In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

PLAINTIFF'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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INTRODUCTORY STATEMENT

Plaintiff has filed with the Special Master Plaintiff's Resume' of Evidence which details much of the testimony and documentary evidence offered. This Resume' was directed toward the facts with argument or comment limited except where Plaintiff determined the context required comment. This Brief shall be directed towards the argument and the law with more general reference to the facts.

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JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Article III, Section 2, Clause 2, the Constitution of the United States which provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."

Title 28, U. S. C. Section 1251, provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more states:"

This case was brought to enforce the provisions of the Iowa-Nebraska Boundary Compact of 1943, which Agreement was approved by Act of Congress July 12, 1943, Ch. 220, 57 U. S. Stat. At Large 494. The Compact was entered into between the states of Iowa and Nebraska pursuant to Article I, Section 10 of the Constitution of the United States which provides:

> "No State shall, without the consent of the Congress*** enter into any Agreement or Compact with another State***."

The question of jurisdiction was argued before the Supreme Court of the United States on January 25, 1965 and on February 1, 1965, the Court entered an order granting the motion of the State of Nebraska for leave to file the Complaint.

It is Nebraska's position that, as a party to the Compact, it has the standing and the right to enforce its terms. Nebraska contends that the State of Iowa is violating the terms and provisions of the Compact and Nebraska is entitled to a decree restraining and permanently enjoining Iowa from violating the Compact and

from interfering with the rights of citizens of either State which were secured to them by the Compact.

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SUMMARY OF THE FACTS AND ARGUMENT

When the States of Iowa and Nebraska were admitted into the Union their boundary was the middle of the main channel of the Missouri River. Because of the swiftness of the current of the river, periodic floodings, and the character of the soil through which the river flowed, it made numerous changes over the years all along the Iowa-Nebraska border and these changes caused continuous problems and uncertainties concerning the location of the boundary which were a matter of common knowledge. This was recognized by both states at the time of the complaint filed in 1890 in the case of *Nebraska v. Iowa,* 143 U.S. 359 and the Decree entered in 1892 at 145 U.S. 519 which determined that Carter Lake on the right bank of the Missouri River was in Iowa. In that case, both States recognized the rapidity of the changes of the river and that these characteristics were typical of the Missouri River between the two States and such phenomona had frequently taken place and might, from the character and history of said river be expected to take place in the future. Commencing in 1901, the legislative history of both Nebraska and Iowa shows a continued recognition of the boundary problems with numerous acts submitted or adopted providing for boundary commissions. Some of these proposed acts recognized that it would be expensive and practically impossible to locate the original boundary line. The literature and

newspaper articles over the years also indicate a general recognition of the difficulty of locating the boundary and the frequent changes of the channel of the Missouri River leaving parcels of land segregated on the opposite sides of the river. The early official Corps of Engineers Reports also document many changes and cut-offs of the river without identifying many of them.

Although the first regulation work by the Corps of Engineers along the Missouri River as it ran between Iowa and Nebraska commenced in 1876 or 1877 at Nebraska City and isolated projects were carried on by the Corps over the years, no comprehensive plan for stabilization of the river was commenced in this area until about 1932. The Omaha District Office was established in 1933 and by 1934 the work was well under way to place the Missouri River in a designed channel as established by the Corps of Engineers. This design placed the river in curves with a river width between the banks of approximately 700 feet with a navigable width of 200 feet of 6 foot depth. In the process of this construction, the Corps first commenced to control the river by a series of permeable dikes and, commencing in about 1936, utilized dredges and the construction of canals in order to assist in placing the river as quickly and economically as possible into the designed channel. In doing this, the Corps paid no attention to the boundary between the States and the design ran through land on either side of the river, through bars, and in some instances divided islands or land areas. Consequently, much land which had been on one side of the main channel of the Missouri River was left on the other side upon completion of the work.

Whether islands were left on the Iowa or Nebraska side, depended solely upon the design itself. Prior to 1943, the Corps had constructed approximately 15 canals in addition to having spent millions of dollars to control the Missouri River.

By 1943, the work between Omaha, Nebraska and Rulo was approximately 99% completed according to the Corps official reports and the river was in the designed channel. Between Omaha and Sioux City to the north, the work was approximately 78% completed, although the river was in the designed channel with the exception of approximately 2,000 feet. It was in the belief that the river had been stabilized and finally brought under control by the Corps of Engineers that the two states entered into the Iowa-Nebraska Boundary Compact of 1943. There is little actual legislative history of the 1943 Compact, but it was the culmination of years of negotiation and acknowledgement of problems by the two states. The Iowa legislature first approved the Compact on April 15, 1943 and it was ratified by the Nebraska legislature on May 7, 1943. It was approved by Act of Congress of July 12, 1943. This Compact established the boundary between the two states as the middle of the main channel of the Missouri River as it appeared on the Alluvial Plain Maps obtained from the Corps of Engineers dated June 30, 1940 and March 29, 1940. Not only were these maps dated approximately three years prior to the Compact, but they show the designed channel of the river north of Omaha as being located in many places on dry land and bar area with the river not yet in the designed channel. These maps do not have the degree of

preciseness to enable a surveyor to lay out a line on the ground establishing the center of the designed channel and have been described as analogous to a road map. They had no distances, azimuths, angles or calls or similar information usually required for a survey. Maps on file with the Secretaries of State were of the scale of 1″ equals 5,280 feet whereas other Alluvial Plain Maps of the Corps are of the scale of 1 inch equals 2,640 feet. They bear a stamp stating that they were compiled from 1939 aerial photographs and field surveys and that the area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the United States Department of Agriculture in 1936, 1937 and 1938.

These were very general maps and obviously were never intended to be used for the purpose of determining a line upon the ground.

As indicated by the testimony of Mr. Victor M. Petersen, Sarpy County Surveyor, the boundary problems between Sarpy County and Mills County had been discussed by the County Officials and they were faced with the problem that, if a settlement could not be made through the legislature, it would become necessary for a surveyor to lay out the boundary between conflicting areas and this was a job that was considered almost impossible to do.

Immediately at and prior to the time of the adoption of the Compact, the officials of the State of Iowa had made no attempt to identify areas which the State of Iowa claimed as abandoned river channels or islands in

the Missouri River. Several of these islands appeared on the Alluvial Plain Maps and were in existence at the time of the Compact. The testimony of the Iowa Conservation Commission Officials made it clear that no one from the State was paying any attention to these islands at that time. In addition, the State of Iowa had attempted to intervene in the case of *U.S. v. Flower* in the United States District Court, District of Nebraska in 1937 which was an action to quiet title to lands in Thurston County, Nebraska which were on the left bank of the Missouri River. Iowa alleged only that it was intervening to protect its sovereign rights and to protect its rights to assess and collect taxes on the lands and, following a memorandum by the Court indicating there was abandoned river bed in the vicinity, the State withdrew. Iowa never made any claim to this abandoned river bed and was making no such claim at the time of the Compact.

The Iowa Statutes provided that the Secretary of State was to keep records of all property pertaining to the State Land Office and Section 10.2 of the Iowa Code required that separate tract books be kept for all such lands as the State "now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate." However, Iowa had no official record of "State-owned land" held or claimed by the State of Iowa on January 1, 1943 or on July 12, 1943, the date of approval of the Compact, which showed the islands or abandoned channels which Iowa was later to claim in the Missouri River Planning Report of January 1961.

In addition, Section 111.19 of the Iowa Code pertaining to the Iowa Conservation Commission provided for the Commission to at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property when said Commission deemed it feasible and necessary. This had been a provision of the Code since 1923 and in 1931 the language "when said Commission deems it feasible and necessary" was inserted. However, the Conservation Commission had not marked any of these island lands or abandoned channels at the time of the Compact and has not marked these boundaries on many of the areas claimed even to the present time. Consequently, at the time of the Compact, the State of Iowa was not making any claim to these lands and there was no record of any such claim in spite of statutory requirements which would have required a record and the marking of such lands.

Both States have agreed that there is no record of lands ceded or actually transferred from one state to the other by the Compact. The States did not provide for the identification by survey or otherwise of land ceded. They did not make any provision to facilitate by payment of costs or otherwise the recordation of title of lands ceded by the Compact.

The language of the Compact was very general in that each state merely ceded to the other the lands lying across the boundary line. It did, however, specifically include provisions concerning titles to land along the Missouri River and the collection of taxes and claims arising from tax liens. Sections 3 and 4 as they appear in the

Compact approved by the Iowa legislature are repeated as follows:

> "Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred."

These two sections are as much a part of the Compact as Section 1 which fixed the location of the compromise boundary.

The provisions in the Nebraska Act are reciprocal and there was a specific provision in Section 5 of the Iowa Act, which was adopted first, requiring that the Nebraska Act contain provisions identical with those contained in Sections 3 and 4 but applying to lands ceded to Nebraska.

Just as the maps used to determine the boundary were general maps, this language concerning titles and collection of taxes was also very general and its meaning must be considered in light of the conditions as they

existed at the time of the Compact and the purpose and intent of the parties to the Compact.

The navigation charts and testimony point out that the navigable channel of the Missouri River in the designed channel tends to follow the outside of the bends or curves. The navigable channel was not coincident with a line midway between the banks of the designed channel except at those places where the navigable channel crossed the center from one curve to another. Consequently, land was "ceded" or transferred from one state to the other along the entire boundary. In addition, because of the natural cut-offs, as well as the man-made canals and avulsions, the river necessarily had to have been entirely in Iowa or entirely in Nebraska at many places. In some of these areas, as at Schemmel and Babbitt, the inhabitants and local officials recognized land east of the river was Nebraska land. The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the States. It was done in a context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands in the Missouri River of the character now claimed and the express conditions of the Compact were to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The States recognized these many problems and attempted to avoid the requirement of making a determination of where the actual boundary was and the attendant expense. At this late date, neither State should now be able to require someone else to make this

determination of where the boundary was located prior to the Compact.

Following the adoption of the Compact, the State of Iowa continued to make no claim to these lands until the late 1950's and the adoption of Part 1 of the Missouri River Planning Report dated January 1, 1961; and the Iowa State Conservation Commission has failed to mark or identify the boundaries of the lands claimed even up until the present time. In addition, the State of Iowa has failed to claim certain abandoned river channels of the Missouri River and its determination of lands claimed is based upon the research or opinion of a few individuals and is an arbitrary exercise of power completely inconsistent with the actions of the two legislatures in adopting the Compact. Not only did Iowa fail to claim abandoned river channels in the known avulsion of the Flower's Island case, but also as late as 1956 acknowledged that it had no claim of ownership of what was an abandoned channel in that same area in the case of *Kirk v. Wilcox.* They disclaimed title to land which was abandoned river bed and had not been on the tax rolls in the Blackbird Bend or Kirk Bar area and made no claim to the 350 feet of abandoned river channel in the Walter Pegg area. They have made and are making no claim to certain abandoned channels in the California Bend area and they had made no claim to abandoned channel around Nebraska City Island and have even purchased land from a landowner in that abandoned channel. When the river was placed back under the dry land bridge built at Decatur, the State of Iowa then claimed the river bed but made no claim to the bridge. They have also

collected no fees for the right of pipelines to cross the river over what they claim is their land.

At the same time that Iowa was disclaiming title to certain abandoned channels of the Missouri River, it was selecting other lands which it claimed. These decisions were based upon the investigation and private conferences by the same few individuals.

When it became apparent that individuals might be in possession of some of these lands which Iowa was claiming, the officials making the decision automatically assumed that these people were squatters and they never gave these individuals an opportunity to be heard before the Conservation Commission. They proceeded to file law suits against some of these people without ever talking to them. Many of these lands were selected by an investigation of maps and without personal knowledge of their history. They were selected without regard to whether a canal had been dug in the vicinity prior to the Compact and apparently some of the locations depended upon whether there was water separating the area from the bank at the time of investigation. In certain areas land was not claimed if it had been under cultivation and in other areas this was disregarded. Also there was no further investigation of where the main channel of the river had been prior to work by the Corps of Engineers. If an area was never brought to the attention of the authorities in Des Moines, it was not included on the list of areas Iowa claimed and if the attorney representing the Iowa Attorney General's Office would discard an area it then was removed from further consideration.

Settlements were made with some land owners whereas other landowners were sued by the State of Iowa without the opportunity of discussion with Iowa officials concerning the basis of their title to the land or Iowa's reasons for claiming it. In some of these settlements, the Iowa Conservation Commission officials or the Attorney General's Office instructed the surveyor where to place his line. In the Schemmel and Babbitt cases, the State of Iowa did not interview any persons with regard to formation of the land. They took the position that anybody who studied the maps, plats and photographs of the area had knowledge of the relevant facts concerning its formation and they didn't pursue any investigation with any individuals. No investigation was made into the records of the Nebraska Counties in the Schemmel or Babbitt cases prior to the filing of the law suits. When Nebraska titles were presented, Iowa immediately called them spurious and fictitious instruments. At the same time, the State of Iowa said in answers to interrogatories that it does not claim the ownership of all abandoned channels of the Missouri River presently located in the State of Iowa and when asked to describe these abandoned channels, Iowa stated that the entire flood plain of the Missouri River from the hills in Iowa to the hills in Nebraska was once the c h a n n e l of the Missouri River and there is no practical means of describing even generally the vast portion of the flood plain which Iowa does not claim to own.

Iowa also claims possession of some of these areas although the evidence shows the State has never had possession of either the Schemmel or Babbitt areas under

any accepted definition of the term "possession" and the land owners have been in open, notorious and exclusive possession under claim of right for years. The evidence also has shown that the State of Iowa can claim land regardless of the amount involved in order to establish a legal precedent which might help the State in claiming lands in other locations along the river. The Middle Decatur Bend or Riley Williams area is an excellent example of how the State of Iowa can afford to spend more to litigate to obtain condemnation proceeds to a channel or bed of the Missouri River than the land itself is worth. They are using tax funds for this purpose against the landowner who is paying taxes.

Delay by Iowa has placed a tremendous burden on the average farmer. Many of the documents have been lost or destroyed and not all of the Corps of Engineers records are available. Some of these showed the location of canals dredged by the Corps. In addition, witnesses have died and the burden of establishing a location of the river years ago is time consuming, expensive, and in some situations almost insurmountable. By the mere questioning of the title by the State, the farmer is prevented from borrowing on his land to finance his operations. Consequently, the right to try the title in an Iowa court is not a practical right at all but the mere filing of a law suit by the State of Iowa has automatically and immediately prejudiced the rights of the landowner.

These actions by a small group of Iowa individuals clothed with the authority, power and financial resources of the State of Iowa, have created a government of men

and not of laws along the Missouri River. It is incredible that a Compact adopted by the legislatures of both States and approved by the Congress of the United States could result in such injustice and it is Plaintiff's position that Iowa's conduct totally disregards the provisions of the Compact.

The Iowa State Conservation Commission published Part 1 of The Missouri River Planning Report dated January 1, 1961, which lists many areas which the State of Iowa claims. The report recognized that when an opportunity arises where a vast recreational resource can be developed without conflict with other land use it should be explored and developed to its fullest capacity. It acknowledged the uncontrolled movements of the river and the cutting of new channels and abandoning of the old. It further recognized that there would be additional oxbows cut off when the newly designed channel work is done. The report also made the statement that the violent fluctuations in the river in the past "made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between State and private ownership because development for recreation was not considered feasible because of constant change." The report further stated that the Conservation Commission must also, as it deems necessary, establish and mark boundary lines between state property under its jurisdiction and privately owned property. Some of the areas listed in this report received little or no investigation of the claims of ownership under previously existing Nebraska titles and Plaintiff submits that the evi-

dence shows a very limited type of investigation of the Missouri River Valley.

In answers to interrogatories, Iowa has also taken the position that, in those places where the Missouri River is presently confined to the stabilized channel as it appears on the Alluvial Plain Maps referred to in the Iowa-Nebraska Boundary Compact, the State of Iowa claims ownership to the entire bed of the Missouri River which is on the east side of the middle of the main channel as described in the Iowa-Nebraska Boundary Compact. Consequently, in those places where the river and the designed channel were entirely in Nebraska at the time of the Compact, such as at California Cut-off, Otoe Bend, Nottleman Island, Winnebago Bend, Lake Manawa, and other places, the title would have been entirely in Nebraska riparian owners. In some places where the Corps dredged canals entirely within Nebraska, the U. S. only took an easement for the designed channel and not the fee. However, Iowa apparently has taken the position that by the adoption of the Compact, Iowa automatically acquired the portion of the channel east of the middle of the designed channel as it appears on the A. P. Maps. Plaintiff contends that this entirely disregards the Nebraska title and is a failure to recognize that Nebraska title. Iowa has also taken the position that, following the Compact, where the river has moved into Iowa the State automatically acquires the bed and any islands which may have grown up in the bed, totally disregarding the claims of the Nebraska riparian owner. The State of Iowa has taken the position that the Nebraska owner cannot claim accretions across the fixed state boundary

line and Nebraska contends that this approach also violates the spirit and intent of the Compact to recognize private property rights.

Since 1943, the river has been redesigned in various places north of Omaha and at least twelve canals have been dredged. The legislatures of both states have adopted resolutions or bills providing for boundary commissions in recognition of the fact that there are still problems concerning the boundary and that, as of today, the river is entirely in Nebraska at certain places and entirely in Iowa at others. The report of the Iowa Governor's Advisory Committee on the Iowa-Nebraska Boundary of December 1, 1964 recognized also that, according to the Corps of Engineers, it is not possible to locate the State Boundary on the ground from their 1″ equals 400′ construction maps since numerous channel realignments had been made and the basic 1″ equals 400′ maps which show the alignment on the Alluvial Plain Maps were not retained and the Alluvial Plain Maps are too small a scale and do not contain sufficient details to locate the State boundary. This report also included among its recommendations that the States of Iowa and Nebraska file a friendly suit in the Supreme Court to establish guide lines to determine title of lands transferred in the Boundary Compact with reference to individual landowners and claims upon lands by the states. The Governor of Iowa in his speech to the Legislature in 1965 also recommended ratification of the settlement of the dispute as recommended by the boundary committees of both states in order to settle long-pending questions of land ownership and open up the western slope of Iowa to

commercial, industrial and recreational development. It is submitted that this recognition of the present problems by other branches of the Iowa State Government further emphasize the necessity for a construction of the Iowa-Nebraska Boundary Compact of 1943 and the determination concerning the propriety of Iowa's conduct. The States must first know what their present agreement means before they can embark upon a new Compact.

The evidence further establishes that Nottleman's Island formed on the Nebraska side of the main channel of the Missouri River as the river cut to the east and into Iowa. As the river cut to the east, an island to the north of the area originally platted as Nebraska land built up to the south and east downstream and then the river cut through this Nebraska accretion leaving Nottleman Island proper. The Corps of Engineers then stabilized the channel and closed off the main channel which had been around the east side of Nottleman Island leaving the island contiguous to what had been the eastern shore. Nebraska residents lived on this land prior to the Iowa-Nebraska Compact of 1943, paid Nebraska real estate taxes upon it, paid Nebraska personal property taxes upon their property on the island, and title to the land had been quieted in a Nebraska quiet title action prior to the Compact. Some of the property was sold through a Nebraska estate proceedings by license obtained from the District Court of Cass County, Nebraska. The birth of a child born upon the island was recorded in the Nebraska Bureau of Vital Statistics and a child died while her family was living on the island and the death was

recorded in Nebraska. The property was surveyed and described by Nebraska tax lot numbers by the County Surveyor of Cass County, Nebraska in 1933. The inhabitants of the property at all times considered themselves residents and citizens of the State of Nebraska and the State of Nebraska took and exercised jurisdiction over these inhabitants and the land involved. Children living on the island went to Nebraska schools as Nebraska residents and the Iowa School officials refused to allow them to go to school in Iowa. People on both sides of the river including the county officials considered Nottleman Island to be a part of Nebraska prior to the adoption of the Compact. A tax title was issued by the Treasurer of Cass County in 1945 which was within the five year period provided for liens or other rights accrued or accruing as tax claims under Section 4 of the Compact. Following the Compact, the landowners of Nottleman Island brought suit against the Mills County, Iowa, officials to require them to place the land upon the tax rolls and the Iowa Attorney General's Office had notice of this proceeding. The Iowa Attorney General's Office did not take any action at that time to assert title to these lands. The County officials of Mills County acknowledged that these lands had been ceded and found that all county officials along the Missouri River seemed to have similar problems since the lands could not be identified by Iowa descriptions. In 1951 the Iowa Conservation Commission acknowledged that this land was not owned by the State but belonged to the landowners and the Iowa Attorney General not only had knowledge of this situation but referred the Iowa Attorney, Mr. Whitney Gillilland, to the Iowa Conservation Commission.

Mr. Gillilland, a capable Iowa attorney and former Iowa District Judge testified that in 1946 when the suit was brought against the Mills County, Iowa, officials to place the land on the tax rolls, he had no idea that Iowa was making any claim to this land. It might be concluded that, had any owners of Nottleman Island or Schemmel Island or any of these other areas along the Missouri River brought a quiet title action against the State of Iowa at that time, Iowa would not have claimed title and the owners would have their titles quieted and be free from harassment by the State of Iowa.

The owners of Nottleman Island have then paid taxes on the real property in Mills County, Iowa since 1947, or for more than 20 years, and the State of Iowa has also assessed an inheritance tax upon the property upon death of some of the owners.

The land is now almost completely cleared and is extremely valuable and Iowa paid no attention to it until it became of considerable value. They are also claiming approximately 50 feet into Nebraska in this quiet title action and even their own expert witness acknowledged this fact.

In the Schemmel area, the evidence has shown that the river developed a pronounced easterly bend until it reached the Iowa chute which is approximately two miles east in some places of where the designed channel is today and the river then moved to the west between 1900 and 1905 by cutting off some of the Nebraska land. It never thereafter returned as far east as the Iowa Chute and there is testimony it made at least one other

natural jump to the west. Then, in 1938, the Corps of Engineers dug a canal which Iowa admitted was dug entirely in the State of Nebraska; the river was placed in this canal and it is presently there in the designed channel today. Beginning in 1895 Nebraska first commenced taxing this land and a tax deed was issued in 1907 pursuant to court proceedings of 1905. The land was taxed continuously until the Iowa-Nebraska Boundary Compact of 1943 and there were several Nebraska quiet title actions including some of the Schemmel land. The early Iowa records and the Iowa oldtimers recognized the Iowa Chute as being the abandoned bed of the Missouri River. Following the Compact, the land was placed on the Iowa tax rolls in 1949 and the Schemmels have paid taxes on it in Iowa for approximately 20 consecutive years. Tax deeds were also issued by the County Treasurer of Fremont County, Iowa, in 1955. Up until the time of the Compact, the State of Nebraska had exercised and was exercising jurisdiction over the land and Mr. Schemmel had made his title of record in Iowa by recording various documents, including a Nebraska quiet title decree entered in 1941. County officials of both states recognized the land as having been ceded by the Compact.

The Schemmel land has also been cleared and made valuable and Iowa made no claim to this land until it became highly productive farm land. This is another situation where the land had been considered Nebraska land and had not been subject to question until the Iowa Conservation Commission initiated its "land acquisition" program. Iowa took the position in the Schemmel case

when trial was commenced in Fremont County, Iowa, that there had been no avulsions in the area and that it only had to rely on the presumption against movement of the Missouri River by avulsion. They thereby placed the entire burden of establishing the past history of the land on the individual landowner, even though Iowa admits it was aware that the Otoe Canal had been dug by the Corps and the river moved into it.

Plaintiff submits that this course of conduct is a violation of the Iowa-Nebraska Boundary Compact which required Iowa to recognize these titles. They can hardly excuse their action by incompetence or inadequate investigation for the Otoe Canal was a known fact to the Iowa officials. Yet they proceeded to claim all of the Schemmel land, taking the position there had been no avulsions in the vicinity and relying upon the presumption against avulsions. This is indicative of Iowa's aggressive approach and how, in their zeal to acquire rich farm land without compensating the owner, they can ignore known facts. Fortunately, some documents and witnesses were discovered establishing the dredging of the Otoe Canal in Nebraska but, had they not been available, Iowa might have succeeded in its contentions without challenge.

This is a case to enforce and construe the Iowa-Nebraska Boundary Compact of 1943. As such, as in any contract case, the situation is unique to its own facts. The entire history of the Missouri River and the boundary problems between Iowa and Nebraska are essential in determining the meaning of the Compact and the result which the parties attempted to accomplish. This agreement is binding upon both states and their officials and

should have the same meaning whether applied 20 years ago, today, or 20 years hence. The Compact is a living document creating obligations as well as rights and Nebraska contends that Iowa officials are completely disregarding these obligations. It is a total document and all sections must be given meaning, not just the section providing for a new boundary line.

The Compact was a compromise and Nebraska contends that this supercedes Iowa's common law and changed the rights which the State of Iowa had in and to the beds or abandoned beds of the Missouri River. This was a necessary consequence of the Compact if private titles are to be recognized under the Compact. It did more than just establish a new state line. It transferred lands all along the boundary from one state to the other and the Compact constituted an agreement by the states that private titles would be good. Section 3 is a recognition of this fact and Section 4 is a further limitation upon the states insofar as any tax claims, which were the only claims being asserted by the states at that time, were concerned. The whole Compact evidences an intent to limit the states in their claims and to finally settle all of the uncertainty which admittedly existed. The fact that imprecise and general maps were used to identify the boundary was a further recognition that the states never intended that this line be laid out upon the ground, but they were more concerned with a general jurisdictional line and, for those purposes, the descriptions in the A. P. maps were adequate. Of course, they also anticipated that the river had been confined to the designed channel and would remain there. The entire Compact

represented an attempt in the easiest and most economical manner possible to solve what were considered to be insurmountable problems and the Compact should be considered in that light.

Iowa's law necessarily was changed by the Compact and the Iowa officials and Courts should be required to acknowledge this fact. Iowa should not be allowed to rely upon Section 1 of the Compact establishing the boundary and ignore the sections concerning the titles to ceded lands as by determining that the land is "in Iowa" this necessarily affects the result because of the application of "Iowa law" that the sovereign owns the beds and abandoned beds of the Missouri River. By requiring the landowner to go behind the Compact and prove that certain lands were "ceded", the State of Iowa has then circumvented a procedure which it avoided in 1943 and has cast an almost insurmountable burden upon the landowner at a time when only Iowa has been benefited by the long passage of time between the Compact and the time that Iowa has made its claim. Such an unfair and inequitable situation should not be allowed to continue.

This case requires a careful consideration of the facts and clear and concise statements outlining the effect of the Compact on the factual situations herein presented in language that even the Iowa State Conservation Commission will understand.

Nebraska contends that it is not necessary to go behind the Compact to determine precisely how the Nottleman Island and Schemmel Island areas formed but that, since there were titles good in Nebraska at the time of

the Compact, the State of Iowa must recognize these titles. If the State of Nebraska or private landowners must make this showing, Nebraska contends that it has been deprived of the benefits of the Compact which were adopted with a view of avoiding this requirement. However, should the State of Iowa now be able, after the passage of all these years, to require the determination of what lands were "ceded" then Nebraska submits that both Nottleman Island and the Schemmel area formed in Nebraska. In addition, Nebraska contends that the exercise of jurisdiction over these areas and the general recognition of the fact that they were Nebraska lands prior to the Compact, establishes that they were included within the lands "ceded" to Iowa by the Compact regardless of where they formed. Nebraska further contends that Iowa does not "own" the entire bed of the Missouri River where it is presently in Iowa and that there were places such as at Winnebago Bend, California Bend, Nottleman Island, Schemmel Island, and Lake Manawa to name a few, where the entire Missouri River was in Nebraska immediately prior to the adoption of the Compact and Iowa has no claim to the ownership of the soil under the bed of that river or to beds or abandoned beds of the river in those places resulting from subsequent movements of the river such as at California and Winnebago Bends. Nebraska further contends that the title of Nebraska riparian owners is not limited by the present fixed state line as established by the Compact and that, when the river retreats into Iowa, the state must recognize that the title to the bed and islands or accretions to the bed may lie in Nebraska riparian owners as vested property rights and such title is not subject to attack by

the State of Iowa by a quiet title action and cannot be taken without payment of just compensation.

When Iowa recognized that titles "good" in Nebraska would be "good" in Iowa knowing the situation that existed along the Missouri River, the State was acknowledging that it would not attack these titles and the State would not claim ownership as against the individual owners.

It is plaintiff's position that the Compact changed the law applicable to the boundary between the States of Iowa and Nebraska and, at the same time, established guarantees applicable to conduct by the States concerning private property rights along the Missouri River, and these provisions take precedence and are controlling over the statutes and common law of both states. It is Plaintiff's position that the States, rather than going to the trouble and expense of ascertaining the boundary and determining what land was specifically being ceded all along its length, compromised and worked out a solution which would avoid the necessity of ever having to make those determinations. Plaintiff therefore contends that Iowa's conduct, which would require individuals to establish the jurisdictional situs of their land as of 1943, is violating the contractual obligations of the Compact. However, should the Court hold that Iowa is able to place this burden upon these farmers and landowners, then it is Plaintiff's position that the evidence has established that both Nottleman Island and Schemmel Island were a part of Nebraska ceded to Iowa by the Compact. The designed channel of the Missouri River was entirely within Nebraska at both of those points and the title to the bed

was entirely in Nebraska riparian owners subject only to the public easement for navigation and public use and the State of Iowa must recognize this title which Nebraska contends was not impaired by the Compact. This discussion will first consider the law prior to the Compact and then the applicable principles determining the effect of the Compact upon that prior law.

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ARGUMENT

I.

The Nebraska law provides that title to the beds and abandoned beds of navigable streams is in the riparian owners subject to the public easement of navigation.

Immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 the law of Nebraska was, and remains, that title to the beds of navigable streams is in the riparian owners subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744, reversing 74 Neb. 573, 104 N. W. 1061. This case was decided in 1906 and, even at that early date, the Nebraska Court recognized the characteristics of the Missouri River and noted at 109 N. W. 746-747:

> "... In passing upon the applicability of the common law to our conditions in the first place it is well to observe that for upwards of half a century the people of the territory of Nebraska and the state of

Nebraska have been in occupancy of the west bank of the Missouri River. The first settlement of the territory was along the Missouri River and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge of which the court will take judicial notice that that great river in this locality takes its course through a wide valley composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect, as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream and be disintegrated and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa, or Missouri. See Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372. These processes have been going on for 50 years. During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river bed but has left the riparian owner in full possession and control of the same to the thread of the stream, and many fertile farms now occupy the place where the waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto and, as fast as it became

> subject to useful purposes, reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the state of Nebraska that the common law is applicable to the conditions along the Missouri River and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. . . ."

The Court commented that, while the Missouri River had been declared by Congress to be a navigable stream and during the early years furnished almost the only channel of communication with the territory along its course and around its head waters, the difficulties caused by the characteristics of the river had caused commerce to resort to rail transportation. The Court said that at some points on the boundary of Nebraska, the then present channel of the river was removed to a distance of more than a mile from where it was thirty years ago. It also noted a number of "cut-off lakes" occupying abandoned river beds along the Missouri River and that the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public has lost nothing by the change of channel and the Court then stated at 109 N. W. 747-748:

> ". . . As was said long ago by Ulpian: 'In like manner, if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, neverthe-

less, to be public, because it is impossible that the channel of a public river should not be public. (D.3. 12. 1. 7)" Ware's Roman Water Law, 34 §22. To hold otherwise in case of a stream of the characteristics of the Missouri River might well lead, by way of repeated changes of the river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska, by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel nearby by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class. When, by reason of natural changes, the stream abandons the bed over which, through the instrumentality of its waters, the public has the right

> to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road and its right and privilege to pass over the old reverts to the abutting owners, 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."

The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result.

The Nebraska Court has also held that, where accretion was begun by deposit against shores of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the owner of the mainland. *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935).

In Nebraska, since the riparian owner owns the land to the thread of the stream, islands and accretion to the bed belong to the riparian owner. If the river which constitutes a boundary changes its main channel without excavating, passing over, and then filling the intervening place between its old and new main channel, the change from the old to the new main channel is considered an avulsion and the boundary remains in the former channel. In *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946)

the Nebraska Supreme Court considered a situation where the thread of the stream at one time was near the north bank of the North Platte River but, over a period of time, the thread became located at the south side of the Platte River leaving an area between the former channel and the new channel. The Court distinguished this case on its facts from earlier Nebraska cases in that the land being litigated in the Ecklund case was old bed of the river which, as more and more water had been taken out for storage above, had been relicted and grown up with brush and willows and grass. The Court then said at 23 N. W. 2d 789-790:

> "The thread of the stream was 40 years ago near the north bank, today it is not far from the south bank, and if the thread of the stream had gradually and imperceptibly moved to the south across all the intervening bed of the river it would, under the authorities cited, have carried the boundary line between plaintiff's and two defendants' lands with it. However, that is not the fact, but the main current to the north gradually became less and less, while the current flowing south of Ware Island became larger, and is now the thread of the stream, and under the authorities the case falls within a recognized exception to the general rule and the boundary line remains where it was at first.
>
> The case closest in point on the legal proposition involved is found in an opinion in the Eighth Circuit Court of Appeals, in Commissioners of Land Office of State of Oklahoma v. United States, 270 F. 110, 113. The case was heard before Sanborn and Carland, Circuit Judges, and Munger, District Judge, and the opinion was written by Judge Sanborn, from which we take the following excerpt: 'The general rule on this subject is: (1) That where the thread of

the main channel of the river is the boundary between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; (2) but, where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. Counsel rely upon the first clause of this rule. That clause is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.' ''

Where the title to the bed belongs to private individuals, there can be an avulsion between the banks. The evidence shows that the Corps of Engineers at various times built dikes out into the Missouri River and did not

wash away everything as they moved the channel. They attempted to move the channel around bars or islands as they existed without washing them away if at all possible since this was the easiest and quickest method. There also are examples in evidence where dikes were built out and holes were left in the dikes to maintain navigation. When these gaps would be closed, the navigable channel would automatically jump to the outside of the dikes and Plaintiff contends that this constituted an avulsion. In addition, when the Corps of Engineers dredged a canal and moved the river into the canal this also constituted an avulsion, whether or not the canal was dredged through high bank land or in the bed of the river. This is discussed in *Uhlhorn v. U. S. Gypsum Company,* 366 F. 2d 211 (8th Cir., 1966), cert. den. 85 U. S. 1026, discussed, infra.

II.

Although the Iowa law purportedly was to the effect that the state owned title to the beds of navigable streams within Iowa, this doctrine was not being applied so as to assert title of the State of Iowa in lands along the Missouri River at the time of the Compact and was not applied in such manner for many years thereafter.

In Iowa, the Courts had followed the principle that the State owns title to the beds of all navigable streams within the State to the high water mark. *McManus v. Carmichael,* 3 Iowa 1 (1856). However, at the time of the Compact, the evidence shows that the State of Iowa was not interested in and made no claim to islands or bars

which had arisen in the bed of the Missouri River as a result of the construction work by the Corps and the State of Iowa had made no claim to various abandoned channels of the Missouri River. Plaintiff submits that there would even have been some question whether these abandoned channels or areas created by the movement of the Corps were property of the State since, in at least one state where the State owned the bed of navigable streams, this title was considered to be in the nature of a defeasible fee with the bed of the abandoned channel reverting to the riparian owners and the new bed becoming property of the state. *Manry v. Robison,* 56 S. W. 2d 438 (Tex. 1932). This case turned upon the Mexican or Roman law and the court entered into an extensive discussion of the early authorities. The Texas Court mentioned that there could be no doubt but the laws of England with reference to rivers were founded upon the Roman law. It then stated at 56 S. W. 2d 446:

> "Each of the nations named in selecting its interpretation of the Roman law as to the ownership of stream beds, so long as occupied, chose that rule which was best suited to its conditions. *The jurisprudence of all the nations mentioned, France, Spain, Mexico, Texas (down to 1840), and England (as to nontidal streams), however, agree with the Roman law, that when a river abandons its bed and selects a new channel, the abandoned bed becomes the property of the adjacent land owners.* Authorities supra; Farnham on Waters, vol. 1, § 49."

In 1956, just prior to the time the Conservation Commission commenced its activity investigating lands along the Missouri River, an article appeared in 42

Iowa Law Review 58 entitled **DETERMINATION OF RIGHTS TO REAL PROPERTY ALONG THE MISSOURI RIVER IN CONNECTION WITH RIVER STABILIZATION** which discussed treatment by the Iowa Courts of Missouri River lands at pages 60-61 as follows:

> "When the Missouri River has retreated from the Iowa shore, in times past, it has created sandbars, leaving a depression immediately below the 'high bank land' and following the gradual contour of the bank. Waters would occasionally stand or flow in such depression during high stages of the Missouri River. Such water in the depression below the high bank has been referred to as a 'shute.' As time passed, this shute would become closed at its northern end by natural fill, and thereafter water would back up the shute from the lower end, until finally the whole shute would become filled and be generally dry. The nature and formation of such sandbars has caused the Iowa courts to vascillate in determining whether they were islands or accretions to the high bank land. Islands can acquire accretions the same as the mainland. Slight variances in the facts of the formation of the sandbars caused variances in the application of the rules of law. However, the characteristics of formation of such sandbars are generally similar, and it would seem that the Iowa courts are more frequently holding sandbar formations in the Missouri River to be accretions to the lands of the riparian owners.
>
> The North Dakota Supreme Court has recently held that where accretions from the mainland and accretions from an island gradually meet and become continuous dry land, the respective owners of the island and mainland would be entitled to their respective accretions, divided upon a line to be surveyed.

> If such sandbars are deemed islands, then there is reason to believe that the State of Iowa, at the instance of the State Conservation Commission, might lay claim to them as state property. However, there has been no determination by the courts that the State of Iowa would have a right to such sandbars, or new lands added to the territorial domain of Iowa through the process of avulsion, or land that may be added to the domain of Iowa by stabilizing work now in progress by the United States Corps of Engineers, against claims by riparian owners. Such conflicts may develop on account of the substantial amount of new land that will be added to the domain of Iowa by reason of such channel stabilization work, and the determination of the state boundary along the center line of such stabilized channel."

The article then indicated that once the Missouri River becomes stabilized, there was apt to be greater probability of conflicting interests in this bar land between the Federal and State Governments on the one hand and the riparian owners or adverse possession claimants on the other. This article was cited by the Iowa Supreme Court in *State of Iowa v. Raymond*, 254 Iowa 828, 119 N. W. 2d 135 and was mentioned in the case of *Wilcox v. Pinney*, 250 Iowa 1378, 98 N. W. 2d 720.

Plaintiff would point out that the river had been stabilized below Omaha prior to 1943 and even up until 1956 there had been no determination by the courts of the State of Iowa that the state would have a right to sand bars or new lands added to the territorial domain of Iowa through the process of avulsion or by the stabilization work. It was only at or after this time that Iowa's aggressive program to obtain title to these lands

without compensating the landowners commenced. Iowa had not asserted title to abandoned channels even though it was aware of such channels as indicated by its conduct in the case of *U. S. v. Flower* and Iowa was not claiming abandoned channels in 1956 at the time of the *Kirk v. Wilcox* case. Someone then came up with a new doctrine or a new and unwarranted application of an old doctrine which would allow the State of Iowa to assert title to some of these areas under the guise of its common law. This would enable Iowa to transmogrify the Compact utilizing the new jurisdictional boundary of the state but ignoring the provisions of the Compact requiring the State to recognize titles to lands good in Nebraska. Nebraska contends that the Nebraska riparian owner's right to the bed is a vested right which cannot be taken away from him without just compensation. Iowa should not be able to circumvent those riparian rights by a mere change in application of its so-called common law in complete disregard of the effect of the provisions of the Compact upon that law.

III.

Riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. The Nebraska owner preserved his riparian rights in the bed of the Missouri River and these rights were not taken away by the transfer of jurisdiction to Iowa.

Riparian rights are vested property rights of which a property owner cannot be deprived without the payment of just compensation. This was so stated in the

case of *Manry v. Robison,* supra, with reference to the rights of the riparian owner in an abandoned channel where the river had moved by avulsion. In *New Orleans v. U. S.,* 10 Pet. 662 and *County of St. Clair v. Lovingston,* 23 Wall. 46, the Supreme Court of the United States held that the future right to alluvion is a vested right which is an inherent and essential attribute of the original property. The Court said at 23 Wall. 68-69:

> "The question here under consideration is not a new one in this court. In *New Orleans v. U. S.,* it was said: 'The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain.'
>
> To the same effect are *Saulet v. Shepherd* and *Schools v. Risley.*
>
> In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the in-

> crement rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim *'qui sentit onus debet sentire commodum'* lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. . . . ''

As a vested right, the Nebraska riparian owner's ownership of the bed of the Missouri River and any accretions, islands, or bars in that bed, could not be taken away from the owner by the mere transfer of jurisdiction over the land. In addition, since the right to accretions is also vested, the changing of the boundary to a fixed state line should not deprive the Nebraska riparian owner of additions to his land when the river moved to the east into Iowa as happened in the case of *State of Iowa v. Tyson,* 283 Fed. 2d 802.

These vested rights must be recognized by the State of Iowa not only under the specific contractual provisions of the Compact, but also under the common law. They should not be nullified by findings that the river, being now in Iowa, is subject to Iowa law that the State owns everything within the bed.

IV.

Where a navigable river forms the boundary between two states, the thalweg or middle of the main navigable channel, with certain exceptions, is the boundary. This is the steamboat channel or the channel used for navigation and is not necessarily the line of the deepest water.

Where a navigable river constitutes the boundary between states, the general rule is the actual boundary is the middle of the principal or main navigable channel or thalweg. If there is more than one channel, the boundary is the middle of the one usually followed in navigation of the river. This rule is well established by a long line of decisions by the Supreme Court. In the case of *Iowa v. Illinois,* 147 U. S. 1, Iowa had contended that, for purposes of taxation of bridges crossing the Mississippi River and for all other purposes, the boundary line between the two states was the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel." Illinois claimed that its jurisdiction extended to the middle of the "steamboat channel." The Court held that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river and, if there be several channels, to the middle of the principle one or the one usually followed. The basis for this rule is that the right of navigation is presumed to be common to both in the absence of a special convention between the neighboring states or long use of a different line equivalent to such a convention.

In *Minnesota v. Wisconsin,* 252 U. S. 273, the Court, in determining the boundary between Minnesota and Wisconsin in Upper and Lower St. Louis Bays, considered the effect of certain soundings and said at pages 282-283:

"The doctrine of Thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow, crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

As we view the whole record, the claim of Wisconsin cannot prevail unless the doctrine of Thalweg requires us to say that the main channel is the deepest one. So to apply it here would defeat its fundamental purpose. The ruling depth in the waters below Upper bay was eight feet, and practically this limited navigation to vessels of no greater draft. For these there was abundant water near the middle line. Under such circumstances Minnesota would be deprived of equality of right both in navigation and to the surface if the boundary line were drawn near its shore."

See also *Louisiana v. Mississippi,* 202 U. S. 1; *Arkansas v. Tennessee,* 246 U. S. 158; and *New Jersey v. Delaware,* 291 U. S. 361.

The testimony of the knowledgeable witnesses in the Nottleman Island area was that the boats went around the east or left bank side of Nottleman Island prior to the commencement of the construction work by the Corps of Engineers. In the Schemmel case, the testimony of wit-

nesses closely familiar with the river was that the boats went along the left or eastern bank immediately prior to the commencement of the river work by the Corps of Engineers. This testimony by river people who were either boat captains or, in the Schemmel case, a fisherman who was completely familiar with the river, should prevail over any reconnaissance or soundings maps offered by Defendant for which foundation is seriously lacking.

V.

When by natural, gradual, and imperceptible processes of erosion and accretion, the navigable channel moves, washing away everything in its path, the boundary follows the stream and remains the varying center of the channel. However, when the navigable channel of the river moves or is moved without overflowing, excavating and passing over the intervening area, or without destroying the vegetation, this is in law an avulsion and the boundary becomes fixed in the abandoned channel at such point where the water ceases to flow. There can be an avulsion between the banks of the river when the main channel is moved around an area which is below the ordinary high water mark. There were avulsions all along the Missouri River wherever the Corps of Engineers dredged canals or moved the navigable channel around bars, islands or intervening river bed.

The Supreme Court of the United States has applied the previous rule to the Missouri River in the cases of *Nebraska v. Iowa,* 143 U. S. 359 and *Missouri v. Nebraska,*

196 U. S. 23. However, in both of those cases, the Court also recognized that there was an exception to the general rule that the boundary follows the stream and remains the varying center of the main navigable channel when the thalweg moves gradually, naturally, and imperceptibly, washing away everything as it moves. This exception occurs when the river moves or is moved leaving land, bar, or vegetation between the former and latter locations of the main channel. In those situations, which are described as avulsions, the boundary becomes fixed in the center of the old channel and the new channel no longer is the boundary between the States. Such movements are also described as sudden or perceptible. As Mr. Justice Brewer stated in Nebraska v. Iowa, 143 U. S. at 360-1:

> "It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States,* 10 Pet. 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' (See also *Jones v. Soulard,* 24 How. 41; *Banks v. Ogden,* 2 Wall. 57; *Saulet v. Shepherd,* 4 Wall. 502; *St. Clair County v. Lovingston,* 23 Wall. 46; *Jefferis v. East Omaha Land Co.,* 134 U. S. 178).

"It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, Sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.'"

The Court then cited extensively from an opinion of the Attorney General as follows at pages 361-362:

"With such conditions, whatever changes happen to either bank of the river by accretion on the one or degredation of the other, that is, by the gradual, and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retain-

> ing the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary."

This case found an avulsion in the Carter Lake area when the Missouri River suddenly cut through the neck of an ox-bow and made a new channel.

The Court also found an avulsion in the case of *Missouri v. Nebraska,* 196 U. S. 23 leaving Nebraska land on the Missouri side of the river at McKissick's Island opposite Peru, Nebraska, which is downstream from the Schemmel area. In these situations, the boundary then becomes fixed at the center of the old channel regardless of continued changes in a newly formed channel. *Nebraska v. Iowa,* 143 U. S. 359; *Missouri v. Nebraska,* 196 U. S. 23; *Arkansas v. Tennessee,* 246 U.S. 158; *Louisiana v. Mississippi,* 282 U. S. 458; *Kansas v. Missouri,* 322 U. S. 213.

These rules are based upon equitable principles that, whereas gradual additions and losses of land seem fair to both states, sudden changes were inequitable. What is considered a sudden or perceptible change varies greatly with the particular factual situations, and is dependent upon those facts.

In *St. Clair County v. Lovingston,* 23 Wall. 46, the Court said at page 68:

> "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782, has already been referred to as holding that there can be an avulsion where the main channel of the river moves around area within its bed without overflowing, excavating and passing over the intervening area.

In another recent Eighth Circuit Case, *Uhlhorn v. U.S. Gypsum Company,* 366 F. 2d 211 (8th Cir., 1966), cert. den. 385 U. S. 1026, the Court considered the question of whether there could be an avulsion within the banks of the Mississippi River as it ran between Arkansas and Tennessee. In order to improve navigation, the United States Army Corps of Engineers had dredged across a reef or bar over a period of years between 1930 and 1936 in an attempt to open a channel across accretions to the bar. The Corps again attempted to establish a new channel in 1937. Following flood waters of 1938, the river abandoned its former channel which had been the boundary between Tennessee and Arkansas and, for the first time, voluntarily adopted the dredged channel as its main channel. The District Court had appointed a Master who found that the shift in the thalweg had occurred sometime between December, 1937 and May of 1938. Even after May of 1938, the original channel maintained a relatively deep channel and was used by river traffic. Then during 1940 and 1941, additional spoil was placed at the head of the old channel in an effort to seal it off and concentrate all the flow through the new channel and

the main channel of navigation never returned to the old channel. This dredging by the Corps was done across a low water sand bar and at the time of the shift in the channel, the area was some four feet below the ordinary high water level. The case concerned title to that portion of the bar which was cut off. This was a well reasoned opinion and is cited extensively, beginning at 366 Fed. 2d 217, because of its significance in holding that there can be an avulsion where the river is diverted through bar area within the bed which was not above the ordinary high water mark:

> "Our problem requires an examination of three rules of law well established in this country. They are (1) the rule of thalweg; (2) the rule of avulsion; and (3) the island rule. The rule of the thalweg holds that where a navigable river is the boundary between states the true line is the middle or thread of the main channel of the river. State of Iowa v. State of Illinois, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1893). Later cases affirmed State of Iowa v. State of Illinois and treated the question as settled. State of Arkansas v. State of Tennessee, supra; State of Washington v. State of Oregon, 211 U.S. 127, 29 S.Ct. 47, 53 L.Ed. 118 (1908); State of Louisiana v. State of Mississippi, 202 U.S. 1, 49, 26 S.Ct. 408, 50 L.Ed. 913 (1906). The thalweg rule acknowledges a change in the boundary only if accomplished by the slow, gradual, imperceptible or insensible, processes of erosion and accretion.
>
> The rule of avulsion is also settled and was articulated by the Supreme Court in State of Nebraska v. State of Iowa, 143 U.S. 359, 361, 12 S. Ct. 396, 397, 36 L. Ed. 186 (1892):
>
> 'It is equally well settled, that where a stream, which is a boundary, from any cause suddenly

> abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, 'avulsion.' * * * 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' (Citing Gould on Waters § 159 and cases.)
>
> * * * Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel.

"See also State of Missouri v. State of Nebraska, 196 U.S. 23, 35, 25 S. Ct. 155, 49 L.Ed. 372 (1904), where a portion of the above excerpt was quoted with approval.

The island rule is an exception to the accretion and thalweg rules in that the thalweg of the original channel remains the boundary between the states even though it migrates slowly and imperceptibly from one side of an island to the other. This exception to the rule of accretion appears to have been first mentioned in the State of Missouri v. State of Kentucky, 11 Wall. 395, 78 U.S. 395, 20 L.Ed. 116 (1870), and defined by this court in Davis v. Anderson-Tully Co., supra:

> The general rule is: (1) That, where the main channel of a navigable stream is the boundary between two states and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; and that (2) where it changes by the sudden and violent process of avulsion, the boundary remains where

> the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. (Citations omitted.) But the first clause of this rule was made to govern and is applicable to cases where, by the slow and natural processes of accretion and erosion, the main channel creeps over the land between its old and its new course. To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation. (Citations omitted.) Id.252 F. at 685.

"To the same effect, see Commissioners of Land Office of State of Oklahoma v. United States, 270 F. 110, 113, 114 (8th Cir. 1920) and cases therein cited.

The difficulty in this case lies not in the understanding of or agreement with the general rules but rather in their application to the facts here presented. The Master made certain findings of fact which the District Court adopted and which we must

accept unless they are clearly erroneous. Transportation Ins. Co. v. Hamilton, 316 F. 2d 294, 296 (10th Cir. 1963); H. F. Wilcox Oil & Gas Co. v. Diffie, 186 F.2d 683 (10th Cir. 1950); Howard Industries; Inc. v. Rae Motor Corp., 293 F.2d 116, 117 (7th Cir. 1961); Dyker Bldg. Co. v. United States, 86 U.S.App.D.C. 297, 182 F. 2d 85 (1950).

The evidence was conflicting as to the character and elevation of Massey Towhead at the time the river abandoned the Bendway and selected the Pointway as its main channel. The Master found that Massey Towhead was a sizeable land formation attached to the Arkansas shore by a low water sand bar but that at the time of the shift in the channel the area was some four feet below the ordinary high water level. The Master found that it was not eroded by the river but continued to grow by accretion until the change in channels. And although the Master found that avultive processes caused the change, he concluded it was not a "true" avulsion because Massey Towhead, at the time of the shift, was not above ordinary high water and, therefore, not land in place. Consequently, the Master concluded that the state boundary shifted as if by erosion and accretion. We do not agree (neither did the District Court) with this conclusion. Although the Master's report indicates that he did a tremendous amount of research on the legal issue involved, he frankly stated that he had been unable to find one decision which passed squarely upon the point in this case so as to support his conclusion. We have been favored in this case with excellent briefs by both parties, and each presents arguments both vigorous and persuasive. Both parties cite numerous cases and counsel differ radically on the interpretation of the decisions. We have reviewed all cited cases with interest but find, as did the Master, that none of them involves the identical issue which the facts here present. In the usual case of avulsion, land is severed and new banks are formed

which enclose the river's new bed. And, in each of the island cases there seems to be no question but that the area in controversy had reached the elevation of ordinary high water and could technically be classified as an island.

We do not cite any of these many cases because we do not believe any is controlling or even persuasive upon the decision here.

We do not think that where a state's boundary is fixed by a navigable river, such boundary can or should be changed by any action of the river except by the gradual and imperceptible process of erosion and accretion, and this we believe to be logical regardless of how the boundary happened to be originally located in the thalweg of the river. To hold otherwise would alter the scope of the doctrine of accretion as well as do violence to the teachings of the Supreme Court. This we have no right to do. A state's boundary should not be cavalierly changed simply because the process through which the river seeks a new channel cannot be considered as "true" avulsion. In most instances where a river changes by avultive processes, it has left intervening land above high water mark, but we do not think the elevation of the land mass between an old channel and a new one that is cut by avultive processes is a decisive criterion for a change in a state boundary. By all logic and reason, the boundary should not and does not change from the original thalweg except as the Supreme Court said in State of Arkansas v. State of Tennessee, supra, "by gradual process." Since there was admittedly nothing gradual here, we conclude and believe that State of Arkansas v. State of Tennessee, supra, commands that the boundary remains in the thalweg of the Bendway Channel subject to its erosion and accretions occurring prior to its stagnation and death.

> We are also of the opinion that the rule of avulsion is applicable here. Massey Towhead was on May 6, 1938 a massive land mass although infrequently submerged by some four feet when the river reached ordinary high water. Massey Towhead was not only massive but solid and compact. It resisted all efforts of the Corps of Engineers to dredge a channel across it. Furthermore, after the Engineers abandoned their intensive efforts, it remained intact after the flood of 1937. It was not until after the revetment of the Tennessee side and the flood of 1938 that the river adopted the Pointway Channel. Massey Towhead remained as it was after the channel change. It was as discernible, intact and identifiable after the channel change as it was before. It did not suffer erosion. Under the facts, it would be completely illogical to conclude that the rule of avulsion does not apply simply because the identifiable land was not above the high water mark."

This case stands as clear authority that there can be an avulsion in the bed of the stream when the main channel is moved around a low water bar or area which is below the ordinary high water mark. Where the Corps of Engineers dredged canals along the Missouri River, Plaintiff submits that these were avulsions under the law and, where the river was actually the boundary, such boundary following the placing of the river in the canal became the abandoned channel.

Where the river moves without washing away or destroying the vegetation this is in law an avulsion. The evidence of the trees on the Schemmel land and the admission by Iowa's witness, Dr. Ruhe, that the river could have moved across the places where those trees were located without destroying the trees, establishes an

avulsion at the time of the work by the Corps of Engineers. The evidence of the 1895 tree and the witness Ruhe's testimony that the river could have moved across that area without destroying the tree also establishes the 1900 to 1905 avulsion In the case of *McCafferty v. Young,* 144 Mont. 385, 397 P. 2d 96, 99-100, the Court considered the evidence of trees in determining an avulsion and said:

> "While it is true, as counsel for defendant contends, that it is presumed that changes in river banks are due to accretion rather than avulsion (Wyckoff v. Mayfield, 130 Ore. 687, 280 P. 340), that rule does not apply where there is evidence of avulsive change. We think the evidence showing the age of trees lying between the former channel and the new channel precludes any conclusion that the lateral migration of the river was slow and imperceptible. The witness Hamre, who was the Helena National Forest Supervisor, testified that the trees lying on the land between the two channels were 70 to 80 years in age and still growing. Had the lateral migration of the river been gradual the soil supporting the roots would have been eroded and the trees would have been washed out. Instead, this physical evidence demonstrates that those trees have remained strong since at least 1880 or 1890. The question is one of fact, and the trial judge found there had been an avulsive change. We feel there is ample and credible evidence to support that finding, and, therefore, it will not be disturbed. Rumsey v. Spratt, 79 Mont. 158, 255 P. 5."

VI.

Following an avulsion, the center of the old channel remains the boundary and this boundary remains subject to gradual change as long as the

abandoned channel remains a running stream. When the water becomes stagnant, the process is at an end and the middle of the abandoned channel becomes fixed as the boundary.

Following an avulsion, so long as the former channel of the river remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretions. But when the water becomes stagnant, the boundary then becomes fixed in the middle of the former navigable channel and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as an ultimate effect of the avulsion. *Arkansas v. Tennessee,* 246 U. S. 158. In *Louisiana v. Mississippi,* 282 U. S. 458 this abandoned channel was referred to as the "dead thalweg".

Consequently, in the Schemmel case, it is plaintiff's position that the Iowa Chute became the fixed boundary between Iowa and Nebraska as this was the final place marked by the termination of the flowing water of the Missouri River. However, should it be assumed for purposes of argument that the Missouri River in 1934 in the Schemmel area was the boundary, plaintiff contends the movement of the river to the west and into the Otoe Canal constituted an avulsion and the boundary would then have become fixed in the place along the east bank where water last flowed which was along the eastern side of Schemmel Island, leaving all of the island in Nebraska prior to the adoption of the Compact in 1943. In the Nottleman Island area the boundary would have been located in the abandoned channel to the east of the island prior to the Compact.

VII.

Regardless of how land along navigable rivers may have formed, long acquiescence by one state in possession of territory by another is conclusive of the latter's sovereignty over that territory. Lapse of time is particularly significant in boundary and jurisdictional disputes and the state raising claims should not be benefited by its own delay in asserting those claims. Equitable principles support a determination that will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. The fact that officers and representatives of both states, as well as the inhabitants, recognized that both Nottleman Island and Schemmel Island were in Nebraska prior to the compact should be controlling that these were Nebraska lands.

Regardless of how land along navigable rivers may have formed, there is another well-established principle applicable to the boundary between States that land may become a part of a State as a result of long and continuous exercise by that State of sovereignty and jurisdiction over the land with the acquiesence of the other state. In the case of *Handly's Lessee v. Anthony,* 5 Wheat. 374, the question was raised whether certain lands along the Ohio River were in Indiana or Kentucky. The Court considered the facts that the people who inhabited the peninsula or island had always paid taxes to Indiana, voted in Indiana, and had been considered within its jurisdiction, both while it was a territory and since it had become a state. The jurisdiction of Kentucky was never

extended over them. Mr. Chief Justice Marshall stated at page 384:

> "It is a fact of no inconsiderable importance in this case, that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned state. No diversity of opinion appears to have existed on this point. The water on the north-western side of the land in controversy, seems not to have been spoken of, as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the north-western side of the Ohio, and being a part of Indiana."

The case of *Indiana v. Kentucky,* 136 U.S. 479, involved the claims of Indiana and Kentucky to jurisdiction over a tract of land embracing about 2,000 acres lying on what was then the north side of the Ohio River. Kentucky had claimed that the owners held their titles under grants made by Kentucky as the original proprietor. The land was taxed in Kentucky, the residents voted in Kentucky, and the courts of Kentucky had exercised jurisdiction over the land. The Court considered the fact that it was over seventy years after Indiana became a state before she commenced suit and during all of that period, Indiana never asserted any claim by legal proceedings to the tract in question. It then said beginning at page 510:

> " * * * On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of com-

plaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenue.

This long acquiesence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

In *Arkansas v. Tennessee,* 310 U.S. 563, Arkansas brought suit against Tennessee seeking a decree determining the true boundary between the states at certain points known as "Moss Island" and "Blue Grass Towhead." The

island was physically connected to and a part of the eastern shore of the Mississippi River and the Master found that the land was originally on the west bank of the Mississippi River, but an avulsion took place occasioned by the water cutting across the neck of a peninsula. This is the same case which was illustrated by one of the slides of Professor Gilliland in his explanation of cutoffs. The Master found that the lands were within Tennessee "as a result of prescription." The Court related the Master's summary of the evidence as follows at pages 567-568:

> " 'The contemporary evidence shows that as early as 1823 entries of the land were being made under the authority of Tennessee and surveys were made under authority of Tennessee as early as 1824. Witnesses sixty-five, seventy-eight and eighty-four years old testified before me that the inhabitants of the island always voted in Tennessee elections; were taxed by Tennessee, married by Tennessee Justices of the Peace, required to do road work under Tennessee authority, educated upon the island in a school operated by Tennessee. The records of Dyer County, Tennessee, showed that assessments on the lands in controversy for local taxes were made by Tennessee authorities and land taxes paid to Tennessee as far back as 1870, prior to which records are missing. Tennessee Exhibit 42 shows a tax sale by a Tennessee sheriff in 1848 covering lands on the island. The bill of exceptions in the case of *Moss v. Gibbs* shows testimony in that case that as far back as 1826 Tennessee assessed the lands on the cutoff island, collected the taxes on them and served process there.'
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> * * *
>
> The Master was equally explicit in finding that the record showed the acquiescence of Arkansas in

this assertion of dominion by Tennessee. On this point his report states:

'There is no showing that Arkansas ever asserted any claim to the land in controversy prior to the institution of this suit. The lands were never surveyed or granted by Arkansas. In 1848 the United States Surveyor of Public Lands in Arkansas wrote to the General Land Office in Washington that he had been called upon to survey the lands on the cutoff island. He received a reply authorizing him to proceed with the survey of the island "more especially if it is not claimed by the State of Tennessee." But no survey was ever made. On October 10th, 1935, application was filed with the Commissioner of State Lands of Arkansas for the purchase of Blue Grass Towhead, but no action was taken thereon. The opinion of the Supreme Court of Tennessee in *Moss v. Gibbs*, 57 Tenn. 283, was published in the year 1872 and made the claims of Tennessee a matter of public notoriety.'"

Mr. Chief Justice Hughes stated that the findings of the Master were fully supported by the record. He then said at pages 569-571:

"The contentions of Arkansas in opposition to the application of the principle of prescription and acquiescence in determining the boundary between States cannot be sustained. That principle has had repeated recognition by this Court. In *Rhode Island v. Massachusetts*, 4 How 591, 639, the Court said: 'No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater

justice and propriety than in a case of disputed boundary.' Applying this principle in *Indiana v. Kentucky,* 136 US 479, 510, to the long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the land there in controversy, the Court said: 'It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' Again in *Louisiana v. Mississippi* 202 U.S. 1, 53, the Court observed: 'The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.' See, also, *Virginia v. Tennessee,* 148 U.S. 503, 523; *Maryland v. West Virginia,* 217 U.S. 1, 41-44; *Vermont v. New Hampshire,* 289 U.S. 593, 613.

In *Michigan v. Wisconsin,* 270 U.S. 295, 308, the Court thus referred to the recognition of this principle in international law, saying: 'That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, *Direct United States Cable Co. v. Anglo-American Telegraph Co.,* (1877) L.R. 2 A.C. 394, 421; Wheaton, International Law, 5th Eng. Ed., 268-269; 1 Moore, International Law Digest, 294 *et seq.,* and a fortiori, to the quasi-sovereign States of the Union.' Prescription in international law, says Oppenheim, may be defined as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during

such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.' And thus he finds that prescription in international law 'has the same rational basis as prescription in municipal law — namely, the creation of stability of order.' Oppenheim, International Law, 5th Ed., pp. 455, 456. See, also Hall, International Law, 8th Ed., pp. 143, 144; Hyde, International Law, § 116.

This principle of prescription and acquiescence, when there is a sufficient basis of fact for its application, so essential to the 'stability of order' as between the States of the Union, is in no way disregarded or impaired by our decisions in *Arkansas v. Tennessee, supra,* and *Arkansas v. Mississippi, supra,* upon which counsel for Arkansas rely. In those cases the evidence fell short of the proof of long acquiescence which was necessary to warrant the application of the principle and there was no such showing of acts of dominion and jurisdiction as are shown on the part of Tennessee in the instant case."

See also *Maryland v. West Virginia,* 217 U. S. 1, *Rhode Island v. Massachusetts,* 4 How. 591, *Virginia v. Tennessee,* 148 U. S. 503, and *Michigan v. Wisconsin,* 270 U. S. 295.

The exercises of jurisdiction by the State of Nebraska over the Nottleman Island area by having surveyed the land, taxed the realty, taxed the personal property of the inhabitants, registered births and deaths, quieted title and conveyed title through estate proceedings and the issuance of a license to sell real estate issued through the District Court, and the fact that the inhabitants all considered it to be in Nebraska, coupled with a complete

lack of exercise of any jurisdiction over the area by the State of Iowa would seem to be conclusive that this was Nebraska land prior to the Compact. Even though the period of time elapsed may have been shorter in the Nottleman Island case, had the land not been ceded there would have been an additional 20 years or more of exercise of jurisdiction by Nebraska. In the Schemmel situation, the land was surveyed as a part of Otoe County and has been on the Nebraska tax rolls since 1895 and the tax deeds, quiet title actions, and taxation of the land coupled with the lack of exercise of jurisdiction by the State of Iowa and the general recognition by the State of Iowa of the abandoned channel in the Iowa Chute also established the land as Nebraska land. These two situations were existing at the time of the Compact, and Iowa contracted in recognition of those situations. In each of these cases the general reputation in the vicinity was significant in determining the state in which the property was located and the treatment of this property by the county and state officials and citizens generally was relevant in acknowledging the proper situs of the land. Certainly the tax records, assessment records, school records, and birth records become even more significant when it is considered that they were of record and of public knowledge at the time that the states entered into the agreement concerning the new boundary.

In the disputed boundary case of *Minnesota v. Wisconsin,* 252 U. S. 273, 280 the Court made the comment:

> "For many years officers and representatives of both states regarded the boundary as on or near this line."

In other boundary cases the Court has taken into account the general treatment of the boundary by the citizens and local public officials. In *Vermont v. New Hampshire,* 289 U. S. 593, the Court considered the Connecticut River boundary between Vermont and New Hampshire under early grants and, in determining that the boundary was the low water mark on the western side of the Connecticut River, the Court said at 614-615:

> "A large amount of evidence, thought to have some bearing on the practical construction given to the boundary by the two states, has been introduced in the present suit. Most of it, when examined in detail, is of such slight weight and so inconclusive as to make unnecessary any extensive review of it here. Of some, but by no means controlling significance, are instances of action by towns in New Hampshire recognizing low-water mark on the west bank as the boundary of the towns and of the state, and numerous deeds or other formal documents introduced in evidence affecting titles in each of the towns on the west bank of the river by which the property conveyed was extended to the river or included the privilege of the use of the water. In the absence of evidence of like character showing the assertion of title or jurisdiction in New Hampshire above the low-water line, these facts have some persuasive force in showing that inhabitants along the questioned boundary considered that it extended along the river at low-water mark. See *Handly v. Anthony, supra,* 384."

The Court also considered the history of taxation of the two states and the fact that Vermont had omitted taxation of the disputed property. The Court said at page 616:

> ". . . The fact that in the period of over a century following Vermont's admission to statehood this is

> the first well authenticated instance of an effort on the part of the New Hampshire authorities to tax property located on the west bank of the river is of substantial weight in indicating acquiescence by New Hampshire in the boundary line restricting her jurisdiction to the river at the low-water mark."

In *Handly's Lessee v. Anthony,* 5 Wheat. 374, the Court said it was of no inconsiderable importance that the inhabitants of the land uniformly considered themselves, and were uniformly considered, as belonging to Kentucky.

It should not be necessary to repeat that in the Schemmel case not only was the land taxed continuously in Nebraska since 1895, but the Iowa tax records show it was not placed upon their rolls until 1949 when the Schemmel family started paying taxes in Iowa and have paid them continuously there ever since. In the Nottleman Island situation, the land was also on the tax rolls in Nebraska since 1933 whereas it was not on the Iowa rolls. It was placed upon the Iowa tax rolls in 1947 and the owners have paid taxes upon it in Iowa ever since. Certainly the county officials of the Iowa counties recognized that these lands were ceded by the Compact.

VIII.

A compact entered into between states and approved by Congress is a contract which is binding upon the legislative, executive and judicial branches of the states as well as their citizens. As such it should not be subject to unilateral determination by only one of the states.

Having considered the general principles of law applicable to the Missouri River and the boundary between Iowa and Nebraska at common law and prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943, it then becomes essential to examine the effect of the Compact on the existing law. The two states, rather than determining their existing rights in and to the lands along the Missouri River by judicial proceedings, instead entered into a compact to compromise and adjust these rights. This Compact superceded the prior law and now governs not only the location of the boundary but the obligations of the states to recognize private titles to lands along the Missouri River. It is a fallacy to use the Compact to establish a jurisdictional line but disregard the other provisions as Iowa has been doing. In both the Schemmel and Babbitt cases, Iowa reportedly used the "compact line" as the westerly limits of its claim and various other maps in evidence indicate that Iowa has used that compact line as the westerly boundary of lands claimed. There is conflict between Iowa and Nebraska as to the correctness of where Iowa has placed this line and their method of placing it, but for purposes of this argument plaintiff would concede that defendant is utilizing its concept of the compact line. In the *Tyson* case Iowa again used the compact line not only as its western border, but as a line to cut off riparian rights of the Nebraska owners. Nebraska contends that the Compact is a unified document and the provisions establishing the lines cannot be separated from the safeguards to titles and the limitations upon the states which are also contained in the Compact. This case is not just a

boundary case, but is a case based upon Compact. A Compact entered into between states and approved by Congress is a contract which is binding upon the states as parties thereto, and is binding upon the legislative, executive and judicial branches. As such, it should not be subject to unilateral determination by only one of the states, but the determination of the rights, duties and obligations is properly a function of the Supreme Court of the United States.

The Compact was entered into with the consent of Congress under authority of Article I, Section 10 of the Constitution of the United States. Interstate compacts are properly classified as contracts and have been so classified since an early time in our history. In *Greene v. Biddle,* 8 Wheat. 1 the Court, in declaring a statute of the State of Kentucky unconstitutional because it was in conflict with the provisions of the Compact between Kentucky and Virginia, said at pages 92-93:

> "A slight effort to prove that a compact between two states is not a case within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous; and in *Fletcher v. Peck,* the Chief Justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and indi-

> viduals; and that a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that state, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure."

The Court recognized rights derived from the laws of Virginia prior to the separation of Kentucky from Virginia because the Compact provided that all private rights and interests to lands derived from the laws of Virginia shall remain valid and secure under the laws of Kentucky. The Compact was not invalid upon the ground of its surrendering rights of sovereignty which were inalienable.

In *Fletcher v. Peck,* 6 Cranch 87 at 136, Mr. Chief Justice Marshall said:

> "A contract is a compact between two or more parties, and is either executory or executed."

In *Rhode Island v. Massachusetts,* 12 Pet. 657, Mr. Justice Baldwin pointed out that at the time of the adoption of the Constitution, there were existing controversies between 11 states respecting their boundaries which had arisen under their respective charters and had continued from the first settlement of the colonies. He then stated at pages 724-726:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition a g a i n s t any state entering into 'any treaty, alliance or confederation,' no power under

the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger*, 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s. p. 1 Ves. sen. 448-9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims v. Irvine*, 3 Dall. 425-54; and in *Marlatt v. Silk*, 11 Pet. 2, 18; *Burton v. Williams*, 3 Wheat. 529-33, &c."

The Court then went on to consider that agreements relating to boundaries were included within the Compact clause and that the construction of compacts was a proper function of the Court.

In *West Virginia, ex rel. Dyer v. Sims,* 341 U. S. 22, the State Auditor of West Virginia had refused to issue a warrant to defray West Virginia's share of the expenses arising out of a Compact entered into with seven other states to control pollution of the Ohio River. An action of mandamus was brought by a Commissioner to compel the State Auditor to issue a warrant for West Virginia's share of the expenses. Mr. Justice Frankfurter described the nature and effect of a compact in the following language at 341 U. S. 28:

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

ligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

The adjustment of disputes by Compact was considered by the Court in *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U. S. 92, concerning a Compact for the apportionment of waters of an interstate stream in which Mr. Justice Brandeis stated at pages 104-106:

"The Supreme Court of Colorado held the Compact unconstitutional because, for aught that appears, it embodies not a judicial, or quasi-judicial, decision of controverted rights, but a trading compromise of conflicting claims. The assumption that a judicial or quasi-judicial, decision of the controverted claims is essential to the validity of a compact adjusting them, rests upon misconception. It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in Rhode Island v. Massachusetts, 12 Pet. 657, 723-725.

The extent of the existing equitable rights of Colorado and of New Mexico in the La Plata River could obviously have been determined by a suit in this Court, as was done in Kansas v. Colorado, supra, in respect to rights in the Arkansas River and in Wyoming v. Colorado, supra, in respect to the Laramie.

> But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' Washington v. Oregon, 214 U. S. 205, 217, 218; Minnesota v. Wisconsin, 252 U. S. 273, 283. In New York v. New Jersey, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

Consequently, it was well recognized that States could adjust their differences without resorting to judicial determination. This is what Iowa and Nebraska did when they entered into the Compact of 1943 and avoided the time consuming and expensive process which Iowa is forcing Nebraska to undertake today. Had the Compact not been adopted, then the situation would have been different, and a judicial determination of the boundary might be necessary in those places where it was in dispute; but the States attempted to eliminate this requirement by agreement and recognition of existing titles. The Court also said in *Hinderlider* that the question of apportionment of waters of an interstate stream between the two states was a question of "federal common law" upon which neither the statutes nor the decision of either state can be conclusive.

As a contract, rights and obligations were created which were binding on each state and its officials. As stated in 81 C. J. S., States, Section 10c at page 906:

> "A compact made by two states in the manner permitted or prescribed by the federal Constitution is a law, or, in legal effect, a contract binding on all the parties thereto, the obligation of which continues as long as that contract exists. * * * its provisions limit the agreeing states in the exercise of their respective powers, and are binding on the citizens of both states, and on the judicial, as well as the executive, branch of the state government, although the validity and interpretation of a compact have been held matters for judicial construction."

In *Virginia v. Tennessee,* 148 U. S. 503, the Court exercised jurisdiction over a dispute between the State of Virginia and Tennessee as to their true boundary. Virginia claimed that an agreement between the two states entered into in 1803 constituted a compact establishing the boundary which was binding whereas Tennessee claimed that the Compact was not valid. Mr. Justice Field, after considering that the line had been accepted by both states as a satisfactory settlement of the controversy which had lasted for nearly a century, stated at page 515:

> " * * * As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the true, certain, and real boundary between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed

from by the government of either, but be respected, maintained and enforced by the governments of both."

He further defined a compact at page 520:

"Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties."

IX.

Provisions of compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable.

The provisions of compacts become the law of the contracting state and a state statute or law which conflicts with an interstate Compact is invalid and unenforceable. *Green v. Biddle,* 8 Wheat 1, *The Interstate Compact Since 1925* by Zimmerman and Wendell, p. 32. In *U. S. v. Bekins,* 304 U. S. 27, which was a case involving the composition of debts under the Federal Bankruptcy Act, the Court considered the sovereign power of the state to make contracts and Mr. Chief Justice Hughes said at pages 51-52:

"* * * It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. 1 Oppenheim, International Law, 4th ed. §§ 493, 494;

2 Hyde, International Law, § 489; *Perry v. United States,* 294 U. S. 330, 353; *Steward Mach. Co. v. Davis,* 301 U. S. 548, 597. The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. Const. Art. 1, § 10, subd. 3; Poole v. Fleeger, 11 Pet. 185, 209; Rhode Island v. Massachusetts, 12 Pet. 657, 725; Hinderlider v. La Plata River & C. C. Ditch Co., post, 92. * * *''

It is Nebraska's position that, when Iowa agreed to recognize Nebraska titles, this included the rights of Nebraska owners to the bed of the Missouri River and there were many places along the boundary where this bed was entirely within Nebraska. This was the situation in Winnebago Bend, California Bend, the Nottleman Island area, and Otoe Bend as established by the evidence in this case and is certainly the situation in many other areas, particularly where canals were dug in Nebraska. The law of Iowa is what the Compact determines it to be, not what Iowa officials and Iowa courts might declare it to be without regard to the Compact.

In the construction of agreements or compacts, the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was made. The history leading up to the compact is relevant in determining the proper construction and effect of the

Compact as applicable to titles along the Missouri River. In the case of *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94, the Court had before it the construction of a contract for the taking of water from the canal and Mr. Justice Bradley stated at pages 99-101:

> "The large investment of capital made by the appellee in sole reliance on the water-power which the lease secures, with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should look carefully to the substance of the original agreement, of January, 1864, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. * * *
>
> * * * "And in making this inquiry we have a right to examine into the state of things existing at the time and the circumstances in which the lease was made. This kind of evidence is especially pertinent when the inquiry is as to the subject matter of the agreement."

In determining the subject matter of the boundary compact and the titles which should be recognized, it is significant that the Compact was the result of years and years of controversy and uncertainty and a recognition of many cut-offs by the Missouri River, leaving land of each state isolated on the other side.

In referring to the construction of an Act of Congress, Mr. Justice Davis stated in *U. S. v. Union Pacific Railroad Co.,* 91 U. S. 72 at 79:

> " * * * The act itself speaks the will of Congress, and this is to be ascertained from the language used.

> But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams,* 3 How. 24; *Preston v. Browder,* 1 Wheat. 120."

In *In re Ross,* 140 U. S. 453, a case concerning jurisdiction to try and sentence an American seaman for a crime committed on board an American ship in the harbor of Yokohama which involved a treaty with Japan, the Court said through Mr. Justice Field, at p. 475:

> " * * * It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties."

X.

General rules of construction apply in the interpretation and meaning of agreements between states. Such agreements are to be interpreted with a view to public convenience and the avoidance of controversy and the great object where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. Considerations which govern the diplo-

matic relations between states require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.

In the case *Handly's Lessee v. Anthony,* 5 Wheat. 374, the question was raised whether certain lands along the Ohio River were in Indiana or Kentucky. Mr. Chief Justice Marshall stated at pages 383, 384:

> "The case is certainly not without its difficulties; but in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

Nebraska contends that the Iowa-Nebraska Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated. The interpretation which Iowa places upon the Compact leads to further controversy and Iowa's technical construction that titles were only to be recognized to lands which individuals must now prove in the Iowa Courts to have been "ceded" is not consistent with the purpose of the Compact. A necessary consequence of Iowa's construction is to throw the parties back to the original situation and revive old controversies at a time when the property owners are at a distinct disadvantage because of the passage of time. These owners are protected against the attacks of other individuals by statutes of limitation and adverse posses-

sion but, if the sovereign is immune to these defenses, the landowner is placed at an almost impossible disadvantage.

In *Massachusetts v. New York,* 271 U. S. 65, the Commonwealth of Massachusetts brought an action against the State of New York to quiet title to land located in the City of Rochester and to enjoin the city from taking it by eminent domain. The title to the land in controversy depended upon the meaning and effect of the Treaty of Hartford entered into between New York and Massachusetts in 1786. Mr. Justice Stone stated that it was the meaning of the grant itself which determined the principal question and then continued at page 87:

> "In ascertaining that meaning, not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted 'with a view to public convenience, and the avoidance of controversy', and 'the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.' Marshall, C. J., in *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Waddell,* supra."

The Court also went on to consider the practical construction by the two states of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and the long, continued, acquiescence by Massachusetts in that construction.

The case of *U. S. v. Chaves,* 159 U. S. 452, involved claims to certain lands in New Mexico under a claimed Mexican land grant with the original grant papers having subsequently been lost. The United States denied that such a grant was ever made. The Court of Private Land Claims which had adjudged the title of the claim to be good and valid had been established by an Act which provided that all proceedings should be conducted as near as may be according to the practice of the courts of equity of the United States and that the Court was to settle and determine the question of the validity of title and boundaries of the grant or claim according to the law of nations, the stipulations of the treaty between the United States and Mexico, and the laws and ordinances of the government from which it is alleged to have been derived. Mr. Justice Shiras, in delivering the opinion of the Court, stated at page 457:

> "The first rule of decision thus laid down by Congress for our guidance is that we are to have regard to the law of nations, and as to this it is sufficient to say that it is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. *Henderson v. Poindexter,* 12 Wheat. 530, 535; *United States v. Arredondo,* 6 Pet. 691, 712; *United States v. Ritchie,* 17 How. 525.
>
> We adopt the language of Chief Justice Marshall, in the case of *United States v. Percheman,* 7 Pet. 51, 86, as follows: 'It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which

> is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

In *Sullivan v. Kidd,* 254 U. S. 433, a case involving the construction of a treaty between Great Britain and the United States relating to the tenure and disposition of real and personal property, the Court through Mr. Justice Day stated at page 439:

> "Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, International Law Digest, vol. 5, 249."

The Court further stated at page 442:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."

In *Nielsen v. Johnson,* 279 U. S. 47, a Danish citizen died residing in Iowa, leaving as his sole heir his mother,

a resident and citizen of Denmark. Iowa attempted to assess an inheritance tax against the estate and the administrator contended that the tax was void as in conflict with the treaty between the United States and Denmark. The Iowa Supreme Court upheld the statute fixing the tax as not in conflict with the treaty. Mr. Justice Stone, in considering Iowa's contentions, stated at pages 51-52:

> "The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro,* 278 U. S. 123; *Geofroy v. Riggs,* 133 U. S. 258, 271; *In re Ross,* 140 U. S. 453, 475; *Tucker v. Alexandroff,* 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle,* 265 U. S. 332; *Tucker v. Alexandroff, supra; Geofroy v. Riggs, supra,* and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware v. Hylton,* 3 Dall. 199; *Jordan v. Tashiro, supra;* cf. *Cheung Sum Shee v. Nagle,* 268 U. S. 336. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. *In re Ross, supra,* at 467; *United States v. Texas,*

162 U. S. 1, 23; *Kinkead v. United States,* 150 U. S. 483, 486; *Terrace v. Thompson,* 263 U. S. 197, 223.

> The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs, as suggested by this Court in *Peterson v. Iowa, supra,* p. 174; and also to extend like protection to alien heirs of the noncitizen."

The Court, interpreting the language with "that liberality demanded for treaty provisions" reversed the Iowa Supreme Court's decision.

See also *Factor v. Laubenheimer,* 290 U. S. 276 and *Jordan v. Tashiro,* 278 U. S. 123.

Nebraska contends that the Compact should be liberally construed to protect the rights of the individuals owning or claiming lands along the Missouri River because Sections 3 and 4 were obviously inserted for their benefit.

The Compact should not be restrictively construed to enlarge the rights of the states at the expense of the landowners who were not personally parties to the Compact.

XI.

In construing compacts and agreements and in ascertaining their meaning, it is proper to look to the practical construction placed upon

them by the parties. Want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred.

Nebraska considers that it is significant that the State of Iowa delayed for almost twenty years in laying claim to the Schemmel and Babbitt lands and in adopting their program of land acquisition along the Missouri River. An official of the Iowa State Conservation Commission as far back as 1951 stated by letter that Nottleman's Island was not State property but belonged to some of the individuals presently claiming it. The Iowa Attorney General's Office had notice of this claim both in 1947 and again in 1951. At the same time, the local governmental agencies recognized these titles and the lands were being taxed. The County Officials and taxing officials served under offices created by the statutes of the State of Iowa and the procedures are governed by Iowa Statute. At the same time, there was nothing of record in any Iowa governmental agency including those required by statute to keep records of public and state owned lands which indicated a claim by the State of Iowa to these lands and in some specific situations where Iowa had notice that lands constituted former river beds or abandoned river beds, the officials failed to take any action to establish Iowa's claim. This course of conduct was consistent with an interpretation of the Compact that these titles were originally intended to be protected.

In the case of *Pigeon River Improvement, Slide & Boom Co. v. Cox,* 291 U. S. 138, the Court construed the Webster-Ashburton Treaty along the boundary between

Minnesota and Canada and in doing so held it appropriate to look to the practical construction which had been placed upon the treaty. In *Choctaw Nation of Indians vs. U. S.,* 318 U.S. 423, the Court considered Indian treaties concerning the allotment of land to the Indians, and Mr. Justice Murphy said at pages 431-432:

> "* * * Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor v. Laubenheimer,* 290 U.S. 276, 294-295; *Cook v. United States,* 288 U.S. 102, 112."

The long lapse of time in pressing any claims by the State of Iowa or its Conservation Commission may be significant in determining whether there is any validity to these claims. Mr. Justice Frankfurter, in considering the power of the Federal Trade Commission, stated in *Federal Trade Commission v. Bunte Brothers, Inc.,* 312 U.S. 349 at 351-352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course can not evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Co. v. United States,* 288 U.S. 294, 315. * * * "

XII.

Boundaries between states are of solemn importance and should not be subject to change by man-made works where the United States Army Corps of Engineers arbitrarily created a new designed channel for the Missouri River and then, by construction and dredging, moved the river into that designed channel.

The Missouri River along the Iowa-Nebraska Boundary has created unique problems not only because of its many natural movements but because it was channelized by the Corps of Engineers. The evidence shows the design was determinative of where the river was to be placed and by man-made works, the river was then placed in that design. This was without regard to the boundary between the states and which side of the main channel land areas had been located prior to the commencement of the construction work. Consequently, islands or bar areas were arbitrarily placed on the Iowa or Nebraska side, depending upon the design. In some cases, such as the Auldon Bar situation, land areas were bisected with portions placed on each side. Plaintiff submits that boundaries between states are of solemn importance and prior to the Compact the Iowa-Nebraska boundary was not subject to change by man-made works where the Corps of Engineers arbitrarily created a new designed channel for the Missouri River and then by construction and dredging, moved the Missouri River into that designed channel.

As pointed out by the Court in *Florida v. Georgia*, 17 How. 478 at 494:

> "By the 10th section of the 1st article of the constitution, no state can enter into any agreement or compact with another state, without the consent of congress. Now, a question of boundary between states is, in its nature, a political question, to be settled by compact made by the political departments of the government. * * * "

If states cannot change the boundary between them by agreement without the consent of congress, it is unthinkable that the United States Army Engineers may do so simply by carrying out construction in aid of navigation.

The Missouri River between Iowa and Nebraska is to be distinguished from most situations in that the entire river along the Iowa-Nebraska border has been diverted by man-made works into a designed channel until it is no longer a natural river but is almost analagous to a canal. The result of the movement of the river by the Corps was such that considerable areas of land became attached to either shore which had prior to the construction either been islands or had been attached to the opposite shore or been within the bed of the river. This was a drastic change, completely unnatural and it is submitted that neither the United States Engineers nor any human agency has authority to change a state boundary and destroy titles in this manner.

The Court has often considered man-made changes in rivers and their effect upon property rights, but in almost all of these instances, the changes have been individual in nature and have not been of the scale engaged in on the Missouri River. Plaintiff contends that this

action by the Corps of Engineers created the equivalent of an avulsion along the entire length of the Iowa-Nebraska Missouri River boundary and did not change the boundary. Instead, the states, in recognizing the practicality of the new river location which they thought had been stabilized by the Corps of Engineers, changed the boundary by Compact to conform to what each state thought was going to be the permanent channel of the Missouri River.

In light of this diversion by human agencies, Iowa should not be able to take advantage of work by the Corps of Engineers to deprive other riparian owners of their vested property rights. When the Corps dredges canals and constructs dikes and revetments it is submitted that this change is not slow and gradual or imperceptible to be analogous to movement of the river by accretion. It is further submitted that when the Corps moved the river by the construction of dikes and by dredging, it did not create land which Iowa thereby became entitled to.

In the case of *Whiteside v. Norton,* 205 Fed. 5, (C.C.A., 8th Cir., 1913), appeal dismissed 239 U.S. 144, private parties were engaged in litigation to preserve their rights to the bed of the St. Louis River which formed the boundary between the states of Minnesota and Wisconsin. A navigable channel ran close to the Minnesota shore and north of a small island which formed on the Wisconsin side. The government of the United States, in the exercise of its power to improve navigation, dredged an artificial channel through these waters whereby the navigable channel was established south of the island and several hundred feet south of the former

main and natural channel. The work was begun in 1899 and completed in 1902. The trial court ruled as if the new channel had been the result of a gradual and natural modification of the old. The Circuit Court of Appeals, 8th Circuit, however, reversed the trial court and stated at page 13:

> "* * * We cannot agree that human agencies can thus suddenly bring about what like acts of nature admittedly cannot accomplish. Cutting this channel was analogous to avulsion; it could not operate to change the boundary between the states of Wisconsin and Minnesota. In any view, the title to this island remains where it was before the government made this improvement, in which case the complainant cannot prevail. * * *"

Appeal was then taken to the United States Supreme Court in *Norton v. Whiteside,* 239 U.S. 144, where Mr. Chief Justice White described the nature of the suit as one "* * * to quiet his title to the whole or part of a certain island which emerged from the waters in front of his land, or, considered from the same point of view in a broader aspect, to protect his asserted riparian rights in the submerged land in front of his shore property." The Court dismissed the appeal for want of jurisdiction but also stated at page 154;

> "* * * Fifth, because we are clearly of the opinion that the mere fact that Congress in the exercise of its power to improve navigation directed the construction of the new channel affords no basis whatever for the assumption that thereby as a matter of Federal law rights of property, if secured by the state law, were destroyed and new rights of property under the assumption indulged in incompatible with that law were bestowed by Congress. * * *"

In *State v. Bowen,* 149 Wis. 203, 135 N. W. 494, a dam was built above an island in the Mississippi River diverting the main channel from the eastern or Wisconsin side to the western or Minnesota side of an island. The defendants were charged with fishing in the east channel in violation of Wisconsin law and the district attorney of LaCrosse County contended that the boundary had changed with the change of channel. The Wisconsin Supreme Court said at 135 N. W. 495-496:

> "In Iowa v. Nebraska and Missouri v. Nebraska, supra, it is held that, where a stream which is the boundary between two states from *any cause* suddenly abandons its old bed and seeks a new one, such change in the channel results in no change in the boundary. That remains in the center of the old bed or channel, even though it may be dry. In each of those cases, the change was caused by avulsion. In the present case, the change was caused by the construction of a dam. It is obvious that any change wrought in the flow of the water by means of a dam cannot affect the question of state boundary any more than can such change produced by avulsion. It is only where the change takes place by the slow process of erosion or accretion that a change in boundary is effected. Missouri v. Nebraska, 196 U.S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372. States and individuals alike are subject to the losses and gains of erosion and accretion; but neither can have the boundaries of his domain changed by avulsion, or by the diversion of the water effected by human agencies. * * *"

In *James v. State,* 72 S. E. 600 (Ga. App.) the venue of an alleged offense depended on the location of the boundary between the states of South Carolina and Georgia. The United States government by a series of dikes had diverted the natural channel of the Savannah

River from the South Carolina side to the Georgia side for the purpose of improving the navigation of the river on the Georgia side at the city of Augusta. The Supreme Court of Georgia stated at page 602:

> "It is insisted, however, by learned counsel for the plaintiff in error, that this current or main thread of the channel has been changed by the work of the United States government for the purpose of improving the navigability of the Savannah River near the city of Augusta, and that the channel of the river is now located much nearer the Georgia side, and that this change in the channel or current of the river changes ipso facto the boundary line between the two states. In support of this contention it is said that Const. U.S. art. 1, § 8, par. 3, gives to the federal government control of all navigable rivers between states, and that it therefore follows that any change in the channel or current of a navigable river is a lawful change, and thereafter the channel of the river is fixed, and the boundary line follows this current or channel. Unquestionably the United States government, by the provision of the Constitution above quoted, has control over navigable rivers for the purpose of improving navigation; but the exercise of this right cannot in any sense affect the boundary lines as fixed by treaties, or law, or prescription, between states, or between riparian owners. Where grants of land border on navigable streams, no change which the United States government might make in the course of such stream could affect in any way the rights of the riparian owners as fixed and determined by deeds or prescription, and, of course, where a river is made a boundary line between two states, if the course of the river is changed or diverted by the United States government in the exercise of its authority to improve navigation, the change in the course of the river would not affect the boundary

line, but the boundary line would remain as fixed by law, treaty, or prescription. The legal effect of the act of the government in changing the main channel or current of the river is analogous to a change caused by avulsion, and not by accretion. The treaty of Beaufort, as therein stated, settled and adjusted the boundary differences between the states of Georgia and South Carolina, and established a fixed and permanent boundary line between them, and this boundary line was distinctly declared to be the current or main thread or channel of the Savannah River between the two states, between designated points on said river. This boundary line, so fixed and established by authority of the two sovereign states, could not be changed or affected by any act of the federal government in pursuance of its power over navigable rivers. Indeed, we do not think that this right to regulate and improve navigable rivers has any relation whatever to the question of boundary lines."

In *Southern Portland Cement Co. v. Kezer,* 174 S. W. 661 (Tex. Civ. App.) the Court of Civil Appeals of Texas declined to hold that the boundary between the states of New Mexico and Texas was changed by the construction of a wing dam on the Rio Grande River which switched the current from one side to the other.

In *Uhlhorn v. U. S. Gypsum Company,* 366 F.2d 211 (8th Cir. 1966) cert. den. 385 U. S. 1026, the United States Court of Appeals for the Eighth Circuit held that the boundary was not changed but remained in the abandoned channel where the Corps of Engineers had dredged through a bar below the normal high water mark to create a new channel.

This work by the Corps placed many areas, which undoubtedly were in the jurisdiction of Iowa on the

Nebraska side of the river and lands which were within Nebraska's jurisdiction on the Iowa side of the river. This created an additional state of uncertainty which existed at the time of the Compact, and the work by the Corps and the fact that they had supposedly stabilized the channel was a factor taken into consideration by the two States. This work by the Corps further would have accentuated the problems of establishing the prior boundary by judicial proceedings and all of this was avoided by the Iowa-Nebraska Boundary Compromise of 1943.

XIII.

A state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and the state holds this land as a subject and not as a sovereign. The same principles should apply to lands on both sides of the Missouri River and Iowa should not be entitled to assert rights or claims merely because the Compact placed the lands within the jurisdiction of Iowa.

A state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and holds such land as a subject and not as a sovereign. See *Georgia v. Chattanooga,* 264 U. S. 472, 81 C. J. S., States, Section 104 at page 1075 and *State v. City of Hudson,* 231 Minn. 127, 42 N. W. 2d 546. Also, when a government appears in the Courts of a foreign state, it does so with no other rights and immunities than those which pertain to private corporations or individuals. *Guarantee Trust Co. v. United States,* 304 U. S. 126.

Consequently, as to land "owned" by the State of Iowa which was placed on the Nebraska side of the designed channel by the terms of the Compact and came within the jurisdiction of Nebraska, Iowa's rights or claims as a state were only the same as those by any other owners without the benefit of sovereign immunity. If Iowa has failed to assert its rights, it would lose them just as any other claimant. This would necessarily follow from the change of jurisdiction of the lands regardless of the implications arising from the fact that Iowa "ceded" these lands to Nebraska and thereby gave up its rights to them. The evidence shows that Iowa has made no claim to any lands on the Nebraska side of the river until one representative of the Attorney General's Office raised such claims. Certainly Iowa's rights should have been determined by the Compact and its conduct thereafter and no change of administration of officials should have the result of changing the law.

The evidence also shows that, in determining its claim to Auldon Bar, the Iowa officials made no attempt to determine where the main channel of the river was prior to the construction by the Corps of Engineers in that area. When the Corps cut through the two islands leaving portions on the Nebraska side of the river and portions of the two islands which eventually grew together and formed one island on the Iowa side of the river, Iowa just claimed the area left in Iowa by the Compact. This points up the fact that it was the design of the Corps of Engineers determining which side of the river lands would be placed upon and then the adoption of

the Compact which have ultimately determined which lands Iowa is claiming. Had the Corps reversed the channel and placed the islands above and below Nottleman's Island on the east side of the river and Nottleman Island on the west side of the river, there would have been no attack upon Mr. Babbitt's title or that of the other owners of Nottleman's Island, but the owners of those islands above and below would have been in jeopardy. The same would be true for the Schemmel land. This is such an unjust result that the position of the State of Iowa can hardly be tenable.

The evidence has also shown the unfairness precipitated by a decision by the State of Iowa to attack a landowner's title in the Iowa courts. The assumption that the defense of such an action will generally assure ample vindication of his rights guaranteed by the Compact is inadequate in these cases.

XIV.

It is neither fair nor equitable for Iowa to rely upon any legal presumption that past movements of the Missouri River were gradual and not by avulsion.

Evidence has established that the State of Iowa is relying upon presumptions in placing the tremendous burden of proving the physical location of the State line as it existed in 1943 upon the individual land owner. In the *Schemmel* case, Iowa only called two witnesses, Mr. Huber and Mr. Windenburg and then rested, taking advantage of Iowa law and the presumptions that all movements of the river had been gradual as indicated by Mr. Murray's

opening statement. The Iowa Courts have even gone so far as to state the presumption in the following language: "The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa." *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097, 1098. Plaintiff submits that there can be no basis for such a presumption where the changes are man-made and there were numerous canals and movements of the river by the Corps of Engineers. These changes together with all natural prior changes were taken into consideration in arriving at the location of the new boundary in drafting the Compact. Such presumption, if allowed to persist, works to the detriment of owners of land ceded by Nebraska by clearly placing the burden of proof upon them to prove title to lands east of the designed channel. Iowa, by waiting, is the only party benefited because the loss or destruction of records, death of witnesses and difficulty of proving happenings of years ago can only work to the disadvantage of the landowner if such a presumption can be utilized by the State. It is submitted that a statement from this Court destroying such a presumption on the Missouri River is necessary and proper as a result of the Compact.

Plaintiff further submits that it is not equitable for the State of Iowa to tax land, fail to have any public record of its claim, and then suddenly attempt to appropriate it under the guise of a quiet title proceeding pursuant to the Iowa common law principle of the State's right to the beds of navigable streams. In *United States Gypsum Co. v. Greif Bros. Cooperage Corp.,* 389 F.2d 252 (8th Cir. 1968), U. S. Gypsum Company claimed land

in the Mississippi River by virtue of an "island deed" from the State Land Commissioner of Arkansas. Greif Brothers filed an action to quiet title to the area and have the "island deed" from the State of Arkansas voided, claiming through various indicia of ownership and the payment of taxes on the land. They also claimed the land did not form as an island and was not subject to sale as such, but formed as accretion to riparian lands. Greif Brothers further claimed that even if the land did form as an island, the state of Arkansas was divested of any title thereto by reason of its acceptance of taxes paid by Greif on the land since 1941. The case also involved previous litigation and a question of res judicata, but the following language and reasoning would also seem to be applicable to claims by the State of Iowa to the Nottleman and Schemmel areas. The Court said at page 263:

> "It appears neither fair nor equitable to allow Gypsum to hold back for 11 years on its purported 'Island Deed' application while Greif paid taxes on this property, and then after partially unsuccessful litigation, perfect its vested interest in the disputed lands by completing its so-called 'Island' acquisition. Nor does it appear permissible for the State to accept taxes on this land for an extended period of time when it had, in an ex parte proceeding on application of Gypsum, determined the disputed area to be island land.
>
> We acknowledge the State's right to public lands and that adverse possession does not run against public property, but the disputed land here was not used for public purposes nor set aside for public use, but was the kind of land the State desired to have placed on the tax rolls either as accretions or relictions, or as island lands. It is true the State did acquire some

additional revenue in selling the disputed area as island lands, but it does not appear that the State should be able to both assess and collect taxes on the land and still hold title to it under the circumstances of this case."

XV.

Iowa ignored the lands along the Missouri River until they became valuable. The misapplication of a common-law principle concerning title to the beds of streams in disregard of the Compact constitutes a taking of private property by the State of Iowa without compensation to the land owner. Iowa is not justified in this course of conduct.

The evidence shows that Iowa paid no attention to these lands along the Missouri River until they became valuable and then Iowa has looked to obtaining some of them for purposes of trading for other land areas. Iowa should not be allowed to take advantage of this economic benefit under the guise of promotion of recreation. In *Hilt v. Weber,* 252 Mich. 198, 233 N. W. 159, the Court considered state ownership of land between the meander line and Lake Michigan. The decision only referred to dry land between the meandered upland and the point to which the water had receded. Prior Michigan cases described as the *Kavanaugh cases* had indicated that the riparian owners' title went to the meander line along the Great Lakes and the title outside this meander line, subject to the rights of navigation, was held in trust by the State for the use of its citizens. The Court recognized the harm that could result from taking sound

language and wresting it from its proper setting and applying it to a different situation. The Court then recognized that the right to acquisitions to land, through accession or reliction, is one of the riparian rights. The Court indicated that the *Kavanaugh cases* enumerated principles in variance with settled authority and said at page 167:

> "* * * When to that are added the considerations that they operated to take the title of private persons to land and transfer it to the state, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.
>
> With much vigor and some temperature, the loss to the state of financial and recreational benefit has been urged as a reason for sustaining the Kavanaugh doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the state and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The state should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the state has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the state, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The state must be honest."

The Court went on to recognize that riparian rights

are property, for the taking or destruction of which, compensation must be made by the State. The previous Michigan decisions holding that riparian owners along the Great Lakes owned only to the meander line were overruled.

In like manner, Nebraska contends that Iowa must be honest with its citizens and with owners claiming through Nebraska titles prior to the Compact and Iowa's purposes do not justify the taking of this private property without compensation.

The evidence shows that, should Iowa contend that these lands are "trust lands" they have not been treated as such in the past, as witnessed by Iowa's disclaiming certain lands such as the Lakin-Peterson lands, failing to claim abandoned channel in the California Bend area and the Flower's Island area, and in purchasing land which was in the abandoned channel which was around Nebraska City Island. The nature of Iowa's trust was described by the Iowa Supreme Court in the case of *Peck v. Alfred Olson Const. Co.,* 216 Iowa 519, 245 N. W. 131 at 134, which involved construction by the state of a dock on the shore of a navigable lake:

> " * * * By the cession of the national government to the state, no proprietary benefit was conferred. On the contrary, a burden was imposed. The subject-matter of the cession carried with it no emolument nor promise of future revenue. * * * "

Plaintiff submits that Iowa is only looking toward future revenues and proprietary benefit, having ignored any burdens imposed upon the State by its so-called "trusteeship." This is indicated not only by their failure to

take any interest in these lands along the Missouri River until they became valuable farm lands, but also by their announced intention to use some of these lands as trading stock. Iowa would now apply such a principle for recreation purposes where the motive appears to be primarily because of financial benefit. Just as in Michigan, the Conservation Commission should not be permitted to take property without compensation under a misapplication of riparian law.

———o———

CONCLUSION

The Iowa-Nebraska Boundary Compact of 1943 is a contract binding upon each State and its legislative, executive and judicial branches and binding upon the citizens of each State as well. In construing the Compact, it is proper to examine into the history of the times and the problems which the Compact was intended to remedy. Consequently, the factual situations existing at the time of adoption of the Compact and the historical problems leading up to the Compact are all relevant in determining its true meaning and intent. In boundary compacts, which are particularly affected by long delay and passage of time, the agreements are to be construed to eliminate controversy and avoid injustice, oppression or absurd consequences. This Compact, which was adopted in broad and general terms, was remedial in nature and should be liberally construed to protect the rights of individuals along the river. Any construction which allows the contesting of a former Nebraska title by the State of Iowa

operates to effectually deprive the landowner of the guarantees secured to him under the Compact and constitutes a violation of the solemn promises made by the State of Iowa to the State of Nebraska.

Plaintiff submits that, under the provisions of Section 3 of the Compact, Iowa is obligated to accept as good and valid all claims to lands along the Missouri River deriving from a Nebraska title or indicia of ownership prior to the Iowa-Nebraska Boundary Compact, including private claims to all areas over which Nebraska was exercising jurisdiction at or prior to 1943. Iowa cannot, at this late date, now question titles flowing from Nebraska. In like manner, Iowa should be restrained and enjoined from filing quiet title actions to lands along the Missouri River based upon Iowa's doctrine of the sovereign ownership of beds and abandoned beds of the Missouri River. By agreeing that Nebraska titles would be good in Iowa, it was a necessary result of the Compact that Iowa's common law concerning sovereign "ownership" of the bed and abandoned beds of the Missouri River as Iowa is now attempting to apply it is not applicable. By entering into the Compact in 1943 under the circumstances and conditions as they existed at that time, Iowa waived, relinquished and contracted away all claims which it had to islands, bars, or other land area which had not been marked as property of the State or were not of record in the State of Iowa General Land Office. The Nebraska riparian owners have retained their title to the bed of the Missouri River and accretions, bars, or islands attaching to that bed in spite of the fact that the land or river bed may now be located in Iowa. This title is sub-

ject to the public easement for navigation as defined by Nebraska law. Iowa should be restrained and enjoined from attacking the landowners' title to that river bed under Iowa's doctrine of sovereign ownership and Iowa should not be allowed to require any landowner to prove in a court of law that his land was "ceded" by the Compact in 1943. Such conduct is inequitable, unfair, and a violation of the Compact.

Plaintiff submits that it is also now the law of Iowa, with regard to lands along the Missouri River, that present Nebraska riparian owners' rights continue to extend to the thread of the Missouri River which is not necessarily the boundary between Iowa and Nebraska and, when the Missouri River moves or is moved into the State of Iowa, the title of the Nebraska riparian owner is not cut off or divested at the state line but continues in the same manner as if the boundary between Nebraska and Iowa were still a movable boundary.

The specific areas described in the cases of *State of Iowa v. Babbit* and *State of Iowa v. Schemmel* were formed in Nebraska and ceded to Iowa by the Iowa-Nebraska Boundary Compact of 1943. Iowa should be restrained and enjoined from further attempts to quiet title to such areas in disregard of the provisions of the Compact and this Court should declare that Iowa has no claim thereto based upon any principle of sovereignty.

In the California Bend area, Winnebago Bend area, and such other places as the river was entirely in Nebraska at the time of the Compact, either because of nat-

ural avulsions, canals dredged by the Corps of Engineers, or movement of the river by the Corps, the State of Iowa has no title to the bed of the Missouri River as the title remains in the Nebraska riparian owners subject to the public easement of navigation and use. Iowa further has no claim to lands or river beds resulting from movements of the river out of the designed channel following 1943 in those places.

Insofar as claims by the State of Iowa are concerned, there should no longer be any presumption that movements by the Missouri River in the past have been slow and gradual in such manner that the boundary moved with the river. There should be a presumption that, as to lands east of the Compact line, any title deriving from the State of Nebraska or any area over which Nebraska exercised jurisdiction at the time of the Compact was ceded by Nebraska to Iowa by the Iowa-Nebraska Boundary Compact. This presumption should be irrebuttable insofar as the State of Iowa is concerned and Iowa should be restrained and enjoined from attacking such titles.

Only with these findings can (a) the State of Nebraska and its citizens be guaranteed the rights which Iowa agreed to in the Iowa-Nebraska Boundary Compact of 1943 and (b) title problems be laid to rest for the future economic and recreational development of the Missouri River Valley. The Defendant should be more anxious to obtain such result for the simple reason that all the uncertainty is on the Iowa side of the river.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 17, 1970, I served a copy of the foregoing Plaintiff's Brief and Argument Before The Special Master Honorable Joseph P. Willson by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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