In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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SUPPLEMENTAL STATEMENT

At the time of the filing of the MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, STATEMENT IN SUPPORT OF MOTION AND COMPLAINT, the State of Nebraska also filed a concise BRIEF OF THE STATE OF NEBRASKA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT. The State of Iowa responded with a BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLANT. Because of the objections raised by the State of Iowa in opposition to the Court's taking jurisdiction of this matter, the State of Nebraska deems it advisable to file a Supplemental Brief in order to

correct certain inaccuracies in the Brief of the State of Iowa and to elaborate upon the clear issues which the Complaint presents.

This brief is directed solely to the question of whether this Court should take jurisdiction and is not directed to the merits of the controversy.

The Complaint attached to plaintiff's Motion for Leave to File clearly sets forth allegations that the State of Iowa is violating the Iowa-Nebraska Boundary Compact of 1943. The pleadings in the cases of *State of Iowa* v. *Babbit* and *State of Iowa* v. *Schemmel* which are attached to the Complaint as exhibits set forth factual situations concerning conduct of the State of Iowa which allegedly constitutes a violation by the State of Iowa of the Iowa-Nebraska Boundary Compact of 1943. Included within these allegations is the claim that the State of Iowa is presently attempting to quiet title to land which is within the State of Nebraska (Complaint, Par. XIV, pp. 14-15) and that this constitutes an encroachment upon the sovereignty of the State of Nebraska. This allegation, in addition to constituting a clear claim of encroachment upon the boundaries of Nebraska, is also indicative of the State of Iowa's interpretation of the Iowa-Nebraska Boundary Compact of 1943 and its unilateral approach towards the placing of the present boundary between Iowa and Nebraska. The State of Iowa, in its BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLAINT, hereinafter referred to as "Iowa's Brief", at page 7 has attempted to point out an inconsistency between the allegations contained in Paragraph XIV and those of Paragraph XX of the Complaint. Iowa has clearly mis-

read the latter paragraph because Paragraph XX does not state that it is impossible in *all* areas to locate the boundary, but states that it is not possible in "many areas" to locate the center line of the proposed stabilized channel of the Missouri River within the meaning of the 1943 Compact, on the ground from maps presently on file in the office of the United States Army Corps of Engineers. These allegations are not inconsistent.

Because the Iowa-Nebraska Boundary Compact of 1943 deals with the present boundary between the two states and because its provisions went beyond the mere establishment of a boundary, but included other contractual provisions deemed essential to the Compact, the question of violation of the Compact becomes interwoven with the problems of boundary. It is the contention of the State of Nebraska that both boundary and Compact and its implications are involved in this case.

SUMMARY OF ARGUMENT

A Compact entered into between States and approved by the Congress is a contract creating mutual rights and obligations as between the States. As such, the extent of these rights and duties should not be subject to unilateral determination by an organ of only one of the States, but is properly the function of the Supreme Court of the United States.

Because the Court clearly has jurisdiction over boundary problems, it must have jurisdiction over the construction and enforcement of compacts to settle boundaries. The entire purpose of the compact clause of the Constitution will be defeated if such compacts,

when once entered into, cannot be enforced by peaceable judicial determination in the Supreme Court of the United States in an action by one of the States which was a party to the Compact. This is supported both by principles of sound reason and by the decisions of this Court.

Because a compact is binding upon, and for the benefit of, not only the States but also all of the citizens thereof, a determination of the construction and effect of a compact in an action between States does not require that all of the individuals affected be made parties as this controversy is between the State of Nebraska and Iowa and is of immediate and deep concern to the State of Nebraska, even though her interest is indissolubly linked with that of her citizens.

ARGUMENT

I.

A compact entered into between states and approved by the Congress is a contract binding upon the states as parties thereto, and the rights and duties created by it should not be subject to unilateral determination by only one of the states but such determination is properly the function of the Supreme Court of the United States.

The Iowa-Nebraska Boundary Compact of 1943 was entered into by the States of Iowa and Nebraska with the consent of the Congress of the United States under the authority of Article I, Section 10 of the Constitution of the United States which provides that "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State

. . ." This compact, therefore, is a legal contract which created obligations on the part of each State, and the questions relating to the validity and interpretation of interstate compacts are properly subject to final determination by the Supreme Court. In *West Virginia ex rel Dyer* v. *Sims,* 341 U. S. 22, the State Auditor of West Virginia had refused to issue a warrant to defray West Virginia's share of the expenses arising out of a compact entered into with seven other States to control pollution of the Ohio River. An action of mandamus was brought to compel the State Auditor to issue a warrant for West Virginia's share of the expenses. Mr. Justice Frankfurter described the nature and effect of a compact at 341 U. S. 28 in the following language:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies (*Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and

> policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

As a contract, rights and obligations were created which are binding on each State and its officials. This is to be distinguished from cases involving reciprocal legislation such as *Massachusetts* v. *Missouri,* 308 U. S. 1, cited at page 6 of Iowa's Brief.

The State of Iowa, however, apparently denies that the Iowa-Nebraska Boundary Compact has placed any duties upon it as such. It has taken the position at page 3 of its Brief that, should the evidence in the cases pending in the Iowa Courts demonstrate that the land in the cases of *Iowa* v. *Babbit* and *Iowa* v. *Schemmel* was in Nebraska at the time of the Boundary Compact, the Iowa Courts would recognize the Nebraska decrees and conveyances. This reasoning completely ignores the proposition that the Compact is a contract to which the State of Iowa is a signatory party and that, as such, the provision that titles good in Nebraska would be good in Iowa is binding upon the State itself. The State of Nebraska contends that, as a Compact, the provisions are binding not only on the judiciary but also on the State, its officials, and all of its citizens. The State of Iowa by the mere fact of questioning the title of these landowners in patent disregard of their Nebraska titles is in violation of the Compact. This has been alleged in the Complaint (Par. XIX) and the determination of whether Iowa's conduct constitutes a violation of the Compact is placed in issue by the Com-

plaint. Iowa's statements on pages 2 and 3 of its Brief that it recognizes Nebraska titles are misleading because Iowa first concludes that certain land is Iowa land and from that conclusion, which in this case is fully unmerited, goes one step further and states that therefore the Boundary Compact is not involved. It then carries its reasoning another step by stating that, because it has determined that the land was always in Iowa and the Boundary Compact was not involved, the laws or public acts, records and judicial proceedings of Nebraska are therefore not relevant. Iowa apparently has not even attempted to ascertain whether the occupants of the lands in *Iowa* v. *Babbit* claim through conveyances or judicial proceedings in the State of Nebraska. At page 39 of the Complaint, Interrogatory 4 is quoted asking Iowa to state whether it is in possession of the land described in their petition and the extent and nature of such possession. Iowa's answer, quoted at pages 43-44 of the Complaint indicates that Iowa does not deem it possible for any claim of adverse ownership to be asserted against the State of Iowa and that it therefore ". . . has made no investigation concerning exactly who is or may be in possession of parts or portions of the disputed area adversely to plaintiff [Iowa] and plaintiff should not be required to make an investigation concerning possession merely for the purpose of answering interrogatories . . ." In Iowa's answer to another interrogatory in the case of *Iowa* v. *Babbit,* it admits in answer 21 at pages 48-49 of the Complaint that it has not interviewed residents in the vicinity of the land involved who possess information and knowledge concerning the formation of said land and this had not been accomplished at the time of Iowa's filing its petition in its State Court. Iowa's

answer 22 at pages 49-50 of the Complaint does, however, seem to admit that it is aware of various instruments on file in Nebraska concerning the land in controversy, but Iowa makes the bold statement that these instruments are "spurious, fictitious, and of no force or effect" in Iowa. The State of Nebraska contends that, under the terms of the Iowa-Nebraska Boundary Compact, it is incumbent upon the State of Iowa, as a party to the Compact, to investigate the status of this land as it might appear on the records of the State of Nebraska or the Nebraska county which borders on the Missouri River at that point because, under the Compact, Iowa agreed to recognize the Nebraska titles. Not only has Iowa failed to investigate into these titles, but, when they are called to its attention, it appears that it has unilaterally determined that the titles are spurious and fictitious and therefore it has made up its own rules as to lands along the Missouri River in complete disregard of the Compact. It is no answer to say that the Iowa Court can determine this because the rights guaranteed the citizens of Nebraska were guaranteed by the State of Iowa in the Compact.

In the *Schemmel* case, Iowa, in its reply (quoted at pages 94-95 of the Complaint) denied that the land was ever within the State of Nebraska and alleged that the ownership of lands on the Nebraska side of the main channel is irrelevant and immaterial to any issue in the case because the land in controversy did not form as accretions to said Nebraska lands or as accretions to that part of the bed of the Missouri River which was in the State of Nebraska at the time of its formation. Iowa also alleged that the common law of Nebraska is irrelevant and immaterial to any issue in

the case. It is clearly Iowa's position, as shown by paragraph 1 of its reply quoted on page 94 of the Complaint, that the Iowa-Nebraska Boundary Compact of 1943 had no effect on the land.

Its position is wholly untenable because, separate and apart from the implications of Sections 3 and 4 of the Iowa-Nebraska Boundary Compact, in any action concerning the title to lands in the bed of or adjacent to the Missouri River, the Iowa-Nebraska Boundary Compact must be taken into consideration insofar as Sections 1 and 2 are concerned. Section 1, which is quoted at pages 24 to 26 and 28 to 30 of the Complaint, provides that the middle of the main channel of the Missouri River, which is to constitute the new boundary "shall be the center line of the proposed stabilized channel of the Missouri River as established by the United States engineer's office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri River from Sioux City, Iowa to Rulo, Nebraska, . . . which maps are now on file in the United States engineer's office at Omaha, Nebraska, and copies of which maps are now on file with the Secretary of State of the State of Iowa and with the Secretary of State of the State of Nebraska." It should be pointed out that the channel was not completely stabilized at the time of the Compact and the Compact was referring to the proposed stabilized channel. This would apparently create an artificial line as the new boundary rather than the moving river boundary which was subject to change. The language "middle of the main channel" as used in the Compact would seem to be a line on the applicable maps equidistant from each bank of the proposed stabilized channel or the "designed channel". Since the deepest part of the main channel of the Missouri

River, where it constituted the boundary previously, varied from shore to shore, it would seem that the Compact resulted in the creation of a new boundary at almost every place along the entire border between Iowa and Nebraska. In light of this, it is difficult to understand how Iowa can take the position that the Compact is completely irrelevant to the actions which it is bringing, particularly since, in some of the actions, Iowa's surveys disregard the thread of the stream and run to the so-called middle of the designed channel or at least to what we would suppose Iowa considers to be the so-called middle of the designed channel. In the second Amendment to Iowa's Petition (Exhibit H, Complaint, page 57) in the *Babbit* case, Iowa has described the line of its survey as running along the Iowa-Nebraska Boundary, using what Iowa considers to be the center of the designed channel of the Missouri River. Nebraska claims in its Complaint that this line is erroneously placed by Iowa. Because of Iowa's action in the case of *Iowa* v. *Babbit* in extending its survey into Nebraska, there must be some dispute between the two States as to where this present boundary line is supposed to be.

Nebraska contends that Sections 3 and 4 were inserted in the Compact to protect private property owners and that Iowa, as a contracting party, bound itself not to question titles to these lands and Iowa waived and relinquished any right or claim of ownership over lands which prior to 1943 had been on the tax rolls of the State of Nebraska or its authorized governmental subdivisions or which have been occupied by private citizens, particularly the residents of Nebraska, who are in possession or had exercised incidents of owner-

ship over such land prior to or at the time of approval of the Iowa-Nebraska Boundary Compact.

The State of Iowa, by apparently taking advantage of the proposed boundary as Iowa understands the Compact and attempting to quiet title to lands up to what it considers to be the boundary as established by the 1943 Compact, is twisting the language and intent of the Compact in such a manner that it can be used to invoke the jurisdiction granted the Iowa courts by the provision in the Compact establishing the boundary while at the same time Iowa is ignoring those provisions of the Compact which were inserted to guarantee and safeguard the rights of individuals claiming ownership under Nebraska law. By taking this approach, Iowa can exert the entire resources of the State against individual land owners, one by one. The State can afford to fight these lawsuits in such a manner, but the individual landowner cannot. The tremendous and immediate cash sums involved in preparing and trying a lawsuit so complex as one of these is so burdensome that, even should the courts eventually rule in his favor, yet he shall have expended such tremendous sums in fees and expenses that he ultimately has lost. There is no way that he can win. The State of Nebraska contends that the language of Sections 3 and 4 was inserted to avoid such situations.

In addition, in the Iowa courts, the State of Iowa has taken the position that adverse possession cannot run against it, as shown in answer 4 to the interrogatories at page 43 of the Complaint, and we would assume that Iowa also takes the position that laches or estoppel cannot run against it because it is a State. Iowa is in a court of equity in the Iowa state courts

demanding equity, but evidently is not willing to abide by the general equitable principles in return. Iowa is taking the position that it is not bound by the acts of its instrumentalities or subdivisions, as illustrated by its answer to Interrogatory No. 22 at page 49-50 of the Complaint where Iowa states that a District Court action ordering the county officials of Mills County, Iowa to place certain instruments of record was not binding on the State, and as can be inferred by answer to Interrogatory No. 20 on pages 63-64 of the Complaint whereby the defendants in the *Babbit* case indicated that the Conservation Commission of the State of Iowa, under date of April, 1950, had disclaimed any ownership in the lands claimed by the defendants in that case.

The State of Iowa has also taken the position that only the Iowa common law is involved, as indicated by Iowa's answer to Interrogatory 9 on page 46 of the Complaint, wherein Iowa stated that its claim is "bottomed on the law of the State of Iowa which all parties to this case were, and are presumed to know and to have known.", and in the *Schemmel* case where Iowa alleged that the common law of Nebraska as to ownership of the beds of streams was irrelevant and immaterial (Complaint, p. 95). In Iowa's answer to Interrogatory No. 6 at page 44 of the Complaint, Iowa stated that the matter of possession of the land in dispute was irrelevant and immaterial for the "further reason that mere possession cannot have any significance in law or equity unless the same, from its inception, be coupled with color of title, and, in this case, none of the defendants have ever had any color of title." The requirement of "color of title" to assert an adverse possession to land is not existent in the Nebraska law and this evidently is another indication that the State of Iowa

is completely ignoring the laws of the State of Nebraska insofar as they might be pertinent and insofar as they might be in conflict with the laws of the state of Iowa.

One of the presumptions which exists in the Iowa law which would deserve re-examination in light of the action of the United States Army Corps of Engineers in completely re-designing the channel of the Missouri River, is that stated in *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N. W. 1097, 1098, in which the Iowa Court stated the presumption that:

> "The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa."

There can be no basis for such a presumption where changes are man-made, and especially where, as here, the changes were taken into consideration in arriving at the location of the boundary line in drafting the Compact. Such presumption, if allowed to persist, works to the detriment of owners of land ceded by Nebraska by clearly placing the burden of proof upon them to prove title to lands east of the designed channel. It is submitted that a statement from this Court destroying such presumption on the Missouri River is necessary and proper, as a necessary effect of the Compact.

The application of an authoritative doctrine would eliminate the type of result illustrated by the case of *Durfee* v. *Duke,* 375 U. S. 106. Here, all the claimants to certain bottom land along the Missouri River appeared in a quiet-title action in the Nebraska courts. The Nebraska courts found that the land in question was in Nebraska. Certain of the claimants then filed a suit in a Missouri court to quiet title to the same land, contending that the land was in Missouri. The

suit was removed to a Federal District Court and the District Court, after hearing the evidence, expressed the view that the land was in Missouri, although it held that all the issues had been adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was *res judicata,* and was therefore binding upon all the parties. The Court of Appeals for the Eighth Circuit reversed the Federal District Court and held that the Court was not required to give full faith and credit to the Nebraska judgment, and that normal *res judicata* principles were not applicable because the controversy involved land and the Court in Missouri was therefore free to retry the question of the Nebraska Court's jurisdiction over the subject. This Court held that the jurisdictional issues had been fully and fairly litigated by the parties and fully determined in the Nebraska Courts and the Federal Court in Missouri was correct in ruling that further inquiry was precluded.

Iowa's conduct in attempting to obtain title to lands along the Missouri River in its courts seems to be the type of situation which the framers of our Constitution envisaged and provided for. In discussing the principles which ought to regulate the constitution of the federal judiciary, The Federalist, No. LXXX stated:

> "The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their

citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government."

II.

Because the court clearly has jurisdiction over boundary disputes, it must also have jurisdiction over the construction and enforcement of compacts to settle boundaries. The entire purpose of the compact clause of the constitution would be defeated if such compacts, when entered into, could not be enforced by an action of one of the states being a party to the compact.

As stated in the Brief of the State of Nebraska in Support of its Motion for Leave to File Original Bill of Complaint, at page 2, this Court has repeatedly accepted original jurisdiction in matters involving disputes as to the location of the boundary between two States. However this Court has also recognized that the litigious solution is sometimes awkward and unsatisfactory and the Supreme Court has sometimes deemed it appropriate to emphasize the practical constitutional alternative provided by the compact clause. In *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 105-06, Mr. Justice Brandeis commented as follows:

". . . resort to the judicial remedy is never essential to the adjustment of interstate controver-

> sies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' *Washington* v. *Oregon,* 214 U. S. 205, 217, 218; *Minnesota* v. *Wisconsin,* 252 U. S. 273, 283. In *New York* v. *New Jersey,* 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

In our present situation, this is what the States attempted to do in 1943. They did so with the long history of controversy concerning the boundary including the case of *Nebraska* v. *Iowa,* 143 U. S. 359, decree at 145 U. S. 519. Even this decision did not permanently solve all the problems concerning the boundary between the States, though it did set forth certain guide lines as to the effect upon the boundary of certain action by the Missouri River. However, that even with these guide lines many problems continued to exist following that Decree and prior to the Iowa-Nebraska Boundary Compact of 1943 is evidenced by an article by an Iowa lawyer, Robert M. Underhill, in "The Instability of River Courses as State Boundary Lines With Reference to the Situation in Iowa", II IOWA B. REV. 11, 14 (1935):

> "Application of these court-made rules has caused friction between the states of Iowa and Nebraska over the dominion of some twenty thousand acres of land, including the Carter Lake district

> at Council Bluffs, Holman's Island in Monona County and Flower's Island in Woodbury County. The uncertainty arising out of the decision in *Iowa* v. *Nebraska,* supra, has been commented upon by the Iowa historian Erik McKinley Eriksson, in (1927) 25 Iowa Jour. Hist. and Pol. 233, 235: 'This decision settled for a time the boundary difficulties between Iowa and Nebraska, but the fickle Missouri River has refused to be bound by the Supreme Court decree. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion'. Where it has been possible to apply the decision awkward situations have resulted. For instance, East Omaha is legally in Iowa - in fact it is included in the corporation of Council Bluffs - yet it is located on the West side of the river in close proximity to Omaha, with which city its interests are much more closely united than with Council Bluffs'."

This was written in 1935, approximately eight years prior to the Compact. Although for many years the Compact apparently seemed to have accomplished its purpose, it now appears that it did not settle the dispute between Iowa and Nebraska as indicated by the allegations contained in the Complaint which Nebraska is requesting leave to file. Should the Court refuse to take jurisdiction now to consider the controversy which has developed over the meaning and enforcement of the Compact, it would certainly tend to discourage the states from entering into agreements which have previously been encouraged by this Court. This was recognized at an early date in our history by Mr. Justice Baldwin in the case of *Rhode Island* v. *Massachusetts,* 12 Pet. 657, in which the Supreme Court took jurisdic-

tion in a controversy over the boundary between Rhode Island and Massachusetts. The case included a contention that a line between the States had been previously agreed upon and the question of the validity and efficacy of prior agreements was brought into issue. Massachusetts objected to the jurisdiction of the Supreme Court. Mr. Justice Baldwin pointed out that, at the time of the adoption of the Constitution, there were existing controversies between eleven states respecting their boundaries which had arisen under their respective charters and had continued from the first settlement of the Colonies. He then stated at pages 724-726:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation;' no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution,

when given, left the states as they were before, as held by this court in *Poole* v. *Fleeger,* 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s.p. 1 Ves. sen. 448-9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims* v. *Irvine,* 3 Dall. 425-54; and in *Marlatt* v. *Silk,* 11 Pet. 2, 18; *Burton* v. *Williams,* 3 Wheat. 529-33, &c.

"In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress, for its consent, its giving its consent, and the action of this court upon them; it is most manifest, that by universal consent and action, the words 'agreement' and 'compact', are construed to include those which relate to boundary; yet that word boundary is not used. No one has ever imagined, that compacts of boundary were excluded, because not expressly named; on the contrary they are held by the states, congress and this court, to be included by necessary implication; the evident consequence resulting from their known object, subject-matter, the context, and historical reference to the state of the times and country. No such exception has been thought of, as it would render the clause a perfect nullity for all practical purposes; especially, the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts; not to prevent the states from settling their own boundaries, so far as merely affected

their relations to each other; but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure.

"Every reason which has led to this construction, applies with equal force to the clause granting to the judicial power jurisdiction over controversies between states, as to that clause which relates to compacts and agreements; we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them; nor refuse to include them within one general term, when they have uniformly been included in another. Controversies about boundary are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession, to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known, that some tribunal can decide

on the right, it is most probable that controversies will be settled by compact.

"There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist. For these reasons, we cannot be persuaded, that it could have been intended to provide only for the settlement of boundaries, when states could agree; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement."

The Court then discussed the rules and principles adopted by it from a very early period including the principle at page 744: "That one state may file a bill against another, to be quieted as to the boundaries of disputed territory, and this court might appoint commissioners to ascertain and report them; since it is monstrous to talk of existing rights, without correspondent remedies." The Court then stated, 12 Pet. 657, 744-45:

"In the following cases, it will appear, that the course of the court on the subject of boundary, has been in accordance with all the foregoing rules; let the question arise as it may, in a case in equity, or a case in law, or a civil or criminal nature; and whether it affects the rights of individuals, or states, or the United States, and depends on charters, laws, treaties, compacts or cessions which relate to boundary. In *Robinson* v. *Campbell,* the suit involved the construction of the compact of boundary between Virginia and North Carolina, made in 1802; and turned on the question, whether

> the land in controversy was always within the original limits of Tennessee, which the court decided. 3 Wheat. 213, 218, 224 . . . In *Burton* v. *Williams,* the case involved a collision of interest between North Carolina, Tennessee and the United States, under the cessions by the former to the two latter, in which this court reviewed all the acts of congress and of the two states on the subject, and the motives of the parties, to ascertain whether the *casus foederis* had ever arisen. The case also involved the construction of the compact between Tennessee and the United States, made in 1806. The court use this language in relation to it: 'The members of the American family possess ample means of defence, under the constitution, which we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is taken away.' It is difficult to imagine, what other means of defence existed in such a case, unless those which the court adopted, by construing the acts recited, as the contracts of independent states, by those rules which regulate contracts relating to territory and boundary. 3 Wheat. 529, 533, 538 . . ."

In *Virginia* v. *Tennessee,* 148 U. S. 503, the Court exercised jurisdiction over a dispute between the States of Virginia and Tennessee as to their true boundary. Virginia claimed that an agreement between the two states entered into in 1803 constituted a compact establishing the boundary which was binding whereas Tennessee claimed that the compact was not valid and prayed to have the compact set aside and annulled and have a new boundary line run. Mr. Justice Field, in language assuming the jurisdiction of the Court, stated, 148 U. S. at 504:

> "This is a suit to establish by judicial decree the true boundary line between the States of Virginia

> and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harrassing conflicts."

The Court considered that the line run was accepted by both States as a satisfactory settlement of the controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. It then stated at page 515: ". . . As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the true, certain and real boundary line between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained and enforced by the governments of both." This compact contained provisions as to claims and titles to land derived from the government of the other state and certainly the duty of each state to respect, maintain and enforce the agreed boundary also was applicable to the other provisions of the compact. This is an affirmative duty although the State of Iowa refuses to recognize that obligation.

As the settlement of complex boundary problems by compact has been encouraged by the Court, it would

only seem logical that any disagreement between the States concerning the construction of such compacts should be decided by this Court in an action between the States as contracting parties. It is only natural that a state may want to protect certain rights of its citizens when land is being transferred to another jurisdiction and, if the land is transferred subject to those conditions, the granting state should have the satisfaction of knowing that any such provisions can be enforced by it. If, by transferring jurisdiction over land, the State is thereby merely subjecting that land transferred to the unilateral determination by the other State of the rights in and to that land, then it would not seem likely that such controversies would ever be settled by compact. If, however, the States do insist upon and include provisions designed to protect the rights of landowners as a condition to the establishment of a new boundary, and if the State has confidence that these provisions can be enforced by it, then it is much more probable that controversies will be settled by compact.

In the present case, the State of Nebraska, by entering into the Compact with the State of Iowa, thereby placed a great deal of land within the jurisdiction of the State of Iowa. As a contracting party, the State having placed its citizens in the situation which now exists, should be in a position whereby it can guarantee that the safeguards which were included in the Compact will be adhered to by the other State. Nebraska is interested in the welfare and comfort of its citizens and this is being threatened on a large scale by the State of Iowa's conduct. As was stated in *Missouri* v. *Illinois*, 180 U. S. 208 at 241, a case involving an injunc-

tion by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to restrain them from permitting sewage to be discharged into the Mississippi River:

> "It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.
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> * * *
>
> "That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

Although under different facts, in our situation likewise, the individual defense of each case by the landowners along the Missouri River is inadequate for many reasons. In part, there is the tremendous expense involved in complex cases of this type. There are the difficulties existent in any suit by a State against an individual with the doctrines of sovereign immunity which seem to apply. This is accentuated by the passage of time, during which witnesses have died, landmarks may have been destroyed, and evidence may have disappeared. By waiting as long as it has to

institute these actions, the State of Iowa has gained a tremendous advantage over the individuals. In *Virginia* v. *Tennessee,* 148 U. S. 503, Mr. Justice Field said at page 523:

> "In the case of *Rhode Island* v. *Massachusetts,* 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary'."

In some of the pending cases brought by Iowa to acquire land along the border, witnesses which would be of assistance to defendants' claims have died or are of such an age that their memory is not sufficiently reliable that it is advisable to call them to testify. Since the States themselves refused to determine the exact line of the disputed boundary prior to the entry into the Compact of 1943, it does not seem fair or logical that the Compact should be so construed that individual landowners must now, approximately twenty years later, be confronted with the burden to prove that fact as against one of the States. It is Nebraska's position that it did not, in entering into the Compact,

thereby place its citizens in such an unfair position. Should this Court refuse jurisdiction of the case, it would thereby be so construing the Compact.

In addition, Iowa in its brief and in its pleadings in the cases of *Iowa* v. *Babbit* and *Iowa* v. *Schemmel* has clearly taken the position that it considers the only issue as being where the land formed. This ignores the doctrine which is well established in the law that land may become a part of a State as the result of long and continuous exercise by that State of dominion and jurisdiction over it with the acquiescence of the other State as indicated in the case of *Michigan* v. *Wisconsin,* 270 U. S. 295, 308, which involved a controversy between Michigan and Wisconsin over boundary wherein the Court said:

> "That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well . . . (citing authority) . . ., and *a fortiori* to the quasi-sovereign States of the Union. 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. *Indiana* v. *Kentucky,* 136 U. S. 479, 509, *et seq.*; *Virginia* v. *Tennessee,* 148 U. S. 503, 522-524; *Louisiana* v. *Mississippi,* 202 U. S. 153; *Maryland* v. *West Virginia,* 217 U. S. 1, 40-44; *Rhode Island* v. *Massachusetts,* 4 How. 591, 639; *Missouri* v. *Iowa,* 7 How. 660, 677; *New Mexico* v. *Colorado,* 267 U. S. 30, 40-41."

The present chaos and confusion which exists along the Iowa border is a matter of such great concern to

the State of Nebraska that this Court should take jurisdiction in order to settle the legal principles involved and the effect of the boundary compact both upon the boundary between Iowa and Nebraska, and the titles to land along that boundary and the rights of each State to the use of the Missouri River and the ownership of the bed of the Missouri River.

If Iowa is correct in its contention that the only issue is where the land formed, then it would seem that truly a state of chaos would exist along the Missouri River in light of the differences in law between Iowa and Nebraska concerning the rights of the States in and to navigable waters and the terms of the Compact. It must be conceded by Iowa that there have been many avulsions, both manmade and natural, along the Missouri River which in each instance would not have changed the boundary but have left it in the abandoned channel. In these situations, where the river had shifted entirely into Nebraska the entire bed of the stream would belong to the Nebraska riparian owner under Nebraska law with an easement for public navigation and Iowa would have had no claim whatsoever in its rights to the river except through Nebraska law. Thus, when Iowa agreed in the Compact that titles good in Nebraska would be good in Iowa, when the line was shifted to the middle of the main channel as shown on the Corps of Engineer maps, and assuming that that designed channel coincided with where the river might be now, then Iowa would not have any rights to the bed of the stream at that place, nor would it have any right to the use of the stream except through Nebraska law. On the other hand, where the river had shifted entirely into Iowa, Iowa would claim not only the abandoned channel but also the new channel. Consequently, when

the Compact was adopted and each State agreed that titles in the other State would be recognized, assuming that each State would live up to its commitment, under Iowa's present theory, it would mean that on certain areas of the river Iowa would own the entire bed, on other areas of the river Iowa would have no claim whatsoever to the bed and the rights of the public under Iowa law would not be clear and on other areas of the river where the deepest part of the designed channel happened to coincide exactly with the former channel, Iowa would only own from the high bank to the middle of the deepest or navigable channel. This would seem to create a state of utter confusion along the Missouri River and one which is in need of a solution.

III.

This is a controversy between the states of Nebraska and Iowa and its determination should not require that all individuals presently being injured or threatened with injury by the action of the state of Iowa as a result of its breach of the compact be joined as indispensable parties to the action.

Iowa has taken the position in its brief that the parties to the specific cases referred to in the State of Nebraska's complaint have not been joined in this action and that thus there is no jurisdiction by reason of lack of indispensable parties. Iowa has also claimed in its brief that there is no controversy between Nebraska and Iowa and that Nebraska's primary purpose is to protect its citizens against alleged violations of their rights (Pages 8 and 9 of Iowa's brief).

Admittedly, Nebraska is interested in the rights of its citizens and is attempting to protect those rights.

However, in this situation, the rights were created by the Compact and the jurisdiction over the land was transferred subject to the safeguards included in the Compact intended for the protection of these rights. Without provisions to protect the rights of the individual landowners, the Compact would never have been entered into by the State of Nebraska. The State has a clear interest because, in the exercise of its constitutional rights as a state it has entered into a Compact which affected the rights of many of its citizens. As a contracting party, a state should have a right to insert any safeguards which it deems necessary. Should the other state then violate those provisions, the contracting state has been injured by the very fact of the unilateral action breaching and abrogating the Compact.

There have been private actions between individual citizens to determine titles to land wherein the jurisdiction of the Court depended upon the location of the land or a provision in a grant or cession of land by one state including safeguards of the titles in the lands being granted. However, this should not preclude the states themselves from enforcing their own contracts. In *Rhode Island* v. *Massachusetts, supra,* Massachusetts claimed people inhabiting the disputed territory ought to be made parties, as their rights are affected. In response to this contention, the court said at page 748:

> "It is said, that the people inhabiting the disputed territory, ought to be made parties, as their rights are affected. It might with the same reason be objected, that a treaty or compact settling boundary, required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void; as the authority to make it was derived from the legislative power

only. The same objection was overruled in *Penn* v. *Baltimore*; and in *Poole* v. *Fleeger*, this court declared, that an agreement between states, consented to by congress, bound the citizens of each state. There are two principles of the law of nations, which would protect them in their property: 1st. That grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right. 12 Wheat. 600-1. 2d. That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred. 8 Wheat 589; 12 Ibid 535; 6 Pet. 712; 7 Ibid 857; 8 Ibid 445; 9 Ibid 133; 10 Ibid 330, 718 &c."

Thus it is not feasible that every party owning land along the boundary be made a contracting party to a compact and it is equally not feasible that all these parties be joined in an action to enforce the compact when one state is violating it.

Discussion of Cases Cited by Defendant

An examination of the cases cited by the defendant in opposition to the Motion to File the Bill of Complaint reveals that these cases are not relevant to the jurisdictional issue involved for either or both of the following reasons:

(a) No interpretation of a compact or agreement was involved;

(b) The cases are prematurely cited for the reason that the Court had already permitted the filing of the Complaint and determination was had after an examination of the issues on their merits.

Plaintiff will discuss these cases only briefly so as to illustrate the points made above. In the discussion

that follows, the page number in parentheses following the citation is a reference to the defendant's brief.

Massachusetts v. *Missouri,* 308 U. S. 1, (p. 6) involved an attempt to invoke the jurisdiction of the Court to determine which of two states had the right to impose transfer, succession or inheritance taxes. The Court stated the rationale of no justiciable controversy thus, 308 U. S. at 15-16:

> "It is not shown that the tax claims of the two states are mutually exclusive. On the contrary, the validity of each claim is wholly independent of that of the other and, in the light of our recent decisions, may constitutionally be pressed by each state without conflict in point of fact or law with the decision of the other."

The court also distinguishes between reciprocal legislation and a compact or treaty, and mere reciprocal legislation "cannot be regarded as conferring upon Massachusetts any contractual right".

In *Arkansas* v. *Texas,* 346 U. S. 368, (p. 6) the Court decided to take jurisdiction in a suit by Arkansas to enjoin the State of Texas from interfering with a charitable contribution from a Texas corporation for the construction of a hospital floor in the Arkansas State Medical Center. No compact was involved. The dissent of Mr. Justice Jackson, with three Justices joining, would have denied the motion for leave to file but recognized that:

> "If a controversy between two states concerns the construction of a compact, *Dyer* v. *Sims,* 341 U. S. 22, . . . this Court must, of course, determine their rights *inter sese.*" 346 U. S. at 372-73.

Oklahoma ex rel West v. *Gulf, C. & S. F. R. Co.*, 220 U. S. 290 (p. 6), has no application to the case at bar. That was a case of a state's suing individual (corporate) defendants to enjoin commission of alleged criminal acts within the state.

Louisiana v. *Texas*, 176 U. S. 1, (p. 6), is cited in support of the statement that jurisdiction will not be executed in the absence of necessity. However, note the language at 176 U. S. 22:

> "But in order that a controversy between states, justiciable in this Court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

The clear implication here is that a justiciable controversy does exist where there is a compact or agreement.

Missouri v. *Illinois*, 200 U. S. 496 (p. 6), was a case where the Court found the evidence on the merits of the case insufficient to support the Bill of Complaint. In its previous opinion, *Missouri* v. *Illinois*, 180 U. S. 208, the filing of the bill was sustained and a demurrer overruled. This was a case of preventing and enjoining a nuisance and involved no compact or agreement.

New York v. *New Jersey,* 256 U. S. 296 (p. 6), was another case in which the evidence was examined and found to be insufficient. Once again the citation is premature. *North Dakota* v. *Minnesota,* 263 U. S. 365 (p. 7), was another case where the bill was dismissed for failure to adduce sufficient evidence to show that defendants caused the injury complained of.

Connecticut v. *Massachusetts,* 282 U. S. 660 (p. 7), was a decision on the final determination of the case on its merits. The decision adopts the findings of the special master that the complainant had failed to sustain the burden of proof.

Iowa v. *Illinois,* 147 U. S. 1 (p. 8), does not hold for the statement for which cited. There Iowa was claiming the right to tax bridges and the Court merely held that the boundary between Iowa and Illinois was the center of the main navigable channel of the Mississippi River.

Smith v. *Maryland,* 18 How. 71 (p. 8), involved only the question of the proper exercise of power of the state to regulate the taking of oysters.

California v. *Southern Pacific Co.,* 157 U. S. 229 (p. 9), was a case in which a *decree* was sought against a person not a party to the law suit.

Minnesota v. *Northern Securities Co.,* 184 U. S. 199 (p. 9), was a suit between a state and a foreign corporation and has absolutely no application to the case at bar.

The cases which Iowa has cited for the proposition that a deed can convey title only to land actually

owned by a grantor and a grantee thereunder takes no greater title under a deed than the grantor had (p. 9-10) are not applicable at this stage. The question of whether Nebraska had sufficient interest in the lands in question to "deed" them is one of those at the root of the proceedings and can only be determined after a hearing on the merits.

CONCLUSION

The State of Nebraska respectfully contends that its Complaint discloses the existence of an actual dispute between Nebraska and Iowa; that it shows said States to be the real parties in interest; that it discloses a justiciable controversy; and that leave should be granted the State of Nebraska to file its Complaint herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October —, 1964, I served a copy of the foregoing Supplemental Brief in Support of Motion for Leave to File Bill of Complaint by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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