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 DECREE RECOMMENDED BY SPECIAL MASTER

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PRELIMINARY STATEMENT

Stated in general terms, Iowa's exceptions to the Recommended Decree by the Special Master filed herein by the Special Master on or about November 9, 1972, are:

(1) That said Decree fails to determine all questions raised by the case, and

(2) That a portion thereof is unclear and subject to possible misinterpretation

The numerous legal definitions of a "Decree" all embody the thought that a "Decree" should always determine *all* questions raised by the case, dispose of the *whole* litigation, and leave *nothing* that would give rise to further litigation.

Sawyer v. *White,* 125 Me. 206, 132 A. 421, 422.

Draper Corp. v. *Stafford Co.,* C. C. A. Mass., 255 F. 554, 557.

Burgin v. *Sugg,* 210 Ala. 142, 97 So. 216, 217.

Pomeroy's Equity Jurisprudence, 5th Ed., Vol. I, Sec. 115.

It is Iowa's belief that the Recommended Decree submitted by the Special Master would fail to accomplish these logical and proper purposes which the Decree in this case should accomplish.

The issues tendered to the Court for determination in this case were several conflicting contentions as to proper interpretation and construction of the Iowa-Nebraska Boundary Compact of 1943. In his "Report of Special Master" filed herein in 1971, the Special Master proposed decisions for each and all of these issues. Some of his proposed decisions upheld the contentions of Nebraska and several of them upheld the contentions of Iowa.

Both states excepted to the Special Master's Report and Recommendations, and the submission to the Court was upon these exceptions. The Court's decision (expressed at Page 5 of Mr. Justice Brennan's Opinion dated April 24, 1972) was:

"We overrule all exceptions, save two of Nebraska addressed to printing errors in the Report, save as we sustain, *infra,* Iowa's Exceptions IV and V insofar as the Special Master recommended that an injunction issue, and save as mentioned in N. 8, *infra.*"

The net effect of the above statement in the Opinion was that each and all of the Special Master's proposed interpretations and constructions of the Compact were approved and adopted by the Court. The only parts of the Report which were not approved were two paragraphs where there were obvious printing errors, and the Special Master's recommendation for injunctive relief was not approved.

Therefore, Iowa asserts in these Exceptions that the Decree should be made to contain a statement as to each and all of these interpretations and constructions of the Compact. That this should be done without regard to whether a particular construction was as contended for by the Plaintiff, Nebraska, or by the Defendant, Iowa. That this should be done without regard for whether or not Mr. Justice Brennan elected to discuss a particular construction in his own words in the Opinion.

IOWA'S SPECIFIC EXCEPTIONS

Exception I

Iowa proposes that a paragraph should be added to the Decree in substantially the following language, 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.

The statement above is a direct quotation from the Special Master's Report at the top of page 193. Nebraska excepted to this statement in her Exception (6) com-

mencing on page 19 of her Exceptions. Her exception was overruled at page 5 of the Opinion where Mr. Justice Brennan, speaking for the Court, said "We overrule all exceptions, save two of Nebraska addressed to printing errors. . . ."

Furthermore, the statement above is one of the rules to be derived from the Circuit Court's decision in *Tyson* v. *State of Iowa,* 283 F. 2d 802 (1960), which this Court specifically approved at page 10 of the Opinion.

The rule above stated is the Compact construction which the Special Master and this Court have said shall apply to determine ownership of areas which have formed since 1943. As the Special Master found and Mr. Justice Brennan noted at page 4 of the Opinion, it is the rule which shall determine ownership of 21 areas and part of a 22nd. Iowa submits that any decree entered in this case would be deficient and incomplete unless it contains this construction of the Compact.

At page 8 of the Opinion, Mr. Justice Brennan said that "Nebraska's basic Exception is to the Findings and Conclusions of the Special Master that ownership of areas that have formed since July 12, 1943, should be determined under the law of the State in which they formed, the boundary fixed by the Compact being the line that determines in which State they formed. . . ." Previously in the Opinion at page 5, he had overruled Nebraska's said Exception. There was no need to overrule it again at page 8.

Failure to include this construction of the Compact in the Decree would enable future lawyers to argue that said issue was not decided in this case, and thus, the Decree would give rise to further litigation of the issue. The Decree should lay at rest the issue as to how ownership of areas which have formed since 1943 shall be determined.

Exception II

Iowa proposes that a paragraph should be added to the Decree in substantially the following language, to-wit:

> SINCE JULY 12, 1943, THE EFFECTIVE DATE OF THE IOWA-NEBRASKA BOUNDARY COMPACT, OWNERSHIP OF THE BED OF THE MISSOURI RIVER IS AND HAS BEEN DETERMINED BY IOWA LAW ON THE IOWA SIDE OF THE NEW BOUNDARY (CENTER LINE OF THE DESIGNED CHANNEL) AND OWNERSHIP OF THE RIVER BED ON THE NEBRASKA SIDE OF THE NEW BOUNDARY IS AND HAS BEEN DETERMINABLE BY NEBRASKA LAW.

This construction of the Compact was recommended by the Special Master at page 183 of his Report in almost the same language set forth above.

Nebraska considered that this was an issue being decided in the Report when she excepted to it in her Exception No. (4) at page 16 of her Exceptions as follows:

> ". . ., Nebraska further takes specific exception to the conclusion (stated in Iowa's words) that . . . after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law . . . (SMR 183)."

Nebraska's Exception No. (4) was overruled (along with others) at page 5 of Mr. Justice Brennan's Opinion dated April 24, 1972.

Iowa's counsel understand and believe that the Special Master excluded this statement concerning ownership of the river bed in his Recommended Decree because Mr. Justice Brennan elected not to discuss the subject in his own words in his Opinion dated April 24, 1972. During the "appropriate hearing" held by the Special Master pursuant to the last sentence of Mr. Justice Brennan's Opinion, it was urged by Nebraska that nothing should or could be included in the Decree unless it could be found in and quoted from the Opinion. A reading of the Recommended Decree indicates that the Special Master accepted this argument.

Iowa submits that the Decree should not be limited to a series of direct quotations from the Opinion. If the Decree were to be thus limited, it would serve no purpose. It would not serve the purpose of determining all questions raised by the case, disposing of the whole litigation, leaving nothing that would give rise to further litigation.

We believe it was this Court's intention, clearly expressed in Mr. Justice Brennan's Opinion of April 24, 1972, to decide each and every issue tendered to the Court for decision in this case. Nebraska argued to the Special Master that Mr. Justice Brennan's failure to discuss Nebraska's Exception No. (4) in his own words constitutes an indication that this Court was declining to decide the issue to which Exception No. (4) was addressed. This is certainly a misinterpretation of the Opinion. At page 5 of the Opinion, it is stated unequivocally that Nebraska's Exception No. (4), among others, is overruled. Nebraska should not be allowed a second chance to relitigate this issue as to ownership of the river bed by making any such argument in later litigation. It should be made clear in the Decree that said issue was decided.

Exception III

This exception is addressed to a portion of Paragraph 6 of the Special Master's Recommended Decree.

As stated hereinabove in our Exception II, the construction placed on the Compact by the Special Master in his Report and approved by this Court when it overruled Nebraska's Exception No. (4), was that since 1943, ownership of the bed of the Missouri River has been determinable by Iowa law on the Iowa side of the Compact boundary. That is to say, that portion of the river bed which lies easterly from the fixed Compact boundary is and has been since 1943 owned by the State of Iowa in accordance with its common law doctrine of state ownership.

The difficulty with Paragraph 6 is that, as written by the Special Master, it would be subject to interpretation as saying that the private individuals who own Nottleman and Schemmel Islands also own the bed of the Missouri River contiguous to the islands, said bed being in Iowa because it is easterly from the Compact boundary. This is because the traverses around the islands from which the legal descriptions of the land involved in *State of Iowa, Plaintiff* v. *Darwin Merritt Babbitt, et al.,* Equity No. 17433 in the District Court of Mills County, Iowa, and in *State of Iowa, Plaintiff* v. *Henry E. Schemmel, et al., Defendants,* Equity No. 19765 in the District Court of Mills County, Iowa, were made up do not stop at the shorelines of the islands, but extend westerly to the Compact state boundary approximately in the middle of the Missouri River. See Exhibits D-1044-A and D-427, both reprinted at pages Nottleman-24 and Otoe-18 respectively, in APPENDIX TO DEFENDANT'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER.

Iowa believes that this exception is serious and substantial because numerous persons, firms and corporations such as bridge builders, pipeline companies, dock and wharf builders and the like, are often needing to know who owns the river bed. The common law of Iowa has always provided a clear answer as regards the beds of navigable waters within her borders. We do not understand that the Special Master or this Court in the case at bar has any intent to bar or impair Iowa's right to have and apply this common law doctrine to the bed of the navigable Missouri River insofar as the bed of that river is within Iowa's boundaries.

There are several possible ways by which Paragraph 6 could be amended so that it would not have the bad effect hereinabove pointed out. One way might be to simply add a sentence at the end of the paragraph as follows:

> HOWEVER, NOTHING IN THIS DECREE SHALL BE CONSTRUED AS SAYING THAT ANY OF THE BED OF THE MISSOURI RIVER WHICH LIES EASTERLY FROM THE IOWA-NEBRASKA BOUNDARY FIXED BY COMPACT IN 1943 IS PRIVATELY OWNED.

Exception IV

This exception is addressed to Paragraph 11 of the Special Master's Recommended Decree. Iowa excepts to said paragraph as written for the basic reason that it is inaccurate, misleading and subject to misinterpretation. If left as is, it would invite further litigation.

At page 192 of his Report, the Special Master was discussing the areas north of Omaha, most but not all of which have been formed since July 12, 1943. The general rule to

be applied for determining ownership of these areas is stated at the top of page 193. Iowa has, in EXCEPTION I hereinbefore stated, asked for a statement of that general rule to be included in the Decree.

At page 192 of his Report, the Special Master said:

> "It is conceivable, of course, that a private person may contend that he has a title supportable under Nebraska law on land existing north of Omaha on the Compact date, July 12, 1943. If so, his title is to be afforded the same recognition as given to Nottleman and Schemmel Islands with no requirement that the land be pinpointed as having formed in Nebraska."

In other words, if a private claimant of land north of Omaha can prove that the land in question formed before 1943 and that he has title supportable under Nebraska law as of 1943, then Iowa does not own it, she having signed away her right to claim it by entering into the 1943 Boundary Compact.

Mr. Justice Brennan deals with the subject in the first paragraph commencing on page 8 and in the first sentence of the second paragraph commencing on the same page of the Opinion. There, Mr. Justice Brennan clearly refers back to the Report and approves what the Special Master had said in the Report by the following words, to-wit: "Although the Special Master recommended, and we agree, . . .".

Paragraph 11 is an unsuccessful attempt to telescope into one sentence the content of several paragraphs of the Report and Opinion, and the result, as we have said before, is an inaccurate and misleading statement. The fallacious inference which may be drawn from Paragraph 11 as written is that a private claimant of an area which has formed since 1943, may, somehow, be able to show title "good in Nebraska" to such area as of the Compact date in 1943.

In truth and in fact, there is no way that a private claimant of any area can show title "good in Nebraska" as of 1943 if the area did not exist in 1943. The only way the private claimant can show title "good in Nebraska" is by showing that the area in question existed in 1943. The only way a private claimant can show entitlement to the protection of the Nottleman-Schemmel rule is by showing that the area in question, like Nottleman Island and Schemmel Island, existed in and prior to 1943.

The above proposition is true because of the common law of both Nebraska and Iowa which is to the effect that when riparian land is washed away and destroyed by action of the water, the title of the former owner is divested. When new land reforms in the same place, the new land belongs to the owner of the land to whom the new land accretes. This is one of the rules derived from *Tyson* v. *State of Iowa*, 283 F. 2d 802 (1960), whereby the Circuit Court disallowed the Harrop claims. See also *Wallin* v. *Clinkenbeard*, 214 Iowa 343, 242 N.W. 86 (1932), and *Yearsley* v. *Gipple*, 104 Neb. 88, 175 N.W. 641 (1919).

There are several ways in which Paragraph 11 could be redrafted so that it would clearly state the proposition. One way would be to simply quote, in the Decree, the paragraph from page 192 of the Special Master's Report which is quoted hereinabove in this Exception.

Another way might be to paraphrase from Mr. Justice Brennan's Opinion substantially as follows:

> "PERTAINING TO THE 21 AREAS AND PART OF A 22ND THAT LIE NORTH OF OMAHA, CLAIMANTS OF TITLE TO THESE AREAS AS AGAINST IOWA MAY ALSO HAVE THE OPPORTUNITY TO SHOW TITLE 'GOOD IN NEBRASKA' ON THE COMPACT DATE, JULY 12, 1943."

Iowa believes that perhaps the best way to clearly and unequivocally express the proposition set forth at pages 192-193 of the Special Master's Report and approved at page 8 of the Opinion would be to redraft Paragraph 11 as follows:

> ALTHOUGH THE GENERAL RULE FOR DETERMINING OWNERSHIP OF THE AREAS WHICH HAVE FORMED SINCE THE COMPACT DATE, JULY 12, 1943, SHALL BE AS STATED IN PARAGRAPH ..... OF THIS DECREE, PRIVATE CLAIMANTS OF TITLE TO ALL AREAS AS AGAINST IOWA SHALL HAVE THE OPPORTUNITY TO SHOW TITLE "GOOD IN NEBRASKA" AS OF JULY 12, 1943, BY SHOWING THAT THE DISPUTED AREA EXISTED IN 1943, THAT THEY HOLD A TITLE "GOOD IN NEBRASKA" AS OF 1943, AND THUS BRINGING THE DISPUTED AREA WITHIN THE RULES SET FORTH IN PARAGRAPHS 4, 5, 7, 8 AND 9 OF THIS DECREE.

Exception V

Iowa respectfully excepts to Paragraph 12 of the Recommended Decree as written, and proposes that said paragraph be enlarged as follows:

> 12. THE NEBRASKA LAW OF ACCRETION DOES NOT OPERATE TO CREATE RIPARIAN RIGHTS WITHIN THE TERRITORIAL LIMITS OF IOWA, AND WHETHER A NEBRASKA RIPARIAN OWNER HAS TITLE TO ACCRETIONS THAT CROSS THE BOUNDARY INTO IOWA IS DETERMINED BY IOWA LAW.

The foregoing is almost a direct quotation from Mr. Justice Brennan's Opinion at the bottom of page 9. Pur-

suant to this Court's direction that the Decree be in accord with the Opinion, Iowa believes that the language of the Opinion be employed in the Decree as accurately and fully as possible. Isolating and quoting phrases from the Opinion is a dangerous game at best, the danger being that the meaning, out of context, may be changed or subject to misinterpretation.

The Special Master's recommended Paragraph 12, would, by its very words, be applicable only "to accretions that cross the boundary into Iowa." Thus, the possible applications of Paragraph 12 would be very limited. It could even be argued that Paragraph 12 has no application at all because it is a basic tenet in the common law concerning accretions that there is no such thing as moving accretions.

Paragraph 12 as proposed by Iowa above is no more or less than a restatement of one of the rules derived from *Tyson* v. *State of Iowa,* 283 F. 2d 802 (1960). The added portion of Iowa's Paragraph 12 is a direct quotation from the *Tyson* case, which was quoted with approval by this Court at the bottom of page 9 of the Opinion. Brevity may be a virtue in some circumstances, but not here, where brevity would result in inaccuracy and uncertainty.

CONCLUSION

Iowa's understanding of Mr. Justice Brennan's Opinion dated April 24, 1972, is that all of the three broad general issues tendered to the Court for decision were in fact decided. These issues were:

(1) What effect did the 1943 Iowa-Nebraska Boundary Compact have on ownership of areas along

the boundary which were in existence in and prior to July 12, 1943, the effective date of the Compact?

(2) What effect did the Compact have on ownership of areas along the boundary which have formed since July 12, 1943?

(3) What effect did the Compact have on ownership of the bed of the Missouri River?

Iowa believes that since this Court decided all three of these issues in the Opinion of April 24, 1972, and since the Decree is to be entered "in accord with this Opinion", the Decree would be lacking and deficient if it does not set forth each and all of the Court's decisions as to these issues.

The Court's decision as to issue No. (1) stated above is fully set forth in the Special Master's Recommended Decree. This is the Court's decision which was in accordance with Nebraska's contentions and against Iowa's. Nevertheless, Iowa does not except to its inclusion in the Decree in some five paragraphs. (Paragraphs 4, 5, 7, 8 and 9.)

The Court's decision as to issue No. (2) is not set forth in the Recommended Decree unless one considers that Paragraph 12 covers the subject, but Paragraph 12 does not cover the subject, as we have attempted to point out in EXCEPTION I hereinabove.

The Court's decision as to issue No. (3) is not even touched upon in the Recommended Decree.

Iowa submits that future readers of the Opinion and Decree in this case, lawyers and judges, should be able to ascertain what this Court's decisions were without the necessity of going back of the Opinion and Decree to the Special Master's Report and to Nebraska's exceptions thereto. The Report and the exceptions will not be readily

available to future readers. The Opinion and Decree will be readily available by publication. The sentence on page 5 wherein it is said "We overrule all exceptions, . . ." is meaningless to future lawyers and judges unless its meaning be spelled out in the Decree.

WHEREFORE, the Defendant State of Iowa respectfully prays that her exceptions hereinabove stated be sustained, and that the Decree in this case be entered in accordance therewith

Respectfully submitted,

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