IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

VS.

STATE OF IOWA,
Defendant.

TRANSCRIPT OF ORAL ARGUMENTS MADE BEFORE HON. JOSEPH P. WILLSON, SPECIAL MASTER

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THE COURT: Well, we have a little different display I notice today. I know one side of the coin sometimes looks a little different than the other side.

MR. WALKER: We hope so.

THE COURT: So now we'll proceed on the Iowa side.

MR. MANNING WALKER: Your Honor, Mr. Moldenhauer, Mr. Moore, if the Court please. I would like to take just a moment to express my appreciation for the consideration that I have been given by the Court and by Nebraska counsel. This has been a very long unusual case; to me it's been very interesting. And regardless of the comments in the heat of battle I still consider it an honor to represent the State of Iowa.

There have been statements made the last couple days about the reneging on the part of Iowa in the 1943 Compact, and there have been some statements about our sanctimonious attitude; and although I might again be accused of waving the flag, I still think that Iowa has tried to follow the agreement between the States and has followed the

rules laid down by our Supreme Court in regard to relationships between states. They followed their statutory and common law, and when I say that I say that advisedly, knowing that all governments are conducted by individuals and those individuals don't always agree from administration to administration and from office to office.

However, by and large, I feel that Iowa has consistently followed the law of Iowa with regard to meandering streams, and I would like to emphasize that the law of Iowa in that regard is the general and more accepted thesis than the Nebraska law, which as far as I can find out is almost unique in the fact that the State of Nebraska after adopting the Iowa law in the first Kinkead case then reversed itself on rehearing and stated that they were going to deny the State of Nebraska any right to claim accretion on the navigable streams.

I would like to point out in that rehearing case the Nebraska Court stated that both theories were acceptable, both were based on sound and sane reasoning, but in their opinion their course of action was better for Nebraska. It so happens that Iowa adopted the other theory. I don't want to repeat too much of this because it's in the brief.

The evidence here, I think the Court will agree, has been very complete, I don't think anything that could aid the Court has been left out by either side. I would like to point out though that there are some basic rules of law which I think the Supreme Court

expects us to follow and their propositions would have to be kept in mind, not only in arguments but in the determination of the final decision -- and, of course, I can't find it. Again, I may have too many of them but I think they, they come up all the way through the briefs.

I think we should keep in mind the law of avulsion and accretion. The Courts for sound and basic reasoning on their part, at least, have held that on the Mississippi River as laid down in Iowa versus Illinois, where Iowa attempted to promote the proposition that they should go to the middle of the river between the banks, and the Court laid down the rule that the thalweg. But in that case they also set out the fact that in Iowa versus, or, Nebraska versus Iowa in 1890 or '92, that there is a presumption that the river moves by accretion. Now Nebraska says that's wrong, that we shouldn't use it. Well, I think we'd be derelict in our duty if we didn't take advantage of legal presumptions laid down by the Courts that are going to decide in a particular case.

But there's another reason for that. In the history of the Missouri River when Lewis and Clark came up the river in their journey the Missouri River ran almost from bluff to bluff. They used to speak about traveling all day when Lewis walked, in fifteen or twenty minutes, walked back to where they left that morning, but the flood of 1881, which from all the arguments indicates that the grand-

daddy of all floods came down the Missouri Valley and almost channelized the river, it shortened it some seventy, eighty, ninety miles, I don't remember just exactly, the mileage on the river." From that day on there were very few avulsions in the legal sense, in the sense that the river avulted around a substantial identifiable piece of ground. There have been thousands and thousands avulsions around sandbars and small formations in the river. There have been thousands and thousands of sandbars and small, small vegetation islands destroyed in the Missouri River, but in a legal sense that's not an avulsion. The typical avulsion, even demonstrated by Dr. Gililland, the expert from Nebraska, who gave us the freshman lecture on geology, the typical avulsion is Carter Lake, a complete loop, McKissick Island; there are very few avulsions until there's almost a circle been completed in the legal sense.

The case that comes to mind is the towhead, I believe between in the case of Arkansas versus Tennessee, and don't hold me to that, but I'm sure it's in the brief, Nebraska cited it and we cited it, where the Court indicated that they were holding that there could be an avulsion in the bed of the stream, and that's about as far as the Courts have ever gone is in that case. But there they emphasize that they felt it was an avulsion because this large substantial, in fact, I think they used the word "massive" towhead had developed in this bend in

the river, and the Corps tried two or three years to cut a canal through it and move it to the base of that arc, but they were ineffective until a flood and then for some reason the river took these canal channel and they held there that there was no argument in which state the towhead developed and in their opinion it was substantial and massive, and they concluded it was an avulsion. But if you'll read that decision you'll also find that it really wasn't below high water mark because the Court said "We hold that this was an avulsion even though the waters (sic) of the river (sic) infrequently overflow it." Well, I suggest that the islands that are in dispute in this case are infrequently inundated even today with the control on the Missouri River, and definitely before 1943.

I point out that both Nottleman and Schemmel are within the flood plain of the Missouri River, they are both riverward of the Army Corps government dikes. For this reason we feel that the presumption in our favor that the river moved by accretion is effective.

Now, the next proposition I think is material to keep in mind is set out in our brief, and that is with regard to the movement of the boundary, and I'm talking now about pre-1943, where the movement of the river by natural, gradual and imperceptible processes of accretion, washing everything in its path, the boundary follows the stream. But you will note in there, in the brief, and without

argument that the authority for the fact that man has something has something to do with that movement, or the Corps of Engineers, doesn't change the rule. If the Corps moves the river gradually, slowly, and imperceptibly it's accretion. If they block up the river and shove it around, a large identifiable piece of ground, and it's identifiable afterwards as the same ground, then it's an avulsion even though it's man-made; and Iowa ascribes to that rule the same as we do all the other rules laid down by the Court, because we feel that they are based on experiences, prior cases.

The proposition which was discussed here between the Court and the counsel for Nebraska about what it means to cede property. When one state cedes territory to another from time immemorial it has never affected private owners, private titles, and we don't think that it was intended that any private title should be affected by the 1943 Compact.

This case is here because Iowa and Nebraska can't agree on what they ceded, and particularly in the two islands where most of the testimony was performed. Simply stated Iowa believes that when they make an investigation, as they did in Nottleman and Schemmel and they find that at some time in history the land involved is not in existence and that the river is to the west of it, and has always been to the west of it, they have no duty and it would be an ineffectual effort to go over and find out what Nebraska did when the evidence is to the effect that

the land was never in Nebraska. And we feel that what the Nebraska courts did is void. We can't take title to the Douglas County Courthouse just because I can get somebody on the street to give me a deed to it and I record it over here in Iowa, and then ten years later go and say "Well, I own this, you're going to have to get the Courthouse off of it." It's as simple as that. The courts and the authority of Iowa shouldn't be allowed to interfere with the titles in Nebraska, and vice versa.

Now when we get to the question of cede, Mr. Moldenhauer said that, up to this point I think that he agrees with me, that you're only giving jurisdiction in dominion and sovereignty, you're not giving the property, and when Nebraska ceded to Iowa they didn't give Iowa title to any land that was owned by Nebraska citizens or owned by Iowa citizens on the Nebraska side of the river, which the law of averages there should have been some, but from that point on we differ. He thinks, he feels -- although I can find no authority for it -- that merely because Iowa was a signatory to the Compact, when she said "cede" that she was giving up her private titles, Iowa's private titles. Now I -- that I can't follow. If Iowa or Mills County or even the City of Glenwood owns some property out on the river I don't believe that the Compact would affect that title, and I don't think it was intended that Iowa should give up any of her privately owned real estate under the term of cessation.

THE COURT: However, let me get that, when you say privately owned, you mean State-owned?

MR. WALKER: State-owned.

THE COURT: State-owned, County-owned, Government-owned.

MR. WALKER: How do you differ between the title in Manning Walker and the title in the State of Iowa? They are both merchantable, they are both transferrable, and I can't, I can't differentiate in my own mind why you can talk about private titles on one hand as it being something different than State-owned titles.

Now we have set out in the brief, and I don't intend to go into it here, but there's, there's authority in there to show that even though one state can prevent another state from owning property within its boundaries, it's quite common for them to allow the other state to do so, and there's cases cited, and they say that they can hold that property and their title there is good as long as the state that the state that the property lies in allows it. Now we feel that under the Compact Iowa had no intentions of giving up any real estate for the simple reason there was no reason to. Nebraska owned no real estate, they had no real estate to give up, and when you're talking about compromise, which I want to avoid, because Mr. Murray is going

to discuss it, compromise presupposes that both sides give up something, and I have yet to find anything in the, in this case where Nebraska has in any way stated that they gave up anything. They say it changes all Iowa laws but it doesn't change Nebraska laws; Iowa gives up all their land but Nebraska doesn't give up any land, so when you talk about compromise I think you have to get a definition of compromise.

THE COURT: Well, when you say that though, Mr. Walker, it seems to me that the contention is that nobody knew who owned what land.

MR. WALKER: Well --

THE COURT: At that time we're talking about now, nobody knew, here we are, we, just a minute ago you talked about the White Plains, and so on -- we didn't know what was Iowa or Nebraska, that's the troublesome part of that.

MR. WALKER: I want to get into that. I disagree in part, there's no fact, there's no point, no point in me sitting here and arguing with the long history --

THE COURT: I mean, that's their contention with respect to that.

MR. WALKER: I know what their contention is, and as a basis of that, they set out the wild, uncontrolled river, and they, they say that it whiplashed here and there and it whiplashed there.

THE COURT: Well, you agree with that, don't you, that that's the characteristics of the river?

MR. WALKER: Well, up to a certain point, but I don't feel that I should overrule Iowa and Nebraska, or Iowa and Illinois.

THE COURT: No, I --

MR. WALKER: Or Arkansas-Tennessee, Virginia, there's any number that says the river generally, as a general rule, the river moves by accretion; avulsion is the exception. I believe that these Courts were introduced with evidence when they laid down those rules that convinced them that that was a reasonable rule. The fact that Mr. Schwob and Mr. Bailey, as Howard testified, said that the Conservation Commission wasn't particularly interested in the Missouri River prior to the '30's and up until 1943, until the river was controlled, for the reason that it wasn't stable enough to expend time and effort to develop. They might go out and develop an area like Nottleman Island for recreational purposes, and two years later the flood come along and cut, the river cut

right down through it and washed, washed the whole island away.

Now I, I'll grant you that; but the fact is nobody ever tried to locate the boundary except Nebraskan riparian owners, and the reason for that was they could acquire that by adverse possession or by accretion to their land, and if it developed sufficiently to get a few crops off of it before it washed away, fine and good.

You didn't have that in Iowa for the simple reason the Iowa riparian owners knew that they didn't own these islands in the river, and they were used for duck hunting and fishing and wild unnatural territories. And we, we didn't have very many Iowans going out and claiming these islands for the simple reason they knew what the law was, they did claim, and there are plenty of cases, the accretion, because it's not, hasn't been very often brought out here in this Court but, in this case, but Iowa allows accretion to the shore lines and they don't claim it as State-owned, they give it to the riparian owner. The only time that Iowa is different than Nebraska is when it accretes to the bed of the stream, the Iowa bed. And when you get into a question of, of Iowa picking and choosing sites, it's ridiculous because Iowa goes in and investigates these areas and if it doesn't, if they can't establish that it forms as an island, they don't claim it, or they shouldn't claim it. I can't sit here and categorically say that they've never claimed some place

they shouldn't have, because they are human too, these officials.

But they talk about Kirk-Bar and they talk about Paine versus Hall. Now they have had Payne, reversed Payne versus Hall, which is the area immediately above one of the disputed areas here, it's west of the Iowa Chute in the Schemmel area, the accretion land that was involved in the Payne versus Hall is immediately west of the Iowa Chute, on the north end above Albert Propp and Givens. I think there was even introduced a survey, or a map fromthe library of the Supreme Court taken from that case. But in that case the Court held that even though there was a chute which they termed the Iowa Chute, and at which times had running water in it, they said that the evidence was not sufficient to even establish that as a chute for the Missouri River, that there was a swamp inland upriver and there was evidence that it drained from there, but they said in any event it accreted away from that bank, and in so doing threw up a rice paddy, leaving the chute. But in their opinion from all the evidence available in 1921 that was accretion.

Now when Nebraska talks about the river moving over to the Iowa Chute and then avulting back, they're asking this Court to reverse Payne versus Hall, that tried the case almost fifty years ago, because it's in that area between the Iowa Chute and Schemmel Island that accretion is identical with the

accretion of Payne versus Hall, just downriver a little bit.

The same situation existed in Kirk Bar, sure, there was a little water channel around there, but Iowa couldn't prove that that had been Missouri River, or that that chute didn't develop after the land had accreted. There is, there are many places that Iowa probably felt, some individuals felt, we could claim this, but I'm not sure that we, we could establish as such. Why they didn't claim it only they will know but you can point out many places. When you get the tri-colored maps there's lake beds on both sides of the river, miles from the river; well, technically somebody could claim that in some instances.

I have my usual talent of getting off my outline, but I think at this point, Your Honor, I'd like to discuss what I think the issue is in this case.

THE COURT: The -- I think the Court will be interested in that.

MR. WALKER: Well, I have tried to characterize the issues from the --

THE COURT: If we can agree on what that issue is, I've been interested in that all the way through.

MR. WALKER: Well, I think we ought to start

with Mr. Moldenhauer's oral statement, or, opening statement in this case last April. You will recall he stated that after making all of these accusations and other arguments Justice Brennan interrupted him, and said, "Are you saying that "Iowa violated the 1943 Compact?" Mr. Moldenhauer said, "Yes, we are." And as Mr. Moldenhauertells it, Justice Breannan said, "Well, why don't you say so and sit down."

Now that to me indicated one thing; that in the unusual occasion when the Supreme Court of the United States invokes their original jurisdiction they limit their original jurisdiction for specific controversies. What Mr. Moldenhauer said, I don't know, I wasn't there, I don't know what all the arguments were; but that statement indicates to me that as far as Justice Brennan was concerned Nebraska could invoke the original jurisdiction of the Supreme Court if they could establish that Iowa violated the terms of the 1943 Compact.

Now how would they go about it? Now as far as the boundary dispute, I don't think the Supreme Court would accept this case as a boundary dispute because the evidence shows that although you can't go out there and pinpoint, and although they said the Surveyor Hart used five hundred foot cords and some places used uneven cords, and now whether another surveyor or Mr. Hart could come along and curve that after establishing the cords, I don't know, to pinpoint accurately, I'm not a surveyor.

But I believe with the exception of maybe two thousand feet the boundary between Iowa and Nebraska has now either been surveyed with some degree of accuracy or lies in the running water of the designed channel. It may not be in the center, but it's in the nine-foot channel. For that reason I don't think that there's any boundary problem that requires the attention of the Supreme Court of the United States.

It's not a parens patria theory because there's only four or five Nebraska citizens that are in any way financially hurt by this action brought by Iowa in, up and down the river. I don't know the exact number, there's families involved, but they're very small considered in this, it's not sufficient to require it to invoke the original jurisdiction of the United States, and I think the cases in our pre-trial statement prove that without any question. So from the arguments and from the briefs and everything else the only issue I can determine is that they say we violated the Compact.

Then comes the question; how did we violate the Compact? And as far as I can ascertain from their theories we are supposed to have violated the Compact by claiming Nottleman Island and by claiming Schemmel Island or Otoe Bend Island, and some way I, I don't quite follow this, we also violated the Compact because we didn't claim some places that we should have claimed, and we settled with some people which indicated we were picking

and chossing who we were going to bother. But I think if you go through the evidence you will, it will show in most instances where the titles to this Missouri River land is involved Iowa was sued, they were the defendants.

In some cases they make their investigation and disclaim, and if they felt they didn't have any claim to it I think that's what they should have done. Now maybe that's picking and choosing, I don't know, I don't know the facts upon which those people decided that. Then on other occasions they came in and defended, and the plaintiff said, "All right, if you, you believe that you own that, let's settle it." So they exchanged documents, setting boundaries between the State-owned land and the riparian owner.

THE COURT: Well, the Courts have always favored settlement, I don't think too much of that --

MR. WALKER: Well --

THE COURT: (Continuing) that it adds too much of a weight because they settle cases, I agree with that.

MR. WALKER: I think it's better for everyone --

THE COURT: I was hopeful that maybe we

could settle this case.

MR. WALKER: Well, Your Honor, I feel that you put Nebraska in a very unfair spot yesterday when you suggested that they try to settle it by accepting Nottleman and Schemmel Islands. They can't do that because they admit by doing so that that's the only reason for this lawsuit, which of course we believe would be, isn't an issue in this case. But by doing that they would have to admit that and I can see their point.

THE COURT: Well, do you say, Mr. Walker, this is a contract case then? When we say Compact aren't we saying contract?

MR. WALKER: Well, the same interpretation.

THE COURT: I think so; the old cases say that; Green versus Biddle, there's one.

MR. WALKER: The old cases threaten to get International Law into it, and all that, but they write down basically is what did the parties intend and have they carried out what they intended.

THE COURT: That's right, I think that's this case.

MR. WALKER: And getting back to that point

of the wild river, they go on after that and show great long periods of negotiations between the states, and correspondence between the Governors, appointment of Committees and Commissions and meetings of Commissions, and all of that; and from that they draw the conclusion that this was just a very general Compact, very general terminology, for the simple reason that there was so much, so many problems that they just couldn't solve them all anyway so let's just make a very general agreement.

But that isn't the history of mankind, and that isn't the holdings of the courts of Nebraska or Iowa or the United States, either one. Most courts feel that where there is long detailed arguments, efforts to reach an agreement between two parties, individuals or states, and they finally agree and they finally reach a written instrument, it's presumed by the Court that they put everything in that instrument that they intended to be there.

Even if the Court doesn't buy that argument, what is there in the negotiations, what is there in the river fluctuations, what is there in the Compact itself that says Iowa is going to give up all of their rights, going to change their laws, not change the common law of Iowa, they would have you believe that Iowa intends to change the common law along the Missouri River only, that we're going to have a conglomerated, high-bred, mixed-up title law in Iowa from now on out; that titles on the Missouri

River are not going to be the same as they are fifty miles from the Missouri River, the titles on the Missouri River are going to be different than they are on the Mississippi River, on the Des Moines River, and the Iowa River, and the other navigable streams, and Lake Okoboji and the other lakes.

We say that Iowa had no intentions of changing their common law or if they had of they'd have said so. I don't think that the Legislature would have ever considered a Compact if there was any inclination there. And again, all of these arduous and long, drawn-out meetings, and so forth, not in one of them, no evidence in this case whatever, in all of this stuff that they put in is there any evidence that Iowa said, "We are going to change our common law," or "We're going to give up our land on the Missouri River." Now don't you think that these newspaper reporters and the Commission's reports and legislative committees, and so on, would have made some little indication there?

The only one that I know of that even bears on the subject is in our brief, and that would be Nebraska State Surveyors laid out the approximate acres that each Nebraska county was going to gain or lose, and if you compare that, that establishes Iowa argument that Nottleman and Schemmel were not in Nebraska, because according to his figures they couldn't have been in Nebraska under that computation. But there is no evidence here that

Iowa intended to give up any of its, any of its common law with regard to title business.

And it's been - they talk about the Tyson case -- I don't like to disagree with the Judge when I'm arguing to him, but I believe the Tyson case rather great detail reaffirms Iowa's common law in many of the abstracts, they, they hold there that --

THE COURT: Of course, he didn't discuss the effect of the meaning of the Compact.

MR. WALKER: He discussed the Compact --

THE COURT: Very generally, he didn't say what is meant or a thing --

MR. WALKER: No, but in his opinion he discussed the 1943 Compact.

THE COURT: He said the Compact, this was not a Compact case, that was all that was said about it, that Iowa was, the land was on the Iowa side of the river by the Compact. Then he went on to say, the last sentence almost, I think he said that cases involving the dispute over the Compact were not in this case.

MR. WALKER: Well, if he held - he held that the, as most courts do, that jurisdictions to

try the title is in the state in which the land is located.

THE COURT: Yes, sure, sure.

MR. WALKER: Well, that's been our argument here from the beginning.

He also upheld the Iowa law of accretion to the bed of the stream.

THE COURT: Oh, yes, sure.

MR. WALKER: There isn't any question about that, he didn't change it --

THE COURT: We're discussing now the Compact, see, we're discussing the Compact. No one, no Court that I've seen in, nobody's cited a case where, where this Compact has been interpreted by any authoritative decision, the meaning of it, such as we got here. Nobody's said what is ceded, what "ceded" means, nobody's said what good title means, and all that sort of thing, under the terms of the Compact.

MR. WALKER: Well, I agree with you there, in other words, it's never been brought up as an issue.

THE COURT: No, that's what this Court's got

to do, that's what this Court is going to do, I think.

MR. WALKER: Well, doesn't this Court though have to consider what other judges have done in regard to -- in other words the Compact was the State of Iowa, the law of Iowa, as well as the law of Nebraska in 1960 when Judge Van Oosterhout entered this decision, and, and if he felt the Compact prevented Iowa from claiming beds in the navigable Missouri River, I'm sure he would have said so. Now the question is --

THE COURT: I don't --

MR. WALKER: (Continuing) does he have to decide --

THE COURT: That issue wasn't raised, that question wasn't raised, that issue wasn't raised, wasn't raised by another signatory to the Compact or anybody else who could raise it in that case.

MR. WALKER: No, but Iowa was in the case.

THE COURT: Yes, yes, but you, of course, didn't raise it.

MR. WALKER: Well, when you get, when you get to arguing there again about what the Compact

meant and with regard to private title, what happens.

Of course, there isn't any dispute that the Compact was in 1943, and there isn't any dispute that Nottleman and Schemmel Islands formed and became islands before 1943.

Now is this allegation of Nebraska that the Compact changed the common law of Iowa retroactive? If Iowa owned Nottleman-Schemmel Island they owned it before 1943. If they have any right to them at all that title vested when the island developed as accretions to the bed of the stream. There again I beg the question that they formed an island, but there are six others that I know of, State Line Island, Copeland, Alden Bar, Saint Marys, all of them south of Omaha, four of them, before the Compact, and Wilson Island and Raymond, north of Omaha, formed before the Compact. And the question arises - -

THE COURT: I think it's fair to say at this point, really my impression is that no one knew where the natural boundary was at that time, it hadn't been decided by either State, by the Engineers, or anybody else, at the time of their discussion, prior to 1943, there wasn't any litigation over the boundary then. Now --

MR. WALKER: Isolated cases.

THE COURT: Well, that might be, but there

wasn't any real determination of anything, that's the reason for the Compact. For instance, we talked about this yesterday, these little things come out, the Engineers didn't bother to ask anybody where the line was, they didn't care about the line, I think all the Engineer witnesses testified to that, they paid no attention to it until after the Compact, and then they started going into court and condemning land, when they were satisfied they were on the Iowa or Nebraska side; but before that nobody knew or cared or paid any attention to it so they made, they dug canals, dug ditches, put up their barricades, and all this sort of thing, all up and down wherever they wanted to, wherever they saw fit, engineer-wise.

MR. WALKER: Yes, but I think they testified here that if it was --

THE COURT: So when you say --

MR. WALKER: (Continuing) bar land they didn't condemn --

THE COURT: When you say this was in Iowa or Nebraska, those two islands, at any specific time before 1943, I think that, that's a disputed proposition, and I'm frank to say that the evidence it seems to me is pretty -- I don't know where it is on that subject.

MR. WALKER: Well, that's why we're here, because it is disputed.

THE COURT: I think so, yes.

MR. WALKER: I, I agree with you there, but --

THE COURT: I mean the physical evidence, I'm talking about now, aside from this recognition evidence.

Go ahead.

MR. WALKER: I would like to point out that there is in the evidence, Your Honor, and I don't expect the Court to read them, but I think you'll recall we presented bound copies of the Nebraska-Missouri River land pieces in each county, up and down the river --

THE COURT: Yes.

MR. WALKER: And, I don't remember the exact number, I think there were some forty-three quiet title actions involving accretion and riparian land.

On the Iowa side we have four or five in the same period of time. Now when people say "We didn't know where the boundary was, we didn't

know what the law was," I think that demonstrates that people in both Iowa and Nebraska, riparian owners, knew the law with regard to their riparian rights, both in Nebraska and in Iowa, and I fully believe that the Iowas knew the Nebraska law, and the Nebraskans knew the Iowa law; and that demonstrates that Iowa farmers didn't go out and claim lands or islands in the river because they knew that the state had some rights there. Nebraskans knew that all they had to do was occupy it for ten years against their neighbors and it was theirs. They go into Court and the Court would verify it.

And I can't believe that the people involved in these larger areas didn't get legal advice, I think it's evident in the Nottleman case, they give the attorney a piece of the land, which as far as I'm concerned if I were in their position I'd do the same thing, and that was to get their title clear, where did he go to clear the title? To Nebraska, because he knew he couldn't in Iowa.

THE COURT: That reminds me of a friend of mine, you know, he wound up with a farm down in western Pennsylvania, see, that he got under a client's will, see. And he was talking to the Judge one day about his farm and the cattle he had on it, and what a nice time he was having living on this farm, and he asked the Judge, "Did you ever own a farm, Judge?"

And the Judge says, "Why, I never had a client that owned a farm."

Go ahead.

MR. WALKER: I think if you will bear with me I'd like to go over, I would like to now go to Nottleman Island in the, the evidence --

THE COURT: All right --

MR. WALKER: (Continuing) we feel --

THE COURT: All right, I'd like to hear that.

I want to say before you start there that I took my law clerk down there yesterda to Rock Bluffs, got a little orientation for him to look at these maps. Mr. Schebe there, the general manager of the elevator, happened to be there. He said, "Do you want to go to the top where you can look over the willows and the cottonwoods and see the land?" So we got in that little wirecage that he has there. We shimmied up the side of the ladder and got to the top, it's a nice view over there. We discussed, of course, the high water mark there I think three years ago, he said the place was covered with water, three years ago, he was worried about a break in the channel, and the, in the west bank of the river where the, where the riprap is in, it apparently held, you see.

MR. WALKER: A terrific flood in '52.

THE COURT: What?

MR. WALKER: A terrific flood in '52.

THE COURT: Well, no, he was talking about a few years ago, I think Mrs. O'Brien, or somebody, Mr. Babbitt, or somebody said they lost their crop, wasn't that --

MR. WALKER: Sixty-seven, I believe.

THE COURT: Yes, '67?

MR. WALKER: Yes.

THE COURT: He was talking about that flood.

MR. WALKER: Didn't anybody try and get him to start practicing law in that old town?

THE COURT: He seemed quite surprised to find out that Iowa was claiming anything more than the taxes on the land, I'll say that.

I said, "Well, Iowa is claiming the whole thing."

He said, "Well, I thought they were just claiming the taxes."

MR. WALKER: He had about the same grasp

of this case that I have.

Well, our first exhibit is the 1879 map. This is again just history. I don't think it has any bearing on where the land formed at the time it was formed. The same way with the 1890. These pink areas were put on here by Mr. Bartleman.

I'm trying to do this chronologically because I feel that it's vital for the Court, if the Court feels it can make any determination on the evidence that this island, and, of course, here again we're not representing that pink area as exact, in fact, our witness demonstrated he wasn't the greatest in the world, but he did the best he could, and that's the general area that the --

THE COURT: Who was that witness again?

MR. WALKER: A young fellow by the name of Bartleman.

THE COURT: Oh, yes, I remember him.

MR. WALKER: We had him insert these just the day before he went on the stand and he didn't have time to do it, he didn't know what we wanted, he had to do some of them over on, after cross-examination, as being too far off.

But that brings us up to the 1890 area. The only other evidence that we believe is competent, for the period of time from 1900 to 1923 are the

photographs that were located by the witnesses Roy Cole, an old gentleman that lived on a farm south of Plattsmouth. He took some pictures on top of King Hill and he took some pictures of his lady friends at the base of the hill. Now Nebraska introduced yesterday those of the ladies in the backwater between King Hill and Queen Hill.

I think here again these pictures, although the Court has even expressed the doubt as to the validity, as to the probative, as to the probative value of this one that looks like Lake Michigan, but I would like to point out that they were taken during the years 1908, 1912, 1916, I believe, possibly some of these in '18, but the records, the brief sets those dates out.

And these, this is the only photographic evidence that I've seen with regard to the river between approximately 1900 and 1923, and it demonstrates the fact that even though there was cutting on the Iowa side, which we had volumes of testimony which I felt narrowed down very much what their expert witness says that flowing water cuts, and that was with regard to my question as to whether or not a chute could cut, and he said, "Yes, flowing water can cut."

But these pictures demonstrate to me that the river between, during the period of time that they were taken, was wide, it was large and it was cutting into in Nebraska as far as it could cut, and when it got to solid old Queen Hill and King Hill it

couldn't cut any farther, but the minute it got to a soft spot between the two hills it cut back, it cut on both sides. And on this testimony of cutting, I think is valueless as far as proving where the thalweg in the main channel is concerned.

And the Court has indicated concern over whether or not there is enough evidence of boats to establish boat tracks. I agree with him, I don't think there's enough boat tracks to establish anything, and they're contradictory, they're on both sides of the island. We do feel that this testimony about by the two gentlemen, that there were boats in the Iowa Chute, and all you have to do is read their testimony, one of them says the boat was thirty by forty and the other one says twenty by thirty, or something like that, but neither one of them of any consequential size and there was water in the Iowa Chute, we don't deny that.

The next exhibit is this 1923 Hydrographic Survey by the Army Corps of Engineers; and on there we have Mr. Huber draw the thalweg. Now we had Mr. Huber because in our opinion -- Nebraska doesn't agree with us -- he's probably the most knowledgeable person living with regard to the Missouri River and its design and as to its natural stage of what the river wants to do when it's not controlled.

I don't think that it takes an expert to draw the thalweg on that if you give credence to the crew that did the sounding. All he did was follow the

deepest soundings. You or I could do that. So that there was a lot of testimony introduced by Nebraska to point out that soundings aren't reliable -- they go down the river too fast, they throw the line ahead of them, and they are more interested in getting the job over with than they are of getting accurate soundings.

But all I can say is a sloppy sounding of that channel is just a hundred percent better than no, than no evidence at all, and until they can establish that this particular crew or this particular sounding was inaccurate I think as a permanent record of the Army Corps of Engineers and the public record, a record on which they relied, that has to be accepted, that in 1923 the area later occupied by the island is basically in Iowa.

There are some there, now I can't see any -- Mr. Moldenhauer said that somewhere up in here Tobacco Island extended down in here someway, and then it was cut off. But this doesn't indicate it. But if it was, Tobacco Island did develop over here, it was developed in Iowa.

Then from that you go to the 1926, '25 or '26, we refer to them as '26 aerials, 692 and 693 are the same, just a little bigger. This one has the island put on it and this one has the island marked, this is the Nottleman (sic) Island area. You can always follow that with that lead design in the center, which evidently is the higher ground. Again Mr. Huber marked the thalweg, and again I think you or I could

have marked the thalweg on there from, just from that photograph.

The east channel is according to the photograph is almost choked with ice up here, so winter reconnaissance and open all the way on the west side, which indicates the deeper water stays open longer.

THE COURT: Is that '26 there, that one you're looking at?

MR. WALKER: These two are '26, both of them.

THE COURT: '26.

MR. WALKER: They are, this is the Army Corps map drawn from these reconnaissance photos, and on that we have the island superimposed, where again the main channel as it appears on there is to the west of all except the northwestern corner.

Here is Rock Bluff Bend has been written in by the cartographer, which you could argue was his impression of where the channel was. That's why we have emphasized the pictures with that because anyone looking at the two could locate the channel and then indicate it on the map.

And then again Mr. Huber, I believe he testified that he started to work for the Corps in Kansas City about 1926 as a young man, and he worked for

them all his working life, that was the only job he ever held, and --

THE COURT: Didn't he open the Omaha office or came up here when the Engineers' office was first opened in Omaha?

MR. WALKER: Well, I think it was Florence, which is now part of Omaha.

THE COURT: Well, I mean, yes, Omaha --

MR. MURRAY: Shortly after.

THE COURT: At the time he came here it wasn't in the District, was it, it was in the Kansas City District?

MR. MURRAY: It was in the Kansas City District, and then they split the river at Rulo.

THE COURT: Yes, and they organized the, what is now called the Omaha District?

MR. WALKER: I believe it was shortly after, I believe it was shortly after it opened, because he was a civilian and the Army opened the office and then they --

THE COURT: Sure, that's what I say.

MR. WALKER: 598, I believe, is underneath here, oh, here it is, a portion of it, of the thalweg. We have that again because that is the same as this, but it has the island mark and the thalweg marked by Mr. Huber again. So these four are really all the same, those are based on the pictures.

Then we have the 19 - yes, that's the 19 that we have, and that's nothing but an enlargement of one of these mosaic pictures, so they are both on there.

THE COURT: Yes.

MR. WALKER: In 1930 we have 595 and 1041. Now that is an enlargement, again a mosaic, two pictures of the island in 1930, and this is the Corps map drafted from these pictures, and the island is superimposed there as well as the Huber opinion as to where the thalweg ran.

And again the only thing west is the small tip.

THE COURT: Well, they didn't have any record, now let's get this, as I understand it, the Engineers didn't make any written record, contemporaneous record, when they drew those maps as to where the thalweg was, did they, this is memory testimony, by looking at the map by a witness, the thalweg?

MR. WALKER: Not directly, no.

THE COURT: What?

MR. WALKER: The only thing that would indicate the thalweg as far as they're concerned and anyone using those maps would be the soundings, the hydrographics that they did for, to locate the water depth for anybody's use, including their own.

THE COURT: They had no reason to say "This is the, this is the boundary," because this is the boat track or this is the deepest water, so this must be the boundary, they didn't make a finding on that?

MR. WALKER: No, they had no intentions to, and wouldn't be caught dead saying where the boundary was. The only reason for it was, as I could see it, would be the possibility of navigation, but even then it wasn't, in the '20's there wasn't any navigation to speak of, commercial navigation.

But I think the reason for these, and as far as we can find out, these were the first, the 1923 were the first aerial photographs. And the reason they did that was, I believe, for preparation of getting the general idea of the river and planning how to control it, which they did seven or eight years later start to work on it, but there was a lot

of planning that went into it, and part of it were these reconnaissance flights and reconnaissance maps and hydrographic maps; and for them to control the river I think everyone will agree that the testimony of the river men, the Army Corps men, they felt that it was easier and less expensive if they could put the river approximately where it wanted to go.

In other words, they didn't want to take all easterly bends and put them all on the west side of the river, they didn't want to change the whole river, they wanted to start from necessary points such as bridges and hard points, and then put the river about where it wanted to go and use the force of the water in the river itself to control it, and I think that what they did demonstrates that.

Only on a rare occasion would they fight the natural flow of the river a hundred percent, and transfer it across the river, if they could develop it into a smaller bend or a larger bend and could work it into the next reach by using the water, it was quicker and easier. And I think they testified that not up until about 1936 that was the only way they controlled it, and then they started using canals in some places where it was feasible.

But in 1930 I think it demonstrates again that the land was forming as an island and was in Iowa. In 1931, I have these two; now the Exhibit 371A is a hydrographic survey by the Army Corps of Engineers where they have sounded the channels,

both channels are sounded.

And again on there we have the island superimposed in the deeper channel or what Mr. Huber considered the main channel, is superimposed by him.

Now the Court can see that this channel is sounded as well as this one, and you can, you can find the deepest channel without being an expert in the field.

This 1044A is this basic map used by the Corps of Engineers as a construction map. But you'll notice that the islands, the sandbars, the channels are here, and they have used this map and convereted it for their construction purposes, and put the designed channel on it, and they have used it to show their construction of dikes and revetments.

In 1937, we have, I believe this is the map, this is the 1937 aerial, and just continues the development of the island.

THE COURT: What's the number of that?

MR. WALKER: 588, a 1937 aerial.

THE COURT: I want to have that on the record.

MR. WALKER: 597 is the 1939 aerial, 599 is the 1941 aerial, which I believe is the last photo-

graph of the area prior to the Compact, and it would be the one nearest to the AP maps which were in 1940-41, although they were adopted in the Compact in '43, see.

THE COURT: Yes.

MR. WALKER: Now we feel that anything prior to 1923 in the Nottleman Island area is, has no probative value because the island was in Iowa as it was forming, and it has always remained there.

Now basically the Court will see that there were some of that area that's now island was in the river and the thalweg was, the deepest part of that river, was east of the northwest edge of the island. But what island had formed was east of the river, east of the main river, as far as the Army Corps recording and as far as Iowa was concerned.

Now you get into the testimony, oral testimony of the witnesses in regard to Nottleman Island, you have complete confusion and contradiction. The plaintiff had Nebraskans and Iowans testifying for them, the defendants had Nebraskans and Iowans testifying for them, and we could go through their testimony one by one. But as far as I'm concerned, and I belive as far as the Court is interested, with the exception of one or two that had definite personal interest and indicated it, as a general rule the wit-

nesses testified just exactly as to what they remembered. I think they were honest and candid with the attorneys and the Court, and I don't fault any of them. If they had agreed on where the island was and how big it was and how big the trees were and where the deepest water was and where the boats went, then I'd be suspect.

But take a look at that area; you have witnesses testifying that they are standing on a hill over in Nebraska, and he sees certain things, and he tells us what he remembers, what he saw. You have another man standing up the river on Queen Hill, and he's testifying to the same river; it doesn't agree with the man that just got off the stand, but it's because they are looking at it, they are looking at that river from a different angle, from different years, from different seasons.

THE COURT: Some of them have girls with them at the time.

MR. WALKER: Yes, they weren't even looking at the river. That's why I'm glad our boys that were popular with the girls took their cameras along.

THE COURT: I see.

MR. WALKER: But I don't think the witnesses could be faulted because they didn't agree, and even

some of our witnesses didn't agree entirely. Whitney Gilliland, Mr. Moldenhauer said that he testified, he did, he wrote letters in which he testified, but in his deposition we get to talking about where, where was he when he saw the river, and he finally concluded that he was quite a ways upstream, maybe it wasn't the same island, and then he finally says "Well, I don't know whether the east channel was the biggest channel or not, but it was of at least equal dignity with any other," and I suppose that there were times in history when there were two channels there of equal dignity, I'm not going to say that just because he was an attorney for the claimants that he in any way said anything that he didn't honestly remember and believe, he has no interest in it now and he wouldn't if he did.

So I realize that the witnesses were put on the spot, Mr. and Mrs. Eyler testified that the river was cutting, but they flatly refused to say it was the main channel of the river. I believe maybe she somewhere in her testimony or deposition said "Well, I assumed it was." And if you see water coming over and cutting out twenty foot slab of dirt, you would naturally assume that it was a substantial river; but at the same moment it might have been cutting out twenty foot of dirt over on the other side of the river which the pictures and the testimony demonstrate.

So from the standpoint of oral testimony I don't

believe that the plaintiff either in its oral testimony or in its documentary testimony has carried the burden in this case. Now I talk about burden advisedly, because my impression of our original meeting with the Court and our original approach to this, it was on the theory that it was a friendly lawsuit, that all we were searching for was the truth, that we weren't trying to pull the wools over anybody's eyes, and come up with anything other than a decision that is just and fair to both parties.

But as the Court indicated yesterday this hasn't developed into the ordinary friendly lawsuit, and Nebraska as the plaintiff filed a reply brief, they have now asked for time to make rebuttal, and I believe that they assumed the position of adversary plaintiff and they have the burden as plaintiff to establish what they have alleged. I think that their briefs also set out the Supreme Court's indication that when one state accuses a sister state of wrongdoing that they not only have the burden normally cast upon the plaintiff, but they have the burden of proving that to the satisfaction of the Court with clear and convincing evidence. So I think that they have that added burden here because they have accused Iowa of violating the solemn agreement.

I don't -- I would like to have a recess.

THE COURT: All right, I would too, I agree with you.

The Court will take fifteen minutes.

(Short recess at 10:40 o'clock a.m.)

THE COURT: All right, gentlemen.

MR. WALKER: Your Honor, my argument so far may not have indicated it, but Mike and I did have a more or less of a format to present this argument. Primarily I was going to in part answer Mr. Moldenhauer's argument insofar as the history was concerned and also as to Nottleman and Schemmel Island, and I was hoping to and will try to answer the Court's inquiries in his September 10th order as to points 1, 2, 5 and 6.

That would leave the general river to be answered by Mr. Murray and also the Court's points 3 and 4 with regard to compromise. I hope that I don't overlap too much, and I'll try to confine myself to what was assigned to me.

But in Mr. Moldenhauer's arguments, and I believe in Nebraska's brief, they quote extensively from the Missouri River Planning Report that was dated I believe and put out for public consideration in 1961.

And yesterday he read this statement: "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location and bars, et cetera, made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between

state and private ownership because development for recreation was not considered feasible because of constant change."

Now I read that for this reason, that we admit the conditions in the Missouri River in its natural state, but we want to emphasize that there wasn't any real purpose for tying down the state boundary prior to control by the river, and when they say we, and there were State of Iowa officials, no evidence on where they based their opinion, said "You can't locate the state boundaries for control by the Corps."

But I want to point out that in individual areas you just can't categorically say that the State boundary couldn't be located there as between Nebraska and Iowa riparian owners. They and their neighbors can establish where the boundary was, and I think we have the history that game wardens, and in prohibition days the Revenue Department, they found out where the state boundary was when they made arrests, and in case the Court doesn't know it, the Missouri River with its island was a great place for a still, and there was quite a few of them up and down the river, and they always found jurisdiction in any specific area that they needed to.

I have covered the exhibits in regard to Nottleman as far as I'm concerned. Now Mr. Murray will have other exhibits, and I have presented those to the Court which I think document

where the deepest channel without argument was and which we submit to the Court as being the thalweg, based on that proof only, it was the deepest channel.

Now I don't know whether this Court or any other Court would want to say that that is the thalweg, and therefore that is the boundary; but the exhibits that we have picked out demonstrate what we feel was the boundary after the island formed and up to the time of the Compact. Now where that spot under the sky was before that I don't think is material. If the island that we're talking about today formed in the early 1920's in Iowa, remained in Iowa until 1943, it belonged to Iowa, and whether or not the Compact changed Iowa's title laws, it had good title prior to 1943 and it still has it, and the Court says you -- the title doesn't swim out from under it, and I don't believe that the Court will make a retroactive repeal of Iowa's common law.

Now going to Schemmel Island I have done the same thing, I have picked out specific exhibits, not that they are the best exhibits to demonstrate our point, but which I think not only demonstrate a point but have been superimposed with the island and our opinion testimony as to thalweg for the convenience of the Court.

And there again I introduced the 1879, the 1890, and as the Court knows there is quite a blank between that and when the Corps started making rec-

ords again, and we go to 1923.

Now in 1923 the river fits the description of an abraded stream as testified to by Dr. Brush. And we didn't call Dr. Brush to put another issue or another problem in the Court's lap; all we want is to demonstrate primarily and originally was the fact that you can't decide this case as a general proposition because when you talk about a wild and uncontrolled river before the Corps started channelization work the river wasn't of the same characteristics along the Iowa and Nebraska border. We submit that with the influx of the Platte River, the Platte is of such size and volume that it changed the characteristics of the Missouri River.

We do that to point out that each individual island has to be considered separately, each individual area has to be considered when you're trying to determine where was the boundary, whether you're doing that by the boat tracks or whether you're doing it by the deepest water or the widest water or any term you want to use. And we feel that this amply demonstrates what we're talking about, the abraded stream is one that is full of sandbars and small islands, and in addition, now here's underwater bars that are just outlined, which as I understand it indicate it hasn't yet risen above water.

This whole area is interspersed with islands and channels and -- but in 1923, and I don't think anybody can argue the point, assuming that this island imposed on here is with some degree of ac-

curacy is all in the river. But forget the idea of where it was, where the thalweg was, our expert says the thalweg was here. And again merely took the deepest soundings. And that leaves a little slice over here in Nebraska.

But basically the spot under the sky in 1923 according to that document was in the river, these sandbars are not islands. Here it says small willows, sand and mud, no designation here. This says willows, in the center of that big bar.

But basically it's sandbars, underwater bars and water. So we feel that anything prior to 1923 is irrelevant, it doesn't have any bearing on this case. So we go from 1923 to the first Corps photographs. We have a mosaic here with the thalweg superimposed by Raymond Huber, and we have a mosaic of the map, survey map made by the Corps of Engineers from those photographs. And there again it demonstrates that the Corps people indicated sandbars, one spot with willows, and the rest of it is either in the water or shallow sandbars. And they arrived at that from these areas which demonstrates the same thing, that there's channels all through that area; and again in 1926 it didn't matter where the island was, it was in the river, and it wasn't possessable.

And from there you go to 1928 where the channel has started to concentrate, and the thalweg was right down through the island, a third approximately west of it. It does overlap a little bit on accretion-

ary sandbars on the Nebraska side, the rest of it is either in Iowa or in the water.

In 1929 we introduced a map that we acquired from the Otoe County Surveyor that he had on his wall in his office, and we got ourselves a copy. Now there again I don't know whether that map was drawn by an individual that actually surveyed the Missouri River and the Missouri River islands or not, but it's the only '29, it's the only one that fills that void, and on that the island is in Iowa.

From there you go back to the Army Corps records of 1930. I don't believe that photograph is 1930.

MR. MURRAY: Yes, it is, but you missed 1928.

MR. WALKER: Photograph?

MR. MURRAY: No, map.

MR. WALKER: I show this photograph because again the island outline has been superimposed. This is a blow-up of 1092A, and this is the Missouri River map drawn from the 1930 aerials, and these are the two '30 aerials.

Now here again, except for this accretionary mass here on the Nebraska side, the island is either in Iowa or in the river. Now on this particular photograph there's been quite an issue made

of the fact that Mr. Huber drew this thalweg here at one time, and in some other case, and I may be wrong, maybe he drew it here in this case and there in the other case, but he testified two different times, and one time he put on this side with a clump of little sandbars, and the other time he put it over there. I believe in this case it's the green line which he put on the Nebraska side.

THE COURT: I have a small feeling that Nebraska thinks he's pretty partial to Iowa.

MR. WALKER: Well, I know they do, Your Honor.

THE COURT: What?

MR. MURRAY: I know they do, but we're --

THE COURT: How many cases has he testified to for Iowa, do you know?

MR. WALKER: One, if you'll pardon me, he testified in the Tyson case.

MR. MURRAY: No, three.

THE COURT: Did he? Did he ever testify for Nebraska? You know, when you're talking about experts --

MR. WALKER: I don t know whether they ever asked him.

MR. MURRAY: They've never been in the case before.

THE COURT: Oh.

MR. WALKER: This is the first time that Nebraska has been involved. He's a resident of Omaha.

THE COURT: You know, in my experience as a judge, you know, you see witnesses are all one side, it's like people in the Courtroom, they tend to take sides, it's human nature.

MR. WALKER: Well, he's retired, and he enjoys the opportunity --

THE COURT: And the emolument that goes with it.

MR. MURRAY: And the emolument that goes with it.

THE COURT: Sure, I don't blame him.

MR. WALKER: But I think the Court, as an attorney realizes --

THE COURT: But sometimes you know you have to choose between witnesses, experts --

MR. WALKER: Yes.

THE COURT: (Continuing) as to which one you accept, not because they're influenced by anything other than what they think, but what they believe, but you got to look behind their thinking, the basis of it, take one and reject the other, that's the trouble with it.

MR. WALKER: Well, I'd like to point out too, Your Honor, and I think Nebraska will verify this with me, if you attempt to get an active employee of the Corps to testify, you have to go through the Attorney General's office and subpoena, and all that, this man is retired and he's available --

THE COURT: Oh, yes, I know.

MR. WALKER: But I do think that his qualifications are without a doubt the most superior in his field that was presented in this case, because he spent his whole lifetime with this, and actually what he did in this case, as I have pointed out before, and I think that you and I could do it and I'm admittedly not an expert on the Missouri River.

THE COURT: Well, I'll agree with you that

I'm not. I'm learning, I'll put it that way.

MR. WALKER: And then I brought out the '28's, '29's and '30's, which I feel will help the Court, and from there we go to '31, which are over here; and there again it's a hydrographic survey in 1931, and I'm not sure of this but I think it's the soundings and the hydrographic survey are placed on - I may be wrong -- it's dated 1931, but it's the hydrographic survey, which means that the river was sounded and the soundings placed on it for the convenience of the Corps.

This is the construction map that the Corps used this basic map to start their construction plan and design and placed it on the river of what they hoped to do with their - and then of course a lot of these dike lines and revetments and other items that were added over the years. This is the basic map which they started with on the construction of the Corps.

Now there again, there was an accretionary mass over here that was in Nebraska. The --

THE COURT: Do you agree that that work, some of that work along there, moved water from the east to the west, do you agree?

MR. WALKER: Well, Judge, it had to move water from the east to the west --

THE COURT: That's what I mean.

MR. WALKER: Because this is all water. The primary portion of where the island is today was water.

THE COURT: Then?

MR. WALKER: Then, and to put that channel over here as they did, this water had to be blocked and brought over there. This channel is the one that they contend was the main channel, this little narrow one is marked "Shallow" and too shallow to sound, and so --

THE COURT: Well, if that's so, I mean, if there's water on that, on the east side and there's land there in the river rather than being under the water, and you move it across, aren't they, aren't the Engineers making a so-called avulsion or else there is a finding there, should be a finding there that the land, that the island was on the Nebraska side prior to Compact.

MR. WALKER: No, Your Honor --

THE COURT: Why doesn't that follow?

MR. WALKER: No, it wouldn't follow, because if you recall the testimony, the Army Corps of

Engineers when they put in these dikes they put in what they call permeable dikes. They wanted the water to flow through those dikes, they didn't want a blockage, they wanted a slow, gradual build-up downstream from those dikes, and they wanted this east channel to be kept open. They wanted water to pass there to take the pressure away from their structures.

And there are cases in Nebraska that the facts are the same as the, identically as here, where the Corps or other, there are some out-state cases, I think, that were cited in our brief, pre-trial statement, where they say that the movement of that river across there, unless it goes around substantial identifiable land it's accretion, because, and again, and I think the evidence, and to be fair with the Court, they testified that they didn't want to destroy these sandbars, and even under-water bars, because that's what they wanted, they wanted that build-up so they would use water equipment as long as they could, and in most of these bars they cut through, either washed through with the paddle wheel, or they went through it with a short dredge so that they could keep their driver moving, but not wash out the basic sandbar.

Now we feel that when they're talking about an avulsion, you're talking about land that is fully developed, vegetation, and it's substantial. There isn't any of that here, there isn't any substantial lands here, and the pushing of the river over is an

accretionary action and the Nebraska courts have held that, Iowa courts have held that, and I, I'm not sure, but I think the Federal courts have held that. And the mere fact that they cut through a sandbar and try to preserve that base, that bed, or build-up doesn't make it an avulsion.

Now if you were talking about the island today, or even 1943, but it really wasn't too fully developed even then, the -- you had trees on it, you had vegetation, and occupancy, and if the river had been on the east side and the Corps had gone in there and blocked that east channel and moved it around the island, to me there wouldn't be any argument at all.

But they didn't block the east channel in 1934 when they started to work there, they didn't want to block it, and they testified that their dikes were put in permeable intentionally. Now up river today, in those days they were putting willow mats and sinking them with a few rocks. Today they go out there with their dike lines and immediately bring barges in and dump rock on both sides of that dike above water level. But they still say those are permeable, we used big enough rocks, it's a bridge, and the water can flow through and carry the silt and the sediment through there for a number of years so that there won't be a constant stress against those dikes by the flow of the river while the river is channelizing itself around the dikes. So even today with the rock they don't block it.

What I'd like to point out here is that the -- unless the Court determines that these sandbars had the identity of islands, why then we feel that this was a pushing of the river over and that in the movement of the water by the Corps it eroded away the accretionary land on the Nebraska shore up here, and later we want to talk about the canal which as I understand it ran approximately a mile through here.

But unless this land was identifiable it's not Iowa's concern, the Army Corps destroyed it and as the cases have said it's still an avulsion or accretion according to the rules of law, and we feel that in this case it was an accretionary movement and that the island build-up behind that movement, which wasn't very far, if this was the thalweg, it was not, on this there isn't any island west of the thalweg. The only thing that the Corps destroyed was the accretionary bank of the Nebraska shore.

From 1931 we go to 1936, and that this shows further development of the island, and the same for '37, '39, '41, '42 and '45. These demonstrate what I was talking about, I was talking about sandbars, there's none west of the thalweg, or deep water, whatever you want to call it. So actually in this area there wasn't any destruction of Nebraska land, even if they, if there were islands out there, unless, in your Court statement you were concluding that the east channel was the main channel.

But unless you conclude that, why, it's, it isn't an avulsion because there weren't any islands west of the deep water.

Now in both Nottleman and Otoe we have the, we feel, corroborating the evidence from the trees that were cut, that more or less bear out our theory of when and where the islands developed. I don't know why the tree experts differed as much as they did or what, all I know is that we got a third one to get an independent reading and he more or less corroborated Iowa, he said there was possibly one year, to several others, some kind of a ring that he didn't know whether it was a false ring or a true ring, but he, in most cases, and it's in the brief and I'm not going to go over it here, but in the Otoe Bend area, Nebraska has contended that there was an avulsion from the Iowa chute and they have a tree that they, their expert, Mr. Weakley said started to grow in 1895; Dr. McGinnis and Dr. Bensend said in their opinion that it began to grow in 1903.

That, as Howard says, doesn't destroy their theory of the avulsion around that tree, because they say the avulsion occurred sometime between 1895 and 1905, so maybe the avulsion occurred after 1903, but when you are speculating to begin with and you come into Court and say, well, there was an avulsion between 1895 and 1905, they have cut it down, their speculation, from 1903 to 1905. And I don't know what happened in 1905 that estab-

lished the avulsion. To me, the tree didn't because I submit that as Dr. Ruhe said, he accepted Nebraska's evidence when he made his investigation and drew his original report.

He later found out that two other experts said the tree grew in 1903, but in his report he accepted 1895; and he said it could have existed because it was right on the west bank of the right bank of the Iowa chute; and he said it could have started to grow in 1895, and a little sandbar and the river moved from there on over; but in his opinion it didn't because the soil and the contour of the west bank of the river shows a natural levee build-up as all streams will from overflow, and the land there, the location of this tree, indicated that it developed prior to the westward movement, and during the westward movement of the river, the left bank of the river.

Now they -- Howard didn't mention this, but they did have an old gentleman out here by the name of Elmer "Buck" Garrison on the stand, and he talks about the river jumping, but if you'll examine the evidence you'll find that what he is talking about and the only one that he claims to have known, he knew the river was in the Shwake Chute one day, and a week later it was a mile west. Well, a mile west puts it about where it is today from the Shwake Chute.

So he couldn't have been talking about that because we know the river was where the island is to-

day since then, so if there had been an avulsion then, there's been an accretion back. So when you start with an avulsion you have to end up with it, and there's no evidence here -- there could have been an avulsion fifteen times around those various sandbars, there's no evidence to the contrary, how can they pick out the time, say, 1895, 1905, there was an avulsion? I don't think there's credible evidence to establish that.

The Iowa Supreme Court in 1921 on this same land between the Iowa Chute and the present day island said the evidence is clear that it was accretionary development, and it's the same land only farther north, but still west of the Iowa Chute.

Now to establish their theory of avulsion in addition to the tree they have a map prepared by Mr. Brown from the plat books of Otoe County, Nebraska, and I believe they call it the Pierce Survey. The surveyor was a man by the name of Pierce.

But there are no records of any measurements or any actual survey, the only record shows pencil lines across plat books that have a square section laid out, and by putting those together they come up with the 1895 Pierce Survey, which coincides favorably to the Iowa Chute, and if there was anything to corroborate that, maybe the boundary was over in the Iowa Chute, but since it's accreted west, according to the Iowa Supreme Court to the present day Schemmel (sic) Island, and today we are arguing

that this was accretion to the Iowa bed of the stream. There's been no complete avulsion back.

THE COURT: Where do you say the Iowa Chute is anyway, or was, when was it formed?

MR. WALKER: Well, actually, Your Honor--

THE COURT: We've heard a lot about it.

MR. WALKER: (Continuing) in Payne versus Hall the Court says that the origination of the Iowa Chute is uncertain, that there was evidence that it came in from the Missouri River up river and flowed around down there. And of course the question there was did the area between the Iowa Chute and the present day Nottleman Island, and the chute east of Nottleman Island, or not -- Otoe Island, and the chute east of it, did that form as an island or form as accretion to the riparian owners.

Now Payne was a landowner, Hall had various classifications, he, Payne said he was a tenant out on this island, this accretionary land mass, now Hall said that he wasn't, that he was an adverse occupant. And then he also said this didn't develop as accretion, it developed as an island and I have occupied it under some color of title argument against Payne. Well, the Supreme Court said that where the Iowa Chute came from was rather vague

and uncertain, that there was some evidence that it came from a slough inland, and it was originally a drain, I don't even remember the name of the slough -- Mule Slough or something.

And then there was other evidence that it came out of the river and went back in the river. And I think the evidence in this case is it still comes out of the river and goes back in the river, they have tubes at both ends so that when the river comes up it can flow back through there.

Mr. Propp, who lives right on the Iowa Chute, testified in this case that the land was there in 1912, west of the Iowa Chute. I think there was a Lon Baker, we took the deposition, an elderly man from Hamburg, and I believe he testified that he shot some brant off of the Iowa Chute and he hunted west of it around 1900.

Mr. Ruhe's soil samples show, or at least he contends that they show that that land -- I'm not going to try and repeat what his report says, but that land developed west of the Iowa Chute at about the same time land developed as accretion some of the land on the Nebraska side of the present river. Their composition and their ageing are corresponding. That land east of the Iowa Chute is considerable older.

But it's interesting in his report, and Mr. Gililland -- well, strike that, I don't know whether he did or not, but one of the defendant's testimony admitted -- I think it was Mr. Brown -- that they

couldn't find a scarp indicating an eastward movement of the river. Mr. Ruhe says he couldn't. The only scarps that he can find would indicate a westward movment. Now if you can't find a scarp establishing eastward movement, that means that they were destroyed when the river went west. Had there been an avulsion around those scarps they wouldn't have been destroyed.

And when you're talking about a five to six foot channel embankment, there's going to be some slope, there's going to be some evidence of that embankment there, I don't care if they plow it, dig up trees, or what they do, there's going to be some contour there, some indication on the tri-colors of the Corps, or something of that contour because those are contour maps. And for the Judge's information on the '46-'47 tri-colors you can follow the channels that are outlined on many of these pictures on that tri-color, the contour has been placed there.

I think that the evidence in the Otoe Bend area is very preponderantly in favor of the fact that the island was not there prior to 1923, that it was, prior to 1930, '31, and that it was actually built by the Corps of Engineers in Iowa.

THE COURT: Yes.

MR. WALKER: I believe that at this point the only thing that I have left to discuss unless the

Court has some questions, well, would be the Court's inquiries of his September order, and it's a little early, maybe we could take a break now and I could shorten it after lunch.

THE COURT: We're getting so we have too long a lunch hour here.

MR. WALKER: Well --

THE COURT: Yesterday we stopped at ten minutes to 12 and now it's twenty minutes to 12.

MR. WALKER: One of the reasons I --

THE COURT: Say, you know, the trouble with this case it doesn't disappear by itself, I have to keep working at it here.

MR. WALKER: The only trouble is my watch hasn't moved fast enough this morning.

THE COURT: Well, you want -- can you go ahead for a while or not?

MR. WALKER: Well, I --

THE COURT: If you can't, okay, we'll come back at one o'clock.

MR. WALKER: No, I, I'll be glad to. There is one point that I would like to discuss before lunch and it has to do with your inquiries.

I think yesterday you asked Mr. Moldenhauer point blank to characterize this evidence of where the people thought it was, you mentioned adverse possession, and he very quickly says, "No, we're not claiming adverse possession against the State." Well there again it's an unfair question to Howard because if he was claiming adverse possession against the State they lose, because you can't have adverse possession against the State, and you are admitting that it was in Iowa. When you are claiming adverse possession against Iowa you have to first assume the proposition that it was Iowa property. So they are in a peculiar situation, that they can't argue adverse possession without admitting as a foundation premise that the land was in Iowa.

Now they have introduced tax records in the Nottleman Island case, but there isn't any dispute there, I don't believe. We don't think there was any occupancy of the island in '28, but they did introduce a 1939 deed that declared in there that somebody occupied it in 1926.

Anything prior to 1926, I think, is again irrelevant in the Nottleman Island area, and in going through the tax records in Otoe County the Court, I am sure, will be interested in following the taxation of this area from year to year, because

it emphasizes Judge Johnson's statements in his recent case where he said to him "there must be systematic, consistent taxation to establish any claim to acquiescence or estoppel or any other theory which you might get."

Now here again I may be corrected, but from memory it is my understanding that these deeds that Mr. Schemmel obtained from somebody along about 1939 covered part or all of two sections, and some of his neighbors didn't seem to agree with him, they had a couple lawsuits and he ended up, I think, with primarily Section 15 Nebraska records.

But in going through here, these are for the years 1896, and again I don't know what materiality they have to an island that didn't come into existence until about 1934 or sandbars, and actually didn't develop into an island until some time in the late '30's.

But I'm not going to go through these one by one, but if you look through Section 15 the name Dan Hill, et al. comes into it, and Section 30, and they show taxation of 695 acres back here in the late '30's, early '40's of a valuation of $200 of 695 acres. I think in one year the taxes were $1.24, another year they were $1.36 of over a section of land. Now I don't think that would fit Judge Johnson's theory of consistent and systematic taxation. Two hundred dollars wouldn't be -- it would be less than twenty-five cents an acre valua-

tion, a few pennies an acre taxation.

Now that's the taxation that they rely on, and I haven't gone through all of these, I don't know what year they finally came up to realistic system of taxation, but they certainly didn't do it very long before the Compact.

THE COURT: Well, for the record you're talking about Otoe County, Iowa?

MR. WALKER: These are Otoe County, yes, Otoe County, Nebraska.

THE COURT: I mean Nebraska, yes, Nebraska certainly, if somebody reads this they would want to know which state.

MR. WALKER: Well, they are too bulky to try to get into the record of the arguments, but they are interesting, in the years, year after year the property is identified here and show $1.24, $1.25, $1.35 taxes, and over on the right-hand column they are marked unpaid. Now I'm talking in the '30's. And it just demonstrates to me what Judge Johnson was talking about, if you're going to claim title to something by virtue of taxes, it should be a realistic taxation. I just wanted to read you.

THE COURT: Doesn't that, aside from claim-

ing title because of taxation, isn't it some recognition by somebody that that land, whether it was worth a dollar and twenty cents, or whether it was worth two hundred dollars, or what it was worth, was in Nebraska? That's what the argument is, not to show the amount.

What do you say about that?

MR. WALKER: Well, I say that the only reason they have any tax record on these at all is just through the negligence of the Otoe County officers, they had a 1895 plat that showed that Nebraska went clear over to the Iowa Chute and --

THE COURT: Now wait a minute, that's just quibbling the question, that's just quibbling the question.

MR. WALKER: Well, no --

THE COURT: Now listen, the Supreme Court cases are careful in boundary disputes and things of that kind, and take into account, I think what the public, population, the county officials and state officials, where they thought it might be, when the dispute is where it is, and the physical evidence is uncertain, that's all it's indicating, isn't it?

MR. WALKER: Well --

THE COURT: Now, here is some, here is some of my knowledge, what I'm talking about this, what do you say about the fact that Nebraska was taxing the land and Iowa wasn't?

MR. WALKER: Well, my, and over the lunch I'll find it, there's one sheet in there that shows $1.26, $1.34 tax, how are we going --

THE COURT: I don't care about that, I don't care about that.

MR. WALKER: And on the right-hand column they have in there the delinquent taxes and the years, and they go back to 1931, and then it says prior to 1931 they have $1,196 delinquent taxes prior to 1931. Now that indicates to me that they carried those taxes on there with nobody ever intending to pay any taxes on it, and every once in a while they show them unpaid and they show them delinquent.

THE COURT: Sure, sure, still Nebraska is carrying them, how --

MR. WALKER: There wasn't any land there, Your Honor.

THE COURT: Well, I mean that's what you say but at least if it was there and they are assess-

ing it, why, that's in Nebraska, that's what I'm saying, that somebody in Nebraska says it's on the Nebraska side.

Well, go ahead.

MR. WALKER: Well, I'd like --

THE COURT: Well, you want to recess now?

MR. WALKER: Recess now.

THE COURT: Okay, we'll recess. Let's make it 1:15, how about that, then we'll get going, 1:15? All right.

(Thereupon, at 11:50 a.m., the hearing in the above-entitled cause was recessed until 1:15 o'clock p.m. of the same day.)

1:15 O'CLOCK P.M.
THURSDAY
OCTOBER 1, 1970

* * *

MR. WALKER: If it please the Court, I evidently misunderstood your question just before the noon recess; but I'm informed that you in effect asked whether or not we agreed whether the taxation evidence is indicating where the people

thought the land was located, and thus aid the Court in determining which state the land was indicated; is that the substance of your question?

THE COURT: Something along that line.

MR. WALKER: Well, in answer to that question I have to say, yes, because just as Mr. Moore said yesterday when a similar question about recognition evidence, he said that under the Federal rules it's admissible. We're not denying that it doesn't have value as evidence to the Court along with other evidence, but we do want to point out that the weight of that evidence in this instant case shouldn't be very great if you consider the fact that, as we said before, and as Judge Johnson said there wasn't a regular progressive and systematic system of taxation in Nebraska.

THE COURT: I thought that up until it was transferred to Iowa.

MR. WALKER: Well, if you'll recall the testimony, Judge, we called --

THE COURT: And then you let these fellows pay taxes in Iowa on it all these years.

MR. WALKER: Well, do you recall Mrs. Rhoades, the Fremont County Deputy Assessor

testifying?

THE COURT: Yes, sir.

MR. WALKER: She testified that the books, the County books, tax records, were lost prior to 1934 so she doesn't know whether or not the area west of the Chute, Iowa Chute, was taxed or not, but in 1934 it was taxed in Iowa, '35 and '36 it was taxed in Iowa, then the books again were lost until '43, and then it was again taxed in Iowa.

Now some of that same land was taxed all during that period by Nebraska, so where does that get you when you find that both states were taxing it, carrying it on their tax books? I don't think there's any evidence here that taxes were paid in Nebraska, it was assessed, the County officers carried it on the books. But if the Court will bear with me this tax record introduced by Nebraska, and then I have the year 1940, which describes under Section 29, Dan Hill, et al., "entire section accretion," no legal description, there was $1.32 in taxes and there's no showing here except $587.26 for delinquent taxes prior to 1931.

You go on down the same sheet, Dan Hill, et al., accretion, Section 32, value $200, taxes $1.32, delinquent taxes $1,169.01 for the years prior to 1931. Now is that a systematic collection of taxes? I don't believe so; but even so under the evidence

we don't believe that this island came into existence and was possessable until sometime in the late '30's, and when both states carry it on their taxes I don't think it's, helps Iowa or doesn't help Nebraska, to me it's something that the books showed and they just continued to carry it.

Now when I'm talking about the Iowa taxes, and I may be mistaken, but I understood the Court was interested in taking back those exhibits that the parties feel are of value in determining this case, you don't want to take back all the chaff.

THE COURT: Well, especially the ones that we discuss here during the arguments.

MR. WALKER: Yes. For that reason I would like to have the Court take the tri-colors back --

THE COURT: Oh, yes.

MR. WALKER: (Continuing) and on these four tri-colors we had Mr. Bartleman put in red those sections of land that Mrs. Rhoades testified that the Fremont County record shows were taxed.

THE COURT: Well, I understand -- I don't want to keep on the subject forever, but I understand that the plaintiff's contention is, Nebraska's contention is that the recognition testimony is, among other things, among other evidence, this

taxation, assessment, payment of taxes in Nebraska before the Compact, after the Compact, efforts on the part of these landowners, to get it on the tax rolls of Iowa, finally they succeeded, payment of taxes, collection of taxes by the State of Iowa, recognizing, tending to show that it's ceded land, that's the argument.

MR. WALKER: Yes, that's the argument --

THE COURT: That's the argument, it seems to me, that there's some merit to that proposition generally speaking.

MR. WALKER: Well, right now. I'm not discussing all the recognition evidence.

THE COURT: I know, I know, but I'm telling you that's the reason.

MR. WALKER: Well, right now I'd like to discuss the -- I'm concentrating on the taxes --

THE COURT: That's right.

MR. WALKER: If you'll recall--

THE COURT: Well, you can pick every one of these things apart, standing piece-meal, and they don't mean so much, it's the totality, the

cumulative effect of everything that adds the weight, if anything.

MR. WALKER: The, if you will recall, this fisherman that Nebraska relied upon, Medford James, Toots James, he was asked the question and I don't want to get out of the record because as I understand it the depositions that weren't read are not in the record, is that correct?

THE COURT: Well, I don't know if I said that, have I?

MR. WALKER: Well, as I said, I don't want to get out of the record, but in their record of this case he was asked if he claimed land in Iowa, the Iowa side of the river. He said "Yes", but "Where is it?" And he gave a general description, and as I recall about 160 acres. "Where do you pay taxes?" He said, "Otoe County, Nebraska." That was after this lawsuit was started in the middle '60's.

THE COURT: Oh, I suppose it was.

MR. WALKER: And I bring that out to demonstrate what I believe is the fact, that this recognition evidence was premeditated and developed to quiet their title in Nebraska courts because they knew that they couldn't quiet title to it in Iowa.

THE COURT: Well, I don't think that's -- I can't accept that argument.

MR. WALKER: Well, look at the record --

THE COURT: I mean, that's your belief and you may have reached that conclusion, but I don't reach that.

MR. WALKER: What effect does it have that the County collects taxes on land admittedly Iowa from 1943 to 1952, does that have any probative value?

THE COURT: I don't think that Iowa can stand by and allow an individual, no matter where he lives or what state he comes from, to pay taxes under this situation that we have got, for fifteen or twenty years, seventeen years, and then say, why, that's, this was always Iowa, didn't have to pay any attention to it, the Court didn't say that. I think that's unfair on the part of the State of Iowa, that requirement --

MR. WALKER: I still think that the probative value is affected when they continue to pay taxes in Nebraska and -- now we are not talking about the individual plaintiffs themselves, you, in your question you posed the thought that the officials in Nebraska counties thought the land was in Iowa

and that's why they were assessing taxes against it.

Now they didn't think the land was in Iowa or in Nebraska after 1943, and they continued to collect taxes until Mr. Peck wrote them a letter and said "Take it off, that's been in Iowa since '43," because he said he decided this case in '52 when he told them to take it off the rolls.

THE COURT: Didn't you continue to assess it to the same people that Nebraska did in Iowa, from '43 until '61, at least?

MR. WALKER: No, I don't think Iowa put it on the tax rolls until they processed Strand versus Watts case against the County officials.

THE COURT: Well, how long did Babbitt and you fellows pay taxes in Iowa, maybe they're still paying them?

MR. MOLDENHAUER: That case will be in the '46, I think '47 was the first year, '46, it was '46 on up in Babbitt, and I think Schemmel was '49 on up.

THE COURT: Until when?

MR. MOLDENHAUER: Until the present day.

THE COURT: Until now?

MR. MOLDENHAUER: Yes, the testimony was that this year they were taxing them, assessed.

MR. WALKER: That's what I'm pointing out.

THE COURT: Don't you see any inconsistency there or not?

MR. WALKER: No, not when they have to bring an action to get it on the tax rolls, the county officials don't want to put it on the tax rolls, we say they didn't want to because it was State-owned property.

THE COURT: All right, go ahead.

MR. WALKER: Now in regard to this recognition evidence I'd like to point out that Nebraska in an early case, Hickman versus Jones, 230 NW 95, didn't have anything to do with the river, but evidence of common repute of the location of the boundary or boundary lines was considered, and they said that reputation evidence is admissible, for the sake of argument it has to be admitted as sound, until it is proven that it is wrong. And in this case all of the local people said that a certain section corner, which was marked was the section

corner of, say, Section 15.

The truth of the matter was it was the corner of Section 16, and the Court says competent evidence shows it was 16, and therefore they were wrong and their evidence loses all its probative value. And we say that any evidence prior to 1923 in the Nottleman Island area and about 1939 in the Otoe Island area has no probative value because the land wasn't there. They couldn't say something was in Nebraska when it wasn't in existence, that's our point on this.

Now we get to your, the Court's questions, and it is indicated that the question of adverse possession has been touched on, but in that you also say prescription, and I suppose you could include in that the theory of estoppel and acquiescence, and the word you used yesterday was recognition.

THE COURT: I think that's a better word.

MR. WALKER: I think the cases will establish that there couldn't be any adverse possession against Iowa, they did bring an action in Nebraska to quiet title on the theory of adverse possession against the riparian owners, and there again I think the Court should consider the fact that none of these claimants are riparian owners.

THE COURT: Now if you want to -- I think you're losing sight of the fact that when you say that

there is no adverse possession against Iowa you're talking about a private person against the State of Iowa; but we're talking here about two sovereign states, where is the boundary and what has been recognition by the officials of both states and the inhabitants and residents of the area and the County officials all the way up as to where the boundary is, that is what we are interested in, where that boundary is.

MR. WALKER: That's right.

THE COURT: Where that boundary is, and what they did and how they acted and how they proceeded, and the Court has said that in any number of these Supreme Court decisions, and I was just looking during the recess at the one of New Mexico versus Texas, or, yes, Texas and New Mexico. And the Court seemed so clear in that case, that this inhabitant testimony, and all that sort of thing, that recognition is persuasive, almost compelling.

And they talk here, they say this conclusion is reinforced by the tacit and long continued acquiescence of the United States, the government stood by, while New Mexico was a territory; no question said that the government at that time owned the territory, the United States Government as such, the people do, the nation. In the claims of those holding land in controversy under Texas surveys and -- Texas has gradually expanded, and

the government stood by and let them do it, but when they come to them afterward the test of where the boundary was, why, they said, "Here, the people think it's here," and they abided by that for all these years, and this is where it's going to be.

We have that problem in this case, that's a real problem in this case, as I see it.

MR. WALKER: Well --

THE COURT: Because I'm convinced, and I don't say this, I'm terribly convinced, pretty strongly that there's no way that this Court after forty years and after thirty-five and twenty-seven years can with any satisfactory result based upon persuasive credible evidence can tell, that I can tell the Supreme Court and the Supreme Court can find where that boundary was, the natural boundary, the old boundary, that at any one moment or any one year or 1943, and I'm satisfied from all this evidence that the states weren't worried about it, they wanted to fix a boundary and then they went into Texas Supreme Court. I think that's the thing we ought to talk about, because I don't, I'm not sure whether it was, whether the credible evidence favors Nebraska or Iowa on this thing we've been talking about here on the formation and the thalweg at the time of the Compact.

But I don't think -- I have to agree with Nebraska

I don't think I have to, I don't think I will make a finding of that kind. If one side insists that a finding be made, okay, I'll attempt to do it, and it seems to me that we passed that point, we have got, you have persuasive evidence, I don't say that you don't, that you're correct. But even this morning, part of that, suppose part of that river bisects even a portion of Schemmel's Island and about this area you're talking about, and the Engineers got ahold of it and they put it on the other side, isn't that some reason for asking why it's assessed in there gives recognition to the fact that Nebraska took it and accepted it, the owners, the people that occupied it -- you can't get away from the fact that these people occupied it, spent money on it -- you might say, "Well, they got it for nothing, didn't do much to it," and all that, but there they are, and now it's worth so much money, it was.

MR. WALKER: Well, of course when you say that the channel --

THE COURT: So I don't --

MR. WALKER: (Continuing) bisected the island, if you study those --

THE COURT: Well, why do you want to come back to that? See, I'm just saying supposing that,

I don't know, I don't think you have to find that, I think it's impossible, you look at --

MR. WALKER: Well, do you agree with me, Your Honor, that the issue here is whether Iowa violated the Compact?

THE COURT: Absolutely, absolutely.

MR. WALKER: And that is the - -

THE COURT: Because it is a Compact case, it's a Compact case and not a boundary case, and I think you're trying to make me find the boundary before the Compact.

MR. WALKER: Well, no --

THE COURT: I don't think you have to.

MR. WALKER: (Continuing) only in regard to that issue, only in regard to that issue.

What I'm trying to demonstrate is this, that when Iowa under their law and their rights to the beds in the streams brought an action against these people on the theory that this island accreted to the bed of the stream in Iowa. Now I don't believe that the Court can find that on the theory of violation of the Compact, that Iowa, if that's true, that Iowa was wrong in bringing this action. Now if

the Court would find that the claimants to these two islands had occupied them and you feel that Iowa is estopped after this period of time, that's a different thing, all Iowa wants is a fair determination, we don't know --

THE COURT: There's no use talking that way because --

MR. WALKER: Well, I know, but here --

THE COURT: Listen, all the Court wants is a settlement of a long-standing dispute and somebody will no doubt suffer, that is, in the State and in the general sense, somebody may lose something from it, somewhere some state, one state may lose jurisdiction over something, I don't know, but the Court in these boundary cases, the Court is always seeking to settle something, that hasn't been settled, now that is what they want to do here, isn't it? I think that I have to take it that way, Nebraska's proposition that this, all this mass of evidence that we discussed this morning, and yesterday most of the day, relates to the situation of the stream and the location of the thalweg, and all that business. What it proved to me is that they didn't know where it was and they really didn't care, either one of them, you didn't know whether you were going to lose anything or gain anything, you didn't worry about that, but you did say a mort-

gage good in that state will be good in my state, and you said a title is good in Nebraska will be good here, and all that sort of thing. And I think you have got to look at it as Marshall said, Justice Marshall, in general terms, not with the niceties you might -- with a contract between two people. He said that very clearly and I like this language you said on page 78 of their brief, they quote it, and you're looking to resolve something, it seems to me the only way I'm coming out of, where I'm probably, you think I'm deciding the case against you, and maybe I will.

MR. WALKER: Well, I realized that at the beginning that there was a possibility of that, but I, what I'm trying to do, and I --

THE COURT: Now I have listened and the point of that is this I have let both sides now offer everything they wished to because I think the Court has, that's my job and I, of course, would want to follow it out anyway because I think all of this evidence that is going before the Court, they disagree with what I think, you know, they can, they can -- you know what they'll do, don't you?

MR. WALKER: Well, yes, and I think --

THE COURT: We're not worrying about that, we're not worrying about that, but after all we all

try to try the case on the basis of some finality to it if we can, and make it as easy as we can, for the United States Supreme Court is busy, but they want to get a settlement here, I think.

MR. WALKER: Well, I think what Iowa --

THE COURT: Hopefully, anyway.

MR. WALKER: Iowa wants to get a settlement, but --

THE COURT: Sure.

MR. WALKER: But what I --

THE COURT: But if you lose Nottleman Island, if you lose on that, that isn't going to break the State of Iowa; it isn't going to help the State of Nebraska, see.

MR. WALKER: It might break my heart, but it won't break the State of Iowa.

And really that isn't the concern of Iowa, the concern of Iowa is the accusation here that we violated the Compact. Now if there is a --

THE COURT: Well, don't worry about that.

MR. WALKER: Well, we worry about it this

way, because they brought the case, they brought the accusation and we don't feel that they have established that.

THE COURT: Listen, all it is, is a difference in the interpretation of a contract, and I'm eighteen years on the bench, and I've seen many a difference in interpretation of contracts, and language, see, and really when you come down to this, the nub of this thing that's what we're talking about. And of course you get to everything that has some bearing on it, how did the people act, you know, before they were, before the lawsuit came up, and that is very important, I feel, how did Iowa act, Nebraska act, during the intervening years until this thing came out, this Planning Report.

MR. WALKER: All right, Your Honor. Then I'm going to a different proposition.

THE COURT: Now, you fellows know as what I'm saying is this, I don't see any more point in that today, now I'll listen to you, but if you, today there's no use of us discussing any longer for one thing where this thalweg is, because I've got to again review this evidence, what you say in your briefs and what you say in your evidence, to find the facts there. I think Nebraska, I tried to get them to say yesterday that they didn't care whe-

ther I did or not, but I guess they want me to, is that right?

MR. MOLDENHAUER: I have found very little you said that I disagreed with, Your Honor.

THE COURT: Well, I mean -- don't try to butter up the Judge.

MR. MOLDENHAUER: I mean as far as propositions.

THE COURT: I think this, you know, I'll say this now, you sit here in Court and listen, and I like to try non-jury cases, I used to think they were the hardest cases to try but I find they are the easiest, and they're not so hard to decide either. It's a peculiar thing, on the facts, and I thought when Iowa put in their case in the first instance it was -- I didn't see how you fellows could come back.

MR. WALKER: Nebraska.

THE COURT: Nebraska, yes. And then when you put it in, I see, I thought, well, you made out a good case, too, see; but the persuasive part of that to me is just what we call a recognition testimony. Now it seems to me that Iowa is in wrong in the legal sense now, only, in standing by from

'43 on.

MR. WALKER: Well, don't you think --

THE COURT: When you knew there was something there, when you knew there was something there. I don't criticize anybody what you did up until '43 but then you knew where your line was, and, of course, I, you're not to be criticized anyway until '61 because you didn't -- it wasn't worth anything then either time, but gradually as the land settled, that is, in the sense the wildness departed, the stability occurred on the valley, in the valley and on the river, and then it became apparent that there was going to be some valuable land, but then you're still stuck with the fact that you laid by all those years too, see, now you can't get away from that.

MR. WALKER: Well, I agree with you, Judge, I'm not saying that the Iowa officials were diligent in protecting these trust lands.

THE COURT: There was a reason, there was a good reason, nobody knew about it.

MR. WALKER: That's what we tried to demonstrate to you, that there was a good reason, but now when you talk about what occurred after 1943, if you get away from the main issue of our violating

the Compact by bringing these actions, there was no acquiescence as between Iowa and Nebraska, because it was always in Iowa after '43, there is no argument about that, the theory of prescription and estoppel and acquiescence is all, all goes out the window after 1943 as far as I'm concerned, because there's no question where the boundary was.

Now we're not saying that Mr. Babbitt and Watts and the other owners on Nottleman Island can't raise that question in the State Court, nor Schemmel in the State Court; but I don't think that that proposition is what the Supreme Court of the United States is interested in.

THE COURT: No, no, no, I think you misunderstand that part; what I was saying there, what I think is the issue on that phase of the case is, there wasn't any title, good title, that anybody had to recognize, either State, until after Compact. Good title must be recognized; and these fellows had established good title, what they say is a good title, and, in Nebraska. Now it troubles me that as a Judge to say which is a good title, because in our state you got to go a long past what they've done here, but it's only ten years out here, but nevertheless it's the decision of a cumulative proposition, it's good there, it's good in Nebraska, and they say, "Well, you didn't recognize it in Iowa after the Compact, which you should have," that's where

they say your violation is, that's all, that's all.

MR. WALKER: That's true.

THE COURT: That's all.

MR. WALKER: And the only answer we have to that is this evidence on where the land was.

THE COURT: Well, I say, I --

MR. WALKER: If it was in Iowa then I don't care what Nebraska did, they didn't have any jurisdiction over it, and they can't establish a good title in another state.

THE COURT: That's right.

MR. WALKER: Now if the land is in Nebraska, then we're wrong, and Iowa shouldn't --

THE COURT: Now wait a minute, the testimony is you didn't know where it was, and I don't think anybody can really with reliability, as the Court now, can say it was here, there or the other where, or any other place in the years, in the 1930's, because there was such a constant shifting in this thing.

MR. WALKER: Well, not after the --

THE COURT: Now the Engineers -- what, not after what?

MR. WALKER: Not after 1934, it was under the control of the Corps of Engineers and it's recorded daily.

THE COURT: I know, but they didn't have to pay any attention to any boundary, they didn't have to pay any attention to any boundary, they moved it where they wanted to, so I think the recognition there was, if there was, as soon as it grew up, that didn't start overnight, you know, that's a gradual proposition. But going to school, being born, and dying, and everything in Nebraska, nothing in Iowa, nothing in Iowa, until after Compact. And there's where the Court is concerned, I don't mind saying that I'm concerned with that type of testimony, I think that I'm going to have to say that that recognition tips the scale, you have argued cases to the jury, you know that scale up there -- that tips the scale, you see.

MR. WALKER: Well, if that tips the scale in placing the land in Nebraska, then I think the Court --

THE COURT: The boundary, where the people thought the boundary was at that point.

MR. WALKER: I understand.

THE COURT: Where they thought the boundary was at that point.

MR. WALKER: I understand.

THE COURT: And I'm not saying it was that way all up and down the river, but people thought there was the boundary at that point.

MR. WALKER: At that point.

THE COURT: Yes. We don't care where it was, if so, and they had a good title then you must recognize it, that's the situation.

MR. WALKER: Well, if the Court would find that the boundary was west of Nottleman Island in 1928 when Mr. Shipley first occupied it, and from there on up to the point of the Compact. Iowa has no objection to that if the Court actually believes that is the true facts and will recite those facts. That isn't going to hurt Iowa too much.

THE COURT: What, if I find what?

MR. WALKER: If you find that the boundary was west of Nottleman in 1943, even if you base it upon this recognition --

THE COURT: You mean west or east?

MR. WALKER: West, or, east -- east, east.

THE COURT: Yes, east.

MR. WALKER: In Nebraska. If you base it on that recognition testimony in corroboration with the other --

THE COURT: Listen, I'm only human in some respects.

MR. WALKER: No --

THE COURT: No, wait a minute, I'm just saying this, and it seems to me, you know, the easiest way to decide a case fairly is sometimes the correct and legal way and the way that a case should be decided.

It seems to me here that the proposition is going to resolve itself as to whether -- now I'm not an engineer or surveyor and the Lord knows, I understand you're not either, see.

MR. WALKER: No, I'm not.

THE COURT: But, and it's hard for me to read those maps, I'll say that, but I've listened to people all my life, and lawyers and judges,

and so on, and what they say about them.

People can take maps as well as they can everything else and make a lot out of them, see, they can make drawings and lines and photographs and all that stuff, and all that sort of thing, and it seems to me there's almost an equal division among you, between you, on this business of where the physical boundary is now on the river, you know what I mean, as distinct from memory and testimony, and all of that, see, we look at the maps, and it's pretty hard to say it was there, because it might have been right there that one year and the next year, the next spring, it might have been somewhere's else. So I'm inclined to view this testimony as having great weight on what occurred before and after 1943 on the recognition part of it. If that decides the case, okay, and that's as far as I want to go. That's what I'm trying to say, I'm not going to accuse Iowa of not going to church when they should go to church, put it that way.

MR. WALKER: Well, what I was saying is that that wouldn't bother counsel for Iowa, it might bother our bosses a little bit, but you can't take Nottleman Island and base your decision on all the rest of the area, because the facts even between Nottleman Island and Schemmel Island are --

THE COURT: No, no, I don't say that, but we only have recognition testimony, the greater weight of it is on those two islands, is that right?

MR. WALKER: Well, there really isn't too much recognition on Schemmel, he didn't start, by their own testimony, they didn't start until '56, they started to clear it in '53, '39 was the earliest evidence of any ownership either in Nebraska or Iowa as to that, and in '39 there wasn't anything there but water, and I, you take that evidence and then jump to '56 to occupancy, and the case was started in, before my time, '63 or '64, I got in it in '65, I think, and so it was before that, that it started.

So you only have eight years and there isn't too much recognition evidence other than their own personal acts with regard to that, so I don't think you can compare Nottleman with Schemmel, but --

THE COURT: Well, let's go at it this way --

MR. WALKER: (Continuing) what I don't want the Court to do if it can be avoided, and the Court agrees with it, to decide because Iowa may have made a mistake on Nottleman Island and then just carte blanche say "Your common law was thrown out by the Compact and you're off the river all the way up and down the Missouri River, and

when you agreed to do that you changed your property title laws and "all" --

THE COURT: Now I don't say that, I don't think the Court can say that, I think this, that my view is that it's like any other land case, if the case is tried in the Iowa court and tried in the Nebraska court between private property owners or between private property owners and the State of Iowa on another piece of land that you haven't talked about here, and somebody shows a title which has gone to final judgment in Nebraska, unappealed from, and is therefore a final judgment that takes in a piece of property that is recognized in Nebraska in one of these type of things, then when it gets into that Court, the only thing is that the Court will say, "Well, we can't apply that common law any more, that's out," and that fellow may prevail unless there's some evidence, you see, that contradicts him there --

MR. WALKER: That's true, but of course in this case if you found the island formed in Nebraska, Iowa was wrong in bringing the action, it still wouldn't have to affect their common law.

Of course, I'm getting into Mr. Murray's argument on whether or not this was a compromise; we feel that it wasn't, but --

THE COURT: Well, let's get on with the

argument here, we're spending time.

MR. WALKER: Of course, we've been discussing this question of whether it was acquiescence that the Court inquires about. We just feel that the theory of acquiescence is not here because no court has found acquiescence, even in the Nottleman case, giving them the benefit of all of their testimony, 1926 is the first evidence of occupancy, and up to 1943 would be about eighteen, nineteen years.

Now there can't be any claim by the State of Nebraska that their jurisdiction was acquiesced in by Iowa after 1943 because we all agree it was in Iowa after that.

THE COURT: Well, I don't know but what you fellows still misunderstand my theory of that on Nebraska's position, that is, that the only reason that the acquiescence is to show what the -- the place of the boundary, the point of the boundary, that's all, acquiescence, people thought here's the boundary, at that time.

MR. WALKER: Well, under the theory --

THE COURT: It isn't that -- we're not talking about the title to the land, but here's a guy on it, everybody, nobody's bothered him, everybody said this is Nebraska land, people say that's Nebraska,

that's Nebraska, well, that's what they call that acquiescence, what we've been calling recognition testimony of the boundary, that's all.

MR. WALKER: But if acquiescence is a theory that's been developed between states' jurisdiction --

THE COURT: Yes.

MR. WALKER: (Continuing) and there's no evidence here of long acquiescence, you give them the benefit of all the doubt, and there isn't sufficient length of time here to acquiesce by Iowa in their claim of jurisdiction over Iowa property. Now if you're getting at it to prove --

THE COURT: That's true.

MR. WALKER: (Continuing) the boundary, to me that isn't the theory of acquiescence, that's what you term recognition testimony to establish the boundary.

I'm not -- maybe I'm confused, but acquiescence to me is when one state exercises dominion and jurisdiction over the territory of another state, and that state allows it until the people assume that that is the new boundary.

THE COURT: The Court in 1924 said this conclusion is reinforced by the tacit and long con-

tinued acquiescence of the United States while the State did something.

MR. WALKER: Yes.

THE COURT: Didn't kick, didn't complain.

MR. WALKER: Long.

THE COURT: What?

MR. WALKER: Long and tacit.

THE COURT: All right, sure, it's long, but I say when you're talking about the boundary and recognition and title, and so on, you're talking about, from there you're talking from perhaps 1930 up until you make a claim against Babbitt.

MR. WALKER: No, because, because the Compact of 1943 placed it in Iowa without a question.

THE COURT: Oh --

MR. WALKER: Nebraska never exercised dominion over it after that. They shouldn't have, but they did collect taxes --

THE COURT: That has, of course that has

two facets, the first part of it was that nobody cared where it was, and Nebraska was taxing it, the people were going to school and all that sort of testimony afterward; all the claim there is that they had a title good in Nebraska and you wouldn't recognize it, and when you should have, but you did really recognize that title all the time because you continued to tax it and accepted the taxes, and you made no claim for it.

MR. WALKER: In '46, in 1946.

THE COURT: Yes.

MR. WALKER: From 1946 until '64.

THE COURT: That's right. There's a period, there was a hiatus there from '43 until '46, I guess, that nobody knew what to do.

MR. WALKER: The Nebraska Treasurer's duties are to accept all taxes that were offered to them --

THE COURT: Oh, yes.

MR. WALKER: (Continuing) and do until this day on Iowa land, and that's what to me weakens their whole proposition. But there again that doesn't --

THE COURT: It turns into a , to a Section 3 case after 1943, there's no question about it.

MR. WALKER: And I think the Court will agree when I say I think that in the state court in Nottleman Island that this evidence after 1943 is certainly admissible to establish their title to the land against the claim of Iowa from the theory of estoppel, even though there is an adverse possession and the state courts of Iowa have held estoppel. Right over here in the Carr case right cross the river in Council Bluffs.

Of course, there the people expended hundreds of thousands of dollars in developing the area and paid taxes on that valuation, and the Supreme Court said "You can't come in and claim that, after allowing that to go on." Now maybe the District Court and the Iowa Court would hold that in the Nottleman Island case, I don't know, that case was never determined.

The theory that they bring to this Court away from the state court is the great expense that it put these landowners to, and yet Mr. Moldenhauer said the other day that in the one case they started, I believe it was the Babbitt case that was tried, Schemmel case was tried, or started to be tried and it was stopped, the only evidence they put in was Mr. Huber and Mr Jauron and then they relied upon the presumptions.

Now that doesn't sound like a very expensive

case to try if that was all the evidence that Iowa submitted; but there again that goes just to my proposition of did Iowa violate the Compact, did Iowa do something. Now if Iowa had sent the National Guard down there and kicked these people off the island and set up sentry duty and kept them off, I can see where that would be wrong; but they didn't, they never even interfered with their possession, they went to Court to see whether or not it belonged to Iowa, they took the proper, I think, the proper attitude. Sure, they are going to be wrong in cases and the decisions show that Iowa has been wrong and been defeated in some of these cases. But the mere fact that they inquired into title in the proper forum to me is not a violation of the Compact unless as Nebraska says we agreed to change our common law as to a part of our territory and were estopped from ever claiming any land on the Missouri River. Now that is in effect what they said yesterday when you asked them if they would be satisfied with Nottleman and Schemmel; they said, "No, they've got to leave the river," or words to that effect.

Now I don't think that there's anything in that Compact or in the history leading up to it that requires a ruling of that drastic nature in this case, and I think that Iowa is perfectly proper when they challenge the Schemmel claim because I think the evidence there is strong in favor of the State of

Iowa, and with the exception of this recognition testimony which the Court feels is of more value than I do, and which is not unusual, Courts have disagreed with me before. I can see the Court's position there. But I don't think there's any ruling in relation to that that goes to the drastic extent that Nebraska is setting forth.

THE COURT: Well, you know, I notice Judge Pope in his comments there when he had the case, he thought perhaps that Nebraska might have in their prayers for relief overlapped their prayers and claims for relief a bit hoping they would get some of them, you know; that isn't unusual, I think, to ask for everything.

MR. WALKER: Well, and I think that the Court will agree that, to the extent that a state comes in and sues an individual, they should be cautious and they should be careful and not to take something to court that isn't, in their opinion, proper and provable, but --

THE COURT: Well, you see, Mr. Walker, they're critical of you, I think, I don't always go along, I'll sustain Iowa on that business of quiet title, let's quiet title, and they say that shows an inconsistency, and so on, shows that you didn't have the title, you were going to get a title, but seems to me it shows this; that they didn't know

whether they had the title or where the land was or whether it was good, bad or indifferent, you see, and I think that goes along with my idea, nobody knew what the situation was until after the Compact when the land started to appear and become valuable, except in these few instances.

MR. WALKER: Well, that --

THE COURT: The mere fact that the planning commission said, "Let's look into Nottleman, let's look into Schemmel," let's look into this California Bend, let's look into all these things, it doesn't mean anything, it doesn't mean of course that they didn't have a right to do it, I think certainly they had a right to do it, it was part of their duty to do it, but they, I don't think they paid much attention to Sections, the other sections of the Compact other than where the channel was, where the boundary was, the new boundary was, that they had to look at a title good in one state, now that was for -- but during those years where titles ripened in Nebraska, that's the thing that Nebraska complains about now, you didn't recognize them, as I understand it, that's the violation.

Is that right or not?

MR. WALKER: Well, there's no question about those two, but I don't know of any others. Nottleman and Schemmel, that's what they said we

did and they do have some indicia of title over there. We say it isn't good; they say it is; well, the Court is going to make that decision, but I don't believe they have shown that any place else.

THE COURT: Well, they argue, they show that there's some land there in those other places that Iowa shouldn't be claiming as --

MR. WALKER: But that's with reference --

THE COURT: In other words asserting the common law against landowners You see, what's needed here, and you know, after all, as judges, we all look to the Supreme Court. What's needed here is a rule, some kind of a rule that the state courts on both sides of the river and the District Court can apply, and the Circuit Court, and everybody else, isn't that right?

MR. WALKER: Well, that's right.

THE COURT: Sure, that's what we need. Then we would leave it afterwards to the private property owners to battle out their problem, we don't care about that because if they have a diversity of cases they'll bring it into District Court, and then they may think, "Well, we get a better shake there because the Supreme Court decided it," but if they can't get it there they will bring

it to the best place they can, and the Court and judges will follow it, judges like to follow the law when they know what it is.

MR. WALKER: That's right.

THE COURT: And that's what's needed here, some statement, and what bothers me is that Nebraska seems to want me to go further than I want to go, and I think I should go, the Court, rather, the Court won't go any farther than it wants to go, I don't mean, don't misunderstand me, don't be bound by what I suggest, but they may be, they may accept it if I suggest something reasonable because I think they're looking for help and assistance in a final settlement. I'd like to get this thing in shape so that the report will set up criteria and standards where both states can live with it, that's all, so the people on the river will understand that.

MR. WALKER: Well, along that line, I don't believe that the Supreme Court of the United States wants to decide or have you recommend to decide private titles.

THE COURT: I know --

MR. WALKER: They want you to lay down a rule that Iowa courts can follow in these cases, and

I agree with you there; but I think that when you lay down such a rule that it should be applicable to both states and it shouldn't penalize Iowa and destroy their law and not affect the Nebraska law.

THE COURT: Destroy what -- their law?

MR. WALKER: Destroy what we consider to be our law today, that's what they're asking you to do.

THE COURT: I don't think there's any question about it, that a title good in Nebraska and we are assuming that in all its aspects, that a certain person has got a good title in Nebraska, and it goes to the other side of the river, you got to recognize it --

MR. WALKER: Absolutely.

THE COURT: (Continuing) in spite of the fact that it doesn't tend for your common law to give way.

MR. WALKER: That's right.

THE COURT: That that's what --

MR. WALKER: No, no, it doesn't affect our common --

THE COURT: Well, listen, you've, you claim then that you own the bed of that river, and he says no.

MR. WALKER: No, not to those titles that were good in Nebraska.

THE COURT: All right, that's all that was said.

MR. WALKER: We have never made that claim. No, we'd love to --

THE COURT: If you'd agreed with that on Nottleman, Nottleman wouldn't have been there, he'd been back in California there, and still there.

MR. WALKER: Your Honor, we suggest that our proposition in our pre-trial statement, that land, good title in Nebraska ceded to Iowa, that Iowa would recognize it, and vice versa.

THE COURT: But you coupled that with the proposition that it had to be formed in Iowa.

MR. WALKER: No, that it had to be ceded is all, that's what the Compact says, we tried to follow the Compact.

THE COURT: Well, of course, we'll come to

that, I suppose, of course, -- well, go ahead, we'll argue here all day and won't get anywhere.

MR. WALKER: Well, I think that this is what oral argument is for, is to give the Judge our ideas on his concern, but I really don't have much more to say, I think we've argued the question of acquiescence and --

THE COURT: Or one phase of it, you argued taxes.

MR. WALKER: Well, I don't think you'll agree with me when I give you an argument on the rest. You talk about birth certificates --

THE COURT: A few, but --

MR. WALKER: And school records and register of death, I believe, on Nottleman Island. They had some equipment out there that was taxed in Nebraska.

THE COURT: Mr. Walker, I don't recall, I maybe could be wrong, but I don't recall any individual who testified as to the location of Nottleman's Island ever put it in Iowa when they asked about it, or knew about, and were concerned with it, it was always in Nebraska, people thought it was in Nebraska; is that right?

MR. WALKER: Oh, no; there was numerous Nebraskans, Nebraskans that said it was in Iowa, if you'd read the record. Now I may be wrong on this that they were asked point blank which state was it in, now that I don't know, but we asked which side of the river was it in --

THE COURT: Now, all right. listen, I imagine -- but which state was it in I'm talking about, which side of the river, I'm saying how was that regarded, Nebraska land or Iowa land? I don't recall anybody that ever said it was Iowa. Now, of course, they said now which side of the channel, and all that sort of thing. I'm talking now on the recognition business.

MR. WALKER: Well, on Nottleman, I think you're right, I don't recall any either, but there was on Schemmel, Propp, Givens. If you remember the witness Givens, he said if it didn't belong to Iowa that it had to belong to his family, it was accretion to their land; if it wasn't an island, it certainly didn't belong to anybody in Nebraska, and he said that on the witness stand.

THE COURT: He wasn't going to admit that it was Schemmel's.

MR. WALKER: No, because if Iowa failed he'd be there waiting, and, again, I don't blame

him, it had some value, if I owned the land adjavent to it I'd be in there trying to establish that that was the law too.

THE COURT: Well, listen, is Mr. Schemmel -- I don't know whether he's still here or not, but if he is -- he may still have a lawsuit with another private party who owns that land for all I know.

MR. WALKER: I think it's on file already, I'm not sure.

THE COURT: Well, I'm not going to try that case, thank the Lord.

MR. WALKER: I thought the witness said the Givens family had filed, but I'm not sure of that either.

But I think you can't lump Schemmel with Nottleman together, I don't believe the evidence substantiates any claim to the Schemmel area at all.

But to get back now to your proposition, is the Nebraska evidence of adverse possession a prescription on which, sufficient on which to base a decision under these circumstances. Now --

THE COURT: Well, that related to the top part there where I couldn't find where the boundary was, the old boundary was.

MR. WALKER: Well, that's right, but the evidence of adverse possession, what you term recognition evidence, I don't think the recognition evidence alone would entitle any Court, the recognition evidence in here to find that. I think with other documentary --

THE COURT: Oh, yes, sure.

MR. WALKER: You might develop a sound case, but without that, why, as I said, I'm getting into Mr. Murray's part of this argument, and I don't think I'm getting too far with the Court, so I'm going to --

THE COURT: Well now, wait a minute -- you come to the time in the case when you've got to talk about what the possibilities may be, don't you know that?

MR. WALKER: That's right, but I just want to mention in here that these were placed on here by Mr. Bartleman and there was some argument with Nebraska counsel that it wasn't accurate because it showed the complete section areas, and that part of it's true, but it does show the Iowa Chute and it shows the accretionary area considered in Payne versus Hall, and then the arrows he has there, little arrows, means that the description in the tax books showed plus accretions, and

he put the arrows in there not knowing where the accretions were. We would like the Court to see those.

There is one other thing that I would like to talk about in the Otoe Bend canal, and that is, the Otoe Bend area, and that is the canal they talked about, and especially what Mr. Moldenhauer discussed in regard to one of the trees that was supposed to be up near the center of the west side of the island near Dike No. 601.9A. Now that was a long dike that came down a lateral and parallel or fairly parallel with the river, onwhich he says there are trees growing out near the end of that dike. Now Nebraska introduced this book of ground level photos, and I would like to have the Court, when he has an opportunity, to look at the pictures with relation to 601.9A, and it shows the beginning of the dike well out into the river, and I fail to see any trees there or any land of any consequence ahead of that dike as it goes through.

Now if the Court will interpret that for itself, but I don't believe that this substantiates his comment in regard to the trees growing there.

We get down to the canal, there's no question the canal was dug, but that canal was dug through Nebraska accretionary land that was built up by the work of the Corps of Engineers, they ran the dikes out from Nebraska, they drove dikes out from Nebraska to where the design channel was to be, and the accretion continued on beyond the dikes,

and a couple years later, in '38, they decided to cut this canal, to push it back over against the design, the west side of the design channel, where they wanted it, and they cut through accretionary land and the river, and there were scrub willows on both sides, and there are pictures to substantiate that.

But the testimony by the witnesses that worked on it said it was a hundred foot wide, and after the river was forced over to it, it widened out to the design, to the established dike lines to the designed channel.

It is our contention that that canal destroyed, when it widened, destroyed any land that was attached to the Nebraska shore. And that is verified by Mr. Schemmel's own testimony when they asked him how did he get out to the island, and he said, "I walked across dike lines because the dikes were attached out," and he walked across water.

Well, they said, "That's on the Iowa side."

And he said, "No, that's on the Nebraska side."

And they said, "Well, we want to know how did you get to the land on the Iowa side." But preliminary to that he testified he walked across water on these dike lines, and from the two witnesses by, of Nebraska's, it established, we think, that the canal by widening out washed away what land there was there.

Now, there are some trees down in that end of the island near where that canal was dug, of

substantial age, we don't think that they go back to the date of the canal. Their witness evidently did. But we'd point out to the Court that even though we haven't established that there was Nebraska land included in what is now Schemmel (sic) Island that these tri-colors show the old contours and the areas that was involved in that canal building and it shows the dikes that were built out from the Nebraska side.

And that's another reason why we'd like to have the Court take these tri-colors.

THE COURT: Yes, I want to take those back. At the conclusion tomorrow, why, the things that we have talked about here, we get some men up from GSA and have them help Jack get them loaded. My boy is going to take those things back if he can get them in one station wagon.

All right.

MR. WALKER: Well, I thank you; that concludes my argument.

THE COURT: All right, we'll take a fifteen minute recess.

(Short recess at 2:10 o'clock p. m.)

THE COURT: I just want to say that some time ago my attention was called by one of my

brother Judges who wrote a couple of books on the Constitution, Judge Dunbaugh, to a work by James Scott Bond -- no -- James Bond Scott, never heard of the guy until about a month ago. But he wrote three volumes on all the controversies which the Supreme Court had heard between the states of the Union up until 1918, and when we got here the other day, my secretary called the public library. Now they didn't have that work in Pittsburg, but much to my surprise they had it here, the three volumes.

And the surprising thing is that they got it in 1920, and I was the first fellow to take them out of the library. So I had to put a ten dollar deposit on them.

But you'll notice here it says Carnegie Endowment for International Peace. It was a project to promote peaceful settlements in controversies between states, and all the decisions are in those volumes, but the best part of it is, this one, this first volume, this Analysis, he has one volume on Analysis.

And you know, for instance, Rhode Island versus Massachusetts is a hard case to read. You pick up that volume and it's like Green versus -- what is the name of that other one?

MR. MOLDENHAUER: Biddle.

THE COURT: Yes. That's another hard one,

because you pore through about sixty of seventy-five pages before you get to the opinion. But this fellow here analyzed each case. He tells what the facts are and what the intentions were, and it makes it a little easier to read. I just point that out to you. And one of the cases that he, that we've been looking at is this case of Maryland versus West Virginia, where they discuss a lot on this recognition testimony, I think. It's a quite helpful volume.

I tried to buy it and I called New York City where they published it, and it's out of print. So it's pretty hard to get ahold of. I'm going to turn this book back, because I had to put that deposit on it and I'm going to get my money back.

All right, go ahead.

Do you use that work, Howard?

MR. MOLDENHAUER: I wish you would give us the title, Your Honor, I haven't seen it.

THE COURT: It's "Judicial Settlement of Controversy between States of the American Union," edited by James Scott, or James Bond Scott, and it's got all the three volumes, one, two and three, in the third volume is the Analysis, see. I don't think that -- there's nothing new in the cases, the cases are still there, but he discusses them in a little bit of detail, and it was easier for my law clerk to pick up that Analysis and find those cases than it was to go through all the books.

Go ahead.

MR. MURRAY: May it please the Court, I was just going to say that I wish I was one of those smart young fellows that could pick up a book like that, that would have avoided me from reading through Green versus Biddle about a dozen times, trying to find out what I think it means. Green versus Biddle has always been a very hard case for me to read and understand, also Rhode Island-Massachusetts, some of those old cases, as you say, you just wade through page after page, and after you get through you don't know what you've read, at least I don't. And I wish I had known about that volume sooner.

By way of introduction or farewll to Manning, I also want to say that the Court has probably heard the last argument by Manning Walker as an Iowa laywer, not just as a lawyer for the State of Iowa, but as a member of our Bar. Day after tomorrow he is going to Phoenix, he feels he must get out of this rugged climate and into a better one and you have been favored with his farewell argument to any court, I believe, as an Iowa lawyer, unless as we hope his health can improve down in Arizona and perhaps he can come back.

THE COURT: Mr. Walker, let me say now while it's appropriate and timely that I wish you good health, continued health, and good luck, and

all that sort of thing.

MR. WALKER: Thank you.

THE COURT: It's nice to have all you fellows in front of me, all of you I think you have good minds, and you've handled the cases very fairly, I think, from your viewpoint, I want to say that. And I would only hope that I could present you with a victory before you go, but I'm not going to decide this case tonight.

MR. WALKER: I hope Mr. Murray didn't make that eulogy for that purpose.

MR. MOLDENHAUER: The Counsel for Nebraska would like to join in those best wishes.

MR. MURRAY: Manning and I discussed for some time how we could divide up this argument between us. And we were interested in the remark you made from the bench, I think it was Monday, or Tuesday, to the effect that you thought there was a natural division of this case really into two segments, because that is the precise way that Manning and I had already decided to divide up our time.

Roughly, his topic was to be the islands that were in existence, or the areas that were in existence, before 1943. We think that is one separate

part of the case. And then my topic was to be the areas that had formed since 1943. That's an entirely different subject matter to us.

We believe that the law controlling those areas which were in existence when the Compact came into effect controlling who would become the owner of them was the law which was in effect when they came into existence. The Compact would have no retroactive effect to change that law which existed in either state to determine who became the owner of those areas.

But the areas which have come into existence since would certainly be controlled by the law of either state, as modified, if any, by the Compact, there isn't any question at all -- well, I retreat for a moment.

Really your questions or suggestions number 3 and 4 in your order of September 10th are the ones which to our thinking related to the areas which have come into existence since. Your number 3 was the Compact was a compromise, and Nebraska contends that this supersedes Iowa's common law and changed the rights which the State of Iowa had in and to the beds or abandoned beds of the Missouri River. Then you ask is this a proper interpretation of the Compact.

Well, first I would point out that really in the quoted phrase from Nebraska's argument there are two statements; one statement, the first statement, is that the Compact is a compromise. Cer-

tainly, it was a compromise, there isn't any question about that.

Both states certainly knew when they adopted that Compact that they were surrendering sovereignty over some territory in exchange for obtaining some sovereignty over some other territory, which they have never exercised sovereignty over before. In that sense it was certainly a compromise, and that gets us back to your question of what does the word "cede" mean in the Compact?

I will not cite the cases which we cited in our brief because they are there, and we blieve that the word "cede" in the Compact had reference only to sovereignty. In fact, any thought that the word "cede" as used in the Compact to our mind was negated by Sections 3 and 4, or is it 2 and 3, I can't remember -- 3 and 4.

Sections 3 and 4 to our mind, in effect, said no land was to be conveyed by the Compact. Those sections to our mind were saying titles to land as they existed before the Compact won't be changed, to any of it, and therefore the very -- any thought that the word "cede" used in the Compact would also mean convey, we feel, is negated within the Compact itself.

So it was an exchange as far as we are concerned of sovereignty for sovereignty, and certainly not an exchange of land for land, titles to land for titles to land. There is a further reason

why to our mind the Compact, the word "cede" in the Compact can't mean convey, and that's because Nebraska had nothing to convey, under their law (sic) they owned no river bed. Under their law the State owns no accretion to beds; so in the sense of compromise, you couldn't hardly say that the word "cede" meant convey, because that would have been just a one-way street. Only one of the states owned anything that could possibly have been conveyed, so we don't feel that --

THE COURT: Was that discussed in the negotiations, was any record of that --

MR. MURRAY: Not that I know of.

THE COURT: (Continuing) mentioned by anybody?

MR. MURRAY: Not that we know of.

THE COURT: The difference in the law?

MR. MURRAY: No, sir.

THE COURT: All right.

MR. MURRAY: Which brings me to this, that we feel that the only reasonable interpretation of the Compact is that the two states were

going to draw a new line, it was admittedly a new line, and that henceforth Nebraska would have sovereignty of and jurisdiction over the land west of that line, and Iowa would have sovereignty and jurisdiction over the land east of it; and never the twain would get in each other's hair again. But here we are -- in each other's hair again, I guess.

But we really feel that that was the nub of the Compact, that the courts of Iowa under Iowa law would henceforth determine the titles to everything in Iowa east of the agreed line, and that the courts of Nebraska would determine the titles to everything in Nebraska west of that line.

We believe that this is borne out by the evidence in this case. Iowa proceeded, and there have been numerous cases in the State Courts of Iowa to determine titles east of the line, and there have been numerous cases likewise in Nebraska to determine titles west (sic) of the line.

Now my count of the exhibits is that there have been, that back in '66 or '67, when the compilation was made there had been forty-three cases in Nebraska where they had, in the words of Nebraska, made unilateral determination concerning ownership of land west of the agreed line, without any interference from Iowa or without Iowa being a party to any of those cases, they simply settled what was on their side of the line and for years we thought that was all right, no interference.

THE COURT: Nebraska, the State of Nebraska on any of those cases?

MR. MURRAY: Not that I know of.

THE COURT: Private property.

MR. MURRAY: Private property. But once again we get back to the point that Nebraska really has no river lands, never did. The only river lands they had are lands they have purchased for some reason or another, and wherever a school section happens to be on the river, I have forgotten, I think originally Sections 12 and 36 in each section in Nebraska was designated as state-owned land for school purposes, and the State still owns some of these school sections, and the only places where they owned land on the river is where those sections happened to lap, or where some purchases have subsequently been made.

So we don't feel that the Compact can be determined to be a give-away by Iowa of its state-owned land for one reason because there could be no reciprocal give-away by Nebraska.

The second reason why we feel that it can't be interpreted that way, is that if the Compact be interpreted as a conveyance by Iowa of its state-owned river beds, state-owned lands, whatever they were when the Compact became effective, you then run into the problem of, well, who were the

grantees, who were the beneficiaries of this give-away?

THE COURT: I don't think anybody contends that it was a grant, I don't think that it is, I agree with you.

MR. MURRAY: Well, they do, they frankly say in their brief they want you to hold and Mr. Moldenhauer said it a couple times, they want you to hold that Iowa no longer owns the bed of the Missouri River in Iowa, that we only have an easement on it. Now if that isn't a claim on their behalf at least that they, that Iowa has lost its state-owned river bed by operation of the Compact, I don't know what it is. Now they --

THE COURT: Well, I look at that, I'm frank to say, as going too far.

MR. MURRAY: Well, we do too.

THE COURT: Well now, what I think that word means, one plain meaning of the word "cede" is yield. That word, we just looked at it in the new Black Law dictionary, it says that's usually used in terminology between sovereign states, yield territory, yield jurisdiction, sovereignty, and so on. And I think all, I think your point there is well taken, except this, that a good

title, you got to get down to the rest of it, you got to get down to the next section, you see.

MR. MURRAY: Yes.

THE COURT: Where you must yield when there's a good title coming to it, that's all it means, very simple statement, I can say that's very simplified.

MR. MURRAY: I agree with the Court's statement there, that we must yield when there's a good title coming to us.

THE COURT: Okay, that's the way it looks.

MR. MURRAY: The only place that you and I, Judge, disagree at the moment on that point is I utterly and completely am unable to see how there can be good title in Nebraska to a piece of ground which was never in Nebraska.

THE COURT: Well, I agree with that, too, I agree with that, but you didn't know where it was, you didn't care where it was.

MR. MURRAY: But that's away from my subject, of course, for the moment. I agree with you that we agreed to yield to good titles coming to us from Nebraska; and our only dispute is, what is a

good title coming to us from Nebraska? They say it is a title recognized in Nebraska. Now we don't think a title recognized in Nebraska is necessarily a good title in Nebraska, and particularly because it just -- I've lost my train, so I'll shift to another subject.

THE COURT: Well, maybe, I maybe threw you off a little bit.

MR. MURRAY: No, I welcome that, Judge.

THE COURT: Well, the point is here that I think we're agreed on that, I don't know whether Nebraska still wants the Court to insist on that all the way up and down, but I have considerable reluctance because it seems to me that it goes further than what is necessary to do to decide the case, the controversy, you see.

I think all the courts need, as I have said before, all the local courts need -- by that I mean the high courts of both states -- is an expression from the Supreme Court that Iowa common law can't be used against a good title, that's all.

Go ahead.

MR. MURRAY: Well, you gave Mr. Moldenhauer an opportunity yesterday to withdraw from that position but he didn't. So that's still their position.

THE COURT: That may be.

MR. MURRAY: And I feel necessary, I feel called upon --

THE COURT: Well, go ahead.

MR. MURRAY: (Continuing) that I must make my argument against that proposition.

THE COURT: Go ahead, go ahead.

MR. MURRAY: Because they still insist upon it.

We feel that if by any stretch of the imagination it be considered that Compact was a give-away by Iowa of its state-owned lands and river beds along the river, that then it must follow the give-away wasn't to Nebraskans but it must have been to Iowans.

Now once again we think that is simple but Nebraska's claim in this case doesn't stop there. They want this Court to say that the conveyance by Iowa of its formerly state-owned river beds and lands was to Nebraskans. We think that is an extreme position which they cannot sustain, and which is not a proper position to be derived from the Compact.

The real principal reason why we feel that that can't be it is just because the Compact doesn't say

so. In that respect we feel they are asking the Court to write a Compact, or change a Compact which we believe the courts have never been willing to do, and the Court shouldn't be willing to here. The rule against implied repeals is against them on this proposition. The rule that Compacts will not ever be construed to derogate the rights of the public is against them on that proposition. The rules against them on that proposition are so numerous that it's almost futile to start out on it.

Now, I have taken a look at these upstream areas, areas other than Nottleman and Schemmel, as you have evidence concerning them in this case. I believe there are six areas below Council Bluffs-Omaha which formed before 1943, and maybe there are only five. In my quick review I am unable to answer for Copeland Bend, but certainly Stateline Island, Schemmel Island, Saint Mary's Bend, Alden Bar and Nottleman Island were formed before the Compact and not affected by the Compact except the Compact to our mind says whoever owned them before still owns them.

There are two areas above Council Bluffs listed in our list of areas which we claim to own which formed before the Compact. One is Wilson Island; I don't know whether they feel that we are violating the Compact by claiming and occupying and in improving Wilson Island or not, but it's an area which formed before the Compact. And the other one above Omaha is Deer Island, which was involved in

the case of Iowa versus Raymond in the Iowa Supreme Court.

That brings me to this. Why does Iowa claim Schemmel Island? To our mind factually Schemmel Island formed at the same time and in precisely the same manner that Deer Island, which was involved in the case of State versus Raymond, was formed. We had at Little Sioux Bend in the Raymond case a wide river, as the wild river was, usually a mile wide, sometimes a mile and a half wide, sometimes two miles wide when the Corps came to Deer Island in the middle '30's and went to work.

It's our position as Mr. Walker has told you, that it doesn't make any difference whether the thalweg was anyplace within that channel; it could have been anyplace. The Corps design at Deer Island was to put a designed channel and confine the river in a curve like that. Their method for doing it was to drive pilings and build dikes out from the Iowa shore -- does that look familiar -- just like down at Schemmel Island.

The only difference up at Deer Island was that after they built these dikes the river went into this designed channel without any further effort on their part, went where they wanted it to go, without a canal.

The difference down at Schemmel Island is that after they got these dikes built and after they got another long dike built clear across the island

with its trail off here, the river insisted on coming back like this; so they dug the canal and moved the river from here to here. And that's the only difference in our mind as between the island that was involved in the case of State versus Raymond and Schemmel Island.

They are alike even in this, that after they built these dikes water continued to flow, back here, and they had to come back and build what they call a chute closure, or a dam, back in here to shut off this water from escaping from their designed channel.

The law of State versus Raymond as far as we are concerned, Judge, if applied to Schemmel Island would say we own it. Now, and, that's one of the explanations at least of why we claim to own it.

THE COURT: What states were parties in that case, any states?

MR. MURRAY: No states. The case of State versus Raymond was Iowa against the Iowa riparian owners, about four or five of them who claimed that this island didn't form as an island, but that it had formed as an accretion to their Iowa shore. The only way the Nebraskans over here got into the case --

THE COURT: They -- Iowa wouldn't stand for that, would they, Iowa wouldn't stand for that

whether the facts were so or not, would it? I mean, Iowa couldn't go along with that theory no matter what the facts were, could it?

MR. MURRAY: I don't follow you.

THE COURT: Well, Iowa wouldn't permit any of its citizens to claim accretion outward from the west bank of the river, or, the east bank of the river, would it?

MR. MURRAY: Oh, yes, they would.

THE COURT: They would?

MR. MURRAY: Yes, sir. And that brings me sooner than I wanted to get to another subject that I was going to talk about. Nebraska is critical of Iowa about being inconsistent where we claim and where we don't claim.

They seem to feel that we are inconsistent if we don't claim to own every place and any place that the river ever was. We do not claim to own every place and any place that the river ever was. We -- it's clearly the law of Iowa in numerous cases that when somebody else's accretions, honest-to-god accretions, building up gradually and imperceptibly from their riparian shore come out here and cover our formerly state-owned river bed, those accretions belong to the riparian owner,

and we don't deny it, never have. The question in Raymond case was whether or not that happened there, and the Court said that it didn't. This island did not form as a gradual and imperceptible accretion to the Iowa shore.

If the fact had been that it had done so, and if the fact had been at Schemmel Island that it grew as a gradual and imperceptible accretion from the Iowa shore, we wouldn't be claiming it either. The only way we could claim either island is on the basis of island formation, separate from the shore, separated, surrounded by flowing waters, and we think both islands.

THE COURT: Well, that's what the Court held in the Tyson case, wasn't it, he found the island in the river?

MR. MURRAY: Yes, sir.

THE COURT: The Tyson case.

MR. MURRAY: Yes, sir.

THE COURT: And gave it to you?

MR. MURRAY: Yes, sir. Found it in the Raymond case too, that one case was the Iowa Supreme Court and the other case was the Circuit Court after the District Court here in Council

Bluffs had held it.

Two areas above Council Bluffs-Omaha, along the river, which Iowa claims to own, we only claim to own by deed, no other theory; so those areas I pencilled off my list, I don't think that they have anything to do with this case.

THE COURT: Which ones are they?

MR. MURRAY: Rand Bar and Rand Access. They were never claimed by Iowa under any theory of sovereignty, of state ownership of the river bed. Actually they were acquired in a trade with Miss Rand. Iowa owned some abandoned river bed in the area, she owned Rand Bar and Rand Access, the abandoned river bed was usable to her, the two other areas were usable to us so we traded them, just that simple.

I can't see that those two areas, Rand Bar and Rand Access, have anything to do with this case. And that leaves, according to my count, eighteen -- correction -- twenty-one areas above Omaha and Council Bluffs which have formed since 1943, and which we claim to own in whole or in part under our Iowa doctrine that the State owns the beds, abandoned beds, and any islands that have formed in the river.

Just night before last after Mr. Moldenhauer had made his argument of Tuesday I had never counted the areas above Omaha-Council Bluffs where

the river since 1943 escaped into Nebraska. Now these twenty-one areas which Iowa claims to own above Omaha-Council Bluffs are generally all areas where since 1943 the river escaped the designed channel in the direction of Iowa. I made a count just a night before last, and this will be mentioned later, I find at least seventeen areas above Omaha-Council Bluffs where the river escaped the other way, which we have never claimed, these are places now in Nebraska, of course, which we have never claimed and there are about seventeen areas like that.

This gets us down to the Court's question, which was, if you followed the theory which they propose that the Compact changed the Iowa common law, I think your words were, "How does this aid Nebraska?"

First of all, my answer to that would be it doesn't aid the State of Nebraska one way or the other, all it can possibly aid might be some Nebraskans, but they have no titles, they have no river beds, they have no lands out there. The only aid any interpretation could be would be to some Nebraskans.

THE COURT: Under the system in this lawsuit, all right.

MR. MURRAY: It's almost impossible, Your Honor, to talk about that proposition without a picture. I must draw another picture.

THE COURT: Okay.

MR. MURRAY: Tyson Bend -- have you ever heard of that?

THE COURT: I've heard of it.

MR. MURRAY: Tyson Bend, in Tyson Bend the river was flowing in its designed channel in 1943. My picture is going to look very much like Mr. Moldenhauer's, he wasn't far off.

What happened at Tyson Bend was that during the late '40's, early '50's, and during the time that the Corps had no money or manpower to maintain their works along the river, the river began to destroy the left bank in that area. So that by 1948 the river was running in a channel over here about a mile or a mile and a half wide. This channel is only seven hundred feet, but this was a mile to a mile and a half wide over here. The state boundary was in the old designed channel, and, of course, remained there even though the river left that channel.

After the river had passed over this area, first, a small island and then larger islands, and then ultimately pretty fair sized island, came to exist in Iowa right about there. I think the evidence was that in 1948 this island existed, water continued to flow through this channel, however, until the '52 flood brought in a load of sand and plugged the old

channel about there.

Nebraska insists that this island belonged to Mr. Tyson. They -- Mr. Moldenhauer still says, and they in their reply brief and they say in their first brief that the Tyson case is wrong. Why do they say the Tyson case is wrong? Their theory is that the thalweg of the stream was always on the outside of the bends and that this thalweg was the private property line between Tyson and whoever owned land on the Iowa side, and I don't know who it was, even though the State line moved from the thalweg to the center. So they say that Mr. Tyson continued after the Compact to own this land in Iowa.

The trouble is, I'll just say, I don't know whether he did or whether he didn't, saying that much doesn't do him any good, doesn't do Mr. Tyson any good, and it doesn't do Nebraska any good. They have to progress from that statement, in otherwords, this is ceded land, and even though it was under the water, and we had to recognize that Tyson was the owner of that river bed.

They have to progress from that statement, and say, this continued to be a moving line, the private boundary line between Tyson and the Iowans continued to be a moving line, even though the State line was fixed in this area, and when the thalweg bulged out here and ultimately came over into here, that Tyson's ownership followed it, and that therefore Tyson owned this spot when an is-

land formed over it, and not the State of Iowa. That's why they say that the Tyson case is wrong.

Now the Court asked this morning whether or not the Tyson case is a compact interpretation case. I agree with this, that the Compact is barely mentioned as such in the opinion or in the Federal District Court decree, which is also in evidence in this case, the Compact was hardly mentioned; but the fact remains that the decision in that case is an interpretation of the Compact. The decision in that case is that even though the thalweg crossed across this place where the island formed, the State of Iowa remained the owner of that spot under the spot in the sky where the island did form under Iowa law.

THE COURT: Go get that Jack, it was more or less a decision from Judge Ley, 283 Fed. 2nd 802.

Is that your interpretation of that, without interrupting the other side?

MR. MOLDENHAUER: I think the factual description that, when they moved it back from here to here, they did not restore that --

THE COURT: Yes, I think that's right.

MR. MURRAY: Yes, I forgot to tell part of the story. In 1957 or '58, somewhere in there, the

Corps had redesigned the river above Omaha, in this particular location it happened that their redesign called for the channel to go back right almost exactly where it had been, not quite, but practically where it had been. And they came back in '58 or thereabouts, and dredged the canal, right up through here, in the designed channel where the river had been, and thus put the river back over here without destroying the island.

I simply say that even though the Tyson and the Tyson opinion mentions the Compact very little, it does interpret the Compact.

THE COURT: Well, all it says was, all he said about that was, in the Tyson case as far as I know, you know, it isn't well for a District Judge to criticize the Chief Judge of the Circuit, don't you know that?

MR. MURRAY: Well, we want you to go with the Tyson case, Judge, we don't want you to criticize the Tyson decision.

THE COURT: I think -- the decision is okay as far as I see it. Moreover, the entire river bed is located in Iowa and that State owns the entire river bed at the point of controversy. In a Compact boundary situation, now he's talking about, the boundary is fixed, as you say in this case by the Compact. The general rule established in the

State of Nebraska, and so on, that case, 143 U.S.; that the thread of the stream the boundary does not apply, that's all he's saying, as far as the boundary is concerned, he don't -- he says just below, it's east of that, as I read that decision. He says that the land formed in the river in Iowa after the boundary, and that's what it's all about, that's really all it amounts to.

MR. MURRAY: Well, of course --

THE COURT: After the Compact, after the Compact.

MR. MURRAY: What that decision does is reject the claim of Tyson.

THE COURT: Oh, yes, sure, sure.

MR. MURRAY: Now Tyson was claiming that that island --

THE COURT: Didn't Tyson claim accretion across the boundary line?

MR. MURRAY: Yes, he did.

THE COURT: Into Iowa?

MR. MURRAY: Yes, he did.

THE COURT: And they say, well, they say, well - they don't decide whether he could do it or not, have land, because they say that in any event the island was formed on the Iowa side of the river.

MR. MURRAY: That's right.

THE COURT: So that they don't have to decide that question.

MR. MURRAY: What they left open, Judge, in that last paragraph of the opinion, to my mind, is this. They left open what would happen in a factual situation which they found didn't exist here.

THE COURT: I think so.

MR. MURRAY: What they left open was the question of what if Tyson's land had accreted above the water, land accreted above the water, out over the State line. And I think what he's saying is that if that had been what happened perhaps we would not say that Tyson couldn't accrete across the State line.

I don't believe, as I review these areas which are involved in this case, that there is a case like this case which the Circuit Court refused to decide in the Tyson opinion. I don't know of a case among our numerous areas above Council Bluffs where

accretions did form above the water, gradually and imperceptibly to either shore, Iowa into Nebraska or Nebraska into Iowa.

THE COURT: Isn't there an area up there where the line is much west of where the new channel of the river is, isn't there an area up there where the boundary line, the Compact line, is west of the present channel of the river so that there's an area in between?

MR. MURRAY: Yes; I believe there are several of them.

THE COURT: Yes.

MR. MURRAY: The one I can think of right off the bat is Omadi Bend, and I plan to talk about Omadi Bend later in my argument, because I think what happened at Omadi Bend is a beautiful demonstration of the complications you can have arising out of the way Nebraska wants you to interpret the Compact as it would relate to these areas that have formed since the Compact.

But the Court said in the Tyson case that Tyson can't accrete over to here under the Compact -- after the Compact, under water. The only way he can accrete beyond the State line according to the Tyson case would be for honest-to-god accretions to form to his riparian shore above water,

and those accretions come across the State line.

When the Circuit Court said this spot where the island first formed was owned by Iowa when it formed, they were rejecting Tyson's claim, and the claim which Nebraska is now making, that the Nebraska riparian owner could accrete across the State line, under water.

THE COURT: Why don't you answer that while Mr. Murray is thinking.

MR. MOLDENHAUER: Your Honor, the reason of course that this is in Iowa is it is in Iowa, but the only reason is because of the State line. We still have a movable line, the State line, we still would have a movable line over here, so they moved it back around the boundary and we had an avulsion, but Nebraska owned it, still owned the land, so we say, and the Nebraska owner accretes to the bed, not the bank, it doesn't have to be to the bank, he accretes to the bed, and his title to the bed is as good as his title to the high bank land, to the thalweg, absent the Compact, so what we say is that you can t say that the Compact has no effect upon private titles and still hold as Tyson did, because it did have effect on private titles. The result of the case was to terminate his title to any rights to the bed and accretions to the bed -- when it hit the state line.

THE COURT: You mean your bed collar of he water or the bare bed?

MR. MOLDENHAUER: Either one. We have title to the bed, yes, we have title in Nebraska to the bed or any accretions to the bed to the thread of the stream, and if land forms in that bed it belongs to Nebraska riparian owner, we say that is a part of his vested riparian right, that's his right to accretion, and so the Compact has changed the result, and I think we might -- that's correct -- the Compact changed the result of this situation of what would be the common law without the Compact.

MR. MURRAY: Yes, sir, I agree to that, if it had not been for the Compact, the result of Tyson, well, in the first place Tyson wouldn't have been tried. If it were not for the Compact land when the State boundary -- or when the river went from its designed channel over to here, the State line would have gone with it, and this area would have formed in Nebraska, over Tyson's river bed, and we would have had no claim for it -- to it; that's why I say the Tyson case is an interpretation of the Compact, it has to be, and the interpretation of the Tyson case is that even though the thalweg came over here, this river bed under the Iowa doctrine remained Iowa's, and therefore the island which formed in it was Iowa's.

Nebraska's argument would have the effect of

saying this. To my knowledge this spot where the island formed was never in Nebraska, ever; but what they contend for is that even though that be true, ownership of the island that grew up in it must be determined by Nebraska law. They want the effect of Nebraska law to go with the thalweg, wherever the thalweg went, after the Compact and to govern in Iowa to that extent, and that's the interpretation that they almost have to have in order to aid themselves in these upstream areas which have formed since the Compact.

You know, there's a certain similarity about all these areas, they are all different and yet they are all similar. We believe that California Bend is determined by the Tyson case. They say in the first place "No, it isn't determined by the Tyson case because the Tyson case is wrong."

The facts that California Bend were that they put in the California Bend canal in 1938, I believe, to cut off this great ox bow of the river which, in which the river was then running into Iowa. After the Compact we admit, we admitted, we still admit, that this, out to the thalweg, wherever it was -- I forgot what I was saying, but what I mean to say is that we admit that that was Nebraska after the cutoff, and then in 1943 it was ceded to Iowa, and to the best of my knowledge the Iowa authorities who are in charge of that recognized that this was ceded from Nebraska and it was still owned by the Nebraskans who owned it in Nebraska.

After '43 -- the state line is here - after '43 again, similar to Tyson, the river attacked this bank up in here and escaped out -- well, my scale is off -- escaped out to about like that, leaving this which was formerly Nebraska, not washing it away, but washing all of this which had been in Nebraska away.

In our view the only difference between California Bend and Tyson Bend is that at Tyson Bend an island grew and in California Bend none did. Before an island could grow the Corps decided again to put the river back where it had been, so they built a new left bank and they dredged a new canal and they dumped all the spoil from the dredge operation into a half-moon shaped area about like that (indicating), and created an island. They just shut this off with the revetment, shut this off with a revetment, except they left a small hole in it for the hunters and fishermen to get up in there.

In the intervening years, most of this upper part of it has dried up, substantial water remains down in this part of it. We say that under the doctrine of the Tyson case that river bed became river bed in Iowa, and under the Iowa doctrine it became state-owned. And when the Corps took the river out of that river bed and made it an abandoned river bed it remains Iowa property, it's that simple.

We do not claim this former Nebraska land which was never washed away, we still recognized

that Nebraska titles to it are good, but we are utterly unable to understand how this land that washed away can still be governed by Nebraska law when it washed away in Iowa and is in Iowa, it once was in Nebraska, but we don't think that their law has arms that are that long that even after the Compact their law still comes over here and dictates who owns that abandoned river bed.

THE COURT: Doesn't that bring up reliction?

MR. MURRAY: Yes, sir. This land that's being made, being exposed, you might say, up in here, is being exposed principally by a process of reliction.

THE COURT: What's going on in there now, what's going on in there, cultivation, or what is it, swamp land?

MR. MURRAY: Tomorrow morning, Saturday morning, it will be full of duck hunters. Our duck season starts Saturday morning, and, well, I'd hate to guess how many blinds there will be in that area.

Ever since the river, since the Corps took the river out of there, up until a year ago it was operated by the State Conservation Commission of Iowa as a refuge. Last year it was made a public shooting ground and it will be a public shooting

ground this year.

Now you say what's going on in the area.

THE COURT: What about the land in Nebraska, you can see in Nebraska what's going on there, to the private property?

MR. MURRAY: It's farm land, some of the best farm land outdoors.

THE COURT: The farmers are farming it, is that it, are you contesting that with that farmer, or anything like that?

MR. MURRAY: No, sir, as a matter of fact, they seem to think this is awful on my part, but I represent Mr. G. William Coulthard, who is a lawyer out in Las Vegas and a law school classmate of mine, who owns a large farm -- my scale's haywire again -- southerly from this bed.

THE COURT: I think he's got a good client there, and he's got a good lawyer.

MR. MURRAY: This lot 5, which Mr. Moldenhauer mentioned in argument is partly south of this old high bank of where the river came to in the early '50's, the edge of this water. And I represent him in litigation with Mr. and Mrs. Simmons concerning about twenty-one acres, right in that

location.

Mr. Coulthard claims that it's either deep, it is either accretion to the land which he bought from the railroad company in this location, or that it is original Nebraska land owned over in Nebraska by a man named Menke, and he has a deed from Menke for it.

The Simmonses on the other hand claim that piece of land as a part of a purchase from Harrison County, Iowa.

This lot 5, Mr. Moldenhauer said he didn't know whether that was an Iowa description or a Nebraska description -- that's an Iowa description, old original government lot 5, from 1852. The Simmonses claim lot 5 by a purchase back in 1954 of a quit claim deed from the County conveying this so-called lot 5. The issue between them is whether or not lot 5 exists any more. It's my position as Mr. Coulthard's attorney that it does not, that she didn't acquire anything by her deed, that this is either accretion to what Coulthard bought from the railroad or what he bought from Menke, and that in either event it belongs to Mr. Coulthard.

Really, your question was does Iowa claim outside this place where the river went to since 1943 -- no, we don't, we just claim to that high bank of where it went in about, oh, 1955, 1956.

THE COURT: Part of the land was obliterated

by the flood?

MR. MURRAY: Yes, sir, it was obliterated in this entire area, became first river bed in Iowa, then it became abandoned river bed in Iowa, and that therefore the State owns it.

I mentioned when I started out, Your Honor, that I wanted ultimately to talk about Omadi, or Omadi, I guess it's pronounced interchangeably, I don't know which is correct, because in my mind what happened in Omadi or Omadi, is illustrative of what happened after 1943 on both sides of the river, and what the consequences of the Compact interpretation that Nebraska contends for would be if applied in Omadi Bend.

I took the liberty of drawing my picutres at home before coming to Court, and with the Court's permission I hope you'll permit me to use them.

THE COURT: Well, go ahead.

MR. MURRAY: I did this because I'm not a very good artist on the blackboard, and working in the quiet of my workroom at home I thought I could get a better scale and a better picture and better representation of Omadi Bend that way.

That's my rough sketch of Omadi Bend, designed channel as of 1943 of the river as it was in 1943. I believe the Court will recognize that Omadi Bend is up about five to seven miles south of Sioux

City, perhaps two miles, two miles southwesterly from the Sioux City airport. That's the way the river looked.

In 1943 the two Legislatures came along in '43, and said that that center line will be the State boundary, permanently fixed. After 1943 the river really escaped from Omadi Bend in two directions; first up in this area it attacked its right bank, and ultimately moved out to here, whereas, the old design channel was here.

After having moved out to here that had a tendency to throw the water against the left bank, in the lower part of the bend, and it attacked its left bank in the lower part of the bend and ultimately moved out into Iowa, in that part of the bend, so you have in one bend an escape in both directions.

The Corps came back in 1959 and designed a new river at Omadi Bend. In the upper part of the river they put the back east even of where it had been before. It had escaped to the west, but they put it back farther to the east.

In the lower part of the bend they more or less adopted the old channel, but not quite. This removal of the channel from here to here in the upper part of the bend was accomplished by canal. This removal of the channel from here back down to here in the lower part of the bend was accomplished by driving pile dikes out from the Iowa shore and pushing the river ahead of it until they got it down to where they wanted it here, in the lower part of

the bend.

I think you were asking if there are any places up and down the river where the river now runs entirely in Iowa. Yes, this is one of them, and there are several more like it although they do not come to mind at the moment.

As a result of these natural movements and then man-made movements to my mind you have three pieces of land, or maybe I should say two pieces of land came into existence, are still coming into existence in Omadi Bend. First there is land coming into existence between these dikes in the lower part of the bend which, by which the Corps moved the river southwesterly to get it to its design channel.

Up in here you have this crescent shaped piece of land which came into existence when the river moved out into Nebraska and then came into existence in Iowa, because this is the fixed state line, and then which was cut off from Iowa when they dug the canal.

Then you have this piece of ground over here, most of which is lake yet, which has come into existence and exists today in Nebraska. Two pieces of land, or something, come into existence since the Compact in Iowa, and one has come into existence in Nebraska.

I don't know just when it was, but two or three years ago the Iowa riparian owners who had joined this bend along in there sued the State of

Iowa to quiet their titles to this. They say that the land which has formed and is forming in that area is accretion to their riparian shore. We are defending in the case; we feel that this land is not accretion to their riparian shore and that it is coming into existence, some of it has come into existence, but it is coming into existence more and more, separate from their riparian shore. It's coming into existence out here between the dikes in the manner in which the river usually acts, that it left a channel here along their high bank, just like Deer Island, just like Schemmel Island, that this remained a flowing channel for some time after this land started to appear. And that therefore these are islands and owned by the State, they are coming into existence in Iowa.

With relation to this piece of land the State of Iowa was sued by the Iowa riparian owners back, I think, in the early '60's. The case of Krogh versus Christensen, which is in evidence in this case, involves a part of this green area. The deeds from Krogh and Christensen involve the upper and lower ends of this area above and below the land which was involved in the case.

The evidence in this case tells you that Krogh versus Christensen was settled, was not tried, actually the case involved more land back in here, and it was settled on the basis that if Mr. Krogh and Mr. Christensen would relinquish any claim

they had to the green area the State would in turn relinquish any claim it had to this area back.

Therefore we believe the green area is now owned by the State of Iowa by reason of that settlement, if nothing else, by reason of the way it formed also, but by reason of the settlement, if nothing else.

I believe the Nebraska State Game Commission now claims to own the orange area, I believe, by purchase. As I say, there's a nice lake right in here, and because there was a nice lake there I believe the Game Commission over here in Nebraska purchased it and claims to own it. They built some valuable improvements down here along the shore line of the lake.

Now those are the positions that the parties have taken with regard to Omadi Bend and that's what's happened up to today. Take a look at what would happen at Omadi Bend if you would apply the rule Nebraska contends for here.

Nebraska would say, interpret the Compact, please, so as to say that it does not effect private boundaries; interpret the Compact so as to say that the boundary between the Iowa part of the river bed when it was in its design channel and the Nebraska riparian owners remained a fluid line to shift back and forth as the thalweg might shift. Okay, follow that.

Then when the river came over into this general area Iowa's title would go with the thalweg, and

would come somewhere near out to the outer edge of the bend.

THE COURT: I don't think that under that one decision, New Mexico case, Texas, that the State of Iowa could cross the state line, I think that's very clear.

MR. MURRAY: All right, take the State of Iowa out of it and say --

THE COURT: Private people.

MR. MURRAY: And say private people, the same thing. But in any event, either Iowa or the State of Iowa, either Iowa or the Iowa riparian owners, would have bulged out into Nebraska as far as the thalweg went under their theory.

Likewise, the Nebraska riparian owners down in here -- I don't even know who they are -- under their theory would have bulged out into here. So you would have to my mind the complete anomaly, or, I don't know whether that's the right word or not, of under their theory you'd have the Iowa riparian owners acquiring land in Nebraska as a result of these river movements since 1943, and you'd have Nebraska riparian owners acquiring land in Iowa as a result of these river movements since 1943.

THE COURT: What's wrong with that, they have been doing that for a thousand years, haven't they?

MR. MURRAY: We don't think that was the intent of the Compact.

THE COURT: All that it said in the Compact was it fixed the boundary.

MR. MURRAY: That's right, that's right.

THE COURT: I mean, we didn't affect the state title that we have been talking about, the private title to people.

MR. MURRAY: That's right.

THE COURT: Or their rights, or anything of that kind, I think it restricted Iowa in crossing any state boundary for any reason at all, the State I'm talking about, the sovereign State of Iowa. The Court very clearly told New Mexico that, and a couple other states that, where, when you join the Union they defined that line, that's your line for all purposes, but they were not talking about private title, not talking about private people.

And there, there, when you're talking about the end here is, the boundary is still there, the boundary is still there, it doesn't affect it at all,

the Compact line.

MR. MURRAY: Well, this is one of the reasons, Judge, why in our mind the Tyson case is what the Tyson case is.

THE COURT: Well, I don't, I don't think -- well, I don't want to argue that Tyson case any more, in fact, I think I got enough to do to try to find a solution to this case.

MR. MURRAY: Well --

MR. WALKER: Could I interrupt?

THE COURT: Sure.

MR. WALKER: I think Mike is -- the Court in your questions, Mike's argument, or, at least I think Iowa's theory is, that when that thalweg moves, and it moves across the state line, then it becomes under, then it comes under Iowa law, and vice versa, when that private owner's title follows the thalweg into Nebraska, when it crosses the boundary, to me it's elementary and basic, that when you cross that state line in Nebraska you're under Nebraska law and sovereignty, and you're under Iowa law when you cross that boundary into Iowa.

I don't think that it affects the title except that

title has to be determined under the law of the state in which it is formed.

THE COURT: I don't question that, I don't question that, as long as we're talking about after the Compact, sure.

MR. MURRAY: Well, that's what we're talking about at this point in the argument.

THE COURT: No question at all about that, I think that's all right.

MR. MURRAY: We're just talking about, really, somewhere around forty areas that had formed in Iowa, and since the Compact and somewhere around twenty areas have formed in Nebraska since the Compact. This is the subject matter that we're talking about right now.

THE COURT: I'm frank to say that I have sort of indicated yesterday, I don't see the problem up there as I did down below.

MR. MURRAY: It is an entirely different problem.

THE COURT: It is an entirely different problem, but I'd like to leave a great deal of that up north to the state courts and to the private per-

sons; but the State of Iowa, you can't cross the line, you can't apply the law of New Mexico, and Texas to Iowa, and leave it go at that, let it go at that, see, that's what they -- that's what I think, don't you read that case that way, the New Mexico case?

MR. MURRAY: Yes, sir.

THE COURT: That you can t cross any state, now I'm talking about state-owned property, and that takes in your common law, you can't cross a state line with your common law, your bed law.

MR. MURRAY: We don't want to, Judge.

THE COURT: Well, of course.

MR. MURRAY: Well, but the place that becomes material is this, there is no reciprocity, there is no equity, if they're going to cross our state line with their law, then ours would go the other way just as -

THE COURT: Private persons could cross it, that's all, private persons on both sides could cross it, if they've got, if they can prove a real honest-to-god accretion they can cross back and forth, yes.

Both states are the same on accretion; between

private parties there's no different law there.

MR. MURRAY: I think so, generally there's a little difference.

THE COURT: I mean, substantial, you know what the law is.

MR. MURRAY: Yes, sir.

THE COURT: Sure, let them litigate, put the money in the hands of their counsel, that's good, that makes business.

But you have to do that, we kid about that, but that's the way things are in this country, see; and I think that you can leave that to them. We have to, we still talk, we are always talking in this case yet, Section 2, 3, 4 of this Compact.

MR. MURRAY: Yes, sir.

THE COURT: That you won't recognize, you won't recognize certain Nebraska titles, that's the point of it, that you must yield. I look at that, read that word "cede" as yield, give up, grant, it's sovereign jurisdiction, we have done that all over this country, we recognize that we have purchased title, we recognize governments have always done that. I guess Texas recognized them, titles in New Mexico when Texas took it over, they

had to, they recognized borders, but the Indian titles, the government recognized all titles but the Indian titles, and I guess that makes good reasoning in both cases.

MR. MURRAY: I guess that's why in Texas they have a very substantial body of Mexican title law.

THE COURT: Sure, that's right, the titles are good. That's why I say, frankly, that Nebraska, I'm disinclined, unless I don't know, I'm trying to avoid really getting into that, those subjects up there, except in general proposition, except as a general proposition, a general statement of law.

MR. MURRAY: Well, this is a very difficult subject to make up a general statement of law about.

THE COURT: Oh, I know, I don't say it's easy, Justice Marshal, the great man that he was, he said "This is not an easy problem."

MR. MURRAY: I don't, I don't know, I'm presently thinking, I don't know how you would make up a general statement of law to cover what should happen in these numerous areas which have formed above, since 1943, maybe it's possible.

THE COURT: Sure.

MR. MURRAY: There are some things that can be stated, but then the question always comes, well, where do you stop?

THE COURT: Well, that's why in a case of this kind I don't think that you can find, like in the first Nebraska versus Iowa, the Court, the judges didn't say anything there, they just made a natural boundary, that's all they said, didn't they, and then when they suggested a survey around a certain part of it, when it was surveyed around Carter Lake, that was put here, wasn't that the one that I understood yesterday?

MR. MURRAY: Yes, sir.

THE COURT: In view of this Compact.

MR. MURRAY: Yes.

THE COURT: And the states again here used a general proposition, this road map. Now what's called for is another little bit more definite statement of what the rights of both states are, and hopefully that will eventually settle it case after case, you see.

MR. MURRAY: Well, we think, Your Honor,

if you're not inclined to go this far with us, but we think that the simplest, plainest statement that could be made by the Court to be helpful in settling for all time these disputes about somewhere in the neighborhood of forty areas that have formed since 1943 would simply be a single statement that the common law of Iowa applies in Iowa, and the the common law of Nebraska applies in Nebraska.

THE COURT: Well, that's what you have been saying.

MR. MURRAY: And that's really the simplest statement and the most settling statement you could make about it, and we don't see anything unfair about it, not a thing.

Once you delve into the problem of saying, well, these two sets of common laws, or just one of them, was changed by the Compact you run into complication to my mind that are almost insolvable. And I hope to take those up somewhat in detail tomorrow; at the moment, Judge, I have about run down.

THE COURT: Why, I had, I had, you know, you move along, I don't say with finality now at all, I don't mean to say that, but it seems to me that a decision here at this point, I'm talking now based upon recognition testimony and inability testimony, inability of under all the evidence to,

in any exactitude find the old boundary in these areas, that Iowa should have recognized those two titles, Schemmel's and Babbitt's, and Nottleman.

MR. MURRAY: We're slowly beginning to get it, Judge.

THE COURT: No, just a minute, that you should recognize those two titles; but under this section of the Compact where you were to recognize those titles good in Nebraska, but under that same situation when there was a title, when a private person could show now title good in Nebraska, at the time of the Compact, on that day of that Compact, 1943, that under Nebraska law he had a good title, you must recognize him and your common law must give way. You don't have any presumptions against him, you don't have anything against him, unless you've got, unless you've got a paper title better than his title, now, you can litigate that title, but not based on your common law, you see, and then what does that do?

Well, you say anybody that brings a case based on his title to quiet his title must show his title. I don't think that it's too unfair to say to some other owner, prove your title, and if you prove that you got a title in Nebraska based on a deed, it's, that's good there in Nebraska, have been recognized in Nebraska, good title there, maybe it had to be adjudicated someplace, why, that's good

enough for Iowa to say that's all right, you back away, you would yield. That's my point, that's the point there, and the same way up and down the river, if they can prove it, it seems to me that that settles it, I don't know why it doesn't settle it, and it gives you your common law where, up here where you want it.

MR. MURRAY: The only place that you and I can have any possible disagreement about these older areas is, for instance, south of Omaha, would be in our definition of good title.

THE COURT: Well, that's a hard--

MR. MURRAY: I agree.

THE COURT: I say that's a hard question, but it seems to me that under the Nebraska law, for instance, you know that they have done this from time immemorial, we used to do it in Pennsylvania seventy-five years ago, if you found a piece of land somewhere, see, and it wasn't assessed and you had it assessed, didn't you, see, and not in your name because that wasn't good, you had it assessed in somebody's name, and when it was assessed a few times then you bought it at tax sale, and you did that four or five times and you had a pretty good title, see.

Now maybe that's what they do in Nebraska;

if so, it's all right, it's been done all over the country, I think, and when these bars appeared and land appeared out of the river someplace, and sooner or later somebody is going to get title to it, it's a good title.

Now I don't mean to say by that good title business that -- it has to be reasonable, some kind of a reasonable interpretation that it's good title, but when it is that and somebody's been there ten or twelve years, I think that you people have been letting that person in Iowa pay taxes on that property, based upon his, based upon his Nebraska title, you ought to recognize it and yield it. That's what happened in both and Babbitt and Nottleman.

That's my speech for tonight. Would you like to quit now?

MR. MURRAY: Yes.

THE COURT: Until 9:30 in the morning.

(Thereupon, the hearing in the above entitled cause was recessed until 9:30 o'clock a.m. the following morning, October 2, 1970).

10 O'CLOCK A.M.
FRIDAY
OCTOBER 2, 1970

* * *

THE COURT: Gentlemen, good morning.

All right, Mr. Murray, when you're ready. Let me say this before we start. Do you know, discussion, so-called, and so on, repartee and colloquy between counsel and the Court sometimes bring up matters, points that we consider afterwards; and when I say in my view now, mind you, this is my view, when we say a title good in Nebraska must be recognized good in Iowa, I'm not talking, I don't mean to convey the impression there that it's necessarily a title that would have to be held good between two private property owners, see, that's a different incident, I take it, maybe, I'm not closing the door to anything.

I think that what the title ought to mean there is the title as between that title in Nebraska, and the State of Iowa should recognize that under the Compact as being a property over which Nebraska had jurisdiction. And then on a transfer Iowa should accept that in the same fashion as Nebraska had, sovereignty only, that's all.

Now when the same two people maybe in Nebraska can argue that point, somebody else can wind up with that title, the same way on the Iowa side, you see what I mean, I mean there's a distinction there that I think that you have to make.

And what I'm saying here, these people back in this audience, they find out that I said that Schemmel and the Nottleman were in Nebraska, I don't mean to say that they got a good title under

Nebraska law, you understand the distinction, that there's a title there that Iowa should recognize as having jurisdictional basis in the State of Nebraska prior to the Compact and passing now the same way in Iowa, you see, all right.

MR. MURRAY: Well, in pursuance of that same subject while we're on it, I had planned to discuss that somewhat again this morning.

THE COURT: All right, go ahead.

MR. MURRAY: And this is a good time.

The record in this case shows that there once was a title to at least about the east half of Nottleman Island in Iowa. About the east half of Nottleman Island was originally surveyed and patented as Iowa land.

Now we don't claim anything for that, because that land which was patented in Iowa originally we feel has been washed away, and it's different land now existing in that same spot under the sky.

Some part of Schemmel Island also was originally patented and granted to somebody in Iowa, because it was within the original government survey of Iowa, but we claim nothing for that because it isn't the same land. We think the evidence in this case clearly shows that it's different land now in that same spot under the sky.

Now that brings you to, right down to the ques-

tion of what titles from Nebraska do we agree to recognize. Certainly not just any title to that spot under the sky to any land whichever existed in that spot.

THE COURT: May I raise a point that I started to talk about?

MR. MURRAY: Yes.

THE COURT: I think all you have to recognize is what Nebraska recognizes as a good title, they didn't disturb these people, the county people, and all that sort of thing, they let them battle all they wanted to. But as far as all incidences of jurisdiction and sovereignty are concerned those two places now were Nebraska property in that sense.

MR. MURRAY: Well --

THE COURT: And now that being so under the Compact I think now Iowa is bound by the terms of the Compact, and when you say it's washed away that's part of my proposition, I think, because it was different land, and so on, it wasn't the same land, it didn't make any difference anyway, but for twenty years, ten years before and ten years after you didn't disturb it, and Iowa possessed it under Nebraska law, good, bad or indifferent, they got tax title and recognized it all.

MR. MURRAY: Well, that brings me to another point which I had in mind to discuss with the Court today.

THE COURT: All right.

MR. MURRAY: We think, Judge, that Nottleman and Schemmel Islands are markedly different on their facts as in evidence in this case.

THE COURT: I agree with you.

MR. MURRAY: We don't think that those two islands can be lumped off under one decision because they are, there are different facts at the two islands.

Now we think that we were there at Schemmel Island, suing Mr. Schemmel before ten years of his peaceable possession had elapsed. It's the evidence in this case, as I see it, that, and this is Mr. Schemmel's evidence himself, that he platted a garden on that island in 1954, he took a crop off of it for the first time in 1955, and we were suing him, I have forgotten it, in 1963 or '64. We think that even under Nebraska's liberal adverse possession law, if that's applicable to the case, that we were there in time. Now that's our position about Schemmel, now we don't think that even estoppel or recognition or laches or anything else runs against us at Schemmel because we were

there within ten years after he was.

Now, sure, we know that it's his testimony that he was out there in '39, he says he sowed some Reed's canary grass out there and that his boys put up some No Trespassing signs on the pile dikes in '39. That testimony is utterly uncorroborated, nobody ever saw the signs, I don't know whether they were there or not.

But the point is that really his possession and occupancy of that island didn't start until '54 or '55. We were there after him within ten years.

We don't think there are any cases of adverse possession, recognition or anything else that decrees you can be bound to have recognized or acquiesced or estopped yourself in that short a period of time. That's the difference between the two islands in my mind, and I think it's a valid difference.

THE COURT: Well, there may be something in that, I'm not, I'm not foreclosing that, I've got to put it together for discussion purposes, you see, and it may be that I'll notice the difference; some balance it seems to me in the Compact situation, the Court wants to settle it, and I'm frank to say that in that situation I think there shouldn't be too much of an argument between states. We don't like that, we don't like that and it ought to be amity in settlement, that's what they want in this case. And it seems to me that it's more amicable and a

better result for all concerned, really, Iowa, too, in those two instances, and a balance in the decision, mind you, the Court looks at that too in this case, see.

MR. MURRAY: Yes.

THE COURT: To say that here, these two are, must recognize, jurisdictional-wise, between Nebraska; then when you get up north there, the principle you talked of yesterday, I think we're talking about the same thing, that if it's a real, what you call, I think, or somebody called an honest-to-god accretion, you're going to recognize it, aren't you?

MR. MURRAY: Yes, sir.

THE COURT: And from Nebraska, as against your title, against your common law, if it moves over across the bay?

MR. MURRAY: We agree we lose our bed when somebody else's accretions cover it.

THE COURT: All right, okay. They have been in some doubt about that, Nebraska has.

MR. MURRAY: Well, we're not in doubt about it.

THE COURT: Well, I don't know, if you lay down rules like that and the local courts then say well, this land was washed away and it's not an accretion, you see, like you said in that, it's not an accretion, is it, so they give it to you, is that right?

MR. MURRAY: Yes, sir.

THE COURT: There's nothing wrong with that as I see it. But Nebraska seems to have the idea that you are applying that law up there where you pick and choose, and I'm not so sure about that, and I don't know that I have to decide about that all the way along at all. That's what I'd like to do, it would make it easier for me to have the Court say, well, that's the way it ought to be.

MR. MURRAY: Well, that's the purpose of us lawyers is to try to point out what we think is the way --

THE COURT: Yes, now, in other words --

MR. MURRAY: That's --

THE COURT: (Continuing) to have as few specifics in my recommendation as I can, and yet come up with something here that the Court's going to say that the states are ultimately going to be

satisfied, it's working, and that's why I want to discuss it with you, maybe afterwards, when we get all through.

MR. MURRAY: I --

THE COURT: You may think that I have decided the case.

MR. MURRAY: No, I, I -- from your remarks I gather that you have not decided the case.

THE COURT: That's right, but we are leaning that way, you can't sit here and hear a case without coming to some tentative conclusion.

MR. MURRAY: No, no, I certainly gather from your remarks that your mind is open about this subject matter --

THE COURT: Yes.

MR. MURRAY: (Continuing) which has been divided off to me as between Mr. Walker and me.

THE COURT: That's right, sure.

MR. MURRAY: Perhaps your mind is somewhat made up concerning Nottleman and Schemmel, but I --

THE COURT: Well, if I had any question about the so-called preponderance, I think, if anywhere, it would be with Nebraska, but on the other hand they started out and I don't think that I have to make that finding. I'd rather not make a finding there, to avoid it, but I'll probably have to make it, see.

MR. MURRAY: That's Nottleman and Schemmel.

THE COURT: Yes, that's right, probably have to make some finding there as to where it was at the time of the Compact and under which state the jurisdiction now, that's all, which takes jurisdiction, which state was the senior in the old term, you know, the signatory and all that sort of thing. If I use one word, and then you add that adverse possession to it then, you fellows pick it up and argue about it, I don't mean it in that sense.

MR. MURRAY: Well, Nottleman and Schemmel as you know aren't my subject matter, but I did want -- I thought you might be interested in my views.

THE COURT: You go ahead.

MR. MURRAY: There are two cases --

THE COURT: Take an hour.

MR. MURRAY: They are different.

THE COURT: What?

MR. MURRAY: Nottleman and Schemmel are different.

THE COURT: All right.

MR. MURRAY: And I say to you, frankly, that I can't disagree with you too much about Nottleman.

THE COURT: All right.

MR. MURRAY: The State was slow, too slow getting to Nottleman; but I don t think we were too slow getting to Schemmel, we were there within ten years after he was, and under the law of almost any state I know of to be there within ten years is fast enough.

But be that as it may, that's off of my subject.

THE COURT: All right, well, we'll look at that too.

Yesterday we were talking about the general subject matter of Nebraska's desires and askings with regard to how it wants this Court to say that the Iowa law was changed by the Compact, and I spent most of my time yesterday on the proposition

that the changes that they asked this Court to decree as resulting from the Compact should not be granted because they lead to a bad result. I'd like to pursue that subject for just a little farther.

MR. MURRAY: All right. And, by the way I thought the Court asked Mr. Moldenhauer this, some questions about this same subject matter I'm talking about.

THE COURT: Yes, I did.

MR. MURRAY: And I thought he didn't answer you, I thought the only answer he gave you was that, Judge, "We want you to decree these changes to have taken place in the Iowa law because that's the only way you can settle everything up and down the river." That's about the only answer I thought he gave you.

THE COURT: He wanted the whole loaf, he wanted it all up and down the river, no question about that.

MR. MURRAY: Yes.

THE COURT: I sort of disagreed with him on that.

MR. MURRAY: Well, I was interested in

your remark concerning Judge Pope's remark, his remark, as I recall was to the effect that he thought perhaps that Nebraska was asking more than they really expected to get. I can't assume that, I have to assume that they want, seriously want everything that they have asked for, and I have to assume during this argument at least that there's some possibility that they might get just exactly what they want.

THE COURT: No, I'm sort of looking for a compromise, you know, the way that people, the way the states did when they entered into the Compact.

MR. MURRAY: Well, we think there is compromise available to the Court here. Mr. Moldenhauer says "You have to go all the way with us in order to settle everything." We say that's not true, in fact, we say to go all the way with Nebraska's askings doesn't settle anything, in fact, it creates more problems, and that's what I was trying to demonstrate yesterday, that going all the way with their theory it just creates more problems instead of settling anything.

It seems to us, and what I'm really arguing for is that the only way the Court can really settle things as regards these forty or so areas which have come into existence, have been changed since 1943, is to leave Nebraska law in effect in Nebraska

and leave Iowa law in effect in Iowa. Now that's the way to settle things with regard to those areas.

We don't feel that the Court can seriously contemplate taking away from the people of Iowa its state-owned river beds, swamps, lands, whatever they were, and its right to have future river beds, swamps and lands which might form after 1943.

We think that construction of the Compact would be diametrically opposed to what the Compact says. The Compact says that as far as we're concerned land ownership shall remain the same, and really Iowa as a party to the Compact was wearing two hats, it was a sovereign dealing with another sovereign, it was also a landowner, and those words were inserted into the Compact, "title shall be recognized" not only for the protection of individuals but also for the protection of the people of Iowa.

THE COURT: Now wait a minute. Is there anything in the, now you know, when, when the Federal Courts like the State Courts, legislative act of Congress, go back to the debates in the Senate and the House in the committee reports, is there anything in there, anywhere there where it says that Iowa was talking about its own land, state-owned, property right, or, proprietary lands, I mean, this is a good argument, you understand?

MR. MURRAY: I understand.

THE COURT: But is there anything in there, you're construing it that way now, see, but we don't know whether the Senators and Governor paid any attention to that or whether they didn't.

MR. MURRAY: I don't know.

THE COURT: If they would have, they would have said something about that, there would be something in their negotiations, correspondence, letters, do you find anything like that in there?

MR. MURRAY: No.

MR. WALKER: I think the term "good" affects the Iowa titles as well as the private ownership, if Iowa had a good title doesn't Nebraska have to recognize it? It didn't say private good titles or individual good titles, it says just "titles".

THE COURT: I agree, I have to agree that there's no question about it, but I'm talking about jurisdiction-wise. If Iowa says these are our trust lands, we had good titles to them, we always had good titles to them, that's an abstract proposition, it didn't know what it had or what it had titles to at the time, that's why he was asking. You had swamp land, you had twenty miles wide one year ten years ago, and then you had two miles, and all that, so we're talking about jurisdictional-

wise again, you see, that kind of a title. Certainly, of course, you have your title, there's no question about it.

MR. MURRAY: We think, Your Honor, that after forty years of negotiations certainly the negotiators knew that the law of Nebraska was the law of Nebraska, and that the law of Iowa was the law of Iowa, whether they mentioned it or not.

THE COURT: But you know as a fact, I think, look at those last sheets there that Howard put in, what do you call that, showing the scarpments, and all the records there, all up and down the valley for the last hundred years.

MR. MURRAY: Yes.

THE COURT: A lot of that land is Iowa land under that theory, isn't it?

MR. MURRAY: Yes, sir.

THE COURT: You never claimed it, you didn't know where it was, you lost it, you had land way up around De Sota Bend there where they found that ship last year, maybe that was your land, you see, and that same argument holds good. You might have had land five miles east, that Mr. Pope lives on, that all might have been your land, but, you

see, you never claimed that and now you're claiming this title up next to the river, that's the point of that, isn't it, doesn't that hold water or not, Mr. Murray, that there must be by that same argument, there must be land that Iowa owned and it's lost or abandoned or paid no attention to it?

MR. MURRAY: I don't doubt that.

THE COURT: Sure.

MR. MURRAY: I don't doubt that. There isn't any question but what prior to 1943, prior to the Corps coming to the river, when the river was wild there were lands forming, washing away.

THE COURT: That's right.

MR. MURRAY: Forming and washing away out there with such frequency that nobody paid any attention to them, they were considered worthless.

THE COURT: That's right.

MR. MURRAY: It's only since the Corps has stabilized the river that anybody has considered these lands really worth fighting about.

THE COURT: I think we're all agreed, just so the record shows it, that the Corps paid no

attention to any boundary line either until '43, the general properties, they did what they had to do and they didn't ask any property owner in Iowa or any property owner in Nebraska about who owned what bar or island.

MR. MURRAY: Even since '43 they haven't paid any attention, Judge.

THE COURT: I'll leave that to the Court, I'll not take on that proposition.

MR. MURRAY: The fact of the matter is, in passing, that the redesign above Wilson Island, you might say, by the Corps in the '50's has placed approximately thirty-one miles of the river, of today's river, entirely in Nebraska. Iowa nor Iowans have any access to it or any interest for thirty-one miles. That's why I say that they aren't paying attention to the equities of the states in their interest in the river even since the Compact.

THE COURT: Maybe so.

MR. MURRAY: We just feel, Your Honor, that the result of the adoption of all the changes which Nebraska contends for would be absolutely unfair, inequitable and unjust.

It would be particularly unfair, we feel, now

for the Court to say that those changes came about after, to my mind, everybody has acted on the proposition that the Tyson case is right. For ten years we have been, we have been acting, and I think everybody's been acting, on the basis that the Tyson case is right. They now say it was wrong.

THE COURT: Now wait a minute, a Federal Judge trying a case here, a District Judge trying a case and neither Iowa or Nebraska would follow it in this circuit.

MR. MURRAY: Would you say that again, I didn't --

THE COURT: I say that a judge, a District Judge trying a case in either Iowa or Nebraska, in this circuit would certainly follow it, I think, don't you, he'd have to follow that.

MR. MURRAY: Not if you upset it, or not if the Supreme Court in Washington upsets it, and we don't want you to upset it, but they want you to upset it.

THE COURT: I don't think that they're going to upset it as such, they might make a rule there that it's a little bit inconsistent, but they're not going to overrule it.

Again, what I'd like to do, see, is divide the rule, you can write it if you wish, and Howard can write it, that would satisfy this proposition north of Omaha, whereby your accretions, the accretions of two honest-to-god accretions on the Nebraska riparian owners and on his land, passing across the state line between titles, but you have no right to accretion beyond your state line because of your Compact. But necessarily your private people are not bound by that, leave those rights, then the Court can settle all these arguments. I think that they can settle it, and that satisfies, I think, the lawsuit in this instance by saying, well, here, you know, your common law of Iowa must give way when a Nebraska property owner has a true accretion, that is, Nebraska's, I mean, Iowa's common law right to the bed of the river.

You agree with that anyway, as I understand it.

MR. MURRAY: Yes, sir.

THE COURT: But, you see, that hasn't been delineated in any authoritative decision that satisfies Nebraska, is that right or not?

MR. MOLDENHAUER: Yes, sir. Can I make one comment?

THE COURT: All right, we're discussing this now, with a result maybe.

MR. MOLDENHAUER: We don't contend that Tyson ought to be reversed, that case is decided, the parties were in Court and I think res adjudicata, that doesn't mean that we agree with the principle or that the decision is right, and we think that we agree on the fact situation, that's purely a question of law as to the effect of the Compact in a fact situation.

It's sort of like when somebody is convicted of a crime and in prison ten years later he proves that he didn't commit it, they let him out, they can't return the ten years to him; and if Tyson was wrong they could go to the Legislature and say we were wronged, but we're not asking that that case be reversed. What we're saying is that principle is not correct and not applicable.

THE COURT: What's wrong with the rule laid down by the Court and approved by the Court that these lands since '43 we're talking about --

MR. MURRAY: Yes.

THE COURT: (Continuing) 1943, that Iowa recognizes the inherent right of Nebraska property owner against your common law right to the bed of the river as valid and true accretion, found on a factual

situation by a court?

MR. WALKER: Your Honor, I think you're misstating our common law, there isn't anything in our common law that says that you can't accrete across the bed of the stream, you wouldn't have to --

THE COURT: Nebraska has said that you haven't accepted that proposition yet.

MR. WALKER: Oh, we -- I don't know where they get that idea.

THE COURT: I'm glad to hear you say that, because I --

MR. WALKER: No, I think, the only thing I think, I disagree with, on your statement, I think under proper circumstances true accretion, I don't think the boundary makes any difference there, the only thing I'm saying is that when that land passes across the boundary accreting, it comes under Iowa law and the Nebraska law doesn't follow it and doesn't change the jurisdictional boundary, that's all we're saying, and under Iowa law true accretion is true accretion.

But they want to go farther than that, they want to say when that land accretes across the state line the Nebraska riparian owner's title precedes

that accretion to the thalweg, which is contrary to Iowa law. We don't feel that that boundary can be shoved back by a private owner and force Nebraska law to follow his boundary into Iowa. That's all we're saying, that anything within the boundaries of Iowa should certainly be under the control of Iowa sovereignty and jurisdiction, that's basically what we're saying.

When he comes into Iowa as a property owner he should be treated like every other citizen and property owner in Iowa under Iowa law.

MR. MURRAY: I'll attempt to redraw the first picture Mr. Moldenhauer drew during his oral argument, it may look something like it.

Design channel 1943. State boundary fixed in the middle of it by Compact in 1943. Generally the thalweg in 1943 running on the outside of the bends and then crossing over to the outside of the bends. The thalweg and the state line are almost never the same except at these points of crossing.

Number one proposition of Nebraska is that prior to the Compact Mr. Nebraskan over here owned to the thalweg. They say even after the Compact he should still own to the thalweg. It follows from their saying that prior to the Compact Iowa owned to the thalweg and they don't say it, but it would follow that Iowa continued to own to the thalweg after the Compact.

THE COURT: Private property owner?

MR. MURRAY: No.

THE COURT: The state?

MR. MURRAY: The state.

THE COURT: Both, both, the state?

MR. MURRAY: The state owns the bed of the river.

THE COURT: Yes, all right.

MR. MURRAY: To the thalweg.

Now if you construe the Compact as taking the state out of it then we certainly think you should put the Iowan in the state shoes, not the Nebraskan, and that the Iowan would stand in the shoes where the state formerly stood, although really we see no reason for the Court to say that. Why the Compact should be construed as a gratuity from the people of Iowa to these few or many select Iowans we can't understand. We feel that really Iowa would continue under their theory to own to the thalweg.

Now I was attempting to say yesterday that going that far with Nebraska with their theory is relatively harmless. If you would say that then the

private boundaries become fixed wherever the thalweg was in 1943 and that they no longer moved like they used to move. I say relatively harmless because these half moon shaped things are never over about 350 feet wide, most of them are still in the bed of the river, still under the water, and really as a practical matter right now what's the difference who owns them?

One of the defects with that is that it's messy how do you determine, that still leaves you to determine where the 1943 thalweg was.

THE COURT: You can't do it.

MR. MURRAY: And you can't do it.

THE COURT: No, I can't do it, nobody can.

MR. MURRAY: In everyone of these cases the possibility would remain that somebody someday might have to determine where that 1943 thalweg was, and as you found out in this case it's almost impossible.

You can assume that it was on the outside of the bend, but it wasn't all on the outside of the bends. If it were always on the outside of the bends there would never have been a steamboat get stuck, and the record here is that steamboats by the hundreds got stuck, and by the thousands got stuck, so the thalweg wasn't always where they thought

it would be and they still get stuck occasionally, not very often any more with the narrow channel and deep channel.

Now what we object to is Nebraska's proposition that this private boundary after the Compact remained a fluid moving boundary, so that if the river escaped in this bend and the thalweg moved gradually over to here, that the Nebraskans would move out with it.

Now assuming for the moment that the Nebraskans' bank stays right there, and that's usually what happened after '43. The river usually simply bulged out when it escaped from the design channel. It didn't entirely move over to here and create real accretions to the Nebraskans' shore, in fact, I don't know of any place in evidence in this case where that happened that the Nebraskans' shore line move out into Iowa.

What we object to is their proposition that as the thalweg moved out under water his boundary would move out under the water so that when an island may be formed over here in Iowa it would be the property of the Nebraska riparian owner. We don't object to his ownership into Iowa if there was an accretion to his shore line; what we object to is his becoming the owner of an island in Iowa on some theory that his boundary moved out here under the water.

THE COURT: Well, is that a statement or a

principle, say that the Iowa property owner, or Nebraska property owner would be entitled to accretion to his shore line, is that it, you are satisfied with that?

MR. MURRAY: Yes, sir. I feel --

THE COURT: That does away with any necessity or need to find any thalweg at any time, doesn't it, at this point?

MR. MURRAY: I feel, Your Honor, that the question of whether or not a Nebraskan can accrete to his high bank over into Iowa is not really in this case, because I don't feel there is a factual situation in this case where one has.

Now if you want to take it on and --

THE COURT: I'm not taking anything on.

MR. MURRAY: And render a decision on the point, so be it, but I don't feel it's in the case. It didn't happen that way at California Bend, it didn't happen that way at Winnebago Bend, it didn't happen that way at Omadi Bend, it didn't happen that way at any place that I know of.

So I just feel that that question isn't in the case, maybe you want to settle the question anyway, and if so, go ahead, but I don't believe the Court here is called upon for it. Just as the Cir-

cuit Court in the Tyson case didn't feel called upon to decide that question because it wasn't in the case.

THE COURT: Well, if it's not in this dispute between you, between the states, I certainly don't have to settle it, if it's not a violation, if you're not violating the Compact in that situation I don't have to decide it, you have to decide it. The allegation is that the reason the Court took jurisdiction is because Nebraska allegation that you're violating the Compact. Of course, your answer to that is negative all the way.

MR. MURRAY: Yes.

THE COURT: But I don't know how -- what Howard is going to say about that proposition.

MR. MURRAY: We filed a cross-petition in this case, or, a counter-claim as it's called, one purpose only; the counterclaim in this case filed by Iowa was only filed for the purpose of opening up the other side of the river to compensating changes if the Court elects to open up the Iowa side of the river and make some changes there. Now we feel --

THE COURT: What happened to the counterclaim, did we try that?

MR. MOORE: I think they lost that.

MR. MURRAY: The Krimlovsky case is in evidence, the forty-three cases, decided by Nebraska since the Compact without interference from Iowa is in evidence. The evidence as to what Nebraska has been doing over on their side of the boundary is in evidence.

THE COURT: In your brief have you claimed any relief on your counterclaim?

MR. MOORE: I believe there was some sort of a pre-trial determination that Iowa's claim would not be tried until Nebraska's claim was determined, am I in error on this?

MR. MOLDENHAUER: Your Honor, Judge Pope suggested that, and that was my understanding, that we were to try this and take up the counterclaim up separately afterwards.

MR. WALKER: I thought that in the conference with Judge Willson we decided to try the whole thing at one time, and that's why we submitted evidence of the west side.

MR. MURRAY: Well, we're in this anomalous situation, I'll tell you frankly, and I think that I have told you before, that we don't want our counter-

claim.

THE COURT: I think that's what you told me before.

MR. MURRAY: We only want it conditionally.

THE COURT: Yes.

MR. MURRAY: If the Court is going to make some changes in the Iowa law then we think that some changes, some compensating changes and some changes which naturally flow must be made in the Nebraska law.

But when I argued this, I'm really not arguing what I feel should be the decision in this case, because I feel that the decision in this case should be that the law of neither state was changed in the manner they seek to have you change it.

We feel that certainly if a rule is to come out of this case to the effect that the Nebraskan can accrete into Iowa, certainly the same rule ought to be put into effect going the other way.

And the counterclaim was for the purpose of raising the issue at least so that if these radical changes, what really we think are radical changes, that Nebraska is contending for in the Iowa law, the Court has the power and jurisdiction at least to make compensating changes on the other bank. We think that the same rule ought to apply in every

bend, not just the ones that go this way.

But once again, basically we feel the Court's decision is to say that Iowa did remain the owner of its river bed in Iowa; Nebraskans did remain the owners of their river bed in Nebraska, and so be it.

Now they say, yes, but, Judge, when you do that you're taking the Nebraskan's title away from him to this ceded river bed. And we say if you feel that you don't want to do that, all right, give him that ceded river bed, but also give us this ceded river bed and stop the process there, don't let it meander out into Iowa again and then meander out into Nebraska again, because that's just creating problems which were, which we thought were being settled.

THE COURT: You're talking about high water shore mark lines, aren't you, you're talking about high water shore lines, high bank lines on each side?

MR. MURRAY: Yes, sir.

THE COURT: But that doesn't sound too bad.

MR. MURRAY: Now if the Court wants to go this one further step, if you feel that you must let the Nebraskan remain the owner of that and you must let the Iowan remain the owner of this, the

process should be stopped as of 1943, and one exception perhaps should be recognized, and that is if shore line accretion occurs in either direction those shore line accretions could extend across the state line.

It's my genuine feeling that you don't have to decide that because I don't believe it's in the case; but if you feel it is we wouldn't be greatly adverse to that kind of a decision.

What we really object to is Nebraska's proposition the Nebraskan can accrete it over into Iowa under the water, we just don't feel that that's possible, because as a practical matter, for one thing, it works out badly, it creates problems which we thought were laid to rest. And the other thing about it is that to go to that extent would in our mind overrule or reverse the Tyson case under which we have all acted for some ten years now, and it would change the rule of the Tyson case to go to this extent.

They propose more changes in the common law that they want you to decree as flowing from the Compact. For instance, they want you to say that any movement of the thalweg caused by the Corps of Engineers should be treated as an avulsive movement. In other words, the boundary -- the private boundaries should never move with the thalweg when the thalweg is moved by the Corps. The effect of this would be to say that when the thalweg moved out to here by a natural escape of

the river from the design channel regardless of how the Corps might restore the river tothe design channel this boundary would stay over here. We can't see the justice or equity in that kind of a position, and we said in our brief that it's contrary to all the cases with the possible exception of one criminal case down in Georgia, all the cases other than that, State versus Smith, hold that movements of the thalweg are avulsionary or accretionary, depending on how the thalweg moved and without regard to whether the Corps had anything to do with it or not.

We think that should still be the law, it's been the law of Nebraska, it's been the law of Iowa, it's the law of everyplace, as I say, except in that one case, State versus Smith, down in Georgia, and I'm not sure about that case. The statement of facts in that case are brief and I'm not sure what the facts are, but we see no reason for that.

They want the Court to say that the Compact repealed the presumption in favor of accretion and against avulsion. In the first place we say where in the Compact does it say that? It doesn't say that or anything like it. No such result can possibly flow from any of the language used in the Compact as we read the Compact. You asked them why they think the Compact should be construed as having that effect, and they say, "Well, just because it's unfair, because the State of Iowa is using it." Well, we admit we use it, I never heard

of a party barred somehow from using a presumption in his favor. I think they would use all the presumptions in their favor in any particular situation, and anybody does, that doesn't make it unfair.

THE COURT: Well, again, of course, we're seeking, what I'm seeking is a reasonable result, to be a guide to both the Courts of both states and the states in this matter, without trying to decide a specific instance, property.

MR. MURRAY: Well, what I'm proposing, Your Honor, is that you should not say that the presumption of accretion as against avulsion was repealed, it's just that simple.

THE COURT: You're saying there, you're saying there that in that illustration, as I understand it, that the center of the boundary is still where you first put it, it isn't you're not moving your boundary, but, of course, the state line is still there, and you are letting, you are permitting Nebraska to cross the state line and to the east bank of the river, is that right, with its principle of accretion, is that right, you're willing to go that far?

MR. MURRAY: I don't precisely understand you, Judge.

THE COURT: All right, I understood you to

say that, here is the state line, isn't it?

MR. MURRAY: Yes, sir.

THE COURT: I understood you to say that you don't see too much wrong with permitting this private owner to cross here and cross here, up to this bank, by the principle of accretion, but stopping there (indicating), is that it?

MR. MURRAY: Yes, sir -- no.

MR. WALKER: No.

MR. MURRAY: I don't say that.

THE COURT: How much further are you going to let him go?

MR. MURRAY: As far as his honest-to-god accretions above the water line may go.

THE COURT: I see, all right, not under water.

MR. MURRAY: Not under water.

THE COURT: Where do you stop him under water?

MR. WALKER: At the state line.

MR. MURRAY: At the state line. I say that unless his above water honest-to-god accretions go out beyond the state line he should stop at the state line.

THE COURT: And if they do, if they're above ground, you'll let him go --

MR. MURRAY: As far as his accretions go.

THE COURT: We're talking about a possible decision on that point, Mr. Moldenhauer, what do you think of that, what's wrong with that, tell me that now rather than when I forget all about it and we come back to it, or, Mr. Moore.

MR. MOORE: If the Court please, this, of course, is a completely new position taken by the State of Iowa.

THE COURT: That's a pretty good one though, isn't it?

MR. MOORE: Well, the first part of it is a good one, that's what we have been saying right along, that you can accrete across state line.

I will remind the Court that Mr. Murray in his letter to the United States District Attorney

in regard to the Riley J. Williams case, where the State of Iowa took the position that you cannot accrete across the state lines, he wrote in his letter "The State claims that if Riley J. and Norma Jean Williams claims the land as accretion to their Nebraska holdings such claim is invalid because as a matter of law there can be no accretion across a fixed state boundary line from Nebraska into Iowa." Now that's the position that they took in the Riley Williams case, and that is the basis upon which they sued in the Riley Williams case or claimed the money in the Riley Williams case.

THE COURT: Justice Stewart said here about six months ago where the Court retracted from its previous position "Just because you realize your error is no reason why you should persist in it."

MR. MOORE: Well, I wonder how many other times the State of Iowa has been in error.

THE COURT: You know, we don't have to count them, we don't have to count them, Joe.

MR. MOORE: And I think we've almost reached the conclusion that they maybe were wroing in Nottleman and Schemmel, but they did take that position.

Now they are taking an inconsistent position which illustrates the way they change their posi-

tion as the facts warrant. But Mr. Murray keeps talking about this phrase "accrete across the state line under water." This is absolutely a meaningless phrase. Now this is either a movable property line or it's not a movable property line.

If it is a movable property line the Nebraska owner owns to the line whether it's above water or below water, and if anything accretes to - -

THE COURT: Well now, is that the definition of a true accretion, above water and below water, it isn't, is it?

MR. MOORE: No, we don't, we don't even have to talk about accretion because we're now talking about what happens between the Nebraska owner's shore and his property boundary which is out in the river, and we don't have to worry about whether it's accretion to the shore or to the bed unless there is the contrary claimant who also comes to the thalweg from the other side, that's when that problem arises.

If that boundary moves the ownership moves and it doesn't make any difference whether it's under water or not under Nebraska law; so accreting across the state line under water doesn't have any meaning.

THE COURT: I understand though, from Mr. Murray here now, that he wants to change that to

some extent, that proposition.

MR. MURRAY: Well, I don't want the Nebraska law to be applied in Iowa.

MR. WALKER: That's all we're asking, they're asking to extend Iowa law just as far as that thalweg goes.

MR. MOORE: But we have preserved that man's title and the title carries with it the right to the bed and --

THE COURT: Now wait a minute, his title is only a riparian title, isn't it, it doesn't mean a thing to him as long as there's water over it, does it?

MR. MOORE: Suppose an island pops up, it means quite a bit to him.

THE COURT: Well, suppose it does, suppose it does, but somebody from Nebraska's side, it seems to me that they ought to have some rights, it seems to me, it's not too inconsistent as I see it to say to them when the land is above water if you can show an accretion all the way across you can have it.

MR. MOORE: Well, we have this other shift

in position by Iowa. They say, they now admit that it is conceivable and proper that this Court find that you can accrete to your land across the state line and follow it right into Iowa, you may have to go into Iowa to --

THE COURT: Even against the State, that's where the State common law gives way to the principle of accretion and private property?

MR. MOORE: What we're saying is that there isn't a bit of evidence that the man's right to his accretion was no greater than his right to ownership of the bed at the time he acquired the title to the high land, and that's what was preserved in the Compact, with all that, that whole bundle of rights, all the hereditaments and everything that go along with it.

MR. MOLDENHAUER: You see, Your Honor, if the Nebraska owner owns the bed even though it's under water it's just as important to him as the fact that Iowa claims it owns the bed. Iowa seems to think that because it's out in the water it makes a difference, but if it weren't out in the water Iowa wouldn't have any claim at all. Their only claim is based on the fact that it's in the water as a sovereign claim, but the riparian owner on the Nebraska side has a title, and we say that his riparian rights which attach to that title which

carry to the movable boundary to the thread of the stream were vested property rights which were protected and included within the phrasing of the Compact that his title would be recognized in Iowa.

THE COURT: I don't believe, I don't believe that he ever had the right prior to the Compact, I don't know whether he had that right prior to the Compact under Iowa law, did they?

MR. MURRAY: Your Honor, I had my own thoughts going while he was talking --

MR. WALKER: You see, the thalweg was the boundary before, and the Nebraska riparian owner owned out to the thalweg, and Iowa owned from the thalweg to the high shore line. Now the Legislatures --

THE COURT: We're moving the thalweg all the time so that we're accretioning his land. I'm trying to get a solution there, a compromise somewhere that will work.

MR. WALKER: Well, it's briefed, Your Honor, and I think you'll find the cases say that a man's riparian rights isn't a vested title the same as his high land, and they use those terms, and I think when the Congress of the United States and the Iowa Legislature and the Nebraska Legis-

lature changed that boundary from the thalweg to the center of the stream, which is the law in many states, is the center of the stream instead of the thalweg, that the riparian owner's property rights are altered to that extent.

Now when we say he can accrete across a state line, he can accrete across the state line because it conforms with Iowa law, but the thalweg doesn't conform with Iowa law and therefore we feel that it shouldn't be allowed to extend into Iowa.

THE COURT: All right, go ahead.

MR. MURRAY: Your Honor, I have been trying to make my position clear.

THE COURT: I think you made it quite clear now.

MR. MURRAY: Well, apparently Mr. Moore didn't understand it.

THE COURT: Well, he don't agree with it.

MR. MURRAY: He not only doesn t agree with it, he says we're changing our position, we're changing our position in this lawsuit -- we aren't doing any such thing, Judge.

Basically, it's our position --

THE COURT: Listen, we don't have to prove whether you changed your position, we want to know what your position is now. I don't care what your religion was ten years ago.

MR. MURRAY: It's still our position that the simple, clear way to put the things at rest up above Omaha and to Sioux City is for the Court to say that Nebraska law and the Nebraska titles now end at the fixed boundary and that Iowa and Iowa titles now end at the fixed boundary, that's still pur position.

What I have been trying to say is if the Court feels that such a decision would deprive this Nebraskan of this crescent shaped piece of river bed and that therefore we're wrong about that, such a decision giving him that crescent shaped piece of river bed would not be abhorrent to us.

THE COURT: Now what you're saying to make that clear in case somebody else ever reads that is that you're saying the east half of the river, aren't you, you're giving them the east half of the river?

MR. MURRAY: It's not the east half of the river, it's this crescent shaped piece over at the thalweg. The thalweg doesn't go over to the Iowa shore, it's somewhere out here.

THE COURT: Well, you're not taking it to the

Iowa shore, you're not taking it over to the Iowa shore.

MR. MURRAY: They don't want to go to the Iowa shore, as I understand it, they want to go to the thalweg, which is in most cases on the outside of the bend somewhere out in the river from the Iowa shore in a bend like this.

I'm also saying that if the Court feels that the Nebraskan or the Iowan should be able to accrete from his high bank by the slow and gradual process of grain upon grain of sand, of laying in against high bank, across the fixed state line, that would not be abhorrent to us.

But what I have been trying to say is that really we feel the simplest solution for the Court to settle things above Omaha is to just say that Nebraska ends at the line and Iowa ends at the line.

THE COURT: That's as to the both states and as to the private property, is that it?

MR. MURRAY: Yes, sir.

THE COURT: No accretion across the state line.

MR. WALKER: Under Iowa law.

THE COURT: Under Iowa.

MR. WALKER: I, I think it would be a legal accretion if a person accreted up to the state line and then he accreted to that accretion over into Iowa, I think that Iowa would have to recognize that as a true accretion to his property. I don't care if he is a Nebraskan, but that's Iowa law, that's not Nebraska law coming into Iowa.

THE COURT: Well, you recognize that principle then of accretion then that you're talking about, that Iowa does it and then you don't hold up your common law against that principle, as I understand it.

MR. WALKER: Well, we think that's our common law of accretion.

THE COURT: I see, all right.

MR. MURRAY: Might I have ten minutes?

THE COURT: You bet, ten minutes, fifteen minutes.

(Short recess at 11:10 o'clock a.m.)

MR. MURRAY: Nebraska counsel and I were just musing about this fact, Judge, that it's our recollection that when you first came out here to sit down and hear this case, you made the remark

that you thought that probably your function would be just to determine some facts, and that there wouldn't be no substantial legal dispute between us.

It would seem that it hasn't turned out that way, has it?

THE COURT: Well, you get that from the idea, you know, that the Supreme Court doesn't try the facts, they send me out to try the facts. The trouble is that they want a recommendation too, you see what I mean.

MR. MURRAY: Well, this case really, this phase of the case is almost purely legal.

THE COURT: Yes.

MR. MURRAY: Almost no factual dispute, it's entirely a legal dispute.

THE COURT: I would hope, I would hope that we could, among all of us, prepare some language, see, that would, I don't mean to say satisfy everybody, but that we can submit and say, here, there would be no great objection to that if that's the ruling, see, and that's in the nature of --

MR. MURRAY: Well, I would hope so too.

THE COURT: And that would satisfy the Supreme Court.

MR. MURRAY: I'm sure that I speak for all of us, that we are perfectly willing and able as officers of this Court to assist you in any way we can, but still representing our clients.

THE COURT: Yes.

MR. MURRAY: A few things occurred to me about what I said yesterday with regard to the Tyson case. I didn't completely make my exposition of the Tyson case.

I completely forgot to tell the Court that the Tyson case was really a three-party case. The State of Iowa was claiming the island as a new formation, island formation, in Iowa. Mr. Tyson was claiming it as an accretion to his Nebraska riparian bed, bank or shore.

THE COURT: That, I at least understood that much of it.

MR. MURRAY: There was a third party in the case, Mr. Harrop, and other people associated with him. You may remember Mr. Harrop, he appeared before you.

THE COURT: Yes.

MR. MURRAY: In the early days of this case. His position was that he held a chain of title in Iowa to this spot under the sky running from the time when that spot under the sky where the island arose from the government down to him.

The Court has been reading the Tyson case, but I just wish to read this one short paragraph where they disposed of Mr. Harrop. "The Harrop claimants further argued that a presumption of ownership arises from their record title to the land. The answer to that contention is that any presumption of ownership is completely overcome by the finding that the land was completely destroyed and washed away." I mention that feature of the Tyson case because we believe that it has a bearing on the Schemmel situation.

Ninety percent of the muniments of title by which Mr. Schemmel claimed to own this spot under the sky in our view were muniments of title before the present Schemmel Island began to form; and what the Court says to our mind in this case was that those muniments of title having to do with some land that existed in that spot under the sky at some other previous time are, create, no presumption of ownership, and when the land was washed away those titles were washed away.

I mention that also because I feel that the Court has indicated that a, that you're thinking about making a finding maybe that the Compact shall recognize, that the Compact requires Iowa to

recognize good titles in Nebraska. And we submit that your decision, if it's in that vein, should certainly be proscribed carefully, carefully proscribed, so that it doesn't make us recognize titles that have been washed away.

This is the law of Iowa and Nebraska and everyplace, that when your land is washed away and new land reappears in the same location, then you have a new title start to the newly formed land, and who owned that spot under the sky before its washing away is utterly immaterial then.

THE COURT: Oh, I think that's all right, that's a good suggestion. I'm talking about a title that Nebraska under its sovereign, under its sovereignty as a state, is recognizing a deed in these landowners, that's all, at that time. It may not be appropriate between two property owners, but as far as Nebraska was concerned she wasn't disturbing it, and they were accepting the taxes and all the muniments of possession and all that sort of thing, and if she had to, was doing that under the Compact, I think you could, you couldn't assert your state rights against that title. And if you are restricted to that, why, it doesn't hurt anybody, is that right, as I see it.

MR. MURRAY: Well, as I see it, Judge, please don't open the door again for Mr. Harrop to get in.

THE COURT: Oh, he'd be in too?

MR. MURRAY: He'd be in, and he'd be up and down the river picking up these ancient titles.

THE COURT: All right, all right.

MR. MURRAY: And that's been his business for fifty years.

THE COURT: All right, we're going to try and take care of that.

MR. MURRAY: And he'll be in it again.

THE COURT: We'll try and take care of that.

MR. MURRAY: And we certainly beseech you not to do something that he can latch onto and start claiming land, wherever it might be.

The next miscellaneous thing that I had noted that I wanted to mention was this.

Mr. Moldenhauer talked about Winnebago Bend; I don't want to talk about Winnebago Bend in detail because in my own judgment that bend is the most confusing situation along the entire river. The river has been wilder there than it has been anyplace; there has been judicial determination which has a bearing on that bend, that judicial determination being binding at least on the

Winnebago tribe.

THE COURT: That was a Federal Court case?

MR. MURRAY: Yes, sir, right here in Omaha.

But the Winnebago Bend by discussing it nothing comes clear because the situation there is just about totally confused.

Of course, neither party came to this trial prepared to try out Winnebago Bend, prepared to try out California Bend, prepared to try out any of those upstream bends, only enough evidence has been introduced here concerning those upstream bends to give you a general picture.

The general picture which we put in evidence enough to show is that in those places where we claim, we think we put in enough evidence to show that there's some reason for us to be there. It just isn't purely a luck of the draw that we claim those places and don't claim others. What I would like to point out about Winnebago Bend is this.

In Winnebago Bend the State of Iowa is not only claiming under our theory of sovereign ownership, but in Winnebago Bend we purchased the riparian land adjacent to the disputed area from Mr. Grosvenor. The deed from Mr. Grosvenor is in evidence. Our purpose in purchasing that riparian Iowa shore line to this disputed area from Mr. Grosvenor was two-fold.

First, we wanted that land, it was a nice timber

where a possible nice recreational development can be made, but even perhaps more important than that, we bought the private Iowan's claim to the disputed area. So at Winnebago Bend since the Compact we are not only claiming under the sovereign's claims, but we are also claiming under the private Iowan's claims, whatever they may be. That's a difference in Winnebago Bend that I wanted to point out to the Court, I believe it's the only place where we have acquired some property to which we had no claim for the purpose of firming up our claim to a disputed area in that manner.

Back to the Court's question concerning how does all this aid Nebraska? I wanted to just say that I hope I have made it clear that anything you do in this case does not aid Nebraska. I think anything that you do with regard to changing the Iowa law would aid some Nebraskans and it would grievously injure some others. I can't personally see how they can take the position they do and feel that they are contending for all the people of Nebraska, because it seems to me that their position if followed necessarily does injury to some Nebraskans who happen to be riparian on this sort of a bend, where the river perhaps escaped into Nebraska since 1943.

And my last remark about that would be "where does the doctrine of parens patriae come then when they are really seeking to aid some Nebraskans

and the only result could be grievous injury to some others?"

THE COURT: How many places in Nebraska did you say that you, that is in the river now in Nebraska entirely that is west of the Compact line, there is some points, isn't there, several of them or not?

MR. MURRAY: I haven't counted the places, I said thirty-one miles.

THE COURT: Yes.

MR. MURRAY: Thirty-one miles altogether.

THE COURT: Yes.

MR. MURRAY: The river is now entirely in Nebraska like this. On the other hand I think there are fourteen miles where the pr esent river is entirely in Iowa like this, by the redesign created by the Corps of Engineers in the 1950's.

THE COURT: Now in the New Mexico case, Texas-New Mexico, the Court held it does affirm the Congressional act in the laying out of the boundary of a state, and so on, as I understand that case, New Mexico couldn't cross, couldn't accrete across that line.

What do you say about that up there where you have drawn that on the, on the east side of it there, the river now is three miles away from the boundary line in the State of Nebraska, what do you say about your abandonment, your bed, going into Nebraska, for the State of Iowa now, aside from the property owner?

MR. MURRAY: You mean this segment?

THE COURT: Yes.

MR. MURRAY: Of the river bed where it now runs entirely in Nebraska?

THE COURT: From the east half of the river, from the old - from the new channel, this part here, did you pick that up or not, did the State of Iowa pick up any land going west under that situation, by accretion?

MR. WALKER: West of the '43 boundary, you're asking?

THE COURT: Yes. The river now has gone west into Iowa.

MR. MURRAY: Into Nebraska.

THE COURT: Nebraska, and now do you see

the '43 boundary?

MR. MURRAY: The '43 boundary is here.

THE COURT: It's all bare land in there now, it's all bare land in there between the high banks. What land did you pick up, did the State of Iowa pick up, if any? There's a bed there, in other words, you have got your abandoned bed.

MR. MURRAY: We don't claim to have picked up any.

THE COURT: Well, that's good, that's good.

MR. MURRAY: We don't claim to have picked up any. We feel that this bed of the river entirely in Nebraska is owned by some Nebraskans. We do feel down here that we own all this river bed, which is entirely in Iowa, that's the Iowa law, all of that, none of that (indicating).

THE COURT: What I'm getting at, you don't, as I understand the New Mexico case you can't come across the state line into Nebraska, the State of Iowa can't under any circumstances, that's what that case holds.

MR. WALKER: Well, I never felt that we could under Nebraska law, because the Nebraska law

governs over there and that gives it to the Nebraska riparian owners.

THE COURT: Well, that's all right, under both, under both laws.

MR. WALKER: Well, I think Mike misspoke, I think that Iowa under the proper circumstances would have picked up that east abandoned channel.

MR. MURRAY: It all depends.

MR. WALKER: Yes.

MR. MURRAY: It all depends on how the Corps took the river from wherever it was to here. I can't answer just as a general statement whether Iowa would own this piece of ground or not without knowing --

THE COURT: Which piece?

MR. MURRAY: This piece of ground in here.

THE COURT: Well, I don't -- I can answer that, I think under that New Mexico case you can't, that's what I'm getting at, under any circumstances. You have agreed now --

MR. MURRAY: Well, we don't want to --

THE COURT: You have agreed to your state boundary, you see, so far as the state is concerned, and I'm talking about the State of Iowa, I think that's one thing that you have got to give up. I'm not talking about an Iowa citizen, a private owner, he can go anywhere he wants to.

MR. WALKER: But the east half of the abandoned channel, it would depend on how it moved, if it moved by accretion the riparian landowner would pick up that abandoned channel; if it was an avulsion that water bed would be Iowa lake.

THE COURT: Well, that's all right, that's the landowner, that part's all right, that's the landowner you're talking about.

MR. WALKER: Yes.

MR. MURRAY: Well, the reason I can't give a categorical answer as to owning it or not owning it, it depends on how the Corps did the thing.

THE COURT: Where is that decision, Jack, Texas and New Mexico?

MR. WALKER: Well, I think the significant feature in that case, that was Congress, or, United States and Texas dealing with a territory, and then New Mexico comes along and changes its boundary

in its constitution contrary to the Congressional boundary, and I think that they said there "We don't care what they put in the constitution because the boundary was determined before."

MR. MURRAY: My understanding of Texas versus New Mexico --

THE COURT: I don't understand it that way, I understand it that when you fellows now, when you're talking about the sovereign states, you lump your rights as a proprietary interest as well as anything else, as far as the state is concerned, your sovereign rights and your ownership rights, you see, it says here "We're going to stay on our side so far as any of those rules are concerned."

MR. MURRAY: I haven't read that Texas versus New Mexico.

THE COURT: That's what I understand that case holds.

MR. MURRAY: But my understanding of Texas versus New Mexico is that, first of all, they, the Court, found that a fixed state line was created.

THE COURT: That's right.

MR. MURRAY: That it's never been moved

by accretion, and that's the point on which I believe they reversed the Special Master. He held that, yes, they have created the state line as the center of the river as of 1850.

THE COURT: Jack, that decision is in one of those volumes there, see.

MR. MURRAY: But that as I understand it, he held that it remained a fluid line. The Court said, no, it was a fixed line.

THE COURT: I, I read that decision what they say about accretion, maybe you can read it different ways, but as I read it, it says "The Constitution defined its boundary by the channel of the river. Congress admitted it as a state with that boundary, New Mexico, and now it's a question of the limitation of its boundary area, assert a claim to any land lying east of the line thus limited."

You're done, you're done there so far as the state is concerned.

MR. MURRAY: Then they put the shoe on the other foot too, I think, and they said that neither state can go across that line.

THE COURT: Well, I agree with you, I agree with you so far as Nebraska, if she owns any land there, we're going on the assumption that she doesn't

own it, she can't go across either, I agree with that.

MR. MURRAY: Well, and another thing, Judge, is that I don't read New Mexico versus Texas --

THE COURT: Well, the difference, of course, is that Nebraska doesn't own any riparian land.

MR. MURRAY: Well, I don't read Texas versus New Mexico as involving ownership of any land by either state, it was a pure question of sovereignty.

MR. WALKER: It was a question of Texas patents were attacked by New Mexico.

THE COURT: I know, but New Mexico was claiming a change in the boundary by accretion.

MR. MURRAY: And the Court held it was fixed.

THE COURT: That's right.

MR. MURRAY: And I think that they held it was fixed as to both parties and appointed a Commissioner to go out and survey it.

THE COURT: That's right.

MR. MURRAY: Told him the line to survey and go survey it.

THE COURT: I don't think that they permit one state to move fifteen or twenty miles into another state by, that is, by proprietary title as distinguished from a boundary proposition, I don't think.

MR. MURRAY: I don't think that either state was claiming to move into the other state by a proprietary title, my impression of that case is that it was a dispute about sovereignty from beginning to end.

THE COURT: All right, okay.

MR. MURRAY: And the result was that neither state could accrete into the other state because the center line of the river as of 1850 was the fixed boundary was the result of the case.

There was also -- the most serious dispute in that case was where the 1850 river was.

THE COURT: Yes, I know that.

MR. MURRAY: We certainly feel, Your Honor, that the Court should somehow refrain from recreating two sets of title laws in Iowa, and

this is what Nebraska wants you to do, and this to our mind is what numerous courts have said they will not do. The cases are so numerous that you just can't even guess how many there are, saying that the laws within any state must have equal application to everybody in that state.

We just can't believe that a result of this Compact could have been that Iowa granted and conveyed some of its state-owned river bed or lands along the Missouri River to anybody even if it was Iowa's. That would, in our mind, would just constitute the unjust enrichment of some Iowans at the expense of the general public, and that shouldn't be the result.

So we believe that after the Compact it must be the rule that the state still owns those river beds of the Missouri River bed which are in Iowa. If you change that, the question then becomes, well, where do you stop? Do you just make that change as to the Missouri, as to certain parts of the Missouri? Do you go to the Des Moines, the Cedar, the Mississippi, and say that the law is changed everyplace? It seems to me that if you say that the state conveyed away its river beds on the Missouri you almost have to say it did it everyplace, and that certainly doesn't flow from the Compact. There's just no reasonable construction or interpretation of the Compact to our mind which could be that way.

One other thing, the Court expressed interest

in its order of September 10th in whether or not Judge Van Osterhout's statement in the Tyson case concerning the wildness of the Missouri River was correct and accurate. Until the receipt of that order we had not recognized the Court's particular interest in that subject. We had had in our possession an article on the subject for some time, but we didn't cite it in our written brief, and I wish to offer it to the Court as an additional citation, not a legal citation, to our brief at this time. This is an article, Your Honor, which --

THE COURT: Why don't you put down the name of it a little bit here so we can have it on the record?

MR. MURRAY: The article, for the record, which I have just handed the Court and Nebraska counsel is from the Engineering News Record of August 22, 1935, the title of the article is "The Behavior History of the 'Big Muddy'." The article was written by Mr. Roy N. Towle, who was then Mayor of Omaha, I believe he still lives here in Omaha, a very old man. He was an engineer and surveyor who spent much of his working life on the river, and we believe this article is an authoritative description of what's happened on the river prior to the time the Corps went to work on it.

What he says in substance in this article is that when Lewis and Clark went up the river it was extremely meandering, and as Mr. Walker said at one time they traveled for a day on the river, and then one of the men was able to just take a stroll back to the place where the men had started that morning. But the sense of this article is that the granddaddy of all floods on the river straightened it out. He made, he limited his study in this article to the stretch between Plattsmouth and Sioux City, he didn't go below Plattsmouth, and he says here that Lewis and Clark mileage between Plattsmouth and Sioux City was 250 miles. In 1935, mileage, river mileage, between Plattsmouth and Sioux City was 150 miles. The river had in those intervening years shortened itself by forty percent.

He says that nearly all that happened in 1881. He concludes on the second page, I believe it is, he says "Since then, since 1881, there have been no cutoffs from Sioux City to Plattsmouth." In other words after 1881 there weren't any of those great loops left to cut off, the river just whooshed down through the valley, straightened itself out, and there weren't any cutoffs after 1881.

Now we realize that perhaps there is an inaccuracy in that, maybe there were a few cutoffs, but not many, after 1881. We believe that this, we call this to the Court's attention because it fortifies the reason behind the presumption in favor of ac-

cretion and against avulsion on the Missouri River.

Nebraska argued in 1892 that the ordinary rules of accretion, avulsion, island, and so forth, should not apply to the Missouri River because it was such a wild river that they couldn't. The Court rejected that argument in 1892, and they are in substance making the same proposition now that the ordinary generally recognized rules of accretion and avulsion should not apply and that this Court should create certain large exceptions to those rules.

Now we just don't believe the Court should engage in that, and I say again that the simplest way, the easiest way for this Court to settle or to say that the Compact settled all existing disputes and future disputes up and down the river is for it to say that Iowa law shall apply to the boundary and Nebraska law shall apply to the boundary. That's a simple and logical way to do it without changing the law of either state.

If they want to let their private citizens have their, have the river bed in Nebraska, so be it. But if Iowa has elected to, for the state to have its river bed within Iowa, so be it. We believe that that's the only logical and fair way for the Court to settle at least the phase of the case which deals with problems which really have arisen since 1943.

Thank you.

THE COURT: All right. Any more, gentlemen?

MR. MOORE: Yes, sir.
May it please the Court and counsel -- this is the longest that I have gone in trial without talking.

THE COURT: You have been very quiet all week, Joe.

MR. MOORE: I hope the discussion to date has dispelled any notion that this is a friendly lawsuit, whatever that is, and I'm constitutionally unable to engage in friendly lawsuits. I think the parties are very interested in getting a determination, and it is important to all of us and will materially affect the rights not only of the states but of the residents of both states.

I'm only briefly going to discuss any factual matters, because I think the Court's probably tired of hearing about them, except there are a few statements that have been made which I would like to comment upon and perhaps correct, and I will try to be as brief as possible.

This matter of the avulsions since 1881, I think that we have proved that there were many, many avulsions, whether they were large or small. Iowa seems to take the position that unless there was a substantial piece of land, which I suppose means large, that the Court should not find that

an avulsion took place. I think that size is of materality only where the state might be interested in a particular piece of ground or where the state boundary determination might be important, but to the landowners the fact that the land is not a great vast body of land is fairly immaterial, and cases don't really hinge on the substantial part. Where there was a large substantial piece of land the Court will throw that in, but the cases don't turn on the size of the piece of land around which the river moves by avulsion, and the matter of determination of what has happened, lawsuits up and down the river which have been decided and there have been many decided in Nebraska as has been pointed out, and I don't think that the record purports to reflect the number of cases that have been tried in Iowa.

But the State of Iowa seems to be disturbed by the fact that in Nebraska disputes between private title claimants or private ownership claimants have been determined in the Nebraska courts without joining the State of Iowa. Well, under Nebraska law it is necessary in a quiet title action to join only those persons whose claim is of record and those persons who are occupying the land. Other than that there is no necessity.

The State of Iowa having failed to assert any claim in any fashion, either by filing of record or by occupying the land, were not necessarily parties to determination of quiet titles in Nebraska.

And I might add that in nearly every quiet title action in the State of Nebraska a careful lawyer joins all persons having or claiming any right, title or interest in the real estate. And, of course, not being able to serve those people he serves them by publication. And I'm sure that any farmer up and down the river, if such publication appeared as to his land he's going to notice it and somebody is going to call it to his attention, he's going to be in claiming it. The State of Iowa made no such claim.

Now we say that the only way to settle the problems that this Compact has produced is not to hold as Mr. Murray claims, not as Mr. Walker claims, the Nebraska law applies in Nebraska, Iowa law applies in Iowa; but to do precisely what Nebraska is urging the Court to do, which is to say that the Compact made the law of both states by the agreement of the states. The Iowa land that winds up on the Nebraska side of the river is, has the, all the rights that the Nebraska owner would have had. Now you can't bring that Nebraska owner over into Iowa against his will and take away his riparian rights without running afoul of his constitutional rights.

So we say that the only way that you can get uniformity, equality up and down the Missouri River was to say that the parties have the same rights on both sides of the river and the riparian owner does own the bed. Iowa's counter to that is

"Well, we always recognized your title where the land was ceded, but we reserve the right to inquire." Well, if they reserve the right to inquire in 1970, why in the world didn't they assert their right to inquire in 1943. We can speculate on a dialogue between the representatives of the two states if this issue was known, if this issue was raised and claimed by the State of Iowa in 1943, where the parties are getting together, and they say, now, we don't know where the boundary is, and I think it's, it's clear, nobody really knew where the boundary was.

We have all this land up and down the river, well, we'll cede you everything that's on the east side to Iowa, and, Iowa, you cede us everything that's on the west side. Now suppose at that point Iowa had said, "Ah, but we reserve the right to later inquire to see whether this land was ceded land from Nebraska and inquire into where the boundary actually was, or is, now, in 1943, or see if it was on the Iowa side and is therefore state-owned."

Well, Nebraska representatives are going to be out of their mind if they agree to a thing like that. Their position then would be either we have no deal, or, wait a minute, make your determination now, claim the land you claim, and if we want to set those aside, let's go see what you have. Let's go to the land records in the Secretary of State's office, let's see what you have, let's go to

the State Conservation office and let's see what you have.

And what they would have found was that Iowa had nothing, claimed nothing. Now if that, if that had gone to that issue, if Iowa had at that point been candid or if they had known that later on they would be making these claims and had been candid, then I think that that result would have pertained. Then perhaps some additional language would have been added to the Compact.

They say, "Well, the only thing that was being ceded was sovereignty." Iowa's title depends on their sovereignty. If Nebraska intended to give them land, they would have, they would have perforce have said so, I'm sure, but if you say that ceded from Iowa to Nebraska, meant only sovereignty, and from Nebraska to Iowa it meant only sovereignty, what in the world did Section 3 and 4 mean? What they are saying in Section 2 is "We don't know where the boundary is, we'll set the boundary and all the land on either side, sovereignty is settled." That was that same land they were talking about in Section 3, land ceded, and they could only have meant that for the entire 191 miles of the river, or whatever it is, all of the land on the Nebraska side was ceded and all of the land on the Iowa side was ceded, and that solves the problem of what was ceded in Section 3 and Section 4. It was quite clear it was all ceded. They want to go back now --

THE COURT: Well, what does that do for you, what does that do for you in this case, how does that --

MR. MOORE: It merely says that they have to recognize those titles on the east side of the river, they have to recognize them.

THE COURT: Nebraska titles?

MR. MOORE: Nebraska titles, and it solves this argument about, well, let's go back and inquire and see if a Nebraska court had jurisdiction. Well, let's go back and inquire and see whether it arose on the Iowa side of the river or the Nebraska side of the river.

THE COURT: What do you say, where does the title, where does the phrase "good title" come in?

MR. MOORE: Yes, sir, yes, sir, and if the title was, if the title was supportable in Nebraska, as these titles were, you see, in Nebraska, all you have to do is claim by adverse possession for ten years, no color of title necessary, you're in. That's the kind of title you can get in Nebraska.

THE COURT: Well, if the Court holds that that's what we have to recognize, what's the prob-

lem, that's all I have been saying, I've been trying to say that.

MR. MOORE: That's what we have been trying to say, I think.

THE COURT: Well, I know, but why go any further then? Iowa objects to going any further than just saying, than making that statement.

MR. MOORE: I'm not following you quite.

THE COURT: You're talking now about Iowa's ceding land, granting land.

MR. MOORE: Yes, sir.

THE COURT: As well as sovereignty.

MR. MOORE: Yes, sir.

THE COURT: And Iowa says, no, we don't grant any land, we don't sell any land, we don't convey any land.

Nebraska says to Iowa that Iowa should recognize what Nebraska was recognizing as a good title on the land, regardless of where the land was.

MR. MOORE: Regardless of where it formed and where it was, right.

THE COURT: That's right. Doesn't that still require, we don't know, I don't know of any other piece of land where a private property owner claims a title up north of the river here, north of Omaha, do you, we haven't any evidence of it?

MR. MOORE: Private title --

THE COURT: Yes.

MR. MOORE: Private claimants?

THE COURT: Yes.

MR. MOORE: I think all the cases that we have talked about are all of private claimants, the Tyson case.

THE COURT: Well, I know, you haven't shown a good title on it.

MR. MOORE: Well, yes, I don't, I don't think that we went quite into it to the depth that we did on the others, no, we don't need to, if we can get the principles established these things will take care of themselves.

THE COURT: I'm saying that I agree with you on that principle.

MR. MOORE: All right.

THE COURT: I agree with you on that principle, I think that, Iowa, I think, contended for a while, at least, here, that you had to show all the muniments of title that you would between private property owners, I don't go that, I don't think --

MR. MOORE: No, I think that if this, if this Court can derive some principles, and I think perhaps the Tyson facts and the California Bend facts are sufficient factual situations in which there is no particular disagreement, those factual situations can develop principles which will solve all the problems up and down the river, at least give us some starting points if we decide we want to have a new Compact, which I think was indicated the states wanted to do.

But we have got to find out what the old one means before we can have a new one.

I did want to make just a few comments on some of the statements about the evidence.

Our burden, it seems to me, is primarily that of proving a violation of the Compact, and the question was raised, well, how did Iowa violate the Compact? They violated the Compact by attacking the titles that they agreed to recognize.

There is some language in New Mexico against Texas which is applicable, I think, since the Constitution for which you could read, since the Con-

stitution defined its boundary by the channel of the river as existing in 1850, Congress admitted it as a state with that boundary. New Mexico manifestly cannot now question this limitation of its boundary or assert claim to any of the land lying east of the land the line has thus limited.

I think that is quite appropriate to the situation that we have here. Iowa's agreed to recognize these titles. Now they claim a right to inquire into the titles and to attack the titles that they agreed to recognize; this is a violation of the Compact, and this keeps us in court and we have proved that they have done this and we have therefore sustained the burden of proving what we set out to prove.

Now as to Nottleman Island, Mr. Walker, and I think I quote him accurately referring to the map said, quote "Anything prior to 1923 has no probative value," that's the end of the quote. This is, of course, what we forewarned the Court that they would do, they start with the map that proves their case and come forward from there. The year previous to that the Seth Dean 1922 survey shows the island and shows the situation as we urged it to have been. That's out of the Woods versus Dashner case.

They did the same thing in Schemmel, they started with the Otoe Bend Island case, they started with a 1923 map and implied that the, that when the Corps did their work that they drove their islands --

THE COURT: Well, Joe, I'm rather affirmatively convinced on Nottleman Island and almost convinced on Schemmel.

MR. MOORE: Well, I'll leave it at that.

THE COURT: That the title evidence, that the title evidence favors good title on the proposition, good title proposition, a recognition of a good title, even though it might be weak, put it that way, weak paper title, and this and that sort of thing, the recognition title carries the balance, tips the scale, see.

But I'm still uncertain about what to do up north because, isn't this correct, you presented no property owners up north there claiming title to the property somewhere that Iowa is after, did you?

MR. MOORE: Well, the --

THE COURT: Other than Mr. Brown on there showing maps and things of that kind.

MR. MOORE: Yes, of course, we had the Riley Williams situation, you know, that Mr. Moody testified to that case, and then, of course, the records from the other matters.

THE COURT: But it's hard for me, I'm wor-

ried about what I have to do too, see.

MR. MOORE: I think the facts in those cases, the Tyson case and the California Bend case, I think the facts are pretty well agreed upon and they are stated in the resume in the briefs, and I think what happened there will not be difficult to determine.

The function of the Court in that regard as I see it is to, from those fact situations, draw out some principles of law which will not necessarily decide those cases, because those cases are not before the Court for decision, but they will give some principles, and if the facts of those cases when they get to trial fall into those principles, then they will be easily determined, and for future reference we will now know what the present Compact means so that we may or may not enter into a new one.

I might add that that recognition, Your Honor, counsel for Iowa seemed disturbed that the time wasn't sufficient, but I might point out to the Court that the recognition continued after 1943, it was a continuous thing.

THE COURT: Well, I think that's important, I think it goes right up to the time that Iowa made the claim.

MR. MOORE: I might say, as Mr. Molden-

hauer pointed out not too long, just a few minutes ago, that this question of the disputed area being in the bed of the stream, Iowa seems to want to kind of gloss over, well, they say, it's in the bed and therefore it doesn't make any difference. But the Nebraska owner owns the bed, and Iowa as a state owns only the bed, so the dispute is over the bed, and the fact that it happens to be under water in any particular given time seems to be begging the whole question.

THE COURT: Well, what's wrong though, what's wrong, Mr. Moore, with the recommendation by me that the Compact as you just read in the New Mexico and Texas case limits Iowa to the state line under all conditions and circumstances, see; but that the same rules apply as heretofore between private property owners on each side of the line.

And then if you leave that that way, then you got something you can work on that Iowa must recognize any title that Nebraska had recognized as good, north or south, anywhere.

MR. MOORE: I would suggest this --

THE COURT: And it doesn't mean then, it doesn't mean the same title that Iowa recognized in this Court between its people.

MR. MOORE: I would suggest this proposition to the Court; that if the State of Iowa by legitimate means becomes a riparian owner, and I mean by condemnation, gift, purchase or otherwise, if they become a riparian owner to land along the river, I personally see no particular objection to allow them to, to that land which they own, to allowing them to accrete across the state line, I see no objection to that.

But when they come into Nebraska they are a private owner in Nebraska just like any other private owner, and they are subject to losing their title by adverse possession if someone comes in and takes it away from them.

THE COURT: That's a good point, I think, that's a good point, a good idea.

MR. MOORE: Well, I don't need to go into that business about the time element on the Schemmel land, because it's obvious that they were there in the '30's and went on the tax rolls in '49, and it was more than ten years before the lawsuit was filed.

I think the whole thing boils down, if we can take Iowa out of the land grabbing business along the river, the private titles will take care of themselves.

THE COURT: Well, you're trying to get the

last word on this subject now.

MR. MOORE: We didn't say it initially, they keep saying it.

THE COURT: You're getting peaceful now, you're getting what, complacency.

MR. MOORE: One other thing --

THE COURT: The trial is pretty near over.

MR. MOORE: One other thing that I think Mr. Murray was urging the Court, I think is a dangerous thought, if we allow ourselves to be lulled by it, and that is this idea that the Tyson case has been precedent and relied upon for ten years.

Now we don't think that the Tyson case says quite what Iowa says it is, we happen to think that the case is bad law. But the fact is the Tyson case was decided in 1960 --

THE COURT: Well, the further away I stay from the Tyson case the better off I am.

MR. MOORE: Well, I think some of those fact situations are going to have to be confronted. The Tyson case was decided in 1960, in 1961 the Nebraska Legislature, and I think it's inferable that it was partly because of the Tyson case that

the Nebraska Legislature, in its first session after the Tyson case came down, directed the State Surveyor to look into the situation along the river.

In 1963 after that two year period when the State Surveyor was working the Legislature directed the Attorney General to look into it. In 1964 this lawsuit was filed, and I don't think that any state can move any more rapidly or efficiently than that as a state.

And in 1964, less than three years, or, about three years after the Tyson case was decided we were in Court with this case, and it's misleading to the Court to say that everybody relied upon the Tyson case for a period of ten years because that's up to now.

Thank you.

THE COURT: Well now, I take it then from the record that everybody has had their day in Court, submitted everything they need, they conclude they need to submit, and said about all they need to say.

MR. MURRAY: Your Honor, you'll notice that I didn't use a single exhibit during my argument. I don't want any inference from that fact that we don't consider the exhibits important.

THE COURT: You know, I hate to suggest to Howard, you know, somebody told me I don't know whether he was there, but he's been in this case for

seven years, and he's anxious to quit it. But this case so far as these titles are concerned and this part of the two islands are, if they are going to stand up in the Supreme Court on a fact basis from my part, you know I have to find facts, you see, say, these are the facts.

And my, my method of judicial determination, I did it here a month or so ago, maybe since, is to indicate tentatively and rather strongly how I'm going to decide the case with the aid of counsel. You're going to have to argue that in the Appellate Court, and you've got to have facts in there that's going to support your contentions.

I don't propose to touch on every detail, but if you submit facts and I examine them rather carefully and I think they're all right, sometimes I delete some and I amend them as I see the need; those are the things that you're going to have to stand on in this part, in this title business, and I think that's what the plaintiff has got to do, and I suggest that you do that in this case.

Now if Iowa wants to submit some, that's up to Iowa. I take it there isn't any factual base, I'm glad, I don't know, I thought perhaps when I got here I'd go back to Erie, Pennsylvania, and start working on this case, but I think I got to give you a little more time to see if you want to add anything. I'm in hopes that we can, that you can suggest language, Mr. Murray, see, in accord with my views up there and in accordance with the discus-

sion yesterday afternoon and this morning that will set out principles that the states can live by, that can guide the courts of Nebraska and Iowa and the Federal Courts here as well. The Supreme Court will say "This is it, we accept it."

You think you could do that, or not?

MR. MOLDENHAUER: We would be pleased to, Your Honor, it might take a little time.

THE COURT: Yes, well, that's what I mean, people like to get cases decided, but this kind of a case has been going on for so long, why, I met one of the Justices and he wanted to know just exactly what was going on, they got enough work to do, see, they'll wait until we're ready. So I'd like to leave it that way.

Do you want to send the exhibits back or don't you, or do you want to use them, I got a station wagon engaged?

MR. MOLDENHAUER: I think that we would prefer to send them back, Your Honor, and I think the Court is going to need that space anyway.

THE COURT: That's good.

MR. MOLDENHAUER: We would like some idea of what will happen to them in the last analysis in case they get destroyed or lost.

THE COURT: Oh, no, listen, I don't mean to say that.

MR. MOLDENHAUER: No, I know that.

THE COURT: I'm going to take them back to Erie, I got chambers there and I've got plenty of room down there, and we'll preserve them. I wish you'd get them packed though.

MR. MOLDENHAUER: I meant, after you're through, I hope there s some refe rence made to them after, when you've decided this and everything, and when they go back to the Court in Washington we'll know where they are.

THE COURT: Yes, I'm talking about that too, you may want them, sure, they'll be there, they'll be there, unless they burn up on the way back in this vehicle.

MR. MOLDENHAUER: May I make a couple more questions, Your Honor, mechanical ones.

Do you desire the two states to divide the reporter bill equally as we did the last time?

THE COURT: Divide everything equal, everything.

MR. MOLDENHAUER: And the same with Mr.

Walcott?

THE COURT: Yes, everything, that's the way they have done in all these cases, they should divide the cost, I haven't seen one yet where they haven't done that, they have done that all the way through, if there's no objection to that.

MR. WALKER: No.

MR. MURRAY: No.

MR. MOORE: Does the Court want these arguments written up?

THE COURT: Oh, I think you ought to, sure, oh, we need this, you pay the reporter for it, I just told him, and he's going to send me a copy of it, just one copy is all I need.

MR. MOLDENHAUER: Then there was one other little thing, as we sat here there were some exhibits which were documents, copies of articles and things that I know went into evidence, and I don't remember seeing them when we went through them the last week, and if something is missing, a lot of those can be replaced, they shouldn't be, but --

THE COURT: I know, we've got to be a little

generous on that part, we know, we have considered everything that we looked at in evidence, there's no dispute about it as I see it. The dispute is about what it means and interpretation of it and all that sort of thing, nobody kicked about the introduction.

I'm not sure now where we are. I don't know, maybe in a private conference we can do a little bit better than we have been doing here, I don't know, but it seems to me that it's going to take us some time, Mr. Moldenhauer, five months.

MR. MOLDENHAUER: Pardon me?

THE COURT: I say it's going to take a little time to prepare this, I assume that you're going to prepare it -- Joe seems to be leaning back and laughing, I don't know whether he's going to work on it or not.

MR. WALKER: I know who's going to have to do any work on this for us.

THE COURT: Well, they tell me -- this is off the record.

(Hearing in the above entitled cause concluded at 12:35 o'clock p.m.)