, 20 S.Ct. 251, 44 L.Ed. 347.

A State asking leave to sue another to prevent the enforcement and exercise of its duties must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. This Court's decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this Court with the action of a state.

Mo. v. Ill., 200 U.S. 496, 520, 521, 26 S.Ct. 268, 50 L.Ed. 572;

N.Y. v. N.J., 256 U.S. 296, 209, 41 S.Ct. 492, 65 L.Ed. 937;

N.Dak. v. Minn., 263 U.S. 365, 374, 44 S.Ct. 138, 68 L.Ed. 342.

The burden upon the plaintiff to state fully and to clearly establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties.

Conn. vs. Mass., 282 U.S. 660, 669, 51 S.Ct. 286, 75 L.Ed. 602.

The contrariety and incongruity of the plaintiff's assertion that the Defendant State of Iowa is violating the Missouri River Boundary Compact of 1943 is readily borne out in paragraph XIV of the plaintiff's complaint, wherein they state:

> "Approximately the westerly 50 feet of the land described in the second amendment to plaintiff's petition in State of Iowa v. Babbit, marked 'Exhibit H', is presently in the State of Nebraska and is west of the center line of the proposed stabilized channel of the Missouri River as established by the alluvial plains maps referred to in the Iowa-Nebraska Boundary Compact."

compared with their allegation contained in paragraph XX of their Bill of Complaint, wherein they provide in pertinent part:

> "The problem is compounded by the fact that the maps referred to in the Iowa-Nebraska Boundary Compact are of too small a scale, (1″ equals 2,640′), and do not contain sufficient detail for a surveyor to accurately locate the boundary on the ground."

Thus, by the Plaintiff's own allegations, they accuse the State of Iowa in one instance of exceeding the boundary line in one case by 50′, only to admit in a sub-

sequent paragraph that they cannot accurately locate the boundary on the ground. This is hardly operative as a clear establishment of the essential elements to invoke original jurisdiction.

It is well settled and conceded by the State of Nebraska that the State of Iowa is the owner to the bed of all navigable streams within the State of Iowa from the high water mark to the boundary and any islands arising out of the bed belong to the State of Iowa.

Iowa v. Ill., 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55;
Hardin v. Jordan, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428;
Cedar Rapids v. Marshall, 199 Ia. 1262, 203 N.W. 932;
Tyson and Schroeder v. Iowa, 283 Fed. Supp. 802.

As owner of islands accreting to the beds of such navigable streams, the State of Iowa has not only the right, but the duty to protect and conserve these natural resources and the legal process instituted to adjudicate this ownership is a proper exercise of that duty.

Smith v. Maryland, 18 How. 71, 59 U.S. 71, 15 L.Ed. 269.

It is equally well settled and conceded by the State of Iowa that Nebraska law invests the ownership to the bed of all navigable streams and islands accreting thereto on the Nebraska side of the boundary to the individual riparian owners along such navigable streams.

Kinkead v. Turgeon, 74 Neb. 587, 109 N.W. 746;
Independent Stock Farm v. Stevens, et al., 128 Neb. 619, 259 N.W. 647.

It can hardly be said, therefore, that any controversy exists between the State of Nebraska and the State of Iowa concerning these lands, since the State of Ne-

braska has absolutely no ownership in the same. This court has repeatedly held that a state may not invoke the jurisdiction of this court by a suit on behalf of its citizens against a state, and where the primary purpose of the suit is to protect its citizens against alleged violations of their rights.

Mass. v. Mo., supra; *Ark. v. Texas*, supra.

It is also clear that the specific cases about which the State of Nebraska complains and the parties thereto, with the exception of the State of Iowa, have not been joined in this action and thus no jurisdiction exists, for this court has held that jurisdiction will not be exercised where indispensable parties have not been made parties to the litigation.

California v. Southern Pacific Co., 157 U.S. 229, 39 L.Ed. 683 15 S.Ct. 591;

Minnesota v. Northern Securities Co., 184 U.S. 199, 46 L.Ed. 499, 22 S.Ct. 308.

Can it be seriously said that *Henry E. Schemmel* and *Darwin M. Babbit* are not materially or beneficially interested in the subject matter of this suit? We think not, for by virtue of Nebraska riparian law, they are the sole parties in interest and are wanting as parties to this litigation.

In the matter at bar, the factual claims are seriously disputed and are proper evidenciary matters to be resolved on an individual case basis in the proper court of record having competent jurisdiction to resolve the same.

It is elementary that a deed can only convey title to land actually owned by a grantor, and a grantee thereunder takes no greater title under the deed than the grantor had,

(*Sibley v. McMahon*, 98 So. 805, 210 Ala. 598;
Ridgeway v. Lewis, 160 S.W. 2d 50, 203 Ark. 1063;
Colorado Pac. Land Co. v. Clinton E. Worden Co., 23 P. 2d 314, 132 Cal. App. 720;
Flader v. Campbell, 207 P. 2d 1188, 120 Colo. 66;
Fitzpatrick v. Massee-Felton Lumber Co., 3 S.E. 2d 91; 188 Ga. 80;
Padgett v. Norrell, 122 S.E. 65, 157 Ga. 526;
Copelin v. Williams, 111 S.E. 186, 152 Ga. 692;
Kentucky River Coal Corporation v. Combs, 107 S.W. 2d 241, 269 Ky. 365;
Fordson Coal Co. v. Collins, 104 S.W. 2d 985; 268 Ky. 331;
Duncan v. Webster County Board of Education, 265 S.W. 489, 205 Ky. 86;
Lossing v. Shull, 173 S.W. 2d 1, 351 Mo. 342;
Adams v. Adams, 113 A. 279, 80 N.D. 628;
Whitaker v. Whitaker, 167 P. 2d 895, 196 Okla. 689;
Bursell v. Brusco, 275 P. 2d 873, 203 Or. 37;
Philadelphia Electric Co. v. City of Philadelphia, 154 A. 492, 303 Pa. 422;
Hershey v. Poorbaugh, 21 A. 2d 434, 145 Pa. Super. 482;
Lewis v. Thomas, Com.Pl. 43 Lack. Jur. 29;
Huber v. Huber, Com.Pl., 92 Pittsb.Leg.J. 137;
Greene v. White, 153 S.W. 2d 575; 137 Tex. 361, 136 A.L.R. 626;
Peterman v. Harborth, Com.App., 300 S.W. 33;
Weishuhn v. Matejowsky, Civ.App., 1700 S.W. 2nd 567, error refused;
Perkins v. Campbell, Civ. App., 63 S.W. 2nd 567;
Peterson v. Paulson, 163 P.2d 830; 24 Wash. 2d 166; 18 C.J. p. 160 note 97;
Smith v. Braley, 184 P. 587, 78 Okl. 220,)

so as to pretermit further discussion of this point.

We submit that the foregoing holdings by this Court are applicable to the case at bar, for here Nebraska seeks, in effect, a declaratory judgment that the State of Iowa has violated the Missouri River Compact of 1943, when by the matters contained within their own pleadings demonstrates that Nebraska has no interest in the controversy as a State, but is attempting to invoke this Court's original jurisdiction on behalf of a few citizens.

CONCLUSION

The State of Nebraska has not shown that its complaint establishes the existence of a justiciable controversy, has not shown clear uncontroverted facts enabling it to the relief prayed for, has shown clearly that it is a suit by a state on behalf of its citizens, is absent indispensable parties, and therefore does not necessitate an exercise by this Honorable Court of its power of original jurisdiction, and its Motion for Leave to File Bill of Complaint should be denied.

WHEREFORE, it is respectfully prayed that this Honorable Court deny Plaintiff State of Nebraska's Motion for Leave to File Bill of Complaint.

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APPENDIX A

In The District Court of the State of Iowa

In and For Woodbury County

DARTMOUTH COLLEGE,
A Corporation,
Plaintiff,
vs.

GERALD ROSE,
GLORIA ROSE,
LAWRENCE HARRIS, and
ROSETTA HARRIS,
Defendants,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AND DECREE

STATE OF IOWA,
Intervenor.

STATEMENT OF THE CASE

This action is to quiet title in the plaintiff to certain real estate lying in Woodbury County, Iowa, located on the Missouri River. Plaintiff Dartmouth College contends that the subject land was formed by accretion or reliction or both to its Nebraska riparian land. Defendants Gerald Rose, Gloria Rose, Lawrence Harris and Rosetta Harris, claimed ownership of the land by virtue of adverse possession and these defendants were found in default and judgment has previously been entered against them and none of these defend-

ants appealed. The State of Iowa intervened, claiming the land in question was an island and because of an avulsion, such land is the property of the State of Iowa.

The plaintiff and its predecessors in title owned land adjacent to the subject land on the Nebraska side of the Missouri River and throughout the years have quieted their title in Nebraska and such decrees were in evidence before this court. While true the State of Iowa was not a part in these actions in Nebraska, yet the court feels that they should be considered in light of all of the other evidence and exhibits in this case. These actions and decrees are, the court feels, entitled to consideration.

Various witnesses testified for both sides and numerous exhibits were introduced in evidence.

FINDINGS OF FACT

This trial took considerable time and there were numerous exhibits of maps, plats, photographs and documents introduced in evidence in this case and the court has considered all of the oral testimony of the various witnesses on both sides and has studied the numerous exhibits and makes the following findings of fact:

1. Plaintiff is the owner of the following described land lying in Nebraska and Iowa, to-wit:

> Commencing at the northwest corner of Lot 5, in Section 15, Township 27, Range 9 East of the 6th P.M., in Dakota County, Nebraska; thence due east along the north line of said lot 5, and the center line of said Section 15, extended to the right (west) bank of the Missouri River; thence southeasterly along the right (west) bank of the Missouri River to its intersection with the south line

of Section 22, Township 27 North, Range 9 East of the 6th P.M., extended; thence due west along the south line of said Section 22, extended, to the southwest corner of said Government Lot 7, in said Section 22, Township 27 North, Range 9 East, 6th P.M.; thence due north along the west line of said Government Lot 7, in said Section 22, a distance of 1745 feet; thence south 80° west, a distance of 2615 feet to the west line of Lot 5, Section 22, Township 27 North, Range 9 East, 6th P.M.; thence due north along the west line of said Government Lot 5 in said Section 22, extended 990 feet; thence south, 82° west, for a distance of 3902 feet; thence north 65° west, for a distance of 1300 feet; thence north, 30° east, for a distance of 1865 feet; thence due east for a distance of 1052 feet; thence due north for a distance of 1220 feet, to the Government meander corner on the north line of Section 21, Township 27 North, Range 9, East of the 6th P.M.; thence north along the west line of Lot 2, Section 16, Township 27 North, Range 9 East of the 6th P.M., to the northwest corner of said Lot 2 in said Section 16; thence east along the north line of Lot 7 extended, in Section 16, Township 27 North, Range 9 East, 6th P.M., to the southwest corner of Lot 5 in Section 15, Township 27 North, Range 9 East, 6th P.M.; thence north along the west line of said Lot 5, Section 15, Township 27 North, Range 9 East of the 6th P.M. to the place of beginning.

2. The subject land, a tract of land bounded on the east by the right (west) bank of the Missouri River; bounded on the west by the State boundary line between the States of Iowa and Nebraska as established by said states and approved by the United States in

1943; bounded on the north by the center line of Section 15, Township 27 North, Range 9 East of the 6th P.M. extended from said west boundary line to the right (west) bank of the Missouri River; bounded on the south by the south line of Section 22, Township 27 North, Range 9 East of the 6th P.M., extended from said west boundary line to the right (west) bank of the Missouri River, located in Woodbury County, Iowa, lines within Woodbury County, Iowa, and this court has jurisdiction of this matter.

3. The subject land was not an island but formed by accretion or reliction to plaintiff's land.

4. While there is evidence to the contrary, the court feels that by the greater weight of the evidence that no avulsion occurred in 1937 and that the boundary line between the States of Iowa and Nebraska moved to the east or to the Iowa side.

5. Following the gradual movement east of the river in 1937 the subject land was accreted to plaintiff's land and became a part of it.

6. Any movements of the river following 1937 were caused by or made by man-made avulsions and did not change the boundary line between the States of Iowa and Nebraska or affect plaintiff's ownership of the subject land.

7. In 1943 the Iowa-Nebraska boundary line was established in the center of a man-made channel in the Missouri River which was subsequently lost because of floods and is now dry and that said boundary line continued to run through the center of the abandoned channel.

8. Following the loss of the man-made channel the

Corps of Engineers permanently emplaced the channel in Iowa approximately where it had been in 1938 and plaintiff has quieted its title in Nebraska to the boundary line pact of 1943.

9. While following 1938 at times water ran down the western or Nebraska side there were chutes common along the Missouri River and that they now are all filled in except for a part in which Omaha Creek flows.

10. South of Mile Post 785 as shown on the maps and charts the channel of the river was always to the east or on the Iowa side and plaintiff, a Nebraska owner, owned to the center of the channel and still does.

11. That the plaintiff, a Nebraska riparian owner, owned to the thalweg and its title was good to all areas under water, and sandbars to the center of the Missouri River and the boundary pact of 1943 did not affect plaintiffs title to the subject land and all accretions and relictions west of the thalweg belonged to the plaintiff when the said Boundary pact put it within the boundary of the State of Iowa.

12. The court finds that under all the competent evidence that the subject land lying within the State of Iowa is owned by the plaintiff and its title in fee simple should be quieted and confirmed as against the State of Iowa.

CONCLUSIONS OF LAW

This was a non-jury trial and while some evidence was objected to by both sides there is no harm in taking any evidence which the parties consider relevant as long as incompetent evidence is not used to support the

court's finding or if there were not sufficient competent evidence to support the findings of fact.

The court concludes that the law is as follows:

1. The Missouri River is a navigable stream, and in Nebraska a riparian owner owns to the thread of the navigable channel (or thalweg) and in Iowa a riparian owner extends to the ordinary high water mark and ownership from such high water mark to the thalweg belongs to the State of Iowa.

Whitaker v. McBride, 197 U.S. 510, 25 S.Ct. 530.

Independent Stock Farm v. Stevens, et al., 259 N.W. 647, 128 Neb. 619.

Rand v. Miller, 250 Iowa 699, 95 N.W. 2nd 916.

State v. Dakota County, 250 Iowa 318, 93 N.W. 2d 595.

2. Prior to the boundary line pact of 1943 between the States of Iowa and Nebraska the boundary line followed the course of the gradual changes of the river.

State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S.Ct. 396.

3. Accretion or reliction or both belong to the riparian owner and the presence of chutes and swales between the high bank and sandbars does not make an island.

Bigelow v. Herrick, 205 N.W. 531, 200 Iowa 830.

42 Iowa Law Review 58-62.

Payne v. Hall, 185 N.W. 912, 192 Iowa 780.

4. There is a presumption in favor of accretion as against an avulsion.

Bone et al. v. May et al., 225 N.W. 367, 208 Iowa 1094.

5. Nothwithstanding the rapidity of the changes in the course of the channel and the washing from one side and on to the other the law of accretion controls on the Missouri River.

State of Nebraska v. State of Iowa, 12 S.Ct. 396.
Milroy v. Pinney, 250 Iowa 1378, 98 N.W. 2d 720.
Solomon v. City, 51 N.W. 2d 472, 243 Iowa 634.

6. Land in a navigable stream which is surrounded by water in times of high water is not an island within the rule that the State takes title to newly formed islands in navigable streams.

Payne v. Hall, 185 N.W. 912, 192 Iowa 780.
Coon v. Johnston, 194 S.W. 2d 193, 208 Ark. 1053.
McBride v. Stanweden, 83 P. 822, 72 Kan. 508.

7. The mere fact that at times water from the Missouri River flows around sandbars or parts of them does not make them islands.

Payne v. Hall, 185 N.W. 912, 192 Iowa 780.

8. An avulsion is a sudden and rapid change in the channel of a stream where it suddenly changes its old bed and seeks a new one.

Conkey v. Knudsen, 4 N.W. 2nd 290, 141 Neb. 517.
State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S.Ct. 396.

Under the Court's findings of fact an avulsion did not occur in 1937 as the State of Iowa contends.

JUDGMENT AND DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the court that the plaintiff Dartmouth College, a corporation, is the owner in fee simple of the

following described real estate within the State of Iowa, to-wit:

Commencing at the northwest corner of Lot 5, in Section 15, Township 27, Range 9 East of the 6th P.M., in Dakota County, Nebraska; thence due east along the north line of said Lot 5, and the center line of said Section 15, extended, to the right (west) bank of the Missouri River; thence southeasterly along the right (west) bank of the Missouri River to its intersection with the south line of Section 22, Township 27 North, Range 9 East of the 6th P.M., extended; thence due west along the south line of said Section 22, extended to the Southwest corner of said Government Lot 7, in said Section 22, Township 27 North, Range 9 East, 6th P.M., thence due north along the west line of said Government Lot 7, in said Section 22, a distance of 1745 feet; thence south, 80° west, a distance of 2615 feet to the west line of Lot 5, Section 22, Township 27 North, Range 9 East, 6th P.M.; thence due north along the west line of said Government Lot 5 in said Section 22, extended, 990 feet; thence south, 82° west for a distance of 3902 feet; thence north 65° west, for a distance of 1300 feet; thence north, 3° east, for a distance of 1865 feet; thence due east for a distance of 1052 feet; thence due north for a distance of 1220 feet, to the Government meander corner on the north line of Section 21, Township 27 North, Range 9 East of the 6th P.M., thence north along the west line of Lot 2, Section 16, Township 27 North, Range 9 East of the 6th P.M., to the northwest corner of said Lot 2 in said Section 16; thence east along the north line of Lot 2, extended, in Section 16, Township 27 North, Range 9 East, 6th P.M., to the southwest corner of Lot 5, in Section 15,

Township 27 North, Range 9 East, 6th P.M., thence north along the west line of said Lot 5, Section 15, Township 27 North, Range 9 East of the 6th P.M. to the place of beginning.

and its title and estate in the said real estate is hereby quieted and confirmed as an absolute title in fee simple and that the State of Iowa is forever barred and estopped from having or claiming any right, title or interest thereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Dartmouth College, a corporation have judgment for its costs of this action.

Dated this 9th day of September, 1963.

(s) R. W. Crary,
R. W. Crary,
Judge of Fourth Judicial District.

PROOF OF SERVICE

I, Evan Hultman, Attorney General of the State of Iowa and member of the Bar of the Supreme Court of the United States, hereby certify that on September 15, 1964, I served a copy of the foregoing Brief of Defendant, State of Iowa, in Opposition to Motion to File Bill of Complaint, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to

HONORABLE FRANK B. MORRISON
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