IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

VS.

STATE OF IOWA,
Defendant.

IOWA'S PROPOSED DRAFT OF REPORT AND RECOMMENDATIONS OF HONORABLE JOSEPH P. WILLSON, SPECIAL MASTER

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GENERAL STATEMENT OF THE CASE

In 1943, the States of Iowa and Nebraska entered into a compact with the approval of the Congress of the United States concerning their common and contiguous boundary, which compact is generally known and referred to as the "Iowa-Nebraska Boundary Compact of 1943".

Nebraska asserts in this case that certain conduct by Iowa constitutes violation of this compact. Nebraska seeks

a construction and interpretation of the compact to the effect that Iowa's conduct constitutes violation, and seeks a judgment and decree of this Court which would force, require and enjoin Iowa to cease and desist from such conduct.

JURISDICTION

Nebraska asserts that this Court's jurisdiction to hear and determine this matter arises from Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C. Sec. 1251 (a) (1). She further asserts that the matter of jurisdiction has heretofore been settled and adjudicated by this Court's prior order wherein her motion for leave to file her Complaint was sustained and Iowa's resistance to said motion was overruled.

Iowa, on the other hand, asserts that this Court must examine its jurisdiction at all stages of the case and, if at any stage it appears that there is no justiciable controversy between the states, or that Nebraska has no real interest in the controversy which would entitle her to maintain the action, the case should be dismissed.

Although Nebraska offered evidence tending to show that the boundary fixed and established by the 1943 Boundary Compact is described in such a manner that it may now be difficult or impossible to precisely locate it in the water or on the ground today, she seeks no relief in this case arising from such fact. In other words, location of today's boundary line between the two states, being the boundary line fixed by the 1943 Compact, is not an issue in this case. In any event, having heard and considered the evidence concerning location of the boundary line fixed by the Compact, your Special Master believes and finds that said boundary line can be located accurately

today at all points where accurate location may be required, although diligent effort may be required in order to do so.

The real issue in this case is concerning where the boundary line between the two states *was* immediately prior to July 12, 1943, the effective date of the Boundary Compact. One might ask: Why should this question of where the pre-1943 boundary line was be a matter of importance to the two states now, some 28 years later? Briefly stated, the matter is of importance because on this question of where the pre-1943 boundary line was, hangs the ownership of a number of tracts of land along and in the vicinity of the boundary. Ownership of lands, river beds and abandoned river beds which were in the State of Nebraska prior to 1943 was determinable by the law of Nebraska. Likewise, ownership of tracts which were in Iowa prior to 1943 was determinable by the law of Iowa. In many cases, the answer as to ownership would be different because of difference between the state laws of the two states. This Court has consistently held that each state may have and apply within its own borders whatever system of land title laws she may see fit. 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 line from where otherwise it should be located."

The laws of the two states regarding ownership of accretion lands, river beds and abandoned channels are similar but there are two important differences: (1) In 1856, approximately 20 years before Nebraska was admitted to statehood, it was determined in Iowa that private land titles to riparian lands along navigable streams would extend only to the ordinary high water mark and that the beds of the navigable streams in Iowa were state-owned. *McManus* v. *Carmichael*, 3 Iowa 1. In 1906, 50 years later, it was determined that private land titles to riparian lands in Nebraska would extend to the thread of the contiguous stream. *Kinkead* v. *Turgeon*, 74 Neb. 573, 104 N.W. 1061. (2) It has been the law of Nebraska from very early in her history that title to land may be acquired by adverse possession as a result of ten years of open, peaceable and notorious possession, even though the possessor entered upon the land as a trespasser. In Iowa, on the other hand, the law is and for many years has been that title cannot be gained by adverse possession unless the possessor entered upon the land and possessed it with claim of right or color of title.

In the beginning, the Iowa-Nebraska boundary was the middle (or thalweg) of the Missouri River from a point opposite the mouth of the Big Sioux River near Sioux City, Iowa, thence downstream to a point where the middle or thalweg was intersected by the Iowa-Missouri boundary

line near the town of Hamburg, Iowa. Movements and changes of the boundary prior to 1943 were governed by the "Rule of the Thalweg" as promulgated by this Court and many state courts, including the state courts of both states. Generally stated, the "Rule of the Thalweg" was and is that wherever a boundary is described as the "middle" of a river, the term "middle" shall mean the "deepest part" or "navigation channel"; whenever the thalweg moved by the gradual process of "accretion", the boundary moved with it; but whenever the thalweg shifted from one channel to another by a sudden "avulsion", the boundary did not move to the new thalweg, and the boundary remained in the abandoned channel.

In prior litigation between the two states (*Nebraska* v. *Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396) it was determined that an avulsion had occurred in the vicinity of Omaha, Nebraska, and Carter Lake, Iowa, whereby the thalweg suddenly shifted from a channel to the west of the town of Carter Lake, Iowa, to a new channel east of the town, with the result that Carter Lake, Iowa, remained in Iowa and did not become part of Nebraska even though it was and still is west of the Missouri River. Special provision in the 1943 Boundary Compact preserved Carter Lake's status as being in Iowa, and there is no issue in this case concerning Carter Lake or any land in that immediate vicinity.

Carter Lake is the only site along the boundary where it had been judicially determined in litigation between the two states that there had been an avulsion so that the boundary was not the thalweg of the river in and prior to 1943.

From the general statements hereinabove made concerning the internal title laws of the two states it will be

seen that, if accretion land formed along the Missouri River, or a former channel became an abandoned channel, or an island arose from the river bed west of the thalweg and in the State of Nebraska, its ownership was determinable by the law of Nebraska. There has been much litigation in the state courts of Nebraska down through the years, both before and since 1943, wherein ownership of these lands has been the issue. Generally, the courts of Nebraska have held that accretion lands which formed contiguous to the shoreline of a riparian owner became property of such riparian owner, and when a channel became an abandoned channel, the riparian owner became the owner to the former thread of the stream, and when an island arose from a stream the riparian owner became the owner of such island, depending on which side of the thread of the stream it arose. The salient fact at this point is that the State of Nebraska has never been found to be the owner of any such lands because by her law, she elected to make all such lands and river beds, islands and abandoned beds privately owned. In some of the Nebraska cases, ownership of river lands was determined by application of the Nebraska law of adverse possession. *Burkett* v. *Krimlofski*, 167 Neb. 45, 91 N.W.2d 57.

There has also been much litigation in the state courts of Iowa concerning ownership of river lands. The Iowa courts have generally held that accretion land which forms contiguous to the riparian shore of a private riparian landowner becomes property of such riparian owner; the state loses its title to that spot under the sky which was formerly river bed but which is now covered by the private riparian landowner's accretions; the state gains title to the new riverbed in Iowa. If the bed of a navigable river becomes abandoned by an avulsion, property boundaries remain unchanged so that the state continues to own the abandoned

bed to the ordinary high water mark. If an island arises from the state owned bed of a navigable river in Iowa, it is considered to be in the nature of an accretion to the state-owned bed and the island is therefore state-owned. *Holman* v. *Hodges,* 112 Iowa 714, 84 N.W. 950. *Payne* v. *Hall,* 192 Iowa 780, 185 N.W. 912; *Iowa* v. *Raymond,* 254 Iowa 828, 119 N.W.2d 135.

During the pre-trial phase of this case, it was established that the State of Iowa now claims to own some thirty-two tracts along the boundary. All of these tracts are presently in Iowa. Some of these tracts are land; some are sand bar; some are marsh; some are still inundated by Missouri River water; some are a mixture of land, sand bar, marsh and land under water. Some of these tracts formed and came into existence in their present forms before 1943 and some since 1943. She claims some of them by operation of the Iowa law of state ownership of navigable river beds, islands and abandoned channels; some of them by exchange with various individuals; some of them by purchase from various individuals; some of them by quiet title decrees; and some of them by a mixture or combination of theories or claims. In addition to the 32 specific tracts, she claims to own all that part of the bed of the present day Missouri River which is in Iowa.

The State of Nebraska does not claim to own any of these tracts. The State of Nebraska claims to own nothing by operation of her common law because, as pointed out above, her law provides no basis for any such claims of ownership.

There is not any tract or parcel of land, river bed, marsh or abandoned river bed which the State of Iowa claims to own and which the State of Nebraska also claims to own. Nebraska's complaint is limited to the proposition that Iowa violates the 1943 Boundary Compact by claiming

to own tracts which were *privately* owned in Nebraska prior to 1943 and tracts which have formed since 1943 in such manner that they became privately owned. Nebraska brought and seeks to maintain the instant case on behalf of these private parties; she claims power to do so because she was a signator to the Compact; her claim of power is under the doctrine commonly known as "parens patriae".

Iowa asserts that Nebraska has no real or present interest in the controversy; that Nebraska is not the "real party in interest"; that necessary elements for "parens patriae" are absent; and that her action, the instant case, should therefore be dismissed and denied. Since all tracts which Iowa claims to own are admittedly in Iowa, and Nebraska doesn't claim to own any of them, Nebraska's territorial integrity is not threatened; Nebraska's tax base is not threatened; it is clear that Nebraska's right to maintain and prosecute the instant case does in truth and in fact depend upon the doctrine of "parens patriae" alone.

A succinct but accurate review of the "parens patriae" doctrine was written by Chief Judge Pence of the United States District Court of Hawaii in the recent case of *State of Hawaii* v. *Standard Oil Company*, (1969) 301 F. Supp. 982. (Opinion on appeal at 431 F.2d 1282). Judge Pence's conclusions concerning parens patriae (which were undisturbed on appeal) were that, where a state seeks to maintain an action in its parens patriae capacity, two prerequisites must be met: (1) The facts must show that the state has an interest independent of and apart from the titles of her citizens, and (2) The facts must show that a substantial portion of its inhabitants are adversely affected by the challenged acts of the defendant.

The evidence here clearly demonstrates that the State of Nebraska has no interest in this case independent of and apart from the titles of her citizens.

Nebraska made no proof as to the number of private parties who are or may be claiming to own the 32 tracts which Iowa claims to own along the boundary. Suffice to say that this number can only be an infinitesimal fraction of the population of Nebraska, and the people of Nebraska generally have no real interest in this matter.

After an obviously thorough search by good and diligent counsel for Nebraska, no case or precedent has been cited to this Special Master wherein a state has ever attempted to prosecute an original action in this Court against a sister state under the facts and circumstances which are here shown to exist. In all of the many cases heretofore wherein two states have contested in this Court concerning a boundary, both states have had a clear, present and real interest in the matter. Always, in cases heretofore, the contest has been concerning where the disputed boundary *is*, not where the boundary *was* in some prior time.

Operating against Nebraska throughout this case was the rule stated by Mr. Justice Roberts in *Colorado* v. *Kansas*, 320 U.S. 383, at page 393:

> "* * * 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. * * *"

The conclusion is inescapable that Nebraska has failed to establish either of the prerequisites restated by Judge Pence from prior authorities cited in his opinion.

Another objection to this Court's exercising original jurisdiction in the case at bar is raised by Iowa: There is no evidence that Iowa has ever advanced its claim of ownership to any tract by forcibly dispossessing any ad-

verse claimant; rather, the evidence is that at all locations where there were or are disputed claims, she has simply sought resolution of such disputes in the courts of competent jurisdiction. Usually the court of competent jurisdiction was the Iowa District Court of the County in which the tract was situated (since all tracts claimed by Iowa are now in Iowa) but on three occasions, the issue has arisen in the Federal District Courts of Iowa in eminent domain cases where the United States, at the behest of the Corps of Engineers, was seeking to obtain right-of-way for Missouri River improvement projects. The cases in state courts have generally been Quiet Title cases, sometimes commenced by the State of Iowa as Plaintiff, sometimes commenced by others against her which she has defended, and in one case at least, she has intervened in a case pending between private parties.

On the question of whether or not Iowa has violated the 1943 Boundary Compact hangs the answer as to whether or not Nebraska has tendered to this Court a justiciable controversy over which this Court should exercise its original jurisdiction. Iowa says, at this point, that since the evidence discloses only that she has sought to have her claims determined in courts of competent jurisdiction, Nebraska has failed to prove violation of the Compact by Iowa, because such conduct by Iowa though proved and admitted does not constitute violation.

Indeed, it seems to me that this Court or any court should be very cautious about enjoining any party from prosecuting or defending any action in any court of competent jurisdiction which would involve valuable rights to real estate claimed or owned by such party. Free access to the courts is a basic principle of our system.

Nebraska seeks to buttress her claim for such an injunction against Iowa by asserting that it is not fair for

Iowa to litigate these matters in her own state courts, the implication being that the Iowa courts are or may be biased where the state is a party. Nebraska further asserts that it is unfair and inequitable for Iowa, with her great resources for investigation and research, to be permitted to use those resources against the individual adverse claimants. Nebraska further asserts that the Iowa law, as promulgated by her courts, is unfair and inequitable to the adverse claimants of these river areas which Iowa claims to own; Nebraska particularly complains about application of the Iowa rule that there is a presumption in favor of accretion and against avulsion which can only be overcome by clear, satisfactory and convincing evidence of avulsion.

Let it be said first that there is no evidence of bias in the state courts of Iowa where the State of Iowa has been a party claiming to own river land. Two cases involving ownership of river land have reached the Iowa Supreme Court for decision: *State of Iowa* v. *Raymond, et al.*, 254 Iowa 828, 119 N.W.2d 135; and *Dartmouth College* v. *Rose, et al., State of Iowa, Intervenor*, 257 Iowa 533, 133 N.W.2d 687. In the *Raymond* case, Iowa's title to the disputed area was quieted; in the *Dartmouth College* case, Iowa's claim to the disputed area was rejected. A third case involving ownership of a river area with Iowa as a claimant reached appellate court, namely: *Tyson* v. *Iowa*, 283 F.2d 802; the Court of Appeals for the Eighth Circuit held that Iowa was entitled to the damages for taking of an easement across a disputed area and it inhered in the decision that Iowa was the owner of the area in dispute.

The above mentioned cases were not re-tried before me in the instant case, but some evidence of the underlying facts in them was introduced before me. Suffice to say that there is no evidence of bias on the part of any of the

courts involved, and there is no evidence tending to indicate that the three results were anything other than fair, equitable and correct.

It has never been held that a party cannot pursue his legal or equitable rights or remedies in courts of competent jurisdiction merely because that party may have more financial and manpower resources at his command than the opposing party. If this were the rule, all of our states, and the United States itself, and many large corporations would be barred from the courts most of the time.

Whether or not the courts of Iowa have been applying proper rules to determine ownership of river lands admittedly within her own borders is not for this Court to say because, as hereinabove pointed out, the several states are each and all entitled to apply their own title laws within their own borders, subject only to the requirement that such laws be constitutional.

On account of all of the foregoing, it is my finding and conclusion that (1) Nebraska has failed to carry her burden of proving that she has any real interest in the present controversy; (2) Nebraska has failed to prove facts such as to entitle her to maintain the instant case under the theory of parens patriae; (3) Nebraska has failed to prove any violation of the 1943 Boundary Compact by Iowa.

Therefore, Nebraska's Complaint should be dismissed and denied.

PRE-1943 HISTORY OF THE MISSOURI RIVER

The first recorded navigation of that part of the Missouri River which now constitutes part of the western border of Iowa and the eastern border of Nebraska was by the Lewis and Clark Expedition during the first decade of the 19th Century. The annals of that expedition are

available for all to read. Reading them, one must be filled with admiration at the bravery, perseverance and will of those hardy men. Probably the chief adversary the expedition had to fight was the river itself.

The channel was clogged with snags; when the river was at low stage, numerous sand bars appeared or lay just beneath the surface; it was difficult to select a channel among the snags and bars which would be navigable; the course of the river was tortuous and meandering; note is made that in one day, near where the cities of Onawa, Iowa, and Decatur, Nebraska, are now located, the expedition traversed a great loop of the river and arrived at nightfall little more than a mile from their starting point of the morning.

In 1846, Iowa was admitted to statehood with part of its western boundary (between the Iowa-Missouri boundary thence upstream to the mouth of the Big Sioux River near Sioux City, Iowa) described as the "middle of the main channel of the Missouri River", and in 1867, Nebraska was admitted with its eastern boundary described similarly. Thus, the two states came to be contiguous along an approximate 200 mile segment of the Missouri River.

Since rivers are natural boundaries, many rivers have become the boundaries between many of the states of the Union. These boundaries became the subject of considerable litigation, from which "the rule of the thalweg" evolved. "The rule of the thalweg" may be succinctly described as follows: Whenever a boundary, public or private, is defined as the "middle" of a stream, the word "middle" shall mean "thalweg". Generally, the term "thalweg" refers to the deepest part of the stream, which is generally the navigable channel. Two exceptions to the rule of the thalweg have been generally recognized: First, whenever the thalweg of a stream suddenly shifts by the process

known as "avulsion" from one side of a tract of land to the other, the boundary remains in the former and now abandoned channel, and does not move to the new channel. Second, whenever a stream is deep enough to be navigable in more than one place, and is in fact navigated along some course which is not the deepest, the thalweg and the boundary shall be the "boat track". But, both in fact and in law, it is considered that movements of the thalweg are usually and commonly by the process known as "accretion", which is the gradual process of the water washing away one bank and building new land behind its movement, and the boundary was considered to move as the thalweg moved in this manner.

The Iowa-Nebraska boundary would be governed by the rule of the thalweg, with its exceptions, modifications and refinements, until July 12, 1943.

The two states engaged in litigation one time before the instant case concerning a segment of their common boundary. The case was *Nebraska* v. *Iowa,* 143 U.S. 186, decree at 145 U.S. 519. The case involved a segment of the river near the Iowa town of Carter Lake, which is northeasterly a short distance from Omaha, Nebraska, then and now on the west side of the Missouri River. This Court applied the rule of the thalweg in that case, found that the town of Carter Lake had been cut off from Iowa by an avulsion, and that it was therefore in Iowa although west of the river. The Carter Lake locale is not one of the disputed areas in the present case.

Many locations up and down the Iowa-Nebraska boundary have been the subject of litigation in the state courts of both states and in the federal courts of original jurisdiction in both states, but these cases usually concerned the ownership of land as distinguished from location of the state boundary.

It seems that the business of commercial navigation has had two flowerings on the Missouri River, and that a third flowering of navigation is now taking place. First, there was considerable freighting on the river before the Civil War, ended by the Civil War when the War Department expropriated nearly all the river boats for use as troop transports, gun boats and material carriers on the Mississippi and other rivers where the fighting was going on. After the Civil War, a second flowering of river navigation occurred, which was ended when the railroads reached the area in the latter years of the 19th century. River transportation was so hazardous, uncertain and expensive that the steamers were unable to compete price-wise with the rails. Steamboating on the Missouri River remained in the doldrums until, in about 1952, the U. S. Army Corps of Engineers was able to assure a navigable channel to Omaha and Sioux City during about eight months each year.

Neither Iowa nor Nebraska appears to have paid much attention, as sovereign entities, to their common boundary along the Missouri River until about 1902, when there seems to have been a recognition by some citizens and officials in both states that the boundary was unsatisfactory and that a new one should be fixed and established. Negotiations for a new boundary went forward in a rather desultory manner until the mid-1930's. The reason why the boundary had become unsatisfactory was that its precise location at many places had become doubtful and uncertain; this doubt and uncertainty was a handicap and hindrance in matters of law enforcement, taxation, and land ownership.

Prior to about 1930, the U. S. Army Corps of Engineers had been concentrating its efforts to develop the Missouri River for navigation and flood control on that reach of the

river from its mouth near St. Louis upstream to Kansas City. In the late 1920's, the Corps began to receive authorizations and appropriations to develop the river upstream from Kansas City to Sioux City, Iowa. Planning went forward immediately and actual construction commenced in about 1933.

The Corps of Engineers found the same type Missouri River which Lewis and Clark had encountered more than a century before. It was wild, wide, sinuous, shallow, and choked with sand bars and snags. It was almost useless for commercial navigation. It usually flooded the valley regularly in April when spring came to Nebraska, Iowa, Minnesota and the Dakotas, and again in June when snow in the Rocky Mountains melted, and usually several more times each year from summer and fall rains.

The Corps had surveyed the entire river from Kansas City to Sioux City in 1923. They had caused aerial photographs of this entire reach to be taken in the winter of 1925-1926 and maps had been made from these photographs. The same was done in 1928 and again in 1930. The Corps apparently found that mapping from aerial photos was not sufficiently accurate for their purposes, so in 1931 and 1932, the river was again surveyed; in this survey, elevations of land along the river were noted, topography was noted, the channels were sounded and depths of water noted, and control lines were laid out on each side so that dikes and other improvements could be located with surveying accuracy.

Corps personnel who worked on the design and construction of the project were witnesses before me. From this testimony and from the documents, maps and photographs in evidence, I ascertain that the Corps design and plan was to narrow and confine the river into one channel, 700 feet wide, which would be a series of curves or bends

alternately from one side to the other. Within the 700 foot wide channel, they proposed to maintain a navigation channel with a minimum depth of six feet.

The precise alignment of the "designed channel" was dictated by a number of factors: For instance, the river had to pass under all existing bridges. In addition to bridges, there were "hard points", "bluff contacts" and cities and towns which it was desirable that the channel be close or contiguous to. Then there was an optimum degree of curvature to be attained as nearly as possible. Lengthy straight reaches were to be avoided. Economy dictated that the existing natural channel be utilized to the greatest extent possible.

At the outset, the river was trained to go into the desired curves by means of pile dikes, some of which were called "lead-off structures", some were called "baffles", and some were called "revetments". Work to cause the river to flow into a particular designed bend would generally commence at the upstream end of the bend. First, a lead-off structure would be built just upstream from the upper end of the designed bend, this so that the river would not flank the structures later to be built in the bend; the lead-off structure was parallel to the designed channel. Then, downstream from the lead-off structure, a series of baffles were built out from the shore to force the river to curve in the desired direction. Finally, revetments were usually built on the outside of the bends to contain the river to a designed width of 700 feet.

After the work had gone forward by the above methods for about four years, several canals were dredged in locations where the river had not moved into the designed channel with the alacrity deemed desirable by the Corps of Engineers.

By 1943, the Corps of Engineers reported that the project was 99% complete below Omaha and 78% complete between Omaha and Sioux City. The river was entirely within the designed channel except for three segments, totaling about 2000 feet in length, where it was not entirely within the design. The entire project had been accomplished by the pile dike method, except canals had been dredged at 11 locations.

THE IOWA-NEBRASKA BOUNDARY COMPACT OF 1943

As I have mentioned, negotiations for a new state boundary line had commenced in about 1902. It is probable that the early negotiations bore no fruit because, until the 1930's, there was no fixed line available to the two states which could be used to describe the new boundary; also, until the 1930's there was no way to know where the Missouri River would be from year to year, or from month to month, or even from day to day.

The Corps of Engineers "designed channel" fulfilled both of these needs. The Corps maps and records provided a "center line" which the states could utilize for description of the new fixed boundary. And it was reasonable to expect that the Corps would confine the river to their designed channel so that the new boundary would remain in the river for all time.

At its session in 1941, the Nebraska Legislature adopted the new boundary compact and notified the Iowa Legislature of its action. But this notification arrived too late for the Iowa Legislature to act in its 1941 session. In its 1943 session, the Iowa Legislature enacted the compact and notified the Nebraska Legislature of its action; the Nebraska Legislature re-enacted the compact; on July 12, 1943, Congress gave its consent and approval and the compact became effective as of that date.

The complete text of the Compact as adopted by Iowa may be found in the 1971 Code of Iowa at Page LXIV. The complete text of the Compact as adopted by Nebraska is identical except that the names of the two states are reversed where appropriate.

The new boundary line described was the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, as shown on certain alluvial plain maps then on file in said office and copies of which were on file in the Secretary of State's offices in both states, except only at Carter Lake. The boundary at Carter Lake was so described that the town of Carter Lake remained in Iowa. Then, the Compact provided:

> "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."

POST-1943 HISTORY OF THE MISSOURI RIVER

Before the Kansas City-Sioux City navigation, bank stabilization and flood control was completed, the country became involved in World War II. During the war, the Corps of Engineers turned its attention, manpower and resources almost entirely to prosecution of projects which were directly concerned with the war.

Fort Peck Dam had been constructed on the Missouri River in Montana. But other upstream dams, later to be known as Garrison Dam, Oahe Dam, Big Bend Dam, Ft. Randall Dam and Gavin Point Dam, in North and South Dakota had not been constructed. Therefore, control of river stages had not been achieved and floods continued.

During and for a time after the war, the river ravaged the bank stabilization structures which the Corps had installed along the river between Kansas City and Sioux City. Below Boyer Bend, which is about 22 miles upstream from Omaha, although the structures were damaged, the river remained in the designed channel. Upstream from Boyer Bend to Sioux City, the river reverted to the wild, escaping from the designed channel in many places.

The most disastrous flood in history occurred in early 1952. (The great flood of 1881 still holds the record for having produced the highest river stage, but the 1952 flood far exceeded it in terms of dollar damages.)

Later in 1952, after the flood, the last of the Dakota dams was closed (Gavins Point Dam) and nothing comparable to the 1952 flood has occurred since, although minor flooding of lands near the river still occurs as a result of ice jams and local heavy rainfall.

At about the time that the Corps was gaining control over river stages by the upstream dams, they also began

giving their attention to repairing the damage to their navigation channel downstream from Sioux City. Downstream from Boyer Bend, because the river had not escaped from the 1943 designed channel, the Corps elected to simply repair and restore the structures so as to stabilize the channel in the same designed channel which had been designed in 1943. Therefore, from Boyer Bend downstream to the Iowa-Missouri state boundary, the mileage today is about 84 miles as it was in 1943, and the Nebraska-Iowa boundary line is still entirely in the river now as it was then, except only at Carter Lake.

Upstream from Boyer Bend to Sioux City, a distance of about 97 river miles, the Corps found it impractical to restore the river to the "state line designed channel" in its entirety. Some segments were restored to the former design, but a new designed channel was laid out for many other segments. This is demonstrated by the fact that mileage from Boyer Bend to Sioux City was approximately 109 miles by following the center line of the 1943 designed channel which is the state boundary, whereas it is now only 97 miles by following the present river. The Corps explains the change of design between Boyer Bend and Sioux City on two bases: (1) It would have been excessively expensive to restore the river to the old design in its entirety. (2) It was felt that some of the bends in the old design were too sharp and that the river should be generally less curvaceous.

About 50 miles of the river between Boyer Bend and Sioux City is in the same channel as was designed for it in 1943; in other words the state boundary is still in the river today for these 50 miles. For a total of about 29 miles in 12 segments, the present river is entirely in Nebraska; at these 12 locations, there is land subject to the sovereignty of Nebraska situated east of the river. For a total of

about 18 miles in eight segments, the present river is entirely in Iowa; at these eight locations, there is land subject to the sovereignty of Iowa situated west of the river. For a distance of about 29 miles in 12 segments, the state boundary is not in the river and is to the east of the river. For a distance of about 18 miles in eight segments, the state boundary is west of the river.

I recite these statistics to show the total effect of what the river did and what the Corps did to the river, after 1943, as regards the state boundary now being substantially different from the Missouri River between Boyer Bend and Sioux City.

The new design for the stabilized channel between Boyer Bend and Sioux City did not emerge from the drawing boards of the Corps of Engineers' offices at Omaha until about 1955. Until then, nobody knew where it would be; nobody knew what lands then existing would be destroyed to make way for the river; nobody knew what areas then in the river would become abandoned channel; nobody knew what construction methods the Corps would employ to move the river from wherever it then was to wherever the Corps might want it to be. Actual construction to place the river in the new design in 1948 at isolated spots was completed in 1960.

When the river reverted to its wild natural condition between Boyer Bend and Sioux City, it washed away lands and created new lands. Then, when the Corps stabilized it to the newly designed channel, they caused it to wash away lands and create new lands. Fresh questions arose as to the ownership of these newly formed areas, some of which are lakes, some of which are marshes, some of which are bars or islands, and some of which are land.

But one question which had always been present as regards areas farmed prior to 1943 had been eliminated by

the 1943 Iowa-Nebraska Boundary Compact. As regards areas formed before 1943, there was nearly always a question as to whether they formed in Iowa or Nebraska, because the pre-1943 state boundary was a moving line, governed by the rule of the thalweg. The 1943 Boundary Compact had created a fixed state boundary line which remained at the center line of the state line channel as that channel had been designed in 1943, and as that channel was produced on certain maps on file in the office of the Secretaries of State of both states, and the post-1943 boundary has not moved with movements of the channel and is not governed by the rule of the thalweg. There may be and are questions as to who may own some of these areas which have formed since 1943; but there can be no question as to which state they formed in; they formed in the state in which they now are located.

It is Iowa's position that ownership of all areas which have formed since 1943 in Iowa must be determined by Iowa law and that the proper forum to make these determinations is the Iowa courts. Nebraska denies both of these propositions and the issues thus existing between the parties will be dealt with in a later division of this Report.

As a result of events that have transpired along the river, both before and after 1943, the State of Iowa presently claims to own some 32 separate areas of land, water, marsh or mixture of the tress. During the trial of this case, these areas were referred to by names as follows (from Sioux City downstream): Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Winnebago Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Deer

Island, Little Sioux Bend, Ballard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, California Bend, Rand Access, Rand Bar, Wilson Island, St. Mary's Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Two of the above listed areas are claimed by Iowa entirely by conveyance and not by operation of her law, and I therefore eliminate these two areas from the instant discussion; the areas thus eliminated are Rand Access and Rand Bar.

Eight of the 30 remaining areas formed before 1943; they are: Deer Island, Wilson Island, St. Mary's Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Twenty-one areas have formed since 1943; they are: Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. Iowa's claim of ownership at Winnebago Bend includes purchased land, land and water area formed before 1943, and land and water area formed since 1943. All 30 of the areas are in Iowa, undisputedly, because all are east of the boundary fixed and established by the 1943 Boundary Compact.

I am satisfied from the evidence adduced before me that each of the 30 areas along the river which Iowa claims to own by operation of its common law has its own individual history. Although some areas have points of similarity, it cannot be said that there is any typical set of facts common to any or all of them.

The immediate proximate cause for Nebraska's commencement of the present case appears to have been the

filing by Iowa of two quiet title cases in 1963: In one, Iowa claimed ownership of Nottleman Island in Mills County; the case is entitled *State of Iowa* v. *Babbitt, et al.*, in the Iowa District Court for Mills County. In the other, Iowa claimed ownership of Schemmel Island in Fremont County; the case is entitled *State of Iowa* v. *Schemmel, et al.*, in the Iowa District Court for Fremont County. These cases are still pending, further proceedings in them having been suspended until there is a final decision in the case at bar.

It is Nebraska's claim that Iowa violates the solemn commitment she made in the 1943 Boundary Compact by commencing and prosecuting these two cases because, Nebraska says, both Nottleman Island and Schemmel Island were in Nebraska prior to 1943, both were ceded to Iowa by operation of the Compact, and Iowa promised to recognize as good all titles to ceded lands which were good in Nebraska. I shall deal with the problems relating to Nottleman Island and Schemmel Island in later divisions of this Report.

Then, Nebraska wishes the Court to proceed, on the basis of evidence adduced relative to Nottleman and Schemmel Islands and on the basis of limited and incomplete evidence adduced relative to other areas, to pronounce what might be termed a declaratory judgment and issue permanent injunctions which would lay down rules and prevent or severely inhibit Iowa's future conduct as regards all areas she claims to own in the vicinity of the river. This portion of the case I will also deal with in another division of this Report.

Since 1943, because numerous segments of the boundary line fixed and established by the 1943 Boundary Compact are no longer in the Missouri River, the two states have commenced new negotiations for another new bound-

ary compact. No new agreement has yet been reached. Nothing concerning this proposed new compact is at issue in this case because it is well recognized that power to make a new compact rests exclusively with the two states, subject only to Congressional approval.

NOTTLEMAN ISLAND

A. Nebraska elected to adduce detailed evidence concerning the history and formation of two sites along the boundary which Iowa claims to own. She seeks by this method to prove that Iowa violated the 1943 Boundary Compact by conduct at these two sites. She also avers that these two sites are typical and similar to all the sites along the boundary which Iowa claims to own. Only brief, fragmentary and partial evidence was adduced by either party concerning the history and formation of the other areas—barely enough to provide the Special Master with a very general knowledge of the other areas.

One of the sites concerning which Nebraska elected to adduce detailed evidence is locally and commonly known as "Nottleman Island".

Today, Nottleman Island is a tract of land comprising some 1600 acres, situated in Mills County, Iowa, east of the Missouri River, and attached to the Iowa riparian shore. It lies in the curve of the river which is known as Rock Bluff Bend. By today's measurement of river miles, it extends approximately from Mile Post 583 to Mile Post 587. It is downstream approximately 8 miles from the place where the Platte River outlets its waters into the Missouri River and is approximately 30 miles downstream from the cities of Omaha, Nebraska, and Council Bluffs, Iowa. Opposite the island, across the river on the Nebraska shore, are two landmark promontories known as King Hill and Queen Hill. Between these two hills is found

the small village of Rock Bluff, Nebraska. King Hill is approximately opposite the middle of the island. Cass County, Nebraska, is opposite Nottleman Island; its county seat is Plattsmouth, Nebraska, a river town upstream a short distance from the island.

Nebraska contends that Iowa violated the terms of the 1943 Boundary Compact by filing a Quiet Title Action in the District Court of Mills County, Iowa, entitled "*State of Iowa* v. *Babbitt, et al.*", wherein she claims ownership of Nottleman Island by operation of Iowa's common law rule as to ownership of navigable river beds and islands formed therein. Nebraska contends that Nottleman Island formed in Nebraska prior to 1943, west of the thalweg of the Missouri River, and she attempted to prove this factual proposition. Nebraska contends that, regardless of in which state the island did form, Nebraska exercised sovereignty and dominion over it and Iowa acquiesced so that the island became part of Nebraska by the theory of prescription, acquiescence or recognition. Nebraska further contends that, by the terms of the 1943 Compact, Iowa's common law rule as to state ownership of navigable river beds was either repealed or modified so that it no longer applies along or in the vicinity of the Nebraska-Iowa boundary.

Iowa, on the other hand, contends that its commencement of said case did not violate the Compact; that since the land is undisputably in Iowa, determination of its ownership is properly and exclusively within the jurisdiction of the Iowa courts; that Nottleman Island formed in Iowa, east of the thalweg of the Missouri River and east of the Iowa-Nebraska state boundary line; that Iowa did not lose its sovereignty over the island prior to 1943 by any theory of acquiescence, prescription or recognition; that the 1943 Iowa-Nebraska Boundary Compact, although it

became a part of the law of Iowa, did not repeal or change Iowa's common law as to state ownership of navigable rivers and islands therein.

B. Evidence as to the location of the pre-1943 state boundary by locating the thalweg:

The original government surveys of Iowa and Nebraska, made in the 1850's and 1860's, show that at that time, the Missouri River ran approximately where it does today, and that the spot under the sky which is now occupied by Nottleman Island was almost entirely in Iowa. The right, or west, bank came down from the north, ran past Queen Hill in close proximity to its eastern base, thence southwesterly near to the town of Rock Bluff, struck the northerly base of King Hill which forced the river easterly or southeasterly along the northerly base of King Hill, thence it went southerly past the east base of King Hill in close proximity to the base. Adjacent to the right bank were the two hills made up mostly of limestone; they were hard points not erodable by action of the river waters. The left bank also came down from the north roughly parallel to the right bank, until it was forced a bit east in order for the river to pass by King Hill. The natural river was substantially wider than today's river (The Corps of Engineers has narrowed the river in order to obtain depth for navigation). The left bank ran through flat erodable soil on the Iowa shore. There were no islands in the spot under the sky which is now Nottleman Island.

The evidence by later maps and other records and testimony is clear that during the years following the original government surveys, the river widened out by eroding the soil along its left bank, while the right bank remained almost stationary along the bases of the two hills. By

1922, 2500 acres of Mills County, Iowa, farm land had been washed away, and the river was about one mile wide in Rock Bluff Bend.

As the channel became wider, it became more shallow, and its current was slowed, so that the river's natural sediment load was dropped in the bed. Thus, sand bars came to form and the channel became really a series of channels running between numerous sand bars, and the channels and bars changed in size, shape and location. Sometime prior to 1923, a sand bar or several bars joined together and arose above the waters of the river with such permanence that it became an island. The parties are agreed that the island later to become known as Nottleman Island appears on a map of the area made by the U. S. Army Corps of Engineers in 1923; the area is denoted on that map as "willow bar". All subsequent maps and aerial photographs show land in that location.

So, the beginnings of Nottleman Island existed as an island in the Missouri River in 1923, and those beginnings were in Iowa or Nebraska depending upon which side of the island the thalweg had been when the island first arose. Both parties adduced evidence upon this subject and numerous witnesses testified concerning the relative sizes of the two channels, one east of the island and the other west, and there is testimony as to where the few boats plying the river in those days went.

The evidence is conflicting as to when the island formed. Nebraska adduced evidence tending to show that it formed prior to 1900; Iowa adduced evidence tending to show that it didn't form until shortly before 1923. Annular rings were counted on samples taken from several trees found growing on the island; Nebraska's expert was of the opinion that the oldest of these trees commenced its growth

in 1900; Iowa's experts, counting the rings on the very same sample, were of the opinion that this same tree commenced its growth in 1922.

Nebraska's witnesses generally observed a substantial channel east of the island during the early years of its existence; Iowa's witnesses generally observed a substantial channel west of it. Many of the witnesses were unable to compare the two channels because they saw only one of them. Those witnesses who did attempt comparisons were in disagreement as to which was wider or deeper. Some witnesses saw boats plying the east channel; some saw boats plying the west channel.

Unfortunately, there was no official mapping of the river at Rock Bluff Bend between 1890 and 1923. The 1890 map by the Missouri River Commission shows a very small island in the approximate location of the oldest part of present day Nottleman Island; this small island was close to the Iowa shore; there is no indication on the 1890 map as to whether the thalweg was east or west of it, and of course, there is no eye witness testimony concerning conditions in 1890; furthermore, the evidence taken as a whole is persuasive that this 1890 island did not survive.

In 1923, the U. S. Army Corps of Engineers made a topographic and hydrographic survey of Rock Bluff Bend. All channels of the river which were deep enough to sound were sounded at irregular intervals from shore to shore. This map shows that the widest and deepest channel was west of the island. The island is denoted on this map as "willow bar" which negatives Nebraska's contention that there were 23 year old cottonwood trees growing on it at that time.

In 1922, landowners on the Iowa side organized a protection district to construct "retards" along the Iowa shore

to stop the river from cutting away the Iowa land, and the map for this protection district is in evidence. It is of no probative value as to the location of the thalweg.

After 1923, many mappings of the area were done, many aerial photographs were taken, and there is considerable testimony concerning the island and the channels. This evidence shows that generally, the main channel has remained west of the island from 1923 to the present time, although there is some evidence by eyewitnesses and maps tending to show that at times in the late 1920's and early 1930's, perhaps the east channel carried more water and was sometimes used for navigation. I would point out that all evidence and testimony concerning where the thalweg was after 1923 is irrelevant and immaterial. If the thalweg did in fact shift from one side of the island to the other after 1923, sovereignty over the island would not shift from one state to the other with these shiftings. This is the law of avulsion.

Having carefully considered all of the evidence relating to the question of whether Nottleman Island formed in Iowa or Nebraska, I find and conclude as follows:

(1) Commercial navigation of the Missouri River at Rock Bluff Bend was so sparse, occasional and infrequent at the time when Nottleman Island formed that there was no "boat track". Therefore, the "boat track" rule of which *Minnesota* v. *Wisconsin,* 252 U.S. 273, is an example, cannot be applied to determine in which state Nottleman Island formed.

(2) If a "boat track" did in fact exist, there is no preponderance of evidence as to where it was, and this is an additional reason why the "boat track" rule cannot be applied in this case.

(3) The deepest thread of the river, which is the "thalweg" by usual definition, was west of the island in 1923, and the island was on the Iowa side of it.

(4) There is no preponderance of evidence to establish when the island formed.

(5) There is no preponderance of evidence to establish that the deepest thread of the river was east of the island when it formed.

(6) Therefore, Nebraska has failed to carry the burden of proof which she assumed as Plaintiff in this case to prove that Nottleman Island formed in Nebraska.

It is my opinion that when Nebraska commenced this case, she not only shouldered the normal plaintiff's burden of proving her facts by a preponderance of evidence, but that she shouldered the heavier and more demanding burden of proving her case by clear, satisfactory and convincing evidence. It is presumed that Nottleman Island formed in Iowa. This is because of two well and widely recognized presumptions: First, is the presumption in favor of accretion and against avulsion. Second, is the presumption favoring the permanency of boundaries.

It is undisputed that the thalweg of the Missouri River was west of Nottleman Island in 1943 immediately before the Boundary Compact became effective. It is my finding, based on the 1923 Corps of Engineers' Topographic and Hydrographic Survey, that the thalweg was also west of the island in 1923. By the presumption in favor of accretion and against avulsion, it is presumed that the thalweg came to be west of the island in both years by the gradual process of accretion which would have carried the state boundary with it, and not by any sudden avulsion which would have left the state boundary in an abandoned channel east of the island. By this presumption favoring the permanency of boundaries, when applied to a river boundary, it is presumed that the main channel in which the thalweg always resides is always the boundary. The

two presumptions are very similar if not identical. Both of them say that Nottleman Island was in Iowa before the 1943 Boundary Compact and that the island was not ceded to Iowa from Nebraska by operation of the Compact. To overcome either of these presumptions, it was incumbent on Nebraska to prove that there was an avulsion at Rock Bluff Bend some time prior to 1923 and after Nottleman Island had come into existence by clear, satisfactory and convincing evidence. Since I have heretofore found that Nebraska failed to prove her claimed facts regarding Nottleman Island by a preponderance of evidence, it follows even more clearly that she has failed to prove them by any clear, satisfactory or convincing evidence. Also, in this connection, I am mindful of the language of Mr. Justice Roberts in *Colorado* v. *Kansas,* supra, quoted at page 9 hereinabove.

I should note at this point that it is the contention of Nebraska that the two presumptions which I have just been discussing are invalid and should be discarded so as not to apply in this case. This contention by Nebraska will be discussed later in this Report commencing at page 55.

C. It is Nebraska's further contention that, regardless of which side of Nottleman Island the state boundary was on when the island formed, and regardless of which state it formed in, it was in Nebraska prior to the effective date of the 1943 Boundary Compact by the theory known as prescription, acquiescence or recognition.

I summarize the facts which Nebraska proved to support this theory as follows: There is eye witness testimony to farming and residency on the island in 1929. There is a suggestion that there was human endeavor of some sort going on in 1926, but the aerial photographs taken by the Corps of Engineers in 1926 disclose no sign of human occupancy or farming in that year. Aerial photo-

graphs taken in 1930 show a small patch apparently under cultivation in that year. Mrs. Ruth Dooley testified that she spent the summer of 1929 on the island with her uncle and grandparents.

The earliest action which might be termed an exercise of Nebraska jurisdiction over the island was in August, 1933, when the County Surveyor of Cass County, Nebraska, apparently at the request of the then occupants, surveyed the island. He recorded a plat of his survey in his own office and another copy in the office of the Register of Deeds of Cass County, Nebraska. The first taxation of the island in Cass County, Nebraska, was for the year of 1934.

During the later 1930's (from 1934 on), and until the Boundary Compact in 1943, several people lived and farmed on the island. The Cleo Baker family occupied the south half of the island as tenants of John Nottleman; the Shipley family occupied the north half claiming to own it. There is no evidence that any of these people or John Nottleman entered upon the island with any claim of right or color of title; none of them owned any Nebraska riparian land which the island might have accreted to; they simply went out there and started occupying and farming.

These people were Nebraskans originally and they claimed to be Nebraskans after moving out to the island. After 1934, they filed Rock Bluff Precinct, Cass County, Nebraska, personal property tax returns; they registered their motor vehicles in Nebraska; they sent their children to the Rock Bluff, Nebraska, school tuition free; the birth of a Shipley child was registered as a Nebraska birth; the death of another Shipley child was registered as a Nebraska death.

In the late 1930's and early 1940's, several conveyances of portions of the island were recorded in the official records

of Cass County, Nebraska. One of these deeds recited that it was a substitution for a lost deed executed in 1928 but never recorded.

In 1940, the Shipleys quieted their title to the north half of the island in the District Court of Cass County, Nebraska, against the owners of Nebraska land which was riparian to the island. The Shipley title was quieted because the Shipleys were found to have been in peaceable possession for more than ten years.

The south half of the island was included as an asset in the estate of John Nottleman, deceased, who died March 31, 1940. The estate was probated in the County Court of Cass County, Nebraska. The property was sold by the Administrator in these proceedings and the deed was recorded in Cass County, Nebraska.

The foregoing is a brief statement of the evidence by numerous witnesses and many public records tendered by Nebraska to establish that Nebraska was exercising jurisdiction and dominion over Nottleman Island prior to 1943, the year in which it became certain for once and all and beyond dispute that the island was in Iowa by operation of the Boundary Compact.

There is no evidence that the State of Iowa or any officials of the State of Iowa had any knowledge of any of the aforementioned purported exercises of dominion by Nebraska over the island in or prior to 1943. Also, as I have already noted, these purported exercises of dominion had only transpired for a period of about ten years prior to the Compact. There was no construction of any roads or other public improvements on the island by Nebraska officials; no visible conduct on the land which Iowa or Iowa officials saw or should have seen.

I find and determine from this evidence that, as of 1943, Nottleman Island was not in Nebraska by reason of prescription, acquiescence or recognition for two reasons: (1) There is no proof whatsoever that Iowa or any responsible officials of Iowa had any knowledge of any of Nebraska's purported exercises of sovereignty over the island prior to the Compact, and (2) The approximate ten year period of Nebraska's purported exercise of sovereignty is entirely too brief.

Concerning reason (1) above, the following quotation from the Report of Special Master Gunnar H. Norbye in *Arkansas* v. *Tennessee,* No. 33 Original, filed July 29, 1969, at pages 11 and 12, is particularly apropos:

> "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 soverign State has ever recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents.*" (Italics added)

Concerning reason (2) above, the most recent case in this Court involving prescription which has come to my at-

tention is entitled *Illinois* v. *Missouri,* No. 18 Original, October Term, 1969, in which Special Master Harvey M. Johnsen was called upon to determine whether three islands were in Illinois or Missouri. Judge Johnsen first determined that "Cottonwoods" and "Roth Island" were in Missouri and "Beaver Island" was in Illinois on the basis of how they formed and where the Mississippi River was when they formed. He then found that "Cottonwoods" was in Missouri by prescription (this being an additional reason for awarding "Cottonwoods" to Missouri), but that neither prescription or acquiescence had been proved against Illinois as to "Roth Island" or "Beaver Island".

Missouri had exercised sovereignty over "Cottonwoods" for approximately 50 years by engaging in a realistic, systematic and progressive scheme of taxation, building and maintaining public roads in the area, recordation of muniments of title and other exercises of dominion. Illinois had engaged in prior litigation in federal court which involved sovereignty over the area and had been defeated. Judge Johnsen found that "Cottonwoods" was Missouri's by prescription although 50 years "is a shorter length of time than had ever been involved in the situations of the Court's previous decisions". Judge Johnsen states concerning "Roth Island" and "Beaver Island" that there was "no exercise of sovereignty of such character and for such period of time"; he noted that "Beaver Island" had been taxed in Missouri for only ten years and there was no evidence that "Roth Island" had been taxed in Missouri any longer.

Other prescription cases in this Court, where prescription has been found, have involved long periods of time: *Indiana* v. *Kentucky,* 136 U.S. 749, over 70 years; *Arkansas* v. *Tennessee,* 310 U.S. 563, 112 years; *Maryland* v. *West Virginia,* 217 U.S. 1, 122 years; *Rhode Island* v.

Massachusetts, 4 How. 491, 125 years; *Michigan* v. *Wisconsin,* 270 U.S. 295, 76 years.

But Nebraska contends that the period of Iowa's acquiescence and recognition did not end in 1943. She contends that Iowa continued to acquiesce and recognize until about 1960 when Iowa first publicly asserted her claim of ownership to the island. This would add some 16 years to the period, making a total of approximately 26 years. During this additional period from 1943 to about 1960, Iowa did nothing to eject the occupants from the island and permitted them to remain in possession. A member of the hired staff of the Iowa Conservation Commission wrote a letter in about 1952 disclaiming that the island was owned by the state. There is evidence that the Iowa Attorney General knew of the situation in about 1952 and took no action. The private claimants to the island started paying taxes on it in Mills County, Iowa, in about 1947. It was not taken off the tax rolls in Cass County, Nebraska, until 1952.

The difficulty with all of this evidence tendered by Nebraska as to what transpired between 1943 and 1960 has to do with *ownership* of the island; it has no relevancy as to where the Iowa-Nebraska boundary line was during that period. The two states had definitely fixed the boundary as west of the island and the island in Iowa by enactment of the 1943 Boundary Compact. This is a boundary case—not a quiet title case. It is not for this Court to say who may be the owner of Nottleman Island; ownership is not an issue in the case. It is my opinion that the question of ownership of the island, which involves the question of whether or not Iowa has become estopped, or been guilty of laches, or has acquiesced, is properly determinable in the state courts of Iowa, the state in which the land is now admittedly situated.

Only one of the parties who claim to own Nottleman Island—the State of Iowa—is a party to this case, and subject to any judgment and decree which may be rendered herein. The several parties who claim to own the island adversely to Iowa are not parties. This is an additional reason why this case must be considered strictly as a boundary case and not a quiet title case.

D. I summarize my findings and conclusions regarding Nottleman Island as follows:

(1) Nebraska has failed to prove that the thalweg and the boundary were east of Nottleman Island when the island formed.

(2) Nebraska has failed to prove that Nottleman Island became a part of Nebraska in or prior to 1943 by any theory of prescription, acquiescence or recognition

(3) Nebraska has therefore failed to prove that Iowa violated the 1943 Boundary Compact when Iowa claimed to own the island by commencing the case entitled *"State of Iowa* v. *Babbitt, et al."*, in the District Court of Iowa in and for Mills County.

(4) There was no title "good in Nebraska" as to Nottleman Island in 1943, which Iowa is now bound to recognize as "good in Iowa", because, in order for a land title to be good in Nebraska, it must be proved that the land was in Nebraska, and this was not proved.

(5) Therefore, Nebraska's prayer for relief as regards Nottleman Island must be dismissed and denied.

SCHEMMEL ISLAND

A. Today, Schemmel Island which is sometimes locally known as Otoe Island, is a tract of land comprising some 660 acres of land situated in Mills County, Iowa, east of the Missouri River, and attached to the Iowa riparian shore. By today's river mileage, it extends approximately

from Mile Post 554.5 upstream to Mile Post 557. It is downstream about five river miles from Nebraska City, Nebraska. It is upstream about two miles from the Iowa-Missouri state boundary. The Nebraska county opposite is Otoe County.

There are similarities between the facts at Schemmel Island and Nottleman Island, but there are also substantial differences between the facts relating to the two islands.

Nebraska contends that Iowa violated the terms of the 1943 Boundary Compact when on March 26, 1963, she filed a quiet title action in the District Court of Iowa in and for Fremont County entitled *State of Iowa* v. *Henry E. Schemmel, et al.*, and therein claimed title and ownership of the area identified herein as Schemmel Island, by operation of Iowa's common law rule of ownership of beds of all navigable rivers within Iowa, and to the islands formed therein. Nebraska asserts that Schemmel Island was in Nebraska prior to 1943 by the facts of its formation and by prescription. She further asserts that Iowa's common law of state ownership was revoked or superceded by the Compact so as not to apply to Schemmel Island.

Iowa, again, contends that she did not violate the terms of the Compact, and the determination of land titles is reserved to the individual states in which the land is located, and that as the land in question has been undeniably within the State of Iowa since July 12, 1943, the determination of the ownership of the area rests exclusively with the courts of Iowa; that the terms of the 1943 Compact are a part of the Iowa law, but that the same did not revoke or supercede Iowa's common law; that Schemmel Island formed as an island in the bed of the Missouri River east of the pre-1943 Iowa-Nebraska boundary as governed by the rule of the thalweg. That the evidence does not estab-

lish that Iowa lost dominion over the island prior to July 12, 1943, by any theory of prescription, acquiescence or recognition.

B. Nebraska undertook to prove that three avulsions had occurred at Otoe Bend prior to 1943. The first is alleged to have occurred between 1900 and 1905, another shortly after 1905, and the third in 1938.

The original government surveys of the area (in 1847, 1852, 1855, and 1858) show that almost all of that spot under the sky which Schemmel Island now occupies was in Iowa or in the river. The land along both banks at Otoe Bend was of the same general type—soft and easily erodable. Thereafter, the river moved laterally, both east and west, building up numerous sand bars and creating numerous channels of varying size and permanency. That by 1895 the left bank had by such movements proceeded about three-quarters of a mile easterly to what is now identified as the east bank of an abandoned channel referred to as the Iowa Chute. This is fairly admitted by both Iowa and Nebraska. However, Iowa contends there is no competent evidence that the thalweg of the Missouri River ever occupied the Iowa Chute or that it was anything more than one of many channels occupied by the river in an area where it took on the characteristics of a braided stream due to the influx of the Platte River some distance upstream. Nebraska, on the other hand, contends that by virtue of its composite of the pages from an "Ancient Plat Book" located in the records of Otoe County, Nebraska, referred to herein as the "Pierce Survey of 1895", the thalweg in 1895 was located near the east bank of the Iowa Chute. At this point it is sufficient to state that the question of how far the river moved eastward is not determinative of where the boundary between the two states was located at that point in time when the present day Schemmel Is-

land started to form. The land which constitutes present day Schemmel Island did not commence to form by rising above the waters of the Missouri River until at least 33 years later, in 1930.

Nebraska contends the river moved eastward to the Iowa Chute by erosion, building up land behind its movement by accretion prior to 1895, and then the river sometime between 1900 and 1905 moved back to a position just east of present day Schemmel Island by a process known as an avulsion, thus leaving a permanent Iowa-Nebraska boundary in the Iowa Chute. She then attempts to establish a second avulsion, by the witness Elmer "Buck" Garrison, from the 1905 position around the present day island to a position approximately where the Missouri River is today. To establish the first avulsion out of the Iowa Chute, leaving the state boundary in the abandoned channel, Nebraska introduced a tree sample, identified as taken from Tree No. 230, a tree growing in 1965 on what may have been the approximate right bank of the Iowa Chute, which her expert testified started to grow in 1895, but Iowa's two experts testified started to grow in 1903. Nebraska would conclude from this that the river had to move around this tree after 1895 by avulsion, with no evidence as to the size of the land area on which the tree took root, or that the left bank had not already accreted west sufficiently. To substantiate this theory, she introduced testimony of Dr. William N. Gilliland, a geologist and professor of geology at Rutgers University, formerly of the University of Nebraska. Dr. Gilliland's theory was that in and around 1900, the Missouri River at Otoe Bend was a typical meandering stream. It was Dr. Gilliland's opinion that the river could return westward only in two ways, i. e., by a neck cut-off where the river finally erodes until merging at the neck and leaving an abandoned channel in the old

curve, or a chute cut-off where the river in high water cuts behind the developed point bar suddenly.

Iowa's position about this matter is that even if the thalweg of the river ever did run through the Iowa Chute (a proposition which she denies), the evidence establishes that the thalweg retreated westward from the Iowa Chute in the same manner that it had gone eastward so as to get there; that therefore, if the state boundary moved eastward with the thalweg into the Iowa Chute before 1900, it also moved westward with the thalweg from the Iowa Chute after 1900 when the thalweg moved to its 1930 location. In other words, Iowa contends that all movements of the thalweg at Otoe Bend were by accretion and none by avulsion.

Iowa does not simply rely on the presumption in favor of accretion and against avulsion. Dr. Lucien M. Brush, an expert in the field of geomorphology of Princeton University, formerly of the State University of Iowa, took issue with Nebraska's Dr. Gilliland; it was Dr. Brush's opinion that the natural Missouri River from the mouth of the Platte River downstream to a point below Otoe Bend was not a "typical meandering stream", but instead was a "braided stream"; thus, it was his opinion that the elemental textbook principles which govern the movements of typical meandering streams did not apply to the natural Missouri River at Otoe Bend. Dr. Brush had examined the results of field investigations done by Dr. Robert V. Ruhe and Dr. Thomas E. Fenton at Otoe Bend and concurred in the expert testimony of Dr. Ruhe and Dr. Fenton. Dr. Ruhe was Senior Staff Geomorphologist for the U. S. Soil Conservation Service and Professor of Geomorphology at Iowa State University; Dr. Fenton was an Associate Professor of Agronomy at Iowa State University. Both testified concerning their detailed study of channel movements and

land formation in Otoe Bend. Maps and other data revealed in their investigation are in evidence.

Based on these studies and his previous experience and knowledge of the matters covered, Dr. Ruhe gave as his opinion that prior to 1930 there had been a general bulging or bifurcation, the left bank moving left and the right bank moving right. That the left bank of the river moved back west over a long period of time in stages, by the process of accretion from the Iowa Chute to just east of present day Schemmel Island. The most conclusive evidence of this gradual westward movement was the fact that a number of "scarps" facing westward were found west of the Iowa Chute, each of these marking a left bank position; the most conclusive evidence that no avulsion occurred as the channel moved westerly from the Iowa Chute was the fact that there were no scarps facing easterly in the area—in other words, all right bank positions were washed away as the river moved west. If there had been an avulsion as the channel moved westward, there would have been a scarp facing east.

It was Dr. Ruhe's and Dr. Fenton's opinions that Schemmel Island developed as an island and in his opinion this was established by the soil texture and the comparable ages of development of the various soils on the island. The oldest soil on the island is 1930, and the island developed basically as the result of the construction of the U. S. Army Corps of Engineers dikes and the resulting siltation below and behind the dikes as they were constructed between 1934 and 1939. That it was pretty well formed as an island by 1939, and the soil patterns established that it was built up with overflow, leaving the more coarse materials on the outside of the island, with finer siltation occurring in the central portion. That the soil patterns of the area between the island and the Iowa Chute

established that this area developed as accretion from the Iowa Chute, moving in a westerly direction over the years in stages, stopping sufficiently long in a set position to create natural levees and escarpments remaining today that coincide with the river's positions over the years as demonstrated by available maps and photos. That on the Nebraska shore directly opposite the island the land was formed by accretion as the direct result of the dike construction by the U. S. Army Corps of Engineers.

The Corps of Engineers commenced work on Otoe Bend in the spring of 1934. From the upper end of the bend to a point about six miles downstream, the natural river was too straight and too wide. Their design was for Otoe Bend to be a bend toward Nebraska and next downstream would be Hamburg Bend toward Iowa and thus, the straight wide reach would be changed into two bends in the shape of a letter "S". Aerial photos taken in 1930 and a Hydrographic Survey made in 1931 show the above situation and an updating of bank lines as of July 1933 the same situation continuing up until commencement of work. Superimposition of the outline of today's Schemmel Island on these maps and photos shows that today's island is precisely where the wide natural river was before work was commenced. The natural thalweg in 1931 was located closer to the Nebraska shore so that approximately 85% of the future site of Schemmel Island was east of the thalweg and in Nebraska. No "island" in the normal meaning of that word was in existence in 1930 and 1931; there were sand bars in the river near both banks. Otoe Bend as designed would be almost entirely within the banks of the wide natural channel; it would only encroach slightly on the Nebraska bank in the upper part of the bend and it would encroach slightly on the Iowa bank in the lower part of the bend.

The construction method employed at Otoe Bend from 1934 into 1938 was similar to that employed at Rock Bluff Bend and which I have heretofore described. A "lead off structure" was built along the Iowa shore at the upper end; then "baffles" were built out from the Iowa shore so as to force the river toward the designed channel near the Nebraska shore; then a "revetment" was built along the right bank of the designed channel to prevent the river from going too far into Nebraska and so as to obtain the designed width of 700 feet.

By 1938, the river had been narrowed into the designed channel in the upstream portion of the bend, and it was close to but not in the designed channel in the downstream portion of the bend. The Corps of Engineers decided at this point in time to accomplish the final movement of the main channel into the designed channel by dredging "Otoe Bend Canal". In 1938, the canal was dredged through the downstream portion of the bend and the river was diverted through it. Nebraska asserts that the dredging of this canal was a man-made avulsion, and in fact, that every canal which the Corps has ever dredged was, in law, a man-made avulsion.

It is my opinion and conclusion that some canals which the Corps has dredged have been man-made avulsions and some have not, and that the Otoe Bend Canal is one which was not, for two reasons: First, the Otoe Bend Canal went through an area which was in the river in 1934 when the construction work at Otoe Bend started. The so-called land which the canal went through was sediment which had deposited in that part of the channel between 1934 and 1938 as a result of the Corps construction in the upstream portion of the bend. In other words, the canal went through land which was just temporarily there during construction and because of construction. Second, the Otoe Bend Canal

did not cut off any substantial body of identifiable land; contemporary maps and photographs show that no identifiable land at all was cut off by the canal.

In any event, and even if the Otoe Bend Canal be considered a man-made avulsion, I must point out that such avulsion would not sustain Nebraska's contention that all of the Schemmel Island was in Nebraska prior to the 1943 Compact. The great bulk of the island (approximately 90% of it) had formed on the Iowa side of the thalweg between 1930 and 1938 and before the canal was dredged. If the canal be considered an avulsion, the state boundary was left in the abandoned channel where the thalweg was immediately before the avulsion, which I have heretofore noted was very close to the canal; the boundary did not revert to some place where the thalweg may have been at some prior time.

I would summarize my findings and conclusions regarding location of the pre-1943 state boundary at Otoe Bend by locating the thalweg as follows:

(1) There is no preponderance of evidence to establish that the thalweg and boundary were ever as far east as the Iowa Chute.

(2) There is no preponderance of evidence to establish that, if the thalweg was ever in the Iowa Chute, it left the Iowa Chute by an avulsion.

(3) There is no preponderance of evidence that there was ever any avulsion from any channel to the east of Schemmel Island.

(4) Since there is no preponderance of evidence to establish any avulsion at Otoe Bend, it follows even more clearly that there is no clear, satisfactory or convincing evidence of an avulsion.

(5) The thalweg of the Missouri River was at all times prior to July 12, 1943, the state boundary between Iowa and Nebraska at Otoe Bend.

(6) The thalweg was west of Schemmel Island in 1943; immediately prior to the Iowa-Nebraska Boundary Compact.

C. Again, as at Nottleman Island, Nebraska contends that if the Court should find that Schemmel Island formed in Iowa, or the evidence is inconclusive as to where it formed and thus in which state it was located on July 12, 1943, then the evidence submitted by Nebraska indicating that the people in the area considered it to be in Nebraska on that date must prevail and that Iowa acquiesced in Nebraska's acts of dominion and sovereignty over the area.

Originally, when Iowa and Nebraska were admitted to statehood, a part of that spot under the sky which is now occupied by Schemmel Island was above the river bank in Iowa and presumably it was taxed in Iowa; none of it was above the river bank in Nebraska or taxed in Nebraska. The Pierce Survey of 1895 by the County Surveyor of Otoe County, Nebraska, was for the purpose of adding land to the Otoe County, Nebraska, tax rolls, and it included the spot under the sky which would, some 35 or 40 years later, be occupied by the island; in the meantime, the spot under the sky was dropped from the Fremont County, Iowa, tax rolls and marked "in the river". When the river moved back west after 1895 and ultimately destroyed the Nebraska land in that spot under the sky, the Otoe County taxing officials did not remove it from their tax rolls. Nebraska claims on these facts that Nebraska has taxed Schemmel Island continuously from 1895, but this cannot be true because Schemmel Island did not come into existence until the 1930's, and the land which Nebraska commenced taxing in 1895 had been washed away before the 1930's. A claim similar to Nebraska's was made by Illinois in *Illinois* v. *Missouri,* No. 18 Original, Oct. Term 1969, and was disposed of by Special Master Harvey M. Johnsen with the following remarks:

> "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."

It is interesting to note that this negligent or inadvertent taxation of Schemmel Island in Nebraska continued until 1949, or six years after the Boundary Compact. Nebraska's claim that the island was taxed in Nebraska from and after 1895 is not well taken.

Henry E. Schemmel and his two sons testified that they "posted" the island and scattered some grass seed on part of it in 1939. Nothing further was done by them in the direction of taking physical possession until about 1953, when they say they again "posted" it and "ringed" some of the cottonwood trees for the purpose of killing them. The Schemmels took their first crop from part of the island in 1956, and have been clearing and farming more and more of it continuously since.

Mr. Schemmel and a partner obtained their first muniment of title for the island, a Quit Claim Deed from one George Ward in 1939; they recorded this deed both in Otoe County, Nebraska, and in Fremont County, Iowa. Nothing appears of record in Otoe County, Nebraska, relating to the title of Schemmel Island prior to this deed in 1939.

The evidence is unclear as to precisely when Schemmel Island became an "island". Dr. Ruhe and Dr. Fenton say there was a "land mass" in part of the spot in 1930, but in their terminology, the "land mass" may have been just a sand bar and the 1930 aerial photos show that this is what it was. Nebraska's tree ring expert was of the opinion

that a tree found growing on the island had commenced its growth in 1932, but Iowa's two experts, counting the rings on the same tree, say that it didn't commence its growth until 1936 or 1937. The salient point is that Schemmel Island existed only for about ten years before the 1943 Boundary Compact, and therefore Nebraska couldn't have exercised sovereignty over it for any longer than about ten years. Actually, the earliest evidence of any exercise of sovereignty was in 1939, only four years before the Compact. Here again, as at Nottleman Island, there is no evidence at all that Iowa or Iowa officials had any knowledge of Nebraska's purported exercises of sovereignty, and nothing was done by Nebraska or Nebraska officials on the island which Iowa saw or could have seen to put her on notice that Nebraska was exercising sovereignty.

For the same reasons heretofore pointed out as to Nottleman Island, I find and conclude that Schemmel Island was not in Nebraska on July 12, 1943, by any theory of prescription, acquiescence or recognition, there being even less evidence to support such theory at Schemmel Island than there was at Nottleman Island.

D. From the foregoing, the Special Master finds that the State of Nebraska, Plaintiff herein, failed to prove any avulsionary action of the Missouri River in the Otoe Bend area that would have fixed the pre-1943 boundary between the states in the Iowa Chute, as alleged, or along any line east of present day Schemmel Island; that Schemmel Island formed in the channel of the Missouri River during the 1930's as the direct result of the dikes and other work of the U. S. Army Corps of Engineers narrowing and controlling the river in its present day channel, and the island formed east of the thalweg as it was pushed westerly by dikes constructed by the Corps of Engineers by the proc-

ess of accretion to the bed of the river; that there being no legal difference between accretion formed by natural river action and accretion formed by the efforts of third parties (U. S. Army Corps of Engineers), the island formed in Iowa and its ownership must be determined by Iowa laws; that the Iowa-Nebraska boundary immediately prior to the work of the Corps of Engineers in 1934 was the thalweg of the river and within the area now occupied by Schemmel Island, and was pushed westward with the river by the accretion land now constituting Schemmel Island to the position occupied at the time of the 1943 Boundary Compact, which is the position the channel occupies today. The island having formed in Iowa prior to July 12, 1943, it could not have been ceded by Nebraska to Iowa.

I further find and conclude that Schemmel Island was not in Nebraska prior to 1943 by any theory of prescription, acquiescence or recognition because (1) the period of purported prescription is entirely too brief, (2) the lands purportedly taxed in Nebraska prior to the early 1930's were destroyed and washed away, (3) the actions of Otoe County officials were not exercises of sovereignty by the State of Nebraska, (4) taxation by Otoe County after 1943 was in violation of the Compact and irrelevant, (5) all purported exercises of sovereignty by Nebraska after 1943 are irrelevant, and (6) there is no evidence of knowledge or acquiescence by the State of Iowa or any of its officials.

I summarize my findings and conclusions regarding Schemmel Island as follows:

(1) Nebraska has failed to prove that the thalweg and the State boundary were east of Schemmel Island when the island formed.

(2) Nebraska has failed to prove that Schemmel Island became a part of the State of Nebraska in or

prior to 1943 by any theory of prescription, acquiescence or recognition.

(3) Nebraska has therefore failed to prove that Iowa violated the 1943 Boundary Compact when Iowa claimed to own the island by commencing the case entitled *State of Iowa* v. *Schemmel, et al.*, in the District Court of Iowa in and for Fremont County.

(4) There was no title "good in Nebraska" as to Schemmel Island in 1943, which Iowa is now bound to recognize as "good in Iowa" because, in order for a land title to be good in Nebraska, it must first be established that the land was in Nebraska at the time such title was created, and this was not proved.

(5) This Court has no jurisdiction to consider present ownership of the Island as all claimants and interested parties are not before this Court, and for the further reason that such determination is within the exclusive jurisdiction of the courts of the State of Iowa.

(6) Therefore, Nebraska's prayer for relief as regards Schemmel Island must be dismissed and denied.

APPLICATION OF THE COMPACT TO OTHER AREAS

I have heretofore noted that altogether, and including Nottleman Island and Schemmel Island, Iowa claims to own 32 areas in Iowa and in the immediate vicinity of the Missouri River. Two of these, Iowa claims entirely by conveyance. Thirty of these she claims at least in part by application of her common law upon the facts as to how these 30 areas were formed. Eight of these 30 areas and part of a ninth came into existence prior to 1943. Twenty-one and part of the 22nd of these 30 areas have come into existence since 1943.

There is a marked and great difference between the pre-1943 areas and the post-1943 areas, which I have heretofore mentioned. An area formed pre-1943 may or may not have been in Nebraska and there may or may not have been a good title to it in Nebraska before it was ceded to Iowa by operation of the 1943 Boundary Compact. But in an area in which the land has washed away or in which new land has formed since 1943, the new river bed or new land cannot be said to have ever been in Nebraska, and there cannot be a good title in Nebraska to any of this new land or new river bed which has become new land or new river bed in Iowa since 1943. It is rudimentary in the law of accretion that when land is washed away, the title also is washed away; and when new land later appears in the same place, ownership of it shall be determined on the basis of whose land it formed as an accretion to. See *Tyson* v. *Iowa*, 283 F.2d 802.

Because this marked difference between the areas which formed before 1943 and the areas which formed after 1943 exists, I have chosen to discuss the other areas involved in this case by categorizing them into those two categories, and I shall first discuss the other areas which formed before 1943.

A. The other areas formed before 1943, besides Nottleman Island and Schemmel Island, are referred to in this record as St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. I will not describe in detail the locations of these other areas at this point in my Report; locations are shown on maps which are in evidence; and a series of aerial and ground level photographs taken by the witness Gerald J. Jauron are in evidence showing the general nature of them. Neither Nebraska nor Iowa attempted or purported to adduce in evidence before me all of the

facts and history concerning the formation of these other areas. Only enough evidence was adduced before me concerning them to provide a very general knowledge of where they are and when and how they formed.

An action to establish and quiet Iowa's title to Deer Island was commenced and prosecuted to completion in the District Court of Harrison County, Iowa, in which said court held and decreed that Deer Island is property of the State of Iowa. This decision was affirmed on appeal to the Iowa Supreme Court in the case entitled *State of Iowa* v. *Raymond, et al.*, 254 Iowa 828, 119 N.W.2d 135. The District Court Decree is dated October 20, 1959, and the Supreme Court Opinion is dated January 15, 1963. It appears to me that the ownership of Deer Island is no longer open to question because the judicial determination made in *State of Iowa* v. *Raymond, et al.*, was a finality.

It appears from the record made before me that Iowa has been in open, peaceable, notorious and adverse possession of Wilson Island for more than ten years and that she has made valuable improvements thereon to enable public enjoyment of the island. It therefore appears that the ownership of Wilson Island is no longer open to question.

This leaves us with five areas formed before 1943 to which my remarks now to be made may have some application, namely: St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and Winnebago Bend.

Concerning areas which formed before 1943, Nebraska asks this Court to (1) prevent Iowa from questioning titles flowing from Nebraska, (2) declare that by entering into the 1943 Boundary Compact, Iowa waived, relinquished and contracted away any claim to islands, bars or other land areas which had not been recorded as state owned in the Iowa General Land Office, (3) enjoin Iowa from applying

the presumption in favor of accretion and against avulsion so as to cast the burden on an adverse claimant to prove that any land now in Iowa was ceded to Iowa by the Compact, (4) declare an irrebuttable presumption that land now in Iowa over which Nebraska exercised jurisdiction in 1943 is ceded land, and (5) declare that wherever the Corps of Engineers have moved the thalweg of the river, such moving had the legal effect of an avulsion, and did not move any boundary.

Nebraska's prayer No. (1) for relief is entirely too broad; it goes beyond the terms of the Compact; it would foreclose Iowa from litigating questions which she should have the right to litigate. Iowa agreed in 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 - - -". This is the agreement Iowa should be bound and held to, and which she says she is willing to be bound and held to. But this Court should not bar or foreclose Iowa from questioning whether or not purported titles flowing from Nebraska were "good titles" and Iowa should not be barred or foreclosed from questioning whether or not the particular tract is "ceded land". Therefore, it is my recommendation that Nebraska's proposition No. (1) above be rejected.

Concerning Nebraska's proposition (2) above, it is my opinion and recommendation that said proposition be rejected because recordation of state owned lands in the Iowa General Land Office was a purely ministerial requirement, and the people of Iowa should not be deprived of their public lands simply because some official failed to perform a ministerial act. I would point out, also, that in 1943 and prior, it was a practical impossibility for Iowa to keep any accurate record of her state owned lands along the Missouri River because of the wild and restless nature

of the river. It was not mere dereliction of duty that Iowa officials in 1943 and prior, were not keeping a number of survey crews on station along the river to accurately survey, chart and record all movements of the channel and all land formations then being created or washed away.

As I understand Nebraska's proposition (3) above, she does not ask this Court to strike down the long recognized and well established presumption in favor of accretion and against avulsion. What she does ask is that the State of Iowa be barred from having the use or benefit of said presumption in litigation concerning the ownership of Missouri River lands. This Court and the courts of numerous states have recognized and employed the presumption in many accretion cases. See Report of Special Master Marvin Jones in *Louisiana* v. *Mississippi,* No. 14 Original, Oct. Term 1962; Report of Special Master Harvey M. Johnsen in *Illinois* v. *Missouri,* No. 18 Original, Oct. Term 1969; *Arkansas* v. *Tennessee,* 246 U.S. 158; *Nebraska* v. *Iowa,* 143 U.S. 359; *Jeffries* v. *East Omaha Land Co.,* 131 U.S. 178; *County of St. Clair* v. *Lovingston,* 23 Wall. 46; *Shopleigh* v. *United Farms,* 100 Fed. 287; *Plummer* v. *Marshall,* 59 Tex. Civ. App. 650, 126 S.W. 1162; *Municipal Liquidation* v. *Tench,* (Florida) 153 So. 728; *Gubser* v. *Town,* 202 Ore. 55, 273 P.2d 430; *Wyckoff* v. *Mayfield,* 130 Ore. 687, 280 Pac. Rep. 340; *Bouvier* v. *Stricklett,* 40 Neb. 793, 59 N.W. 550; *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097. The presumption favoring accretion and against avulsion and the presumption favoring the permanency of boundaries, which are very similar, and which produce the same result, are too deeply rooted in our law to now be uprooted. Nebraska argues that these presumptions are unfair and inequitable, but this argument is not well taken.

I perceive no reason why the State of Iowa should be deprived of the use and benefit of these presumptions in liti-

gation when they are operating in her favor. It would be a most unusual rule of evidence if it were to operate or not operate depending solely upon which party is claiming it. There is no terminology in the Compact which could possibly be construed as a repealer or partial repealer of the presumptions. I recommend that the presumptions be left unimpaired to benefit whomsoever they may benefit in litigation concerning ownership of lands in the vicinity of the Missouri River.

Nebraska's proposition (4) above would create an irrebuttable presumption where none has existed in the law heretofore and it is my opinion that no such new presumption should be now created. The evidence before me in the instant case demonstrates that the facts surrounding the formation of each of the nine areas which were formed before 1943 and the facts of Nebraska's purported exercises of jurisdiction over them prior to 1943 are different; each of the nine sites must be judged upon its own facts; this Court should not attempt to lay down any broad irrebuttable presumption to control all cases such as Nebraska proposes.

Nebraska's proposition (5) above is contrary to all case law on the subject heretofore. So far as I have been able to discover, the general and universal rule has been that when the thalweg of a stream moves, the boundary moves with it if the thalweg movement was by accretion, but the boundary does not move with it if the thalweg movement was by avulsion, and this is true regardless of whether the thalweg movement was caused by the forces of nature or by the forces of some third party man-made endeavor. The law of Nebraska is contrary to Nebraska's proposition (5). *Burkett* v. *Krimlofski,* 167 Neb. 45, 91 N.W.2d 57. The law of Iowa is to the contrary of Nebraska's proposition (5). *Solomon* v. *Sioux City,* 243 Iowa 634, 51 N.W.2d 472. This

Court has adopted and followed the general rule that whether the movement was natural or affected by artificial means is immaterial. *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 23 L.Ed. 59. *Louisiana* v. *Mississippi,* No. 14 Original, Oct. Term 1962, 384 U.S. 24, 16 L.Ed. 330, 86 S.Ct. 1250.

There is reason and equity behind the general rule; there is no good reason to discard it and adopt Nebraska's proposal.

Summarizing my opinions and conclusions concerning the disputed areas which formed before 1943: (1) In prior Divisions hereof, I have stated my findings and conclusions concerning Nottleman Island and Schemmel Island. (2) Iowa's ownership of Deer Island and Wilson Island has been settled and determined and nothing herein should be construed so as to reopen any question concerning the ownership of them. (3) Nebraska should be awarded some specified time after final determination of this phase of this case in which to elect whether or not she desires to adduce additional evidence bearing upon whether or not the areas which Iowa claims to own at St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and the part of Winnebago Bend which existed before 1943, or any part of them, were in Nebraska by the facts of their formation or by recognition in and prior to 1943 and whether or not there were good titles in Nebraska to said areas, or any part of them, which Iowa bound herself by the Compact to recognize. (4) The presumption favoring accretion and against avulsion and the presumption favoring permanency of boundaries should apply in making determinations as to where the pre-1943 state boundary was. (5) The rule that the pre-1943 boundary moved with the thalweg when the thalweg moved by accretion but that it did not move when the thalweg moved by avulsion, should apply in mak-

ing all determinations of where the pre-1943 state boundary line was. (6) Iowa should not be enjoined from questioning all titles flowing from Nebraska. (7) Iowa should not be enjoined from claiming lands which were not recorded as being state owned in the Iowa General Land Office prior to 1943. (8) The usual and ordinary rules of prescription, acquiescence and recognition should apply in determining what lands were ceded and what lands were not by operation of the 1943 Boundary Compact.

B. Having discussed the areas which were in existence prior to 1943, we now have remaining for discussion the 21 areas (and part of a 22nd area) which Iowa claims to own and which have formed since 1943. There is no question as to where the state boundary line was when these areas came into existence because, in 1943, the two states had fixed and established the boundary as an unmoving line, to-wit: the center line of a designed channel as shown on certain maps. All the areas now under discussion are now in Iowa; hence it follows that they formed in Iowa. I should note that Iowa does not claim to own all areas which have formed in Iowa since 1943; only those areas which she considers to be state owned by reason of Iowa law and the facts surrounding their formation.

All of the areas formed since 1943 are upstream from Boyer Bend, which is approximately 21 river miles upstream from Omaha, Nebraska, and Council Bluffs, Iowa. The reason why there are no areas formed since 1943 downstream from Boyer Bend is that the river did not escape from the 1943 designed channel at any point in those approximate 84 miles. Hence, below Boyer Bend, the river has not washed away any land, created any new river bed, created any new land, or abandoned any channels since 1943. As I have hereinbefore noted, however, in the approximate 97 miles from Boyer Bend to Sioux City, the river escaped

from the 1943 designed channel at numerous places after 1943. In doing this, the river washed away substantial bodies of land along both banks, created new river bed, created new land, and abandoned its channel at many places. Then, when the Corps of Engineers re-designed the stabilized channel and placed the river in it, lands were washed away, more new river bed was created, more new land was created, and more channel was abandoned. These things happened on both sides of the Iowa-Nebraska Boundary but we are presently concerned with only the Iowa side because the 21 areas and part of a 22nd which Iowa claims to own are all on the Iowa side.

Concerning these areas which have formed in Iowa, east of the Compact boundary, since 1943, Nebraska asks this Court to declare and adjudge that the State of Iowa owns none of them because: (1) by operation of the Compact, Iowa's common law of state ownership of river beds, abandoned river beds and islands no longer applies to the Missouri River, (2) by operation of the Compact, Iowa waived, relinquished and contracted away all claims to land ownership in the vicinity of the Missouri River, (3) Nebraska riparian landowners retained precisely the same accretion rights in Iowa, after cession of their lands and river beds to Iowa by operation of the 1943 Compact, which they previously had when their lands and river beds were in Nebraska, and (4) private property boundaries along the river remained at the thalweg of the stream after the 1943 Compact, the same as they had been prior to 1943, and said private boundaries remained moving boundaries with later movements of the thalweg.

The sum total effect of Nebraska's propositions (1) and (2) above, were they to be adopted, would be to extinguish utterly all of Iowa's claims of land ownership, river bed ownership, and abandoned channel ownership

in the vicinity of the Missouri River, and this would be a very simplistic and final ending to the present case. But my most careful and prudent reading of the 1943 Boundary Compact discloses no terms, phrases or language which can be construed as saying that Iowa repealed her historic common law when she adopted the Compact. And although Nebraska has tried strenuously to adduce evidence concerning the circumstances surrounding negotiations leading up to the Compact, circumstances surrounding adoption of the Compact, and circumstances which have transpired since the Compact which would entitle or command this Court to so construe the Compact, she has failed. Therefore, it is my opinion and conclusion that the common law of Iowa regarding state ownership of river beds, islands and abandoned channels remained unchanged after 1943 and it was not repealed, altered, modified or changed by the Compact, and it continued to apply to lands along the Missouri River the same as it did over the rest of the state.

The reasons which impel me to reach the above conclusion are many and varied. I mention some of them, not necessarily in their order of importance. First, I search the Compact in vain for any language, phrases or terms which could possibly be construed or interpreted as saying that Iowa was repealing or changing her historic doctrine concerning state ownership of navigable river beds, abandoned river beds, and islands, or that Iowa was excluding the Missouri River from that doctrine's application. I search the record of negotiations leading up to adoption of the Compact in vain for any evidence that it was Iowa's intention or Nebraska's expectation that there would be any change in Iowa's common law doctrine. I search the evidence concerning Iowa's conduct after the Compact in vain for anything indicating that Iowa was unilaterally interpreting the Compact as a repealer or partial repealer of her common law doctrine.

As a matter of fact, the evidence before me discloses that on two separate occasions in 1939 and 1942, the Iowa Conservation Commission refused to sell Wilson Island; that in 1944, Iowa was causing a survey to be made of "Nobles Lake", a state owned oxbow lake then about a half mile from the Missouri River; that in 1947, Iowa was in court to enjoin the draining of Nobles Lake by a local drainage district; that during the 1940's and 1950's, the Iowa Conservation Commission was almost continuously studying and considering what best use the state owned areas along the Missouri River could be put to.

Next, my conclusion expressed above is in accord with the law of the Eighth Circuit as delineated in *Tyson* v. *Iowa,* 283 F.2d 902, and with the law of Iowa as delineated in *State of Iowa* v. *Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135, and numerous other cases decided in the Iowa Supreme Court since 1943. It inheres in *Tyson* and in *Raymond* and in numerous other decisions that the Iowa common law doctrine was unchanged and not repealed in whole or in part by the 1943 Boundary Compact, and I see no valid criticism of these decisions. For detailed discussions of the Iowa doctrine and its applications, in addition to the two cases cited above, see *McManus* v. *Carmichael,* 3 Iowa 1; *Holman* v. *Hodges,* 112 Iowa 714, 84 N.W. 950; *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097; *Payne* v. *Hall,* 192 Iowa 780, 185 N.W. 912; *Bigelow* v. *Herrink,* 200 Iowa 830, 205 N.W. 531; *Solomon* v. *Sioux City,* 243 Iowa 634, 51 N.W.2d 471; *Wilcox* v. *Pinney,* 250 Iowa 1378, 98 N.W.2d 720; *Dartmouth College* v. *Rose,* 257 Iowa 533, 133 N.W.2d 687.

Next, my conclusion is in accord with the rule against implied repeal, one of the restatements of which appears in *Reeves & Co.* v. *Russell,* (N. Dak.) 148 N.W. 654, at page 659:

"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.' "

See also *Bandfield* v. *Bandfield,* (Michigan) 75 N.W. 287; and Earl T. Crawford text on *Statutory Construction,* Sec. 228, page 422.

It is also in accord with the rule that any court, while it may construe legislation, must not legislate. Mr. Justice Davis in *U. S.* v. *Union Pacific R. R. Co.,* 91 U.S. 72, stated this rule at pages 85 and 86 as follows:

"* * * 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 gen-

> eral 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. * * *"

My conclusion is also in accord with the rule that a statute shall be construed so as to diminish the rights of the public only so far as is made necessary by an unavoidable construction. *Massachusetts* v. *New York*, 271 U.S. 65, 89; and cases cited therein.

If I were to construe the Compact as Nebraska proposes, I would be indicting the Legislature and other officials of Iowa who engaged in negotiation of the Compact for total abdication of their responsibilities to the citizens of Iowa and to the public generally. Whatever areas Iowa owned in 1943, and whatever areas she now owns as a result of channel movements since 1943, are public property. They were and are owned by the state in trust for the use, benefit and enjoyment of the general public. Iowa's rights are rights of the public. Particularly in this present era, when public lands and waters are no longer plentiful as they once were, and public recreational areas for camping, boating and the like are in such great demand, I believe there is more reason than ever to construe statutes, compacts and laws so as to diminish the rights of the public as little as possible consonant with unavoidable construction.

In addition to the legal difficulties which Nebraska encounters in putting forth her contentions for construction of the Compact, there are also very substantial practical difficulties:

If the Compact were construed as saying that by its operation, Iowa waived, relinquished and contracted away

all islands, bars and other land areas along the Missouri River, the inevitable question next to arise would be: Who are the gratuitous grantees and beneficiaries of Iowa's largess? Nebraska seems to be saying that this question should be answered by application of Nebraska law. But all of the areas involved herein are located in Iowa, and the law of Nebraska does not apply to them because her law applies only within the borders of Nebraska.

Another practical difficulty encountered, were Nebraska's proposition to be adopted, would be: Precisely where would the demarkation line be located as between the lands which Iowa waived, relinquished and contracted away and the lands which she did not? In other words, how far into Iowa would Nebraska law apply? Nebraska's terminology is simply "along the river"; this terminology is too vague and imprecise for legal purposes.

The proper place for Nebraska law to cease application and for Iowa's law to commence application is at the state boundary, and my conclusion is in accord with this rule.

For many reasons, only some of which I have mentioned above, I find, conclude and recommend that Nebraska's propositions (1) and (2) be rejected. In lieu thereof, I find and conclude that Iowa's law concerning ownership of lands, islands, bars, river beds and abandoned river beds in the vicinity of the Missouri River remained the same after 1943 as it was before, and its application remained state-wide including all areas in Iowa along the Missouri River.

There is a close relationship between Nebraska's propositions (3) and (4) relating to the areas formed since 1943 and stated hereinabove, and I shall therefore discuss both together.

At several places along the river, the 1943 Iowa-Nebraska Boundary Compact had the effect of changing the state boundary substantially. These places were the places where there had been avulsions prior to 1943 so that the pre-1943 boundary was not in the river; it had been left in some abandoned channel as a result of the prior avulsion. I make no attempt here to itemize where these places were, or may have been, because the evidence before me is incomplete as to many places, and from my limited information, I cannot determine where there may have been pre-1943 avulsions and where not. Suffice to say at this point that the places where there had been pre-1943 avulsions were relatively few.

Along perhaps 90 per cent of the boundary, both the pre-1943 boundary and the boundary established by the Compact were in the river, because in 1943 the river was in the designed channel; the thalweg was in the designed channel; and the new boundary was described as the center-line of the designed channel. Therefore, along this 90 per cent of the boundary, the Compact had little or no effect of moving the boundary from one place to another place.

Nebraska, in her propositions (3) and (4), is contending that although the Compact affected and changed the state boundary all along the river, it did not affect or change private boundaries or private land titles whatsoever. But it is my opinion that Nebraska overlooks or ignores a very important feature, perhaps *the* most important feature, of the Compact. By the Compact, Nebraska ceded to Iowa jurisdiction and sovereignty over all land east of the new boundary. She gave up and surrendered to Iowa all jurisdiction and sovereignty she may have formerly had over the lands east of the boundary. She said in effect that Nebraska law would no longer apply east of the

boundary. Nebraska should now be held and bound by it. Nebraska should not be permitted to project the operation of her law beyond the agreed line, and Iowa cannot project the operation of her law into Nebraska.

It is my opinion and conclusion that both Iowa and Nebraska intended when they entered into the 1943 Boundary Compact that henceforth and after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law. In other words, good titles to Nebraska lands which Iowa agreed to recognize as good in Iowa became good Iowa titles; they did not become good Nebraska titles in Iowa. And good Iowa titles to lands ceded to Nebraska became good Nebraska titles, not good Iowa titles in Nebraska. Iowa is still entitled to have her law that the state owns the beds of all navigable rivers in the state and that private land titles terminate at the ordinary high water mark. Nebraska is entitled to have her law that private land titles shall extend to the thalweg. But the law of Iowa must stop at the boundary and Nebraska law must stop at the boundary.

This conclusion is in accord with the general rule that no state may extend or project the application of its laws beyond its own borders, and in matters of land titles, lex loci must be the controlling rule. Mr. Justice Johnson stated the rule in *Hawkins* v. *Barney,* 30 U.S. 294, 5 Pet. 457, 8 L.Ed. 190, as follows:

> "* * * the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined."

The Court's comments at 30 U.S. page 300, are particularly apropos to 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."

More recently, see *Arkansas* v. *Tennessee,* 246 U.S. 158, at page 175, where this Court stated:

> "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 (sic) doctrine that it is for the States to establish for themselves such rules of property as they deem expedient. . . ."

Nebraska's propositions (3) and (4) were dealt with directly in the *Tyson* case, which I have hereinbefore men-

tioned. This case is important, it is the law of the 8th Circuit, and it warrants detailed discussion because, if I were to adopt Nebraska's said propositions, I would be disavowing and overruling it. The case is cited as *Tyson* v. *Iowa*, (1960) 283 F.2d 802.

The land in Tyson Bend which later became the subject of controversy began to form in 1948. The Missouri River had been in the designed channel in 1943, but between 1943 and 1948, the river escaped from the designed channel by washing away the left bank stabilizing structures and the land along the left bank. That is to say, the left bank moved into Iowa. The state boundary remained at the center line of the designed channel per 1943 Boundary Compact. After the left bank had moved a mile or thereabouts into Iowa, an island arose from the bed between the designed channel and the main channel. The island arose in Iowa. It was an island because when it arose and for several years thereafter, waters of the river continued to flow around both sides of it, the main channel flowing to the east of it and water continuing to flow through the designed channel to the west of it. In the 1952 flood, the designed channel was filled with sediment and the island was connected to the Nebraska shore. In 1958, the Corps of Engineers had determined to place the river back into the designed channel at Tyson Bend and to accomplish this by dredging a canal in the designed channel and then diverting the river through the canal. Eminent Domain proceedings were commenced to condemn an easement on the island so that spoil from the dredge could be cast upon it. The issue litigated was who was entitled to the compensation for the taking and this turned upon who was the owner of the island.

Three parties or sets of parties laid claim to ownership of Tyson Island. The State of Iowa claimed it as an

island formed over the state owned river bed in Iowa under the Iowa doctrine of state ownership. The Harrop claimants claimed it because they held the old Iowa titles to the land which had existed in that spot under the sky before the river began its escape eastward from the designed channel. The Tyson claimants claimed it as an accretion to Nebraska land or river beds belonging to them.

The decision in District Court was for Iowa and this was affirmed on appeal. The Harrop claim was rejected because the lands they once owned had been entirely washed away. The Tyson claim was rejected because the island had not arisen as an accretion to any land or river bed owned by them. Iowa was adjudged owner of the island and entitled to the compensation because the island had arisen from the state owned river bed in Iowa.

Nebraska's contention now put forward in this case that the private boundary of the Nebraska landowner continued to be a moving boundary after the Compact and moved into Iowa as the thalweg moved into Iowa was rejected in the *Tyson* case, where it was being put forward by the Tyson claimants. It is my opinion that the law of the *Tyson* case is good law; that the *Tyson* case should not now be overruled or disavowed.

Numerous reasons why the courts decided the Tyson case as they did and why the case should now be upheld are apparent. It is my opinion that rule of *Tyson* gives effect to the 1943 Boundary Compact as the two states intended an expressed their mutual intentions. The language of the Compact is "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line - - -". To me, the courts were simply applying the above quoted language from the Compact when they decided the *Tyson* case as they did, and if this court were now

to adopt Nebraska's propositions (3) and (4), it would be ignoring or violating the plain import of that language.

Nebraska argues that the Compact should be construed so as to make it carry out the mutual desire of the two states to put at rest future controversies along the boundary. The rules and result of *Tyson* have this effect. The rule of *Tyson* is that Iowa law applies in Iowa and Nebraska law applies in Nebraska. Firm adherence to this rule should go far toward putting at rest future controveries.

The *Tyson* case did not deal with a situation where accretions to the high bank land of a Nebraska owner had formed and extended gradually from the Nebraskan's high bank land and then across the fixed state boundary and into Iowa. The evidence before me does not show that this has occurred at any of the areas which are involved in this case. Therefore, I don't believe I am called upon in this case to decide whether or not a landowner in Nebraska may accrete across the fixed state boundary into Iowa. Concerning this matter, I will simply say that I see no reason why a landowner in either Nebraska or Iowa should be barred from owning all accretions which may form gradually and imperceptibly to his riparian shore even though they may extend across the fixed state boundary and into the other state.

I would summarize my findings and conclusions concerning possible applications of the 1943 Boundary Compact upon the several areas which have formed since 1943 and which Iowa claims to own by the facts of their formation and by operation of the Iowa common law upon such facts, as follows:

(1) Each state ceded sovereignty and jurisdiction to the other over all lands, river beds and abandoned beds

situated beyond the new boundary, by operation of the Compact.

(2) The Iowa common law doctrine concerning state ownership of the river bed, abandoned beds and islands was not repealed or altered by the Compact and it applies to areas formed in Iowa since 1943 the same as it did before 1943.

(3) Titles to lands which Nebraska ceded to Iowa by the Compact became good Iowa titles and did not become good Nebraska titles in Iowa. Therefore the boundary of all land in Iowa riparian to the Missouri River is the ordinary high water mark.

(4) After 1943, Nebraska land titles have terminated at the agreed line fixed by the 1943 Boundary Compact.

(5) Since 1943, if there have been any occasions where accretion lands have formed gradually to the high bank land of a Nebraskan or an Iowan, his boundary shall include his accretions even if such accretions may extend across the fixed boundary and into the other state, and the same should apply to other accretion lands which may form hereafter.

(6) By the Iowa doctrine, if any accretions form to a riparian landowner's high bank and extend over the formerly state owned river bed, title to that part of the river bed which was formerly state owned and becomes occupied by such accretion lands passes from the state to such riparian owner whenever such accretions arise above the ordinary high water mark. But if an island forms upon the state owned river bed in Iowa, not attached to the riparian shore, such island remains state owned.

(7) By the Iowa doctrine, if a channel of the river becomes an abandoned channel by an avulsion, either natural or man made, title to such abandoned channel remains in the State of Iowa.

IOWA'S COUNTERCLAIM

Counsel for Iowa have stated throughout the pendency of this case that they desire consideration of Iowa's Counterclaim on only one condition, to-wit: If the Court were to construe the Compact so that it would repeal the Iowa common law doctrine of state ownership, or bar the Missouri River from application of that doctrine, or subject areas in Iowa to control by Nebraska title laws; then and in that event, Iowa would desire a further construction of the Compact to determine how and to what extent the common law doctrine of Nebraska was also repealed or changed by the Compact, or its application limited, or to what extent Iowa law might now apply in Nebraska as a result of the Compact.

As will be seen from what I have said hereinabove, I recommend a construction of the Compact which leaves the Iowa common law doctrine intact to apply to all lands and river beds in Iowa, and it is my opinion that Nebraska title laws stop at the boundary and do not apply in Iowa. Of course, the reverse of this is also true; Nebraska is entitled to have her own common law regarding ownership of river lands and river beds to apply to all areas on her side of the boundary. It is my opinion that the Compact did not repeal or change the common law of Nebraska; the common law of Iowa concerning ownership of river beds and river lands ceases applying at the boundary and does not apply in Nebraska.

Accordingly, it is my recommendation that Iowa's Counterclaim be denied and dismissed.