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 REPLY TO NEBRASKA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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Comes now the Defendant, the State of Iowa, and for her Reply to Nebraska's Exceptions to the Special Master's Report now on file herein, respectfully states to the Court as follows:

PRELIMINARY STATEMENT

On pages 3, 4 and 5 of Iowa's Exceptions to the Special Master's Report, Iowa attempted to distill seven propositions or rules which she believes are contained in the Report. On pages 35 and 36 of Nebraska's Exceptions, Nebraska restates two general principles of law which she believes are contained in the Report, and then she mentions that there are three other recommendations by the Special Master with which she agrees. From these

statements by Iowa and Nebraska, it will be seen that there is no substantial disagreement as to what the Special Master's Report is intending to say and recommend.

The rule set forth by the Master in italics commencing near the bottom of page 174 and continuing onto page 175 of his Report deals with areas which Iowa claims to own and which were in existence when the Compact was adopted in 1943. Iowa has excepted to this rule altogether on the ground that it is not a proper interpretation or construction of the Compact. Nebraska agrees with the rule as far as it goes, but contends it should be broader.

The rule set forth by the Master on page 193 of his Report deals with areas which Iowa claims to own and which have formed in Iowa since 1943. Iowa agrees with this rule and has stated no exception to it. Nebraska excepts to the first sentence of this rule, and Nebraska states at the bottom of page 35 of her Exceptions that this constitutes her "basic exception to the Master's findings".

This Reply by Iowa will be mainly a reply to Nebraska's "basic exception". Iowa's reply to Nebraska's other exceptions will be stated as briefly as possible. Division I of this Reply will be directed to Nebraska's exceptions other than her "basic exception". Division II will be directed to her "basic exception".

DIVISION I

In Division II of Nebraska's Exceptions, commencing on page 2 and continuing onto page 11, Nebraska states twelve "exceptions to findings of fact".

For reply to Exception No. (1) on page 2, Iowa states: Insofar as facts are related, stated or found by the Master at pages 50 to 61 of his Report, said facts are true and correct and are sustained by evidence in the record made before the Master.

For instance, it was established during the pre-trial phase of this case that the State of Nebraska does not claim to own any tract or parcel of land which the State of Iowa adversely claims to own. All lands, river beds, abandoned river beds and islands which Iowa claims to own in the vicinity of the Missouri River are on the east side of the boundary and in Iowa. All lands which Nebraska claims to own in the vicinity of the river are in Nebraska. (See LIST OF AREAS OWNED BY THE STATE OF IOWA ALONG THE MISSOURI RIVER AND DISCLAIMER voluntarily filed by Iowa with Special Master Walter L. Pope. See also, Iowa's Interrogatories No. 1 and No. 2, and Nebraska's Answers thereto.)

There is no evidence concerning how many Nebraskans or persons claiming by Nebraska titles there are or may be who are claiming to own river lands adversely against Iowa's claim of ownership. Nebraska made no effort to prove this fact. Iowa had no burden to prove it. The meager record made concerning this fact proposition fairly establishes that there are only a miniscule number of private individuals claiming adversely to the State of Iowa and that Nebraska does not represent her general citizenry or any class thereof when prosecuting this action.

For reply to Exception No. (2) on page 2, Iowa states: The fact stated in the quotation from the Master's Report is true. There is insufficient evidence to establish even a title good in Nebraska as to any area which existed in 1943 and which Iowa claims to own. There is no evidence whatsoever as to whether or not there was a title good in Nebraska as of 1943 as to State Line Island, Copeland Bend, Auldon Bar or St. Mary's Bend, these being the areas south of Omaha which Iowa claims to own, other than Nottleman Island and Schemmel Island.

For reply to Exception No. (3) commencing on page 2, Iowa states: The facts stated by the Master on page 181 of his Report and quoted on page 4 of Nebraska's Exceptions are true. (See Exhibits D-636, D-637, D-638, D-644, D-646, and D-1048.)

For reply to Exception No. (4) commencing on page 3, Iowa states: The Master's finding that the "1943 Compact contains no terms, phrases or language that can be construed as saying that Iowa repealed her historic common law when she adopted the Compact" is a true and correct finding. (See the 1943 Iowa-Nebraska Boundary Compact.)

For reply to Exception No. (5) on page 8, Iowa states: We do not understand that Nebraska is excepting to the Master's findings concerning how the land formed at Tyson Bend which became the subject of litigation in *Tyson* v. *Iowa,* 283 F.2d 802. Nebraska simply says that the decision by the U. S. District Court and affirmed by the Circuit Court in that case was wrong. Nebraska is excepting to the Master's conclusion that said decision was right. It is and always has been Iowa's position that the decision of *Tyson* v. *Iowa* is right and that the basic rules announced therein are applicable to determine other areas which have formed in like manner along the Missouri River.

The basic rules derived from *Tyson* v. *Iowa* are: (1) When privately owned lands are washed away and destroyed by action of the river waters, the private title to such lands is also washed away and destroyed, and by Iowa law, title passes to the State. (2) When new land forms, ownership of it shall be determined by the law of the state in which it forms.

The Master says in his Report that these rules are applicable to determine ownership of all areas which have formed since 1943 and Iowa submits that he is correct in this. Iowa's exceptions to the Master's Report are bottomed on the proposition that these rules should also be applied to determine ownership of areas which had formed prior to 1943, and Iowa's basic exception to the Report is on account of his failure to apply said rules to both the areas formed pre-1943 and the areas formed post-1943.

Nebraska's Exception No. (6) commencing on page 8 is well taken.

For reply to Exception No. (7) on page 9, Iowa states: Whether there were 11 or 15 canals dredged by the Corps of Engineers prior to 1943 is a matter of no importance or significance. Iowa objects to any implication that each and every "canal" dredged by the Corps constituted a "man-made avulsion" or that every canal was so dredged and located that it cut off a piece of Nebraska and left it on the Iowa side.

One of Nebraska's principal contentions is that neither state nor anybody knew where the pre-1943 state boundary was; that the Compact was entered into for the purpose of (1) fixing a new boundary and (2) avoiding the necessity of ever having to determine where the pre-1943 boundary was. Iowa submits that Nebraska is totally inconsistent when she urged the Master and now urges this Court to find and determine that there were avulsions at

many locations prior to 1943 which stranded Nebraska land on the Iowa side of the river while contending that nobody knew or knows where the pre-1943 boundary was.

For reply to Exception No. (8) on page 10, Iowa states: The Compact contains no terms which can be construed to mean that the states were agreeing to repeal the presumption favoring accretion as against avulsion; and there are no circumstances surrounding the enactment of the Compact which render it so construable. The Master erroneously construes the Compact as an agreement by Iowa not to use the presumption in litigation concerning the ownership of areas along the river which had formed prior to 1943. Nebraska excepts to the Master's failure to construe the Compact as a total repealer of the presumption in all litigation concerning the ownership of river land. Iowa's reply to Nebraska's exception is reassertion of her position above stated: The Compact is not construable as an agreement to repeal the presumption at all.

For reply to Exception No. (9) on page 10, Iowa states: The Master quoted Nebraska's proposed statement concerning the post-1943 material facts (SMR 91-102), and quoted Iowa's proposed statement concerning the same matters (SMR 102-108). At the top of page 109, the Master accepted Iowa's proposed statement, and thereby by implication rejected Nebraska's. The record sustains the Special Master's said decision.

For reply to Exception No. (10) on page 10, Iowa states: Nebraska urged the Master to make many various findings of fact at pages 102-123 of her proposed findings, some of which may be true, but some of which are not true. Since Nebraska has elected to except to the failure of the Master to adopt said findings *en masse,* Iowa's reply is that the Master's failure to adopt said findings *en masse* is not erroneous.

For instance, Nebraska urged the Master to find as a matter of fact that Winnebago Bend Canal and California Cut-off Canal were dredged in Nebraska. Both Nebraska and Iowa stated frankly that they were not adducing all available evidence concerning Winnebago Bend or California Cut-off; that only enough evidence was being adduced concerning those areas to demonstrate the general nature of the problems existing there. The Master understood this; hence his refusal to find facts at those locations; he was correct in his refusal to find facts as urged by Nebraska at pages 102-123 of her proposed findings.

The Master's refusal to find the facts urged by Nebraska as aforesaid is also a recognition of the inconsistency of positions taken by Nebraska. As mentioned hereinbefore, on the one hand, Nebraska wanted the Master to find that the pre-1943 Boundary cannot be located or determined; on the other hand, she wanted the Master to find that certain areas were "in Nebraska" prior to 1943, and that canals were dredged "in Nebraska" prior to 1943. Nebraska wants one rule at some locations, another rule at other locations. The Master recognized that if he were to construe the Compact as a recognition and agreement by the states that the pre-1943 boundary could not and would not be located, then that rule must apply to the entire boundary, not to a few areas where Nebraska might want to apply it.

Iowa agrees that Dr. Weakly was Nebraska's tree expert as stated in Exception No. (11) on page 10.

Nebraska's Exception No. (12) on page 11 is well taken.

Commencing on page 13 of her exceptions, Nebraska enumerates seven exceptions to "relief recommended by the Master and categorization of the issues".

For reply to Exception No. (1) commencing on page 13, Iowa states: The Master fairly stated one of the issues in Proposition II on page 1 of his Report. Furthermore the Master's answer to the issue is correct. And this is true regardless of whether the issue be stated as the Master stated it or whether it be stated as Nebraska would state it. That is to say: Ownership of land which has formed since 1943 in the vicinity of the Missouri River must be determined by the title laws of the state in which it formed, using the boundary fixed and established by the Compact to determine in which state they formed; more specifically, Nebraska title laws do not extend, project or apply beyond the boundary into Iowa.

The Special Master determined that neither this rule nor its application divests any riparian rights or titles from any riparian owner. He is right about this. The matter will be discussed in detail in DIVISION II hereinafter.

Iowa does not believe or understand that Exception No. (2) on page 14 is really an exception. In any event, Iowa does not understand what portion of the Master's Report is being excepted to.

For reply to Exception No. (3) commencing on page 14, Iowa states: By the Compact, Iowa agreed to recognize "titles - - - good in Nebraska"; the Master recommends that Iowa be required to recognize "titles - - - good in Nebraska"; Iowa recognizes its obligation to recognize "titles - - - good in Nebraska". Nebraska says that the Master is in error when he fails to foreclose Iowa from contesting whether or not an alleged title was a "title - - - good in Nebraska". In arguing for her Exception No. (3) on page 15, Nebraska repeats four times that Iowa must be required to recognize "the titles", or "the titles of private landowners", or "the title". Every time, Ne-

braska omits the word "good". This omission of the word "good" when Nebraska is discussing what Iowa agreed to recognize is not accidental. Nebraska well knows that many alleged or purported titles to Missouri River lands are not "good" titles by Nebraska law and were not "titles - - - good in Nebraska" as of 1943.

The Special Master is correct in his conclusion that Iowa only bargained to recognize "titles - - - good in Nebraska". After all, this being the terminology of the Compact, the conclusion was inevitable and inescapable.

Having reached the conclusion that Iowa only agreed to recognize "titles - - - good in Nebraska", the Master recognized that he could not foreclose Iowa from contesting whether or not an alleged title was "good". To foreclose Iowa from contesting would have been the equivalent of requiring Iowa to recognize every alleged title, every purported title, every color of title and every piece of paper emanating from Nebraska. The Master was correct in concluding that Iowa should not be foreclosed from contesting the validity of all alleged "good - - - titles" in courts of competent jurisdiction.

For reply to Exception No. (4) commencing on page 15, Iowa states: The Special Master's recommended rule is that, since 1943, Nebraska titles have terminated at the state boundary fixed and established by the 1943 Boundary Compact, just as they terminated at the state boundary which had theretofore existed. The Master, in his Report, sets forth several reasons why he concluded that application of this rule does not divest any private riparian landowner of any vested titles or rights which he theretofore possessed. The reasons why Iowa believes that the Special Master is correct in this matter will be discussed in DIVISION II hereinafter.

For reply to Exception No. (5) commencing on page 18, Iowa state: This exception again puts forth Nebraska's "vested rights" theory. Again, Iowa replies that no "vested rights" are divested by the Special Master's proposed rule. The Master's reasons and Iowa's reasons for so believing will be discussed in detail in DIVISION II.

For reply to Exception No. (6) commencing on page 19, Iowa states: Again, in this exception, Nebraska puts forth her "vested rights" theory. Again, Iowa replies that no "vested rights" are divested, and the subject will be discussed in detail in DIVISION II hereof.

For reply to Exception No. (7) commencing on page 20, Iowa states: In this exception, Nebraska puts forth the rules which she was urging the Master to adopt in lieu of the single, simple rule which he did adopt for determining ownership of river areas which have formed since 1943. After having adopted the rule that ownership of areas formed since 1943 is to be determined by the title laws of the state in which they formed, the Master had to reject the rules promulgated by Nebraska in Exception No. (7) because they are inconsistent with the rule he adopted and recommends in his Report. Also, he rejected the rules promulgated by Nebraska in Exception No. (7) because they are not valid interpretations of the 1943 Boundary Compact. There are no terms, phrases or language in the Compact to mean that Iowa was conveying away her state owned river beds in the Missouri River or repealing her historic common law regarding state ownership of navigable river beds. The Compact affirmatively states that "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands - - - lying easterly of said boundary"; thus, the Compact affirmatively states that Nebraska jurisdiction, Nebraska sovereignty and Nebraska law shall cease

application at the boundary, shall no longer apply easterly of the boundary and shall not apply in Iowa. Nebraska's Exception No. (7) will be further discussed in DIVISION II of this Reply.

DIVISION II

Nebraska states, at the bottom of page 35 of her Exceptions, that her "basic exception" to the Special Master's Report is her exception to the following rule adopted and recommended by the Master, to-wit:

> "Ownership of areas which have formed since July 12, 1943, shall be determined by the law of the state in which they formed, the boundary fixed by the Iowa-Nebraska Boundary Compact of 1943 being the line which shall determine in which state they formed."

Throughout her SUMMARY OF ARGUMENT and ARGUMENT, Nebraska contends that application of the above rule would divest private riparian landowners of "vested rights" which they possessed before the Compact. The Special Master rejected this contention and Iowa believes that this Court should reject it.

The logical first inquiry to be made is: What were the "vested rights" of a Nebraska riparian landowner in and prior to 1943? Nebraska says he owned the bed of the navigable stream contiguous to his land to the thread or thalweg of that stream. Nebraska asserts that this doctrine became the common law of Nebraska in *Kinkead* v. *Turgeon,* 74 Neb. 580, 109 N.W. 744 (1906).

A reading of *Kinkead* discloses that there was no issue in the case as to ownership of the bed of any navigable stream. The issue was as to the ownership of an *abandoned bed* of a navigable stream, to-wit: the Missouri River.

In both of the Nebraska Supreme Court's opinions in the *Kinkead* case, previous decisions of that Court and the decision of the Supreme Court of the United States in *County of St. Clair* v. *Lovingston,* 23 Wall. 46, were reviewed. The Nebraska Court determined that all prior pronouncements had been in cases where the facts were different from the facts in *Kinkead.* Prior pronouncements were therefore classed as *obiter,* and the Court therefore stated at 74 Neb., page 581, that "- - - we approach the question unhampered by any previous adjudication." Hence, the Nebraska Court was saying, in effect, that the riparian owners had no "vested rights" to the bed of the contiguous navigable river prior to 1906.

At 74 Neb., page 583, the question is stated as follows: "- - - the question here presented as to the right of a riparian owner to an *abandoned* river bed of a navigable stream. - - -" (Italics added.) The question is answered at 75 Neb. 590-591, as follows: "- - - and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, *reverts* to the riparian owners to the thread of the channel where the waters flowed. - - -" (Italics added.)

Thus, there was no issue in *Kinkead* as to ownership of the bed of a navigable stream while it is under the waters of the stream. The issue was as to ownership of the *former* bed of the navigable stream *after* that bed had been *abandoned* by an avulsion. And the law of the case is that *after abandonment,* the bed *reverts* to the riparian owner.

Hence, whatever was said in *Kinkead* concerning ownership of the bed before abandonment was *obiter dicta*

or *dicta*, or at best *judicial dicta*. Neither *obiter dicta nor judicial dicta* has the status of a *decision* or an *adjudication*. 29 Words and Phrases 13 (Obiter Dictum); 12 Words and Phrases 557 (Dictum); 23 Words and Phrases 494 (Judicial Dictum); *Lancaster County* v. *McDonald*, 73 Neb. 453, 103 N.W. 78, 81. So far as Iowa's counsel have been able to ascertain, it has never even been asserted in any case we have been able to discover that a "vested right" can arise from either *obiter dicta* or *judicial dicta*. Iowa submits that no Nebraska riparian landowners possessed any "vested rights" to the bed of the Missouri River contiguous to their riparian lands as of 1943 as a result of the Nebraska Supreme Court's decision in *Kinkead* v. *Turgeon*, supra.

We proceed next to consider other Nebraska cases which might be considered to be the "- - - line of cases commencing with *Kinkead* v. *Turgeon* - - -" mentioned by Nebraska at page 33 of her Exceptions. The only case Nebraska cites is *State* v. *Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946); Nebraska notes that *State* v. *Ecklund* was decided after the Compact; for that reason, it is hardly possible that any "vested rights" could have existed as of the effective date of the Compact by reason of *State* v. *Ecklund*. Furthermore, it is stated in the Court's opinion at 147 Neb., page 520, that the Platte River, where the disputed land was located, was non-navigable; for this reason alone, it cannot be said that any "vested rights" to beds of or islands in navigable rivers may be derived from *State* v. *Ecklund*.

Concerning other Nebraska cases: *Higgins* v. *Adelson*, 131 Neb. 820, 270 N.W. 502 (1936), involved accretions in being to an island in the non-navigable Platte River. *Independent Stock Farm* v. *Stevens*, 128 Neb. 619, 259 N.W. 647 (1935), involved the ownership of land which

had formed by gradual accretion to the land of the plaintiff; that is to say, the land had risen above the water; the land was in being; there was no issue as to ownership of any river bed. *Frank* v. *Smith,* 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 458 (1940), involved land in the vicinity of the non-navigable North Platte River. *Yearsley* v. *Gipple,* 104 Neb. 88, 175 N.W. 641 (1919), also involved ownership of accretion land which had theretofore formed, not the bed of the river. *Thies* v. *Platte Valley P. P. & I. District,* 137 Neb. 344, 289 N.W. 386 (1939), involved the non-navigable North Platte River. *Hardt* v. *Orr,* 142 Neb. 460, 6 N.W.2d 589 (1942), involved the ownership of an island in being in the non-navigable North Platte River. *Conkey* v. *Knudsen,* 135 Neb. 890, 284 N.W. 737 (1939); *Conkey* v. *Knudsen,* 141 Neb. 517, 4 N.W.2d 290 (1942); *Conkey* v. *Knudsen,* 143 Neb. 5, 8 N.W.2d 538 (1943); and *State ex rel. Conkey* v. *Ryan,* 136 Neb. 334, 285 N.W. 923 (1939), all related to one and the same body of accretion land which was already in being, had risen above the waters of the Missouri River, and there was no issue in any of these cases concerning ownership of any river bed.

In *Yates* v. *Milwaukee,* 10 Wall. 497, quoted by Nebraska at page 57 of her Exceptions to Special Master's Report, this Court set forth the proposition that it was not bound by the common law of a State, holding that the title of the owner of a riparian lot extends to center of the stream, and stated:

> "As to the first of these propositions, it does not seem to be necessary to decide whether the title of the lot extends to the thread of the channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of *The Railroad Company* v. *Schurmier* (7 Wal-

> lace 272), would limit the *title* to the margin of the stream." (pages 503-504.)

The riparian right the Court thereafter considered in the decision as vested was not title to thread of stream but rather as stated:

> "* * *; and among those rights are access to the navigable part of the river from the front of his lot, * * *." (page 504.)

and right to make wharf, etc., subject to general rules and regulations as the Legislature may see proper to impose. Following this decision, it would appear that even if the common law of Nebraska grants riparian owners title to the thread of navigable streams in the state, it is void, or this Court would limit the title to the margin of the stream, "if the soil was originally part of the public lands of the United States" (page 504), which they were, as both Iowa and Nebraska were created out of the territory known as the Louisiana Purchase, and were definitely public lands of the United States. The Court then stated the Supreme Court of Wisconsin had gone further by asserting the doctrine that the *title* of the owner of such a lot extends to the center of the stream. In regard to this extension of the doctrine, the Court said at bottom of page 506 and top of 507:

> "* * *, the case of the Railroad Company v. Schurmier decided that if the lot, as thus described, came to the margin of the stream, no title to the precise locality supposed to be dedicated ever passed from the United States."

The riparian owner had, however, right of access to navigable portion of stream.

It is the position of Iowa that from the foregoing, it is apparent that the common law of the State of Nebraska

did not in fact give the Nebraska riparian owners along the Missouri River title or ownership of the bed of the navigable channel of the river, and they acquired no property right to such bed until it was abandoned by the river. In the event this Court believes Iowa counsel has misinterpreted the doctrine set out in the *Kinkead* and *Ecklund* cases, supra, then Iowa submits the Nebraska court had no jurisdiction over the bed of the navigable waters of the Missouri River as title to some had never passed from the United States, as set out in *Yates* v. *Milwaukee,* supra.

Next, and still discussing the possible "vested rights" of a Nebraska riparian landowner beyond the bank of the Missouri River prior to 1943, Iowa urges that the eastermost private boundary of Nebraska landowners under Nebraska law was always the state boundary. They never had any "vested rights" beyond the state boundary. While is it true that the pre-1943 state boundary was also the thalweg of the Missouri River along most of the boundary, we think it is inaccurate of Nebraska to say that private boundaries of Nebraska landowners along the Missouri River were "the thalweg of the river". A more accurate statement would be that private boundaries of these Nebraska landowners was "the state boundary". This is true because wherever the state boundary was west of the thalweg of the river prior to 1943, Nebraska rights and titles terminated at the boundary and did not extend to the thalweg. Carter Lake, which was involved in *Nebraska* v. *Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396 (1892), is typical of this situation where the boundary was west of the thalweg of the river as of and prior to 1943. In other words, if a Nebraska riparian owner had any "vested rights" in the bed of the Missouri River to the thalweg prior to 1943, it was due to the coincidental fact that the thalweg

was also the state boundary, and his rights were always limited to the Nebraska side of the boundary.

The power and jurisdiction of the United States, acting through the U. S. Army Corps of Engineers, to move and stabilize the thalweg as it might deem necessary or desirable has always been recognized, and so long as these movements were within the bed of the river, it has been unquestioned that no private vested rights were divested or involved. If the thalweg and the state boundary could be moved by the Corps without impairing "vested rights" before the Compact, we submit that the state boundary could be moved by the Legislatures of Iowa and Nebraska by adoption of the Compact without impairing any "vested rights".

We next approach and discuss the question of whether or not it was within the power of the Nebraska Legislature to amend or change the common law of Nebraska by adoption of the 1943 Boundary Compact. At page 190 of his Report, the Special Master finds and concludes that the Nebraska Legislature did indeed possess this power, and that to the extent necessary to sustain his interpretation of the Compact, it should be considered that the Compact was an exercise of that power. The Special Master cites *Western Pac. Ry. Co.* v. *Southern Pac. Co.*, 151 F. Rep. 376, 399, as authority. The language employed by the Court in that case is pertinent:

> "But it is said that the predecessors in interest of the appellee had a vested right to future alluvion, acquired before the adoption of the provision of the Civil Code above quoted and before the adoption of the present Constitution, a right to all alluvion that might be deposited upon its shore land in all time to come, and that this right is sustained by the dictum of the

court in County of St. Clair v. Lovingston, 23 Wall. 46, 23 L.Ed. 59. In the course of the opinion in that case, it was said: 'The riparian right to future alluvion is a vested right. It is an inherent essential attribute of the original property.' The controversy in that case did not even remotely relate to the right to future alluvion, but related only to alluvion then existing. We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists. The language so used was quoted from the language, also obiter, of Bullard, J., in Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624, in which it was said, in substance, that, if the Legislature had attempted to declare that thereafter owners of tracts of land fronting on a river should no longer be entitled to any alluvion which might be formed, such act would be held unconstitutional, on the ground that the right to future alluvion is vested.

In Pearsall v. Great Northern Ry. Co., 161 U. S. 646-673, 16 Sup. Ct. 705, 40 L.Ed. 838, the court quoted with approval from Cooley's Principles of Constitutional Law, 332, as follows:

'Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.'

Within that definition of vested rights, there can be no question, we think, that the right to future possible accretion could be divested by legislative action. To say that one who acquires from the state title to tide lands acquires therewith a vested right to all possible future accretion is to impose a restriction on the power of the state to occupy or improve for the public benefit the adjacent submerged lands. Said the Supreme Court of Washington, in Eisenbach v. Hatfield, 2 Wash. 236-250, 26 Pac. 539, 12 L.R.A. 632:

'But appellee claims that he has a vested right to future accretion to his land, and cites as authority to sustain his position the case of County of St. Clair v. Lovingston, 23 Wall. 46, 23 L.Ed. 59. And the court in that case does say that the riparian right of future accretions is a vested right. But we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence. It seems to us that the more reasonable doctrine is announced in the case of Taylor v. Underhill, 40 Cal. 471, in which case the court says: "The plaintiff, as a riparian owner, has also a right to accretions to his land, and it is said the claim of defendant will be a cloud upon his title to such accretion. But, as yet, there is no such property, and there may never be. He cannot ask the court to interfere in advance, and prevent a cloud being cast upon his title to that which may never have an existence." '

The Supreme Court of Iowa, by its decision in Chicago, Burlington & Quincy Ry. Co. v. Porter Bros. & Hackworth, 72 Iowa 426, 34 N.W. 286, in effect denied that the right to future accretion is a vested right. In that case the railroad company, under a statute of the state authorizing it to occupy without payment

of damages any of the state lands, had constructed its railroad along the Mississippi river below the ordinary high-water mark. The defendants were owners of the land bounded by the river. The court said:

'The lawful appropriation of the land by the Rock Island Railroad Company cut off accretions to defendant's land and established a line beyond which no right of accretion can be acquired.'

In Sage v. Mayor, 154 N.Y. 61, 47 N.E. 1096, 38 L.R.A. 606, 61 Am. St. Rep. 592, it was held that, in every grant of lands bounded by navigable waters made by the government or by the state as trustee for the public, there is reserved by implication the right to improve the water front in aid of navigation for the public benefit without compensation to the riparian proprietor, and the decision in Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548, 38 L.Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide land or submerged land in front of a riparian proprietor, and thus deprive him of the right to future accretion, what tenable ground is there for saying that the state may not by a statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not lawfully make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the sea could not be extended over the lands then held by the state in trust for the public by virtue of any accretion that might thereafter be deposited thereon?"

So, it was within the power of the Nebraska Legislature to say "ownership of all lands and river beds easterly of the new boundary shall henceforth be determined by the title laws of Iowa", and it is the Special Master's conclusion that this is, in effect, what the Nebraska Legislature was saying when it adopted the Compact. And this interpretation of the Compact does not constitute any unconstitutional taking of anybody's private vested titles or rights without compensation.

The Special Master notes that the Nebraska Supreme Court would have had the same power and right to change the common law of Nebraska if it had elected to do so, citing *Hilt* v. *Weber,* 252 Mich. 198, 233 N.W. 159 (1930), as authority.

Nebraska seems to feel that the Special Master was derelict or in error in failing to answer the following question: "Did the Compact operate to change the boundaries of the private property owners from the thalweg or middle of the main channel of the Missouri River to the fixed Compact line?" (See Nebraska's Exceptions, page 13.) Iowa submits that it was unnecessary for the Master to answer this question. It was only necessary for him to determine that his construction of the Compact does not divest any private persons of any vested titles or rights. That the Special Master so determined inheres in his Report.

The Special Master's rule is that, since 1943, Nebraska titles have terminated at the Compact Boundary, and easterly from the Compact boundary there are only Iowa titles. (SMR—page 191.) In other words, Iowa law applies in Iowa; Nebraska law applies in Nebraska. During the trial and arguments, the Special Master often spoke of this as his "source of title" theory. His rule is that Nebraska titles which were ceded to Iowa by the Compact did not

become good Nebraska titles in Iowa, but became good Iowa titles in Iowa. This is a necessary construction of the Compact to be in accord with *Hawkins* v. *Barney* 5 Pet. 457 (1831), and other similar cases; it is necessary in order to avoid freezing of the status of the ceded lands in both states; it is necessary in order to enable "living law" to be applicable to them; it is necessary in order to avoid the existence and application of diverse title laws within a single jurisdiction—either Iowa or Nebraska.

Nebraska notes at page 51 of her Exceptions that the case of *Hughes* v. *Washington,* 389 U.S. 290 (1967), is factually distinguishable from the case at bar. Iowa agrees.

First, no private riparian landowner claiming adversely to the State of Iowa is claiming that his rights are derived from a federal grant, as was Mrs. Hughes in the cited case. If federal law is involved at all in the instant case, it is involved in the context in which it was discussed in *Yates* v. *Milwaukee,* supra, and it operates in favor of Iowa's position, not Nebraska's.

Second, the accretions which were the subject of controversy in the *Hughes* case were already in existence and under any rule of accretion law, Mrs. Hughes' title to them had vested. In the instant case, the Special Master specifically notes at page 191 of his Report that: "At this point we are discussing areas north of Omaha which were formed since 1943 by the changes in the river either natural or by the Engineers. In 1943 these were expectant or contingent accretions. Iowa is claiming these areas not in 1943, but in 1961 and thereafter. So far as we know there were no accretions in 1943."

Third, the Court found in the *Hughes* case that there had been a "startling" change by the Washington Supreme Court in its interpretation of Article 17 of the 1889 Constitution. In fact, there had been a complete reversal of

interpretations within 20 years. (See page 297 U.S.) There has been no such "startling" or "unpredictable" change by the Iowa Supreme Court. Continuously and consistently since 1856, the Iowa court has adhered to the doctrine of state ownership of navigable river beds; it has applied the presumption of accretion as against avulsion wherever applicable; it has applied the presumption favoring the permanency of boundaries wherever applicable. There has never been even a bill introduced in the Iowa Legislature to change the common law of Iowa as it was being promulgated by the Court, this constituting tacit approval of that common law by the legislative branch. Commencing as early as 1911 (*Iowa* v. *Carr*, 191 Fed. 257, D.C. Ia.) the executive branch was attempting to enforce the common law of Iowa regarding state ownership of river beds and islands forming therein.

Nebraska now says that her legislators who entered into the Boundary Compact in 1943 on her behalf had reason to expect that Iowa, by enacting the Compact, was superseding Iowa's common law and agreeing that thereafter, the Compact would be "determinative of all rights to be recognized or established by it". (See bottom of page 8, top of page 9, Nebraska's Exceptions.) Iowa should be held to that interpretation of the Compact, Nebraska says, because after abiding by that interpretation for some 15 or 20 years, Iowa changed her policy and conduct in a startling and unpredictable manner. There is no evidence in the case at bar that Iowa ever changed her policy or her common law relating to state ownership of navigable river beds or that she ever made any "startling" or "unpredictable" change whatsoever. There is no evidence that the Nebraska Legislature ever expected that repealer of the Iowa common law would flow from the Compact; there is no evidence of any grounds for that expectation; there is no ground or reason for any inter-

pretation of the Compact which would construe it as a total or partial repealer of Iowa common law to be applied in the future to any lands or river beds in Iowa.

Finally, the Special Master's proposed rule here under discussion should be approved by this Court because the adoption of any other rule for the determination of the ownership of areas which have formed since 1943 would produce bad results, confusion and uncertainty.

Nebraska has said over and over again during the pendency of this case that the Compact was intended to settle all future disputes and put at rest all future controversies along the boundary, and that it should be interpreted and construed so as to make it accomplish that purpose. Iowa submits that if the propositions promulgated in (A), (B), (C) and (D) at pages 20-21 of Nebraska's Exceptions were to be adopted, this purpose of the Compact would be absolutely destroyed.

For instance, if the Compact were interpreted as a give-away by Iowa of all of her state owned river bed in the Missouri River (and all accretions thereto), as proposed by Nebraska in paragraph (A), page 20, the next logical question is: Who are the grantees and beneficiaries of these gratuitous gifts? Nebraska proposes no answer to this difficult question. There is no simple answer. An answer probably could only be derived from years of litigation.

In paragraph (B) commencing on page 20, Nebraska proposes that the rule of *Tyson* v. *Iowa,* 283 F.2d 802 (1960), be reversed and disavowed. This would be the effect of Nebraska's proposal in (B) although she does not say so at that point in her exceptions. The rule of *Tyson* has been the law of the river for 12 years. It is good law. Both private parties and the State of Iowa have acted on it continuously since 1960 in claiming or not claiming owner-

ship of river areas. Many uncertain ownership questions on both sides of the river have been peaceably settled on the basis of the *Tyson* rule. If the *Tyson* rule were now struck down, and Nebraska's proposed rule substituted for it, it would be like opening Pandora's Box again. Every riparian landowner, including the State of Iowa, would have to re-examine his title and rights in the light of the new rule. The *Tyson* case laid many controversies at rest; they should remain at rest.

If Iowa titles continued to be good Iowa titles in Nebraska and if Nebraska titles continued to be good Nebraska titles in Iowa after the Compact, as Nebraska contends when she says that private boundaries were unchanged by the Compact, one arrives at the unconscionable and anomalous situation that now, some landowners in Iowa own to the thread of the contiguous navigable river and other ownerships end at the ordinary high water and likewise, most landowners in Nebraska will own to the thread while some will end at the ordinary high water. The only way to avoid this incongruous result is to hold that Iowa law applies in Iowa and Nebraska law applies in Nebraska, as the Special Master did. This does not result in the changing of private boundaries or in the divesting of any vested private rights, for reasons hereinbefore discussed.

Also, adoption of Nebraska's proposed rule (B) would clearly violate the rule of construction that all statutes, grants and compacts shall be construed so the public interest will be derogated and diminished as little as possible. *Massachusetts* v. *New York,* 271 U.S. 65, 70 L.Ed. 838, 46 S.Ct. 357 (1926).

Nebraska's proposed rule (C) on page 21 of her Exceptions is totally inconsistent with her general position in this case. Generally, she has contended that it was one

of the purposes of the 1943 Boundary Compact to avoid any necessity of ever having to ascertain where the pre-1943 boundary was located. Yet in rule (C) she proposes a rule which would apply only to those locations where the river had been entirely in Nebraska prior to the Compact. Inevitably, application of this rule would require determinations as to where these locations are.

Nebraska's proposed rule (C) would finally lead to the result that the boundary of landowner A owning land in Iowa contiguous to the Missouri River would be the ordinary high water mark, while the boundary of landowner B owning land in Iowa contiguous to the same river would be the thread of the stream, and landowner C also in Iowa would own the entire bed of the stream. Iowa submits that no such result was intended by the drafters of the Compact.

Nebraska's proposed rule (D) on page 21 of her Exceptions is a perversion of what the Compact actually says. Nebraska would have it say: "Iowa - - - contracted away any rights she may have had to contest titles along the Missouri River - - -". The Compact says: "Titles, - - - good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa - - -". Iowa has said throughout this case that she is ready, willing and able to abide by the provisions of the Compact, but she does not feel that she should be required to abide by Nebraska's perversion of it.

In DIVISION II of this Reply, we have been dealing with that part of the Master's Report which has to do with areas which have formed since enactment of the Compact in 1943. That is to say, we are dealing with lands which have come into existence by natural or Engineer induced movements of the river since 1943, river beds which have become river beds by natural or Engineer

induced movements of the river since 1943, abandoned river beds which have become abandoned river beds by natural or Engineer induced movements of the river since 1943. By the historic law of accretion, as it is in effect in both Iowa and Nebraska, there can be no "titles - - - good in Nebraska" as to any areas above described which have come into existence on the Iowa side of the Compact boundary since 1943. *Yearsley* v. *Gipple,* 104 Neb. 88, 175 N.W. 641 (1919); *Tyson* v. *Iowa,* 283 F.2d 802 (1960). By proposing rule (D), Nebraska would have this Court bar Iowa from contesting Nebraska purported titles even where there can clearly be no good Nebraska titles because any previous titles have been washed away and destroyed since the Compact. The Special Master refused to adopt any such rule and we submit that he was correct in his refusal.

CONCLUSION

Basically, Iowa believes that the Special Master's rule for determining ownership of areas formed since 1943 is fair, just, equitable and a proper construction of the Compact. There is noting wrong with the rule that "Ownership of areas which have formed since July 12, 1943, shall be determined by the law of the state in which they formed, - - -". Iowa's query is: If this be the rule for determining ownership of areas formed since 1943, why shouldn't it also be the rule for determining ownership of areas formed before 1943? Iowa's criticism of the Special Master's Report heretofore made in Iowa's Exceptions to the Report, is that he failed to apply the same rule to the areas formed pre-1943.

There is nothing new or different about a rule which states that ownership of land shall be determined by the law of the state in which it comes into existence. It is in accord with all precedent and authority. What would

be new and different and violative of precedent and authority would be this Court's limitation of the rule's application to areas which have formed since July 12, 1943, and its failure to apply it also to areas which formed prior to July 12, 1943. This fundamental right of sovereignty is as old as the first sovereign nation. The 1943 Boundary Compact contains no terms, provisions or language construable as a forfeiture of said fundamental right of sovereignty. The Compact should therefore be construed so as to permit the Courts of Iowa to freely determine all title disputes relating to lands within her borders.

Dismissal of Nebraska's Complaint and cause of action in this case would be one way to accomplish this result. An alternate way to accomplish this result would be adoption of the simple and straightforward rule that "Ownership of all areas along the boundary shall be determined by the law of the state in which they formed".

Respectfully submitted,

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