

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MISSISSIPPI ET AL, Petitioner v. LOUISIANA, ET AL.

CASE NO: 91-1158

PLACE: Washington, D.C.

DATE: November 9, 1992

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1 PROCEEDINGS

2 (11:47 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 91-1158, Mississippi v. Louisiana.

5 Mr. McCartney, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF JAMES W. McCARTNEY

8 ON BEHALF OF THE PETITIONERS

9 MR. McCARTNEY: Mr. Chief Justice, and may it
10 please the Court:

11 This action involves the boundary between the
12 states of Mississippi, Louisiana, and the private
13 ownership of a body of land known as Stack Island or
14 Island No. 94, patented by the United States as
15 Mississippi land in 1881. The identity and physical
16 location of this island, which is the only island at issue
17 in this case, can be traced from ancient maps beginning in
18 1826 through aerial photographs beginning in 1932 through
19 hydrographic, U.S. hydrographic maps up to the present
20 time. So the island, according to the evidence before the
21 trial court and as the trial court found, has been in
22 existence at least since 1881 and can be identified today.

23 Now there is no substantial dispute with respect
24 to the applicable boundary law. This Court has many times
25 said, even in controversies between Louisiana and

1 Mississippi, that the thalweg, that's corrupted in
2 Louisiana and Mississippi to thalweg, of the Mississippi
3 River forms the boundary between the states, and that
4 boundary shifts with gradual shifts in the location.

5 QUESTION: If that's so, why is it that 1881
6 became the relevant date for the district court's inquiry?
7 Why shouldn't it have been where the thalweg was at the
8 time when the state was admitted to the Union?

9 MR. McCARTNEY: 1881 became the focal point of
10 the controversy, Your Honor. There was no controverting
11 evidence with respect to the documentary evidence showing
12 the island as early as 1826.

13 QUESTION: Well, was it --

14 MR. McCARTNEY: So that's why it became the
15 center of the trial court's fact findings.

16 QUESTION: Was it -- and you contend that that's
17 the correct date to focus upon?

18 MR. McCARTNEY: No, the correct date according
19 to the rules of this Court would be the date the existence
20 of the island if it were present at the date the state was
21 admitted to the Union or at the date it was formed.

22 QUESTION: Is that what you argued in the trial
23 court?

24 MR. McCARTNEY: Yes. Your Honor, in the trial
25 court we offered all of this evidence and suggested --

1 QUESTION: I know you offered it all, but was
2 your theory in the trial court that the date of admission
3 to the Union was the critical date, and that you tried to
4 find out from the best evidence available what the
5 situation was at that point?

6 MR. MCCARTNEY: The theory in the trial court
7 focused on the 1881 because of the controversy, but the
8 evidence in the trial court and the finding of the trial
9 court, the ultimate finding is susceptible of the
10 interpretation that the applicable state entry date can be
11 under the evidence of this case the controlling date. But
12 no, the principal focus of the argument in the trial court
13 was the controversy in 1881 forward.

14 Now, the second point relating to the boundary
15 issue is the doctrine of acquiescence, also a fact-
16 intensive doctrine. The trial court found after a review
17 of the conflicting evidence of the experts that the
18 thalweg lay on the west side of the island, and thus under
19 the thalweg rule the island was Mississippi property. The
20 trial court also found based on extensive evidence that if
21 the trial court were wrong in that finding that
22 nevertheless the land were Mississippi land because of the
23 doctrine of acquiescence. That is of course long
24 assertion of dominion, control, and jurisdiction.

25 So we had two basic ultimate fact findings. We

1 had innumerable subsidiary fact findings. We then come to
2 one of the two central points in this case, and that is
3 the Fifth Circuit's exceeding the constraints of Rule 52
4 and according deference to the trial court's findings of
5 fact.

6 QUESTION: Mr. McCartney, would you clarify a
7 couple of things for me with respect to what the Fifth
8 Circuit did? I guess there were two basic questions.
9 One, who owned the particular land, was it the Houston
10 Group or the State of Louisiana?

11 MR. McCARTNEY: Correct.

12 QUESTION: The second question is was the land
13 at issue located in Mississippi or Louisiana, right?

14 MR. McCARTNEY: Right.

15 QUESTION: Now, did the Fifth Circuit, do you
16 think, did its judgment have any effect on the ownership
17 dispute as opposed to the state boundary question?

18 MR. McCARTNEY: Yes, it did, Your Honor.

19 QUESTION: You think it did?

20 MR. McCARTNEY: Yes. The land was patented as
21 Mississippi land and the Fifth Circuit, the finding of the
22 trial court was that it was, the private ownership was in
23 the Houston Group. That finding was reversed and rendered
24 by the Fifth Circuit.

25 QUESTION: Now, are you here representing the

1 Houston Group or Mississippi?

2 MR. McCARTNEY: Both, Your Honor.

3 QUESTION: Both.

4 MR. McCARTNEY: Yes. My counsel advises under
5 Louisiana law if it's Louisiana land it's owned by the
6 state.

7 But the focus of the first of these issues is
8 then the clearly erroneous rule or standard under Rule 52
9 which this Court has given more precision in Anderson v.
10 Bessemer City and in Amadeo v. Zant, and has very clearly
11 let it be known that if there are two permissible views of
12 the evidence that there can virtually never be a clearly
13 erroneous finding by the trial court, and that --

14 QUESTION: Mr. McCartney, do you think that rule
15 necessarily applies in the case in which at least some
16 people might have thought belonged in this Court in the
17 first place? You know, we have original jurisdiction of
18 controversies between two states.

19 MR. McCARTNEY: Yes.

20 QUESTION: Do you suppose we might have a little
21 broader authority to review the fact finding that
22 underlies the decision of such a controversy?

23 MR. McCARTNEY: Unquestionably, Your Honor. It
24 would be a different standard.

25 QUESTION: So that we may not be bound by the

1 clearly erroneous standard.

2 MR. McCARTNEY: I would not agree with that.

3 QUESTION: You think we are bound by it?

4 MR. McCARTNEY: I would say that as the case
5 comes up through the appellate court route that the
6 appellate courts are bound by the erroneous standard. If
7 the case comes to the Supreme Court by the original
8 jurisdiction route, then this Court has no constraints but
9 it is likewise obligated to make the fact findings
10 required as a matter of its original jurisdiction. So I
11 see a distinction between the standards of review under
12 the clearly erroneous finding.

13 QUESTION: Depending upon how it gets here, you
14 say.

15 MR. McCARTNEY: Yes.

16 QUESTION: But this one has gotten here not
17 through original jurisdiction --

18 MR. McCARTNEY: Correct.

19 QUESTION: -- and so you say we would be bound
20 by what the district court found?

21 MR. McCARTNEY: Correct. If that you find from
22 a review, of course, that the finding was, quote,
23 plausible or was, quote, permissible.

24 And just, if I may briefly address the Court's
25 attention to some of the evidence that clearly indicates

1 that the trial court's findings were supported.

2 QUESTION: Before you do that, would you clarify
3 for us what if we think that only this Court can determine
4 the boundary dispute, this Court and no other, that the
5 district court could not decide that question, what do we
6 do now?

7 MR. McCARTNEY: If you do that, then we think
8 that you can do one of two things. You can dismiss, in
9 which there is no forum. Of course this Court has already
10 considered that problem and made a contrary determination.
11 But alternately you could consider the findings of the
12 trial court based on the record and treat them as the
13 findings of a master that you might have appointed.

14 QUESTION: But there is no third alternative of
15 vacating any decision on the boundary but then dealing
16 separately with the question of who owns the land?

17 MR. McCARTNEY: I think not, Your Honor. Our
18 position is that when the case comes up through the
19 appellate route, and that's the way this Court has mapped
20 the route of this case, then we look at it on a standard
21 of review based on clearly erroneous, and if the case
22 comes up through the original jurisdiction route you
23 consider those facts yourself as a matter of original
24 jurisdiction.

25 QUESTION: Mr. McCartney, may I put the

1 question, I don't know if Justice O'Connor had this in
2 mind but just a slightly different version of her
3 question. Is it conceivable that the ruling on ownership
4 is not dependent on the ruling on where the boundary is?

5 MR. McCARTNEY: It is conceivable -- in this
6 case, Your Honor?

7 QUESTION: Yes. Obviously it's conceivable, but
8 in this case do both parties feel that one cannot answer
9 the ownership question without first answering the
10 boundary line question?

11 MR. McCARTNEY: I believe that to be true --

12 QUESTION: I see.

13 MR. McCARTNEY: -- because of the ownership of
14 the state unless, unless there is an adverse possession
15 possibility, and I am not certain whether the land has
16 been sufficiently divested from ownership by the state to
17 permit the adverse possession of the Houston Group to
18 mature title, even if this is Louisiana land.

19 QUESTION: I see.

20 QUESTION: So that you would fear, I guess, the
21 precedential or the res judicata effect if we allowed the
22 private ownership determination to stand and vacated with
23 respect to the sovereignty issue between the two states?

24 MR. McCARTNEY: No, Your Honor, if the private
25 ownership were allowed to stand on the basis of the

1 adverse possession concept, then that would be the ruling
2 of this Court. But --

3 QUESTION: And what would be your position if we
4 vacated and allowed an original action as between the two
5 states on their controversy?

6 MR. McCARTNEY: Your Honor, our position would
7 be that the original action would directly affect the
8 ownership if you were to at this point in time --

9 QUESTION: So the original action would not,
10 would not be subject to res judicata is what you're
11 saying?

12 QUESTION: Why don't you answer that at 1:00,
13 Mr. McCartney. We'll recess until then.

14 MR. McCARTNEY: Thank you.

15 (Whereupon, at 12:00 p.m., oral argument in the
16 above-entitled matter was recessed, to reconvene at 1:00
17 p.m., this same day.)
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1 AFTERNOON SESSION

2 (12:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. McCartney, you've
4 had the lunch hour to think about Justice Souter's
5 question. Let's proceed.

6 QUESTION: What was the question? Would you
7 repeat the question?

8 MR. McCARTNEY: As we understood the question it
9 was basically whether title and boundary were intertwined,
10 and we believe that they are, that if this Court were to
11 decide boundary in Louisiana that that would directly
12 affect title, although there is some --

13 QUESTION: Why?

14 MR. McCARTNEY: Well, because, Your Honor, I was
15 going to say there is some uncertainty because of the
16 Louisiana ownership of the islands as opposed to the fact
17 that the private owners Houston have title from the United
18 States, a patent from the United States. But the case was
19 tried and it appears to us that title and boundary fall
20 together.

21 QUESTION: Well, you still haven't told me why.

22 MR. McCARTNEY: The best answer I can give you
23 is that if the land is in Louisiana then we have no title
24 out of Louisiana, and we may have a possessory right if
25 the Court were to find some facts --

1 QUESTION: What do you mean you don't have any
2 title out of Louisiana?

3 MR. McCARTNEY: Precisely that, Your Honor. The
4 title is out of the United States covering Mississippi
5 land.

6 QUESTION: Well, what difference would it make
7 if it's in Louisiana? How would that cancel out your
8 title from the United States?

9 MR. McCARTNEY: Well, that, Your Honor, is why I
10 qualify to say it's not altogether clear, and that's
11 what's not clear.

12 QUESTION: Well, what's the argument that your
13 title would be affected if it's in Louisiana?

14 MR. McCARTNEY: Because we could not mature a
15 limitation title against a sovereign Louisiana by
16 possession and occupancy, and we would not have record
17 title.

18 QUESTION: Oh, you mean adverse --

19 QUESTION: Adverse possession.

20 MR. McCARTNEY: Yes, sir.

21 QUESTION: But does Louisiana recognize the
22 doctrine of accretion and avulsion that, you know, title
23 may change depending upon whether a switch in a river
24 thalweg was sudden or gradual?

25 MR. McCARTNEY: Louisiana recognizes title by

1 accretion to private land owners and there would be a fact
2 question about the private land ownership.

3 QUESTION: I suppose if we said that the title
4 issue should have been that we have exclusive jurisdiction
5 to decide the boundary issue, then we could, couldn't we,
6 if we decided it that way couldn't we remand to the courts
7 below to decide whether or not the fact that we took the
8 boundary issue here could be, can be disassociated with
9 the title issue?

10 MR. McCARTNEY: Yes, you could do that.

11 QUESTION: Because I would think that the courts
12 below could, would know more about that than we do.

13 MR. McCARTNEY: Yes.

14 QUESTION: Mr. McCartney, I thought it was your,
15 frankly I'm surprised to hear what you've said. I thought
16 it was your position, I gathered from footnote 14 of your
17 brief that Mississippi would remain free to litigate the
18 boundary issue even if we decided we had no jurisdiction,
19 if we decided that the district court had no jurisdiction
20 over the question. That's what it says. It says a
21 holding that the district court lacked jurisdiction of a
22 third-party complaint against Mississippi would require
23 vacation of the judgment against the state and leave
24 Mississippi free to litigate the boundary issue anew.

25 MR. McCARTNEY: Yes.

1 QUESTION: I thought you might concede --

2 MR. McCARTNEY: What we're saying there was that
3 we recognize that this Court could reconsider its 1988
4 decision to defer --

5 QUESTION: Right. And suppose we do that? I
6 thought that was the question you were being asked.
7 Suppose we do that, isn't Mississippi then free to
8 relitigate the boundary issue?

9 MR. McCARTNEY: Yes, Your Honor.

10 QUESTION: Okay.

11 MR. McCARTNEY: If that's the question I was
12 asked, then it's very clear.

13 QUESTION: Maybe I misunderstood it.

14 MR. McCARTNEY: Yes. If this Court were to
15 reconsider, and we would urge after of course a very
16 lengthy period of litigation that it not do so, but if it
17 were to do so then we feel it would be free, and neither
18 Louisiana nor Mississippi would be bound by the district
19 court's decision. But as it stands --

20 QUESTION: Although the title decision would
21 stand.

22 MR. McCARTNEY: We believe that the title
23 decision would likely follow the determination of the
24 boundary, but I will have to say that I'm not clear on
25 that and that is frankly the best I can do.

1 QUESTION: Well, we wouldn't -- if we granted,
2 if we granted a motion for leave to file an original
3 action it would just deal with the boundary, I suppose.
4 We wouldn't be deciding title.

5 MR. McCARTNEY: That's correct, Your Honor. It
6 would be left to another day to decide the title.

7 QUESTION: And of course if Louisiana had never
8 intervened into this case Mississippi could have remained
9 in it and litigated the title.

10 MR. McCARTNEY: Louisiana brought Mississippi
11 into the case.

12 QUESTION: Oh, oh.

13 MR. McCARTNEY: Louisiana brought Mississippi --

14 QUESTION: Mississippi wasn't a party at the
15 outset?

16 MR. McCARTNEY: No, Your Honor. Louisiana --
17 and that was the third issue on cert, was the third-party
18 complaint by Louisiana against Mississippi within the
19 jurisdiction of the district court.

20 QUESTION: But do you agree that Mississippi
21 would be equally free to litigate the boundary issue --

22 MR. McCARTNEY: Yes.

23 QUESTION: -- if we vacate the judgment with
24 respect to the boundary issue but we, for whatever reason,
25 do not disturb the judgment with respect to the title

1 issue, the private title issue?

2 MR. McCARTNEY: You're referring to the Fifth
3 Circuit's judgment of the district court's judgment?

4 QUESTION: Yes, the Fifth Circuit judgment.

5 MR. McCARTNEY: The Fifth Circuit judgment.
6 I'll have to return to my original answer that I believe
7 that the Court, if it were to vacate, would leave the
8 title question to a later date but that it would have a
9 distinct impact on the title issue. Perhaps I could put
10 it that way.

11 QUESTION: In other words I think you're saying
12 that we could not consistently vacate the judgment with
13 respect to the boundary and leave the judgment with
14 respect to the private title as it is, as the Fifth
15 Circuit decided it.

16 MR. McCARTNEY: I believe that to be correct.

17 QUESTION: Okay.

18 QUESTION: And I take it that if in the first
19 instance we had decided to permit the filing of the
20 complaint and exercised our original jurisdiction the
21 private parties would not have been parties to that aspect
22 of the proceeding?

23 MR. McCARTNEY: That's correct. There was a
24 motion to stay, Your Honor, and presumably the case would
25 have been stayed pending this Court's determination of

1 that issue. This Court denied the motion to stay.

2 QUESTION: And it seems to me it's not unusual
3 that boundary determinations which determine where
4 property is are conclusive of many private claims --

5 MR. McCARTNEY: Correct.

6 QUESTION: -- whether or not those private
7 owners are represented in the boundary dispute.

8 MR. McCARTNEY: If I might just briefly address
9 the main point of the support of the findings of the trial
10 court, and this only by way of example. But we have
11 exhibit which is the original survey in 1881 which is
12 adverted to by the trial court and by the Fifth Circuit
13 which clearly shows the thalweg lying to the west of Stack
14 Island. We have exhibit 8, which is the expert testimony
15 of Austin Smith, which locates the thalweg west of Stack
16 Island. We have the Louisiana expert, Mr. Easterly,
17 agreeing, agreeing that this is an appropriate location of
18 the thalweg. We have the Mississippi River Commission on
19 which the Fifth Circuit, which it finds virtually
20 conclusive, saying that the objective was to bring the
21 thalweg, or main channel as it's called, back to the west
22 of the island, and if it's going to be brought back
23 obviously it has to have been there at some time. Those
24 are examples that more than demonstrate the permissible
25 finding by the trial court that this was Mississippi land.

1 Furthermore, the trial court buttressed that
2 finding by the finding of acquiescence, and it made the
3 ultimate finding very clearly, that if it was wrong with
4 respect to the thalweg it was right with respect to
5 acquiescence because there had been taxation by
6 Mississippi since 1989, excuse me, 1889, no taxation by
7 Louisiana. There had been foreclosure, there had been
8 sale, there had been exercise of jurisdiction, there had
9 been enforcement of game laws, there had been enforcement
10 of criminal laws, there had been litigation in the courts,
11 nothing, no litigation in the courts regarding this
12 property, there had been an uninterrupted exercise of
13 dominion and control.

14 This is a pure fact question, and it is a
15 complex fact question, and the trial court heard the
16 evidence on it and it made the finding. Now, the Fifth
17 Circuit disregarded it and it said it was not adequate,
18 but the record itself will demonstrate that the Fifth
19 Circuit was not correctly following this Court's
20 interpretation of the clearly erroneous rule and was
21 ignoring substantial record evidence that supported the
22 trial court's findings.

23 Now, if I may turn briefly to the jurisdiction
24 question, essentially this Court has held, as it well
25 knows, that it has jurisdiction to decline under Article

1 1251(a) both original and exclusive jurisdiction, and
2 there are a number of cases so holding. And the cases and
3 the conclusion of this Court that it has jurisdiction,
4 correctly based on the fact that its primary function
5 should be to act as the supreme appellate court and that
6 it is ill-equipped to make the fact findings necessary for
7 original jurisdiction.

8 Now, its findings are consistent with the
9 dictionary definition of the term exclusive, which is the
10 power to exclude. Its findings have been recognized by
11 Congress, that is its discretionary interpretation of
12 1251, so there can't be a question about that.

13 Now, Louisiana agrees essentially that the
14 district court had jurisdiction over Louisiana. It agrees
15 that the district court had jurisdiction over the
16 controversy by virtue of Federal question jurisdiction.
17 Now, where it disagrees is that the district court of
18 Mississippi could determine title to land in Louisiana,
19 but in this respect Louisiana position is inconsistent
20 because it asks this Court to reverse and render.
21 Certainly the Fifth Circuit could not have had
22 jurisdiction if the district court did not have
23 jurisdiction.

24 QUESTION: Mr. McCartney, is your position on
25 the jurisdictional point that you're asserting, is that

1 the position of both the private client you represent and
2 also of the State of Mississippi?

3 MR. McCARTNEY: It is, Your Honor.

4 QUESTION: Mississippi acknowledges that the
5 court had jurisdiction over it for purposes of the
6 boundary dispute?

7 MR. McCARTNEY: It does, Your Honor. It entered
8 the fray in the district court and our position is that
9 the District Court of Mississippi, having Federal court,
10 excuse me, Federal question jurisdiction, had the power to
11 decide the Federal question that gave it the jurisdiction,
12 and that Mississippi's position that a hard and fast
13 exception to the discretion rule regarding boundary is not
14 well taken.

15 I would like to reserve --

16 QUESTION: Mr. McCartney, before you reserve,
17 what you have just told me is again contrary to what your
18 brief says. The footnote 14 of your brief says that
19 Mississippi believes that what it said in 1988 as to the
20 jurisdiction of the district court to determine the
21 boundary dispute was correct and it adheres to that
22 position now. Does it adhere to that now or doesn't it
23 adhere to that now?

24 MR. McCARTNEY: Yes, Your Honor. Mississippi
25 opposed jurisdiction in this Court. Mississippi said this

1 Court should defer to the jurisdiction of the Mississippi
2 district court, and it adheres to that position now. And
3 if I may reserve the rest of my time.

4 QUESTION: Thank you, Mr. McCartney.

5 Mr. Keyser, we'll hear from you.

6 ORAL ARGUMENT OF GARY L. KEYSER

7 ON BEHALF OF THE RESPONDENTS

8 MR. KEYSER: Mr. Chief Justice, and may it
9 please the Court:

10 The facts in this case and the law do not favor
11 the petitioners. The facts and the law are with Louisiana
12 and the Louisiana residents. The case is one which
13 ironically we believe now has its origin in the erroneous
14 acts of a map maker some 20 or 30 years ago who put a
15 dotted line on a map somewhere with the geological survey
16 that said indefinite boundary, and it's on the Louisiana
17 bank. And seeing the indefinite boundary, the petitioners
18 got the idea that they could move across the Mississippi
19 River and claim land which is within the radiating
20 sections in Louisiana patented out by Louisiana to
21 Louisiana riparians.

22 I have two exhibits I'd like to show you.

23 (Survey map shown.)

24 MR. KEYSER: The first is Louisiana Exhibit 1,
25 which is a 1970 U.S. Geological Survey map which does

1 indeed have the dotted line showing an indefinite
2 boundary.

3 QUESTION: Is that a duplicate of something we
4 have in the Appendix?

5 MR. KEYSER: Yes, Justice O'Connor, that's on
6 page 136. It's Louisiana Exhibit 1A from the trial court.

7 The indefinite boundary runs along inland
8 actually of the Louisiana bank. The island which
9 petitioners were patented in 1888 based on an 1881 survey
10 is a 117-acre island, shown here near the east bank of the
11 river in black. That island eroded downstream in a
12 south --

13 QUESTION: Shown in black?

14 MR. KEYSER: Yes, sir, right here. (indicating)
15 It's a little bitty figure.

16 QUESTION: So, with black, with a black outline?

17 MR. KEYSER: With a black outline, yes, sir.
18 The island eroded south and southwesterly and eventually
19 moved toward the Louisiana bank. At the same time the
20 Louisiana bank was being scoured westerly by the river in
21 a slight migration of the river into the Louisiana bank.

22 QUESTION: Did it ever wash away completely or
23 did this sort of land mass just slowly move?

24 MR. KEYSER: Our expert calculated that and it's
25 a very difficult thing to see because there are two

1 competing notions about that. But our expert Hatley
2 Harrison held that in fact the remnants of what were Stack
3 Island some mile or 2 to the east against Mississippi had
4 completely eroded away by the time the Louisiana riparian
5 sections starting rebuilding through the accretionary
6 process.

7 QUESTION: And was there contrary testimony? In
8 other words was there evidence on that score from which
9 the trial judge could have gone either way?

10 MR. KEYSER: No. No, there was no contrary
11 testimony. The trial judge simply concluded that 8 miles
12 of accretion from above Lake Providence to below the
13 corner in the reach of the river, thousands of acres, was
14 really no more than the original 117-acre Stack Island,
15 less erosion, plus accretion, but he failed to consider,
16 although all the maps show, that the accretion which
17 filled up the Louisiana bank simply restored the radiating
18 sections which Louisiana patented out of its state land
19 office over 100 years ago.

20 So the trial judge's theory, like the
21 petitioners', was an island can move laterally across the
22 river and grow and become a part of the bank in Louisiana
23 ergo it's still an island or once was and those remnants
24 belong to the petitioners.

25 QUESTION: Is there any clear law on the

1 application of the thalweg island exception in an instance
2 in which the original island disappears, as you claim this
3 one did?

4 MR. KEYSER: First of all, I have never found a
5 case quite like this. I have never heard of one like this
6 and I have researched diligently trying to find a similar
7 example and never have. It's not, it's not your usual
8 avulsion case. The river never left its banks or bed. It
9 never cut a new bed, never cut through, never left a
10 cutoff loop. It simply migrated a little bit to the west
11 and then came back to center position again. It's a
12 unique case in that instance.

13 Also in this LA-1 we see a frozen thalweg to the
14 east of Stack Island.

15 QUESTION: Mr. Keyser, I think that word is
16 pronounced thalweg. I know it has been pronounced thalweg
17 by everybody who has spoken. I have checked it in a
18 couple of dictionaries. It's based on the old German word
19 t-h-a-l, which is the word for a valley, and that's
20 pronounced thal I think, not thal.

21 MR. KEYSER: You're correct, Mr. Chief Justice,
22 and my friends think I am being uppity when I say that.

23 (Laughter.)

24 MR. KEYSER: I was here in the number 9 case,
25 the Louisiana tidelands case, and the number 36 case and

1 the number 86 case, and I have seen that word before but I
2 am reluctant to say thalweg.

3 (Map shown.)

4 MR. KEYSER: This is another map exhibit which
5 is for illustrative purposes. It shows the colors a
6 little bit more vividly. The river is quite clearly blue,
7 the outline of the 1881 location of the island is in
8 yellow. And we see now -- now this is a 1988 Corps of
9 Engineers map from the flood control and navigation series
10 that they put out every year. We see that the 1881
11 location of the island is now occupied by a very large,
12 huge really, island that is midstream in the river in the
13 same location as the 1881 island, yet petitioners continue
14 to claim the accretion along the west bank of the river at
15 Lake Providence.

16 Now, historically what has happened here, and
17 when I began I said the facts do not favor Mississippi,
18 that is because in 1879 Congress for the first time funded
19 massive river construction projects, being the one here at
20 Lake Providence, at Stack Island and at Plum Point about
21 100 miles north. The upshot of that was by 1883, 1884 at
22 the conclusion of the project, the Mississippi River
23 Commission reported to Congress what it had done.

24 And what it said was, and it attached
25 hydrological data in the form of maps which are in the

1 Appendix attached to Louisiana Exhibit 18A and which are
2 colored to show the Court their importance, the
3 Mississippi River Commission reported to Congress that the
4 east chute channel of the Mississippi River carried the
5 main channel of the river in December of 1881. It was
6 scouring the Mississippi bank, it was threatening to erode
7 the bank.

8 The Mississippi River Commission saw as its
9 chief purpose here the object of training the river away
10 from Mississippi to keep it from eroding the bank. It did
11 that by building a series of dikes out of the north end of
12 Stack Island and connecting to Baleshed Towhead to the
13 north, so that the river was suddenly diverted out of the
14 east chute channel to midstream position. That occurred
15 by 1883 because of the two maps attached to Louisiana
16 Exhibit 18A --

17 QUESTION: How was that diversion accomplished?

18 MR. KEYSER: They drove dikes into the sand and
19 drove them in a northerly direction and connected them by
20 willow mattresses so that the river could no longer flow
21 directly behind the island.

22 QUESTION: To block the east channel?

23 MR. KEYSER: To block the east channel. It did
24 remain open for a while as a low-water channel, but the
25 main current of the river and the downstream track of

1 navigation was then carried to the west in more of a
2 midstream position, pretty much the way it is today.

3 In that report the second part of it is that by
4 1883 that act had been accomplished. So in December of
5 1881 you have the main flow of the river on the east side
6 of the island. Within a few months it had been diverted
7 to the outside, toward the right descending bank, and
8 stayed there for about 20 years before it moved slowly
9 back into that position. And it stayed to the east of the
10 island until the 1970's, at which time, as you see from
11 the 1988 map, the Corps got more heavily involved in
12 construction projects, built dikes all along the east side
13 and revetments all along the west side, and has captured a
14 substantial amount of sediment to train the river into a
15 center flow position and to keep it from ambulatory
16 movement back and forth between the east and west banks.

17 The report to Congress is explicit, it's clear,
18 it's plain meaning is what I have just told you. The
19 district judge disregarded that. The petitioners expert
20 disregarded it. He refused to answer questions about it
21 on cross-examination, and he refused to answer other
22 questions about other map exhibits that Louisiana
23 produced. That report and those maps are the most
24 conclusive pieces of evidence, although we have put in
25 dozens of other maps to show the same story. The Fifth --

1 QUESTION: Were you able to authenticate that
2 report in any way other than as an official document as to
3 just what efforts had been put in and what the
4 qualifications of the people on the commission were?

5 MR. KEYSER: We didn't get into the history of
6 the Mississippi River Commission. It was stipulated
7 between counsel that it was an authentic report, that it
8 was a Government document, that it indeed was reported to
9 Congress, and the experts testified. Louisiana's two
10 experts, Mr. Harrison and Dr. Easterly, testified from it.
11 Petitioner's expert, Mr. Austin Smith, declined to testify
12 from it.

13 QUESTION: Well, did he express doubt as to its
14 correctness?

15 MR. KEYSER: No, his version was that what the
16 language really meant was that the main channel of the
17 river was always to the right of the island and that there
18 was no avulsion in 1882-1883 because the river was always
19 to the right of the island, which is contrary to the plain
20 reading of the report itself, which --

21 QUESTION: Was -- might not the district court
22 have been free to discount the usefulness of the report?
23 I mean, was he obligated to take it? You suggest, it
24 seems to me, almost like a stipulation.

25 MR. KEYSER: Well, there was no countervailing

1 testimony that the report didn't say what it plainly says
2 except Mr. Smith said his interpretation was that it meant
3 the stream was, the main body of the stream was to the
4 right. Our experts said it said what it said, and the
5 judge tried to get them to admit maybe it meant something
6 different and they said no, it means what it says. And
7 that's as simple as it gets.

8 The petitioners started off their case, now both
9 Louisiana and Mississippi had listed all of their
10 exhibits. We started with exhibits more at the time of
11 Louisiana's sovereignty and Mississippi's sovereignty, but
12 Mississippi, being the plaintiff in the case, never used
13 those exhibits. So we responded to their case at trial,
14 didn't put those exhibits on because their theory at trial
15 was the river was subject to two avulsive actions which
16 they said their expert Austin Smith would prove up, and
17 that they occurred sometime around 1912-1913.

18 Well, when Mr. Smith testified he only testified
19 about one avulsion which he claimed was due to the
20 flooding of 1912-1913 which he concludes happened because
21 he has some tables of river elevations of that year which
22 he said demonstrated a flood which apparently enlarged the
23 chute channel to the east of Stack Island, meaning that
24 the river boundary and the downstream track of navigation
25 or thalweg would have been frozen to the west of the

1 island. But even Mr. Smith only said it apparently
2 enlarged the chute channel. And when I showed him maps
3 prior to the 1912-1913 claimed floods, I showed him maps
4 of 1908, 1909, 1911 from the U.S. Geological Survey, that
5 showed that the channel was already occupied with the main
6 channel of the river, the chute channel, he refused to
7 discuss it. He said the maps were unwholly and that
8 Louisiana must have rigged those maps up or something to
9 that effect.

10 So we disproved the northerly avulsion which he
11 really didn't even clearly testify to, and as to the
12 southerly avulsion, which would have the boundary going a
13 couple of miles inland 8 or 9 miles downstream, he had no
14 testimony whatsoever.

15 Then in the Fifth Circuit, after the Fifth
16 Circuit reversed and rendered, the petitioners changed
17 their theory to the time of sovereignty. Certainly the
18 Fifth Circuit was in error in using the 1881-1882 avulsion
19 caused by the Mississippi River Commission. The Fifth
20 Circuit should have looked to much earlier periods of
21 time.

22 In our briefing we have pointed out that in all
23 other periods of time Stack Island didn't exist at the
24 claimed relevant time, the time of sovereignty of either
25 state, or at any later time until right up just prior to

1 the Mississippi River construction program, the cause
2 being in this reach of the river, although the alignment
3 is relatively straight, it's a reach of the river that
4 stores sediments from upstream. And you can see even now
5 there is substantial amounts of sediment stored. When
6 these become too large I presume the Corps will allow them
7 to go downstream by removing some dikes and revetments,
8 but this reach of the river has always had a lot of
9 movement of shoals and bars and islands.

10 So while Stack Island was in existence prior to
11 the Louisiana sovereignty in the 1700's-1800's, it
12 disappeared by 1812, it reappeared in the 1820's, it
13 disappeared by the 1850's and sixties, and it came back in
14 the late 1860's. It was a small island near the
15 Mississippi shore, but it was cut off from Mississippi by
16 the main channel of the river, the east chute channel,
17 which the Mississippi River Commission sought to move away
18 from the Mississippi bank and thence the construction
19 project.

20 So Louisiana's position has been that the east
21 chute channel, being avulsively diverted by the
22 Mississippi River Commission project, created a frozen
23 thalweg to be connected at the north and at the south to
24 the active downstream track of navigation or live thalweg,
25 and that was a position of our experts. They clearly

1 testified to that. We say that the, at all pertinent
2 times the thalweg was east of the island. There never was
3 a time favorable to Mississippi.

4 QUESTION: Well, Mr. Keyser, what is your
5 position if this Court determines that the lower court had
6 no jurisdiction to determine boundaries between the
7 states?

8 MR. KEYSER: I must reluctantly admit that the
9 district court did have jurisdiction. I didn't like it.
10 I told the court that --

11 QUESTION: Well, we might not agree with you.

12 MR. KEYSER: That -- if you hold that the
13 district court had no jurisdiction?

14 QUESTION: Yes.

15 MR. KEYSER: You must hear the case and decide
16 it yourself.

17 QUESTION: Well, what about the boundary? The
18 title dispute?

19 MR. KEYSER: The boundary must be decided in the
20 first instance because petitioners are claiming riparian
21 sections of land which have historically been in Louisiana
22 in a different land district than the Mississippi land
23 district. That's the ultimate question, and that's why we
24 intervened, because Mississippi people had sued Louisiana
25 riparians and a state agency on the west bank claiming

1 adverse possession.

2 QUESTION: What is the basis upon which you
3 conceded that the district court had jurisdiction? On
4 what theory?

5 MR. KEYSER: I have only done that recently, and
6 I have looked through the law and find no exception to the
7 district court having jurisdiction. All the cases I find
8 say that even though I don't like it and even though I say
9 the district court had to predetermine its jurisdiction
10 and thence the outcome of the case before it even heard
11 the first witness, nonetheless as a matter of
12 jurisdictional finality they did have jurisdiction.

13 QUESTION: Is that because of the presence of
14 third parties or because of the order of this Court, or
15 both?

16 MR. KEYSER: I would say it's because of the
17 jurisprudence in the orders of this Court declining to
18 take jurisdiction itself, thereby giving the district
19 court the suitable alternative forum, implicit
20 jurisdiction to hear and determine all issues.

21 QUESTION: I see. You don't contest that we
22 could have taken original jurisdiction if we had chosen to
23 do so?

24 MR. KEYSER: No, sir, I moved for it twice.

25 QUESTION: As long as we didn't take it, you say

1 that was a judgment of ours?

2 MR. KEYSER: Only that the district court must
3 then be vested with sufficient jurisdiction to hear and
4 determine all issues. Implicit in that ruling would be
5 that the Court had found that to be the suitable
6 alternative forum beside the Supreme --

7 QUESTION: Well, I'd say implicit in the ruling
8 is that the judges that voted that way probably thought
9 that, but does it have the force of a judgment of this
10 Court that there is jurisdiction?

11 MR. KEYSER: As a practical matter it certainly
12 does. I don't know as a technical legal matter whether or
13 not it does.

14 QUESTION: Isn't it at least theoretically
15 possible, maybe this isn't what the majority was actually
16 thinking then, but that the Court might have thought that
17 the title issue could have been resolved without resolving
18 the boundary issue and that the district court was an
19 adequate forum for that purpose?

20 MR. KEYSER: I don't know how the Court could
21 have reached that conclusion.

22 QUESTION: Well, lots of times the ownership of
23 land could be in the same party even though he thinks he's
24 in Mississippi when in fact he turns out to be in a
25 different jurisdiction. I think at least analytically

1 they are, they could be regarded as separate issues.
2 Maybe not on the facts of this case after you get into it.

3 MR. KEYSER: Because of the interstate boundary
4 issue I made a rather concerted effort to point out that
5 this case did deal with an interstate boundary, that it
6 involved the Treaty of Paris, that it involved acts of
7 Congress, that it involved statutes of the United States,
8 and I did everything I could to draw the court's attention
9 to that.

10 QUESTION: I'm not sure any of that would be
11 conclusive on the question whether the boundary issue
12 would also necessarily determine the title issue. That's
13 all I'm saying. Maybe it is, I just don't know,
14 understand it well enough.

15 MR. KEYSER: Well, in our view if the boundary
16 is drawn in its proper place all of the lands at issue
17 remain in Louisiana as they were patented out, thereby the
18 only claim that the Mississippi people would have would be
19 one of adverse possession or acquiescence, and they
20 certainly can't prove either of those.

21 QUESTION: On the facts of this case, but I
22 suppose it's at least theoretically possible, isn't it,
23 that a Mississippi citizen could acquire land in Louisiana
24 by adverse possession?

25 MR. KEYSER: I would agree with that.

1 QUESTION: I suppose it doesn't make a whole lot
2 of difference to the state who owns it, does it, so long
3 as the state has sovereignty over it?

4 MR. KEYSER: I would agree with that. Our port
5 commission is faced with the possibility that it no longer
6 has water frontage because of the boundary drawn by
7 petitioner's expert, and the riparian owners from above
8 Lake Providence to below Lake Providence no longer have
9 river frontage and they are cut off somewhere a quarter of
10 a mile inland from the river. Those are all issues.

11 QUESTION: And that, of course, and that
12 pertains to the title, not to the boundary?

13 MR. KEYSER: Yes, sir.

14 QUESTION: Are you going to address the
15 acquiescence aspect of this case?

16 MR. KEYSER: I certainly could. I hadn't
17 intended to. The greater preponderance of all witness
18 evidence and all documentary evidence is with Louisiana
19 simply because the Louisiana riparians have lived on the
20 Louisiana side of the river and gone to the water's edge
21 since the time of their titles.

22 We had the very elderly widow of the former
23 speaker of the House of Representatives who lives in Lake
24 Providence down in this area, in fact on LA Exhibit 1, her
25 name is Mrs. Vail Delony and you will see two straight

1 lines drawn out to the water's edge and the name Delony
2 written in there. Mrs. Delony and her daughter, Mrs.
3 Reed, both testified that from the early part of this
4 century their family has lived there, mined sand and
5 gravel there, hunted there. They never have seen any
6 Mississippi people there.

7 And all of the other witnesses I called, and I
8 have to tell you the trial judge didn't like some of my
9 witnesses. I called the United States Fish and Wildlife
10 field agent who is known all over the United States
11 although he's a relatively young man in his thirties, he
12 has exercised jurisdiction all over the accreted area
13 since he has been assigned to this area and said he never
14 saw any Mississippi people. He said he wrote all his game
15 violations and took them to Federal court in Louisiana.

16 Then I called several Louisiana Wildlife and
17 Fisheries people and they said the same thing. They had
18 grown up there, exercised Louisiana wildlife authority.
19 They never saw any Mississippi people there, wrote all
20 their violations under Louisiana law and Federal law, and
21 took them all to court in Monroe and Shreveport. Every
22 witness that we called said that they had never seen any
23 Mississippi people here.

24 As a practical matter I know that there were
25 people from Mississippi hunting deer out here at different

1 times because there was some testimony to that effect, but
2 it was not generally recognized that they were Mississippi
3 people exercising adverse possession.

4 Now as to the acquiescence argument there is no
5 testimony or evidence of which I am aware that as a
6 sovereign either state dealt with this area. Certainly
7 Louisiana never recognized the sovereignty of Mississippi
8 here. There was not one single witness to say that
9 Mississippi exercised sovereignty here. We had such
10 colorful witnesses as Jelly Higgins and Horsefly Higgins
11 for the petitioners, who were their main witnesses. Now,
12 Jelly and Horsefly said they were acts of adverse
13 possession out here, but I didn't think it was good,
14 strong evidence myself and I pointed that out to the
15 court. And I have to say whenever you have a serious case
16 in Federal court if those are your strongest witnesses
17 you've got a problem. And that's my view of acquiescence.

18 Are there any questions? Thank you.

19 QUESTION: Thank you, Mr. Keyser.

20 Mr. McCartney, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF JAMES W. MCCARTNEY

22 ON BEHALF OF THE PETITIONERS

23 MR. MCCARTNEY: First, as the Court can see,
24 this is a case that is highly fact-intensive. There is
25 dispute. We dispute what Mr. Keyser has represented to

1 the Court as the facts. Obviously we can't get into the
2 entire record. The trial court did. The nature of the
3 case as such is to validate this Court's exercise of its
4 writ of discretion to let the facts be heard by the trial
5 court.

6 Secondly, as I pointed out to begin with, Stack
7 Island can be traced as a separate body of land from 1826
8 to date by maps, aerial photographs, and surveys. There
9 was a controversy before the trial court regarding the
10 disappearance of the island. The trial court made a
11 specific fact finding that this island, which has migrated
12 from the Mississippi shore southwesterly to the Louisiana
13 shore, is the same identical island that existed during
14 the 19th century, and that fact finding is fully supported
15 by the record. So --

16 QUESTION: What -- was there specific testimony
17 on your behalf that the original island had not
18 disappeared and reappeared, but had enjoyed a continuity,
19 a physical continuity throughout the period?

20 MR. MCCARTNEY: At the Joint Appendix page 98
21 and 99 our expert witness so testifies that the island has
22 never disappeared. It says in place in 1988 and remained
23 in place throughout the entire period and is still there
24 today. So there was certainly evidence on which the
25 district court could have rendered its fact finding.

1 And, with respect, we submit that this is not an
2 accretion case at all. This is a case of an island that
3 has migrated from one point to another. Migration out of
4 its original location does not constitute disappearance.
5 We have the same body of land. We have facts to support
6 that finding. That finding was not clearly erroneous.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 McCartney.

10 The case is submitted.

11 (Whereupon, at 1:37 p.m., the case in the above-
12 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Mississippi v Louisiana

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)