IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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IOWA-NEBRASKA BOUNDARY COMPACT

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OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

Comes now the Defendant, the State of Iowa, and for her exceptions to the Report of Special Master Joseph P. Willson now on file herein, respectfully states to the Court as follows:

PRELIMINARY STATEMENT

This action was brought by the Plaintiff for the purpose of having this Court enforce and construe the Iowa-Nebraska Boundary Compact of 1943. 1971 Code of Iowa, Vol. 1, pages LXIV-LXV, Chapter 220, 57 U.S. Statutes at Large 494. Nebraska's allegation is that the State of Iowa is and has been violating said Compact by claiming ownership of certain lands in the vicinity of the Missouri River. Iowa does claim to own about 30 separate areas in the vicinity of said river; the evidence adduced before the

Special Master established that about 8½ of these areas had formed prior to 1943 and were in existence at the time the Boundary Compact became effective, and that the remainder of the areas (21½) have formed and come into existence in their present forms since 1943. It is undisputed that all of the areas which Iowa claims to own are now in Iowa, being east of the boundary fixed and established by the Boundary Compact in 1943.

Nebraska's allegation is that the areas which had formed prior to 1943 were lands which she ceded to Iowa by the Compact; that they were in Nebraska prior to 1943; and that they were owned by diverse private individuals under Nebraska law as of 1943. That Iowa promised to recognize private titles to all ceded lands. That Iowa violates this promise when she asserts ownership of them.

Iowa's contra assertion is that none of the lands which she is claiming to own were ever in the State of Nebraska; that all of them were always in Iowa, both before and after 1943; that none of them were ceded lands within the meaning and intent of the Compact. Iowa asserts that because the lands which were in existence in 1943 had formed in Iowa, ownership of them must be determined by Iowa law, and that under Iowa law they are state owned; that neither sovereignty nor ownership of these lands was changed or affected in any manner by the Boundary Compact of 1943.

Nebraska's allegation concerning the areas which have formed since 1943 is that they too are owned by diverse private individuals, although formed in Iowa admittedly, and that Iowa therefore also violates the Boundary Compact by claiming ownership of them. Nebraska's theory concerning the areas formed since 1943 is that even though the state boundary was fixed by the Compact, Nebraska riparian law still applies east of the boundary into Iowa so that ownership of areas in Iowa must still be determined by Nebraska riparian law.

Iowa's contra assertion is that certainly, since all the areas which have formed since 1943 are now in Iowa, they must have formed in Iowa, because it is agreed that the boundary line fixed and established by the Compact is a fixed and unmoving line. That therefore, ownership of them must be determined by Iowa law.

Nebraska is among the states which elected to have for her common law that private titles to riparian lands would run to the thread of the contiguous stream. *Kinkead* v. *Turgeon,* 74 Neb. 580, 104 N.W. 1061 (1906). Iowa is among the states which elected to have for her common law that private titles to riparian lands would run only to the ordinary high water mark on navigable streams, and that the state is the owner of the beds of all navigable streams within the state and is also the owner of any islands which may form therein. *McManus* v. *Carmichael,* 3 Iowa 1 (1856). *Holman* v. *Hodges,* 112 Iowa 714, 84 N.W. 950 (1901).

A fair generalization would be that the Special Master found for Nebraska and adopted her contentions with regard to the areas which had formed prior to 1943 and that he found for Iowa and adopted her contentions with regard to the areas which have formed since 1943.

A brief summary of the rules which the Special Master recommends and the relief which he would have this Court grant is as follows:

(1) The term "ceded lands" as used in the Compact should be interpreted and construed so as to include all lands which could possibly have been ceded, irrespective of whether a particular tract was actually in one state before the Compact and ceded to the other state by the Compact.

(2) Lands were "ceded" by Nebraska to Iowa by the Compact if there was title good in Nebraska to them prior to the Compact, irrespective of whether the particular tract was actually in Nebraska or not prior to the Compact.

(3) Nottleman Island in Mills County, Iowa, was a tract of land ceded by Nebraska to Iowa by the Compact within the above rule, and Iowa violated the Compact by commencing and prosecuting the suit entitled *Iowa* v. *Babbitt, et al.,* in the District Court of Mills County, Iowa, wherein Iowa asserted ownership of it and sought to quiet her title to it.

(4) Schemmel Island in Fremont County, Iowa, was a tract of land ceded by Nebraska to Iowa by the Compact within the above rule, and Iowa violated the Compact by commencing and prosecuting the suit entitled *Iowa* v. *Schemmel, et al.,* in the District Court of Fremont County, Iowa, wherein Iowa asserted ownership of it and sought to quiet her title to it.

(5) Iowa should be enjoined from claiming to own Nottleman Island and Schemmel Island, and enjoined from further prosecuting the quiet title suits above named.

(6) Iowa should be barred from using her common law to claim ownership of any lands in the vicinity of the Missouri River which were in existence in 1943. That is to say:

(a) Iowa should be barred from using her common law doctrine that the state owns navigable river beds, islands and abandoned channels.

(b) Iowa should be barred from using her doctrine that the sovereign state cannot be adverse possessed.

(c) Iowa should be barred from applying the presumption favoring accretion and against avulsion.

(d) Iowa should be barred from applying the presumption favoring the permanency of boundaries.

(7) Ownership of all areas which have formed since 1943 shall be determined by the law of the state in which they formed. That is to say: where islands have formed since 1943 east of the state boundary fixed by the 1943 Boundary Compact in such manner that they would be state owned by the Iowa common law doctrine of state ownership, such islands are state owned; where land has become river bed since 1943 east of the state boundary fixed by the 1943 Boundary Compact, such river bed would be state owned by the Iowa common law doctrine; where river bed has become abandoned river bed since 1943 east of the state boundary fixed by the 1943 Boundary Compact in such manner that they would continue state owned by the Iowa common law doctrine, such abandoned beds are state owned. In general, the same common law of Iowa which was being applied in Iowa to riparian lands, river beds and abandoned beds prior to 1943 continued and continues in full force and effect to determine ownership of riparian lands, river beds and abandoned beds in Iowa since 1943.

EXCEPTION No. I

The Defendant Excepts to That Part of the Special Master's Report Wherein He Concludes, by Implication, That the Plaintiff Has Pleaded and Proved the Existence of a Justiciable Controversy, in Which the Plaintiff Has an Interest Sufficient to Entitle Her to Maintain the Action, and As to Which the Supreme Court of the United States Should Exercise Its Original Jurisdiction.

ARGUMENT

The Special Master states, at the bottom of page 49 of his Report, that it is Nebraska's contention that this Court's Order of February 1, 1965, granting Nebraska leave to file her Complaint in this case settled the issue of jurisdiction. On pages 50 through 61, the Special Master quotes Iowa's contra contentions.

We find no specific findings of fact, rulings or recommendations by the Special Master relative to the aforesaid contentions, but it inheres in the Report that the Special Master recommends that the Court exercise its original jurisdiction in the case. His reasons for so recommending are set forth at page 78 of his Report, where he says that the meaning and application of the Iowa-Nebraska Boundary Compact of 1943 is of paramount interest to both states; at page 174, where he says that the courts and the states need an interpretation of the Compact; at page 190, where he says that both states can profit by a Supreme Court announcement; and at page 200, where he says that both states need a construction of the Compact.

Now that the evidence is in, and the arguments have been made, and the Special Master's Report has been made and filed, Iowa submits to the Court that the only proper and correct decision to be reached in this case is that Nebraska's Complaint and cause of action should be dismissed and denied.

It is generally held that all courts, including this Court, must examine and re-examine the limits of their jurisdiction in all cases and at every stage of every case. In *Hilton* v. *Dickinson,* 108 U.S. 165, 2 S.Ct. 424, 27 L.Ed. 688 (1883), this Court said (At page 168 U.S.):

> "* * * if on looking into a record we find we have no jurisdiction, it is our duty to dismiss on our own motion without waiting the action of the parties. * * *"

In *Minnesota* v. *Hitchcock,* 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954 (1902), this Court was re-examining its jurisdiction after the Special Master's Report had been filed *sua sponte,* and the following language was employed (At page 382 U.S.):

> "* * * It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. * * *"

Iowa believes also that after the evidence is in, this Court must determine whether or not Nebraska has met the test laid down in *Colorado* v. *Kansas,* 320 U.S. 383, 88 L.Ed. 116, 64 S.Ct. 176 (1943), as follows (At page 393 U.S.):

> "* * * Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on a complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. * * *"

It should be noted that never in his Report to you does the Special Master say or find that Nebraska has "clearly proved" any of the facts which she alleges and relies upon

as a basis for this Court to exercise its original jurisdiction. The best he can say for any of Nebraska's evidence is that some of it, relating to certain matters, constitutes a "preponderance". When the Special Master determined that the facts relied on by Nebraska had not been clearly proved as required by *Colorado* v. *Kansas,* supra, he should have recommended dismissal of the case.

It is undisputed that Nebraska has no proprietary interest in the controversy which she is here asking this Court to determine. There is no issue as to where the present boundary between the States of Iowa and Nebraska is now located. Both parties agree that the present state boundary was located, fixed and established by the Iowa-Nebraska Boundary Compact of 1943. Thus, Nebraska's territorial integrity is not in question. Impairment of her taxation base is not threatened. Nobody questions Nebraska's right to exercise sovereignty over all territory within her borders. Iowa does not seek to exercise sovereignty beyond her own borders or into Nebraska. The State of Nebraska does not claim to own one single tract or parcel of land which the State of Iowa adversely claims to own. All thirty of the areas which the State of Iowa claims to own in the vicinity of the Missouri River and in the vicinity of the boundary are admittedly east of the boundary fixed by Compact in 1943 and therefore in the State of Iowa and subject to Iowa's jurisdiction and sovereignty. The Special Master could not find and properly did not find that any proprietary interests of Nebraska are involved.

This case is a "disputed boundary" case only in the sense that the location of the state boundary which existed prior to 1943 is in dispute. The question as to where the pre-1943 boundary was located only becomes an issue because the ownership of several tracts of land may depend upon whether they formed, prior to 1943, in Iowa and

east of the pre-1943 boundary or in Nebraska and west of the pre-1943 boundary. The salient point here is that the State of Nebraska claims to own none of these tracts of land; Nebraska's claim is that diverse private individuals own them, and that the State of Iowa therefore does not own them.

Accordingly, it is clear that Nebraska is asserting authority to commence and prosecute this action under the familiar doctrine of *parens patriae,* as trustee, guardian or representative of her citizens or some of them. Did she manage to bring herself within the rules of parens patriae?

The rules are summarized in 39 *Harvard Law Review,* at pages 1085 and 1086, as follows:

> "It is difficult to formulate a rule to determine when a state has a sufficient interest in a suit to satisfy the last mentioned requirement. When a state sues in the role of property owner, jurisdiction cannot be denied on the grounds that the state has no real interest in the suit. The clearest case of this kind is one involving a boundary dispute. In a majority of cases, however, the state's property interest is rather unsubstantial and is not at all the motivating cause of the suit. While counsel and the court generally try hard to find some property interest in the state, a standing has been accorded the state in some cases where its only interest is that of parens patriae, or guardian of the health, welfare and prosperity of its inhabitants. But the court is slow to allow original suits by a state in this capacity. Where the defendant is also a state, such reluctance is proper, in order not to interfere unduly with the policy of the Eleventh Amendment. The state must show a threatened injury to its residents as a whole, or to the members of a defined class of its residents, as such. So, while a state may maintain

> an original suit to enjoin a sister state from further injuring the real property of its citizens, it cannot recover in their behalf damages for past injuries."

In the recent case of *Hawaii* v. *Standard Oil Company*, 301 F.Supp. 982, 431 F.2d 1282 (1969), it was stated that the facts must show that a substantial portion of the complaining state's inhabitants are adversely affected by the challenged acts of the defendant.

It is readily apparent that the general citizenry of Nebraska have no interest whatsoever in the instant case, and counsel for Nebraska made no effort to establish that they do. Neither did counsel for Nebraska make any effort to prove how many of her citizens may be adversely affected by Iowa's claiming to own some thirty tracts of land along the boundary, all of which are definitely in Iowa and have been in Iowa for 28 years or more. Suffice to say the number of Nebraska citizens having any interest in this litigation is miniscule. In fact, when one considers that it is Iowa's expressed intention to devote whatever river lands she may own to use and enjoyment by the general public, it becomes apparent that Nebraska's prosecution of the instant case is contrary to the interests of her general citizenry.

Iowa does not deny that it is within the jurisdiction of this Court to interpret and enforce interstate compacts, but Iowa submits that said jurisdiction should only be exercised when application is made by the real party in interest, or one of the real parties in interest. The Special Master is simply wrong when he says in his Report that "both Nebraska and Iowa need a construction and an interpretation of the (Compact)". The record made before the Special Master establishes that the State of Nebraska has no interest in the matter and no construction or interpretation of the Compact can possibly result in any benefit or

injury to the State of Nebraska or its general citizenry or any class of its citizens.

By prosecuting this case, Nebraska is asking this Court, among other things, to determine land titles to lands which are admittedly in Iowa. She thereby asks this Court to abandon its historic policy of leaving the determination of land titles in each state to the state courts of the respective states. *Arkansas* v. *Tennessee,* 246 U.S. 158, 62 L.Ed. 638, 38 S.Ct. 301 (1918). Furthermore, Section 2 of the Nebraska enactment of the 1943 Boundary Compact specifically states: "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 * * *". This was a clear statement by the State of Nebraska that jurisdiction to determine titles to ceded lands was being reposed in the courts of Iowa. Now, Nebraska asks this Court to divest the Iowa courts of that jurisdiction and to take said jurisdiction unto itself. The Special Master, when he recommends issuance of an injunction to prevent Iowa from prosecuting the quiet title suits now pending in the state courts of Iowa concerning Nottleman Island and Schemmel Island is, in effect, quieting the titles to said islands in the private claimants as against the State of Iowa.

Neither should this Court depart from its historic policy of refusing to issue advisory opinions. See *Alabama* v. *Arizona,* 291 U.S. 286, 78 L.Ed. 798, 54 S.Ct. 399 (1934), where the Court said (At pages 291-292 U.S.):

> "This Court may not be called upon to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States,* 219 U.S. 346. *Willing* v. *Chicago Auditorium Assn.,* 277 U.S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of

absolute necessity. *Louisiana* v. *Texas,* 176 U.S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois,* 200 U.S. 496, 520-21. *New York* v. *New Jersey,* 256 U.S. 296, 309. *North Dakota* v. *Minnesota,* 263 U.S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri* v. *Illinois,* supra, 521. In the absence of a specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. *Cf. Ex parte La Prade,* 289 U.S. 444, 458. The burden upon the plaintiff states fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669."

In addition to the other reasons calling for dismissal which have been discussed hereinbefore, Iowa submits that Nebraska has failed to carry the burden of proof which she shouldered as Plaintiff. Taken in its most favorable light for Nebraska, the evidence only establishes that Iowa has asserted her claims of ownership by bringing quiet title actions or defending quiet title actions in courts of competent jurisdiction. Such conduct by Iowa, as distinguished from forcibly evicting the private adverse claimants, does not constitute violation of the 1943 Boundary Compact so as to call for an exercise of original jurisdiction by this Court.

EXCEPTION No. II

The Defendant Excepts to That Part of the Report Wherein the Special Master Construes and Interprets the 1943 Iowa-Nebraska Boundary Compact to Require Iowa to Recognize "Titles Good in Nebraska" Regardless of Whether the Lands in Question Were Ever in Nebraska or Not. (See first paragraph, page 173, where Special Master adopts Nebraska's contention No. 1, set out at page 164.)

ARGUMENT

It has been Iowa's position throughout this controversy and before, that she bound herself when she enacted the 1943 Boundary Compact to recognize as "good in Iowa" all titles which were "good in Nebraska" to lands which were in Nebraska prior to the Compact and which Nebraska "ceded" to Iowa by operation of the Compact. It has also been Iowa's position that there could not be a title "good in Nebraska" to any parcel of land which was not in Nebraska and thus subject to Nebraska title laws prior to and at the effective date of the Compact, July 12, 1943. It has also been Iowa's position that whether or not there was a title "good in Nebraska" to a particular parcel of land must be adjudged as of July 12, 1943, and that events occurring after that date can have no bearing on whether or not there was a title "good in Nebraska" as of that date. It has also been Iowa's position that the 1943 Boundary Compact had no application to or effect upon any titles to any lands except "ceded" lands; that is to say, if a parcel of land was in fact in Iowa before 1943 and remained in Iowa after the 1943 Compact, it could not be "ceded" land, and when Iowa claims ownership, such claim of ownership could not possibly constitute violation of the Compact. It has also been Iowa's position that when land has been washed away and destroyed, the title to it is also washed away and destroyed, and that when new land later emerges in that same

spot under the sky, a new title commences. This is the common law of both Nebraska and Iowa. *Yearsley* v. *Gipple,* 104 Neb. 88, 175 N.W. 641 (1919). *Tyson* v. *Iowa,* 283 F.2d 802 (1960). *Wallis* v. *Clinkenbeard,* 214 Iowa 343, 242 N.W. 86 (1932).

Iowa's exception taken to this portion of the Special Master's Report is based upon two general propositions: (1) That the Special Master, under the guise of interpretation or construction, actually amends, changes and enlarges the Compact to restrict Iowa from claiming ownership of lands which the Compact, properly construed, does not restrict her from claiming. (2) The Special Master's language used in discussion of the matter is so indefinite and uncertain that his Report, if approved, would lead to more disputes than it would put at rest.

We again refer to Section 2 of the Nebraska enactment of the Compact because the terminology is so important:

> "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 Iowa." (Emphasis added)

The phrase "all lands now in Nebraska" is not uncertain, indefinite, or subject to more than one meaning. The phrase involved in *Alabama* v. *Georgia,* 64 U.S. 505, 511, 23 How. 505, 16 L.Ed. 556 (1859), was "west of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof". Alabama contended that the western boundary of Georgia was the low water mark and Georgia contended for the high water mark. Alabama averred that the high water mark was not intended "not only on account

of the uncertainty in ascertaining and locating the same, but * * * the jurisdiction of the State of Georgia would pass far west of the river at its ordinary height * * *; * * * and your complainant has ever claimed and exercised jurisdiction all along and upon said bank to low water mark * * *".

The Court then stated on pages 512-513:

> "The contract of cession must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, * * *."

And in conclusion, the Court said at page 515:

> "* * * , that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee River where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee River and along the western bank thereof."

Thus, in *Alabama* v. *Georgia,* supra, we see the Court rejecting the argument that a literal translation was not intended. Surrounding circumstances and conduct of the parties were not allowed to vary or change the literal meaning of the phrase employed. Where the words of the Compact are not ambiguous, they are literally translated so as to carry out the *expressed* intentions of the parties, and they are not subject to construction or interpretation.

In the case at bar, the Special Master concludes that the Compact should be liberally construed so as to leave individuals occupying or claiming river lands secure in their positions as of the date of the Compact. (Paragraph 1, page 173.) This should be done, he says, because Iowa

was not asserting her ownership claims along the river at the time of the Compact or prior thereto. (Paragraph No. 5, pages 63-64.) His finding that Iowa was not asserting her ownership claims in 1943 and prior is clearly erroneous. The following items of evidence were admitted and are uncontradicted to demonstrate that Iowa was asserting her ownership of river lands during the period in question:

Exhibits D-636, D-637, D-638, D-644 and D-646 are minutes of official meetings of the Iowa Conservation Commission in 1939, 1942 and 1943 at which the Commission was dealing with Missouri River lands owned by the State of Iowa.

In the case entitled *Sioux City* v. *Betz,* 232 Iowa 84, 4 N.W.2d 872 (1942), Sioux City was claiming to own the disputed land (accretion land in the Missouri River) by a Patent issued to it by the State of Iowa in 1938. Issuance of Patent indicates assertion of ownership by Iowa Executive Council.

In the case entitled *Solomon* v. *Sioux City,* 243 Iowa 634, 51 N.W.2d 471 (1952), Sioux City was also claiming to own the disputed land (another tract of accretion land in the Missouri River) by a Patent issued to it by the State of Iowa in 1940.

Iowa asserted ownership of a tract of Missouri River accretion land near Council Bluffs in the case entitled *State of Iowa* v. *Carr,* 191 Fed. 257, decided in 1911.

The Judicial Department of Iowa consistently and without any deviation applied the Iowa doctrine of state ownership from 1856 down to the present time. For examples, see cases cited at pages 83-84, Iowa's Appendix to Brief and Argument before Special Master.

The State of Nebraska (Judicial Department) knew in 1935 that Iowa was asserting her common law claims of ownership to Missouri River areas. See *Independent Stock Farms* v. *Stevens,* 128 Neb. 619, 259 N.W. 647 (1935).

At the time and immediately prior to the adoption of the Boundary Compact in 1943, the parties engaging in it were well aware that Iowa was asserting her ownership of Missouri River lands by reason of her common law doctrine of state ownership of navigable river beds, islands forming therein, and abandoned channels. It is not possible that the State of Nebraska can now deny knowledge of facts which her own Supreme Court knew and wrote about. The basis upon which the Special Master would give the words of the Compact more than "their received meaning and use in the language in which it is written" does not exist.

Iowa would also point out that the Compact is not merely a contract between two sovereign states; it is also a statute of Iowa and a statute of Nebraska. It was a solemn enactment made only after protracted negotiations and arduous and conscientious study. The language finally employed was carefully chosen. It is not within the jurisdiction of this Court to attribute any meaning to the language employed beyond its "received meaning" or any different than its "received meaning" where its "received meaning" is plain, unequivocal, and unambiguous.

The rule that the courts cannot legislate, or amend legislation, or supply deficiencies in legislation under the guise of construing or interpreting statutes is well recognized. See Division II, page 25, and Division IX, page 72, of Defendant's Brief and Argument before the Special Master, and cases cited therein.

As hereinabove mentioned, Iowa agreed in the Compact to recognize titles which were "good in Nebraska" at the time of the Compact to all lands which were "ceded" by Nebraska to Iowa. The Special Master's construction of this language in the Compact is that Iowa, by entering into the Compact, agreed to recognize any and all titles emanating from Nebraska whether such titles concern ceded lands or not. He rationalizes this construction by attributing a meaning to the word "cede" not in accord with any usual, ordinary or legal definition of the term. His discussion of the meaning of "cede" commences near the bottom of page 79 and ends near the top of page 89.

In effect, the Special Master concludes that all lands along the river must be treated as "ceded" lands if there was, in 1943, a private title or claim of title emanating from either state as of 1943. Thus, the determination of whether or not a particular tract of land was "ceded" by Nebraska to Iowa is made to depend on whether or not there was, as of 1943, a Nebraska title or claim of title to it. Whether or not the tract was actually in Nebraska prior to 1943 becomes irrelevant by the Special Master's construction. Iowa submits that whether or not the tract was actually in Nebraska prior to 1943 should be the controlling factor, and whether or not there was a Nebraska title or claim of title should be irrelevant.

The fallacy in the Special Master's construction above mentioned is demonstrated as follows: Prior to 1943, the main channel of the Missouri River moved laterally within the flood plain for varying distances ranging up to several miles, and the Iowa-Nebraska boundary was a moving boundary, which moved with all gradual and accretionary movements of the channel. When the channel moved toward Iowa, Iowa lost territory and Nebraska gained, and vice versa. When Nebraska gained, a title or claim

of title would emanate from Nebraska, but often the old Iowa title would remain on the books in Iowa as at least a claim of title, although the land had been washed away and the old Iowa title would be of no validity. Now, suppose the main channel moves gradually back toward Nebraska washing away all the accretion land which Nebraska had gained by the prior movement toward Iowa, and suppose an island forms in Iowa, east of the main channel, and behind the westerly movement of the main channel toward Nebraska. By Iowa law, such island would be state owned, being an accretion to the state owned bed of the river. The effect of the Special Master's proposed construction of the Compact would be that Iowa cannot assert its ownership of the Island because there is a title or claim of title emanating from Nebraska and Iowa agreed to recognize all titles and claims of title emanating from Nebraska. The intentions of the parties, to be gathered from the language employed, was that *good* titles emanating from either state would remain unimpaired. Nowhere in the Compact is there any mention of "private" titles as distinguished from "public" titles. All good titles, including titles belonging to the State of Iowa, are afforded equal protection by the Compact. The Special Master's construction places private titles on a plane above public titles; in fact, he destroys the public title wherever there is a private title or claim of title.

In this respect, the Special Master's construction violates the rule of construction stated by this Court in *Massachusetts* v. *New York,* 271 U.S. 65, 70 L.Ed. 838, 46 S.Ct. 357 (1926), as follows (at page 89 U.S.):

> "* * * all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable

construction. *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 544-548, *Shively* v. *Bowlby,* supra."

The language of Section 3 of the Iowa-Nebraska Boundary Compact of 1943 is:

> "Titles, mortgages and other liens *good in Nebraska* shall be good in Iowa as *to any lands Nebraska may cede* * * *." (Emphasis added)

The term "titles" is clear and unambiguous, and where not limited to "private titles", is certainly meant to include "all titles", both private and public. Yet, the Special Master construes the term "titles" as used in the Boundary Compact to mean "private titles" and not to include "public titles" held in trust by either the State of Iowa or the State of Nebraska. He limits the term "titles" to a narrower meaning than normal and customary usage gives it. There is no reason appearing in this record nor any reason in fact for the Special Master to divine or assume that the intent of the states when entering into the Compact was to protect only "private titles" to the exclusion of "public titles". The language employed clearly indicates their intention to protect both.

Only one adjective is used in connection with the word "titles" in the Compact and that adjective is "good". Iowa submits that the term "good titles" was employed by the parties because they did not elect or wish to bind themselves to recognize any titles less than "good". In other words, they did not bind themselves to recognize a color of title, or an indicia of title, or a claim of title. Only "titles good" in the ceding state were to be recognized as "good" in the receiving state. There was no promise or agreement concerning any titles less than "good".

The Special Master's Report has the further effect of absolutely reversing all legal presumptions which have

heretofore been recognized relating to river boundaries. The Special Master states at page 79 that "* * * the states did not know what specific areas lying on the left bank or eastern side of the new boundary had previously been within the jurisdiction of Nebraska. They both accepted the fact that any possible such areas were 'ceded' to the other state by this general language."

Now, keep in mind that it is an undisputed fact that the main channel of the Missouri River as of July 12, 1943, was flowing in the designed channel along the entire length of the boundary, and that therefore, the Compact fixed and established the new boundary as the center line, not only of the designed channel, but also as the center line of the Missouri River as it was then flowing. The Special Master's rule above quoted says that all land east of the river which could possibly have been in Nebraska before the Compact shall be deemed to have been in Nebraska and therefore ceded to Iowa by the Compact.

The presumption which has historically prevailed as regards river boundaries was that, whenever and wherever a boundary is described as "the river" or "center of the river" or the "center of the main channel of the river" or by words of similar import, it will be presumed that from time to time and at all times, the river is in fact the boundary, and anybody claiming that the river was not the boundary at any particular place or time had the burden of proving that fact by clear, satisfactory and convincing evidence. *Shapleigh* v. *United Farms,* 100 F.2d 287; *Wyckoff* v. *Mayfield,* 130 Ore. 687, 280 Pac. 340; *Bouvier* v. *Stricklett,* 40 Neb. 793, 59 N.W. 550; In *Plummer* v. *Marshall,* 59 Tex.Civ.App. 650, 126 S.W. 1162, at page 1163 S.W., the rule was stated as follows:

> "The party who asserts the channel of a water course recognized as the boundary line is not in fact, at the point of controversy, the true boundary, resting his contention upon a sudden shifting of the course of the channel, assumes the burden of proving that fact."

In deciding the previous dispute between Nebraska and Iowa, this Court said (at page 366 U.S.):

> "In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself; because nothing is more natural than to take a river for a boundary when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

Nebraska v. *Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396 (1892). See also, *Arkansas* v. *Tennessee,* 246 U.S. 158, 62 L.Ed. 638, 38 S.Ct. 301 (1918); *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178, 33 L.Ed. 872, 10 S.Ct. 518 (1890).

In *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097, 1098 (1915), the Iowa Supreme Court stated simply:

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

Applying this presumption to the instant case, it would be presumed that, as of 1943 immediately before the Compact became effective, all land east of the river and therefore also east of the new boundary was in Iowa and not ceded by Nebraska to Iowa in the Compact. The Special Master's rule not only ignores but absolutely turns around this long standing and universally recognized presumption often referred to as "the presumption favoring permanency of boundaries".

Another presumption which has often been utilized by many courts, including this Court, in determining river boundary disputes is commonly known as the "presumption in favor of accretion as against avulsion". Special Master Marvin Jones recently employed this presumption in his Report to this Court in *Louisiana* v. *Mississippi,* No. 14 Original, October Term, 1962. See his discussion commencing on page 19 of his Report, where he says that:

> "* * * the general rule of the 'live thalweg' is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion * * *."

The Oregon Supreme Court said, in *Wyckoff* v. *Mayfield,* 130 Ore. 687, 280 Pac. 340, that:

> "* * * the presumption is, following the rule of the value of natural movements or fixed boundaries, that if any change occurred at all, it was by accretion and not by a sudden and violent force. * * *."

Both the Florida and Oregon Courts have stated simply that "there is a presumption of accretion or erosion as against avulsion." *Municipal Liquidation* v. *Tench,* (Fla.) 153 So. 728, 731. *Gubser* v. *Town,* 202 Ore. 55, 273 P.2d 430.

The presumption is that whenever a river has moved laterally from one place to another, it is presumed that such movement was by the gradual process of washing away one bank and forming accretions to the other bank so that the boundary followed such movement and remained in the river, and it is presumed that the river did not move by a sudden avulsion from the old channel to the new channel so that the boundary would remain in the old abandoned channel. Application of this presumption in the instant case would also lead to the proposition that all lands east of the Missouri River in 1943 were in

Iowa and therefore not ceded by Nebraska to Iowa in the Compact.

When the Special Master says that both states were agreeing when they engaged in the Compact, that all lands which could possibly be considered as ceded would be treated as ceded, he writes a proviso into the Compact which is not there, and he reverses both of the presumptions mentioned above.

This Court should hold and determine that all lands east of the river in 1943 were in Iowa prior to the Compact except those lands which can be proved to have been in Nebraska by clear, satisfactory and convincing evidence. That therefore, no lands which were east of the river in 1943, and therefore east of the boundary established by the Compact, were "ceded" by Nebraska to Iowa except those lands which can be clearly and convincingly established as having been in Nebraska prior to the Compact. That it is factually and legally impossible for there to have been a "title good in Nebraska" as of 1943 to any land which was not in Nebraska and subject to her dominion and jurisdiction as of 1943.

EXCEPTION No. III

The Defendant Excepts to That Part of the Report Wherein the Special Master Proposes the Following Rule: "In Any Proceeding Between a Private Litigant and the State of Iowa Involving a Claim of Title Good under the Law of Nebraska, Alleged to Have Been Ceded to Iowa under Sections 2 and 3 of the Compact and Contiguous to the Missouri River on the Iowa Side, the State of Iowa Shall Not Invoke Its Common Law Doctrines Either As a Plaintiff or As a Defendant." (See in italics, bottom of page 174, top of page 175, and full paragraph on page 175.)

ARGUMENT

In the next paragraph after the italicized portion above referred to, the Special Master goes into detail concerning his proposed rule. He would have this Court instruct all trial courts, state and federal, trying a land ownership case involving the State of Iowa, to first determine whether or not there is a claim of title against Iowa's claim based on Nebraska law as it existed in 1943. If the trial court finds that such a claim is involved, he shall then determine whether or not the claimant "shows a title supportable under Nebraska law". Later in the same paragraph, he says the private claimant "must show title good in Nebraska". If the private claimant shows title "good in Nebraska", then he would bar Iowa from overwhelming such title by invoking its several common law doctrines. He would bar Iowa from asserting that the sovereign State of Iowa cannot lose its title as result of adverse possession by a private individual. *United States* v. *Insley*, 130 U.S. 263, 266, 32 L.Ed. 968, 9 S.Ct. 485 (1889). *Manatt* v. *Starr*, 72 Iowa 677, 34 N.W. 784 (1887). *Board of Park Comm.* v. *Taylor*, 133 Iowa 453, 108 N.W. 927 (1906). *Sioux City* v. *Betz*, 232 Iowa 84,

4 N.W.2d 872 (1942). He would bar Iowa from asserting ownership by operation of her common law that the state owns all beds of navigable rivers, all abandoned beds of navigable rivers, and all islands formed in navigable rivers within the boundaries of the state. *Holman* v. *Hodges,* 112 Iowa 714, 84 N.W. 950 (1901). *Iowa* v. *Raymond,* 254 Iowa 828, 119 N.W.2d 135 (1963). He would bar Iowa from asserting the presumption of accretion as against avulsion. *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097 (1915); *Dartmouth College* v. *Rose,* 257 Iowa 533, 133 N.W.2d 687 (1965).

Iowa excepts to this portion of the Report, basically and principally, for the reason that the 1943 Boundary Compact contains no words, no language, no phrases which can possibly be construed, interpreted, stretched or twisted so as to make it say what the Special Master is saying it says. And there are no facts of record which would entitle the Court to say that this is the meaning of the Compact by implication.

The single so-called fact upon which the Special Master claims power to re-write the Compact is that "At that time Iowa was not contesting these property rights". (Report, page 88) It is the Special Master's theory that because Iowa was not asserting her ownership of Missouri River lands in 1943, this warrants construing the Compact as a promise by Iowa not to claim ownership of the Missouri River lands then in existence forever afterwards.

As we have heretofore pointed out in our discussion of Exception No. II, the Special Master is simply in error when he finds that Iowa was not applying her common law doctrines to lands in the vicinity of the Missouri River in and prior to 1943. But even if it were true that Iowa was not contesting these property rights at that

time, such fact would not justify reading into the Compact the repealers of Iowa common law which he reads into it.

Continuously from 1856, *McManus* v. *Carmichael,* 3 Iowa 1, the Iowa courts and the federal courts applying Iowa common law have uniformly and consistently adhered to the doctrine that the state is the owner of all beds of all navigable waters in the state and all islands formed therein and all abandoned channels which become abandoned by avulsion. See cases cited at pages 83-84, Appendix to Defendant's Brief and Argument before Special Master for a sampling of these cases. See also *Iowa* v. *Carr,* 191 Fed. 257, D.C. Iowa (1911); and *Tyson* v. *Iowa,* 283 F.2d 802 (1960). For applications of the presumption of accretion as against avulsion, see *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097 (1915); and *Dartmouth College* v. *Rose,* 257 Iowa 533, 133 N.W.2d 687 (1965). The Iowa common law being applied to riparian lands and navigable waters both before and after 1943 was not exceptional; it was in conformity with the common laws of many of her sister states.

Should this Court determine that the Compact is ambiguous or indefinite and requires interpretation or construction, the Court should seek to ascertain the true intent of the parties to be gathered from the language employed by them to express their intentions. There is certainly nothing in the conduct of the courts to lead Nebraska or anybody else to believe that Iowa was intending to change her common law, repeal her common law, suspend her common law, limit the application of her common law so that it would not apply to certain lands in the vicinity of the Missouri River, convey some of her public lands to unknown grantees, or do any of the things which the Special Master now says she did when she enacted the Compact.

Iowa's prosecution of the case entitled *Iowa* v. *Carr*, 191 Fed. 257 (1911), was a clear assertion by the Iowa executive branch that Iowa's common law doctrines were in full force and effect along the Missouri River. Her refusal to sell Wilson Island in 1939 and her refusal to sell again in 1941 were clear assertions that she owned the island—and Wilson Island is one of the 30 areas involved in this case, which Iowa still claims to own. See last paragraph, page 166, of Special Master's Report. See also pages 60-91, Appendix to Defendant's Brief and Argument before the Special Master, for additional evidence of Iowa's adherence to her doctrine of state ownership along the Missouri River.

We can understand why the Special Master might feel that the State of Iowa was not doing enough in and prior to 1943 to assert, protect, defend and develop her state owned areas along the Missouri River. But the record made before the Special Master clearly establishes that it was erroneous of him to find that Iowa was doing nothing.

The interpretation which the Special Master places on Iowa's conduct, or lack of conduct, in and prior to 1943, is not warranted. The Special Master says, in effect, that because Iowa was not contesting private property claims along the Missouri River prior to and in 1943, the Compact is made construable as a promise by Iowa never to contest such claims. This, he says, is proper construction of the Compact even though the Compact says no such thing. We submit that if other reasons existed in 1943 and prior years to explain Iowa's conduct, or lack thereof, then the Court is not warranted in attributing a certain other reason or meaning to it, and is not warranted in using its meaning as a basis for construing the Compact. The true reason for Iowa's lack of diligence or zeal, if it be considered that she was lacking in

diligence or zeal, in protecting and developing her state owned lands along the Missouri River in 1943 and prior was that said lands and the river itself were so unstable that protection and development were impossible.

For almost a century prior to 1943, the river and all land in its proximity had been considered worthless. The river had been an implacable foe, an undefeatable enemy. Floods came at least twice yearly, and usually several more times yearly. The channel wandered violently, back and forth, washing away nearby lands, creating new lands, creating new channels, all in utter disregard of the wishes of the mere men trying to live and work in its vicinity.

In the early 1930's along came the U. S. Army Corps of Engineers, with all the resources of the United States at its disposal. A worthy adversary for the mighty river, thought the people of the area; it would be interesting to see who would be the winner. Odds were with the river in the eyes of most area residents; after all, the river was the undefeated champ; the upstart challenger was considered to have only an outside chance.

So, the Corps of Engineers joined battle. First, they designed a channel on paper; then gradually they pushed the river into the design; by 1943, the river was almost entirely in the design from Sioux City downstream to the Iowa-Missouri border. But the battle was not won. In 1943, the country and particularly the U. S. Army Corps of Engineers was engaged in World War II. Money and manpower were diverted from the Missouri River battlefield to the battlefields of Europe and the Pacific. The river continued to attack. Stabilizing structures along the south of Omaha were heavily damaged; stabilizing structures upstream from Omaha to Sioux City were almost totally destroyed, and the river reverted to the wild.

By 1948, the first battle of the war—Corps of Engineers v. Mississippi River—must be counted a victory for the river.

Commencing in about 1948, the Corps of Engineers again turned its attention to the Missouri River War. During the first battle, the Corps had learned some things; they learned that the Missouri River War could not be won without controlling floods by means of a series of upstream dams in the Dakotas; they learned that the curves which they had designed previously were too sharp and they had to be gentled if the river were to be confined; they learned that pile dikes ballasted with small quantities of stone could not withstand the river's pressures and that only pile dikes heavily ballasted and reinforced with large quantities of stone would suffice.

Thus, the battle was joined again. The channel was redesigned upstream from Omaha to Sioux City; the river was placed in the new design; the Dakota dams were built. Despite everything the Corps could do, the most disastrous flood of the Missouri River in all recorded history occurred in 1952. Shortly after the great flood of 1952, Gavins Point Dam in South Dakota was closed, and the Corps announced that henceforth, there would be no more floods of the magnitude of the 1952 flood.

Little wonder that residents of the area took this pronouncement by the Corps with a grain of salt. The Corps had lost the first battle of the war; they had lost the second battle of the war; what reason was there now to believe that the war had been won. It would take years for the people to realize that, this time, it was true, the war had been won. Confinement of the river into the new designed channel was not completed until about 1959, but no great floods have occurred since 1952.

The State of Iowa was more alert to the fact that the Corps of Engineers v. Missouri River war had been won by the Corps than most residents of the area. In the late 1950's the state realized that the disastrous floods of the past were truly a thing of the past; that no more would the channel lash back and forth, destroying land, creating new land, creating new channels, or abandoning old channels. The state realized that there was a reasonable prospect for stability along the river.

Whereas, the state had theretofore considered the river lands of such doubtful permanency and of such little value to the public for recreational or any other purposes, it now realized that the Corps was presenting to the people an unprecedented opportunity for development of public facilities. At the same time, the demand for public facilities was multiplying. The State of Iowa was the only public authority which could protect and defend the public interest along the river because Nebraska had elected long ago to relinquish her river beds, islands and abandoned channels into private hands.

Accordingly, in the latter 1950's, the State of Iowa single-handedly commenced the fight to protect and defend the public interest along the river. Little did Iowa expect that her chief adversary would be the State of Nebraska, whose citizens would benefit equally with those of Iowa.

It is obvious from reading the Special Master's Report that he considers the State of Iowa to be a latecomer on the scene, and that for this reason strained constructions may be placed on the Compact designed to bar Iowa from asserting her claims. Iowa submits that his construction is invalid and his reason for it is equally invalid. *United States* v. *U. P. RR. Co.,* 91 U.S. 72, 23 L.Ed. 224 (1875).

It will be seen by reading his discussion of the proposed rule commencing on page 173 and ending on page 175 of his Report that the Special Master's proposed rule to which Iowa is here excepting would have very narrow and limited application. It would apply only against one claimant of Missouri River lands. It would apply only to tracts of land which existed in 1943, which were ceded to Iowa by the Compact, which are alleged to have been privately owned in Nebraska as of 1943, which are contiguous to the Missouri River on the Iowa side, and which are south of Omaha. Iowa submits that interpolation of this rule into the Compact by the Special Master constitutes the creation of a second title law in Iowa to be applied in determining titles to a few tracts of land, which differs from the Iowa title law applicable to determine titles to all other lands in the state. This violates the rule that a state's laws must have equal application to all lands within its boundaries.

The Special Master's proposed construction of the Compact also violates the rule against "implied repealers". See Earl T. Crawford text on *Statutory Construction,* Sec. 228 at page 422, Sec. 309 at page 629, Sec. 310 at page 630. *Reeves & Co.* v. *Russell,* (No.Dak.) 148 N.W. 654, 659; *Bandfield* v. *Bandfield,* (Mich.) 75 N.W. 287, 288.

EXCEPTION No. IV

The Defendant Excepts to That Part of the Report Wherein the Special Master Adjudges That the State of Iowa Does Not Own Nottleman Island and Recommends That Iowa Be Enjoined from Claiming It. (See Paragraph No. 5, on page 201, and see page 111, of Report.)

ARGUMENT

Nebraska, as Plaintiff, selected the two areas along the river as to which she would adduce detailed evidence to establish private ownership. The Court might assume, and it is a fact, that Nebraska selected the two areas along the entire boundary where the evidence tending to establish private ownership is strongest. The areas which she selected were Nottleman Island and Schemmel Island.

These two areas were selected because both had formed prior to 1943 and were in existence at the time of the Compact. Of the 30 areas involved, Nottleman Island is probably oldest of all, having formed shortly prior to 1923. Schemmel Island formed during the 1930's as a result of the Corps of Engineers channelization work in those years. (Schemmel Island will be discussed in Exception No. V.)

From the outset in this case, Nebraska asserted that Nottleman Island was in Nebraska immediately prior to July 12, 1943, and was therefore ceded to Iowa by operation of the Compact for two reasons: (1) That the island formed at a time when the thalweg of the Missouri River was east of it, and (2) That Iowa had recognized that the island was in Nebraska and that it was therefore in Nebraska prior to 1943 by prescription.

After the evidence was in and both parties had rested, the Special Master stated from the bench, and stated to counsel in chambers, and stated in a written memo to coun-

sel that it was his opinion that Nebraska had failed to prove that the thalweg was east of the island when it formed and that Nebraska had therefore failed to prove that Nottleman Island was in Nebraska prior to July 12, 1943, by reason of how it formed and where the boundary was when it formed, and that Nebraska has therefore failed to sustain her burden of proving theory No. (1). See Special Master's statement at page 372, Transcript of Oral Arguments. See also pages 264, 266, 278, 315-317, 359, 379, 383, 386 and 387, Transcript of Oral Arguments.

We refer to the remarks of the Special Master during oral arguments for the purpose of demonstrating that even he, after all evidence was in and both parties had rested, was uncertain as to whether Nebraska had adduced a *preponderance* of evidence to establish that Nottleman Island formed in Nebraska. He resolved this uncertainty in his Report and found that Nebraska had adduced a "fair preponderance of the evidence" on the matter. (See Paragraph No. 2, page 164, of Special Master's Report.) Iowa's point is that the Special Master did not find the evidence adduced by Nebraska to be clear, satisfactory or convincing, and in the absence of clear, satisfactory and convincing evidence, he should have found that Nebraska failed to carry the burden of proof which she shouldered as Plaintiff. We believe that the Special Master chose his words "fair preponderance" very carefully, and that he very deliberately did not characterize Nebraska's evidence as "clear, satisfactory or convincing".

There are several rules of law, rules of evidence and presumptions which dictate that Nebraska was required to prove her facts by clear, satisfactory and convincing evidence in the instant case.

First, the burden on a complaining state suing a sister state is to fully and clearly establish all essential elements

of her case, and is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669, 75 L.Ed. 602, 51 S.Ct. 286 (1931). *Alabama* v. *Arizona,* 291 U.S. 286, 291-292, 78 L.Ed. 798, 54 S.Ct. 399 (1934).

Second, it is undisputed that the main channel of the Missouri River was west of Nottleman Island in 1943 and for several prior years. By the "presumption favoring the permanency of boundaries", it is presumed that the pre-Compact boundary was in the main channel west of the island and that the island was therefore in Iowa. This presumption could only be overcome by Nebraska by clear, satisfactory and convincing evidence that the boundary was someplace else.

Third, it is Nebraska's claim that in 1943, the pre-Compact boundary was east of the island although admittedly the Missouri River was west of the island. It is Nebraska's claim that separation of the river from the boundary came about as the result of an avulsion. It is presumed by the presumption favoring accretion as against avulsion that no such avulsion occurred at Nottleman Island. This presumption could only be overcome by Nebraska by clear, satisfactory and convincing evidence.

Iowa's exception taken to the Nottleman Island portion of the Special Master's Report is that he failed to apply these usual, applicable and ordinary rules of evidence against Nebraska, and then, he compounds his error by finding that Nottleman Island was in Nebraska prior to 1943 by recognition or prescription.

The evidence taken in its most favorable light for Nebraska establishes that the first human occupancy or use of Nottleman Island occurred between 1926 and 1930, probably in 1928. The 1926 aerial photo of the island shows

no evidence of human endeavor (Exhibit D-693). The 1930 aerial photo shows small patches of clearing or farming (Exhibit D-595-A). Ruth Dooley testified that she stayed on the island during the summer of 1929 (Defendant's Appendix, page 94). It is undisputed that the Shipley family (which first occupied the north part of the island) and John Nottleman (who first occupied the south part) entered upon the island as trespassers, and were squatters in common parlance. That is to say, the evidence shows that they owned no riparian land, either in Nebraska or in Iowa, to which the island could have been an accretion; they had no title or claim of title to the island when they moved upon it.

Again taking the evidence in its most favorable light for Nebraska, the first exercise of any dominion over Nottleman Island by Nebraska or any official of Nebraska was in 1933, when Mr. Fitch, the then County Surveyor of Cass County, Nebraska, surveyed the island (Exhibits P-735 and P-2345). There is no evidence that Mr. Fitch surveyed the island in his official capacity and it appears, therefore, that he surveyed it in his capacity as a private licensed land surveyor. He recorded his plat in the Cass County, Nebraska records and from this recording, the island was placed on the Nebraska tax rolls. It was first taxed in Nebraska in 1934 (Exhibit P-550).

The purpose of this brief recitation of facts is to show that Nebraska's alleged exercises of dominion and sovereignty over Nottleman Island commenced no sooner than 1933. Therefore, as of 1943, Nebraska had been exercising dominion no longer than 11 years. If one dates Nebraska's exercising of dominion from the beginning of taxation, the period was only 10 years. Based on this evidence, the Special Master concluded that Nottleman Island was in Nebraska as of July 12, 1943, by prescription, acquiescence or recognition.

Iowa takes exception to this conclusion (1) because the alleged period of prescription was entirely too brief, and (2) because there is absolutely no evidence of any knowledge on the part of the State of Iowa or any of its agents, officials or employees that Nebraska was exercising dominion in any manner.

From the outset, Nebraska recognized that the period of prescription prior to 1943 was entirely too short, so she attempted to prove that Iowa acquiesced after 1943 and until about 1960, thus adding some 17 years to the period. Counsel for Iowa are aware of no case to the effect that a state may lose its territory by 28 years of acquiescence, and certainly none to the effect that territory may be lost in 11 years. See *Indiana* v. *Kentucky,* 136 U.S. 479, 34 L.Ed. 329, 10 S.Ct. 1051 (1890), where the time period was "over seventy years"; *Arkansas* v. *Tennessee,* 310 U.S. 563, 84 L.Ed. 1362, 60 S.Ct. 1026 (1940), where the period was 122 years; *Maryland* v. *West Virginia,* 217 U.S. 1, 54 L.Ed. 645, 30 S.Ct. 268 (1910), where the period was 122 years; *Rhode Island* v. *Massachusetts,* 45 U.S. 591, 4 How. 659, 11 L.Ed. 1116 (1846), where the period was 125 years; *Michigan* v. *Wisconsin,* 270 U.S. 295, 70 L.Ed. 595, 46 S.Ct. 290 (1926), where the period was about 76 years.

The most recent case to involve acquiescence or prescription is *Illinois* v. *Missouri,* No. 18 Original, October Term, 1969, in which Hon. Harvey M. Johnsen, Special Master, found that "The Cottonwoods" had been in Missouri's domain with Illinois' acquiescence for about 50 years. Judge Johnsen notes at page 39 of his Report that 50 years "is a shorter length of time than the periods which appear to have been involved in the situations of the Court's previous reported decisions." Missouri also claimed Beaver Island and Roth Island by acquiescence and prescription extending over a period of about 10 years,

but Judge Johnsen refused to find that they were Missouri's by acquiescence or prescription.

The facts of record concerning acquiescence and prescription at Nottleman Island are similar to the facts at Beaver Island and Roth Island in Judge Johnsen's case, and are entirely dissimilar from the facts at The Cottonwoods in Judge Johnsen's case. A new and dangerous precedent would be set if this Court were now to hold that a state may acquiesce and territory may be acquired from her by a sister state in a period as brief as 11 years.

Additionally, Nebraska must lose on the issue of acquiescence and prescription at Nottleman Island because the record made before the Special Master is absolutely devoid of any evidence that the State of Iowa or any of her officers, agents or employees had any knowledge that Nebraska or any of her governmental subdivisions were exercising any sovereignty over Nottleman Island. Hon. Gunnar H. Norbye disposed of Arkansas' claim based on acquiescence and prescription in *Arkansas* v. *Tennessee,* No. 33 Original, October Term, 1969, at pages 11 and 12 of his Report, as follows:

> "It is not necessary to discuss in detail the evidence regarding the alleged exercise of dominion and sovereignty of Arkansas as to the lands in question. * * * *But there is a total lack of evidence that the State of Tennessee as a sovereign State has ever recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents."* (Italics added).

It is noteworthy that Judge Johnsen found ample evidence in his record in *Illinois* v. *Missouri,* supra, to establish that the State of Illinois and her responsible officials well knew that Missouri was exercising dominion over The Cottonwoods during all or almost all of the 50 year period.

It could be that Iowa has become estopped from claiming ownership of Nottleman Island by reason of her failure to claim it until some 17 years after the Boundary Compact of 1943, and this may very well be a proper issue to be tried in a case involving the ownership of the island. But the case at bar is not a case involving the ownership of Nottleman Island or any other land. Whether or not the island is owned by the State of Iowa is an issue properly triable in the state courts of Iowa, that being the state in which the island is located, and it being universally recognized that determination of land titles in the several states is exclusively within the jurisdiction of the courts of each state. *Hawkins* v. *Barney,* 30 U.S. 294, 5 Pet. 457, 8 L.Ed. 190 (1831). *Arkansas* v. *Tennessee,* 246 U.S. 158, 175, 62 L.Ed. 638, 38 S.Ct. 301 (1918).

Although Nebraska does not plead or urge estoppel in this case, having mentioned that Iowa might be accused of laches or estoppel in state court, we should note that the facts relating to estoppel by Iowa at Nottleman Island are totally unlike the facts in *Iowa* v. *Carr,* 191 Fed. 257 (1911), where the court found Iowa was estopped from claiming the land there in dispute. In *Iowa* v. *Carr,* valuable improvements had been made on the disputed land by the adverse claimants. At Nottleman Island, there are no valuable improvements and all adverse claimants who testified admitted under cross-examination that if it were now adjudged that the island is property of the State of Iowa, they would still realize net profits from their years of farming state-owned land.

As hereinabove mentioned, Nebraska set out to prove that Iowa acquiesced for an additional 17 year period after the Boundary Compact became effective in 1943. Acquiesced in what? Iowa couldn't acquiesce in Nebraska's exercising sovereignty, dominion or jurisdiction over Not-

tleman Island after July 12, 1943, because Nebraska didn't exercise sovereignty, dominion or jurisdiction over the island after the Compact. Nebraska could not and did not exercise sovereignty over Nottleman Island because by the Compact, she had contracted, promised and agreed not to. It is not factually or legally possible that Iowa acquiesced after 1943 because the thing she is accused of acquiescing to was no longer happening.

Iowa submits that the Special Master is in error when he determines that Nottleman Island was ceded by Nebraska to Iowa in the Boundary Compact of 1943; that he is in error when he determines that there was "title good in Nebraska" to Nottleman Island as of 1943 because the island was not in Nebraska at that time; and that he is in error when he recommends issuance of an injunction by this Court to enjoin Iowa from further prosecuting the quiet title case entitled *Iowa* v. *Babbitt, et al.*, in the District Court of Mills County, Iowa.

EXCEPTION No. V

The Defendant Excepts to That Part of the Report Wherein the Special Master Adjudges That the State of Iowa Does Not Own Schemmel Island and Recommends That Iowa Be Enjoined from Claiming It. (See Paragraph No. 5, page 201. See also page 111.)

ARGUMENT

Nebraska asserts that Iowa violates the 1943 Boundary Compact by claiming ownership of Schemmel Island in Fremont County, Iowa, for the same general reasons which Nebraska asserts regarding Nottleman Island and which we have been discussing under EXCEPTION NO. IV. That is, it is Nebraska's assertion that Schemmel Island was in Nebraska prior to the Compact, that there was good title in Nebraska to it, that it was ceded to Iowa by the Compact; that there was no "title good in Nebraska" to the island as of 1943; that the island is property of the State of Iowa by reason of the facts of how it formed and by reason of the operation of Iowa law upon those facts.

The facts concerning the formation of Schemmel Island are very different from the facts at Nottleman Island. See Special Master's remark on page 462, Transcript of Oral Arguments:

> MR. MURRAY: We think, Judge, that Nottleman and Schemmel Islands are markedly different on their facts as in evidence in this case.
>
> THE COURT: I agree with you.

The evidence taken in its most favorable light for Nebraska establishes that the land which today constitutes Schemmel Island commenced forming in 1932; Iowa's evidence tends to fix 1936 as the year in which formation

commenced. The four year time difference is not important.

Aerial photographs taken and maps made by the Corps of Engineers in the 1920's and early 1930's show that the future site of the island was in the Missouri River during those years. (See Exhibits D-1124, D-1093-A, D-1121, D-1122, D-1092-A, D-1123, D-291-A, all reproduced at pages Otoe-4 through Otoe-16 of Appendix to Defendant's Brief and Argument before the Special Master.) By Nebraska's evidence, the oldest tree found on the island commenced growing in 1932; Iowa's experts said the same tree commenced growth in 1936. Other evidence establishing that the land which constitutes Schemmel Island today did not exist before 1932 is in the record, but we will not encumber this Brief with a recitation of it.

Nebraska contends and the Special Master found that "The Schemmels acquired the first Nebraska deeds to the land in 1938 which trace back to the 1905 court sale and 1908 Otoe County Treasurer's Deed * * *". (Report, page 147.) The so-called chain of title is: to one Hanks by the said court sale and Treasurer's Deed in 1905 and 1908 (Exhibits P-138 and P-141); from Hanks to one George Ward by Warranty Deed in 1918 (Exhibit P-1529); from George Ward to Schemmels by Quit Claim Deeds in 1938 (Exhibits P-192, P-193 and P-2644).

Iowa contends that the Quit Claim Deeds which the Schemmels obtained from George Ward in 1938 conveyed nothing because whatever land George Ward acquired in 1918 was washed away and its identity destroyed. By the law of Nebraska, when one's land is washed away, the owner loses it and the chain of title is broken; and when new land reappears in that spot under the sky, a new title commences in whomsoever the new land may form

as an accretion to. *Yearsley* v. *Gipple,* 104 Neb.88, 175 N.W. 641 (1919). This is the law of accretion generally, applied in *Tyson* v. *Iowa,* 283 F.2d 802 (1960), to disallow the Harrop claims to the land there in dispute. This is why Iowa has referred to the 1938 deeds from Ward to Schemmel as spurious and fictitious; they are pieces of paper represented to convey land but actually conveying nothing.

When the Special Master adjudges that the Schemmels held "title good in Nebraska" to Schemmel Island as of 1943, he violates his own rule set out at page 175 of his Report, wherein he states that the private litigant must show "a title supportable under Nebraska law". Later in the same paragraph, he states: "To emphasize again the private litigant must show a title 'good in Nebraska'." The language of the 1943 Boundary Compact was that Iowa would recognize "titles * * * good in Nebraska", and this she willingly does; but Iowa did not agree to recognize every scrap of paper put forth as a "title good in Nebraska".

The Special Master violates another of his own rules when he recommends that Iowa be enjoined from pursuing its claim of ownership at Schemmel Island. In the same paragraph on page 175 of his Report, he says: "But it should be understood that Iowa is not foreclosed from contesting under Nebraska law the private litigant's alleged Nebraska good title". We submit that his proposed injunction would certainly foreclose Iowa's right to contest the Schemmel claim of good Nebraska title at Schemmel Island.

What is a trial court, either federal or state, to understand when the Special Master says, on one hand, that Iowa must only recognize titles *good* coming from Nebraska, and then, on the other hand, enjoins Iowa to recognize a title less than *good* coming from Nebraska at Schemmel Island?

Another serious inconsistency exists in the Special Master's Report as it concerns Schemmel Island: At Nottleman Island, he adopted Nebraska's theory of acquiescence and prescription to find that the state boundary was east of the island as of 1943 and that Nottleman Island was therefore ceded to Iowa by the Compact; but at Schemmel Island, he found the pre-1943 boundary was in the Iowa Chute despite clear evidence that all local officials and all local residents considered that the boundary was not in the Iowa Chute after the river moved westward from the Iowa Chute prior to 1905.

Iowa simply submits that if acquiescence and prescription is to be the rule at Nottleman Island, it should also be the rule at Schemmel Island. There is no ground for using the rule to bar Iowa from claiming ownership of Nottleman Island, and then ignoring it or violating it to bar Iowa from claiming ownership of Schemmel Island, especially when the facts concerning acquiescence and prescription are even stronger in Iowa's favor at Schemmel Island than were the facts at Nottleman Island in Nebraska's favor.

The evidence at Schemmel Island is that the Missouri River channel moved easterly into Iowa until 1895, when it reached its farthest easterly location in a channel referred to and known as the "Iowa Chute". By 1905, the channel had retreated westerly from the Iowa Chute and it has been west of the Iowa Chute ever since. Whether the westerly movement was by avulsion or by accretion became the subject of expert testimony. Iowa believes that the weight of this testimony was definitely in her favor and in favor of the proposition that the westerly movement was accretionary, not avulsionary; that therefore, the state boundary moved westerly with the river after 1895 just as it had moved easterly prior to 1895 when the river moved easterly.

To establish that the river moved westward out of the Iowa Chute by an avulsion between 1895 and 1905, Nebraska introduced the expert testimony of Dr. William N. Gilliland, a geologist, of Rutgers University, who testified that the natural Missouri River at Otoe Bend was a "typical meandering stream". Then, he testified how meanders form, enlarge and move downstream in "typical meandering streams"; and how "point bars" are cut off. It was Dr. Gilliland's opinion, based on elementary theories of geology and hydraulics applicable to "typical meandering streams", that the Missouri River moved westward from the Iowa Chute between 1895 and 1905 by an avulsion.

Iowa tendered the testimony of Dr. Lucien M. Brush, an expert hydraulogist and geomorphologist, of Princeton University, who testified that the natural Missouri River at Otoe Bend was not a "typical meandering stream"; that from the mouth of the Platte River downtsream almost to St. Joseph, Missouri, the natural Missouri River was a "braided stream". Dr. Brush's point was that Dr. Gilliland's theories concerning movements of "typical meandering streams" would have no application to Otoe Bend and that his theory concerning what happened between 1895 and 1905 at Otoe Bend was invalid, being based on a false premise.

Iowa also tendered the research and expert testimony of Dr. Robert V. Ruhe and Dr. Thomas Fenton, of Iowa State University. These men had made exhaustive and detailed studies of the soils, elevations, contours, scarps, and of the maps and aerial photographs of Otoe Bend, Schemmel Island and the Iowa Chute. They had found a series of seven westerly-facing scarps between the left bank of the Iowa Chute and the left bank of the 1905 channel, this indicating a gradual movement of the channel westerly from the Iowa Chute in those years. They found

no easterly-facing scarps in the area and this eliminates any possibility that the channel left the Iowa Chute by any avulsion. Dr. Brush concurred in these conclusions.

But the conclusive evidence establishing that the boundary did not remain in the Iowa Chute after the river moved west of it is the acquiescence and prescription evidence.

In 1921, in *Payne* v. *Hall,* 192 Iowa 780, 185 N.W. 912, the Iowa Supreme Court held that the river had moved westward from the Iowa Chute by accretion and not by avulsion. That case involved the ownership of land contiguous on the north to the land between the Iowa Chute and Schemmel Island. (Exhibit D-747.)

Tax records of Fremont County, Iowa, for the years prior to 1934 have been destroyed, but records from 1934 on show that the land west of the Iowa Chute was taxed in Iowa. (Exhibits D-1200, D-1200-A, D-1201, D-1201-A, D-1202, D-1202-A, D-1203, D-1203-A.)

In 1929, C. A. Shannon, County Surveyor of Otoe County, Nebraska, prepared a map of Otoe County showing the state boundary line to be west of the island site, and the entire island site to be in Iowa. (Exhibit D-272.)

Albert J. Propp owns and operates a farm consisting of 260 acres east and 160 acres west of the Iowa Chute. He has lived on this farm since 1912. He and his father before him have possessed and operated this unit peaceably since 1912, paying their taxes in Iowa. The Givens family has farmed land adjoining the Propp land on the north and lying on both sides of the Iowa Chute. Taxes were paid in Iowa and the entire unit was always considered to be Iowa land.

All maps from and including the U. S. Geologic Survey Map of 1905 down to date designate all land east of the river at Otoe Bend as being "Iowa".

If it is true that the state boundary was east of Nottleman Island by acquiescence and prescription prior to 1943, then it follows as night follows day that the state boundary was in the Missouri River at Otoe Bend by acquiescence and prescription and that Schemmel Island formed in Iowa east of the state boundary.

CONCLUSION

Iowa resisted Nebraska's Motion for Leave to file its Complaint in this case because she did not believe that a justiciable controversy exists between the states and because she did not believe that Nebraska is a "real party in interest" so as to entitle her to maintain the action. At that time no evidence had been introduced and Iowa understands that Nebraska was permitted to file her Complaint so that she would thus be afforded an opportunity to prove the existence of a justiciable controversy and to prove that she has a real interest therein. Now that the evidence is in, Iowa again submits that Nebraska's Complaint should be dismissed and denied, because Nebraska having had an opportunity to prove the essential elements of her case, has failed to do so.

Even if the Court considers that this be a proper case for exercise of its original jurisdiction to construe the Iowa-Nebraska Boundary Compact of 1943, Iowa submits that the Court should confine itself to construing the Compact. That it should not invade the jurisdiction of the state courts of Iowa by quieting the title to Iowa land or enjoining Iowa from asserting its ownership claims in courts of competent jurisdiction.

In construing the Compact, Iowa simply asks that the term "cede" and the term "titles good in Nebraska" be given their usual, ordinary and received meanings. The legislators who drafted and enacted the Compact must be

deemed to have meant what they said, not what the Special Master would read into the Compact now, some 27 years after its enactment.

The term "cede" means to assign or transfer sovereignty over land and necessarily implies that the land was in the ceding state at the time of cession. The term "good title" means title of such quality that it can be defended against all possible adverse claimants, against the world as it is sometimes said.

WHEREFORE the Defendant State of Iowa respectfully prays that its exceptions hereinabove stated be sustained.

Respectfully submitted,

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