In the

Supreme Court of the United States

October Term, 1964

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No. 17, Original

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STATE OF NEBRASKA, *Plaintiff*,

vs.

STATE OF IOWA, *Defendant*.

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

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RICHARD C. TURNER

Attorney General of Iowa
State Capitol Building
Des Moines, Iowa 50319

MICHAEL MURRAY

Special Assistant Attorney
General of Iowa
Logan, Iowa 51546

MANNING WALKER

Special Assistant Attorney
General of Iowa
233 Pearl Street
Council Bluffs, Iowa 51501

Attorneys for Defendant.

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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INTRODUCTORY STATEMENT

Plaintiff has filed with the Special Master what she entitled a "Resume of Evidence." It is, however, only a "Resume of Plaintiff's Evidence in Argumentative Form."

Defendant responds to the Plaintiff's Brief and Argument as briefly as possible without the insertion of testimony or exhibit references, and tries to assist the Special Master by inserting those portions of the testimony and exhibits that substantiate her arguments in response to Plaintiff's Propositions, by reporting the same and placing the same in a separate volume for convenience in references. There has been no attempt herein to set out all evidence and exhibits that are in the record favorable to Defendant, but only sufficient thereof to substan-

tiate Defendant's argument without being redundant, and without encumbering this Brief with matters which only have remote bearing on the issues.

Defendant has made no attempt herein to raise new issues and has diligently confined herself to answering the specific issues and propositions tendered by Plaintiff in her Brief and argument.

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JURISDICTION

The Plaintiff, State of Nebraska, has petitioned this Court to invoke its original Jurisdiction under Article III, Section 2, Clause 2 of the Constitution of the United States of America citing same, together with Title 26, U. S. C., Section 1251. That this Court under the foregoing has authority to invoke its original Jurisdiction is not disputed, where on the request of either contracting party to an Interstate Compact an interpretation thereof is requested, with an allegation of violation by the other party thereto. As it appears, Plaintiff has confined herself to but one complaint, i. e., Iowa has violated the terms of the 1943 Nebraska-Iowa Boundary Compact.

As stated now by Plaintiff, this case is brought to enforce the provisions of the Iowa-Nebraska Boundary Compact of 1943; and Plaintiff contends as a party to the Compact, she has the standing and the right to enforce its terms, alleging that Iowa is violating its terms. The Compact is not long, nor does it seem vague or ambiguous, and except for the boundary description, is as follows:

IOWA-NEBRASKA BOUNDARY COMPROMISE

"An Act to establish the boundary line between Iowa and Nebraska by agreement; to cede to Nebraska and to relinquish jurisdiction over lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska; to provide that the provisions of this Act become effective upon the enactment of a similar and reciprocal law by Nebraska and the approval of and consent to the Compact thereby effected by the Congress of the United States of America and to declare an emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

SECTION 1: On and after the enactment of a similar and reciprocal law by the State of Nebraska, and the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows: . . .

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

SECTION 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.

SECTION 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.

SECTION 5: The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the Compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska lying easterly of said boundary line so described in Section 1 of this Act, and contiguous to lands in Iowa and also contain provisions identical with those contained in Sections 3 and 4 of this Act, but applying to lands ceded to Nebraska.

SECTION 6: (Effective on publication April 21, 1943.)

The foregoing, on its face, does not appear to be complicated, uncertain, confusing or ambiguous. In Section 2, Iowa ceded all lands in Iowa lying west of the agreed boundary line to Nebraska, and Nebraska (by a reciprocal section) ceded all lands in Nebraska lying east of the agreed boundary line to Iowa. In Section 3, all titles, mortgages and other liens good in Nebraska shall be good in Iowa as to *any lands Nebraska may cede to Iowa.* There are no words or phrases in this Compact that can be interpreted to preclude Iowa from retaining ownership of lands belonging to her whether ceded to Nebraska or not, or that indicia of title in Nebraska to lands outside its boundaries and jurisdiction are *good*

in Nebraska, and hence, must be recognized as *good* in Iowa. There are no words or phrases in this Compact that can be interpreted to deny Iowa the right and duty to have disputed titles to lands in Iowa determined under Iowa title laws, which now include the foregoing Compact, in the courts of Iowa and the Federal Courts of original jurisdiction.

The Plaintiff, State of Nebraska, has failed to carry its burden as Plaintiff in demonstrating to the Court by any clear and convincing evidence of Iowa violating the terms of this Compact or interfering with the rights of her citizens secured by the Compact, and the complaint should be dismissed.

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IOWA'S SUMMARY OF FACTS AND ARGUMENT

Commencing on page 3 and continuing onto page 27 of Nebraska's Brief and Argument, counsel for Nebraska have summarized the facts which they presumably believe to be germane to the case. Iowa submits that many of the matters related by them are not germane, and do not afford the Special Master any assistance in determining the issues now before the Court.

It is interesting history that it took the two states approximately 42 years (1901-1943) to negotiate and enter into the Boundary Compact of 1943. It is true that the purpose of both states in entering into the Compact was so that there would henceforth be a definite boundary line which could be located by the people, by the county

officials, by the Corps of Engineers, by the peace officers of both states, etc. But if Nebraska is seeking to read into these protracted negotiations some continuing sinister plot on the part of Iowa to take some wrongful advantage of Nebraska or her citizens, such conclusion is completely unwarranted. Iowa believes that if the fact of lengthy negotiations means anything in this case, it means that both states adopted the Compact with eyes wide open; that they composed a Compact saying precisely what they mutually wanted it to say; that the Compact therefore means precisely what it says, no more or no less.

It is true that, after all these negotiations, the legislatures adopted a Compact which describes a state boundary line that in a few locations may be difficult to precisely locate on the ground or in the water, as the case may be. Nebraska was unable to point to a single segment of the Compact line where the line *cannot* be accurately located. Willis Brown, the Nebraska State Surveyor, was able to locate the boundary to his satisfaction at Nottleman Island. L. H. Hart, the former Corps of Engineers surveyor, now deceased, actually laid out many miles of the Compact line during his lifetime. Surveyor Jack Virtue testified that he has accurately surveyed numerous segments of the Compact boundary. Professor R. J. Lubsen inferred that there is sufficient data in the Corps of Engineers files to enable accurate location of the Compact boundary line throughout its approximate 191 mile length. See also testimony of R. L. Huber. (See Appendix A.)

The entire record in this case abidingly establishes by more than a preponderance of evidence that the Compact boundary line *can be located.*

But suppose, for the sake of argument, that the Compact boundary cannot be located. We search Nebraska's Argument in vain for any relief sought by Nebraska stemming from this alleged fact. Therefore, whether or not the boundary fixed by Compact in 1943 can be located is irrelevant to any issue now before the Court.

What the Corps of Engineers did prior to 1943 to place and confine the Missouri River in the channel which they had designed for it *is* germane and relevant to the issue in this case.

The evidence of the Alluvial Plain Maps, of the Reconnaissance Maps, of the Construction Maps and the testimony of General Loper and of R. L. Huber, engineer in charge of design, establish that wherever possible, the Corps designed the river to be where they found it. Moving the river wasn't an easy matter; therefore, they planned and moved it as little as possible. Almost throughout its length, the Corps found a natural river much too wide (and hence, too shallow) for navigation purposes.

Wherever the Corps found it necessary to narrow the river or to move it in order to place it and confine it in a designed width of about 700 feet and in the sweeping curves which they deemed desirable, the Corps method at the outset was to push the banks inward or push the channel gradually toward one shore by constructing pile dikes out from the shores or from one shore, causing the

channel to narrow and move gradually in the desired direction until the channel attained the designed width and alignment. Sometimes, it was found necessary to construct pile revetments along the opposite shore against which the water was being pushed, in order to prevent the opposite shore from being washed away too much. (See Appendix B.)

At Otoe Bend, the Corps found a natural river running much too wide, and it was almost a straight reach for several miles from Frazier's Bend to below Hamburg Bend. The river here was both too wide and too straight. The design and the project here were to narrow the channel and make it curve. Otoe Bend would be a curve toward Nebraska, almost entirely within the wide natural channel. (See Appendix C.)

The Modus Operandi was construction of pile dikes (sometimes called baffles) out from the Iowa shore, in the upstream portion of the bend, thus narrowing the channel and forcing the water to flow in the westerly part of the old natural channel. These dikes were permeable, and for some time, river waters continued flowing through them; this was a deliberate part of the Corps plan; the Corps wanted land to form between and below the dikes so that ultimately, all the water would come to flow around the outer ends of the dikes in the designed channel; the Corps plan was that silt-laden water would flow through the dikes, its velocity would be slowed by the dikes, the silt would be dropped, and the area between and below the dikes would become land. The plan worked and the northerly 75% of Otoe Island was formed in what had

theretofore been the Iowa half of the old, wide channel. (See Appendix D.)

In the downstream portion of Otoe Bend, by 1938, the channel had moved southwesterly toward the designed channel, but it had not reached the designed location and was not moving in that direction as fast as the Corps desired. In the meantime, a new tool had become available to the Corps—dredge boats. To accomplish the final movement of the channel in the lower portion of the bend, a canal was dredged in the designed channel and the river was diverted into the canal; it was expected that the water would wash away the banks so that the canal would ultimately become the main channel some 700 feet wide with a navigable depth; this is what happened. (See Appendix E.)

At this point, two remarks concerning the Otoe Bend canal are in order: First, Nebraska would have this Court find that this canal (and all other canals) was, in law, a man-made avulsion; Iowa submits that not all canals are man-made avulsions, and the Otoe Bend canal in particular, was not an avulsion. Second, even if the Otoe Bend canal were to be considered as an avulsion, it would not follow that Otoe Island was in Nebraska prior to the 1943 Boundary Compact and ceded to Iowa by the Compact; as hereinabove pointed out, the greater part of Otoe Island (approximately the northerly 75%) had already formed in Iowa, east of the river, in and prior to 1938; if it be deemed that the 1938 canal was an avulsion, its legal result would be that the state boundary remained in the channel which became aban-

doned as a result of the avulsion; as stated in Division VI of Nebraska's Brief, this boundary remained subject to gradual change as long as the abandoned channel remained a running stream, and then, when the water became stagnant, the process was at an end and the middle of the abandoned channel became fixed as the boundary.

The "abandoned channel" referred to in this rule is not some channel where the river may have flowed 50 years before the avulsion or 5 years before the avulsion or 5 months before the avulsion; it is the channel in which the river was flowing *immediately before* the avulsion. Nebraska, in its Brief, attempts to whiz by and finesse this point because whereas Otoe Island contains a total acreage of about 600 acres, only about 70 acres at most in the Southwesterly part of the island could have been involved in the alleged canal avulsion of 1938. (See Appendix F.)

Returning to Iowa's proposition that the 1938 canal at Otoe Bend was not an avulsion: The rules of avulsion only come into play when *a substantial body of identifiable land is cut off*. We believe that *no land* was cut off by the Otoe Bend canal of 1938; certainly no substantial body of land was cut off; hence there was no avulsion. The evidence concerning the canal and its effect in the form of maps and photographs is almost voluminous. This evidence shows that the area between the channel where the river was flowing in 1938 immediately prior to the construction of the canal, and the canal was entirely water and sand bar; it was not "land" at all; it was river bed. This conclusion is corroborated by the fact that the

Corps neither purchased nor condemned any right-of-way for the canal; it was Corps policy then, as it is today, to purchase right-of-way whenever their works are going to destroy private property; they considered that the Otoe Bend canal was being dredged within the bed of the river, and not through any "land" which necessarily would have been privately owned. (See Appendix G.)

At Rock Bluff Bend, all moving of the channel was accomplished by the gradual pushing-washing method. At the upstream end of Rock Bluff Bend, in which Nottleman Island already existed on the Iowa side of the natural river, the channel was narrowed and pushed westerly by the construction of pile dikes out from the Iowa shore. In the downstream part of the bend (between Queen Hill and King Hill), it was pushed easterly by the construction of pile dikes out from the Nebraska shore. Entirely by this method, the channel was caused to attain its desired alignment. (See Appendix H.)

As stated by Nebraska at page 5 of its Brief, by 1943 the works below Omaha were 99% complete and between Omaha and Sioux City, the works were 78% complete, and the river was entirely in its designed channel except only about 2000 feet. All of this project had been done by the gradual pushing-washing method, except the work had been aided by approximately 11 canals. Presumably, the Iowa-Nebraska state boundary line was the thalweg of the river throughout the river's length, except for Carter Lake, where this Court had determined in 1892 that the state boundary was through the lake, and not in the river.

Although no judicial determinations have been made in litigation where both states were party to the action that the pre-1943 boundary was any place other than in the river at any location other than Carter Lake, Iowa believes there is clear, satisfactory and convincing evidence that the boundary was not in the river at the following locations:

1) *Nebraska City Island.* Iowa always recognized that Nebraska City Island was Nebraska land on the Iowa side of the river until ceded to Iowa by the 1943 Boundary Compact.

2) *St. Mary's Bend.* Nebraska and Federal Courts had found that the river had departed from Clarke Lake by an avulsion, leaving the state boundary in Clarke Lake. Also, the construction of St. Mary's Bend Canal in about 1936 was a true man-made avulsion, cutting off a substantial body of identifiable land. Therefore, most certainly, the pre-Compact state boundary was not in the river at St. Mary's Bend. The Special Master may count himself fortunate that he has no duty or obligation in this case to determine where the boundary was in St. Mary's Bend prior to the Compact.

3) *California Bend.* Iowa has always recognized that the dredging of the California Bend Canal in about 1938 was a true man-made avulsion.

4) *Peterson Bend.* We understand the Nebraska Court found that the Peterson Cut-off Canal, dredged in about 1939, was a man-made avulsion, cutting off a substantial body of identifiable Iowa land, leaving it on the Nebraska side; the Court therefore held that Remington, who had owned the land when it was in Iowa, was still the owner in Nebraska after the Compact.

5) *Winnebago Bend.* The pre-Compact boundary was most certainly not in the river as the river was running in 1943. In *U. S. v. Flowers,* the Federal Court had held on in 1938, that there had been two avulsions at Winnebago Bend prior to 1938; that the first of these had stranded Iowa land on the Nebraska side of the river, and that the second had stranded Nebraska (Indian) land on the Iowa side of the river. Also, the Winnebago Bend Canal was dredged in about 1938. Again, the Special Master has no responsibility to determine in this case where the pre-Compact boundary in Winnebago Bend was; it suffices to say that it was not in the 1943 designed channel.

6) *Bartlett-Pinhook Bend.* A canal had been dredged through an island in about 1938 and the river was running through the canal in 1943. This canal was probably a man-made avulsion. The question remains as to which state the island was in prior to 1938, and the Special Master has no duty to make that determination here.

Nebraska would have the Court hold and decree that the state boundary line never moved with a movement of the river channel if the channel movement was caused by works of the Corps of Engineers. Such a holding would be contrary to the law of accretion and avulsion as it has been applied in all states where the question has arisen (including Iowa and Nebraska) and in the Supreme Court of the United States. The true rule is that the boundary line moved whenever the river channel moved by the gradual process of accretion and regardless of whether such movement of the channel was natural or caused by works of the third party, Corps of Engineers. See Divisions V and XII hereafter in this Brief.

Iowa believes that there is a greater weight or pre-

ponderance of evidence in this case to justify a finding by the Court that both Nottleman Island and Schemmel Island were in Iowa before 1943; that therefore there is no violation of the Compact by Iowa in claiming ownership of them, because they were not ceded land. But Iowa counsel would be remiss if they failed, at this point, to say that such is not necessary in order to sustain Iowa's position.

The law is that Nebraska, as Plaintiff in this case, certainly has the normal and ordinary Plaintiff's burden of proving its allegations by a preponderance of evidence. Therefore, if the Court finds the evidence to just be in balance, the Court's solution would necessarily be in favor of Iowa and against Nebraska.

But Nebraska shoulders an even greater burden in this case than the normal Plaintiff's burden. At least three separate and distinct rules cast upon Nebraska the burden of proving its allegations by clear, satisfactory and convincing evidence:

First, is the rule of the Supreme Court of the United States that whenever one sovereign state is charging another sovereign state with violation, the burden is on the charging state to prove such violation by clear, satisfactory and convincing evidence.

Second, is the presumption in favor of accretion and against avulsion; in other words, whenever a boundary river has moved, it is presumed that it moved gradually by the process of forming accretions to one shore while washing away the other shore, and that it did not move

suddenly by an avulsion; it is therefore presumed that the boundary moved as the channel moved and remained in the channel. The evidence necessary to overcome this presumption is that the party claiming avulsion must prove avulsion by clear, satisfactory and convincing evidence. In Nebraska's Division XIV, they infer that this presumption is just a peculiarity of Iowa law, but see Iowa's Division XIV establishing that it is the general rule, applied in Iowa, Nebraska, the Supreme Court of the United States, and the Courts of numerous other states.

Third, is the presumption favoring the permanency of state boundaries. That is to say, prior to 1943, when the Iowa-Nebraska boundary was defined as "the middle of the Missouri River," it is presumed that from time to time and at all times, the boundary was "the middle of the Missouri River." The burden on anyone claiming it was somewhere else is to prove that it was somewhere else by clear, satisfactory and convincing evidence. Concerning burden of proof, see Division XIV.

Twice in Nebraska's Summary of Facts (on pages 5 & 9) Nebraska calls the Court's attention to the fact that it was Iowa who adopted the Compact first in 1943 and that it was Nebraska who adopted it later in 1943. What relevancy is there in this fact? The inference is that Iowa drew the Compact and Nebraska merely acceded to its terms and therefore the Compact should be strictly construed against Iowa as scrivener. What happens to this inference when you consider that, in a matter of fact, Nebraska adopted the Compact first in 1941, and

Iowa failed to adopt a reciprocal act in 1941 only because the Governor of Nebraska failed to notify the Governor of Iowa until it was too late in the Iowa legislative session of the year for the Iowa legislature to act on it? (See Exhibit P-1856. Boundary Compact adopted by Nebraska May 21, 1941.)

Commencing at the bottom of page 13 and continuing onto page 14 of Nebraska's Summary of Facts, they mention and discuss the subject of "adverse possession" of the Schemmel and Babbitt areas. We believe that this is the first time in this case that Nebraska has put forth "adverse possession" as a ground for relief sought. Until now, we had thought Nebraska to agree with Iowa that "adverse possession" is not an issue in the case and really has nothing to do with the case. We can hardly believe that Nebraska, now, at this late date, is seeking to inject the issue of "adverse possession" into the case; it wasn't pleaded; but even more to the point, it is universally the law that a State cannot lose any real estate it may own by any fact or theory of "adverse possession." *Armstrong v. Morrill,* 14 Wall. 120, 20 L. Ed. 765; *Sioux City v. Betz,* 232 Iowa 84, 4 N. W. 2d 872; *State v. Cheyenne County,* 132 Neb. 1, 241 N. W. 747; *Topping v. Cohn,* 71 Neb. 559, 99 N. W. 372.

In passing, it should be noted that neither "laches" nor "estoppel" is an issue in this case; neither "laches" nor "estoppel" is pleaded; but more to the point, the necessary element of a detriment suffered by Nebraska is utterly lacking; there is no evidence whatsoever of detriment or change of position by Nebraska in reliance on any action or failure to act on the part of Iowa.

The charge made by Nebraska in its Complaint was that Iowa "acquiesed in the possession of said territory by the State of Nebraska." (See paragraph XII, Nebraska's Complaint.) There is not one iota of evidence that Nebraska ever "possessed" either Nottleman Island or Schemmel Island or any other area which Iowa claims to own.

Relevant to these matters of adverse possession, laches, estoppel or acqquiescence, is the undisputed fact of record that every claimant of land claiming adverse to Iowa who testified in this case admitted that he or she already realized net profits from farming of the lands so that if it be now determined that they did not and do not own the land, none of them will suffer financial loss. The picture which Nebraska attempts to paint on pages 14 and 15 of the great, powerful, wealthy State of Iowa unfairly and dishonestly taking advantage of some poor, downtrodden, brave, honest and venturesome farmers is not a true picture. On the same pages, Nebraska is critical of Iowa for its alleged failure to move rapidly with its program of quieting its titles to state owned areas along the Missouri River. In other words, they are critical of our programs, and they are also critical that we didn't institute the program sooner; they are also critical that we didn't investigate thoroughly before instituting the program. It would appear that there is no way Iowa can please Nebraska in the matter, except by withdrawal, leaving the area to be fought over by the hunters, fishermen, squatters, etc. Iowa cannot in conscience withdraw; the public stake in the matter is too great;

and there is no evidence or ground appearing in this case to warrant this Court in commanding Iowa to withdraw.

Commencing on page 18 of her Brief, Nebraska sets out her version of the facts regarding Nottleman Island. Nebraska counsel, apparently realizing that their evidence to establish that Nottleman Island formed in Nebraska is woefully insufficient, passed over this crucial phase of the matter with three sentences at the beginning of the paragraph commencing on page 18. Their treatment of this subject is almost an admission of their failure to prove even *when* the island formed, and if they failed to prove *when* it formed, they can hardly claim to have proved *where* the main channel was when it formed. Iowa counsel believes the record, taken as a whole, can only be interpreted as establishing that Nottleman Island first appears on the map of the Corps Hydrographic Survey of 1923 as a willow bar east of the main channel and therefore in Iowa; it continues to appear on every map and every aerial photograph thereafter and it is ever-afterward on the Iowa side of the main channel.

Nebraska counsel, after whizzing by the matter of Nottleman Island's formation, proceeds to discuss at some length the evidence concerning acquiescence and prescription. This matter will be discussed in detail in DIVISION VII hereinafter. Suffice to say at this point that the first exercise of sovereignty by Nebraska over Nottleman Island was in September of 1933, when R. D. Fitch made his survey; this was less than 11 years before the Boundary Compact; and never has a sovereign state been held to have lost territory by acquiescence in such a short period of time. (See Appendix K.)

Commencing on Page 20 of Nebraska's Summary of Facts is Nebraska's summary of what they believe the evidence to show concerning Otoe Bend or Schemmel Island. They assert that they have proved an avulsion at Otoe Bend between 1900 and 1905. Iowa denies that any such avulsion is proved; in fact the evidence by Dr. Ruhe, Dr. Fenton and Dr. Brush disproves it; the evidence taken as a whole disproves it. The evidence of Nebraska exercising sovereignty over Schemmel Island before the Boundary Compact is even less than at Nottleman Island; Henry Schemmel doesn't claim ever to have seen the island until 1939; Iowa certainly couldn't have acquiesced in four years. Mr. Schemmel admits as a witness that he didn't farm any part of the island until 1955.

Near the bottom of Page 22 Nebraska commences her list of contentions:

First, she wants the Boundary Compact to be "enforced and construed". Iowa has no objections to this. Iowa would only object if the Court were to write a new compact or amend the compact as written by the parties, under the guise of "construing" or "interpreting", which is really what Nebraska is asking. Iowa does not object to enforcement of the compact in accordance with its plain meaning and intent.

Nebraska says that "the compact was a compromise". Iowa agrees. But Iowa fails to see any compromise in the compact construction for which Nebraska is contending. She says Iowa's common law was superceded and changed, but wherein does she admit that Nebraska's law was superceded or changed? She says Iowa relin-

quished and quitclaimed away all of her state owned lands in the vicinity of the river, but wherein does she admit that Nebraska made any reciprocal relinquishment or disclaimer?

Nebraska asserts that where lands were ceded from Nebraska to Iowa, Nebraska law must still be applied to determine their boundaries, and riparian rights of accretion, reliction, island, avulsion, etc. must continue to be determined by Nebraska law; but Nebraska asserts that when lands were ceded by Iowa to Nebraska, those titles must be determined under Nebraska law. Where is there any "compromise" in these assertions?

The way they would have the Compact construed and enforced, it would be no compromise at all; it would just be "Iowa! Stay out." and "Us Nebraskans will settle who owns all lands along the river."

Iowa agrees that the Compact does not permit Iowa to own any *land ceded* by Nebraska to Iowa. Iowa cannot own any land which formed and came into existence in Nebraska anyway, whether ceded or not. Iowa claims only land which she believes to have formed in Iowa and became state owned by Iowa law. This is and always has been the pole star in Iowa's program designed, not to acquire land for the people of Iowa, but to prevent and stop the loss of lands already public property to the trespassers and squatters who would appropriate them for private gain.

Second, Nebraska wants the Court to tell Iowa to keep hands off all lands where "there were titles good in Nebraska." It is truly beyond the comprehension of

counsel for Iowa that there could possibly be a "title good in Nebraska" to any parcel of land which was not in Nebraska. It simply is not possible.

Third, Nebraska wants the Court to find that she has proved by clear, satisfactory and convincing evidence that Nottleman Island and Schemmel Island were "ceded lands", having been in Nebraska by acquiescence or prescription prior to 1943. Iowa contends that the facts necessary to establish that these islands were "ceded lands" have not been proved.

It is Iowa's contention by way of counterclaim, filed herein, that if the court finds that the Iowa common law with relation to State ownership of navigable river beds within the State was changed by the 1943 Boundary Compact then it must follow that Nebraska's common law relating to adverse possession was also changed. If Nebraskans retained all appurtenances to their Nebraska titles after their lands were ceded to Iowa, then it must follow that the State of Iowa retained all appurtenances to its titles to lands which were ceded to Nebraska, including the appurtenances that Iowa lands which were state owned could not be adversely possessed, and were exempt from taxation.

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ARGUMENT

I.

Nebraska's Proposition I in its Brief heretofore filed is as follows:

> **"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."**

Iowa agrees that this is a fair general statement of the law of Nebraska.

Iowa's position is, however, that the proposition has no application in the instant case unless and until Nebraska has established by clear, satisfactory and convincing evidence that at least some of the lands, river beds, or abandoned river beds which Iowa claims to own had their origin and came into existence in Nebraska. Iowa's position is that Nebraska has failed to carry this burden and that, therefore, Nebraska's Proposition I has no application in the case at bar.

Detailed discussion of the evidence bearing on whether Nottleman Island or Otoe Island formed in Iowa or Nebraska will follow in later divisions of this Brief. Also, the evidence bearing on whether other areas claimed by Iowa formed in Nebraska or Iowa is discussed in detail later in this Brief.

In argument under Proposition I, Nebraska counsel assert that the Nebraska rule is "based upon * * * equitable principles * * *," thereby inferring that the Iowa rule is not based upon "equitable principles." In *Kinkead v. Turgeon,* as first decided, and set out in 74 Neb. at page 573, 104 N. W. 1061, the Court citing *Bouvier v. Stricklett,* 40 Neb. 793, 59 N. W. 550, as authority, stated Nebraska had adopted the rule that the State owned

the beds of navigable rivers and not the riparian owners, and on page 1063 of 104 N. W. Rep. stated:

> "* * * It is also apparent that each of these two divergent lines of authority start from a basis both sound and sane, and that the results of each of these lines of decisions have been sanctioned and approved by the Supreme Court of the United States."

Iowa does not want the Supreme Court to dictate a change in Nebraska's internal law, and would expect Nebraska to extend Iowa the same courtesy. As stated in *Arkansas v. Tennessee*, 246 U. S. 158 at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. (Citing cases.) Thus, Arkansas may limit riparian ownership by the ordinary high-water mark (Citing cases.) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark, (Citing cases.) may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

See also Nebraska Supreme Court decision affirmed on appeal in the Supreme Court of the United States in *Whitaker v. McBride*, 197 U. S. 857 affirming 65 Neb. 137, 90 N. W. 966.

The Nebraska Supreme Court found in the case of *State of Nebraska v. Ecklund,* 145 Neb. 508, 23 N. W. 2d 782, cited by complainant, that a very definite island in the Platte River was not excavated, passed over by the channel and then filled in, but in fact, the North channel dried up and the South channel became the thread of the stream. The owner of the island was awarded the area in the abandoned channel to the center. The facts indicated an avulsion. Iowa recognizes the rule of avulsion when the facts constituting an avulsion are established. In the instant case, the complainant has failed to prove avulsion. The mere allegation of an avulsion does not establish the fact, the burden of the complainant and the presumption against avulsion require clear and convincing evidence. This has not been provided under the record in the instant case.

Here Nebraska claims that its laws were absolutely unaltered or changed by the adoption of the Compact, but in some manner yet unexplained the terms of the Compact completely change Iowa's title laws; Iowa's position, which is based on good authority, is that the Compact became the law of both states, but that it was not intended, nor should it be construed as having changed the existing title laws of either state.

II.

Nebraska's Proposition II is as follows:

> **"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."**

Iowa's Proposition II responsive to this is as follows:

> **The Iowa law provides that title to the beds and abandoned beds (where the bed became abandoned by avulsion) and all accretions to the beds of navigable streams in Iowa is in the state, and this law of Iowa has been applied to lands along the Missouri River consistently from 1856 to date.**

As heretofore mentioned in Iowa's Response to Division I, the Iowa Supreme Court never deviated from the doctrine and applied it consistently from 1856 down to the present time in every case where the issue was tendered; and the cases were numerous; and many of them involved the Missouri River. A sampling of the cases decided by the Iowa Supreme Court involving Missouri River lands is set forth in Appendix I.

The Iowa Conservation Commission was exercising its statutory powers relative to state owned lands in proximity to the Missouri River at least as early as 1939,

and was dealing, in one way and another, with these lands continuously from that time to the present.

The Judicial Department of the State of Nebraska knew what the Iowa doctrine was. In 1935, in its decision of *Independent Stock Farms v. Stevens,* 128 Neb. 619, 259 N. W. 647, the Nebraska Supreme Court stated:

> "All states do not agree as to the ownership of land along navigable streams like the Missouri River. In Nebraska this court, after the rehearing in the case of *Kinkead v. Turgeon*, 74 Neb. 573, 580, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 13 Ann. Cas. 43, held that the riparian owners are entitled to the possession and ownership of the soil formerly under the waters of such a stream as far as the thread of the stream, while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such streams owns only to the shore line. *Haight v. City of Keokuk,* (1856) 4 Iowa 199; *Payne v. Hall,* 192 Iowa 780, 185 N. W. 912. So that if an island occurs in the Missouri River on the Iowa side of the thread of the stream, it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner."

See also: *Kinkead v. Turgeon*, supra.

The Iowa Executive Council, including the Governor and several other elected State officials, had occasion to affirm the Iowa doctrine in 1939, when it refused to sell Wilson Island in Pottawattamie County to Travelers Insurance Company. (Hon. George Wilson was Governor of Iowa at that time; hence, the name "Wilson Island.") The Executive Council had caused a patent to be issued to the City of Sioux City for the land involved in *Sioux*

City v. Betz, 232 Iowa 84, 4 N. W. 2d 872, in 1938. The Executive Council had caused a patent to be issued to the City of Sioux City for the land involved in *Solomon v. Sioux City*, 243 Ia. 634, 51 N. W. 2d 472, in 1940.

The Federal District Court for the Southern District of Iowa recognized the Iowa doctrine that the state owns all that part of the bed of the Missouri River which is in Iowa in a least two cases: *Iowa v. Carr*, 191 Fed. 257 (D. C. Ia.), 1911; *U. S. v. 242.83 acres of land, Tyson, et al.*, 283 Fed. 2d 802, Exhibit D-1049.

The Federal District Court for the District of Nebraska knew the Iowa doctrine in 1937 when it decided *U. S. v. Flower, et al.*, Exhibit D-1114.

The Circuit Court of Appeals for the 8th Circuit, which includes both Iowa and Nebraska, knew and applied the Iowa doctrine when it decided *U. S. v. Flowers, et al.*, in 1939, Exhibit D-1115, 108 Fed. 2d 298, also when it decided *Iowa v. Tyson*, supra, in 1960, Exhibit D-1113, 283 Fed. 2d 802.

As can be seen by the foregoing and Appendix II, the Iowa doctrine relative to river beds and islands has been applied by the Courts of Iowa, the Executive branch of the State, and the Legislative branch as well. The Judicial branch of the State of Nebraska, as shown, understood the Iowa doctrine and knew that it was being applied over the years. The Legislative and Executive branches of Nebraska must also have been aware of such doctrine and its application, if many Legislative Boundary Commissions, appointed by the Governor, expended the time and energy that counsel for Nebraska would have

us believe that they did, in meetings with the Iowa Boundary Commission, and we would hope they made their own investigation of the Iowa and Nebraska laws relative thereto.

Iowa believes that Nebraska's Proposition II fails for two reasons. First, the facts as established by the evidence and record in the instant case do not sustain this allegation. Secondly, repeal, alteration or abrogation of either a common law or statutory law by implication is not favored. It is Iowa's belief that the 1943 Compact when adopted by both states and approved by Congress became the statutory law of both states. Nebraska would have us believe that as a statute it repealed Iowa's common law doctrine established and enforced since *McManus v. Carmichael*, 3 Ia. 1, in 1856. Our courts, both State and Federal, have almost universally held that unless the intention of the legislature to alter or repeal is clearly expressed, the Courts will not give a statute the effect of repealing or altering existing laws. Earl T. Crawford, in his text *Statutory Construction,* sets out this theory as follows: Section 228 at page 422:

> "THE COMMON LAW.—If a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted. This is the rule whether the statute is simply declaratory of the common law, or whether it abrogates, modifies or alters it in any way. And there is a presumption that the law-makers did not intend to abrogate or alter it in any manner, although where the intention to alter or repeal is clearly expressed, it must be given effect by the courts. Even where this intention appears, there is a further presumption that the law-makers did not intend to

alter the common law beyond the scope clearly expressed, or fairly implied. In fact, it may be set down, as a general rule, that a statute in derogation of the common law shall be strictly construed, although in some states this rule had been changed by statute. * * *''

Section 309 at page 629:

''THE INTENT OF THE LEGISLATURE.—Whether a statute, either in its entirety or in part, has been repealed by implication, as already stated, depends upon the intent of the legislature. It is the province of the court to ascertain this intent, from the terms and provisions of the later enactment. But the courts will not recognize an implied repeal, unless the intent to repeal clearly appears. It must be free from any reasonable doubt. And the courts will seek to avoid a repeal by implication by resorting to any reasonable construction or hypothesis. If by any fair interpretations all sections of a statute can stand together. there will be no implied repeal.''

Section 310 at page 630:

''THE PRESUMPTION AGAINST THE IMPLIED REPEAL.—As is thus apparent, the courts do not look with favor upon implied repeals, and the presumption is always against the intention of the legislature to repeal legislation by implication. The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption, which is accentuated where the various statutes were enacted at the same session of the legislature. Consequently, as we have already indicated, the intent to repeal must clearly appear, and such a repeal will be avoided if at all possible.

''This presumption against the intent to repeal by implication rests upon the assumption that the legis-

lature enacts laws with a complete knowledge of all existing laws pertaining to the same subject, so that the failure to add a repealing clause indicates that the intent was not to repeal any existing legislation. This presumption, however, is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing law. Similarly, when a statute specifically repeals certain acts or parts of an act, it will not be presumed that the legislature intended to repeal any act or any part of an act not mentioned."

The North Dakota Supreme Court in *Reeves and Co. v. Russell,* 148 N. W. 654 at page 659, quotes Endlich on Interpretation of Statutes, Section 127:

"The presumption against an intent to alter existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by the decisions.

"The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the Parliament had that design, they would have expressed it in the act' that 'the rules of the common law are not to be changed by doubtful implication.' "

The Michigan Supreme Court in *Bandfield v. Bandfield,* 75 N. W. 287 at page 288, quoted a similar rule:

"In all doubtful matters, and when the expression is in general terms, statutes are to receive such a con-

struction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise that is expressly declared in the act. Therefore in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act."

Iowa submits that the foregoing applies to the 1943 Compact. The Legislatures were fully aware of the problems involving the Iowa-Nebraska Boundary, spent many years conferring before arriving at the terminology set out in the Compact, and the presumption arises that they expressed their intentions and the Court should not read into the Compact any intent that is not clearly expressed. (See Appendix I.)

III.

Nebraska's Proposition III is as follows:

> **"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."**

Iowa's Proposition III responsive to this is as follows:

> **Under Iowa's construction of the compact, no Nebraska riparian owner was deprived of any vested property right, and owners of land former-**

ly in Nebraska, now ceded to Iowa, still become the owners of any accretions to such lands which have formed since the compact, or which may later form.

Plaintiff is stating that Nebraska riparian owners prior to the Compact had an expectancy in accretion and reliction. That this expectancy was a vested right under Nebraska law. The pre-Compact boundary was a moving boundary, always following the thalweg as it moved. The state boundary since the Compact is a fixed, permanent boundary. The Nebraska riparian owners' rights before the Compact were limited, by the state boundary, and they are still limited by the state boundary. Any vested right to accretion, reliction or to bed of the stream East of the fixed boundary must be determined by Iowa law, now, the same as it was prior to the Compact. Iowa, under her law, owns the bed of the Missouri River East of the state boundary, but riparian owners whose private boundaries accrete across the bed acquires the accretion. It is only when land accretes to the bed of the stream, and not the shore, that Iowa's sovereign right to ownership applies. This sovereign right extends only to the Iowa boundary, unless as plaintiff contends such title is extended into Nebraska by accretion.

However, this is not an action to determine private titles, but a complaint that Iowa violated the Compact. Iowa submits the two states at the time of the Compact believed that the boundary established by them was a fixed line in the exact center of a permanent, stabilized channel. That the center of the channel and the bound-

ary between the states would ever after be identical. This is why the boundary was described in such a general manner, except for Carter Lake. The erroneous assumption was a mutual error, both parties overlooking the possibility of changes by the U. S. Army Corps of Engineers. However, plaintiff would have this court place the responsibility for this error in judgment on Iowa alone, by declaring Iowa must suffer the imposition of Nebraska laws on a portion of her domain.

The case of *Manry v. Robison*, 56 S. W. 2d 438, cited by Nebraska in her argument, is not in point. It involved an area that included both banks of the Brazos River, as it existed prior to an avulsion in 1914, and as the river existed after the avulsion. It was not a boundary river. The titles to land were originally obtained from the Mexican Government while a part of Mexico, and under Mexican law the riparian owners obtained the title to the beds of avulsion-left abandoned channels, and the new bed was taken from the "dominion" of the prior owners, "by its being made public as the river and as the bed which is abandoned was." Both sides of the river were in Mexico and then became a part of Texas. The lands became part of Texas through Austin's colonization grants, where each grant recited "with all their uses, customs, privileges and appurtenances," for him, his heirs and successors. These rights "were sedulously preserved to the grantees by the constitution and laws of the Republic of Texas. The laws under which the grants were made, including the Mexican civil law, were continued in force by the Constitution of 1836," (as did the Constitutions of 1845 and 1876) and by the Treaty of

Guadalupe Hidalgo on March 2, 1836. Texas adopted the common law by legislative enactment in 1840 and it was argued that this repealed the rule of the Mexican law of 1836. The Court did not agree with this view, and stated:

> "We hold that the claimed rule of the common law was not adopted in this state as to our streams above the ebb and flow of the tide; but that the other clear rule of the common law, that abandoned river beds are the property of the riparian owners, regardless of navigability, should be applied to all our streams above tidewater, navigable in fact or in law; a rule in entire harmony with the Mexican civil law. This makes all our grants, whether Mexican or subsequent, subject to the same rule, and prevents confusion, inconvenience, and discrimination between owners of grants made prior to the act of 1840 and those made since that date."

The other cases cited by Nebraska to support Proposition III (*New Orleans v. U. S.*, 10 Pet. 662, and *County of St. Clair v. Lovingston*, 23 Wall. 46, 23 L. Ed. 59) are not in point. Neither involves any state boundary. Both simply hold that a riparian owner is entitled to his accretions, and with this we do not disagree. This is the law of both Nebraska and Iowa.

We don't believe that Nebraska is contending that Nebraska riparian law was applicable beyond the boundary and into Iowa before 1943. We don't deny that it was applicable to land in Nebraska. We simply say that since 1943, the same is true, i. e., the Nebraska law still applies in Nebraska, and the Iowa law still applies in Iowa.

The rule contended for by Nebraska would produce this result: The State boundary line fixed by the 1943 Compact would not be the private boundary line between the contiguous lands in Nebraska and Iowa any place except those few places where the thalweg of the river may happen to coincide with the state line from time to time. In other words, Nebraska contends that the thalweg still remains the private boundary. Iowa can't believe that any such result was intended by the two states when they entered into the Compact. Nebraska says that the Compact was intended to put at rest all disputes along the boundary. If Nebraska's interpretation were adopted, the effect would be that *no* title disputes were put to rest, nothing was settled, and probably the seeds of more title disputes than ever were sown.

Iowa believes that the clearly expressed intent of the two states was that henceforth, Nebraska sovereignty would extend to, but not beyond, the agreed line, and Iowa's sovereignty likewise would extend to, but not beyond, the agreed line. Titles to all ceded lands which were good in the ceding state would be good in the receiving state, and certainly, a Nebraskan's good legal title in Nebraska to some land which was ceded became a good legal Iowa title after cession.

Every Iowa land title there is or ever was, where the land is contiguous to navigable water, ends at the ordinary high water mark.

Nebraska's contention would result in the creation, in Iowa, of a select few land titles which would extend beyond the ordinary high water mark and into the nav-

igable water. It would force Iowa to recognize two types of land titles within its borders and sovereignty, one type ending at and bounded by the ordinary high water mark, the other type extending into the thalweg.

The State of Virginia thought, just as Nebraska now contends, that it had created some super-titles in Kentucky by insertion of the following language into the Virginia-Kentucky Compact of 1796:

> "All private rights and interests of lands within the said district (Kentucky), derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the law of the proposed state, and shall be determined by the laws now existing in this state (Virginia)."

The Supreme Court of the United States, in *Hawkins v. Barney,* 30 U. S. 294, 5 Pet. 457, 8 Law Ed. 190, in deciding that Kentucky's "seven years' possession law" was effective as to the ceded lands, stated as follows:

> "* * * the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." (30 U. S., page 298.)

The Court's comments at 30 U. S., page 300, are particularly apropros in the case at bar:

> "* * * It can scarcely be supposed, that Kentucky would have consented to accept a limited, crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let

> the language of the compact be literally applied, and we have the anomaly presented, of a sovereign state governed by the laws of another sovereign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws, under which A. would be subject to one class of laws, because holding under a Virginia grant; while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government. If the seventh article of the compact can be construed so as only to make the limitation act of Virginia perpetual and unrepealable in Kentucky; then I know not on what principle, the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate."

What Justice Johnson was saying here was that, even though a literal interpretation of the Virginia-Kentucky Compact would require a holding favorable to Virginia claimants, the Court would not do it, where the result would be the reduction of Kentucky to a state of vassalage and dependency.

If the Court in the instant case were to adopt Nebraska's Proposition III, the result would be reduction of Iowa to the same state of vassalage and dependency to which Justice Johnson was referring.

Nebraska states, on page 40 of its Argument, that the decisions reached in *State of Iowa v. Tyson*, supra, by both the Federal District Court and the Circuit Court of Appeals were wrong. It is true that the result reached in both decisions of said case were contrary to Nebraska's Proposition III. The *Tyson* case is authority that Nebraska's Proposition III should be rejected.

IV.

Nebraska's Proposition IV is as follows:

> **"Where a navigable river forms the boundary between two states, the thalweg or middle of the main 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."**

Iowa believes this to be a proper statement of the rule. However, we believe Nebraska is wrong where they state that the testimony of the most knowledgeable witness in this case proves that the boat track was east of Nottleman Island and along the eastern bank at Otoe Bend prior to the commencement of construction work by the Corps of Engineers. The greater weight of the evidence, the more convincing and acceptable evidence supports a contrary conclusion.

Purely and simply considering the testimony of the "old-timers" witnesses who testified as to where the few boats went past Nottleman Island, Iowa believes that the weight of testimony is in favor of a finding that most of the boats went west of the island. But the "old-timer" testimony is just part of the evidence. When the documentary evidence (maps, aerial photographs, ground level photographs, etc.) is thrown onto the scales, the scales are clearly tipped in favor of finding that the boat track (if there was sufficient boating to establish a track) was west of the island.

Nebraska, in the last phase of argument under Propo-

sition IV, seeks to down-grade the evidenciary value of reconnaissance maps and sounding maps offered in evidence by Iowa. They don't even mention the photographs and other maps. This tack by Nebraska in argument is understandable, because the documentary evidence, taken as a whole, absolutely destroys their claim on Nottleman Island.

Every court which ever confronted a problem such as the Court here confronts has relied most heavily on the Corps of Engineers' maps and records to determine the true history of the area involved. There can be no question that contemporary photographs are far better evidence than the recollections of "old-timer" witnesses. The Nebraska Supreme Court has recognized the value of Corps maps and records in *Burkett v. Krimlofski,* 167 Neb. 45, 91 N. W. 2d 57.

In Appendix J is set forth a resume of the exhibits that establish that both Nottleman Island and Schemmel Island formed east of the principal or main channel of the Missouri River. The west channel was, under the evidence produced, the widest, deepest and swiftest. It was where the "debris" floated, where the "boils" were, where a "snagboat" worked and where a greater number of the relatively few commercial boats were placed by the witness for going up and down the river. If the Court deems that there was insufficient commercial boating to establish a track, or the evidence insufficient to establish where the track was, then evidence as to the existence of a channel deep enough for navigation must be considered to establish the boundary between the states.

The Court is asked to accept the testimony of a boat captain who by his own testimony could "read" the river and follow the deepest channel, who "read" the west channel in 1915 as the deepest, but upon hitting a sandbar backed up and went up the east side, as against the testimony of numerous witnesses on both sides of the disputed island, whose testimony was substantiated by photos taken by them, and by the maps, aerials, and soundings of the U. S. Corps of Engineers.

In the Schemmel area the testimony of a fisherman familiar with the river should be accepted, as against the testimony of such knowledgeable witnesses as Albert Propp, Oscar Hays, James Givens, and Otto Hintz, who lived there right on the river all their lives and hunted, fished, made ice and farmed there fighting the river's destructive nature. We realize that other witnesses in addition to the boat captain and fisherman substantiated their story, but the parole testimony of Iowa's lay witnesses and experts substantiate the maps, aerials, and surveys, including the reconnaissance and sounding maps of the U. S. Army Corps of Engineers, and plaintiff totally failed to carry her burden as plaintiff, or overcome the presumption against avulsion. (See Appendix J.)

V.

Nebraska's Proposition V contains four sentences, each of which is really a separate proposition. The logical way for Iowa to make response is sentence by sentence.

Nebraska's first sentence is:

> **"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.**

Iowa believes the statement is accurate if amended to delete the third word "natural." It has never been any part of the law of accretion that the accretions must form "naturally" in order for the boundary to move with the stream and stay in the stream.

The Nebraska Supreme Court, in *Burkett v. Krimlofski*, supra, at page 57, said:

> "Reference will be made to the work of the U. S. Army Corps of Engineers in controlling the Missouri River and its effect on the creation of the problem here presented. The rule as to that is: The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto." *Ziemba v. Zeller*, 165 Neb. 419, 86 N. W. 2d 190.

In the recent case of *Louisiana v. Mississippi*, (No. 14, Original) where it was argued that man-made avulsions upstream caused rapid erosion and movement downstream, and that the downstream movement should also be considered avulsive, the Special Master in refusing to accept this theory stated on page 22 of his report:

> "* * * Whether the direct cause is natural or artificial or whether the related event is an avulsion is immaterial. Each change must on its own merits stand the test."

In the case of *County of St. Clair v. Lovingston*, supra, at page 66:

> "The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial."

See also *Abolt v. Fort Madison*, 252 Iowa 626, 108 N. W. 2d 263; *Solomon v. Sioux City*, 243 Iowa 634, 51 N. W. 2d 472.

Thus we see that under Nebraska, Iowa and Federal case law the foregoing proposition is erroneous and must be corrected by striking the third word "natural."

Nebraska's second sentence is:

> **"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."**

Iowa would amend this statement slightly as follows:

> **When the navigable channel of the river moves or is moved without overflowing, excavating and passing over a substantial body of identifiable land, this is in law an avulsion and the boundary becomes fixed in the abandoned channel at such point where the water ceases to flow.**

The *Ecklund* case cited by the Plaintiff in support of the foregoing statement is not in point. In that case

the main channel north of a large well-developed island, granted to the original owner by the Government, gradually dried up over 40 years and during the same period the channel south of the island developed into the main channel. The boundary between riparian owners of the island and the mainland remained the thread of the old channel. This was a case involving the Platte River, neither a navigable nor a State boundary river, and was a question of ownership of the old river bed.

In *Uhlhorn v. U. S. Gypsum Co.*, 366 Fed. 2d 211, case cited by the Plaintiff, the Eighth Circuit Court of Appeals in reversing the findings of the Special Master, stated on page 219:

> "* * * In most instances where a river changes by avultive processes, it has left intervening land above high water mark, but we do not think that the elevation of the land mass between an old channel and a new one that is cut by avultive processes is a decisive criteria for a change in a state boundary. * * *
>
> "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." (Italics added.)

Iowa counsel believe that *Uhlhorn,* as the Circuit Court noted in its opinion, is the only case of its kind. Judge Mehaffy states that

> "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 *Uhlhorn,* there was an extension of the avulsion rule to a fact situation to which the avulsion rule had never been applied before.

The facts in *Uhlhorn* were that, prior to 1930, substantial accretions had formed to Brandywine Island in Arkansas and these accretions were known as Massey Bar; in 1931, 1932 and 1933, the Corps of Engineers conducted extensive dredging operations in Bendway Channel, around the bar, and deposited the spoil on the bar; in 1933, 1934 and 1936, the Corps attempted to cut across the bar by dredging Pointway Channel and the spoil from this dredging was deposited on the bar; by natural forces combined with Corps construction work, Massey Bar became "not only massive, but solid and compact." All of this transpired in Arkansas because undeniably, the old boat track and state boundary line remained through Bendway Channel through those years. "Following the flood waters of 1938" the river finally adopted Pointway Channel as its main channel. Massey Bar remained "discernible, intact, and identifiable after the channel change

as it was before." The Court found that the channel change was not "gradual" but "sudden," and that the boundary therefore did not move with the movement of the main channel to Pointway Channel, even though Massey Bar had not arisen above ordinary high water.

Iowa would point out, first of all, that even after *Uhlhorn*, the rule of "avulsion" still requires that the channel must still cross a massive, solid and compact land mass which remains discernible, intact, and identifiable after the channel change as it was before; and the channel shift must be sudden. Nebraska would extend this *Uhlhorn* rule further, so that whenever the main channel moves across a sand bar, regardless of elevation of the bar or the size of the bar, and regardless whether the movement be sudden or gradual, should be deemed an avulsion. This extension of the avulsion rule would lead to repeal of the rule of accretion; whenever the main channel of the Missouri River has moved within the river's main banks, it must move across underwater bars; in other words, the river bottom is never smooth. Carry this thought to its logical end and the only conclusion to be reached is that the boundary never moved unless and until accretions form to a bank line, thus causing the bank line to move.

Nebraska's third sentence is:

> **"There can be an avulsion between the banks of the river when the main channel is moved around an area which is below the high-water mark."**

Iowa would submit the following responsive proposition, to-wit:

> **In order for there to be an avulsion between the banks of a river, the main channel must move or be moved suddenly around a substantial body of identifiable land, without washing away such land or destroying its identity.**

Without going into the detailed facts of each case cited by Nebraska as supporting its proposition, Iowa simply states that none of them support the proposition. *Nebraska v. Iowa*, 143 U. S. 359, involved a neck cut-off, where the river suddenly made for itself an entirely new channel, leaving a substantial body of identifiable Iowa land on the Nebraska side; it was not a movement between the banks of the river. The facts in *Missouri v. Nebraska,* 196 U. S. 23, were similar, a neck cut-off, a sudden new channel, not between the banks of the river, stranding a very substantial body (McKissick's Island) of identifiable Nebraska land on the Missouri side. *Arkansas v. Tennessee*, supra, involved an event in 1876 "which both parties properly treat as a true and typical avulsion;" the event was: "the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck." In *Louisiana v. Mississippi,* 282 U. S. 458, by 1912, an area 5 or 6 miles in length and several miles in width had been added to the Louisiana shore; in 1912-13, there was no controversy about the fact that the river suddenly made a short cut to the west of this area. In *Kansas v. Missouri,* 322 U. S. 213, Kansas claimed that the 2,000 acres in dispute formed

as either accretions to the Kansas shore or as an island on the Kansas side of the main channel and that the area was then cut off from Kansas by an avultive movement either in 1917 or 1927; the Court found that Kansas failed to carry the burden of proof which was on her as complainant, and held that no avulsion was proved.

In *Nebraska v. Iowa,* 143 U. S. 359, at page 365, the Supreme Court of the United States defined avulsion as:

> "* * * in the very uncommon case called 'avulsion' when the violence of the stream separates a *considerable part* from one piece of land and joins it to another, *but in such manner that it can still be identified,* the property of the soil so removed naturally continues vested in its former owner." (Italics added.)

This phrase was quoted with approval in the Federal District Court decision of *Uhlhorn v. U. S. Gypsum,* 232 Fed. Supp. 994, 1000.

Still, the only authority for the proposition that there can be an avulsion as to an area below ordinary high water is *Uhlhorn v. U. S. Gypsum Co.,* supra, and still it is Iowa's position that the rule of *Uhlhorn* should not be extended beyond the particular facts which existed in that case.

In *Louisiana v. Mississippi,* No. 14, Original, Oct. Term, 1962, Special Master Marvin Jones quoted with approval from *Nebraska v. Iowa,* supra, page 369, as follows:

> "There is, no matter how rapid the process of subtraction and addition, no detachment of earth from

the one side and deposit of the same upon the other. The only thing which distinguishes this river from the other streams, in that matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto."

The fourth and last sentence of Nebraska's Proposition V is:

> **"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."**

Iowa disagrees entirely with this general statement and would submit the following responsive proposition, to-wit:

> **Every location at which the main channel has moved must be studied separately to determine whether such movement was accretionary or avulsive. Each location must be judged on its own facts, and by application of the law of accretion, avulsion or island as the particular facts may warrant.**

Iowa does not believe that the Court can or should generalize on this subject at all. There is no sufficient evidence concerning what the Corps may have done "all along the Missouri River" to enable the Court to generalize concerning the legal result at any locations except Nottleman Island and Schemmel Island. As put by the Special Master Jones on page 22 of his report in *Louisiana v. Mississippi,* No. 14 Original, October Term, 1962, "Each change must on its own merit stand the test."

Furthermore, the Supreme Court of the United States has often said that it is not in the business of giving advisory opinions. See *Alabama v. Arizona,* 291 U. S. 286, 291-292, where the Court said:

> "This Court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat v. United States,* 219 U. S. 346. *Willing v. Chicago Auditorium Assn.,* 277 U. S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana v. Texas,* 176 U. S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri v. Illinois,* 200 U. S. 496, 520-21. *New York v. New Jersey,* 256 U. S. 296, 309. *North Dakota v. Minnesota,* 263 U. S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri v. Illinois,* supra, 521. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade,* 289 U. S. 444, 458. The burden upon the plaintiff states fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut v. Massachusetts,* 282 U. S. 660, 669."

See also *Trailmobile Co. v. Whirls,* 331 U. S. 40 at page 48.

At Nottleman Island, the preponderance of evidence establishes that prior to Corps work which was commenced in about 1934, the main channel was the channel west of the island, but it didn't quite fit the Corps design. The Corps design called for the river to remain in the west channel, but it was to be narrowed and formed to gently curve. The narrowing and curving were accomplished by pushing the banks in from both sides; there was no dredging; there is no evidence that any identifiable land, under water bars, or anything else was cut off or jumped across; the movement of the channel was gradual, not sudden; in law, the boundary must have moved as the channel was moved because the movement met all tests for an accretionary movement, and meets none of the tests for an avulsive movement.

At Otoe Bend, from 1934 through most of 1938, the Corps work was the same, i. e. they pushed the main channel into the designed channel and narrowed it there by building dikes from the both shores, keeping the main channel in front of the work. By mid-1938, they had accomplished moving of this main channel into the designed channel by this method, except along the extreme southwesterly part of the bend, the main channel had not gone entirely into the design. Only then (1938) was the canal dredging method employed. This canal was dredged so close to the then main channel that there was no substantial body of identifiable land between the two, and therefore, there was no avulsion by canal as claimed by Nebraska. Even if it be considered that there was an avulsion by canal, the boundary was left in the main channel as it was immediately before the avulsion, that is, just a short distance away from the canal.

VI.

Nebraska's Proposition VI is:

> **"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."**

As an abstract proposition, Iowa agrees with this, but Iowa does strenuously say that this statement has no application at either Nottleman Island or Schemmel Island. There is no argument that the areas now occupied by both Nottleman Island and Otoe Bend Island were in Iowa on the date that Iowa was admitted to the Union, and they were still in Iowa when Nebraska was admitted. See Exhibits P-1691 with P-713 for Nottleman Island and Exhibits P-208 with P-233 for Otoe Island. There is no argument that the same areas are now within the State of Iowa. Starting with this premise, the decisions of our State and Federal Courts, including the Supreme Court of the United States, are in unanimous agreement that all lateral movements of a river, navigable or non-navigable, boundary or inland, were by erosion and accretion, and the party alleging an avulsive movement has the burden. Nebraska shouldered several burdens when commencing and prosecuting this case.

First, she shouldered the usual and ordinary plaintiff's burdens of proving her allegations by a preponderance of evidence, *Kansas v. Missouri*, supra.

Second, in suing a sister state, she shouldered the burden of proving *clearly* that Iowa has been guilty of wrongdoing.

In *Colorado v. Kansas,* 320 U. S. 383, Mr. Justice Roberts stated for the Court:

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

See also, *North Dakota v. Minnesota,* 263 U. S. 361. *Washington v. Oregon,* 297 U. S. 517.

Third, she shouldered the burden of overcoming the presumption that lateral movements of a boundary stream have been by accretion and not avulsive. This presumption will be discussed in detail under Proposition XIV of this Brief.

Fourth, she shouldered the burden of overcoming the presumption in favor of "present boundary lines," which is closely related to the presumption in favor of accretion and against avulsion, and which will also be discussed in detail under Proposition XIV.

In a nutshell, Nebraska has failed to prove in this case that the Iowa-Nebraska state boundary line was east of either Nottleman Island or Schemmel Island when said islands came into existence; she has failed to prove that any avulsion occurred at either island so as to leave

the state boundary in some abandoned channel east of either island. She has failed to prove these things which are absolutely essential to her case by "a preponderance of evidence", by "clear evidence", by "satisfactory evidence", by "convincing evidence" or by any other standard of evidence. She has failed to carry any of the several burdens which she undertook herein.

Therefore, her Proposition VI has no application at either Nottleman Island or Schemmel Island, and since the Court should not in this case render judgment concerning other locations, it has no application in the case.

VII.

Nebraska's Proposition VII is as follows:

> **"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."**

Nebraska's above proposition contains four sentences, but Iowa believes all four are simply statements or re-statements of the same thing, to-wit: that in state boundary cases there is a rule commonly known as "acquiescence" or "prescription" and that it should be applied in this case in favor of Nebraska and against Iowa at both Nottleman and Schemmel Islands.

Iowa agrees that there is such a rule but denies that it has any application in this case. First, it has no application because there is no evidence of *long acquiescence.* Second, it has no application because there is no evidence of any knowledge, recognition or acquiescence by the *sovereign State of Iowa.*

Let us examine the periods of *long acquiescence* found by the Courts in the several cases cited by Nebraska under this proposition: in *Handly's Lessee v. Anthony,* 5 Wheat. 374, the decision did not turn on acquiescence; the Court merely remarked that its decision was in accord with what the inhabitants had thought for many years; the time period involved was apparently approximately 37 years. In *Indiana v. Kentucky,* 136 U. S. 479, the time period as stated by the Court was "over seventy years." In *Arkansas v. Tennessee,* 310 U. S. 563, the time period was about 112 years. In *Maryland v. West Virginia,* 217 U. S. 1, the time period was about 122 years (1787-1909). In *Rhode Island v. Massachusetts,* 4 How. 491, the time period was 125 years. In *Michigan v. Wisconsin,* 270 U. S. 295, the time period was about 76 years.

The most recent case involving acquiescence is *Illinois v. Missouri,* No. 18, Original, Oct. Term 1969, in which the Report of Hon. Harvey M. Johnsen, Special Master, was recently filed. Three tracts of land were in dispute called "Cottonwoods", "Roth Island", and "Beaver Island." Missouri claimed all three on the facts of how they formed and also claimed all three by prescription. Judge Johnsen determined that "Cottonwoods" and "Roth Island" had formed in Missouri and that "Beaver Island" had formed in Illinois. He then found that "Cottonwoods" was within Missouri's domain by prescription (this being an additional reason for awarding "Cottonwoods" to Missouri), but that neither prescription nor acquiescence had been proved against Illinois as to "Roth Island" or "Beaver Island." The facts regarding acquiescence are set out in some detail commencing on page 38 of Judge Johnsen's Report. The period of Illinois' acquiescence in Missouri's exercise of sovereignty over "Cottonwoods" was approximately 50 years, which Judge Johnsen says "is a shorter length of time than had ever been involved in the situations of the Court's previous decisions." During this 50 year period, Missouri had engaged in a realistic, systematic and progressive scheme of taxation upon the "Cottonwoods" area, both as the land developed and as its value became enhanced; Missouri built and maintained public roads in the "Cottonwoods" area; muniments of title were recorded in Missouri; when Illinois blocked the public road, Missouri arrested, tried, convicted and fined them for criminal trespass; the Illini officials sought damages from the Missouri officials and citizens for arrest beyond Missouri's

jurisdiction in Federal Court in Illinois, and their claim was denied after trial on the merits; the U. S. Department of Agriculture recognized "Cottonwoods" as a part of Missouri. Meanwhile, Illinois' manifestations of concern were of no substantial significance or weight in the situation. With regard to "Beaver Island" and "Roth Island", Judge Johnsen states that there was "no exercise of sovereignty of such character and for such period of time"; Beaver Island was first placed on Missouri's tax rolls in 1960 (the case was commenced in October, 1969, and the land had been on the rolls for 10 years); there was no evidence that Roth Island had been taxed in Missouri any earlier. Judge Johnsen's holding is that Illinois had not acquiesced in Missouri sovereignty over either Beaver Island or Roth Island.

Now, compare the facts in Judge Johnsen's case to the facts at Nottleman Island and Schemmel Island. Keeping our eyes on the target, the question is: In which state were these islands on July 12, 1943, immediately before the Compact?

The first taxation of Nottleman Island in Nebraska was in 1934, after the Fitch Survey had been made in 1933, so it was taxed in Nebraska only 10 years; it is not material that it remained on the roll in Nebraska until 1952, an additional period of nine years after the Compact. The taxation in Nebraska was not a realistic, systematic or progressive scheme. The first muniment of title recorded in Nebraska referable to any part of the island was in 1937 (Exhibit P-460), only 6 years before the Compact. There was no road building or road main-

tenance on the island whatsoever at any time, nor any public improvement on the island of any kind by Rock Bluff Township, Cass County or the State of Nebraska. The first Court action in Nebraska relating to the island was in April, 1940, Exhibit P-462. The actual period of acquiescence by Iowa (if it may be termed acquiescence in the absence of any knowledge by Iowa or any responsible officials of Iowa) was 10 years (1934-1943). Judge Johnsen held that this was not long enough to establish prescription rights or acquiescence; and Iowa believes that this is good law.

At Otoe Bend, Schemmel Island is established by the evidence as having formed and come into existence either shortly before or shortly after commencement of Corps construction work in 1934. The oldest tree on the island, according to Dr. Weekly, started growth in 1932; the same tree, according to Dr. Bensend and Dr. McGinnis, started growth in 1936. The 1930 aerial photo establishes that there was no island in 1930. Nebraska says at page 63 of its Argument that Nebraska commenced taxation on the island in 1895. How can that be? It may be that Nebraska was taxing some land in that spot under the sky in 1895, but it was not Schemmel Island; it was not the same identical land. Nebraska also mentions a survey in 1895 and tax deeds and quiet title actions which occurred around the turn of the century; none of these related to Schemmel Island because Schemmel Island did not exist at that time. As a matter of a fact, the spot under the sky where Schemmel Island was later to come into existence was only on the tax rolls in Nebraska prior to 1932 through the inadvertence, mistake and negligence of

the Otoe County officials; as the land was washed away, it should have been removed from the rolls. Similar to Judge Johnsen's description of Illinois' purported taxation of "Cottonwoods" (Page 40 of Special Master's Report, *Illinois v. Missouri,* supra), Iowa states that Nebraska cannot be said to have exercised or manifested any such revenue interest as to the area. While the plat which had existed of the area before the time the land was washed away was continued to be carried forward upon the records of Otoe County, Nebraska, this appears to have been done in Courthouse routine and not in any sovereign revenue concern or action as to the rebuilt land. Concerning the same matter, Judge Johnsen remarks (Page 41):

> "And taxes upon avulsionarily destroyed property would seem, in both sovereign and taxpayer incidence, to be so unusual as to rather suggest that it probably was due to a lack of checking by the taxpayer, and thus represented a mistake which had simply been perpetrated through the years, and which then was later conveniently seized upon and sought to be magnified in relation to the present action."

The evidence establishes that Schemmel Island was not taxed in Nebraska before 1932 because it didn't exist before 1932; Iowa believes that the better evidence is that it was not taxed in Nebraska before 1936 because it didn't exist before 1936; neither period (1932 to 1943 or 1936 to 1943) is a sufficient period to generate prescriptive rights or rights by acquiescence. The first muniment of title recorded in Nebraska relating to any part of Schemmel Island was in 1938; the first court action was

in 1940. As at Nottleman Island, no public roads were built or maintained nor any other public improvement. The purported taxation was not realistic, systematic or progressive.

In this case, the ruling must be against Nebraska on the issue of acquiescence. At both islands which are at issue, the maximum evidence of Nebraska purported exercising of dominion is something less than 15 years. Never has a state been found to have acquiesced in less than 35 to 40 years; the time period here is not sufficient.

Additionally, Nebraska must lose on the issue of acquiescence for the reason pointed out by the Honorable Gunnar H. Norbye, Special Master in *Arkansas v. Tennessee,* No. 33, Original, in the Supreme Court of the United States, in his Report to the Court filed 29th of July, 1969, pages 11 & 12:

> "It is not necessary to discuss in detail the evidence regarding the alleged exercise of dominion and sovereignty of Arkansas as to the lands in question. There is evidence that as to certain parcels of land in the disputed area taxes thereon have been paid to the State of Arkansas by a limited number of individuals. And it is readily evident that certain individuals, mainly those who are residents of Arkansas, have considered that these lands belonged to Arkansas rather than Tennessee. Hunters and fishermen living in the State of Arkansas have procured Arkansas licenses to carry on such activities. Others have procured Tennessee licenses. There is evidence that officials of the State of Arkansas in enforcing the game and fishing laws have patrolled these lands in behalf of the plaintiff. Tennessee game wardens also have considered this area their territory. Some

> crop raising and timbering have been carried on by Arkansas residents. *But there is a total lack of evidence that the State of Tennessee as a sovereign State has ever recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents.*" (Italics added.)

Vermont v. Young, 46 Vt. 214, was a criminal case in which the question was whether the alleged crime occurred in Vermont or in New York. In order to facilitate construction of a bridge, the local residents in 1834 straightened the boundary stream "by shoveling and boring", thus cutting off a bit of Vermont and putting it on the New York side. The Court relates (page 215):

> "The local authorities of both states appear, for about thirty-five years after the change, to have treated this place as a part of the State of New York, for the purposes of taxation and the record of private titles. * * * These facts constitute the acquiescence relied upon. There is no doubt but political boundaries as well as those of private property, may be established or changed by acquiescence of proper parties. *Corinth v. Newbury,* 13 Vt. 496; *Rhode Island v. Massachusetts,* 4 How. 591. And these acts by these authorities would, doubtless, have been sufficient and long enough continued to change this boundary and establish it in this new place, if the constituencies of the authorities had been the only parties that were to be affected by the change. But these were merely the local town authorities, acting so far as they did act, for their respective towns and not for the states; and a change of the boundary between these two states, could be directly made, only by the states themselves, acting in their sovereign capacities, and probably not by them even without the sanction of Congress, expressed by act, or perhaps by acquiescence. These towns could not by any action they

or their authorities might take, affect the state boundary at all, directly; and it is plain that they could not do indirectly, by acquiescence, what they could not do directly, by action."

VIII.

Nebraska's Proposition VIII stating:

> "**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.**"

is acceptable as a general rule. Neither state can determine the State boundary to be other than where it was placed by the Compact. It is also apparent from the record that either state, in this case, can locate the Compact boundary at any point or at any time they desire, and the boundary as such, has not caused any conflict between the states. The Compact is a Boundary Compact, and has transferred a meandering boundary into a fixed boundary. This Court should not expand the Compact beyond this apparent and expressed limit.

However, if Nebraska is not referring to the Boundary line, which was, as we stated, the purpose of the Compact, but was referring to the jurisdiction of the Iowa or Nebraska Courts to determine land titles within their respective states, then we disagree. The States of Iowa and Nebraska having distinctly different title laws, their respective Courts must of necessity approach the question of titles under different rules of law. This does not constitute a unilateral determination by either State, or their

respective Judicial branches of government, as there is no terminology in the Compact that can be construed or interpreted to change the internal title laws of either state. Iowa would further point out that the Supreme Court of the United States has stated it has no power, jurisdiction or authority to write a Compact between States, nor will it under the guise of interpretation or construction extend a Compact beyond its expressed term.

Nebraska states: "The two states, rather than determining their existing rights in and to lands along the Missouri River by judicial proceedings, instead entered into a Compact to compromise and adjust these rights." They can mean by this only jurisdictional rights, as the State of Nebraska owned no land along the Missouri River. Admittedly, in both the Nottleman Island and Otoe Island cases, Iowa used the jurisdictional line as the westerly boundary of its claim, for the simple reason that under the laws of Iowa, including the terms of the Compact, the true and proper westerly boundary of its claim is also the State boundary or Compact line. Admitted, that in the Rock Bluff Bend area the Iowa surveyor did not take into account the narrowing of the channel by the U. S. Corps of Engineers after the date of the Compact, and its formal claim was 50 feet in error, but this was in the flowing stream. The evidence is clear that either State can locate the Compact line with all the certainty that any reasonable person would require, the attention of the U. S. Supreme Court is not required, and should not be invoked for such trivial differences that might exist in fact. For all practical purposes, this is not a boundary dispute.

The *Tyson* case has been covered previously in this Brief, but Iowa again points out that the Court did not use the Compact line to cut off riparian rights of Nebraska land owners, as alleged. The decision was based on facts indicating that Tyson had no riparian accretions, and the Court set out the rule that riparian rights are controlled by the law of the State in which they formed, as dictum, but still did not intimate riparian rights would be denied, when valid, under Iowa law.

Any dispute prior to the work of the U. S. Corps of Engineers with regard to boundary or land ownership that arose would have been in all probability resolved by the action of the river before it could be litigated. Both states were misled by the optimism of the U. S. Army Corps of Engineers, who had concluded that the river was controlled, and to avoid future difficulties, such as this litigation, agreed on a permanent boundary. Nebraska would like the Court to believe that the long history of Iowa-Nebraska Legislative Boundary Commissions was motivated by the problems presented to the Court today. To argue the Compact must mean more than it says, when in fact Carter Lake, Iowa, and its citizens were the principal subject of the Boundary Commission conversations.

Immediately following the Compact, the Nebraska Courts accepted jurisdiction of title disputes involving lands ceded to Nebraska by Iowa, some of which were owned by Iowa as a Sovereign State. In accepting jurisdiction of the subject matter of these litigations, the Nebraska Courts would of necessity have had to determine the location of the State boundary, and in many in-

stances they determined, to their satisfaction at least, the pre-Compact State Boundary, as they did in the *Krimlofski* case, supra, which was admittedly land formed in Iowa, ceded to Nebraska, and adversely possessed by squatters. The courts of Nebraska invoked the title laws of Nebraska existing at the time of the Compact to lands ceded by Iowa. Should not the Courts of Iowa be allowed to invoke its title laws at the time of the Compact to lands ceded by Nebraska? Does not Iowa have the right to own land the same as the other 49 states? Why does Nebraska contend that an identical action by Iowa, as a title holder, constitutes a unilateral interpretation, or a violation of the Compact by Iowa? If Nebraska Courts can determine the pre-Compact boundary are not the Iowa Courts competent to do the same? Why does Nebraska fear such decisions by the Iowa Courts? Why should the State of Iowa be denied the right to defend its property rights when sued in Federal and State Courts, or when its property is being destroyed and occupied by others?

Interpreting this Section 3 of the Compact, taking interpretation of this to mean simply giving the legal meaning to language within this Section, its meaning seems to encompass little more than its literal meaning. It specifies that titles, mortgages, and other liens derived and good under the law of Nebraska *applying to the lands Nebraska ceded to Iowa,* shall be recognized and upheld by Iowa. It also sets out the extent to which titles derived under the law of Nebraska shall be recognized in Iowa. The parties have made such specific provisions in

this section that all their intentions must be considered to be encompassed in the agreement.

Thus, the real question is what is the meaning of this Section construed in the light of the applicable rules? Does this section mean something more than its literal language implies when so construed? Does this section indicate that the law or legal process of Nebraska be extended to determine title to lands formed in Iowa and never under Nebraska jurisdiction? Iowa believes that Nottleman Island and Otoe Island formed in Iowa and were never in Nebraska. But assuming this not to be the fact, should the State of Nebraska be allowed to interfere with a judicial determination of that fact by the Iowa Court of Original Jurisdiction? Or should this Court interfere with the determination of that fact by the Iowa Courts?

In *Hawkins v. Barney,* supra, this Court stated:

> "If the seventh article of the Compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate." 5 Pet. at 466.

Another case interpreting a similar Compact section is *Kentucky Union Company v. Kentucky,* 219 U. S. 140 (1911).

A sound argument for contending that it need not mean more than its language implies, is the fact that in an agreement of such gravity and importance, the parties would be likely to propound in detail all phases of the

agreement, and the relationship resulting therefrom, in order to avoid any ambiguity or later difficulty.

In the analogous area of international law, an area of the law is recognized as one of the bases for construing interstate Compacts, such a usage is prevalent. For, as pointed out in *United States v. Arredondo,* 31 U. S. Sup. Ct. 462, 6 Pet. 691, 712 (1832):

> "* * * it is the usage of all the civilized nations of the world, when territory is ceded to stipulate for the property of its inhabitants. An article to secure this object so deservedly held sacred, in the view of policy, as well as of justice and humanity, is always required and is never refused." *Henderson v. Poindexter,* 12 Wheat. 535.

It is noteworthy in this regard that, even though such rights are recognized under the general law, they have been specifically provided for in a number of interstate Compacts. Examples of this are found in the Massachusetts and Rhode Island Boundary Settlement of 1859; New York and Connecticut Boundary Agreement of 1879; Virginia and Tennessee Boundary Agreement of 1901; New Jersey and Delaware Agreement of 1905; Massachusetts and Connecticut Agreement of 1914; and New York and Connecticut Boundary Agreement of 1911-1912.

Thus, it seems to be seen that such a provision is common in treaties and has, on numerous occasions been placed in interstate boundary Compacts without, it appears, extending its literal meaning.

The decision in *Green v. Biddle,* supra, cited by Nebraska, supports the position of Iowa and not Nebraska.

A careful examination of this decision will reveal that: (1) there was no Compact between two states, but a cessation of territory to the United States, and the creation of Kentucky by Federal Government; (2) Kentucky adopted a constitution which incorporated the conditions of the Virginia Cessation, which stated Virginia land titles in the new state should be recognized according to the laws of Virginia *existing* at the time of the cessation; (3) The occupying claimants law subsequently passed by Kentucky made such Virginia titles less secure than they were under the laws of Virginia existing at the time of cessation, and (4) they were therefore unconstitutional under the Kentucky Constitution (not the U. S. Constitution).

In *Green v. Biddle,* Justice Washington states at Page 84:

> "* * * If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky Court as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the latter state. * * *"

There has never been any suggestion in the case at bar that Iowa has denied or denies the right of Nebraskans to come into the Courts of Iowa and demand trial of their rights in ceded lands the same as they could have done in the Nebraska Courts if the land had not been ceded.

Differing from the facts in *Green v. Biddle,* Iowa and Nebraska were both established states; with complete systems of property law. Since the legal systems were

already established, it is likely that conflicts would arise not between subsequent laws, but between those already established. If the parties to the Compact intended to require in effect, that two different sets of laws would apply within a sovereign state, they would have so stated in unequivocal terms.

Can it be argued that the Compact in the case at bar intended to have such a meaning? In *Green v. Biddle*, the Court did not ascribe any meaning to the articles of cessation beyond the literal meaning of the words used. The States of Iowa and Nebraska both undoubtedly desired that rights of titles, mortgages, and other liens acquired under the law of their state should be recognized in the receiving state. The desire that these rights should be specifically recognized in order to avoid doubt and controversy is a sufficient reason for Section 3.

This section further provides that any pending suit or action concerning the ceded lands may be prosecuted to final judgment in the ceding state. This provision clears away doubt as to whether the ceding state has the right to try these cases to completion, and probably amounts to an extension of the general rule. Further, the two provisions taken together amount to a statement of the extent of what rights acquired under the law of the ceding state shall be recognized and also the extent to which the legal process of the ceding state shall be available in determining these rights, even after the cession. They extended the legal process beyond what it would have been under the general principle requiring recognition of private rights. That in so doing not only

has the extension of the ceding state's legal process been provided, but also the limit. This seems to be a case where the rule applies, as set out in *Green v. Biddle,* supra, commencing on page 89, that:

> "* * * where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning is excluded. This is a maximum of law and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest on his own understanding of a law, until a judicial construction of those instruments had been obtained."

These conclusions are buttressed by the general rules applicable in interstate Compacts. The first of these, pointed out in *Massachusetts v. New York,* 271 U. S. 65, 89 (1926), is that:

> "* * * all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction. *Charles River Bridge v. Warren Bridge,* 11 Pet. 420, 544-548, *Shively v. Bowlby,* supra."

Although the grant in our case is one both by and to a sovereign, the purpose of this rule appears clearly to be to keep sovereign rights inviolate. It appears that the intent of this rule, as applied to our case, would be to prevent the diminution of that sovereignty, except where it was made necessary by an unavoidable construction. Certainly this rule, so applied, in conjunction with the literal meaning of the statute and sound reasoning, indicate that the Iowa Courts should be allowed to exercise

their jurisdiction to determine if a specific area was ceded, as asserted by a claimant, being bound to apply the law of Nebraska in determining title to any lands ceded, existing at the time of cessions.

The intention of the parties to a Compact must govern and such intention must be gleaned from words used in their ordinary significance, and only if the words of the instrument be ambiguous may the circumstances surrounding their drafting be then considered. The defendant submits that the Iowa-Nebraska Boundary Compact of 1943, its words, terms and phrases should not be lightly determined ambiguous and subject to judicial construction.

The Court, in *Virginia v. Tennessee,* supra, also points out that a Compact meets the vital requisite of an agreement or contract. The Court states on page 520 that:

> "* * * The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border of contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations. * * *"

The mutual consideration in our Compact of 1943 is the establishment of a fixed boundary for the mutual benefit of the contracting parties. Under Iowa law, the State of Iowa owns the beds of all navigable rivers and on the date of the Compact owned valuable areas in and along the Missouri River, and there could be no mutuality of considerations in Iowa giving up the titles to these

lands, as contended by Nebraska. What word or phrase in the Compact requires that Iowa disclaim all of her trust lands in the Missouri Bottoms? Nebraska gave up no lands, either to Iowa or to Iowa citizens, as she did not own any of the land ceded.

There is a fundamental principle of equality among the States of the Union, which seems to underlie, and be basic, in all the decisions involving interstate controversies. In the light of the history of the Compact, its terms and the equal sovereignty of the signators, Nebraska should not at this late date, be permitted to challenge the right of Iowa to exercise dominion over her territory. The Compact being part of the law of Iowa, any protection therein granted owners of the Nebraska land ceded to Iowa by the Compact, has been and will be recognized by the Courts of Iowa.

Iowa submits that the boundary line can be located and is identifiable, that the Compact should not be construed to deprive the State of Iowa of lands it owns any more than it should be construed to deprive individuals, either Nebraskans or Iowans, of lands they own; that it is entirely possible to determine whether disputed land is ceded land, or land that always was in one state or the other, or was land that came into being subsequent to 1943 in one state or the other. Iowa would have no right as a Sovereign State to give up the trust lands of its citizens, or any other property, without adequate consideration. We must not forget the community has rights, as well as individuals.

IX.

Nebraska's Proposition IX states:

> **"Provisions of Compacts became the law of the contracting states and state statutes or laws which conflict with an interstate Compact are invalid and unenforceable."**

It is certainly true that a state which has incurred certain obligations by Compact with a sister state cannot thereafter adopt a statute which would impair any obligation so incurred. But even in such a case, the courts will not find the later statute invalid as violative of the prior Compact unless the evidence is clear. In *Green v. Biddle*, supra, this was the situation being considered, and the Court said on page 92:

> "* * * that the duty, not less than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the Constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken; and that those decisions entirely cover the present case. * * * "* * * If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws; our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out. * * *"

The situation in the case at bar is different from that in *Green v. Biddle*, supra; there is no claim here that Iowa has adopted any statute or changed her common law

since the Compact so as to impair the obligations which she entered into by the Compact; the claim by Nebraska is that the Iowa common law to the effect that all navigable river beds and all accretions thereto within the state are owned by the state was repealed by the Compact, or at least partially repealed so that it no longer applies in the vicinity of the Missouri River.

We have heretofore argued that implied repealers are not favored. See Division II of this Brief. At the risk of being repetitious: We again say that there are no words, clauses or phrases in the Compact which can be stretched to mean that the Compact was a repealer of any internal land title law of either Iowa or Nebraska; and this is true whether the Compact be construed liberally, literally, restrictively, or in the light of surrounding circumstances. To construe the Compact as a repealer or partial repealer of the Iowa doctrine concerning ownership of beds of navigable rivers within the state would constitute legislating by the Court, a function which the courts have always refused to perform. As stated by Mr. Justice Davis in *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, a case cited by Nebraska, at pages 85 and 86:

> "* * * But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning which is contrary to all legal rules. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. 'We are bound', said Justice Buller, in an early case in the King's Bench, 'to take the Act of Parliament as they have made it; a casus omissus can, in no case, be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province

> to consider whether such a law that has been passed be tyrannical or not.' Jones v. Smart, 1 Term. Rep. 44-52. *Lord Chief Baron Eyre, in the case of Gibson v. Minet (1 H. Bl. 569-614), said: 'I venture to lay it down as a general rule, respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely; that the words may bear the sense, which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them.' This rule is as applicable to the language of a statute as to the language of a deed. * * *''

Iowa submits that if the Court were to construe the Compact as requested by Nebraska, it would really be jumping from the frying pan into the fire. If it be held that Iowa did relinquish and disclaim all of its state owned river beds and lands in the vicinity of the Missouri River by her adoption of the Compact, then the Court comes face to face with this question: Who will be the owners of these formerly state owned areas? In other words, who were the grantees of these gratuitous relinquishments and disclaimers?

Nebraska proposes three answers to these questions in paragraphs I, II and III of her prayer in the Complaint filed herein: In paragraph I, she asks this Court to say that the grantees were those private citizens who have "settled and occupied or as to which the incidents of ownership had been exercised all prior to" the Compact. In paragraph II, she asks this Court to say that the grantees were those persons who held "titles, mortgages and other liens" which had been *"recognized"* in Nebraska prior to the Compact. (It is noteworthy that at this point, Nebraska isn't satisfied to have Iowa re-

quired to acknowledge the validity of *good* Nebraska titles; she wants Iowa required to acknowledge the validity of titles *recognized* in Nebraska, whether good or not.) In paragraph III, Nebraska asks the Court to say that the grantees were all persons in whose names lands had been taxed in Nebraska prior to 1943. What is the Court to do about all those lands for which there were indicia of title or taxation in both states prior to 1943?

And, with total inconsistency, Nebraska prays in paragraph V that the Compact be enforced "so as to give full effect to its intention to settle completely ownership rights to land along or in proximity to the Missouri River and its abandoned river channels."

Without going into further detail concerning the perplexities which would necessarily arise from adoption of Nebraska's construction of the Compact, Iowa simply says: First, Nebraska's proposed construction would result in a totally inequitable and unfair distribution of public lands to private parties having no *good* or *valid* claim to them. Second, Nebraska's proposed construction would reopen myriad title questions along both sides of the boundary, which have long been considered as laid at rest, sufficient to keep the Supreme Court of the United States and the lawyers practicing near the boundary busy for years determining what private individuals are to be the beneficiaries of Iowa's largesse. Third, adoption of Nebraska's proposed construction would be like firing the starting gun for a race, the racers being all private parties desiring to own some river land, the prizes being the thousands of acres along the river not now in private

possession or taxed, and the millions of losers would be the general public, including generations yet unborn.

Nebraska counsel state on page 75 of their Brief and Argument that:

> "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."

This oft repeated insinuation that Iowa Judges and officials are either parochial, prejudiced, or are in some manner being corrupted, demeans the great State of Nebraska in view of the fact that they have not introduced one iota of evidence to support such statements. Iowa Courts and officials have always recognized the Compact terms. True, they recognized it for what it is, a very simple unambiguous agreement as to the boundary between the two states, and private titles have been protected. See *Dartmouth College v. Rose*, and Appendix I.

Iowa agrees with the Nebraska statement that "the Compact was the result of years and years of controversy and uncertainty". But Iowa denies that the Compact was a recognition of many cut offs; it was a recognition, among other things, that there were some cut offs; but there is no evidence that there were many. We must also add at this point that Nebraska land owners did not hesitate to protect their rights when their land was isolated on the Iowa side of the river, such as at Nebraska City Island, Brower's Bend, California Bend, Winnebago Bend, and others. Nor did the State of Nebraska hesitate to exercise sovereignty over Iowa areas isolated on

the Nebraska side of the river. She even attempted to exercise sovereignty over Carter Lake, Iowa. (*Nebraska v. Iowa*, supra, 1892.)

Nebraska counsel have gone to great lengths to emphasize the wild, rampant, eroding characteristics of the Missouri River and the long history of negotiations between the States. This merely supports the contention of Iowa that after so many years of negotiations and consultations, the document finally drafted and adopted would contain the entire intent of the contracting parties, and if the Compact were to abrogate or invalidate any statutes or rules of law, of either state, it would have been spelled out in the document. It is a concise, unambiguous document, and should not be altered under the guise of interpretation.

Good titles to lands located within the territorial boundaries of Nebraska prior to the 1943 Boundary Compact, and under the Compact terms ceded to Iowa's jurisdiction, should be recognized by the State of Iowa and Iowa Courts in accordance with the principles of law of the State of Nebraska as of the date of the Compact. Titles to lands never in the State of Nebraska, either before or after the Compact, should be recognized under rules of law of the State of Iowa. The foregoing is axiomatic, and under the decisions of this Court, as well as the Courts of the various states, follows irrespective of whether a title dispute arises between the State of Iowa and a private citizen or between two or more private citizens. Title to many of the areas claimed by Iowa as State trust lands are not in dispute: some have been obtained by purchase: some have been decided by courts

of competent jurisdiction (both for and against the state): and others are being challenged in courts of competent jurisdiction. Each parcel claimed has a unique history and unique fact situation. There are no typical areas and a decision as to one disputed parcel will not be determinative of any of the other disputed areas.

Nebraska would have this Court enjoin the State of Iowa from protecting its trust lands along the Missouri River from adverse claimants, apparently on the broad assumption that the present boundary is uncertain, and ergo, it is impossible to determine if any specific parcel was ceded, ever in Iowa, or ever in Nebraska. The evidence reveals this broad assumption does not apply to those areas now claimed by Iowa, nor to those areas disputed by Nebraskans. The truth of the matter is that Nebraska and a few Nebraskans would like to be able to prove that certain lands along the river were in Nebraska before 1943 and that these lands were therefore ceded; this they cannot do because, as a matter of fact, the lands were not in Nebraska before 1943 and are not ceded lands. In the extremity of their dilemma, they want this Court to treat all lands in the vicinity of the river as if they had been ceded, drawing a demarcation line somewhere back east of the boundary, and telling Iowa to "keep hands off" thousands of acres acknowledged to be within Iowa's sovereignty and dominion. If this had been the intent of the parties when adopting the Compact in 1943, they should have located the new boundary some two or three or more miles east of the middle of the designed channel. The fact that they didn't do so is proof positive that they intended no such

interpretation of the Compact as Nebraska seeks in this case.

The aspect which Nebraska would overlook and have this Court overlook is that Iowa, in addition to being a sovereign signatory to the Compact, was also a land owner of thousands of acres of land and river bed along the river in and prior to 1943. Yet, Nebraska would have this Court say that the Compact was designed to preserve and protect only *private* titles. This would mark the Iowa Governor and legislators who were charged with protecting and preserving the public interest as mental retardates or worse.

There is nothing in the Compact, or in the "history leading up to the Compact", or "in the state of things existing at the time and the circumstances under which the agreement was made", or in "the practical construction placed upon" the Compact by the parties, which can entitle Nebraska to the Compact interpretation and construction which she seeks.

The loss of Iowa's trust lands would be a loss not only to the State of Iowa, as such, but to the people of Iowa and under expressed plans for recreational development, a loss to the people of Nebraska and other neighboring states as well. As stated in *Charles River Bridge v. Warren Bridge,* 11 Pet. 420 at 431:

> "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness of and well-being of every citizen depends on their faithful preservation."

It is unconscionable to think that the responsible officials of Iowa in 1943 were utterly derelict in their duty to protect the public interest. And now, as then, it is the duty of Iowa officials to defend the titles to its trust lands, whenever and wherever they are attacked, and this Court should support Iowa in these endeavors. Future generations will thank us, not castigate us, for our effort.

X.

Nebraska's Proposition X states:

> **"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 diplomatic 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."**

And Iowa has no quarrel with the broad principles set out, but we do not agree with Nebraska's application of the principles to this case.

The proposition set out under X alludes to rules of construction, but the argument set out under X is concerned with acquiescence by Iowa in not attacking the claims of interlopers immediately after the Compact. They appear to say Iowa's actions indicate acquiescence

in the claims of individuals: How do they square this with the undisputed fact that Iowa was on the scene at Nobles Lake asserting its ownership and rights in 1944?

Iowa is criticized for not taking possession of the islands and abandoned channels which came to be hers as they formed. We respond that Iowa did take possession in the only way the public can do so, when public use of the various areas commenced; to build fences around them and thus to prevent public use would have stopped their use by the very people who owned them, in addition to destroying their utility as wild and natural areas.

Complaint is made that Iowa's so-called long delay in asserting her claims at Nottleman Island and Otoe Island placed the adverse claimants at a disadvantage. We ask, why should Iowa bear all blame for this passage of time? What was preventing the individual claimants from quieting their so-called titles at any time they wanted to? They can't get by with saying they didn't know that their claims were flimsy and weak. Something was awry when various parts of Nottleman Island were changing hands by Quit Claim Deed for considerations ranging from $2.00 to $3.00 per acre, without abstracts, and on one occasion at least, "sight unseen". Why did Babbitt, Watts, O'Brien, Sargent, et al, retain Whitney Gillilland in about 1952 to find out whether or not Iowa claimed the island? Why didn't Mr. Gillilland do the normal thing for a lawyer to do under the circumstances and commence a quiet title action in their behalf? Could it be that Mr. Gillilland knew his clients had brought a losing case to his office? Perhaps, with Mr. Beckman asleep in his office in far away Des Moines at that time, the maneuver

might have worked. Why did Mr. Henry Schemmel start writing letters, as Deputy County Treasurer of Otoe County, Nebraska, to the County Recorder of Fremont County, Iowa, in 1939, if he had full confidence that Otoe Island was in Nebraska and his property under Nebraska law? Why all the elaborate maneuverings with tax sales and tax deeds at both islands, with wives and daughters purchasing and acquiring the tax deeds? These things should be recognized for what they are: the classic methods of lifting yourself by your own boot straps; the time worn methods of creating the appearance of a chain of title where there really is no title. See Appendix K for evidence concerning knowledge of claimants.

In argument for her Proposition X, Nebraska quotes from *Handley's Lessee v. Anthony* and *Massachusetts v. New York*. We note that the South Dakota Supreme Court had occasion to consider how these two cases might affect the 1905 Nebraska-South Dakota Boundary Compact in the case entitled *Dailey v. Ryan,* 71 S. D. 58, 21 N. W. 2d 61 (1946). At page 64 of 21 N. W. 2d, Judge Smith, considering the same two quotes set out out by Nebraska, spoke for the Court as follows:

> "These authoritative expressions must be read in the light of the fact that the court was interpreting treaties and grants which employed broad general terms to describe a boundary line They furnish a guide in the exercise of judicial power in construing ambiguous compacts between states. They are not authority for the proposition that a court may substitute its notions for the judgment of the high contracting parties to an unambiguous boundary compact. In dealing with such a compact a court, we think, has no

other function than to declare and enforce its clear and definite terms."

And the Court rightly and properly refused to embark upon any interpretation or construction of the Compact there at issue. It was held that the 1905 Nebraska-South Dakota Compact described a boundary clearly and certainly, although the description was simply that the boundary would be the middle of the Missouri River as it ran in 1905. Compared with the boundary description in the 1905 Compact, Iowa submits that the boundary description in the 1943 Iowa-Nebraska Compact is a jewel of definiteness and preciseness.

Before leaving our discussion of *Dailey v. Ryan,* we must remark that it was there claimed that Nebraska had acquiesced in a boundary other than the boundary fixed by the 1905 Compact, and the South Dakota court held that there was no acquiescence by Nebraska because no knowledge had been proved.

Nebraska's argument, as we understand it, is that the Compact of 1943 had this effect:

In every instance where Iowa has reason to believe it owns land in the vicinity of the Missouri River, it is required, as a preface to inquiry into ownership by judicial proceedings, to ascertain whether any individual had any indicia of title to such land in Nebraska. This whether the land was ever in Nebraska or not. If Iowa finds any indicia in Nebraska referable or possibly referable to a spot under the sky now occupied by the tract in question, she must stop, and acknowledge that she has released and relinquished her ownership of that tract. This

whether the same identical land existed in that spot under the sky or not. To hold that the Compact had this effect would be truly monstrous. It would mean that during the time when the boundary was moving as the thalweg of the river moved, it moved in only one direction: east, never west; with every eastward movement, Nebraska gained, but she never lost, even when the river moved westward; with every eastward movement, Iowa lost, but she never gained, even when the river moved westward. It would mean that every spot under the sky which had any indicia of title pertaining to it in Nebraska prior to 1943, was conclusively in Nebraska on July 12, 1943, and therefore ceded to Iowa by the Compact. "Once in Nebraska, always in Nebraska", is the law, says Nebraska. More precisely, "Once taxed in Nebraska, or once quitclaimed in Nebraska, or once probated in Nebraska, always in Nebraska", is the law, says Nebraska. The courts have always said that the common law of accretion, reliction and avulsion is equitable and fair because the parties riparian have the chance of loss to offset the chance of gain. Nebraska's proposals would remove all equity and fairness from the picture.

Any indicia of title, Nebraska says, constitutes title good in Nebraska; and no inquiry may be made. Never mind that the tract may never have been in Nebraska. Never mind that it may not be the same identical land. Never mind that the indicia may be something less than good.

Nebraska took the position at page 24 of her Supplemental Brief in Support of her Motion for Leave to File

Bill of Complaint that this Court should take jurisdiction in this case for the purpose of protecting "certain rights of its citizens * * * (in) land * * * being transferred to another jurisdiction * * *." Iowa agrees that it is precisely these lands—those "transferred to another jurisdiction"—which are the subject of the reciprocal promises made in the 1943 Compact. Nebraska seems to be saying now that because of Iowa's failure to abide by the Compact with reference to Nebraska lands ceded and the failure of both states to provide for the identification and description of lands transferred, all lands along the river must be treated as transferred. She complains that her citizens are being subjected to a "unilateral determination" by Iowa courts as to whether certain lands were transferred or ceded land. She conveniently declines to recognize the patent injustice of a construction of the Compact which would permit an individual Nebraskan or Iowan to quiet title in himself to riparian lands merely by paying taxes on it to a Nebraska county or causing it to be listed on the tax rolls some place. This would constitute "unilateral determination", by an individual that he owns land, and any such self-serving determination by an individual is certainly not as credible as a decree by an Iowa court in a formal proceeding in which all claimants to the land appear. Nebraska would foreclose inquiry; Iowa would inquire, and has done so.

Nebraska would have the Court hold Iowa responsible for the problems created, not by the Compact itself, but by a disintegration of the factual structure on which that Compact was predicated. This disintegration has made inquiry a necessary preface to justice for all

affected parties. The Compact was entered into at a point in time when the Corps of Engineers had placed the Missouri River in its "proposed stabilized channel", and had surveyed the Missouri River, run control lines on both sides of their proposed stabilized channel, erected check points on said control lines and prepared detailed maps of the river setting out the "proposed stabilized channel". The boundary line was defined in the Compact with all definiteness possible without an actual survey. After describing the line around Carter Lake, the boundary running northerly was:

> "* * * produced to the center of the channel of the Missouri River; thence up the middle of the main channel of the Missouri River to a point opposite the middle of the main channel of the Big Sioux River."

Running southerly from Carter Lake to the Missouri's northern boundary, the new boundary was described in the same language. Then this language was added:

> "* * * The said middle of the main channel of the Missouri River referred to in this Act shall be the centerline of the proposed stabilized channel of the Missouri River."

Obviously both states considered the river permanently confined, or on the verge of a certain confinement, within a stabilized channel. No longer were both states and the citizens of both states to be plagued by the problems of a wildly vagrant river.

Both states were wrong, largely for reasons over which they had no control. World War II was in progress. Funds and manpower were diverted; stabilization

of the river escaped the grasp of the Army Corps of Engineers, and the river, untended, fled in many places from the designed channel. After the war, the Corps found it more practical not to attempt to place the river back into the designed channel in all places. So, they redesigned a different channel upstream from Wilson Island, and now the actual river channel and the boundary as defined are not identical in all places.

During the period of time that the river escaped the grasp of the Army Corps of Engineers, it behaved as it had historically; it eroded its banks, washing away land; it added to land by accretion; it subtracted from what some riparian owners owned and added to what others owned; it moved suddenly from its channel in at least one place (Soldier Bend) by avulsion; it spawned sandbars, some of which became islands. All of the ancient consequences of unconfinement reasserted themselves. Neither state was responsible for this or anticipated this; indeed both acted on a presumption that the river was no longer wayward. Retrospectively, it can be argued that the states should have provided in the Compact for such contingencies.

Is it a judicial function now to supply the Compact clauses which the states did not supply? Iowa thinks not. More particularly, is it the Court's function now to enjoin and restrain Iowa from even causing judicial determinations to be made concerning ownership of these newly formed areas? Iowa thinks that would be the rankest form of injustice. If omissions were made in the 1943 Compact, Iowa submits that they can only be supplied

by another Compact between the two states, negotiations for which are already underway. It is a political matter, not a judicial matter. The Court is limited to interpretation or construction of what was written in 1943 and declaration of the common law of accretion and avulsion insofar as applicable.

XI.

Nebraska's Proposition XI states:

> **"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."**

Iowa submits that the foregoing statement is an attempt by Nebraska counsel to state the *doctrine* of *estoppel* without using the word *estoppel*. But regardless of what words are used or not used, the theory here put forward is that of *estoppel*. We have heretofore stated and argued that estoppel is not an issue here. (See pages 16, 17 and 18 of this Brief.)

Nebraska summarizes the facts which she relies on to sustain Proposition XI at page 84 of her Brief, but we must look to the record for the facts.

The facts of record as regards Nottleman Island are: that Iowa didn't commence the case of *Iowa v. Babbitt, et al.*, until 1963, but she was prosecuting her rights and

defending herself at other locations, in state and federal courts, commencing in 1947; that Mr. Ray Beckman, an employee of the Iowa Conservation Commission, wrote a letter in 1951, without the knowledge or consent of the Commission or any member thereof or any other responsible official of Iowa, stating that Iowa didn't own Nottleman Island; that Mr. Whitney Gillilland, as attorney for Babbitt, Watts, Sargent and O'Brien inquired of the Iowa Attorney General whether or not Iowa claimed Nottleman Island, erroneously stating that the island had been in Nebraska and had come into Iowa by cession; that without independent investigation and in reliance on the correctness of Mr. Gillilland's statement of the facts, the Attorney General took no action; that the county officials of Mills County recorded muniments of title and entered the island on the tax rolls commencing in about 1948 after having been commanded to do so by Writ of Mandamus issued in a case to which Iowa was not a party; that no Iowa governmental agency was keeping a record of state owned lands, river beds, or abandoned river beds along the Missouri River; that Iowa didn't prosecute some quiet title actions which counsel for Nebraska thinks she should have.

The facts of record as regards Otoe Island are: that Iowa didn't commence the case of *Iowa v. Schemmel, et al.*, until 1963; that the county officials of Fremont County started recording muniments of title and entering the island on the tax rolls in about 1949. (See testimony of Winifred Rhoades, Appendix K.)

Wherein did the sovereign State of Iowa do something or fail to do something to indicate that she was

placing some "practical construction" on the Compact, which now bars her from owning land in the vicinity of the river? Is the fact that *Iowa v. Babbitt, et al.*, and *Iowa v. Schemmel, et al.*, were filed in 1963 construable that the power to commence said cases did not exist? We think not, especially in consideration of the surrounding circumstances appearing of record.

The facts of record are that the Corps of Engineers had assured both Iowa and Nebraska in 1943 that the wild Missouri River had been or soon would be entirely tamed and confined to a certain designed channel; that the disasterous floods were a thing of the past. Both states discovered, almost before the ink was dry on the 1943 Compact, that the assurances by the Corps could not and were not being kept. The river that had been tamed went wild again. The second highest flood stage ever recorded on the river was recorded in 1952, and this 1952 flood was the worst in history in terms of dollar damage. At about this time, the Corps began redesigning the "designed channel" but nobody knew what the redesign would look like for several years; nobody knew where the river would be, what lands would be destroyed, what lands would remain, where the abandoned channels would be, what new lands would be formed, or where new ox-bow lakes would be made. Even after the redesigned channel was on paper, nobody knew how the Corps would do the work, whether there would be a few canals, many canals, or no canals; nobody knew whether the relatively narrow and deep navigation channel would again be attained by gradually pushing the river banks inward as had been done in the 1930's; nobody knew

whether the Corps would permit the ox-bow lakes to remain as lakes or whether they would be filled and made into land. The only practical policy for Iowa to adopt during this period of uncertainty was a policy of "wait and see". Then, as the material facts began to emerge, Iowa acted. Investigation extended over several years and culminated in the publication of Part I of the Missouri River Planning Report in January, 1961; Iowa was in Federal Court defending her rights at Tyson Bend in 1958; she was in court asserting her ownership of Deer Island in 1959; she was in court protecting her rights at Omadi Bend before November 3, 1958; she was settling her boundary at Wilson Island in 1960; her men were erecting signs and building fences. How this conduct by Iowa can be twisted into a "practical construction" of the Compact that Iowa had relinquished all her trust lands along the river is more than we can see.

Additional answers to Nebraska's Proposition XI are:

Concerning the acts of Mills and Fremont County officials, it has been held that the acts of the agents of one governmental body cannot be imputed to another. In *In re Morrison County*, 120 Minn. 147, 139 N. W. 286 (1912), it was held that an admission made by a county attorney in a pleading to the effect that a prior judgment for taxes was valid was not binding on the State, so as to estop the State to claim further taxes. The Court said, at 139 N. W. 289:

> "The alleged admission of the county attorney is not, however, clearly shown; but we predicate our de-

> cision on the rule that public officers cannot bind the state by acts which, as to individuals, might constitute an estoppel. (Cases cited.)"

Erroneous or wrongful collection of taxes by taxing officials do not work an estoppel against the city, county or state. The lands in question are islands and accretions, and as such, are the property of the State of Iowa. Iowa Code Section 427.1 (1) provided:

> 427.1 Exemptions. The following classes of property shall not be taxed:
>
> 1. Federal and State property. The property of the United States and of this State . . .

Thus, the land in question, belonging to the State of Iowa, was improperly and illegally levied upon by county officials. It has been uniformly held throughout the country that States shall not be estopped by the unauthorized conduct of their officials. See *Arkansas State Highway Commission v. MacNeil,* 222 Ark. 643, 262 S. W. 129 (1953); *State ex rel. Com'rs of Land Office v. Frane,* 200 Oklahoma 650, 199 P. 2d 212 (1948). In Iowa, this doctrine has also been approved. See *Independent School District of Ogden v. Samuelson,* 222 Iowa 1963, 270 N. W. 434; *Board of Park Commissioners v. Taylor,* 133 Iowa 453, 108 N. W. 927. In the latter case, the defendants contend, among other things, that plaintiffs were, by virtue of the levy and collection of taxes upon property, estopped to claim any interest therein. The Court said at 133 Iowa 464-465:

> "There is some contention on behalf of defendants as to adverse possession and estoppel. But, as against the State, holding title to the beds and banks of nav-

igable rivers for the public, there can be no adverse possession.

"As to estoppel it is sufficient to say that the State and plaintiff claiming under the State, could not be estopped by acts of city officials. *Simplot v. Chicago, M. & St. P. R. Co.,* (C. C.) 16 Fed. 350 (5 McCrary 158). And in general, to the effects that unauthorized acts of officials will not estop a municipal corporation. (Cases). Thus, the levy of and collection of taxes on property will not estop a city from asserting title to the property for the public."

Accord: *State v. Ball,* 90 Neb. 307, 133 N. W. 912. *Howard County v. Bullis,* 49 Iowa 519 (1878), contains the following language:

"The acts of the county were done by its officers. If these acts were in violation of law, they can have no effect to bind the county setting up the invalidity of these acts. This proposition is obvious. If it be not true the county can have no protection against the unlawful acts of its officers. The lands, being county property, were not taxable. The assessments, sales, and deeds were therefore, void. A void act is no act; it is binding for no purpose. How can it be said, then, that the void acts of the county officials will operate to bind the county through representation which the law will infer therefrom? In truth, these acts, being in violation of law, have no force for any purpose."

Levy and collection of taxes by agents of the county was illegal. Under the above authorities, it is submitted that the State cannot be bound or estopped by the acts of county or state officials, which are done in excess of their authority.

Where a party having suffered a detriment seeks to invoke the doctrine of estoppel, it must be shown that the detriment was incurred in reliance upon certain conduct of his adversary which might reasonably be anticipated to *induce* reliance. Nebraska contends that the collection of taxes and acts of officials constitute such conduct. The authorities demonstrate that the law is otherwise.

Plaintiff here seeks her desired interpretation upon the basis of collection of some taxes, fencing of some of the land, use and occupancy, and isolated acts of State officials, but not possession of the land over a considerable period of time or the construction of valuable improvements. The equities in favor of complainant are insubstantial, subtle and tenuous. They have no persuasive force. All cases cited in this Brief and numerous others deleted for brevity, may stand together as examples of various factual situations affected by the same principles of law. An examination of these authorities indicates that each case in which a party seeks an estoppel (which Nebraska's argument is in fact) against the State must be viewed upon its own facts, and a decision rendered in accordance therewith.

Payment of taxes is not of great probative value as to ownership, even under Nebraska law, as demonstrated by the Nebraska decisions in following cases:

In *James v. McNair,* (Neb.) 81 N. W. 2d 813, the Nebraska Court said quoting:

> "*Lantry v. Parker,* 37 Neb. 353, 55 N. W. 962, at page 963. 'The law does not require that possession

shall be evidenced by complete enclosure, nor by persons remaining continuously upon the alleged land and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be, in its nature adopted.' We think the evidence adduced by the appellees discloses that they and their predecessors in title have, for more than 10 years, maintained such an actual, continued open and exclusive possession of the land they are now claiming that they are entitled to have their title thereto quieted and confirmed. In this respect, we have not overlooked the fact that appellants, and their predecessors in title paid taxes on part of this land over a period of years, as did appellees. Such payment while indicative of a claim of ownership, does not overcome the actual ownership of appellees obtained by adverse possession. As to the effect thereof, see *Purdum v. Sherman,* 163 Neb. 889, 81 N. W. 2d 331."

In the *Purdum v. Sherman* case, infra, the Nebraska Court said:

"The plaintiffs claim that they had asserted their title to the disputed tract by paying the taxes, placing a mortgage on the land, by executing an oil and gas lease, and in securing a permit for a railroad crossing in 1948. The taxes, mortgage and mineral lease included the disputed acreage only by the use of the description of the Northeast quarter of the Southwest quarter of Section 31, as it appeared in their Deed. They indicate nothing more than the deed itself."

In *Worm v. Crowell,* 87 N. W. 2d 384 (Neb.), the Nebraska Supreme Court on Page 392 said:

"The official tax records of DeSoto precinct in Washington County, wherein this land is situated,

> also evidences the fact that the river, at some time changed its course and washed away almost all of the land patented to Constance Cochelin because, for a long period of time, only a fractional part (3 acres) of appellees' south 40 was assessed for taxation purposes. Considered the way in which this land was assessed over the years herein involved, we do not think the payment of taxes thereon by either the Woods or appellee to be very significant."

Insofar as the opinion of a State Conservation official that the Nottleman Island area was not claimed by Iowa in 1951, or not listed as State-owned lands by those having a duty to list them as such, it has been long-established and accepted that neither a County, State or Federal government can be bound by the acts of its officers when they depart from the requirements of the law. See *Howard County v. Bullis,* supra, holding that not even the county is bound by the unlawful acts of its own officials.

In *Moffatt v. United States,* 112 U. S. 24, at page 31, the Supreme Court of the United States states:

> "* * * The Government does not guarantee the integrity of its officers nor the validity of their acts. * * *"

Nebraska would have the Court overlook the very important fact that Iowa became the owner of most of the areas which she owns along the Missouri River by the facts of how, where and when the areas came into existence and by the operation of law upon those facts. No overt act by any state official was necessary in order for these areas to become state owned. Iowa submits that if land formed east of the Iowa-Nebraska Boundary

as accretion to the State-owned river bed, it became Iowa property, and as a Sovereign State, its land titles were not subject to adverse possession and not subject to taxation. The areas were used primarily for public fishing, hunting and recreation until about 1934 at Nottleman and 1953 at Schemmel, and were not truly permanent prior to those dates. Assertion of power by the State of Iowa the next day after the 1943 Compact was finalized would not have created a better or greater title in Iowa, and failure of the State of Iowa to establish the islands as state-owned lands would not have created a title in the claimants. Iowa submits it has always protected its land titles whenever they have been attacked, and whenever adverse claims become apparent, such as occupancy and conversion to private use.

XII.

Nebraska's Proposition XII is as follows:

> **"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."**

Iowa's responsive Proposition is:

> **Whether or not a particular lateral movement of a boundary stream was accretionary or avulsive has never and does not depend on whether such movement was natural or resulted from the works**

> **of the U. S. Army Corps of Engineers or some other third party, if the Corps moved the channel by a method which meets the tests of accretion, the same legal results flow from the movement as would flow from a naturally accretionary movement; if the Corps moved the channel by a method which meets the tests of avulsion, the same legal results flow from the movement as would flow from a natural avulsion. Each movement must be studied and judged on its own particular facts.**

Iowa does not wish to be misunderstood as saying that the Corps of Engineers never created a man-made avulsion on the Missouri River. Certainly, St. Mary's Cut-Off, DeSoto Bend Cut-Off, California Cut-Off and Peterson Cut-Off were man-made avulsions. These are examples which come to the writer's mind at the moment.

But Iowa does deny that all movements of the channel by the Corps should be judged avulsive so that the boundary never moved after the Corps began laying their hands on the Missouri River.

The principal reason for Iowa's taking this position is that Nebraska's proposition is not and never has been the law; the cases cited by Nebraska as supporting their proposition do not support it. In *Florida v. Georgia*, 17 How. 478, the Court was considering the question of whether or not the U. S. Attorney General could properly intervene in a boundary dispute between two states. In *Whiteside v. Norton*, supra, an island had formed in the St. Louis River on the Wisconsin side of the thalweg, in Wisconsin, and had become the property of Whiteside un-

der the Wisconsin law. The Corps of Engineers, under its power to improve the river for navigation, shifted the thalweg, by dredging, to the other side of the island, without destroying the island or its identity. The Minnesota riparian owner claimed that, *because the avulsion was man-made,* the private and state boundaries moved to the new channel. The Court held no, that the man-made avulsion had the same legal effect as a natural avulsion, and the boundaries remained in the abandoned channel and Whiteside remained owner of the island. This case is authority for Iowa's Proposition XII, not Nebraska's. *State v. Bowen,* 149 Wis. 203, 135 N. W. 494, is another "island" case as stated by Nebraska in the second line on page 90 of her Brief and Argument, and the Court held again, that an avulsion is an avulsion, whether man-made or natural. In *James v. State,* 72 S. E. 600 (Ga. App.), 601, the Court noted that the boundary was "fixed and determined" by the treaty of Beaufort, and that the treaty of Beaufort fixed a "permanent boundary line between the two states, subject to be changed only by the subsequent joint action of the two states." It was held that works by the Corps of Engineers to improve navigation could not move the boundary which the states had specifically said in the treaty could only be changed by their subsequent joint action. In *Southern Portland Cement Co. v. Kezer,* 174 S. W. 661 (Tex. Civ. App.), the holding was that venue should be determined on the basis of where the boundary was before the wrongful placing of an obstruction in the river, and not on the basis of where the boundary was eight years later when plaintiff's land was flooded as a result of the obstruction.

In *Uhlhorn v. U. S. Gypsum*, supra, the Court found that the channel movement was a natural avulsion and that the boundary therefore remained in the abandoned channel.

Contra to Nebraska's Proposition XII and supporting Iowa's responsive proposition, there are literally hundreds of authorities in dozens of jurisdictions. Iowa will here limit its citations to Iowa, Nebraska and Federal cases.

A leading case on the subject in Iowa is *Solomon v. Sioux City*, supra, where the Court said (243 Iowa, page 639):

> "In an exhaustive annotation in 134 A. L. R. 467, 468, dealing with riparian owners, it is stated as a general rule that 'a riparian owner is not precluded from acquiring land by accretion or reliction, notwithstanding the fact that the accumulations brought about partly by artificial obstructions erected by third persons, where the riparian owner had no part in erecting the artificial barrier.'
>
> ". . . the land . . . was created . . . by the dikes or jetties built by the government."

See also *Abolt v. Fort Madison*, supra.

A leading case on the subject in Nebraska is *Burkett v. Krimlofski*, supra, a quotation from which is set forth at page 41 heretofore in this Brief. In *Frank v. Smith*, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458, where a bridge had been built and dikes and obstructions placed for the purposes of narrowing the river, the Nebraska Court wrote at length on the subject as follows (134 A. L. R. pages 463, 464 and 465):

"The facts in the instant case fail to disclose avulsion, in any particular; rather, the process was gradual and imperceptible by the deposit of the solid material called by alluvion. Such deposits attached to plaintiff's land. The additional effect of the obstructions during the course of time caused the land to become uncovered by the gradual subsidence of the water. This would be reliction, and the same law applies to both of these forms of addition to real estate which are held to be the property of the abutting landowner. See R. C. C. 226, Sec. 1.

" 'Where the water of a river gradually recedes changing the channel of the stream, and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor.' *Topping v. Cohn,* 71 Neb. 559, 99 N. W. 372; followed in *Conkey v. Knudsen,* 135 Neb. 890, 284 N. W. 737. *That the accretion or reliction was caused by other than natural causes does not affect the rule of accretion.*

"In the case of *County of St. Clair v. Lovingston,* 23 Wall. 46, 23 L. Ed. 59, the question involved was the right to accretion which had been formed by reason of obstructions placed in the river, the contention being that the accretion was caused wholly, by such obstructions, and that the rules upon the subject of alluvion would not apply. The Court said (23 Wall. page 66, 23 L. Ed. 59): 'The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water is natural or affected by natural or affected by artificial means is immaterial. * * *'

"In 1 RCL 233, Section 7, it is said: 'But if the accretion is indirectly induced by artificial conditions created by third parties it would seem that the right of the riparian owner to such accretion would not be affected, and such appears to be the holding of a majority of the cases.' In support of the foregoing are cited *Lovingston v. County of St. Clair,* 64 Ill.

56, 16 AM Rep. 516, and note (*County of St. Clair v. Lovingston,* supra); *Adams v. Frothingham,* 3 Mass. 352, 3 AM Dec. 151, and other authorities.

* * *

"The evidence in the instant case shows that the land involved was formed by accretion by the river receding from its former south bank in a gradual process, brought about purely by the construction of irrigation works, dikes and the fills for bridges. There was no rapid and sudden change of channels and the seeking of a new bed, as required in avulsion. We believe that, under the circumstances and evidences disclosed, plaintiffs are entitled to the land in controversy, and as described in their petition, by accretion and that in such respect the trial court did not err." (Italics added.)

See also: *Heider v. Kantz* (1957), 165 Neb. 649, 87 N. W. 2d 226; *Ziemba v. Zeller* (1957), 165 Neb. 419, 86 N. W. 2d 190.

Perhaps the leading case on the subject of man made accretions by the Supreme Court of the United States is *County of St. Clair v. Lovingston,* supra, cited by the Nebraska Supreme Court in the above quotation from *Frank v. Smith.*

Most recently, Special Master Marvin Jones in *Louisiana v. Mississippi,* No. 14 Original, October Term 1962, cited *County of St. Clair v. Lovingston* with approval and followed the rule in his Report; said Report was "in all things confirmed" by the Supreme Court of the United States on April 18, 1966. 384 U. S. 24, 16 L. Ed. 330, 86 S. Ct. 1250.

Again, at this point, Iowa must remark on the inconsistencies in Nebraska's positions and arguments. These inconsistencies are called to mind by two paragraphs in her Argument under Proposition XII. First, there is the paragraph immediately following the quotation on page 87. If it is really unthinkable that the state boundary should not follow movements of the channel caused by Corps of Engineers construction, isn't it even more unthinkable that county officials and local residents should have the power to change the boundary, which, as Nebraska says, can only be changed by agreement of the states and with the consent of Congress? Second, in the last paragraph commencing at the bottom of page 92, Iowa submits that Nebraska is contending for a rule which would create absolutely insoluble problems all along the boundary from Sioux City downstream to the Iowa-Missouri line; Nebraska asks this Court to say that neither the state boundary nor any private boundaries moved as a result of any channel movements caused by the Corps of Engineers construction. When would they put this rule in force? When the Corps first worked on a few bends back in the 19th century? When the Corps returned to the river and went to work on it in earnest in the early 1930's? When they drove the first piling in the particular bend in question? When they first went to work in the bend immediately upstream from the bend in question? How about the man-made construction of other agencies than the Corps of Engineers, such as the railroads and highway authorities, who tinkered with the channel at every bridge-site? How about levee and drainage districts up and down the river who tinkered with the channel in their efforts to protect the lands from

floods? Why should the Corps of Engineers be singled out as the one third party agency whose works didn't affect or change the boundary? How does one determine precisely where the thalweg was immediately prior to Corps construction? Nebraska would eliminate the use of Corps soundings, etc., for this purpose, leaving the Court to determine where the preconstruction boundary was on the basis of the recollections of old-timers witnesses as to where the steamboats went.

In the same Brief, while proposing this utterly unworkable rule of law, Nebraska asks that the 1943 Boundary Compact be so construed as to lay at rest all problems of the Missouri River Valley. (See last paragraph, Nebraska's Brief, page 104.)

XIII.

Nebraska's Proposition XIII is:

> **"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."**

Iowa would correct the first sentence of the above proposition and state:

> **A state which acquires land in another state by consent or agreement with the other state can claim whatever immunities or privileges permit-**

ted by the agreement or the laws of the state in which the land is located.

Our courts have consistently held that when one State owns property in a sister State, as a general rule, the title is held as private owner, subject to the laws and dominion of the State in which it is located. The courts have just as consistently held that sister states can by agreement circumvent this general rule.

The very general rule set out in the first sentence in Nebraska's proposition above is correct, but there are exceptions to most rules, including this one. There is nothing in the line of decisions cited by Nebraska that prevents states from contracting any type of title they require to accomplish the purpose of their compact. This is pointed out in 81 Corpus Juris, Section 104, page 1077:

> "(1) *Land situated in another state.* A state can not hold land in another state if the latter state objects thereto, but it may do so with the consent of such other state. Where a state has acquired land in another state with the tacit consent of the latter, its title can be divested only by some proceeding by that state in the nature of office found, and it can not be impeached by a private individual in the absence of any action by the state." * * *

In the case of *Phillips, et al v. Moore*, 100 U. S. 212, 25 L. Ed. 603, a portion of a grant of land in Texas had been conveyed to a resident and citizen of Mississippi, contrary to laws of Mexico and Texas prohibiting aliens and non-residents from holding land in Texas. There the Court stated on page 212:

> "(2) By the common law, an alien can not acquire real property by operation of law, but may take it

by act of the grantor, and hold it until office is found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.'" * * *

Again in *Hauenstein v. Lynham*, 100 U. S. 484, 25 L. Ed. 628, the Court stated at page 484:

"(3) By that law 'Aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them.' 2 BL. COM., 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another but such a title is always liable to be divested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, can not pass the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. *Fairfax v. Hunter*, 7 Cranch 603."

In *City of Louisville v. Babb*, 75 Fed. 2d 162 at page 167:

"Where the law of other States has made the purpose for which property is used the test of whether it should be exempted from taxation, it has been held ownership is not material."

(Question: Could Kentucky Municipal Bridge between Kentucky and Indiana be taxed by Indiana in light of her constitutional exemption of property from taxation that is used for "Municipal" purposes. Court held Indiana constitution exempted bridge as it was used for public and hence municipal purposes.)

In *Dodge v. Briggs*, 27 Fed. Rep. 160 at pages 171 and 172, Court states:

> "An alien may hold lands in Georgia and while the comity which exists between States of our Union, will not, in my judgment, legalize the purchase and possession of lands by one State in another State, as a general proposition, *still it will permit a State of the Union to authorize or tacitly sanction such a transfer of the title to lands in its territory to a sister State as will prevent the latter from loss.* In order to vitiate the title of the State of Indiana, some proceeding in the nature of 'Office Found' must have been adopted. It must be understood also that when the State of Indiana bought these lands it came as a subject, and not as a sovereign. It is to be presumed that the State of Indiana got the lands for a legitimate purpose. It is to be further presumed that the State of Georgia would have objected had it seen proper to enforce its political and exclusive rights." (Italics added.)

It is apparent from the foregoing that if it were the intention of the contracting states that by virtue of the 1943 Compact Nebraska land titles were to retain all appurtenances and riparian expectancies, existing under Nebraska law at that time, after their being ceded to Iowa, even where contrary to Iowa title laws existing at that time, then it must follow in logical sequence, that Iowa land titles ceded to Nebraska must also retain all appurtenances and immunities existing under Iowa law at that time, even though not in conformity with Nebraska law. It would also follow that if two different sets of title laws are to be imposed by the Compact upon Iowa, then two different sets of title laws are imposed upon Nebraska.

Nebraska's second sentence in this proposition of their Brief should read:

> **"The same principles should apply to lands on both sides of the Missouri River, and neither Iowa nor Nebraska, or their citizens should be entitled to assert rights or claims not allowed by the laws of the ceding state merely because the compact transferred the lands to a different jurisdiction."**

Nebraska solemnly covenanted in the Compact to hold Iowa's land titles "ceded" to Nebraska inviolate. But according to the evidence Nebraska courts have entered quiet title decrees against the State of Iowa, without having jurisdiction of Iowa, the real party in interest, and this would be so even though, as Nebraska contends, Iowa held the land only as a subject. The Nebraska courts did this without determining in most cases whether the land was ceded by Iowa, or where they so found, they ignored the fact, as in the *Krimlofski* case, supra, in which the Nebraska Court went to the ultimate end by holding that the land was formed in Iowa as an island, and had been adversely possessed by Krimlofski, as he used it for hunting and fishing, which was its highest use. We find no other case in which a State or a Federal court has held that wild, natural lands can be adversely possessed by using it for hunting and fishing, and especially where the state holds it for the use of its citizens as a hunting and fishing preserve, as does Iowa, with no evidence that Iowa was aware of the claimed adverse occupancy.

Thus, all lands owned by Iowa as a sovereign state and ceded to Nebraska by the Compact are still the property of the State of Iowa, and all Nebraska tax deeds and Quiet Titles Decrees issued or entered of record with regard to these lands since the Compact are void. Lands owned by the sovereign State of Iowa before the Compact were not subject to taxation or adverse possession, and therefore, would not be after the Compact. Applying Nebraska's argument to Iowa's titles, these attributes would be vested property rights, more so, we believe, than the Nebraska owners "expectancy" in accretion and reliction. Thousands of acres have accreted to Iowa lands and islands owned by Iowa before the Compact and now on the Nebraska side of the fixed boundary.

All of these have been possessed and occupied, contrary to Iowa's title, and are now being taxed under Nebraska law. Now if title to accretion land in Iowa shall be controlled by Nebraska law, shall not Iowa's titles, which were exempt from taxation and not subject to be adversely possessed, before the Compact, retain those attributes, even though contrary to Nebraska law?

Speculation as to what Iowa would do had the river run differently than it did and been thus controlled in a different position by the Corps of Engineers would be an exercise in futility. This is so, as evidence in the case at bar was rather clear and convincing, that the islands both above and below Rock Bluff Bend and Otoe Bend formed in Nebraska, and as previously stated, Iowa only desires property belonging to the people of Iowa. Title to the areas above and below the disputed areas have

already been determind by the Nebraska courts without interference by Iowa.

The Nebraska courts have quieted title to lands within their jurisdiction. What Nebraska is really saying under this proposition is that it was just and fair that Nebraska courts determine ownership of lands west of the 1943 boundary, whether ceded or not, but Iowa's position that Iowa courts should determine ownership of lands within their jurisdiction is untenable and unfair. The Iowa court decisions between private claimants and those between the State of Iowa and private claimants, demonstrates the shallowness of this statement.

XIV.

Nebraska's Proposition XIV is as follows:

> **"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."**

Iowa purely and simply denies this proposition. It is most interesting and illuminating to note that, in this proposition, Nebraska virtually admits that there is a presumption of accretion as against avulsion. Nebraska only asserts that it is unfair and inequitable for Iowa to rely on it. Let it be said here and now that counsel for Iowa know of no case or authority in any jurisdiction holding that a party litigant, who has a presumption operating in his favor, is barred from relying on it for any reason. Counsel for Nebraska apparently have found no authority for their proposition; at least, none is cited:

U. S. Gypsum Co. v. Grief Brothers Cooperage Corporation, 389 F. 2d 252, is not in point.

In this cited case (*Gypsum Co. v. Grief Bros.*), the presumption concerning accretion and avulsion was not involved, but the question of whether it had been determined by prior litigation between the same parties. Also, after criticizing the conduct of the State of Arkansas and the Gypsum Company concerning their manipulations of the "island deed" in the language quoted by Nebraska at pages 97 and 98 of her Brief, it should be noted that the Court held the "island deed" good and valid because the land had in fact formed as a state-owned island and title to it must be determined under the law of Arkansas, the state within which it had formed.

Iowa counsel's analysis is that really, the "presumption in favor of accretion and against avulsion" and the "presumption in favor of a permanency of boundary lines" are but two ways of saying the same thing. And the result of the application of either presumption in any particular case is the same, to wit: *Wherever a boundary (public or private) is described as being "the middle of the river," it is presumed that from time to time and at all times, the boundary is "the middle of the river."*

In the present case, it is undisputed that, on July 12, 1943, the effective date of the Boundary Compact, the river was flowing in the designed channel; presumably that was where the boundary was (except at Carter Lake); the Boundary Compact placed the agreed boundary in this same channel; therefore, presumably, the boundary was simply changed from the thalweg to the center of the

designed channel. The above statements are applicable at both Nottleman Island and Schemmel Island.

Special Master Marvin Jones dealt with a similar matter in *Louisiana v. Mississippi*, No. 14 Original, Oct. Term 1962, commencing at page 19 of his Report:

> "The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> "This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied *in all cases, unless there has been a clear and convincing avulsion.* This avulsion must be sudden and perceptible. It is conceivable that the term 'sudden' should be applied in a more flexible sense than its use in ordinary conversation. But even conceding the strength of this argument, we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases, the new channel was formed when the river 'suddenly leaves its old bed and forms a new one. * * * ' *Arkansas v. Tennessee*, 246 U. S. 158, 173.
>
> "Unless suddenness and perceptibility are not thus clearly established, the general rule must be applied." (Italics added.)

In the very recent case of *Illinois v. Missouri,* in the Supreme Court of the United States, Original No. 18, Oct. Term 1969, Special Master Harvey M. Johnsen dealt with similar problems in the following language (Page 18):

> "*As to the argument that the erosions and depositions occurring in connection with high waters and flood stages cannot be recognized as a basis of accretion rights along a stream, I know of no such rule of law. The conditions are natural and regular incidents in the history of most midwestern rivers.* Notably they have been thus recurrent in the case of the Mississippi River, as the experts of both parties agreed generally in their testimony. The volume and the force of the water during such stages increase of course the actions of erosion and deposition. *But neither the acceleration of the stream's processes nor the greater extent of results produced thereby in themselves remove such a situation from the operation of the law of accretion. Erosions and depositions are not on that basis recognized as avulsions. The distinction between accretion and avulsion lies not in the extent of a stream's natural processes, but in the character of or type of its actions.*" (Italics added.)

Judge Johnsen cites *Jeffries v. East Omaha Land Co.,* 131 U. S. 178; *County of St. Clair v. Lovingston,* 23 Wall 46 and *Nebraska v. Iowa,* 143 U. S. 359, and quotes the Court's ruling from these cases extensively, which we will not repeat here.

In *Shopleigh v. United Farms,* 100 F. 2d 287, the Court chose to quote and apply the rule as it is stated in 9 C. J. 271:

> "The presumption is in favor of present boundary lines, and the burden of proof is on the party alleg-

ing the location of the line to have been changed by the forces of nature."

In *Plummer v. Marshall,* 59 Tex. Civ. App. 650, 126 S. W. 1162, the Court expressed the thought at page 1163 as follows:

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

After reviewing the evidence, the Court stated:

> "Verdicts can not rest upon guess or conjecture * * * a court that is left without knowledge of a fact after exploring to the full every channel of information must needs decide against the litigant who counts upon the fact as an essential of his claim. *Shopleigh v. Mier,* 299 U. S. 468; 81 L. Ed. 355. (Justice Cardozo)."

The Florida Court, in *Municipal Liquidation v. Tench,* 153 So. 728 at page 731, cited *Gubser v. Town,* 202 Or. 55, 273 P. 2d 430, as authority for the pointed statement that:

> "And there is a presumption of accretion or erosion as against avulsion."

The Florida Court also quoted with approval from 93 C. J. S., Waters, Section 83 as follows:

> ". . . therefore, the law seems clear as to these principles of law; in the event of erosion or submergence, the title to the land covered by water reverts to the State; erosion is presumed over avulsion; and the burden of proof is upon the party alleging avulsion."

In *Wyckoff v. Mayfield*, 130 Ore. 687, 280 Pac. Rep. 340, the Oregon Court chose to say it like this:

> "In presumption in favor of a permanency of boundary lines, the burden of proof is on the one alleging that the location of the line has been changed by the action of the forces of nature.
>
> "Plaintiffs having alleged that the gravel pit in question was their property, the burden of proof to establish that allegation is theirs. Plaintiffs rely for their evidence for that purpose upon the claim that the presumption is that the channel of the Rogue River was changed by some sudden, violent force sometime prior to 1877; but as we have seen from the authorities, the presumption is to the contrary—that is, the presumption is, following the rule of the value of natural movements or fixed boundaries, that if any change occurred at all, it was by accretion and not by a sudden and violent force. Consequently, plaintiffs failed to adduce any evidence upon their material allegation of ownership."

Iowa has chosen to set out the foregoing quotations from the courts of several jurisdictions so the Special Master here may be advised that the rule we are here discussing is not just a peculiarity of Iowa law; it is not even a minority rule; it is the general rule in every jurisdiction which has had occasion to meet the problem.

It is even the law of Nebraska. In *Bouvier v. Stricklett,* supra, the Nebraska Supreme Court cited Gould, Waters, Section 159, which cites Vattel (page 121, Book a, C. 22, Section 268):

> "For if I take possession of a piece of land declaring that I will have for its boundary the river which washes its side, or if it is given to me on that footing, I thus acquired beforehand the right of alluvion; and

> consequently I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly' because, in the very uncommon case called 'avulsion' when the violence of a stream separated a considerable part from one piece of land, * * *."

The Supreme Court of the United States subscribed to the same author, inserting the above quote in *Nebraska v. Iowa,* supra, and continued the balance of the quotation from Vattel as follows:

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

The Iowa Supreme Court was not one bit out of order when it stated in *Kitteridge v. Ritter,* 172 Iowa 55, 151 N. W. 1097, 1098, that:

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

The Court was simply following and applying the general rule.

In order to do justice to the Iowa Court, its reasoning should be set forth in more detail. The paragraph on page 1098 from which the above sentence was extracted is as follows:

> "On behalf of defendant it is claimed that in 1881 there was a sudden avulsion whereby the channel of the river was changed so as to cut off a body of land which had theretofore been upon the west side

of the river, and that the land in question is part of such detached body. We have only to do, therefore, with the weight of the evidence as bearing upon these two contentions. There are two or three important presumptions which aid the plaintiff greatly, and which impose a considerable burden upon the defendant: (1) The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa. (2) Inasmuch as the land concededly lies between the riparian lots as surveyed by the government and the present east bank of the Missouri River, it is presumed to be the result of accretion and not of avulsion. *Coulthard v. McIntosh*, 143 Iowa 389, 122 N. W. 233; *Coulthard v. Stevens*, 84 Iowa 241, 50 N. W. 983, 35 Am. St. Rep. 304; *Jefferis v. East Omaha Land Bank Company*, 134 U. S. 178, 10 Sup. Ct. 519, 33 L. Ed. 872; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; *Hardin v. Jordan*, 140 U S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Nebraska v. Iowa*, 145 U. S. 519, 12 Sup. Ct. 976, 36 L. Ed. 798; *State of Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55; *St. Paul & P. R. R. Co. v. Schurmeier*, 7 Wall 272, 19 L. Ed 74; *Missouri v Kentucky*, 11 Wall 395, 20 L. Ed. 116; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186."

Nottleman Island, in 1943 just before the Compact, was concededly on the east side of the Missouri River, and it was therefore presumably in Iowa. Schemmel Island was the same. Iowa does not assert that this presumption is not rebuttable, and that it therefore solves this case automatically; but Iowa does say that Nebraska's evidence adduced to support its claims of avulsions at both locations, when balanced against Iowa's evidence adduced to support its claim of accretionary movement at both locations, falls far short in both quality and quantity of what is required to rebut the presumption.

XV.

Nebraska's Proposition XV is as follows:

"Iowa ignored the lands along the Missouri River until they became valuable. The misapplication of a common-law principle concerning the title to the beds of streams in disregard to 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."

Iowa's responsive proposition is as follows:

Iowa has not ignored her trust lands along the Missouri River. Iowa does not misapply its common law principle that the state owns the beds of all navigable rivers in the state. The Compact should not, indeed cannot, be construed as repealing Iowa's doctrine that the state owns navigable river beds within her borders. Iowa seeks only what lands are rightfully hers, and this cannot be termed a taking of private property without compensation because we seek to take no private property from any private land owner. Iowa is not only justified, but she is obligated as trustee for the people to preserve state ownership of her public lands.

The evidence in this case fully and completely establishes (although it was not Iowa's burden) that the first sentence of Nebraska's proposition is incorrect and untrue. Iowa has always been interested in the areas to which it holds title, whether they be abandoned channels

filled with water, sand dunes and pot holes, islands of little value or islands of substantial value.

The Iowa Conservation Commission by its very nature and purpose is and always has been vitally interested in all wild, natural and undisturbed areas in the State without regard to their commercial or agricultural value. True, these areas on the Missouri River are invaluable to the citizens of the Middlewest for recreational purposes, and many would have great dollar value to those privileged few who would acquire title should Iowa's titles be denied. However, the statement that Iowa ignored these lands along the Missouri River until they became valuable is not only irrelevant and immaterial to any issue involved, but it is contrary to these facts as established by the evidence. See Appendix I.

When Nebraska accuses Iowa of "misapplication of a common-law principle" she must have reference to the doctrine applied in Iowa since 1856 that the state owns the beds of all navigable streams within its boundaries, all accretions thereto (islands) within its boundaries, and all abandoned beds (which became abandoned as result of avulsion). Apparently, Nebraska feels that we misapply the doctrine whenever we seek to apply it in the vicinity of the Missouri River; the doctrine is still all right with Nebraska when applied to the Mississippi; the Des Moines, the Cedar, the Iowa and all other navigable streams in or bordering Iowa; but we misapply it when we seek to apply it in the vicinity of the Missouri. And this remarkable partial repealer, resulting in the creation of two sets of title laws in Iowa, they would have us believe, came about by the 1943 Boundary Compact. No

claim is made that the Compact says any of this; but, they say, it should be construed that way because of some hazy and isolated circumstances surrounding adoption of the Compact.

Why is there no thought that, if somebody's law had to be repealed by the Compact, perhaps it might have been Nebraska's? Why is it that the people of Iowa must suffer all the loss and the individuals who have tried to gain these public lands by trespass (Iowans, Nebraskans, and non-residents of both) are secure with their plunder?

Iowa does not disregard the Compact. She recognizes the *good* Nebraska titles which were held by private parties in Nebraska City Island, California Bend, Soldier Bend, Winnebago Bend and Browers Bend. She believes that she recognizes the *good* Nebraska titles to all ceded lands which were in Nebraska before the 1943 Compact.

Iowa does not take away or propose to take anybody's private property without compensation. After all, if Iowa has owned any particular parcel of land ever since it came into existence, she can't very well be taking it from somebody else.

Only two cases are cited by Nebraska as supporting her proposition XV. Neither of them supports Nebraska's proposition, and both of them support Iowa's responsive propositions.

In *Hilt v. Weber*, 252 Mich. 198, 233 N. W. 159, the Michigan Court acknowledged that it had been wrong in holding that the boundaries of riparian lots along the Great Lakes were the meander lines as surveyed when

the lots were originally laid out; this erroneous rule had been laid down in the *Cavanaugh* cases; the Court held that "The waters themselves constitute the real boundary" (233 N. W., page 161).

As noted in the quotation at page 99 of Nebraska's Brief, it was argued by the riparian owners that the Cavanaugh rule had been depriving them of valuable rights of riparians without compensation. The Court responded that this was true and that changing the rule would return these rights to them.

It was argued by Michigan that changing the rule would deprive the public of valuable "financial and recreational benefit." The Court's answer to this was that changing the rule would not deprive the state or the public of anything it rightfully owned.

The other case cited by Nebraska is *Peck v. Alfred Olson Construction Company,* 216 Iowa 519, 245 N. W. 131. It was held that the state owned bed of Lake Okoboji is "trust land" and that, as such, it was not only the right, but also the duty of the state to maintain and promote the navigable lake, even though such works may impair or destroy a contiguous lot owner's right of access to the lake. The brief quotation from the Court's opinion at page 100 of Nebraska's Brief is used out of context; to show the Court's thinking more fairly and fully we quote further immediately following Nebraska's quote, as follows:

> "* * * The state came under the burden of maintaining the navigable lake and promoting it. The dominion thus conferred upon the state was subject to the

power and duty of the national government to regulate interstate commerce. In all other respects the dominion of the state is supreme. The question here is, which is paramount, the right of access of the riparian owner, on the one hand, or, on the other hand, the title and trusteeship of the state? The question is not a new one. It has been considered and debated by the courts of many of the states and by the United States Supreme Court. The question has never been directly passed upon in this state. *The United States Supreme Court has held definitely that the riparian owner of land in such a case takes the incidents of his titles, such as right of access, subject to the navigability of its waters and subject to those incidents of navigability, which look to its maintaining and promotion;* that the right of the government to maintain and promote navigation by whatever reasonable means it may is paramount to the right of *ingress and egress of a riparian owner.* When the national government has occasion to assert its power over navigation in the regulation of interstate commerce, it holds the riparian right of access as subordinate to the power of the government to promote navigation.

"One brief quotation from *Scranton v. Wheeler,* 179 U. S. 163, 21 S. Ct. 48, 57, 45 L. Ed. 126, will suffice to indicate the doctrine established by the Supreme Court:

" 'Whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in a navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. *Whatever the nature of the interest of the riparian owner in the submerged lands in front of his upland bordering on a public navigable water,*

> *his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland,* but to be held at all times subordinate to such use of submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.' " (Italics added.)

The Court then sustained the Trial Court's dismissal of the lot owner's prayer for an injunction to enjoin the construction of the wharf; it was not any taking of the lot owner's property without compensation.

The very point that Iowa attempts to make throughout the case at bar is that she has a *duty* to the people of Iowa (and to the general public, too, for that matter) to preserve and protect all public lands and waters within the state for public use and against the depredations of all trespassers or squatters who would gather these areas into their own private domains to the exclusion of any public use. Nebraska says, in the last sentence of her Proposition XV, that: "Iowa is not justified in this course of conduct." Iowa submits that she is not only "justified"; she has a duty and obligation to pursue this course of conduct.

———o———

CONCLUSION

At first glance, the first paragraph of Nebraska's CONCLUSION, commencing on page 101 of her Brief and Argument, would seem to be a harmless assembly of

platitudes with which nobody could possibly disagree. For instance, Nebraska asks the Court to construe the Compact so as to "avoid injustice, oppression or absurd consequences." To this, Iowa says "Amen". But in the next sentence, Nebraska wants the Compact "construed to protect the rights of individuals along the river." What happened to the rights of that very substantial group of individuals who constitute "the State of Iowa" and is sometimes known as "the general public"? We submit that the Compact cannot be construed so as to avoid injustice, oppression or absurd consequences unless the court keeps in mind that the construction must also protect the rights of the public. In truth, it might just be possible that the public interest in this matter is paramount, and should be uppermost in the Court's mind. *Peck v. Alfred Olson Const. Co.*, 216 Iowa 519, 245 N. W. 131, a case cited by Nebraska, is authority that the public interest is paramount.

We have been trying to say throughout this Brief that adoption of Nebraska's proposed construction of the Compact would trample the rights of the public in lands along the river and would lead to absurd consequences. In the paragraph commencing on page 102, Nebraska wants Iowa "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 * * * Compact, including private claims to all areas over which Nebraska was exercising jurisdiction at or prior to 1943." What happened to the language of the Compact that "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may

cede to Iowa * * *?'' Iowa submits that the difference between these two statements is monumental. Iowa acknowledges that she is obligated to the Compact language, but she certainly does not acknowledge obligation to Nebraska's substitute language. The Court has no jurisdiction to delete the Compact language from the Compact and substitute Nebraska's language in lieu thereof.

Even if the Court had jurisdiction to make this substitution, it should refuse to do so. According to Nebraska, we are trying to avoid ''absurd consequences''. Yet, the consequence of this substitution would be that every parcel of land which ever had an ''indicia of ownership'' in Nebraska would be held to be in Nebraska on July 12, 1943. This, regardless of whether the land was ever actually in Nebraska or not. This, whether it is the same identical land or not. Every time the river moved eastward, Nebraska gained; but Nebraska never lost. This consequence would be not only absurd, but weird.

It is the words and phrases of the Compact which lead to justice and fair consequences. There is no reason to tamper with them, change them, construe them, delete them, or add to them, and there are no words or phrases in the Compact, no established fact, acceptable testimony or exhibit in the record, and no law of Iowa, Nebraska or the United States to support Nebraska's conclusion on page 102 of their Brief and Argument to the effect that Section 3 of the Compact obligates Iowa to accept as ''good'' a claim of title based upon indicia of ownership, unless the land involved was actually within the State of Nebraska and such indicia of ownership establishes a

title "good" under Nebraska law; that obligates Iowa to waive her Sovereign right to determine land titles to any land within her boundaries; that obligates Iowa to relinquish all title to her trust lands along the Missouri River; that repealed Iowa's common law ownership of navigable river beds and lakes within her borders; or that waived, relinquished or contracted away all claims which she has or may have to islands, bars, or lands not marked or registered.

Iowa submits this Court should state: That the Nebraska riparian owners have the same rights in Iowa that any Iowa riparian owners have, no more, no less. That Iowa riparian owners have the same rights in Nebraska that Nebraska riparian owners have, no more, no less. That the rights of riparian owners west of the Compact line must be established under Nebraska law, and riparian rights east of the Compact line must be established under Iowa law. The sovereign rights reserved by the States of the Union will permit no other interpretation.

Nebraska's conclusion that the specific lands in the Nottleman and Otoe areas were formed in Nebraska and ceded to Iowa by the Compact is not supported by the record, and particularly considering the burden undertaken by plaintiff as previously set out herein. Further, assuming for sake of argument that such conclusion was supported by the clear and convincing evidence required, the Iowa Court would not be precluded to determine conflicting claims to the areas, such as that interjected by the witness James Givens who stated "and if it doesn't

belong to us * * * it has got to belong to the State of Iowa'' (R. V. XXII p. 3164). The Compact should not be construed to deny Iowa or Nebraska any principle of sovereignty. It was not intended by the parties and cannot be read into the Compact.

Nebraska cannot have her way in this case without prevailing upon this Court to literally shatter the law of accretion and avulsion. In her extremity she must request this Court to deny Iowa the benefit of a long-accepted legal presumption of avulsion, that is based on sound and sane reasons, as stated by Nebraska Supreme Court in the first *Kinkead* case, and imposing an *irrebuttable presumption* that any lands east of the Compact line over which Nebraska exercised jurisdiction, were ceded by Nebraska to Iowa. An irrebuttable presumption is not a presumption, it is a rule of law. Such a holding by this Court would change the title laws of Iowa insofar as the Missouri River lands are concerned, creating a conflict in Iowa title laws and only add to the confusion and problems along the boundary. Iowa would be entitled to an *irrebuttable presumption* that any lands west of the Compact line over which Iowa exercised jurisdiction (or ownership), were ceded by Iowa to Nebraska. Thus all lands owned by Iowa prior to the Compact would still belong to Iowa, and the many Quiet Title Decrees entered by the Nebraska Courts voided. Not all the uncertainty would lie on the Iowa side of the river as blandly stated by Nebraska in their last sentence of their Brief and Argument.

In the first case of *Nebraska v. Iowa,* supra, Nebraska was claiming that because of the peculiar nature

of the Missouri River, the way in which the channel moved and particularly the rapidity with which it moved, the usual and well-recognized rules of accretion and avulsion should not apply to it. Now, again, Nebraska is contending the very same thing except present capable and ingenious counsel have come up with new and different reasons. They say that the boundary didn't move when the thalweg moved unless the thalweg movement was natural. They say the presumption of accretion as against avulsion shouldn't apply. They say that Iowa's doctrine of state ownership of navigable river beds was or should be repealed as to the Missouri River (while claiming that Nebraska's law was and should be left intact). They say that whenever the thalweg moved or was moved from one locale in the river bed to another locale in the river bed, such movement should be termed an avulsion, so that the boundary didn't move.

Nebraska's contention in this case, if adopted, would make a shambles out of that substantial body of law which has long been referred to as the law of accretion and avulsion. Again, as in 1892, Nebraska is saying that the time-honored and well-recognized rules be discarded along the Missouri River. Again, as the Court did in 1892, the Court should reaffirm that these good, fair and equitable rules are still in effect and operating.

It is Iowa's position that the Compact of 1943 between Iowa and Nebraska is not ambiguous and is therefore not subject to interpretation. That it must be accepted according to the ordinary meaning of its words and phrases, and this Court should not attempt to rewrite the Compact entered into by the legislative branches

of the two states and approved by Congress of the United States. That Iowa has recognized titles to the lands ceded to Iowa by the Compact and should do so in the future; that the title laws of the contracting states remain unchanged; that the Compact is a binding statute of both states and should be so considered by the Courts of both states; that the Compact did not affect the titles to lands in Iowa or in Nebraska prior to the Compact; that the State Boundary can be located by the parties without the assistance of this Court; that Nebraska has not overcome the evidenciary burdens assumed by her as plaintiff or the legal presumptions imposed upon her as a matter of law, and has not established a violation of the Compact by her sister State, and the Complaint should therefore be dismissed.

Respectfully submitted,
STATE OF IOWA, Defendant

By:

RICHARD C. TURNER

Attorney General of Iowa
State Capitol Building
Des Moines, Iowa 50319

MICHAEL MURRAY

Special Assistant Attorney
General of Iowa
Logan, Iowa 51546

MANNING WALKER

Special Assistant Attorney
General of Iowa
233 Pearl Street
Council Bluffs, Iowa 51501

Attorneys for the Defendant

PROOF OF SERVICE

I, Michael Murray, Special Assistant Attorney General of the State of Iowa, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 31, 1970, I served a copy of the foregoing Defendant's Brief and Argument before the Special Master the Honorable Joseph P. Willson, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

CLARENCE A. H. MEYER

Attorney General of Nebraska
State Capitol Building
Lincoln, Nebraska 68509

HOWARD H. MOLDENHAUER

Special Assistant Attorney General of Nebraska
1000 Woodmen Tower
Omaha, Nebraska 68102

JOSEPH R. MOORE

Special Assistant Attorney General of Nebraska
1028 City National Bank Building
Omaha, Nebraska 68102

such being their Post Office addresses.

.....

Michael Murray

Special Assistant Attorney
General of Iowa
Logan, Iowa 51546

INDEX

INDEX—Continued

INDEX—Continued

INDEX—Continued

INDEX—Continued

Pages

CASES CITED

A.

CASES CITED—Continued

CASES CITED—Continued

Pages

F.

G.

H.

I.

CASES CITED—Continued

CASES CITED—Continued

Pages

L.

M.

N.

CASES CITED—Continued

CASES CITED—Continued

CASES CITED—Continued

Pages

CONSTITUTION CITED

CASES CITED—Continued

Pages

STATUTES CITED

COMPACTS CITED

TEXTS CITED

Pages

TEXTS CITED—Continued