In the

Supreme Court of the United States

THE STATE OF OHIO	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 27 Original
	)	
THE COMMONWEALTH OF KENTUCKY,	)	
	)	
Defendant.	)	

Washington, D. C.
January 10, 1973

Pages 1 thru 38

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THE STATE OF OHIO, Plaintiff,	:	
v.	:	No. 27, Original
THE COMMONWEALTH OF KENTUCKY, Defendant.	:	

Washington, D. C.
Wednesday, January 10, 1973

The above-entitled matter came on for argument at 11:41 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOSEPH M. HOWARD, ESQ., Executive Assistant to the Attorney General, State House Annex, Columbus, Ohio 43215; for the Plaintiff.

JOHN M. FAMULARO, ESQ., Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601; for the Defendant.

C O N T E N T S

* * *

Afternoon Session begins on page 14.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 27, Original, Ohio against Kentucky.

Mr. Howard, proceed whenever you are ready.

ORAL ARGUMENT OF JOSEPH M. HOWARD, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. HOWARD: Mr. Chief Justice, may it please the Court:

This is an action by the State of Ohio, requesting a determination of the location of its boundary with Kentucky and the Ohio River. The only question presently before the Court is whether or not Ohio shall be permitted to amend its original complaint. That original complaint was filed back in 1966. At that time, Ohio claimed that the boundary existed at the low water mark on the north side of the river, that is, on the Ohio side, as it stood in 1792, which was the date at which Kentucky became a state.

Kentucky filed an answer and it claimed that the boundary lay at the present low water mark on the north side of the river, on the Ohio side. That, of course, was much farther up on the Ohio shore than the old 1792 line because of the new dams which have been put in on the Ohio River, beginning back in 1890; the planning began, the dams were erected. I think the first set of them were completed in 1925. And then in the fifties a new set of high level dams

began to be erected by the Army Corps of Engineers, and that caused a much higher level of the water and further inundation on the Ohio side.

The issues were joined on the original complaint in the answer. And this Court appointed a Master and there were quite a number of conferences between the Master and counsel as to how the case should be conducted and the evidence presented. There were a great number of conferences apparently between counsel on both sides, determining just what the evidence would be. And in July, 1970, Ohio made an offer of settlement. As I recall it, it was 250 feet out into the river. I may be mistaken on the exact figures on that, but that was--

Q And somewhere between the 1792 line and the present line on the north shore?

MR. HOWARD: I am not sure, Your Honor, exactly what. I would guess it would have been about the 1792 line. That is my guess.

Q The issue originally in this lawsuit was whether or not the low water mark on the north shore was that of 1792 or that of today?

MR. HOWARD: That is right. That is right.

Q And I suppose, therefore, I would guess, I would assume, that a settlement would fix the line somewhere in between the two.

MR. HOWARD: I have not gotten into that part of it yet at all, and I cannot say. I am guessing that it was closer to what Ohio wanted than what Kentucky felt Ohio should get. Apparently, from what I can gather from the Master's comments and from what I see in the file, counsel on both sides felt that there was some chance that this would be accepted, at least they were content. Nobody could tell, of course, what the legislatures or the executive department on either of the states would have done.

So, it had gone just that far, that the offer was made. Unfortunately, the counsel for the State of Kentucky, John Browning, who had been handling the case since the very outset was killed in an automobile accident about two weeks after the offer was made.

Ultimately, in November of 1970, Kentucky simply rejected the offer. That was in November. A little over a month later, the administration in Ohio changed. A new attorney general came in. And he asked--well, nobody was left on the staff who had worked on this case at all. So, he asked a complete re-examination of the file and everything connected with it be made.

That was done, and after about four or five months study, a recommendation was made to the attorney general that the effort be made to ask this Court to admit an amendment of the complaint in order to permit Ohio to make an argument

that it was entitled to a line in the middle of the river. We did not want to go off the deep end on this without checking. And we called the attorney general's office in Kentucky and asked them to look through Mr. Browning's files and see whether there was anything that would make it clear that we were in error, that we could not possibly prevail in that argument.

Well, we got no answer from that call. And eventually we filed the motion to amend the complaint, which is pending before the Court at the present time. That was done in August, 1971. And what we did was to add the first count of the complaint, that is, alleging that the real boundary between the two states lies in the middle of the river. And then there were some minor alterations in the further parts of the original complaint. That is, if the Court disagrees with us on permitting us to amend the--or if the Master were to find against us on the middle of the river, then we would still argue for the 1792 line.

And the third question involved is the question of concurrent jurisdiction, which is, I think, irrelevant as far as the present proceeding is concerned.

The Court referred our motion to the Master, and that was argued before the Master in December, 1971. And in April he filed his report making a recommendation. That recommendation was that our motion to amend be denied. The

Master's grounds for that were that the new allegations as to the middle of the River failed to state a cause of action.

He also said that even if we did state a cause of action, any relief for Ohio would be barred by this Court's opinions in a series of cases discussing the Indiana-Kentucky borderline.

And, finally, he said that there were three cases in the Supreme Court of Ohio which indicated that the State of Ohio acquiesced in those Indiana-Kentucky cases.

Our position is that the new allegations that we have made alleging that the boundary line does lie in the middle of the river, clearly state a cause of action. We also contend that we are in no way barred by this Court's decisions in the Indiana-Kentucky boundaries. We were not parties to those cases and finally that the three particular cases that the Master picked up from the Supreme Court and found to be acquiescence in the Indiana-Kentucky line of cases do not so hold and that is the only thing in the case so far that goes to the point of acquiescence. Outside of that, that point should not be further considered at the present time.

I really have nothing much to add to the arguments that have been made in the brief.

Q Did the Special Master independently hold that

only aside from prior adjudications or Ohio's reaction to them, that Ohio was estopped because of long silence with respect to the boundary?

MR. HOWARD: Yes, sir, he had some language to that effect in the Supreme Court.

Q Citing cases in this Court to support it?

MR. HOWARD: No, he did not cite any cases.

Q Michigan against Wisconsin was pretty close to it.

MR. HOWARD: Well, yes, that is right. I am sorry. You are correct. Michigan, Wisconsin.

Q Assume he was right in that view but quite wrong in saying that your amended complaint did not state a cause of action, the complaint nevertheless should not be-- if he were right on the estoppel point, the amendment still should not be allowed, should it?

MR. HOWARD: I think it should.

Q If you knew as a matter of law that Ohio had to lose because estopped?

MR. HOWARD: Well, how do we know that?

Q I assumed it. I say assume the Master was right in his ruling here. Of course, if he is wrong in that ruling, then that is something else again. But if he is right--

MR. HOWARD: I would agree with that. If we were

sure that we were wrong--

Q Did not the Master at page 15 expressly state, "...and on the basis of Kentucky's open and continuous assertion and exercise of dominion to that point without formal objection by Ohio for more than 150 years"?

MR. HOWARD: I do not know where he got that, except from the brief that was filed by Kentucky. The only thing that is in the case at the present time is our amended complaint, and that says nothing about acquiescence one way or the other. That is an affirmative defense that Kentucky has to raise. So far, they have not even had the chance to raise it because this Court has not granted the permission to us to file a complaint. That statement is without any support in the record at all. And, of course, we do not agree to it.

Q I gather from what you have said the proceedings before Judge Forman were limited simply to an oral argument?

MR. HOWARD: That is right. That is right.

Q No facts related or taken or anything else?

MR. HOWARD: No facts. No, sir.

Q Just on the face of the amended complaint?

MR. HOWARD: That is right. That is right.

Q Where does the fact of the 150 years acquiescence in the Dominion of Kentucky, where does that

come from?

MR. HOWARD: It comes from one of Kentucky's briefs. I forget--

Q It is based, however, is it not, on Ohio Supreme Court decisions, at least in part? Of which the Special Master could take judicial notice.

MR. HOWARD: He could take judicial notice, that is right. That is right. Of course, our position is that he misread those cases.

Q Yes, I understand that.

MR. HOWARD: They were not talking about the middle of the river at all or anything of that sort. They were talking only about the margin of the river, that is, between the low water mark and the bank of the river.

Q Would you take the position, Mr. Howard, that the issue of acquiescence over a period of 150 years is basically a factual one that you would want to call witnesses on and have a factual determination rather than just a legal one?

MR. HOWARD: Yes, that is right. It could be a legal one if there were some action on the part, for instance, of the governor or the legislature of the state, which actually did acquiesce. Or as in Indiana cases. There was a compact between the two states.

Q If the Master is right in saying that this

Court's decision in Handly's Lessee, although not res judicata as to Ohio, the rationale requires the same holding as to the Ohio-Kentucky border, then that would be a legal determination quite apart from any acquiescence, would it not?

MR. HOWARD: It would, but of course the Court had the same thing in the submerged lands cases. You remember the California case was the first one, and that was followed up by the two from Louisiana and Texas in which the contention was made that those courts were bound by the decision made in California. But the Court directed full hearings on it. And the same thing is before the Court right now in the Continental Shelf cases. Those also depend on the original California submerged lands case.

Q Would not the holding in Handly have to be overruled?

MR. HOWARD: Yes, it would--not the holding of the case but the dictum in the case would have to be overruled.

Q The rationale.

MR. HOWARD: Well--

Q Whatever you can call it. The reason for giving judgment to the winner of that case would have to be--

MR. HOWARD: No, sir, because the reason that land was above the low water mark anyway and there was no reason for the Court saying anything about the middle of the river. He could have decided it simply by saying that this land lies

between the low water mark on the north side and the Indiana bank. Consequently--

Q Would you not have to disapprove or reject that italicized statement on page 5 from Handly?

MR. HOWARD: Yes, sir.

Q "But when, as in this case, one state is the original proprietor," et cetera.

MR. HOWARD: Yes, sir.

Q That would have to be rejected, disapproved?

MR. HOWARD: That is right.

Q That is the reason they gave for reaching their judgment in that case? I mean, there might have been another reason but that is the reason they gave?

MR. HOWARD: Yes, that is the reason they gave. Yes. Of course, our position is that Chief Justice Marshall was a Virginian, of course, and nobody raised this question of where the boundary line lay, was it in the middle of the river or the north shore; so, he did not even go into it.

Later on when question of title came up in the Worcester v. Georgia case, he had to go into it very thoroughly, and what he said there is in direct conflict with what he said in the Handly case.

I really think I would just be repeating what I have said already if I go through, because questions that have been addressed to me have brought out the main argument

that we are making.

MR. CHIEF JUSTICE BURGER: It is time to stop, counsel, in addition to which it is lunch time.

[Whereupon, at 12:00 o'clock noon a luncheon recess was taken.]

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AFTERNOON SESSION - 1:02 o'clock

MR. CHIEF JUSTICE BURGER: Mr. Famularo.

ORAL ARGUMENT OF JOHN M. FAMULARO, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. FAMULARO: Mr. Chief Justice, and may it please the Court:

Mr. Howard has fairly stated the facts and history of this case. However, we wish to emphasize two points at this point. First, we wish to point out that Kentucky did challenge the sufficiency of the allegations to state a cause of action but that we did not do this in the form of an affirmative defense. We rather raised it as a point of law much as a common law demur. And that point was that the allegations of the State of Ohio are immaterial. That is, if they are true, they in no way change the boundary which was established by Congress long ago, based upon the cession of Virginia and the acts of Congress thereto.

Secondly, we wish to point out that in the original complaint of 1966 the State of Ohio conceded that the boundary between the states of Kentucky and Ohio was the low water mark on the northern shore as that mark existed in 1792. They further conceded that the states involved in the Handly's Lessee v. Anthony case, that is, Indiana and Kentucky, should control as between Ohio and Kentucky based upon the identical title relationship of the parties.

Thus, they recognized that Handly was controlling and should control as between Ohio and Kentucky. And they have recognized this for more than 150 years since the decision in Handly. At least it has been recognized to the extent that they were judicially aware of Handly and yet have sat by inactively for a period of at least 150 years until the amendment is now sought attempting to establish the boundary in the middle of the river.

We submit that the recommendation of the Special Master was correct for two basic reasons. The first reason is what we refer to as the immateriality of any alleged defect in the title of Virginia where the boundary was clearly fixed by Congress based upon the cession of Virginia and the acts of Congress.

Secondly, we submit that the Special Master's recommendation was correct due to the judicial admissions found in the 1966 pleadings and the judicial and historical acquiescence upon the part of Ohio, which is undisputed. Let us briefly deal with the first allegation.

Ohio claims that the boundary is in the middle of the river now, based upon an alleged defect in Virginia's title due to various pre-Revolutionary War documents and actions by the British Crown.

We submit that after the Revolutionary War all the territories situated within the United States was a part of

the United States and any claim or derivative claim of the British Crown was clearly extinguished by the results of the Revolutionary War.

Once Virginia ceded the land situate lying and being to the north of the River Ohio for the sole purpose of creating new states and once the Sovereign United States accepted this cession and the terms thereof and recognized the sovereignty of Virginia over the entire river, any defect in that title to the land north of the river is clearly immaterial.

The only two parties involved, the Sovereign State of Virginia and the Sovereign United States, based upon the negotiations involved, recognized that the boundary was to be on the northern shore. Certainly they had the authority to act and did so, and the boundary was clearly established as residing within Virginia on the northern shore and all the land south of the river. This was determined long before the State of Ohio was ever created. And Ohio is in no position now to vindicate the rights of the province of Quebec or to vindicate the rights of the Indians. They can only vindicate any rights that they have acquired since they became a state, and we submit that clearly the boundary was determined based upon the acceptance of Congress of the Virginia cession.

It is that law that is the law of the Sovereign

United States which must govern this boundary dispute and not the law of any foreign political entity. The Special Master has not rejected this, as Ohio claims; and if indeed Judge Forman did, this Court can certainly hold otherwise.

We submit that the cession of the Virginia and the legislative enactments did indeed become the subject of judicial interpretation. In Handly's Lessee v. Anthony the Supreme Court judicially recognized and accepted the legislative enactments involved and resolve the boundary dispute reasoning to the language of the cession of Virginia itself and also to the acts of Congress involved.

Q Is not the central issue here whether an amendment should be allowed at this time?

MR. FAMULARO: This is true, Mr. Chief Justice.

Q Has not the Court historically been rather generous in allowing amendments, particularly in actions between the states?

MR. FAMULARO: Certainly the courts have been lenient in this regard, Your Honor. However, we submit that they have not been lenient in this regard or indeed the factual allegations taken upon the sufficiency of their face do not establish as a matter of law cause of action. And we submit that any alleged title defect in Virginia's land, as we have previously pointed out in our argument so far is clearly immaterial. And to tie up the Court and to bring in

such an immaterial claim would in no way resolve the matter or would in no way achieve the expediency which the courts strive for.

Q Do you have anything to suggest about the scope of the factual matter that would have to be dealt with if an amendment should be allowed?

MR. FAMULARO: Without going outside the record, Your Honor, suffice it to say that it would be a totally and completely burdensome task. It would in all likelihood truly invalidate a counterclaim, as was suggested in the hearing before the Special Master. This in itself would be an onerous task in trying to compute all of the expenditures over all the years. And where the allegation is completely immaterial, as we submit it is, we submit that this Court should not consider this and should not be burdened with this task. And the Special Master correctly so held.

Q What the Special Master did here was tantamount to allowing a motion to amend the complaint and then dismiss any amended complaint for failure to state a claim for relief because it was legally barred?

MR. FAMULARO: Yes. This is correct, Mr. Justice Rehnquist. Basically what the Special Master did was that, reasoning more to the theory of acquiescence than to our initial theory here of the immateriality of any alleged effect in Virginia's title.

Q A sort of demurrer's approach, was it not?

MR. FAMULARO: Yes, it was, Your Honor.

Q And then he acted on that theory?

MR. FAMULARO: Right. He stated the theory of acquiescence to give validity to this argument and to set forth the rationale.

Q It is a little hard to conceptualize. In a normal lawsuit--let us say I file a complaint alleging a promise without consideration to give me $1,000. As a matter of law, that does not state a cause of action on its face, because there was no consideration, no action, reliance and so on. You could still file that complaint, but it would be dismissed, I suppose, on a motion to dismiss or on demurrer.

MR. FAMULARO: This is true, Your Honor.

Q Assuming all the facts to be true, it simply does not state a cause of action under the law.

MR. FAMULARO: This is true, Mr. Justice.

Q And here assuming all the facts to be true it does not state a cause of action under the law. The law in this case not being the general law, such as the law of contracts, but the law that the boundary between Kentucky and Ohio is the low water mark of the northern side of the Ohio River.

MR. FAMULARO: That is basically our contention.

Q But still I suppose the complaint, at least as a technical, logical, symmetrical matter, should have been allowed to be filed, should it not? Just as I can go into a trial court and file an action alleging a promise without consideration to pay me $1,000, and it may be absolutely no good; it may not state a cause of action because there was no consideration or its equivalent. But, nonetheless, I can file that complaint, can I not?

MR. FAMULARO: Yes, Mr. Justice Stewart, this is correct.

Q Subject to a demurrer or a motion to dismiss.

MR. FAMULARO: Subject to the motion to dismiss.

Q Right.

MR. FAMULARO: However--

Q You said a while ago that part of your case was that as a matter of law, even accepting the allegation as true, that the dedication by Virginia and the acceptance by the United States as a matter of law ended the matter.

MR. FAMULARO: This is true. We are making that statement. And we submit--

Q That is not what the Special Master held, though, is it?

MR. FAMULARO: He did not reject this theory.

Q That is not the grounds for his--

MR. FAMULARO: No, it is not. He based his upon

the theory of acquiescence. However, we submit that he did not reject this theory and clearly the--

Q Absent a holding on the ground that we just discussed just this moment, should not the complaint been allowed to be filed, the amendment?

MR. FAMULARO: Since this was an original proceeding, Mr. Justice White, I think the technical rules actually are not followed and this Court looks to them for guidance. If indeed this were the typical lawsuit between the average parties, then in all likelihood exactly what you are saying would be correct. But in the original proceeding where the court strives to get the issues before it and tries to eliminate any burdensome issues, which we submit that the boundary in the middle of the river clearly is, it should be rejected and this forms the basis of our contention.

Q There was a case that I have just remembered argued about my second or third day here on the Court back in 1958. It is reported in 358 U.S., page 64, California against Washington. And that was an argument on a motion to file a bill of complaint, and it is a very short per curiam judgment. The motion for release of the bill of complaint is denied. And then the 21st Amendment of the Constitution is cited, Section 2 of that amendment, along with three or four or five decided cases under the 21st Amendment, i.e., on the merits of the case. But we did not allow the complaint

to be filed and cited cases going to the merits of the complaint rather than allowing the complaint to be filed and then dismissing it on the merits.

MR. FAMULARO: I think that is a sound--

Q That was 358 U.S., page 64.

Q Mr. Famularo, what is this counterclaim that you mentioned earlier? I gather Kentucky, you said, would have to file if the amended complaint--

MR. FAMULARO: Yes, it would be a counterclaim basically for expenditures over all the years, Mr. Justice Brennan, in excess of the middle of the river to the far side, if indeed Ohio--

Q You would have to make that kind of record in the event that Ohio should prevail and its claim to the middle of the river?

MR. FAMULARO: That is right.

Q But would you have to make that kind of record until actually Ohio had prevailed if it did?

MR. FAMULARO: I think to protect the record of the case and to protect our interest, once the amended complaint is allowed to be filed, then as a protective device for the Commonwealth of Kentucky--

Q You would file the counterclaim, I gather, but would you have to try it until the issue of the location of the boundary line was settled?

MR. FAMULARO: Would we have to try the counterclaim? No, in all likelihood we would not, because the expenditures for the area lying north of the river and to the northern shore.

Q Mr. Famularo, to take Justice Stewart's hypothetical of a moment ago in a commonlaw court where you file a complaint that does not state a claim for relief as an amendment, but the court simply denies you leave to file it. And you appeal and on appeal the court were to say, "well, he should have been given leave to file this complaint, but we see that it does not state a claim that we would grant relief, even conceding the facts." Would the appellate court, do you think, reverse and say even though it would have done you know good, you should have been allowed to file the complaint, or would it affirm on other grounds?

MR. FAMULARO: It seems to me that to reverse and say that they should have been allowed to file would be going around the circle of the matter. It seems more critical that the court should and could look to the facts and take judicial notice of any undisputed facts that are in the record and prohibit such a proceeding from developing.

Q Would that not deprive the trial court of its inherent right to permit an amendment to the complaint? Inherent power, I should say.

Obviously it is an economical and efficient

proceeding, but litigation is not always efficient.

MR. FAMULARO: Certainly the right of the trial court to grant an amendment, Mr. Chief Justice, would be infringed upon. However, that right is not absolute, and there are various motions to be filed for leave of court, in which the grounds are spelled out, as certainly this Court is aware, after the responsive pleadings are filed. If that motion or if that attempt to file the amended complaint shows that as a matter of law nothing would be accomplished by it, I do not think the rights of the trial court in this regard are so abruptly encroached upon that as a matter of expediency such could not be held to be dismissed.

Q The very holding of the reviewing court in this commonlaw hypothetical case, the very theory of the appellate's court action, might put the party on notice as to how he might appropriately amend his complaint.

MR. FAMULARO: This is true. However, if I had the language of Mr. Justice Stewart's case before me, I might be better able to answer this question. Not having it, I can only again state that I think for expediency in a matter, especially an original proceeding--

Q I suppose the one basic difference is that we, unlike an appellate court, in a state commonlaw system have plenary power. We are the original court here.

MR. FAMULARO: That is true. And the uniqueness

of the original proceeding is something to be considered in this case.

Q Often, though, that cuts when your controversy is between two states, as the Chief Justice suggested earlier, to give considerable latitude to the states to have their claims determined when they are in controversy with a sister state.

MR. FAMULARO: This is true, Mr. Justice Brennan, but we submit that on a close examination of the facts before this Court, as little as they may be at this point, the pleadings themselves establish, as we have pointed out, that any defect in the land lying northwest of the Ohio River is immaterial.

Q Would you say the same thing if you were defending the recommendation of the Special Master on the basis of the acquiescence on which he relies?

MR. FAMULARO: I am going to get into that right now and we will say the same thing. We think that the Special Master was correct in applying that, based upon acquiescence of the State of Ohio, that the motion for leave to amend should be denied.

Q Is acquiescence consisting, number one, of 150 years; number two, of the concessions made in the original complaint?

MR. FAMULARO: Exactly those two things, the

judicial admissions made in the 1966 pleadings, the inactivity of over 150 years by the State of Ohio while Kentucky has continuously exerted control over the river in all of its dealings, although they are not specifically a part of the record.

Moreover, Kentucky's legislature as early as 1810 attempted to alleviate the problem as to the boundary question before Handly's Lessee was even decided. Yet Ohio's legislature apparently has made no such attempts. For 150 years Ohio has been satisfied in being aware of the judicial determination in Handly's Lessee v. Anthony and Indiana v. Kentucky, but yet has made no attempts to clarify that insofar as it relates to them.

They claim that they are not a party to those litigations and therefore they are not bound by them. Before getting into the Master's acquiescence theory, I would like to briefly respond to that allegation.

To say that they are not bound by that in the strict sense is correct. They were not a party. However, we submit that such a contention is certainly undermined by their judicial admissions. Certainly such a contention is undermined by the lapse of time involved. And finally such a contention is undermined by the holding of the Special Master that such a contention would create a checkered river, contrary to the intentions of Congress and the

intentions of the State of Virginia and would be totally unascertainable. No one would know where the boundary would be. Based upon that, we submit that Ohio cannot claim that she was not a party.

And, finally--

Q How would the checkboard or however you describe it, result follow? Would you not have one rule on the Indiana border and another one on the Ohio one?

MR. FAMULARO: This would be true, but on the river it would be extremely difficult to ascertain where the boundary of Ohio stops or where the boundary of, let us say, Illinois or Indiana starts. For the average fisherman or the average tugboat operator or the average beer distributor on the river and a restaurant attached to the dock, it would be hard to ascertain which is Ohio, which is Illinois, and such would be a checkered fashion.

Q Is that not true in Mississippi between Illinois and Missouri and just as hard there as here?

MR. FAMULARO: It would be. But such does not make the result any more correct.

Finally, we submit that the report of the Special Master was correct in recommending that the motion for leave to amend be denied, based upon the judicial admissions and based upon the judicial and historical acquiescence upon the part of the State of Ohio. Ohio's court--

Q Both the acquiescence and the judicial admissions in this case, I suppose, took place under the authority of this Court's decision in Handly's Lessee, not that Ohio was a party to it. But the rationale of that case was very, very clear. This Court in the past has reconsidered earlier decisions. This is the only Court that Ohio can bring a lawsuit against Kentucky in. It is a case not only of original jurisdiction but of an original and exclusive jurisdiction. There is no place else that Ohio can go for relief.

Certainly the Master in this case is going to consider our existing decisions controlling. But should not Ohio have an opportunity to ask us to reconsider the rationale of a previous decision? After all, it would not be making history for us to do that and to reconsider a previous decision and to overrule it.

MR. FAMULARO: We submit that Ohio, based upon its long delay and more importantly based upon the continuous dominion by the Commonwealth of Kentucky, should not be allowed at this point to change its total theory.

Q All this acquiescence and all this delay and all this judicial admission was done under the compulsion of Ohio's understanding of the existing law in this Court. But should not Ohio be given an opportunity to ask us to reconsider and review the existing law and maybe find that it

was erroneous in the first place and without a solid historic foundation?

MR. FAMULARO: We submit that such should not be done, based on our first argument. That even if they had this attempt, that it will fail as a matter of law, as the Special Master held, to state a cause of action.

Q Not because of any decision of this Court but because of the action of the Congress--

MR. FAMULARO: That is right. And in no way has that reasoning been detracted from by any decision. In fact, it was reaffirmed in Handly.

Q In Handly that was the interpretation given.

MR. FAMULARO: That is right. And specifically determined the boundary as the--

Q I suppose even that could be reconsidered.

MR. FAMULARO: The intentions of Congress? I suppose it could be. But again we fall back upon our first argument that such would be to inject in this proceeding at this time an immaterial point.

Q Incidentally, what is going to happen to this controversy between Ohio and Kentucky if we accept the Special Master's recommendation?

MR. FAMULARO: If the Special Master's recommendation was accepted, Mr. Justice Brennan, it would leave the litigation in the state of the original complaint being filed

and our answer being filed.

Q You still have to resolve the question of where the low water mark is, whether it is 1792--

MR. FAMULARO: Or whether it is the present low water mark as set up in an affirmative defense in our answer.

Q May I ask what is the practical significance outside of criminal and some other jurisdiction? Has gas been discovered up around Portsmouth and so on?

MR. FAMULARO: Outside of the record, Your Honor, my understanding of it is there has been some minerals found in and around the Henderson area, which is across from Evansville, Indiana.

Q That is Indiana. I mean east of the Great Miami River.

MR. FAMULARO: The problems of licensing of boats and of licensing of fishermen, hunters, the licensing and taxing, all of these are posing critical questions that need to be resolved in terms of the boundary. And the dealings of the Commonwealth of Kentucky, we think, have been consistent with the boundary at the present low water mark, without getting into that at this point. Certainly those facts are not a part of this record.

Q No, that is the original lawsuit.

MR. FAMULARO: That is right.

The basis of our acquiescence claim is that this

Court can certainly judicially notice the undisputed judicial admissions--can judicially notice the undisputed judicial admissions--of the State of Ohio and can judicially notice the undisputed historical facts, that is, the continuous dominion and control over the Ohio River by the Commonwealth of Kentucky and the undisputed delay and inactivity and silence by the State of Ohio. Based upon the judicial notice of this--

Q You cannot say undisputed, can you?

MR. FAMULARO: What is undisputed we say is a matter of law. The judicial admissions, as a matter of law, we submit speak for themselves, and this Court can certainly judicially notice them.

The historical facts, at least insofar as we have stated them, that is, the continuous dominion by the State of Kentucky and the silence by the State of Ohio, is an undisputed fact, and this Court can certainly judicially notice that.

Q Supposing we can judicially notice it, does it amount to any more than saying, "You have a great deal of evidence which would clearly be admissible in support of your view," as opposed to being conclusive on Ohio?

MR. FAMULARO: Certainly we submit that it is more than enough evidence to establish that any attempt of Ohio to now say that the boundary is in the middle is improper at this

time, be it by a motion to dismiss or whatever. We admit that these theories and these undisputed facts clearly substantiate our views and as a matter of law entitle the Commonwealth of Kentucky to a ruling at this point, that as a matter of law they fail to state a cause of action. They cannot be overcome.

True, Ohio may have many other facts that they can introduce. However, those facts can in no way, we submit, overcome that which has already been transpired in the past. Again, we fall back on our first argument, Mr. Justice Rehnquist, that the expediency of this matter in the original proceeding should attempt to prohibit and avoid any such circumvention of the most direct route. Based upon this, we submit that the finding of the Special Master was correct insofar as it denied the motion for leave to amend.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Famularo.

Mr. Howard?

REBUTTAL ARGUMENT OF JOSEPH M. HOWARD, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. HOWARD: Yes, sir. May I make just a couple of points on the estoppel and acquiescence? That question was raised in United States v. California, the first tidelands oil case. California claimed that the United States was estopped from claiming title to that three-mile belt off the

California coast. it claimed that the United States had acquiesced in California's claims of title for years. Nevertheless, the Court's opinion, written by Mr. Justice Black, refused to accept that argument and discussed it at some length.

I think that seems to me to be controlling in this particular case.

The other point is, recently there has been a number of bridges constructed between Ohio and Kentucky. They were the subject of contracts between the two states. The contracts provided that Kentucky would pay for the bridge up to the low water mark on the north side of the river, and Ohio would pay for the rest of it. That is on the Ohio side. But the contracts also provided that nothing said therein should be determinative of where the boundary line lay. That shows that Ohio was still maintaining its position that the boundary line was not at the low water mark.

Q I guess those contracts were written after the amended complaint in this case was offered, were they not?

MR. HOWARD: I think some of them were written prior to that time, Your Honor. I am not sure of that. I know some of them have been written after that.

Q As I understood what you told us about the history of the litigation, this original complaint was filed

when?

MR. HOWARD: 1966.

Q Sixty-six?

MR. HOWARD: Yes.

Q Then by reason of a change of administration or other reasons, people in your office looked at it and there was nobody familiar with it, and you began a study of it, and it was then and only then, back four or five years after the original complaint was filed, that this theory was discovered or evolved or whatever, that was the basis of the amended complaint and that that was the first time.

MR. HOWARD: May I say that the prior administration was familiar with this argument.

Q With the argument?

MR. HOWARD: That is right. They were familiar with this. They had the Vinton argument made to the General Court of Kentucky back in 1848, which has been mentioned right at the end of our brief and is the best statement of Ohio's position. They had that at that time. They did not have any faith in it. They did not think that because of the length of time that had passed that they would be able to prevail on this Court to permit them to go ahead with that argument.

We examined it and we take a different view of it. That is all. Two different sets of lawyers looking at it and

deciding what should be presented to the Court.

But I think--I am not quite sure about those contracts, but I am pretty sure there were some of them that were written before 1966.

Q What kinds of proof would you have in mind offering in support of a middle-of-the-river line?

MR. HOWARD: We have lined up all the documentary evidence which shows to me conclusively that Virginia had no title on the north end, the west side of the river.

Consequently, the doctrine that Chief Justice Marshall laid down in the Handly case did not apply at all. He said that if one state owns both sides of the river and gives up one side, it retains the entire river. But if two states own the opposite sides of the river, then their boundary runs to the middle.

Those documentary proofs of what happened prior to the time of the Revolution show that Virginia, regardless of what their original claim was under the charter, no longer had any title on the north and west side of the river. The title was in the British Crown. It was reserved for the use of the Indians. And at the time of the Revolution upon the Declaration of Independence, that claim passed directly to the United States, not to any of the individual states at all, because they had no claim to it at that time.

Q What about the acts of the Congress in

recognizing the cession and accepting it?

MR. HOWARD: Which?

Q As I understood Kentucky's position--

MR. HOWARD: Oh.

Q --there had been acts of the Congress in connection with the cession by Virginia to the United States.

MR. HOWARD: Your Honor, those acts simply mentioned the Ohio River as a boundary. They say no more than that. They talk about the lands north and west of the river and the land south and east of it, and that is all.

Q You do not go to the extent of saying that Ohio belongs to some other country?

MR. HOWARD: No.

Q If you are saying that Congress accepted the cession?

MR. HOWARD: Let us go back to the time of the Revolution. At the Declaration of Independence all of the land which was then controlled by the British Crown and which was outside of the boundaries of the states passed directly to the United States under the external sovereignty rule that has been used in the tidelands oil cases and is now being argued by the Solicitor General in the Continental Shelf case.

The position that we are taking here is the same as the position that he is taking in that case.

Q Did the United States act as though it had acquired the land from the states?

MR. HOWARD: The Continental Congress controlled the Northwest Territory right from the start. They made treaties with all the Indians who were at that time living and had occupancy of the territory. The land eventually came to the United States through the treaties that they made with the Indians. Every bit of Ohio was covered by a treaty with the Indians.

Q That was the Treaty of Greenville.

MR. HOWARD: That was the last one, the biggest one. There were a lot of them before that.

Q The Northwest Territory, I had always understood, was the land lying north of the Ohio River.

MR. HOWARD: That is true, but there was also a Southeast Territory, which was the land south and east of the river, Tennessee and Kentucky.

Q Right.

MR. HOWARD: And if you look through the early acts of Congress, that is all they refer to, the land north and west of the river and the land south and east of it. There was never any attempt to draw a line--

Q The cession by Virginia in 1784--

MR. HOWARD: They did not have anything cede.

Q --was a kind of quitclaim deed, but it was not--

MR. HOWARD: That is right, they gave up their claim.

Q --whatever it may have been, and you say they did not have anything to cede.

MR. HOWARD: They had no title, that is right.

Q I understand your argument.

MR. HOWARD: That is right.

Q And that John Marshall was wrong in thinking that they had.

MR. HOWARD: Yes, sir. Yes, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

[Whereupon, at 1:37 o'clock p.m. the case was submitted.]

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