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In the

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Supreme Court of the United States

STATE OF MICHIGAN,)
)
Plaintiff,)
)
v.)
)
STATE OF OHIO,)
)
Defendant.)

No. 30, Original

Washington, D. C.
December 11, 1972

Pages 1 thru 22

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF MICHIGAN, :
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 Plaintiff, :
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 v. : No. 30, Original
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 STATE OF OHIO, :
 :
 Defendant. :
 :
----- X

Washington, D. C.
Monday, December 11, 1972

The above-entitled matter came on for argument
at 1:09 o'clock p.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:

CHARLES F. KEELEY, ESQ., 630 Seven Story Office
Building, 525 West Ottawa, Lansing, Michigan 48913;
for the Plaintiff.

CHARLES S. RAWLINGS, ESQ., State House Annex,
Columbus, Ohio 43215; for the Defendant.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 30, Original, Michigan against Ohio.

Mr. Keeley, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES F. KEELEY, ESQ.,

ON BEHALF OF THE PLAINTIFF

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

Michigan instituted this action back in 1966 practically on the invitation of Governor Rhodes who indicated that it would be quicker to solve the controversy between the north cape of Maumee Bay to the International Boundary. We filed this matter with this Court. It was referred to Special Master Maris for hearing. He held several hearings and finally he made a report. It is this report for which Michigan has found some exceptions.

The first exception that the State of Michigan finds is that this Special Master did not correctly relocate the north cape of Maumee Bay. I would refer you to finding number 31 in which he said that the location of the north cape of Maumee Bay can be found by referring to Captain A. Talcott's survey.

At that time it was recognized by the Special Master that that is a correct conclusion as to what the north cape of Maumee Bay was in 1835. There is absolutely no

evidence in this record to say that the north cape had washed away by 1836. So, we would submit that this is the better method of finding the north cape of Maumee Bay, and we would also like to cite the matter of Chinoweth v. Haskell, 28 United States Reports, page 92. This case said that courses and distances should be regarded in locating boundaries.

Q Would you somewhere along the line enlighten me as to why this case is very important to the State of Michigan. Are there islands that are at issue or is the land under the water important some time, or is it just because you want the matter finally determined?

MR. KEELEY: No, I think the reason that this case began, Your Honor, is because there was oil and gas believed to have been underneath this water. Additionally, there have been some other mineral developments that are not in the record at all that are important to both states.

Q I see. It just had not come clear to me, and I wondered what it was all about.

MR. KEELEY: When the Special Master made his relocation of the north cape of the Maumee Bay, he did not determine it pursuant to the statute of 1836. That is June 15, 1836. But he relied on the survey by Engineer Ganet when there was a joint commission provided by the two states to survey the land boundary. And when he relocated that line,

he used the same degree of measurement from Post 70 to 71 until it intersected with the south 45 degree angle from the existing sea wall on Turtle Island. That is why we believe that our position is correct, because it is contemporary with the statute of 1836. There was a statute and the report of which was before the Congress at the time that the statute was passed.

Judge Maris assumed that the line would be north 87 degrees, 49 minutes, and 44 seconds east, and there is no way you can do that except by going back to the previous survey and the teens of the 20th century. This is not where he should have located. He should have gone back to the survey just prior to the passing of the statute.

Q Did not the Special Master say that Congress drew the line that you say they drew in 1836 and West Sister Island would be in Michigan? They certainly did not mean to do that, did they?

MR. KEELEY: What island would be in Michigan?

Q West Sister Island. That is what the Master says.

MR. KEELEY: I am not aware that he did say that, Mr. Justice.

Q Well, I will get the page for you. He said it would be a bizarre result. Let me find it. Go ahead, I will find it.

MR. KEELEY: Okay, thank you.

We take a very fundamental disagreement with regard to the fact that the Special Master said--I believe it is on page 29 of his report--that the statute of 1836, June 15th of 1836, is clear and unambiguous. We feel that this statute was not clear and unambiguous. We say that the 24th Congress itself felt the statute was not clear and unambiguous because only eight days after this statute was enacted, they enacted another statute to define the northern boundary of the state of Ohio. And if you look at the statutes, they are almost identical from the point of view of whether they go northeast to the International Boundary Line.

Therefore, we believe that you must take another look at the statute and recreate the history by which it was enacted. We also put into evidence the witness Ralph Berry who comes with eminent qualifications. He is a civil engineer. He is a professor of geodesy at the University of Michigan and he has testified on page 88 of the record that this is a matter that it is not clear and unambiguous; you have to take into consideration all the facts and circumstances of the case.

Lastly, I would like to have this Court consider the fact that the Special Master included in his definition of the boundary line from the north cape to the International Boundary Line Turtle Island. And in no way was Turtle Island

a part of the statutory language defining this boundary. Turtle Island was a point of reference by Captain A. Talcott to locate the north cape of the Maumee Bay.

Q I thought that that is the only way the Special Master used it. And what he did was to use the old lighthouse which was locatable on Turtle Island within a very small margin of error, and he reversed the northeast course backwardly, what we would call in sailing a 45 degree course. He reversed it backwardly to a 225 degree course to get the line, is that not right, through the old lighthouse.

MR. KEELEY: That is correct, Your Honor.

Q That is the way I understood it.

MR. KEELEY: But as far as the statute creating the boundary line is concerned, that only relocates the north cape of the Maumee Bay. It has nothing to do with the course from the north cape of the Maumee Bay. There is no reference at all in the statute--

Q The reference is to a northeast course, is it not?

MR. KEELEY: A northeast course, yes.

Q And northeast is 45 degrees. So the Special Master held, and your claim is that it means generally northeastwardly following the previous line; is that not it?

MR. KEELEY: That is correct.

Q Which would be just a couple of degrees north

of east.

MR. KEELEY: That is correct. And he maintains that further on the ground that the statute is clear and unambiguous.

Q In the circumstances of a disagreement of this kind, do you think there is any perfect way to achieve a perfect solution?

MR. KEELEY: I would not think there is any perfect way to achieve anything, except I think you can follow the statute, if you want to call that a perfect remedy.

Q I am talking now about the physical factors, not statutory interpretation. What I am getting at is, you have this kind of a boundary problem. Is it not a matter of doing the best you can with what you have to work?

MR. KEELEY: Yes, I see what you mean now, Mr. Chief Justice. If you are going to do that, I suspect that one of the things you might look at would be taking a perpendicular line to the north cape and draw that as the line which would separate the two states. But that was not in the evidence. That is why I would hesitate to call that to your attention at this time. But I think that would be one way in which the parties on both sides of the bay would get what was perhaps given to them by the Congress.

Q Perpendicular to what, Mr. Keeley?

MR. KEELEY: Perpendicular to the bay. That is one

of the problems that would be confronted with any determination of that is to find out what the bay consists of.

Q You mean a line across the mouth of the bay?

MR. KEELEY: That is right. That is approximately what it would be. And would it be from the north cape down to Kelley's Island or would it be embraced from the end of the Detroit River down to some other group of islands across the lake?

I do not have anything more. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Rawlings.

ORAL ARGUMENT OF CHARLES S. RAWLINGS, ESQ.,

ON BEHALF OF THE DEFENDANT

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

The issues involved in the Michigan-Ohio boundary dispute as it goes through Lake Erie are basically two. The enabling legislation at issue, of course, is the legislation of June 15, 1836, which legislation established the northern boundary line of the State of Ohio and provided for the admission of the then territory of Michigan into the union upon the conditions expressed in that statute. One of the conditions expressed was that Michigan specifically assent to the boundary line as set forth in the statute. After some months of debate in the territory of Michigan, Michigan did

assent in December of 1836 and was admitted to the union in January of 1837. The boundary description, of course, as it affects us in this particular dispute extends from the southern extremity of Lake Michigan to the most northerly cape of the Maumee Bay, the most northerly cape as it existed in 1836 at the time of the enactment of the legislation before us. And from that point northeast to the International Boundary Line between the United States and Canada.

It is and has been Ohio's position throughout the course of this controversy that the term "northeast" used in the 1836 legislation means halfway between north and east or an equal point from each. And in terms of degrees, that would translate into north 45 degrees east. We feel that the statute embodying this term is clear and free from ambiguity. And if that is so, it is not necessary to look to contemporary historical documentation, such as is in evidence in this particular case, in order to locate the direction of the course from the former north cape to the International Boundary Line. If one accepts Ohio's premise and the Special Master's conclusion that northeast means north 45 degrees east, we are still left with the problem of relocating the former position of the north cape of the Maumee Bay. The north cape of the Maumee Bay as it existed in 1836 had been subject to considerable erosion at that time and, of course, no longer occupies its former position.

In trying to reach a solution to this problem, we are aided by several factors. Initially we know that the land portion of the boundary line between Michigan and Ohio was monumented and surveyed by joint agreement between the two states in 1915 and currently terminates at what is known as Post 71, which is the easternmost terminal monument going toward the former land position of the north cape as it existed in 1836. That land boundary has been unchallenged, so far as we are aware, since 1915 and it does follow a defined course.

We are further aided--

Q Why did it take until 1915 to have that surveyed made?

MR. RAWLINGS: The dispute between the two states was settled in 1836 by virtue of the enabling legislation. Apparently from 1836 until the early part of the 20th century the territory around Toledo and Lucas County and what is northwestern Ohio was not fully developed to an extent to cause too much confusion. The report of the survey and engineer's report in 1915 lists as the cause of the survey the fact that land values have been appreciating rapidly in the Toledo, Lucas County area, and also states in the course of its report that there was considerable apprehension among the citizens because of this increase in land value as to where the boundary lay. And it was therefore felt necessary

by both the states of Ohio and Michigan to permanently monument that particular boundary. In so doing, they attempted to retrace the boundary as set forth and monumented by William Harris in the year 1817. The stated reason again in the 1915 report is that land had been increasing and there was enough concern on the part of all landowners in the area to at this point in time warrant a survey of the land boundary.

Q This general dispute has a long, long history, does it not, back to the so-called War of Toledo when troops from Michigan and troops from Ohio were well on their way to a confrontation over this boundary dispute?

MR. RAWLINGS: Yes, it does, Mr. Justice Stewart. The misunderstanding, of course, originally giving rise to the dispute was due to the incorrect position of the southern extremity of Lake Michigan, as shown on most of the maps of the day. And a further dispute between the states as to whether the boundary line on the land portion should go from the southern extremity of Lake Michigan to the north cape of Maumee Bay or should be a due east line from the southern extremity of Lake Michigan.

Q It was a strange, to say the least, starting point, the southern extremity of Lake Michigan, for a boundary between Ohio and the State of Michigan.

MR. RAWLINGS: Yes, although when one considers that

Ohio and Michigan are part of the five states carved out of the northwest territory and further considers that at that point in time Lake Michigan was perhaps the only known physical feature of that area which could be located other than the Ohio River on the south and the Pennsylvania line on the east, it is not too surprising, because Congress concerned itself with carving out three states, at least, perhaps five, out of the northwest territory. It is surprising in a sense that the position of Lake Michigan or at least its southern extreme, as shown on the prevailing maps of the day, primarily Mitchell's Map of 1755, was generally assumed to be quite valid and showed a latitude of 42 degrees, 30 minutes north, whereas in fact the position as shown was considerably north of its true position. This error and this mistake in what everyone prior to around 1815 had considered a rather fixed monument from which to draw a boundary was the cause of considerable historical problems between Ohio and Michigan and, as has been alluded to, almost caused a war between the two states. Only the personal intervention of President Jackson and considerable diplomatic maneuvering prevented armed conflict between Ohio and Michigan.

Q Mr. Rawlings, would Congress have had any reason to think that a line between the southern tip of Lake Michigan and the north cape of Maumee Bay would have been an east-west line as opposed to perhaps a more northeasterly line

than it turned out to be?

MR. RAWLINGS: I do not believe so, Your Honor. By the time the legislation of 1836 had been enacted, the true position of the southerly extreme of Lake Michigan was known, and that true position falls south of the north cape, so that a line drawn due east from the true position of the southerly extreme of Lake Michigan would not strike the north cape at all but would strike several miles below it.

Q You say that Congress knew this in 1836?

MR. RAWLINGS: I believe in 1836 Congress knew the physical fact of the southern extremity of Lake Michigan much better than they had realized it prior to that time. They had taken into consideration many arguments from senators and representatives from both the State of Ohio and the then Territory of Michigan, and memorials sent to Congress and to the executive branch--most of this documentation is in evidence in this proceeding and before the Special Master.

Q If they knew that the line were northeast, does that not give some plausibility to Michigan's contention that when it speaks of the northeast projection out into the lake that they meant simply a continuation of the land boundary?

MR. RAWLINGS: I do not believe so, Your Honor, because the due east line which was striven for by the Territory of Michigan up until the enactment of the 1836

legislation was rejected by the Congress of the United States. Congress in so rejecting it, recognized in effect the Ohio proviso to the Constitution of 1802 and extended the boundary northeast. It seems to us that it is considerably more logical to believe that Congress in using the term "northeast" meant north 45 degrees east than to conclude that they meant a line which, although true it is about 2 degrees, 10 seconds north of east, comes very close in practical effect to being a due east line. I think if Congress had meant to extend the existing land boundary according to the Talcott survey of 1834, they might well have used language in the legislation appropriate to that purpose, either indicating direct to the International Boundary Line or using phraseology more appropriate to that end.

The Turtle Island which has been referred to considerably in the briefs and arguments before the Special Master and in argument this morning, is a small island located by Captain Talcott in 1834, and its existence was known prior to that time at the mouth of the Maumee Bay. It is located approximately three-quarters of a mile from the Maumee Bay, and we know by reference to historical surveys in evidence in this proceeding that a line drawn north 45 degrees east will pass through the existing circular concrete sea wall on Turtle Island.

We have never contended in the course of this

proceeding that the existence of Turtle Island is determinative of the question of the meaning of the term "northeast." Clearly it is not. It is relevant, however, if one accepts the basic premise that northeast means north 45 degrees east. By reference to historical surveys we know that a line drawn north 45 degrees east will pass through that island. It is then logical to reverse that known call, south 45 degrees west, until we strike the projection of the known and existing land boundary line monumented in 1915. It is at that point in time that both Ohio and the Special Master contend one has relocated the north cape of the Maumee Bay with about as much practicable accuracy as one can hope for, I think, when one is trying to locate a point which has not been in existence since well before the middle of the 19th century.

The north cape of the Maumee Bay therefore, under that theory, would be readily ascertained and Turtle Island would serve as a convenient fixed boundary or monument readily seen by anyone sailing in or out of Maumee Bay as a memorial or monument on the boundary line.

Throughout the course of Michigan's arguments both before the Special Master and in this Court, there has been reference to the survey made by Captain Andrew Talcott in 1834. And, of course, Michigan's basic position in this litigation is that that survey or at least a computation or

an extension of the line of that survey through mathematical computations of its witness called in this proceeding, should be extended in a northeasterly direction about two degrees north of east to the International Boundary Line. We would point out that Congress in 1836, when it enacted the statute providing for the admission of the territory of Michigan into the union had before it three basic surveys. It had before it the Harris Survey of 1817, which was drawn in accordance with the Ohio proviso and went from the southerly extreme of Lake Michigan to the most northerly cape of the Maumee Bay. It had before it the Fulton Survey, which was a due east line drawn really at the request of the then acting Governor Cass of the Territory of Michigan, who complained that the Harris Survey was not drawn in accordance with then existing legislation. And the Talcott Survey in 1834.

We submit there is nothing in the record of this case which indicates at all that Congress intended to extend the Talcott line across the lake. The very title of the act providing for the Talcott Survey is called "An Act Preparatory to Adjusting the Northern Boundary of the State of Ohio." And apparently Congress, at least as revealed in the Michigan Exhibit 8, Senate Report on the Territories, felt it necessary in view of the very difficult situation which developed between the state and territory and in view

of the conflicting claims, to have Captain Talcott ascertain the latitude and longitude of the points in issue prior to further considering the arguments between the state and territory and coming to a conclusion on the boundary. It did come to a conclusion on that boundary in 1836, and that conclusion settled the issue in favor of the State of Ohio.

Finally, as we have indicated, if the position is adopted that the legislation of 1836 is clear on its face, then there is no need to refer to debates between Senators and Congressmen or letters addressed to Congress to construe the meaning of the statute. But if this Court determines that indeed, in accordance with the claim of Michigan, the statute is not clear on its face, that there is some ambiguity, and if there is then a felt need to refer to the documentation introduced in evidence in this case, we believe that a review of that documentation will not support the claim of Michigan. We point, for example, to Michigan Exhibit 10 in Evidence in this proceeding, at particularly pages 4 and 6 of that exhibit, which contain statements by the then duly authorized representatives of the Territory of Michigan rejecting admission of their state or their territory into the union because they could not live with the boundary line set by Congress in the statute, and noting clearly in that particular documentation that Michigan knew the import of the congressional decision. There is reference in that

exhibit to the fact that Ohio, if Michigan has to accede to this proposition, will obtain jurisdiction over the entire western end of Lake Erie, almost to the mouth of the Detroit River and above the River Raisin. Michigan decries this. They say it is unfair. They indicate it is not in conformance with the ordinance of 1787. They indicate it is not in conformance with the legislation of 1805, by virtue of which the Territory of Michigan was formed out of Indiana Territory. But they nonetheless recognized what the meaning of the legislation is. And after rejecting Congress' proposal twice, finally the third time around they agreed to this proposal with much bitterness and rancor, as is revealed in the debates, feeling that admission into the union and the advantages of statehood outweighed losing a position for which they had striven for some 25 or 30 years prior to that time.

We would also note the fact, as is revealed in the documentation and evidence in this case, most of it supplied by Michigan, that under a third of the due east line extending from the southern extremity of Lake Michigan, the theory that is contained in the statute before the exact position of the southern extreme of Lake Michigan was known and under the maps in existence at that time, Ohio would have gotten almost all of Lake Erie. Clearly, it seemed that Congress had before it maps of the lake, and there is even

references in the documentation and evidence in this case to the effect that Ohio might have claimed more than it chose to claim had it not inserted the proviso indicating that the boundary should be established to the north cape of the Maumee Bay. The reason they inserted that proviso, I believe both states can agree, is because Ohio at that time was primarily concerned with preserving the Port City of Toledo and the mouth of the Maumee Bay. The debate between the two states prior to 1836 over what was referred to as the Toledo Strip being concerned with those points.

We further note the testimony which has been referred to in argument this afternoon and was discussed extensively in briefing and argument before the Special Master. That is the testimony of the geodetic engineer of the University of Michigan, called on behalf of Michigan. We indicated at the time to the Special Master and reiterate our position this afternoon that although the State of Ohio has no evidence rebutting the mathematical calculations of Professor Berry as he extends the Talcott line across the lake to the International Boundary Line. We consider these calculations totally irrelevant if this Court believes that the true boundary, as revealed in the language of the statute, is north 45 degrees east.

Much of the testimony concerns the professor's opinion as to the meaning of the historical documents and his ultimate conclusion of law on this case. We consider it

not relevant if the Court initially holds that the line is due northeast.

Finally, we would refer the Court's attention to the other exhibits offered by Ohio, the resolution of the Ohio General Assembly in 1933 defining the boundary as we have contended it to be today. The Michigan rescision resolution of 1945 in which they agreed with the State of Ohio. True, they rescinded that resolution two years later, but it indicates at least to us that highly placed officials of the State of Michigan at that point in time were aware of where the boundary lay and agreed with Ohio.

Q Was that in the 1930s?

MR. RAWLINGS: Yes. The Ohio General Assembly passed their resolution in 1933.

Q And it was done with the prospect that Michigan would pass a concurrent resolution?

MR. RAWLINGS: Yes, specifically stated in the 1933 resolution is the hope that Michigan would pass a like resolution.

Q And Michigan did so.

MR. RAWLINGS: They did in 1945, identical to that of Ohio. They rescinded that resolution in 1947, two years later. And that is where the matter lay until the filing of this litigation.

We would also refer the Court's attention

respectfully to the two other exhibits submitted by Ohio, the maps of the Erie and Oregon quadrangle compiled by the Geodetic Service. Both of those maps show the boundary line between the two states as being north 45 degrees east from a point located as north cape and notations at the top of those exhibits indicate that the exhibits were prepared in collaboration with the Commissioner of Highways of the State of Michigan.

In summary, therefore, we would respectfully urge this Court to confirm the findings and the conclusions issued by Judge Maris, the Special Master in this case, and to enter a decree in this matter in conformance with the findings and conclusions and recommended decree of the Special Master.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Keeley?

MR. KEELEY: I have nothing, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well. The case is submitted, gentlemen.

[Whereupon, at 1:43 o'clock p.m. the case was submitted.]