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**In The**  
**Supreme Court of the United States**

**October Term, 1964**

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**No. 17, Original**

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**STATE OF NEBRASKA, PLAINTIFF,**

**v.**

**STATE OF IOWA, DEFENDANT.**

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**AMENDED ANSWER AND COUNTERCLAIM  
OF DEFENDANT,  
STATE OF IOWA,  
TO COMPLAINT OF PLAINTIFF,  
STATE OF NEBRASKA**

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## INDEX

	PAGE
AMENDED ANSWER .....	1
COUNTERCLAIM .....	10
EXHIBITS:	
"A"—Petition, <i>Burkett v. Krimlofski</i> .....	19
"B"—Decree, <i>Burket v. Krimlofski</i> .....	24
"C"—Decision of Supreme Court of Nebraska, <i>Burket v. Krimlofski</i> .....	29
"D"—Petition, <i>Krimlofski v. Matters</i> .....	40
"E"—Decree, <i>Krimlofski v. Matters</i> .....	47
"F"—Decision of Supreme Court of Nebraska, <i>Krimlofski v. Matters</i> .....	53
Order Granting Leave to File Amended Answer and Counterclaim .....	62
Proof of Service .....	63

## CITATIONS

### CASES:

<i>Nebraska v. Iowa</i> , 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892) .....	1, 13
<i>Burket v. Krimlofski</i> , 167 Neb. 45, 91 N. W. 2d 57 (1958) .....	12
<i>Krimlofski v. Matters</i> , 174 Neb. 774, 119 N. W. 2d 501 (1963) .....	13

### CONSTITUTION AND STATUTES:

Art. IV, Sec. 1, Constitution of the United States .....	6, 16
Iowa-Nebraska Boundary Compact of 1943.. .....	2, 3, 4, 5, 6, 7, 8, 10, 14, 15, 16, 17, 18



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STATE OF NEBRASKA, PLAINTIFF,  
v.  
STATE OF IOWA, DEFENDANT.

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**AMENDED ANSWER**

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The State of Iowa, by Lawrence F. Scalise, Attorney General, substitutes this Amended Answer for its previous Answer to the Complaint of Plaintiff, State of Nebraska, as follows:

I. Admitted by decision of this Court, entered the 1st day of February, 1965.

II. Admitted.

III. Admitted.

IV. Admitted as concerns the area involved in *Nebraska v. Iowa*, No. 4, Original, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892).

V. The State of Iowa admits the statements and averments contained in Paragraph V with the exception of the concluding averment, "and it became almost

impossible to determine the exact boundary between Iowa and Nebraska in many places at any given time in the past", which averment is specifically denied and proof of such averment is demanded.

VI. Admitted.

VII. Admitted. This averment demonstrates that the Iowa-Nebraska boundary has been validly established and that further definition of same is not required. Nor would any other definition be competent in the absence of an averment and finding that the Iowa-Nebraska Boundary Compact of 1943 is invalid. No averment of invalidity has been made.

VIII. Admitted.

IX. Denied, and the State of Iowa demands proof thereof. The State of Iowa admits that for several years it has been quieting title to riparian lands it owns in Iowa along the Missouri River, in actions involving Iowa citizens in Iowa courts and, on occasion, Nebraska citizens in Iowa courts. No action of the State of Iowa has violated either the provisions or the spirit of the Iowa-Nebraska Boundary Compact of 1943, since: (1) No action has been taken or claim of ownership asserted in respect to any lands ceded by Nebraska to Iowa by the compact; (2) No action has been taken or claim of ownership asserted in respect to lands that ever were within the State of Nebraska; (3) Some of the land in respect to which the State of Iowa has brought a quiet title action or has asserted informally a claim of ownership was not in existence in 1943, but formed within the State of Iowa by reason of the Missouri River's convolutions subsequent to that time, becoming, on the facts of its formation and applicable law, the property of the State of Iowa.

X. Admitted except that the averment, "The State of Iowa, in prosecuting the previously mentioned quiet

title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River from the high water mark to the thread of the stream and of state ownership of abandoned river channels of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact and without regard to the state in which such land was formed and the fact surrounding the formation and occupancy or control over said land.”, which averment is specifically denied and strict proof demanded thereof.

XI. Admitted.

XII. Denied. The State of Iowa further answers that the averments are irrelevant and immaterial for the reason that all of the lands in respect to which the State of Nebraska alleges an exercise of sovereignty always have been within the State of Iowa; and that exercises of sovereignty, even if proved, are probative neither of title to lands nor of the jurisdiction in which they lie. The State of Iowa specifically denies that the State of Nebraska ever has possessed any of the lands in dispute in *State of Iowa v. Babbit*, or that the State of Iowa has acquiesced in the alleged possession. For further answer, the State of Iowa alleges that it has exercised jurisdiction and sovereignty over the land.

XIII. Denied. Proof of the relevant and material averments is demanded.

XIV. Denied. Proof of the averments is demanded.

XV. Admitted except that the averments, “Plaintiff is informed and believes that the boundary line between Nebraska and Iowa at the time of the Iowa-Nebraska Boundary Compact was to the east of the

land described in said Petition because of prior avulsive action by the Missouri River which resulted in a change in the channel, but not in a change of the boundary between the states. Plaintiff is informed and believes that the channel of the Missouri River as it existed in 1943 at the time of the effective date of the Iowa-Nebraska Boundary Compact was entirely within Nebraska at such place and that, under the terms of the Iowa-Nebraska Compact, the State of Iowa recognized that it had relinquished all claim to the ownership of land located in the bed of the Missouri River at that place. In the 1930's the United States Army Corps of Engineers, by dredging and the construction of dikes and revetments, shifted the channel of the Missouri River in such manner that, if it should be determined that the then main channel of the Missouri River did in fact constitute the boundary between Iowa and Nebraska at that place, the boundary did not change, leaving land described in said Petition in the State of Nebraska, though located on the easterly side of the Missouri River. Such land was ceded to Iowa by Nebraska under the provisions of the Iowa-Nebraska Boundary Compact.", which averments are denied and strict proof demanded.

XVI. Denied. Proof of the averments is demanded. The State of Iowa further answers that the State of Iowa acquired its ownership of that part of the bed of the Missouri River which then lay within the State of Iowa when the State of Iowa was admitted to the Union in 1846. As the Missouri River changed its bed after 1846, the State of Iowa acquired title to all beds which the river occupied from time to time within the State. Ownership in the State never ceased. This ownership continued after the land in question arose above ordinary high water mark because the land formed as an accretion to the state owned bed of the river. The State of Iowa further answers that if any taxes have



been paid to the State of Iowa on the lands in question, they have been infinitesimal.

XVII. Denied. Proof of the relevant and material averments is demanded. The State of Iowa further answers Paragraph XVII of Plaintiff's complaint by answering that it is already the owner of lands about which the Plaintiff specifically complains, and the individuals asserting claims to said lands are wrongfully, without authority and unlawfully converting the natural resources thereon to their own use and benefit. That the State of Iowa has been injured by the removal of timber, other natural resources and the use of land which it holds in trust for the benefit of all its citizens. That the encroachments are without the authority or permission of the State of Iowa.

XVIII. Denied, for the reason that the lands in dispute in *State of Iowa v. Babbit* and in *State of Iowa v. Schemmel* are not lands which were ceded by Nebraska to Iowa by the 1943 compact, these lands never having been within the State of Nebraska at any time, and for the reason that actions by the State of Iowa in respect to these lands are not in any sense attempts to "obtain" title but are actions solely to quiet title to lands before and since the 1943 compact owned by the State of Iowa.

XIX. The State of Iowa denies that prior to and at the time of the adoption of the Iowa-Nebraska Compact the boundary line between Iowa and Nebraska had not been determined. It alleges, on the contrary, that the boundary line had been determined in law and in fact, and that it was the thalweg of the Missouri River except where the river had moved by avulsion. Defendant admits that, in many locations, the pre-compact boundary line has not been established by survey or monumented, but defendant denies that it is "almost impossible" to do so and alleges, on the

contrary, that it was and is entirely possible to do so, and to do so at a cost not disproportionate to the value of lands, the determination of whose ownership might be aided thereby. Defendant admits that the Boundary Compact of 1943 provided no unique procedure for identifying specific parcels of land ceded by one state to the other or for placing their descriptions on record in the state to which they were ceded, but denies that existent "machinery" was inadequate to accomplish these ends. Defendant admits that the purpose of the Iowa-Nebraska Boundary Compact of 1943 was to establish the boundary line between the states as the center of the stabilized channel of the Missouri River, but denies that Sections 3 and 4 of the compact were meant solely to protect titles of individual citizens of Iowa and Nebraska. Defendant answers further that the compact was meant to protect all titles, without respect to the citizenship of the titleholder, and without respect to whether the titleholder was an individual or a governmental body. Defendant denies that the compact was meant to preclude inquiry into whether titles to lands ceded were good in the ceding state, or that it was meant to vest good title in those who invoked indicia of title in one state as to lands never before or after the 1943 compact within their state or as to lands that came into being subsequent to 1943 not within their state. The State of Iowa further denies that it has unilaterally abrogated or is unilaterally abrogating the Iowa-Nebraska Boundary Compact, or that it has violated the provisions of Article IV, Section 1, of the Constitution of the United States.

XX. Denied. The first three sentences are immaterial and irrelevant. The State of Iowa further answers that the Iowa-Nebraska Boundary can be accurately located from the alluvial plain maps (Scale 1" equals 2,640') referred to in the Iowa-Nebraska

Boundary Compact, and that it is informed and believes that United States Army Corps of Engineers construction maps (Scale 1" equals 400'), which show the river alignment in conformance with the alignment on the alluvial plain maps, are available.

XXI. Denied. Strict proof of the averments is demanded. The averments further contain conclusions of law to which no answer is required, but to the extent to which they are relevant and material, the State of Iowa demands proof thereof.

WHEREFORE, Defendant, State of Iowa, prays:

I.

THAT THE COURT ADJUDGE AND DECREE that the Iowa-Nebraska Boundary Compact of 1943 is valid, and settled the boundary line between the respective states for the purpose of jurisdiction, and that any issues of private ownership of said lands between the State of Iowa and private citizens be resolved by the Courts of competent jurisdiction of the respective states or the proper federal forum exclusive of this Honorable Court.

II.

THAT THE COURT ADJUDGE AND DECREE that the State of Iowa is only required to recognize those valid titles, mortgages and other liens that are good in Nebraska, and that the asserted titles to the specific lands in question are not "good" in Nebraska or of the nature to be recognized as valid under Section 3 of the Iowa-Nebraska Boundary Compact of 1943.

III.

THAT THE COURT ADJUDGE AND DECREE that the State of Iowa is the owner of the lands about

which the Plaintiff specifically complains, and further adjudge and decree that the actions of the State of Iowa in protecting its natural resources in the cases of *State of Iowa v. Schemmel* and *State of Iowa v. Babbit* do not constitute an abrogation of the Iowa-Nebraska Boundary Compact of 1943 or a violation of Article IV, Section 1, of the Constitution of the United States.

IV.

THAT THE COURT ADJUDGE AND DECREE that this is merely a proceeding by the State of Nebraska on behalf of a few of its citizens and not assertive of any interests of the State itself, and that no adjudication of ownership claims in land asserted by individuals not parties to this action is possible, their presence being indispensable.

V.

THAT THE COURT ADJUDGE AND DECREE that the Iowa-Nebraska Boundary Compact of 1943 and particularly Section 3 thereof did not purport to create, alter, convey or determine ownership rights in land along or in proximity to the Missouri River and its abandoned river channels.

VI.

THAT THE COURT ADJUDGE AND DECREE that the prayer for an injunction restraining the State of Iowa, its officers, agents and servants be denied and that the State of Iowa be permitted to continue exercising its rights and performing duties in protecting its natural resources and regulating its state owned lands, and that the court affirm its faith in the Iowa Courts to do justice to all parties regardless of their state of residence.

VII.

THAT THE COURT ADJUDGE AND DECREE that the Bill of Complaint filed by the State of Nebraska be dismissed and that the Court make such further orders as may be necessary to enforce its decrees; and that the Defendant may have such other and further relief as to which in equity and good conscience it may be entitled.

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**COUNTERCLAIM**

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The State of Iowa, by Lawrence F. Scalise, Attorney General, adopts each and every allegation, denial and admission of its Amended Answer to the Complaint of Plaintiff, State of Nebraska, and adds thereto the following:

**COUNTERCLAIM**

By way of counterclaim arising out of the transaction or occurrence which is the subject matter of Plaintiff's Complaint, Defendant State of Iowa states:

I.

The Iowa-Nebraska Boundary Compact of 1943 fixed a boundary line between the two states. In addition, the Compact, as ratified by the 56th General Assembly of the State of Nebraska on May 7, 1943, contained the following provisions pertinent to the subject matter of this counterclaim:

“Sec. 2. The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Nebraska.

“Sec. 3. Titles, mortgages, and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgment shall be accorded full force and effect in Nebraska.

“Sec. 4. Taxes for the current year may be levied and collected by Iowa, or its authorized governmental subdivisions and agencies, on lands ceded to Nebraska and any liens or other rights accrued or accruing including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section; Provided, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.”

## II.

On October 13, 1954, Earl H. Burket and Harriet C. Burket filed a petition in the District Court of Washington County, Nebraska, captioned “*Earl H. Burket and Harriet C. Burket, Plaintiffs, v. R. E. Krimlofski et al, Defendants,*” which petition was docketed in Docket Q at Page 240 and numbered Case No. 5586. A copy of this petition is attached hereto and marked “Exhibit A.”

## III.

On December 27, 1956, the District Court of Washington County, Nebraska, issued its decree in *Burket v. Krimlofski*, a copy of which is attached hereto and

market "Exhibit B." On January 2, 1958, defendants' Motions for a New Trial were overruled, and on January 7, 1958, defendants filed their Notice of Intent to Appeal to the Supreme Court of Nebraska. On July 3, 1958, the Supreme Court of Nebraska filed its opinion reversing the trial court and remanding the case to the District Court. Its directions were to render a judgment quieting title in plaintiffs to lands (as described) which had formed by accretion to the west bank of the Missouri River, and to quiet title in defendant Krimlofski to lands (as described) which had formed by accretion to a former island in the Missouri River. The dividing line between plaintiffs' and defendant Krimlofski's accretion lands was defined as the thread of a dried-up chute of the Missouri River, a chute which had been the main channel of the river until the U.S. Army Corps of Engineers caused it to move from the west side to the east side of the island in the late 1930's. It was found that Krimlofski had acquired ownership of the island by adverse possession. A copy of the opinion of the Supreme Court of Nebraska in *Burket v. Krimlofski* is attached hereto and marked "Exhibit C." The citation is 167 Neb. 45, 91 N.W.2d 57 (1958).

#### IV.

On April 19, 1955, Richard E. Krimlofski filed a petition in the District Court of Washington County, Nebraska, captioned "*Richard E. Krimlofski v. Helen M. Matters, et al, Defendants*," which petition was docketed in Docket Q at Page 299 and numbered Case No. 5645. On August 6, 1961, six years later, Richard E. Krimlofski filed an amended petition in *Krimlofski v. Matters*, a copy of which is attached hereto and marked "Exhibit D."

On March 12, 1962, the District Court of Washington County, Nebraska, rendered its decree in *Krim-*



*lofski v. Matters*, a copy of which is attached hereto and marked "Exhibit E." On appeal, the Supreme Court of Nebraska on February 11, 1963, found as before that Krimlofski had acquired ownership by adverse possession of that same island involved in *Burket v. Krimlofski*, and quieted title in him as to accretions north of those disputed in the *Burket* case. A copy of that opinion (174 Neb. 774, 119 N.W.2d 501) is attached hereto and marked "Exhibit F."

## V.

The evidence adduced in both *Burket v. Krimlofski* and *Krimlofski v. Matters* confirmed that: (1) The island, ownership of which in both cases was found to lie in Krimlofski, had formed east of the main channel of the Missouri River; (2) The island had remained east of the main channel until late in the 1930's, when the U.S. Army Corps of Engineers by means of dikes and other structures had diverted the main channel from the west to the east side of the island in the process of aligning and stabilizing the channel; (3) The former main channel between the island and the Nebraska bank was made to shrivel into a chute and dry up, and (4) It was by the foregoing processes that the island was caused to affix itself to Nebraska riparian lands.

## VI.

The Supreme Court of the United States determined the boundary line between the states of Iowa and Nebraska in the case of *Nebraska v. Iowa*, 143 U.S. 359 (1892). It ascertained that the boundary line was the center of the main channel of the Missouri River; that the boundary line moved with the main channel when the channel's movement was caused by the gradual process of accretion; but that the boundary line remained in the center of a channel when the river aban-

doned that channel by avulsion. The court's decree, establishing the boundary line which remained in effect until the Compact of 1943, is found at 145 U.S. 519 (1892).

## VII.

The island and accretions thereto, ownership of which was disputed in *Burket v. Krimlofski* and *Krimlofski v. Matters*, formed within the State of Iowa and remained within the State of Iowa until jurisdiction over it was ceded to Nebraska by the Iowa-Nebraska Boundary Compact of 1943. Movement of the main channel of the Missouri River to the east of the island was artificially caused and left the island undestroyed. This action by the U.S. Army Corps of Engineers did not move the boundary line from the channel west of the island. The island was owned by the State of Iowa before 1943, and the island and its accretions, now a part of the Nebraska mainland, are owned by the State of Iowa today. The State of Nebraska and its courts violated the Compact of 1943 by ignoring its applicability. In *Burket v. Krimlofski*, the Nebraska Supreme Court said:

“Defendants contend that the island was originally in Iowa and now by compact between the states is in Nebraska. That situation does not enter into the decision here.”

## VIII.

In causing the main channel of the Missouri River to move from the west to the east side of the island involved in *Burket v. Krimlofski* and *Krimlofski v. Matters*, the U.S. Army Corps of Engineers was proceeding to channelize the river in conformance with a stabilization plan. This work began in the 1930's. The states of Nebraska and Iowa predicated a Compact in 1943 on an assumption of stabilization. Because World War II diverted funds and manpower,

control of the river suffered, and in places the river cut new channels. Work was resumed after the war and dams were constructed upstream to control the flow of water. The river could not be said to have been stabilized for all practical purposes until the recent past, however. Stabilization caused a drying up of lands on the east, or Iowa, side of the river, which historically had been wet and marshy for most of the length of the river, making approach from the Iowa side difficult. Historically, land on the west, or Nebraska side, of the river has been higher and drier, making possible the construction at an early date of towns, roads, and other installations along the river. This also made it possible for Nebraskans to reach islands in the river with facility. Some Nebraskans who claimed islands in the river were trespassers; that is, they owned no riparian lands and had no ownership under Nebraska law of islands which formed by accretion to the river bed. Krimlofski, a defendant in *Burket v. Krimlofski* and plaintiff in *Krimlofski v. Matters*, trespassed on the island whose formation and development was considered in those two cases.

## IX.

Defendant is informed and believes that Nebraska courts have quieted title in Nebraska claimants to lands along, or arising from the bed of the Missouri River, in a substantial number of cases since 1943. Defendant is informed and believes that in many cases Nebraska courts have invoked and applied Nebraska's law of adverse possession in determining ownership of these lands, without determining: (1) Whether the lands formed within the State of Iowa; (2) Whether the lands were the subject of cession by reason of the 1943 Compact; (3) Whether the lands were owned in Iowa prior to cession by the State of Iowa or Iowa citizens; (4) Whether the lands were within the pro-

tection of Sections 2, 3 and 4 of the Iowa-Nebraska Boundary Compact of 1943; (5) Whether, as a consequence of the foregoing inquiries, it was obligatory to invoke and apply Iowa's laws in determining title to these lands, and (6) Whether titles to ceded lands were good in Iowa. In *Burket v. Krimlofski* and *Krimlofski v. Matters*, the State of Nebraska violated the Compact of 1943 by failing to recognize that title to the disputed island, and accretions thereto, was vested in the State of Iowa. Defendant is informed and believes that in other cases since 1943, the number of which is yet unknown to defendant, the State of Nebraska has violated the Compact by failing to recognize titles good in Iowa as to ceded lands owned in Iowa before cession by the State of Iowa or Iowa citizens.

X.

The State of Nebraska, in quieting title in its citizens to lands owned by the State of Iowa in *Burket v. Krimlofski* and *Krimlofski v. Matters*, violated Article IV, Section I, of the Constitution of the United States, which provides that: "Full faith and credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State."

WHEREFORE, the defendant, State of Iowa, prays the Court to:

I.

Adjudge and decree that the State of Nebraska consented by the Iowa-Nebraska Boundary Compact of 1943 to the ownership in Nebraska by the State of Iowa of lands owned by the State of Iowa prior to July 12, 1943, jurisdiction and sovereignty over which were ceded by Iowa to Nebraska.

II.

Adjudge and decree that the State of Nebraska violated the Iowa-Nebraska Boundary Compact of 1943 in the cases of *Burket v. Krimlofski* and *Krimlofski v. Matters* by failing to find that the island in dispute, and accretions thereto, had formed within the State of Iowa and had remained within the State of Iowa until July 12, 1943.

III.

Adjudge and decree that the State of Nebraska violated the Iowa-Nebraska Boundary Compact of 1943 in the cases of *Burket v. Krimlofski* and *Krimlofski v. Matters* by failing to find that the island in dispute, and accretions thereto, has been ceded by the State of Iowa to the State of Nebraska.

IV.

Adjudge and decree that the State of Nebraska violated the Iowa-Nebraska Boundary Compact of 1943 in the cases of *Burket v. Krimlofski* and *Krimlofski v. Matters* by applying its law of adverse possession in determining title to lands ceded by the State of Iowa to the State of Nebraska; by failing to invoke and apply the laws of Iowa to determine title to such lands; and by failing as a consequence to recognize title good in Iowa to the island in dispute and accretions thereto.

V.

Adjudge and decree that the Iowa-Nebraska Boundary Compact of 1943 requires both states to determine titles to ceded lands by determining whether titles to such lands were good in the ceding state, and that the compact has been violated by the State of Nebraska in each case since 1943 in which its courts have failed to determine whether ceded lands were the sub-

ject matter of such cases or have failed to invoke and apply Iowa law after such a determination.

VI.

Adjudge and decree that the State of Iowa retains the ownership in Nebraska of segments of abandoned channels of the Missouri River still covered by water where the abandonment of those channels was caused by diversionary works of the U.S. Army Corps of Engineers, or natural avulsion, before July 12, 1943.

VII.

Adjudge and decree that the State of Nebraska violated Article IV, Section 1, of the Constitution of the United States by quieting titles in Nebraska citizens to lands owned by the State of Iowa and ceded by Iowa to Nebraska by reason of the Iowa-Nebraska Boundary Compact of 1943.

VIII.

Retain jurisdiction of this matter to make such further orders as may be necessary to enforce its decrees, and grant the defendant such other and further relief as to which in equity and good conscience it may be entitled.

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Attorneys for Defendant

EXHIBIT 'A'

IN THE DISTRICT COURT OF  
WASHINGTON COUNTY, NEBRASKA

Doc. Q, No. 5586

EARL H. BURKET and  
HARRIET C. BURKET,

Plaintiffs,

vs.

R. E. KRIMLOFSKI,

First and Real Name Unknown, .....  
KRIMLOFSKI, First and Real Name Unknown, his  
wife, and all persons having or claiming any interest  
in: Part of Government Lot 3, in the West Half of  
the Southwest Quarter, Section 34, Township 17,  
Range 13, Washington County, Nebraska, described  
as follows: Beginning at the Northeast corner of the  
Southeast Quarter of Section 33, Township 17, Range  
13, thence running in a southerly direction along the  
east line of Section 33, Township 17, Range 13, 782.5  
feet; thence turning an angle  $71^{\circ}7'$  to the left and con-  
tinuing along this line in an easterly direction a dis-  
tance of 436.3 feet; thence turning an angle of  $2^{\circ}1'$  to  
the right and continuing along this line a distance of  
315.0 feet; thence turning an angle of  $98^{\circ}41'$  to the  
left and continuing along this line a distance of 203.5  
feet; thence turning an angle of  $76^{\circ}54'$  to the right  
and continuing along this line a distance of 29.0 feet  
to the point on the west bank of the Missouri River;  
thence turning an angle of  $100^{\circ}15'$  to the left and  
continuing along the west bank of the Missouri River  
a distance of 240.0 feet to a point on the west bank  
of the Missouri River; thence turning an angle of  $5^{\circ}45'$   
to the left and continuing along the west bank of the  
Missouri River a distance of 628.0 feet to a point on  
the west bank of the Missouri River and on the north  
line of the Southeast Quarter of Section 33, Township  
17, Range 13 produced; thence in a westerly direction  
along the north line of the Southeast Quarter of Sec-  
tion 33, Township 17, Range 13, produced a distance  
of 555.1 feet to the point of beginning, containing

14.2 acres more or less; and all accretions thereto, Real Names Unknown,

Defendants.

### PETITION

Come now the plaintiffs and for cause of action against the defendants allege:

1. That the plaintiffs are the owners, as joint tenants with right of survivorship, of the following described real estate situated in the County of Washington, State of Nebraska, to wit:

Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle  $71^{\circ}7'$  to the left and continuing along this line in an easterly direction a distance of 436.3 feet; thence turning an angle of  $2^{\circ}1'$  to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of  $98^{\circ}41'$  to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of  $76^{\circ}54'$  to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of  $100^{\circ}15'$  to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of  $5^{\circ}45'$  to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a dis-



tance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto;

as shown on Exhibit A attached hereto and made a part hereof. That the plaintiffs and their predecessors in title have been in continuous possession of the above described property for a period exceeding twenty years last past, and have been in continuous, open, notorious and exclusive adverse possession of said real estate for the period aforesaid.

2. That the defendants R. E. Krimlofski and ..... Krimlofski, his wife, whose first and real names are unknown to the plaintiffs, claim some right, title or interest in and to the above described real estate and particularly the accretions thereto; that the basis, nature and extent of the claims of said defendants Krimlofski are unknown to the plaintiffs but are subject, junior and inferior to the paramount fee simple title of the plaintiffs in and to said real estate and all accretions thereto; that such claim, interest, right, title or lien as asserted by said defendants Krimlofski does not appear of record in or by their respective names in Washington County, Nebraska.

3. That there are persons who claim to have some interest in, right or title to or lien upon said property hereinabove described and shown as Exhibit A, together with accretions thereto, and that the ownership of, interest in, right or title to, or lien upon such property of such persons does not appear of record in or by their respective names in Washington County, Nebraska; and plaintiffs, after diligent investigation and inquiry, are unable to ascertain and do not know the names or whereabouts, if in this state, or the residences of such persons, and they are designated herein as all persons having or claiming any interest in said

particularly described real estate as shown on Exhibit A, together with accretions thereto.

4. Plaintiffs allege that none of the defendants to this action, as designated in the caption hereof and as particularly identified and referred to herein, have any right, title, interest, lien, claim or demand, of any nature whatsoever, in and to said real estate; and any interest which any of them may have had in said real estate has long been barred by the Statute of Limitations and by the adverse possession of the plaintiffs and their predecessors in title. And in this connection it is noted that by the decree of the District Court of Washington County, Nebraska, in Case No. 3833, and which decree was entered on January 11, 1932, title to the property herein particularly described, together with other properties, was quieted by said decree in Francis Tadmire Parker, who, on the 23rd day of January, 1932, conveyed the property here in question to the plaintiff Earl H. Burket who has been in possession and has occupied said premises continuously therefrom.

5. That by virtue of the facts set out above, there is cast a cloud upon the title of plaintiffs to said real estate, particularly with respect to the accretions thereto; that unless plaintiffs' title against the defendants and each of them is quieted and established, plaintiffs will be caused irreparable injury; that plaintiffs have no adequate remedy at law. With respect to that portion of plaintiffs' lands referred to and described herein as "all accretions thereto", plaintiffs allege and say that on the 23rd day of January, 1932, when the plaintiff Earl H. Burket obtained title to the property particularly described herein and shown on Exhibit A, the then west bank of the Missouri River was at the location shown and indicated on Exhibit A, which exhibit is the survey and engineer's drawing of said property as of the date January 23, 1932; that

since January 23, 1932, the Missouri River has slowly and gradually receded to the east accreting lands to the riparian lands of plaintiffs, and that at the present time the west bank of the Missouri River is some distance east of the location of said west bank as shown on Exhibit A, and that said accretion lands thereby created and accreted to the lands of the plaintiffs are really the lands here in controversy, and said lands are accretion lands to the lands of the plaintiffs and the property of said plaintiffs by reason thereof, as said accretion lands extend from the west bank of the Missouri River as of January 23, 1932, to the present west bank of said Missouri River and between the lines as extended to the present west bank of the Missouri River, which lines represent the north line of plaintiffs' property and the south point thereof as determined and established by the description herein above set forth and shown on Exhibit A attached hereto and made a part hereof.

WHEREFORE, plaintiffs pray that their title to said real estate be quieted and confirmed in them, as joint tenants with right of survivorship, as against each of said named defendants and against all persons having or claiming any interest in said real estate, real names unknown; and that each of them be enjoined forever from asserting any claim or interest in said real estate or any portion thereof; and for such other and further relief as equity may require.

EARL H. BURKET and  
HARRIET C. BURKET, Plaintiffs

SPIER, ELLICK & SPIRE

By: CLARENCE SPIER

Their Attorney

712 Farm Credit Bldg.

Omaha, Nebraska

Atlantic 4133

STATE OF NEBRASKA }  
COUNTY OF DOUGLAS }ss.

Earl H. Burket, being first duly sworn, on oath states that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Petition, and that the facts therein stated are true, as he verily believes.

EARL H. BURKET

Subscribed in my presence and sworn to before me this  
4 day of October, 1954.

LENOIR MATTER,  
Notary Public.

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EXHIBIT 'B'

IN THE DISTRICT COURT OF  
WASHINGTON COUNTY, NEBRASKA

Doc. Q 240, No. 5586

EARL H. BURKET and  
HARRIET C. BURKET,

Plaintiffs,

vs.

R. E. KRIMLOFSKI,

First and Real Name Unknown, ..... KRIM-  
LOFSKI, First and Real Name Unknown, his wife,  
and all persons having or claiming any interest in:  
Part of Government Lot 3, in the West Half of the  
Southwest Quarter, Section 34, Township 17, Range  
13, Washington County, Nebraska, described as fol-  
lows: Beginning at the Northeast corner of the South-  
east Quarter of Section 33, Township 17, Range 13,  
thence running in a southerly direction along the east  
line of Section 33, Township 17, Range 13, 782.5 feet;  
thence turning an angle  $71^{\circ}7'$  to the left and continu-  
ing along this line in an easterly direction a distance  
of 436.3 feet; thence turning on angle of  $2^{\circ}1'$  to the  
right and continuing along this line a distance of 315.0  
feet; thence turning an angle of  $98^{\circ}41'$  to the left and  
continuing along this line a distance of 203.5 feet;  
thence turning an angle of  $76^{\circ}54'$  to the right and con-  
tinuing along this line a distance of 29.0 feet to the  
point on the west bank of the Missouri River; thence

turning an angle of  $100^{\circ}15'$  to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of  $5^{\circ}45'$  to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto, Real Names Unknown,

Defendants.

### DECREE

Now on this 27th day of December, 1956, the Court, being fully advised in the premises, finds that due and legal service of process has been made upon all the defendants in the manner and form provided by law; that this matter came on for hearing upon the Petition of the plaintiffs, trial was had, evidence having been adduced, and arguments of counsel heard, and this Court, being fully advised in the premises, finds generally in favor of the plaintiffs and against each and all of the defendants herein.

The Court further finds that the allegations contained in plaintiffs' petition are true and that the plaintiffs are the lawful owners in fee simple of the following described real estate, to wit:

Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle  $71^{\circ}7'$  to the left and continuing

along this line in an easterly direction a distance of 436.3 feet; thence turning an angle of  $2^{\circ}1'$  to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of  $98^{\circ}41'$  to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of  $76^{\circ}54'$  to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of  $100^{\circ}15'$  to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of  $5^{\circ}45'$  to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto, said accretions presently described as: Beginning at the Southeast corner of tax lot number 5 in Section 34, Township 17, Range 13, Washington County, Nebraska, thence  $N88^{\circ}46'15''$  E a distance of 1150.00 feet to a point; thence  $N21^{\circ}09'30''$  E a distance of 474.80 feet to a point; thence  $N23^{\circ}09'15''$  E a distance of 299.15 feet to a point; thence  $N41^{\circ}32'00''$  E a distance of 120.64 feet to a point; thence  $N89^{\circ}55'00''$  W a distance of 1751.28 feet to a point; thence  $S17^{\circ}08'45''$  E a distance of 628.00 feet to a point; thence  $S11^{\circ}23'45''$  E a distance of 240.00 feet to point of beginning. Said land being tax lot number 11 and containing 26.76 acres;

and that with respect to that portion of plaintiffs' lands referred to and described herein as accretion land, since plaintiffs obtained title on the 23rd day of January 1932, the Missouri River has slowly and gradually receded to the east accreting lands to the

riparian lands of the plaintiffs, and that at the present time the west bank of the Missouri River is some distance east of the location of said west bank at the time plaintiffs took title on January 23, 1932, and that said accretion lands thereby created and accreted to the lands of the plaintiffs are accretion lands to the lands of the plaintiffs and the property of said plaintiffs by reason thereof as said accretion lands extend from the west bank of the Missouri River as of January 23, 1932, to the present west bank of said Missouri River and between the lines as extended to the present west bank of the Missouri River, which lines represent the north line of plaintiffs' property and the south point thereof as determined and established by the description hereinabove set forth; and that plaintiffs and their predecessors in title have been in continuous possession of the above described property for a period exceeding twenty years last past and have been in continuous, open, notorious and exclusive adverse possession of said real estate for the period aforesaid under claim of title in fee simple and that plaintiffs are entitled to a decree quieting their title thereto as against all of the defendants.

THEREFORE, IT IS ORDERED AND DECREED BY THE COURT that the plaintiffs are the lawful owners in fee simple of the following described real estate, to wit:

Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle  $71^{\circ}7'$  to the left and continuing along this line in an easterly direction a distance

of 436.3 feet; thence turning an angle of  $2^{\circ}1'$  to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of  $98^{\circ}41'$  to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of  $76^{\circ}54'$  to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of  $100^{\circ}15'$  to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of  $5^{\circ}45'$  to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto, said accretions presently described as: Beginning at the Southeast corner of tax lot number 5 in Section 34, Township 17, Range 13, Washington County, Nebraska, thence  $N88^{\circ}46'15''$  E a distance of 1150.00 feet to a point; thence  $N21^{\circ}09'30''$  E a distance of 474.80 feet to a point; thence  $N23^{\circ}09'15''$  E a distance of 299.15 feet to a point; thence  $N41^{\circ}32'00''$  E a distance of 120.64 feet to a point; thence  $N89^{\circ}55'00''$  W a distance of 1751.28 feet to a point; thence  $S17^{\circ}08'45''$  E a distance of 628.00 feet to a point; thence  $S11^{\circ}23'45''$  E a distance of 240.00 feet to point of beginning. Said land being tax lot number 11 and containing 26.76 acres;

that title to said real estate be and it hereby is quieted in the plaintiffs against the claims or apparent claims of all of the defendants or any and each of them, of whatever kind or character, and that the defendants and each of them and all persons claiming by, through or under them, be and they hereby are forever en-



joined from claiming or asserting any interest or ownership of any kind or character or from interrupting plaintiffs' use, enjoyment or possession of or in the above described real estate.

BY THE COURT

JAMES T. ENGLISH

Judge

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EXHIBIT 'C'

EARL H. BURKET and  
HARRIET C. BURKET,

Appellees,

vs.

R. E. KRIMLOFSKI, first and real name unknown,  
Mina Krimlofski, his wife,

Appellants.

No. 34395

Supreme Court of Nebraska

July 3, 1958

Action for a decree quieting title in plaintiffs of certain accretion and reliction lands in the Missouri River. Decree for plaintiffs and defendants' motion for new trial was denied in the District Court, Washington County, English, J., and the defendants appealed. The Supreme Court, Simmons, C. J., held that the evidence established existence of the island and adverse possession to it by the defendants and that the parties were entitled to a decree as indicated in the opinion.

Reversed and remanded with directions.

Heard before SIMMONS, C. J., and MESSMORE,  
YEAGER, WENKE, and BOSLAUGH, JJ.

SIMMONS, Chief Justice.

In this action plaintiffs seek a decree quieting title in them to certain accretion and reliction lands. The action was against defendants Krimlofski and all other persons having or claiming an interest in the lands involved.

Defendant R. E. Krimlofski answered claiming title by adverse possession to the land involved. He prayed for a decree quieting title in him.

The trial court rendered a decree for the plaintiffs. Defendants filed a motion for a new trial, in part on the ground of newly discovered evidence. A hearing was held on this motion. Defendants offered, and there were received in evidence, maps and aerial photographs.

The trial court denied the motion and defendants appeal. We reverse the judgment of the trial court and remand the cause with directions.

The cause is here for trial de novo. Both parties here treat the exhibits, introduced on the motion for a new trial, as in evidence and each relies on them. The plaintiffs contend that they were not properly newly discovered evidence; that a hearing on that ground should not have been had; and that the exhibits should not have been admitted. Plaintiffs do not cross-appeal. We consider the exhibits as evidence for our consideration.

Defendants assign error in the refusal of the trial court to admit two photographs in evidence. Each was cumulative of other evidence in the record. It is not necessary to further consider the assignments.

Defendants further complain of error in admitting on cross-examination testimony of Mr. Krimlofski as to a conversation had with Mr. Burket obviously for the purpose of exploring the possibility of a settlement.

The evidence possessed no controlling influence on the decision here made. This assignment will not be considered further in this opinion.

Without dispute plaintiffs in 1932 became the owners of a tract of land referred to as Tax Lot 5, lying west of the Missouri River with the east bank of the land described in the deed as "along the west bank of the Missouri River." The deed also described "And all accretions thereto." The evidence shows that there was then a county road along the west bank of the river and at that time was a few feet therefrom. Defendants contend that whatever accretions attached to the land attached to the county road and that they belong to the county and not the plaintiffs. There is no evidence in the record showing the title of the county to the roadway other than that which points toward an easement based on use. We do not consider the contention of controlling merit, and put it aside.

Defendants' claim of title rests on a claim of adverse possession to an island in the Missouri River. Defendants are husband and wife. This island first appeared as a sand bar in 1926. The evidence shows that they took possession of this sand bar in 1926, planting willows on it and sinking anchor weights so as to dock boats on it. They built duckblinds on it and fished from it. By 1927 willows were growing on it. In a few years it became timbered with cottonwoods, willows, and underbrush. They then conceived the idea of making a wild life sanctuary of it. They put up "No Trespassing," "No Hunting," and similar signs. Whenever others came upon it they claimed ownership of it, ordered them off, and make their control effective. When others built hunting blinds on the island, they destroyed them. In later years they policed the property to put out and prevent fires. They granted permission to friends to use the island. At the time of the trial

this island was heavily timbered, with trees going to a height of 40 or 50 feet in parts of it.

Without reciting the evidence in detail, we deem it sufficient to establish the existence of the island and adverse possession to it as such under the rules last stated in *Worm v. Crowell*, 165 Neb. 713, 87 N.W.2d 384: The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

The established rule is: Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. *Briard v. Hashberger*, 107 Neb. 199, 185 N.W. 430. See *Higgins v. Adelson*, 131 Neb. 820, 270 N.W. 502.

We come then to the question of fact as to whether the accretion and reliction land involved here belongs to the defendants as owners of the island or to plaintiffs as owners of the mainland.

The land in dispute extends directly east from the plaintiffs' land.

Defendants contend that the island was originally in Iowa and now by compact between the states is in Nebraska. That situation does not enter into the decision here. Nor are we concerned with the question of the navigability of the Missouri River. The rule is: "\* \* \* the rights of riparian owners upon the Missouri River to land formed by accretion are the same as if the river were not navigable, and \* \* \*

the common law applies in full force." *Kinhead v. Turgeon*, on rehearing, 74 Neb. 580, 109 N.W. 744, 746, 7 L.R.A., N.S., 316, 121 Am.St.Rep. 740. See, also, *Worm v. Crowell*, *supra*.

The rules also are: Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made of contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. *Ziembra v. Zeller*, 165 Neb. 419, 86 N.W.2d 190. Accordingly we will refer to the lands herein involved as accretion land without making an effort to determine where accretion ends and reliction begins.

Reference will be made to the work of the U.S. Army Engineers in controlling the Missouri River and its effect on the creation of the problem here presented. The rule as to that is: The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. *Ziembra v. Zeller*, *supra*.

We go now to the evidence as to the accretion involved.

We have referred above to the situation that the evidence shows existed in the river, in 1926 and following, showing the development of the island. The

evidence is that in the early years the Missouri River had two channels, one on the Iowa side to the east of the island, and one on the Nebraska side touching within a few feet of the border of plaintiffs' land.

We discuss the exhibits chronologically. Exhibit 16 is a picture offered by defendants taken on the island in 1927 showing small willows growing thereon. This picture was excluded on the ground that it was not within the issues of the case. Parol evidence of that fact had been admitted. We deem its exclusion an obvious error and consider it here.

Exhibit 15 is a picture offered by defendants showing the existence of the island in the river, with water beyond to the east. This was taken from a point on the mainland to the immediate north of plaintiffs' land.

Exhibit 6 is an exhibit offered by plaintiffs. It is a map prepared by the U.S. Army Engineer's office in September 1930. This map shows a large island with the legend "willows" on it. The southern end lies to the east of plaintiffs' land. It shows the main channel of the river to the west of the island and touching the plaintiffs' land to the immediate east of the county road.

Exhibit 2 is a map offered by plaintiffs based on a survey made in 1931. It shows the Missouri River touching plaintiffs' land to the immediate east of the county road.

Exhibit 10 is a photograph taken in January 1935, and offered by plaintiffs. It shows the high bank of the river close to the road and ice in front where plaintiffs' son is skating.

Exhibit 9 is a picture taken in October 1935 offered by plaintiffs taken from a cabin site on a high point on their land. It is a picture looking down from an

elevation on the river bank. It shows the main channel of the river in the immediate foreground and the island beyond with trees growing upon it and water between the island and the Iowa mainland.

Exhibit 22 is a map offered by the defendants prepared by the U.S. Army Engineer's office on October 29, 1936. It shows a large island in the river east and north of the plaintiffs' land with an indication of sand bars accreted thereto extending down to and opposite plaintiffs' land. It shows the main channel of the river touching plaintiffs' land as before described. It also shows dike piling and revetments completed across the main channel some distance to the north. This fixes the first definite date of the commencement of control work by the U.S. Army Engineers.

Exhibit 23, offered by defendants, is a map prepared by the U.S. Army Engineer's office dated May 5, 1937. It shows additional dikes completed across the main channel of the river to the north. It shows the island as before but not as distinct as in the previous exhibit.

Exhibit 24 is a map offered by the defendants prepared by the U.S. Army Engineer's office dated October 21, 1938. It shows additional dikes and revetments completed across the former main channel of the river. It shows a larger island to the north but nothing directly to the east of plaintiffs' land. It shows a channel to the west of the island and touching plaintiffs' land as above described.

Exhibit 25 is a like map offered by defendants dated May 1, 1939. It shows the main channel to the east of the large area of land located where the island began.

Exhibit 26 is a like map offered by the defendants dated March 20, 1940. It shows the main channel of the river to the east of the island with the island ex-

tending down to and opposite plaintiffs' land with an open water area to the west of the island.

Exhibit 7 is a like map offered by the plaintiffs dated March 29, 1940. It shows a large island extending down to and almost opposite plaintiffs' land with an open water area to the west.

Exhibit 27 is an aerial photograph offered by defendants taken August 15, 1941, by the U.S. Department of Agriculture. It shows the main channel of the river to the east of a large island that extends down to the east of plaintiffs' land and about half the distance of their eastern boundary. It shows an open channel from the north to the south running the full length of the island to its west. This is now described in the evidence as a chute. It shows definitely for the first time a narrow accretion area, wider at the south, attached to plaintiffs' land.

Exhibit 8 is a U.S. Army Engineer's map dated 1946-1947, offered by plaintiffs. It shows the main channel of the river fully established to the east of the land here involved. To the west is a solid area of land bearing the legend "willows." This extends for the full distance and beyond the boundaries of plaintiffs' land extended to the east. It shows the chute between this land and the mainland to the west.

Exhibit 28 is an aerial photograph offered by defendants taken by the U.S. Department of Agriculture dated July 31, 1949. This shows the island now extended downstream well beyond plaintiffs' land. It shows the main channel of the river to the east. It shows the channel of the chute, then largely dry land. It shows the accretion to plaintiffs' land, above mentioned, to the west of the chute channel, and vegetation growth both to the west and east of the chute channel.

In 1954 the defendants fenced in the land on the west



side. The exact location of the fence is not determinable. The discovery of the fence by the plaintiffs seems to have precipitated this controversy.

Exhibit 29 is an aerial photograph offered by defendants taken by the U.S. Department of Agriculture on June 7, 1955. It shows the main channel of the river to the east of the area involved with vegetation-covered land extending to the west to the road on plaintiffs' land. The old outline of the bed of the chute, then dry land as described by witnesses, is clearly visible with greater growth of vegetation on a narrow strip of land to the west attached to plaintiffs' land and to the east of the chute bed also.

Exhibit 18, a photograph offered by the defendants, taken in 1956, shows this vegetation to be trees of a substantial size.

The parol testimony supports the story shown by the exhibits. We will not extend it by the recital of it more than has been done.

It is clear that an island formed in the river, in 1926 and following, between the two large channels of the river. As recited herein defendants established title to the island by adverse possession. Beginning then, as a result of the work of the Army Engineers, the main channel of the river was consolidated and flowed to the east of the island. Accretions began to form on the island and over the years its boundaries were extended to the west and south by that process, leaving for a time a channel west of the island, herein referred to as the chute. Accretions began to form then to the east of plaintiffs' land to the west of the chute and these attached to plaintiffs' land. Finally as a result of reliction the chute also became dry land.

We conclude that the accretion land east of the chute attached to and became a part of the island in defendants' ownership. The accretion land to the west

of the chute attached to and became a part of plaintiffs' land.

The Supreme Court of North Dakota recently stated the applicable rule for determining the dividing line, in *Hogue v. Bourgois*, N.D., 71 N.W.2d 47, 49, 54 A. L.R.2d 633, as follows: “\* \* \* Where the accretion commences with the shore of the island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.”

In *Roll v. Martin*, 164 Neb. 133, 82 N.W.2d 34, we found “no fault” with a contention that the owners of land were entitled to all accretions to the thread of the closed channel as a matter of right.

Accordingly we find that plaintiffs are entitled to a decree quieting title in them to the accretion land here involved attached to their land from its old bank, east to the thread of the chute channel as it existed before it became dry land by reliction as shown on exhibit 29.

The defendants are entitled to a decree quieting title in them to the accretion land here involved which attached to the island which lies generally east of the thread of the chute channel as shown by exhibit 29 as it existed before it became dry land by reliction.

The plaintiffs advance the contention here that defendants must prove adverse possession, not alone to the island, but also to the land attached thereto by accretion and reliction. Such a rule, of course, would nullify any rights resting on accretion or reliction. In *Roll v. Martin*, *supra*, we found no fault with the contention that one who owned an island was not required to take possession of accretion land in order to establish his claim thereto as a matter of right unless

someone actually had established the right thereto by adverse possession. Plaintiffs' evidence falls short of proving adverse possession to the accretion land.

Plaintiffs further argue that one of the reasons for the riparian right rule is to assure the owner of riparian lands continued access to the water of a stream and accordingly he has the right to have his land follow the stream so as to preserve his riparian right of access to the water.

Plaintiffs rely on a statement found in *City of St. Louis v. Rutz*, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941. That case in turn relies on *Mulry v. Norton*, 100 N.Y. 424, 3 N.E. 581. A reading of these cases reveals that the court was there dealing with the rights of conterminous owners of mainland. The problem here presented does not seem to have been involved.

The rule is: Land, to be riparian, must have the stream flowing over it or along its border. *Stratbucker v. Junge*, 153 Neb. 885, 46 N.W.2d 486.

The fact here is that plaintiffs' land, although once riparian, is no longer riparian and it does not now have those rights that once attached to the land.

A somewhat comparable case is that of *Wholey v. Caldwell*, 108 Cal. 95, 41 P. 31, 30 L.R.A. 820, 49 Am. St.Rep. 64. There land that was once riparian, by natural forces became non-riparian. The owner claiming riparian rights asserted the right to go upon the land of others and to restore the water to its former channel. The court held that when the flow was lost, the riparian rights were lost with it.

We find no merit in the contention.

The judgment of the trial court is reversed and the cause remanded with directions to render a judgment quieting title to each of the parties to the land involved as above indicated.

If the parties cannot agree as to the location of the common boundary line, then the court is directed to receive evidence limited to that issue and to determine the exact location by metes and bounds of the thread of the chute as it appears on exhibit 29 and to decree that such line is the boundary line.

Reversed and remanded with directions.

CARTER, J., participating on briefs.

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EXHIBIT 'D'

IN THE DISTRICT COURT OF WASHINGTON  
COUNTY, NEBRASKA

Case No. 5645, Doc. Q, Page 299

RICHARD E. KRIMLOFSKI,

Plaintiff,

vs.

HELEN M. MATTERS, a single person; Jacob J. Jobst and Annie Jobst, his wife; Bernard J. Jobst and Emma S. Jobst, his wife; Martha Uerling, a single person; and all persons having or claiming any interest in and to the following described real estate, to-wit: Beginning at a point 399.4 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, said point being on the Quarter-Quarter line, thence North  $13^{\circ}30'$  West, a distance of 148.5 feet, thence North  $50^{\circ}45'$  East, a distance of 1089.2 feet, thence North  $61^{\circ}$  East, a distance of 1003.2 feet to government meander corner between Sections 27 and 34, Township 17 North, Range 13 East of the 6th P.M. Washington County, Nebraska, thence East on said Section line a distance of 1525 feet to a point on the West bank of the Missouri River, thence Southwesterly along the West bank of the Missouri River a distance of 1450 feet to a point on the North line of Lot 2, Section 34, Township 17 North, Range 13

East of the 6th P.M. extended, thence West on said line to the place of beginning, all being in the North Half of the North Half of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska.

Defendants.

### AMENDED PETITION

COMES NOW the plaintiff and for cause of action against the defendants alleges:

#### I.

The plaintiff is the owner in fee simple of part of Tax Lot 10 and original Gov't lot 1 lying East of the center of a dry chute described as follows:

Beginning at a point on the North line of Section 34 T17N R13E, 895.6 feet East of the Northwest corner of said Section 34 and assuming the North line of said section to be due East; thence continuing East a distance of 2582.80 feet to the West bank of the Missouri River; thence following the meander of said West bank, S 9°27'30" W a distance of 307.4 feet; thence S 15°03'30" W a distance of 294.7 feet; thence S 23°59' W a distance of 800.0 feet to a point on the E-W  $\frac{1}{4}\frac{1}{4}$  line of Section 34; thence West along the  $\frac{1}{4}\frac{1}{4}$  line (Said  $\frac{1}{4}\frac{1}{4}$  line being parallel with the North line of Section 34) a distance of 2587.5 feet to the center of a dry chute; thence N 19°04' E along said center of a dry chute a distance of 1396.62 feet to the point of beginning. Lying in the N $\frac{1}{2}$  of the N $\frac{1}{2}$  of Section 34 T17N R13E of the 6th P.M. in Washington County, Nebraska, and containing 81.58 acres more or less.

#### II.

The plaintiff acquired title to said land as follows: In 1926, plaintiff took possession of an island in the Missouri River, which island occupied a part of the above described area. Said island was separated from

the land on the west bank of the Missouri River by the main channel of the Missouri River. As a result of the work of the Army Engineers commencing in 1937, the main channel of the Missouri River was consolidated and made to flow east of said island. Accretions formed on said island and over the years, its boundaries were extended to the west and south by the process of accretion and reliction, being finally separated from accretions to Government Lot 1 in Section 34, and accretions to the Northeast Quarter of the Northeast Quarter of Section 33, Township 17 North, Range 13 East of the 6th Principal Meridian in Washington County, Nebraska, and accretions to other riparian land to the south thereof, only by a chute which was the remnant of the former channel of the Missouri River. The land described in paragraph 1 hereof, is that part of said island which is now in the North Half of the North Half of said Section 34, together with accretions thereto, bounded on the west by the center line of said chute. The plaintiff maintained actual, open, notorious, exclusive, continuous and adverse possession of the land described in paragraph 1 hereof under claim of ownership from 1926, or its subsequent appearance, until 1955, when the defendant, Martha Uerling, first asserted a claim to said land, and plaintiff has continued to the present time to hold such possession, subject only to the disturbance thereof by the defendant, Martha Uerling, commencing in 1955.

### III.

On December 15, 1949, after the plaintiff had perfected his title to the above described land by more than 10 years adverse possession as aforesaid, the defendant, Martha Uerling, purchased land from Emma M. M. Jacobus, a widow, who executed and delivered to said defendant a deed describing said land as follows:

Northeast Quarter of the Northeast Quarter ( $NE\frac{1}{4}NE\frac{1}{4}$ ) of Section Thirty-three (33), and Government Lot One (1) in Section Thirty-four (34) all in Township Seventeen (17) North, Range Thirteen (13) East of the 6th P.M., in Washington County, Nebraska,

which deed was filed December 18, 1949, and recorded in Book 67, Page 485 of the Deed Records of Washington County, Nebraska.

#### IV.

Prior to 1926, the Missouri River had eroded away the Northeast corner of the Northeast Quarter of the Northeast Quarter of said Section 33, and had eroded away all of said Government Lot 1, except a very small triangular piece of land in the Southwest corner thereof which was the remainder of original Government Lot 1 after western movement of Missouri River, described as follows:

Beginning at the  $\frac{1}{4}\frac{1}{4}$  corner South of the Northwest corner of Section 34 T17N R13E; thence East along the  $\frac{1}{4}\frac{1}{4}$  line South of the North line of said Section 34 a distance of 220.0 feet; thence N  $21^{\circ}48'$  W a distance of 592.36 feet to a point on the West line of said Section 34; thence South along the aforesaid line a distance of 550.0 feet to the point of beginning. Lying in the  $NW\frac{1}{4}$  of the  $NW\frac{1}{4}$  of Section 34 T17N R13E of the 6th P.M., in Washington County, Nebraska, and containing 1.39 acres more or less.

Subsequently, the Missouri River added accretions to said Southwest corner of Government Lot 1, in Section 34 and to the Northeast Quarter of the Northeast Quarter of said Section 33, which accretions are bounded on the East by the center of the chute which is the West boundary line of the land described in paragraph 1 hereof, and which accretions, insofar as they are within the boundaries of said Section 34, are

part of Government Lot 1 and part of Tax Lot 10 lying West of the center line of a dry chute described as follows:

Beginning at the Northwest corner of Section 34 T17N R13E; thence East along the North line of said Section 34 a distance of 895.6 feet to the center line of a dry chute; thence S 19°04' W along the center line of said chute a distance of 1396.62 feet to a point on the  $\frac{1}{4}\frac{1}{4}$  line South of the North line of Section 34; thence West along the aforesaid  $\frac{1}{4}\frac{1}{4}$  line a distance of 219.50 feet; thence N 21°48' W a distance of 592.36 feet to a point on the West line of said Section 34; thence North a distance of 770.0 feet to the point of beginning. Lying in the NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 34 T17N R13E of the 6th P.M. in Washington County, Nebraska, and containing 18.84 acres more or less.

#### V.

In 1955, for the first time, the defendant, Martha Uerling, asserted a claim to the land described in paragraph 1 hereof, claiming it as well as the land west of said chute as accretions to said Government Lot 1 in Section 34 and to the Northeast Quarter of the Northeast Quarter of Section 33.

#### VI.

Said land, described in paragraph 1 hereof, is part of an island and accretion to an island as alleged in paragraph 2 hereof, and is not accretion to said Government Lot 1 in Section 34 or to the Northeast Quarter of the Northeast Quarter of Section 33, but even if it were accretion to said last mentioned parcels of land, the plaintiff nevertheless perfected his title thereto by adverse possession as alleged in paragraph 2 hereof, prior to December 15, 1949, and prior to any disturbance of his possession by the defendant,



Martha Uerling, and nothing has since occurred which would deprive plaintiff of his title to said land.

## VII.

There are persons who appear, or may appear, to have some claim of interest in, right or title to, or lien upon the property described in this paragraph, and the claim of such persons does not appear of record in and by their respective names in Washington County, Nebraska, and plaintiff, after diligent investigation and inquiry is unable to ascertain and does not know the names or whereabouts, if in this State, or the residences of such persons, and they are therefore designated herein as "all persons having or claiming any interest in and to the following described real estate, to-wit:

Beginning at a point 399.4 feet east of the Southwest corner of the Northwest Quarter of the Northwest Quarter of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, said point being on the Quarter-Quarter line, thence North  $13^{\circ}30'$  West, a distance of 148.5 feet, thence North  $50^{\circ}45'$  East, a distance of 1089.2 feet, thence North  $61^{\circ}$  East, a distance of 1003.2 feet to Government meander corner between Sections 27 and 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, thence east on said section line a distance of 1525 feet to a point on the West bank of the Missouri River, thence Southwesterly along the West bank of the Missouri River a distance of 1450 feet to a point on the North line of Lot 2, Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, extended, thence West on said line to the place of beginning, all being in the North Half of the North Half of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska,

real names unknown." The defendants, Helen M. Matters, Jacob J. Jobst and Annie Jobst, his wife, Bernard J. Jobst and Emma S. Jobst, his wife, appear to claim or may appear to claim some right, title, interest, estate in or lien on the premises last above described. None of the named defendants, and none of said defendants whose names are unknown have any right, title or interest in said real estate, and any interest which any of them may have had in said real estate had been barred by the statute of limitations long before the filing of this suit.

### VIII.

By virtue of the facts set out above, there is cast a cloud upon the title of plaintiff in the real estate described in paragraph 1 hereof, which prevents the quiet use and enjoyment of said premises, and which tends to impair and lessen the value of the same, and will, unless plaintiff's title as against the defendants is quieted and established, cause plaintiff irreparable injury and that plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that his title to said real estate described in paragraph 1 hereof be quieted and confirmed in him as against each of said defendants, including all persons having or claiming any interest in said real estate, real names unknown, and that each of them be forever enjoined from asserting any claim or interest in said real estate or any portion thereof; and plaintiff prays for such other and further relief as may be just and equitable in the premises.

RICHARD E. KRIMLOFSKI, Plaintiff  
By: ROY I. ANDERSON and

SWARR, MAY, ROYCE, SMITH,  
ANDERSEN & ROSS.  
His Attorneys

STATE OF NEBRASKA }  
COUNTY OF DOUGLAS } ss.

RICHARD E. KRIMLOFSKI, being first duly sworn, on oath deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing amended petition, and that the facts stated therein are true as he verily believes.

RICHARD E. KRIMLOFSKI

SUBSCRIBED in my presence and sworn to before me this 1st day of April, 1961.

EDSON SMITH,  
Notary Public

Filed at 9:00 A.M. Apr. 6, 1961.

CHRIS K. BENDORF  
Clerk District Court

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EXHIBIT 'E'

IN THE DISTRICT COURT OF WASHINGTON  
COUNTY, NEBRASKA

Case No. 5645, Doc. Q, Page 299

RICHARD E. KRIMLOFSKI,

Plaintiff,

vs.

HELEN M. MATTERS, a single person; Jacob J. Jobst and Annie Jobst, his wife; Bernard J. Jobst and Emma S. Jobst, his wife; Martha Uerling, a single person; and all persons having or claiming any interest in and to the following described real estate, to-wit: Beginning at a point 399.4 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, said point being on the Quarter-Quarter line, then North 13°30' West, a distance of 148.5 feet, thence North 50°45' East, a distance of 1089.2 feet, thence North 61° East, a distance of 1003.2 feet to

Government meander corner between Sections 27 and 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, thence East on said section line a distance of 1525 feet to a point on the West bank of the Missouri River, thence Southwesterly along the West bank of the Missouri River a distance of 1450 feet to a point on the North line of Lot 2, Section 34, Township 17 North, Range 13 East of the 6th P.M. extended, thence West on said line to the place of beginning, all being in the North Half of the North Half of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska,

Defendants.

### DECREE

This case came on for trial by the Court upon the issues as made up by the pleadings. Plaintiff appeared in person and by his attorney, Edson Smith. Defendant, Martha Uerling, appeared in person and by her attorney, Paul I. Manhart. The other defendants listed and described in the caption of the above-entitled case, failed to make any appearance, although due and legal service of process was made upon all of the defendants in the manner and form provided by law, and default was duly filed and entered against the defendants other than Martha Uerling, which default is incorporated in this decree and made a part hereof as though copied herein. Evidence was heard in this case on November 6, 7, 8, 9, and 10, 1961. On November 11, 1961, at the request of the parties, the undersigned, the District Judge presiding at said trial, accompanied by counsel for the parties, inspected the disputed land and adjoining land referred to in the exhibits in the case and in the testimony. Thereafter, counsel for the parties submitted briefs to the Court, and on February 15, 1962 presented their oral arguments to the Court. The matter was thereupon submitted to the Court. And now upon consideration

of the pleadings and the evidence, and being fully advised in the premises—

1. The Court finds generally as to the following described real estate in favor of the plaintiff, Richard E. Krimlofski, and that the allegations of his amended petition are true, and that he is the owner in fee simple of a tract of land described as follows:

Beginning at a point on the North line of Section 34, Township 17 North, Range 13 East, 895.6 feet East of the Northwest corner of said Section 34 and assuming the North line of said Section to be due East; thence continuing East a distance of 2582.80 feet to the West bank of the Missouri River; thence following the meander of said West bank, South  $9^{\circ}27'30''$  West a distance of 307.4 feet; thence South  $15^{\circ}03'30''$  West a distance of 294.7 feet; thence South  $23^{\circ}59'$  West a distance of 800.0 feet to a point on the East-West Quarter-Quarter line of Section 34; thence West along the Quarter-Quarter line (Said Quarter-Quarter line being parallel with the North line of Section 34) a distance of 2587.5 feet to the center of a dry chute; thence North  $19^{\circ}04'$  East along said center of a dry chute a distance of 1396.62 feet to the point of beginning, lying in the North Half ( $N\frac{1}{2}$ ) of the North Half ( $N\frac{1}{2}$ ) of Section 34, Township 17 North, Range 13 East of the 6th P.M. in Washington County, Nebraska, and containing 81.58 acres more or less;

that said land includes part of what was formerly an island in the Missouri River, together with accretion extending from said island both to the East and West thereof; that the accretions to said island extending from it to the West eventually met and joined the accretions to the West bank of the Missouri River at the center line of the chute referred to in the above description, which chute was the remnant of the former channel of the Missouri River; that the plaintiff, Richard E. Krimlofski, has maintained actual,

open, notorious, exclusive, continuous, and adverse possession of the said island and the accretions thereto contained in the above description for more than ten years prior to 1955, the year in which this suit was filed; that plaintiff's said adverse possession of said island commenced in 1926 or shortly thereafter, and of the accretions thereto from the time they appeared, and continues to the present time, subject only to the interference therewith by the defendant, Martha Uerling, commencing in August of 1955; and that by reason of the facts aforesaid, the said plaintiff, Richard E. Krimlofski, is entitled to a decree quieting title thereto in him against the defendant, Martha Uerling, and all the other defendants herein, and the Court finds generally against the defendant, Martha Uerling, on her cross-petition as to the above described real estate.

2. The Court finds as to the following described real estate generally in favor of the defendant, Martha Uerling, and that with regard thereto, the allegations of her cross-petition are true, and that she is the owner in fee simple of a tract of land described as follows:

The Northeast Quarter ( $NE\frac{1}{4}$ ) of the Northeast Quarter ( $NE\frac{1}{4}$ ) of Section 33 and that part of the Northwest Quarter ( $NW\frac{1}{4}$ ) of the Northwest Quarter ( $NW\frac{1}{4}$ ) of Section 34 described as follows: beginning at the Northwest corner of Section 34; thence East along the North line of said Section 34 a distance of 895.6 feet to the center line of a dry chute; thence South  $19^{\circ}04'$  West along the center line of said chute a distance of 1396.62 feet to a point on the Quarter-Quarter line South of the North line of Section 34; thence West along the aforesaid Quarter-Quarter line a distance of 439.50 feet to the Southwest corner of the Northwest Quarter ( $NW\frac{1}{4}$ ) of the Northwest Quarter ( $NW\frac{1}{4}$ ) of Section 34; thence North along the section line a distance of 1320 feet to the point of beginning; all in Township

17, North, Range 13 East of the P.M. in Washington County, Nebraska;

that the above-described real estate was acquired by the defendant, Martha Uerling, by purchase and as accretion to land purchased by her; that the defendant, Martha Uerling, and her predecessors in title have been in open, notorious, exclusive, continuous and adverse possession of the above-described real estate for more than ten years last prior to the commencement of this action, and during all of that time asserted title to the said premises against all persons whomsoever.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Richard E. Krimlofski, is the lawful owner in fee simple of the following described real estate:

Beginning at a point on the North line of Section 34, Township 17 North, Range 13 East, 895.6 feet East of the Northwest corner of said Section 34 and assuming the North line of said Section to be due East; thence continuing East a distance of 2582.80 feet to the West bank of the Missouri River; thence following the meander of said West bank, South  $9^{\circ}27'30''$  West a distance of 307.4 feet; thence South  $15^{\circ}03'30''$  West a distance of 294.7 feet; thence South  $23^{\circ}59'$  West a distance of 800.0 feet to a point on the East-West Quarter-Quarter line of Section 34; thence West along the Quarter-Quarter line (Said Quarter-Quarter line being parallel with the North line of Section 34) a distance of 2587.5 feet to the center of a dry chute; thence North  $19^{\circ}04'$  East along said center of a dry chute a distance of 1396.62 feet to the point of beginning, lying in the North Half ( $N\frac{1}{2}$ ) of the North Half ( $N\frac{1}{2}$ ) of Section 34, Township 17 North, Range 13 East of the 6th P.M. in Washington County, Nebraska, and containing 81.58 acres more or less;

that title to said real estate be, and it hereby is quieted

in the said plaintiff against the claims or apparent claims of the defendants or of any or each of them, of whatever kind or character, and that the defendants and each of them and all persons claiming by, through or under them, be and they hereby are forever enjoined from claiming or asserting any interest or ownership of any kind or character in the above-described real estate or any portion thereof, and from interrupting the use, enjoyment, or possession of, or in the above-described real estate by the plaintiff, Richard E. Krimlofski.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Martha Uerling, is the lawful owner in fee simple of the following described real estate, to-wit:

The Northeast Quarter ( $NE\frac{1}{4}$ ) of the Northeast Quarter ( $NE\frac{1}{4}$ ) of Section 33 and that part of the Northwest Quarter ( $NW\frac{1}{4}$ ) of the Northwest Quarter ( $NW\frac{1}{4}$ ) of Section 34 described as follows: beginning at the Northwest corner of Section 34; thence East along the North line of said Section 34 a distance of 895.6 feet to the center line of a dry chute; thence South  $19^{\circ}04'$  West along the center line of said chute a distance of 1396.62 feet to a point on the Quarter-Quarter line South of the North line of Section 34; thence West along the aforesaid Quarter-Quarter line a distance of 439.50 feet to the Southwest corner of the Northwest Quarter ( $NW\frac{1}{4}$ ) of the Northwest Quarter ( $NW\frac{1}{4}$ ) of Section 34; thence North along the section line a distance of 1320 feet to the point of beginning; all in Township 17, North, Range 13 East of the 6th P.M. in Washington County, Nebraska;

that title to said real estate be, and it hereby is quieted in the defendant, Martha Uerling, in fee simple against the claims or apparent claims of the plaintiff and of the other defendants herein, and of any and



each of them, of whatever kind and character, and that the plaintiff and the other defendants herein and each of them, and all persons claiming by, through or under them, be and they hereby are forever enjoined from claiming or asserting any interest or ownership of any kind or character in the above-described real estate or any portion thereof, and from interrupting the use, enjoyment or possession of, or in the above-described real estate by the defendant, Martha Uerling.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the costs of this action be, and they hereby are taxed against the defendant, Martha Uerling, and in favor of the plaintiff, Richard E. Krimlofski, and said plaintiff shall recover his costs herein expended taxed in the amount of \$67.46.

DATED this 12th day of March, 1962.

BY THE COURT,  
DONALD BRODKEY  
District Judge

Prepared by:

SWARR, MAY, ROYCE, SMITH, ANDERSEN & ROSS  
By EDSON SMITH  
Attorneys for Plaintiff,  
Richard E. Krimlofski

Receipt of a copy of the above proposed decree is acknowledged this 9th day of March, 1962, together with notice that it will be presented to the Court at Blair, Nebraska, at 9:30 A.M. on March 12, 1962.

PAUL I. MANHART  
Attorney for Defendant

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EXHIBIT 'F'

SUPREME COURT OF NEBRASKA  
RICHARD E. KRIMLOFSKI, Appellee,

v.

HELEN M. MATTERS, et al., Appellees,

Impleaded with MARTHA UERLING, Appellant.

No. 35296

February 8, 1963.

Appeal from the district court for Washington County: Donald Brodkey, Judge. Affirmed.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

Brower, J.

This was an action brought in the district court for Washington County, Nebraska, by the plaintiff and appellee Richard E. Krimlofski against the defendant and appellant Martha Uerling and other defendants to quiet title to real estate lying on the west bank of the Missouri River. All defendants except the appellant Martha Uerling defaulted.

The plaintiff's petition sought to quiet title to a tract of land designated in exhibit No. 1 as Tract C, and described by metes and bounds in the judgment of the trial court. The tract is bounded on the west by the centerline of a chute or dry run, on the east by the present west bank of the Missouri River, on the north by the north line of Section 34, Township 17 North, Range 13 East of the 6th P.M., and on the south by the south line of Government Lot No. 1 of said section, assuming both of said lines were extended eastward to the river. The tract contained 81.58 acres. Government Lot 1 or Lot 2 may be referred to simply as Lot 1 or 2.

Plaintiff's asserted claim of ownership was by adverse possession of an island formed in the river and accretion and reliction east towards the river and the west to the chute.

Defendant by her answer and cross-petition claimed the premises as owner by a chain of title from the

United States to said Lot 1 on the west bank of the river and accretion thereto, and adverse possession in herself and predecessors in title. Her cross-petition asked that her title be quieted as against all parties to the action.

A trial to the court resulted in a finding and judgment for the plaintiff. Defendant's motion for a new trial being overruled she has brought the cause to this court on appeal.

The defendant's assignments of error, so far as need be considered by us, are that the judgment is contrary to the law and the evidence. She alleges that the trial court erred in admitting certain evidence but neither in the assignment of error nor the motion for new trial is the evidence referred to set out, though it is alluded to in the argument, and it cannot be considered on appeal.

Since 1912, plaintiff made a hobby of fishing and hunting and protecting wild animals. In 1922, he obtained permission from James Snodderly, the owner of Lot 2 to the south of Lot 1, to use his river-front as a headquarters and boat landing. The landing was about 200 feet north of Snodderly's house. Plaintiff brought there at first two inboard motorboats and rowboats. A road running north out of Florence known as the River Road ran through Lots 1 and 2, leaving about 50 feet of ground between this road and the landing at Snodderly's. In the year 1926, Snodderly gave Krimlofski the land in Lot 2 which lay east of the road. The plaintiff by means of his boats had access to the island from the landing. Snodderly's house burned in 1930 and plaintiff built and paid for another for him with an understanding that he be given Lot 2. Snodderly died without signing any papers and plaintiff later bought the lot at public sale. In 1926, a sandbar had formed an island east of the Snodderly Lot which extended north beyond the north

line of Lot 1, and south in front of the place south of the Snodderly Lot known as the "Burket Place." Lot 1, according to the evidence of plaintiff, had then been washed away except for a few acres. In 1926, plaintiff put duck blinds on different parts of the island. Thereafter, he hunted and fished thereon and invited his friends. He ordered away those not invited and patrolled the island at times. At different times he brought houseboats and installed several places to anchor them on both sides of the island. Further details of plaintiff's evidence as to his occupancy will not be set out as plaintiff's evidence was substantially the same in this action with respect to the premises in suit as it was on his behalf in a previous case in this court concerning the land claimed by Burket lying further south on this same island. *Burket v. Krimlofski*, 167 Neb. 45, 91 N. W. 2d 57. Plaintiff's witnesses testified much the same as to the occupancy in both cases and there are many photographs in evidence showing the presence of the witnesses at and near the disputed premises and in the plaintiff's boats at outings throughout the years 1926 to 1948.

In 1926, and for many years thereafter, plaintiff and several witnesses testified that a large body of water about 200 feet in width ran between the island and the bank of the river to the west. Plaintiff's houseboats made trips up this waterway and around the island. As the years went by the trees and vegetation grew thereon. The willows held the silt and debris from floods and the island became larger. By accretion and reliction the island extended farther into the river on the east side and towards the shore on the west. This process was greatly accelerated after revetments were built to control the river north of the island in 1936. The western shore extended in the same manner and in time it was divided from the accretion from the island only by a small stream de-

nominated throughout the case as "the chute." Later except in times of high water it became but a "dry run." Plaintiff testified the trees in the center of the island were larger and tapered off in height toward the chute; and that those on the higher land to the west likewise were larger and became shorter as they approached the chute.

A surveyor who testified for the plaintiff introduced more than 55 maps made by government engineers in their work on the river which showed the island, the river on its west, and the growth of the island over the years. Some of the earlier maps show but a small spot where the island was, and on some it cannot be seen. The witnesses however testified that at times the bar was covered by high water. The surveyor also testified the maps made by the government engineers were sometimes made to picture the shore from boats, and islands were not always noticed. In some instances only the shoreline or the main course of the river was desired to be traced. We think these show the island and its growth and acceleration after the time the revetments were built in 1936. Aerial photographs were likewise introduced that tend to show this also.

Defendant produced a witness Andreas Andreason whose testimony sharply conflicted with this evidence. He testified that in 1936 and 1937 he cut and hauled willows over the land involved for government use in riprapping; that Lot 1 and its accretion, from which the defendant's claim stems, extended three-quarters of a mile to the river; that he drove right through it; that there was no chute off the river though water was brought down to the lower areas at times through a creek or draw; and that the so-called "chute" was a dry slough, dry enough on the land in suit to haul willows with a team and wagon to the east river bank.

This conflicts with several maps prepared by the Corps of Army Engineers at different times in 1936.

They are numbered in sequence as exhibits 58-16 to 58-22 in which the island in question is plainly shown, together with the river on the west thereof with its soundings placed on the exhibits. The water at all times shown on those maps appears at least 3 or 4 feet deep and on those dated in July of that year, 12 to 20 feet in depth.

It likewise conflicts with one of the defendant's witnesses who testified that there was a split channel and an island in the year 1936.

The government patent at entry No. 23 of the defendant's abstract of title dated October 16, 1903, shows the area in Government Lot 1 to be 34.20 acres. The deed at entry No. 36, dated September 26, 1910, and another entry No. 37, dated January 18, 1911, both describe Lot 1 as "9 acres more or less with all accretions and increases." It would appear that at this time most of Lot 1 was considered by the grantors to be washed away.

The testimony of the remaining witnesses of the defendant, one her brother-in-law and three her nephews, was largely negative in character. It is to the effect that they were on the premises in question on occasions and didn't see the signs, fences, blinds, or paths testified to by the plaintiff nor did they meet him or anyone thereon at those times. Moreover most of these witnesses did not testify concerning the premises prior to 1940 at which time the nephews were quite young.

The defendant received a deed from Emma Jacobus dated in December of 1949. The premises were therein described as the northeast quarter of the northeast quarter of Section 33, and Lot 1 of Section 34, Township 17 North, Range 13 East of the 6th P.M. No accretion is mentioned therein. The purchase agreement dated in November 1949 between the same par-

ties contains the same description followed by the words "containing 40 acres more or less." In 1955, defendant procured a second deed from Emma Jacobus, dated August 12, 1955, and recorded that day, describing Lot 1 of said section, followed by a metes and bounds description of the land in question to the banks of the Missouri River. The defendant's agent bulldozed plaintiff's fence down in August 1955, which was followed by plaintiff bringing this action on August 19, 1955. Emma Jacobus testified by deposition. She testified that she and her deceased husband, who owned the land as joint tenants, bought it in 1927 or 1928; and that the road then ran at the foot of the hill and the river was right next to the road. They both lived at Florence until his death after which she continued to reside there. At the time of her deposition she lived at the Florence Home for the Aged. The Jacobuses placed no buildings, improvements, or fences on the premises. They had no boats and took no outings or picnics thereon. After her husband's death in 1943 she viewed it from the road only as she drove past it on two or three occasions.

It seems clear that the defendant's predecessor in title was not even conscious of the existence of extensive accretion land when she entered into the purchase agreement with the defendant. Neither is there evidence of any operations on the land in suit by the defendant or her agents after her purchase except the testimony of "walking through" it at infrequent intervals. Her first deed was dated within 10 years of the filing of this suit and no right by adverse possession could accrue during the period of her ownership.

The rules of law applicable to this action are all set out in the case of *Burket v. Krimlofski*, *supra*, involving similar claims on this same island. We shall now state them. "The claim of title to land by adverse possession must be proved by actual, open, exclusive,

and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

“Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.

“Land uncovered by a gradual subsidence of water is not an accretion but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner.

“Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

“Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.

“The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.

“Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the



island and to the mainland eventually meet, the owner of each owns the accretion to the line of contact.

“Land, to be riparian, must have the stream flowing over it or along its border.”

From the evidence in this case it appears the claims of the plaintiff as to occupation of the island openly, exclusively, and continuously under claim of ownership for more than 10 years following the late 1920's, were amply proved by the preponderance of the evidence. His use of the island was for the purposes to which it could be adapted. Further we find the preponderance of the evidence shows that the land between the island and the chute was accretion land attached to the island and not the mainland. Also the defendant failed in her proof concerning any title acquired to the lands in suit by adverse possession.

It follows that the judgment of the district court was right and should be affirmed.

Affirmed.

Simmons, C. J., not participating.

ORDER GRANTING LEAVE TO FILE AMENDED  
ANSWER AND COUNTERCLAIM

IT IS ORDERED that leave to file an amended answer and counterclaim be, and the same is hereby granted subject to the requirement, however, that the answer of the State of Iowa, as further amended, be filed in printed form in compliance with the Rules of the Supreme Court, with the Clerk of the Supreme Court, and served as required by such Rules upon the plaintiff.

IT IS ORDERED that the plaintiff shall be and is hereby granted 30 days from the filing of said amended answer and counterclaim in the Supreme Court within which to answer or otherwise plead to said counter-claim.

Dated Nov. 26, 1965.

WALTER L. POPE  
Judge, United States Circuit Court of Appeals  
Ninth Circuit

Special Master

## PROOF OF SERVICE

I, Sewell E. Allen, Special Assistant Attorney General of the State of Iowa and member of the Bar of the Supreme Court of the United States, hereby certify that on January . . . ., 1966, I served a copy of the foregoing Amended Answer and Counterclaim of Defendant, State of Iowa, to Plaintiff's Bill of Complaint, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE FRANK B. MORRISON  
Governor of the State of Nebraska  
State Capitol  
Lincoln, Nebraska

HONORABLE CLARENCE A. H. MEYER  
Attorney General of Nebraska  
State Capitol  
Lincoln, Nebraska

JOSEPH R. MOORE  
Special Assistant Attorney General of Nebraska  
1028 City National Bank Building  
Omaha, Nebraska

HOWARD H. MOLDERHAVER  
Special Assistant Attorney General of Nebraska  
1100 First National Bank Building  
Omaha, Nebraska

such being their post office addresses.

SEWELL E. ALLEN  
Special Assistant Attorney General  
State of Iowa









