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Boundary Controversies between States Bordering on a Navigable River

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BOUNDARY CONTROVERSIES BETWEEN STATES BORDERING ON A NAVIGABLE RIVER

THE MINNESOTA-WISCONSIN CASE

The controversy between Minnesota and Wisconsin as to the boundary line between the two states in the waters which separate Duluth and Superior is one of long standing, and one that is rife with points of interest in the development of the north country at the head of the Great Lakes. The unanimous opinion of the Supreme Court in the case of Minnesota v. Wisconsin delivered on March 8, 1920, by Mr. Justice McReynolds is noteworthy not only because it settles once and for all the various questions of law and fact involved in this dispute, but because it gives the latest view of the Supreme Court on the much mooted question of what constitutes the boundary line between states of the Union which border on a navigable river, and, in at least one respect, qualifies and defines the rules of law previously laid down.

I. THE JURISDICTION OF THE COURT.

The constitution of the United States provides:\(^2\)

"The judicial power shall extend . . . to controversies between two or more states; between a state and citizens of another state; between citizens of different states; . . . and between a state, or the citizens thereof, and foreign states, citizens or subjects."

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2 Art. III, Sec. 2.
"In all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction."

The 13th Section of the Judiciary Act of 1789 provides: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction."

While the language of the clause conferring jurisdiction is general, disputes between states as to their boundaries would seem plainly to be included thereunder. The soundness of this conclusion is confirmed by the fact that when the constitution was framed and adopted there were existing controversies between eleven states respecting their boundaries, a situation which furnishes an interesting sidelight on the ineffective congressional method of settling boundary disputes provided by the Articles of Confederation, and which obviously required the establishment of some procedure more adequate than that thereupon in effect. Although doubted at times by men whose names are written large in the history of American law, the jurisdiction of the Supreme Court in this type of cases has been upheld uniformly. The first case to come before that court having to do with the question of boundaries between states was that of New Jersey v. New York, which involved one of the disputes pending at the time the constitution was adopted. The opinion of the court in that case, though written by the most eminent of its chief justices, is of the routine type. The court, however, is held to have jurisdiction, largely on the authority of the noted case of Chisholm v. Georgia, the decision in which was nullified by the passage of the eleventh amendment before the judgment following that decision could be put into effect.

The next case is that of Rhode Island v. Massachusetts, decided in 1838. In spite of the earlier decision sustaining the court's jurisdiction, counsel for Massachusetts, including Daniel

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3 This section has been successively re-enacted and is now known as Section 233 of the Judicial Code.
5 The ninth Article of Confederation provided: "That the United States in Congress assembled, shall be the last resort on appeal in all disputes and differences now subsisting, or which may hereafter arise between two or more States, concerning boundary, jurisdiction or any other cause whatever."
6 (1831) 5 Pet. (U.S.) 284, 8 L. Ed. 127.
7 (1793) 2 Dall. (U.S.) 419, 1 L. Ed. 440.
8 (1838) 12 Pet. (U.S.) 657, 9 L. Ed. 1233.
Webster, argued earnestly that the constitutional provisions quoted supra were limited to questions involving property only, and did not extend to political matters such as boundaries between states. Although Chief Justice Taney dissented, the majority opinion of Mr. Justice Baldwin sustained the court's jurisdiction in a positive and exhaustive fashion. The precedents and historic facts are presented in a manner and order altogether convincing, and there can be no question as to the soundness of the court's conclusion that it has "undoubted jurisdiction" in cases of this type.

In the case of Florida v. Georgia, Chief Justice Taney, apparently having changed his opinion in the matter, says:

"It is settled, by repeated decisions, that a question of boundary between states is within the jurisdiction conferred by the constitution on this court."

The question of jurisdiction in this type of cases was raised seriously as late as 1870, however, when the case of Virginia v. West Virginia was before the court. In that case counsel for West Virginia, of whom Reverdy Johnson was one, argued much the same question as that raised by Webster thirty-two years before. The conclusion of Mr. Justice Miller is almost as positive as that of the court in the earlier cases:

"We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two states of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those states; or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceedings."

The Supreme Court, therefore, has exclusive original jurisdiction to determine boundary controversies between states, though of course, as impliedly provided in the constitution, the states themselves, with the consent of the Congress, may enter into an agreement as to their boundaries.

II. THE PROCEDURE.

Neither the constitution nor the precedents prescribe the procedure to be followed in this type of cases. The court's

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9 (1854) 17 How. (U.S.) 478, 15 L. Ed. 181.
10 (1870) 11 Wall. (U.S.) 39, 20 L. Ed. 67.
11 Art. 1, Sec. 10.
dilemma in the early cases is thus stated by Chief Justice Taney in the case of *Rhode Island v. Massachusetts:* 12

"The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a court of justice; and we have no precedents to guide us in the forms and modes of proceeding, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing."

Without going into this phase of the question with any degree of minuteness, it may be stated that the following general rules of procedure were laid down by the Supreme Court in the early cases and have been followed without serious question in those cases which came up thereafter:

(1) The rules and usages of equity practice are followed, omitting, however, any niceties of chancery pleading or procedure, so as most expeditiously to bring the case to an issue on its real merits. 13

(2) If the defendant state does not appear process will be issued for its appearance, which process must be served on both the governor and attorney general of such state. 14

(3) "If the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance; but the complainant or plaintiff will be allowed to proceed ex parte." 15

(4) An appearance once made by a defendant state may be withdrawn upon due application, but in such case the complainant state may proceed ex parte, as if no appearance had been made on the part of the defendant. 16

(5) Ordinarily in these cases the costs are divided equally between the states concerned, for the reason that, as stated by Mr. Justice Brewer, in the case of *Nebraska v. Iowa:* 17

"The matter involved is one of these governmental questions in which each party has a real and vital and yet not a litigious interest."

III. THE DEVELOPMENT OF THE LAW

Considering the varied and diverse interests involved, the number of boundary controversies which have come before the

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12 (1840) 14 Pet. (U.S.) 210, 256, 10 L. Ed. 423.
13 Ibid. 257.
15 Grayson v. Virginia, (1796) 3 Dall. (U.S.) 320, 1 L. Ed. 619.
17 (1891) 143 U. S. 359, 370, 36 L. Ed. 186, 12 S. C. R. 396.
United States Supreme Court is surprisingly small. Some of them involve questions of fact only, and as such, though they may contain much of historic or political interest, add nothing to the principles of law involved. No attempt will be made in this article to analyze or codify all the cases, and reference will be made only to those decisions which seem most pertinent in the development of the law of the phase of the question stated in the title herein, or which contain matters particularly relevant on their facts to the Minnesota-Wisconsin controversy.

The case of *Missouri v. Kentucky* is in the nature of a pioneer case of its type. By the treaty between France, Spain and England in February, 1763, the middle of the Mississippi River was the boundary between the British and French territories, and became the boundary between Missouri and Kentucky when the former became a part of the Union in 1820. Both states apparently admitted that the true line was in the middle of the main channel of the river. The court assumes that the question must be determined as of the time that Missouri was admitted into the Union, or at least as of no later date, and analyzes the evidence at some length. The opinion of Mr. Justice Davis contains little of law, but several of his comments on the facts are so apt and trenchant as to warrant their quotation:

"In a controversy of this nature, where state pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony."

"But it is said the maps of the early explorers of the river and the reports of travelers prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle to dispossess a party of property on the mere statements—not sworn to—of travelers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?"

Both quotations apply with full force to the facts in the case of *Minnesota v. Wisconsin*.

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The case of *Nebraska v. Iowa*[^19] is of interest because it first applied the well recognized doctrines of accretion and avulsion in determining the boundary line between states bordering on a navigable river. The line between the two states was "the middle of the main channel of the Missouri River." Between 1851 and 1877 in the vicinity of Omaha there were marked changes in the course of the river's channel. Out of these changes the litigation arose, both states claiming jurisdiction over the same tract of land.

In suits between private riparian owners it had been held generally that where the banks of a stream are changed by the gradual process known as accretion the line still remains the stream, including the accumulated soil. It had been equally well settled that where a stream suddenly abandons its old and seeks a new bed, in other words, where an avulsion occurs, the boundary line between riparian owners remains in the old channel. These principles are applied by the court to the boundary line between the two states; the "muddy" Missouri is held to be no exception to the general rule; and the law of accretion is found to obtain at all the places involved, except in one instance where the river "had pursued a course in the nature of an ox-bow," and "suddenly cut through the neck of the bow and made for itself a new channel," in which case the boundary is held to remain in the abandoned channel.

The opinion of the court, written by Mr. Justice Field, in *Iowa v. Illinois*[^20] is undoubtedly the most important of all the decisions in the cases involving this question. The words "middle of the Mississippi River," were used in the Enabling Acts of the two states. Iowa contended that the boundary was the middle line between the two banks or shores, while Illinois claimed that the boundary was the channel upon which the commerce of the river by steamboats usually was conducted.

The old theory that the boundary line between states separated by a river is the medium filum aquae—a line drawn through the center of the river—is held not applicable to cases in which the evidence shows there is "a channel of commerce," "one usually followed," "a channel of traffic," "one which is best suited and ordinarily used" for the purposes of navigation. In such cases the channel of commerce or the navigable and navigated channel is held to be the boundary line between the states. The reason

[^20]: (1893) 147 U. S. 1, 37 L. Ed. 55, 13 S. C. R. 239.
for this rule is stated by the court to be obvious, because "the right of navigation is presumed to be common to both."

The court's conclusion is positive and decisive:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates, is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest."

Clear and determinative as is the opinion in the case of Iowa v. Illinois, the point was reargued before the Supreme Court in the case of Arkansas v. Tennessee, decided in 1918, on the basis of a decision of the supreme court of Tennessee reaching a contrary conclusion. The opinion, written by Mr. Justice Pitney, is a clear affirmation of the earlier doctrine and its conclusions:

"The true boundary line between the states, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes."

The question of acquiescence sometimes becomes of controlling importance in this type of cases. Though relied upon by both Minnesota and Wisconsin in the controversy recently decided the Court referred only inferentially to this point in its opinion, and apparently considered that the facts supporting the claims of both states in this connection fell short of the rules applicable, a conclusion which, under the facts of the case, seems clearly correct. Several brief quotations from the decided cases will show the general rules of law as to the effect of acquiescence on the boundary line between two states:

"Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And he pointed out that every age, every century and every decade this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this

great principle may be involved with greater justice and propriety than in a case of disputed boundary."  

"It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."  

"The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule may be in respect of the acquisition by prescription of large tracts of country claimed by both."  

IV. THE MINNESOTA-WISCONSIN CONTROVERSY.

The Wisconsin Enabling Act, approved August 6, 1846, described the boundary of the proposed state in part as follows:  

"Thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian Village, according to Nicollet's map; thence due south to the main branch of the River St. Croix."

With the boundaries stated in the Enabling Act Wisconsin entered the Union May 29, 1848.

The Minnesota Enabling Act, approved February 26, 1857, describes the boundary in part thus:  

"Thence east along the northern boundary of said state [Iowa] to the main channel of the Mississippi River; thence up the main channel of said river, and following the boundary line of the State of Wisconsin, until the same intersects the Saint Louis River; thence down said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan until it intersects the dividing line between the United States and the British possessions."

With boundaries thus described, Minnesota became a state on May 11, 1858.

The controversy arises from diverse interpretations of the italicized portions of the Wisconsin Enabling Act. Nicollet's

22 Rhode Island v. Massachusetts, (1846) 4 How. (U.S.) 591, 639, 11 L. Ed. 1116.  
25 Chap. 89, 9 Stat. at L. 56.  
26 Chap. 60, 11 Stat. at L. 166.
map, published three years before the passage of that Act, is
drawn on a very small scale and does not indicate definitely
either the mouth of the St. Louis River or the main channel of
that river. Nor were they located definitely until the decision of
the Supreme Court on March 8th. A brief statement of the
peculiar geographic and hydrographic conditions involved may
serve to clarify the matter.

At the westerly end of Lake Superior there are three pairs
of points or projections extending out from the opposite shores of
Minnesota and Wisconsin. The most easterly of these are known
as Minnesota and Wisconsin Points, the former about six miles
in length and 200 to 800 feet in width, the latter about as wide
but only approximately half so long. Between these points there
is a natural opening of approximately a quarter of a mile in
width known as the “Entry” or “Superior Entry.” A canal
through Minnesota Point near the Minnesota mainland was cut
about 1870, and is known as the Duluth Ship Canal. Through
these openings the traffic from Lake Superior to the cities of
Duluth and Superior enters.

About a mile to a mile and a half westerly from Minnesota
and Wisconsin Points there is another pair of points, the one
reaching out from the Minnesota shore being known as Rice’s
Point and that from the Wisconsin shore as Connor’s Point.
The intervening water between these two pair of points is known
as Superior Bay, and is, as has been indicated, about nine miles
long and a mile and a half wide.

A narrow channel between Rice’s Point and Connor’s Point
leads into what is known as St. Louis Bay, or Lower St. Louis
Bay, approximately a mile and a half wide and three miles long,
at the westerly end of which another pair of points is reached,
the larger of which extends from the Minnesota mainland and is
known as Grassy Point. The opening between Grassy Point and
the corresponding point extending from the Wisconsin shore is
about a quarter of a mile in width. Beyond these points the waters
again widen out to a width of more than a mile in what is known
as Upper St. Louis Bay, with Big Island at its southwesterly end,
more than two miles from Grassy Point. From here on the waters
have well defined banks and the admitted characteristics of a
true river. Up the river southwesterly from Big Island a distance
of several miles is the Village of Fond du Lac, formerly a trad-
ing post of the Hudson Bay Company and the Indian Village referred to on Nicollet's map and in the Enabling Acts.

The various depths and channels of these waters are thus tersely stated in the opinion of the Supreme Court:

"Meade's Chart indicates: A depth of not over eight feet across the bar at "The Entry." A deep channel through Superior Bay; rather shallow water with a ruling depth of eight feet in Lower St. Louis Bay; eight feet of water on a fairly direct course, about a mile in length, from the deep channel south of Grassy Point and east of Fisherman's Island to the deep water immediately westward of the bar, about seven-eighths of a mile north-east of Big Island. It further discloses a curving channel along the west side of Grassy Point and thence close to the Minnesota shore and around Big Island, with a depth of fifteen or more feet except at the bar, where there are only ten, possibly eight, feet. To the South of Big Island lies the well-known and formerly much used course indicated on Lieutenant Bayfield's Map."

Meade's Chart, referred to by the Court, was made in 1861 under the direction of George Gordon Meade, then a Captain of Engineers. It shows soundings taken with apparent care and correctness throughout the waters in question, these soundings being indicated on the map by figures and depth contour lines. A rough outline of the whole situation sketched from Meade's Chart follows:

Fisherman's Island, also referred to by the Court, is a small piece of land not indicated on the sketch from Meade's Chart. This island has been largely obliterated by the government improvements in the channels of these waters, but before those im-
Improvements were made this island was about 100 feet long by 50 feet wide, and was located in Upper St. Louis Bay, approximately midway between Grassy Point and Big Island. As to the Bayfield Map the court says:

"During 1823-1825 Lieutenant Bayfield of the British Navy surveyed and sounded the westerly end of Lake Superior and the lower waters of St. Louis River. A chart compiled from data so obtained (1:49,300,—4108 feet to the inch) and published in 1828, shows the general configuration and lays the proper sailing course southward of Big Island. Prior to 1865 this was the only available chart and navigators often used it."

The court, with entire correctness and incisive brevity, further says:

"The level of the water within all the bays is substantially the same as in Lake Superior; such current as exists flows in opposite directions according to the wind and movement within the Lake. The shores are irregular and much indented.

"Since 1893 the United States have dredged a twenty-two foot channel through Upper St. Louis Bay and around Grassy Point; thence through Lower St. Louis Bay (where there are two branches) and between Rice's and Connor's Points; thence through Superior Bay to "The Entry" and into the Lake. Extensive docks have been constructed from the Minnesota shore in both the upper and lower bays; those extending southwest from Grassy Point across the boundary claimed by Wisconsin. The general situation of 1846 continued until long after 1861, but during the last thirty years extensive improvements required for a large and busy harbor have produced great changes."

The line called in question is in Upper St. Louis Bay between Grassy Point and Big Island, that in Superior Bay and Lower St. Louis Bay having been settled by tacit agreement for many years. Docks worth millions of dollars have been built out from the Minnesota shore on the westerly side of Grassy Point and crossing the boundary claimed by Wisconsin, but wholly on the Minnesota side of the center of the waters, and also on the Minnesota side of the dredged channel referred to by the court. For some seven years both Wisconsin and Minnesota have taxed large portions of these docks claimed to be in both states. Tax sales followed and the titles became inextricably confused. Indeed at one time some person (claimed by neither state nor its adherents) went so far as to paint the state line on one of these docks at the point claimed by Wisconsin.

In 1911 an attempt was made to settle the dispute by a joint boundary commission appointed by the respective states. This commission convened in August, 1911, at Superior, and in
August, 1912, at the Minnesota capitol in St. Paul. The report of the commission from each state supports thoroughly the contentions of that state, but the joint report reads:

"The controversy existing between the two states concerning the boundary line is fundamental and substantial, and we find and determine that there is no opportunity to an adjustment of this controversy which does not involve a complete surrender by one or the other of the states of its position and contention with reference thereto. We therefore agree that this commission can arrive at no satisfactory adjustment of these differences."

Various suits between private persons owning property on the shores of the respective states in the disputed locality were commenced in the succeeding years, and finally in October, 1916, the attorney general of Minnesota made a motion for leave to file a bill of complaint against the state of Wisconsin in the Supreme Court of the United States. A subpoena in due form was served thereafter on the governor and attorney general of Wisconsin, and on March 6, 1917, Wisconsin's answer and counterclaim was filed, followed six weeks later by Minnesota's reply. Thereafter a commissioner was appointed by stipulation to take the testimony, which was heard in Duluth and Superior throughout the months of August and September, 1917. The case was briefed at length, and argued before the Supreme Court on October 16 and 17, 1919.

As has been stated, the controversy comes from conflicting interpretations of two portions of the Enabling Acts. Minnesota has always contended (at times, as in the report of its boundary commission in 1912, as the only reason for its claims) that the mouth of the St. Louis River is southeast of Big Island, where the physical characteristics of a true river end and the features of a lake begin, and that the boundary through the disputed waters, they being part of the lake, was therefore in the center of those waters.

Although the supreme court of Wisconsin27 and the lower federal courts28 had come to the conclusion that the mouth of the St. Louis River was between Minnesota and Wisconsin Points, the United States Supreme Court, at two different times, had refused to decide this question. In the Duluth ship canal case, *Wisconsin v. Duluth*,29 the court said:

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27 Bright v. Superior, (1916) 163 Wis. 1, 156 N. W. 600.
29 (1877) 96 U. S. 379, 24 L. Ed. 668.
“Whether these bays are considered as parts of Lake Superior or as mere expansions of the river, is in our view immaterial.”

Again, in the case of Norton v. Whiteside,\(^{30}\) the court said:

“The question whether the stretch of water and the channel through it be treated as a part of Lake Superior, as asserted by the complainant, or be considered at the point in issue as a mere continuation of the St. Louis River, as asserted by the defendant (a view held by both the courts below), is wholly negligible.”

This question therefore was an open one before the Supreme Court and was argued strenuously by counsel for both states.

Minnesota’s evidence on this point substantially proves:

(1) That the waters of Lake Superior and not those of the St. Louis River are dominant at the locality in question; (2) That if the water coming down the St. Louis River should be diverted or dried up, the disputed waters would still remain at approximately the same level as they now are; (3) That the oscillations and changes in the lake’s surface affect the waters as far as the end of Big Island, but not substantially above that point; (4) That the waters in the disputed locality flow in both directions rather than in one direction as in the case of a river; (5) That the waters of these bays are subject to the ebb and flow of the true tide of the lake.

Though Wisconsin offered the expert testimony of certain professors from its state University which tended to lessen in some respects the effect of Minnesota’s position on this point, the sole reliance of its attorney general before the Supreme Court, so far as this phase of the case is concerned, was that the mouth of the St. Louis River was an unambiguous term, definitely understood and intended to describe the space between Minnesota and Wisconsin Points, this understanding being indicated by historical data both before and after 1846.

Wisconsin’s counsel summarize the position of that state in this connection thus:\(^{31}\)

“The mouth of the St. Louis River, as will be amply proven, was so fundamental a term that it did not require location. The mass of haphazard conjecture; the poor stock of oral tradition and hearsay based on the uncertain memory of living witnesses seeking to recreate and reestablish the mental content of a legislative body that wrote the language in question three-quarters of a century before this record was made up, is overwhelmed by the long line of witnesses, of whose utterances and writings this court must take judicial notice. With something of splendid pageantry they throng to its attention from every rank and station and from most diverse quarters of the land.”

\(^{30}\) (1915) 239 U. S. 144, 60 L. Ed. 249, 36 S. C. R. 54.

\(^{31}\) Brief of Wisconsin, page 3, in case of Minnesota v. Wisconsin.
scientist, courtier and coureur du bois, combine to weave a strand of narrative in which the golden threads of heroic legend are woven with the coarser fibre of a sometimes bestial commonplace. Grenville, John Jay, John Quincy Adams, Clay, Webster, Benton, Calhoun, and Lewis Cass appear; the ascetic figure of Nicollet with his ribbon of the Legion of Honor, burning out the slender stock of his vitality in his zeal for scientific attainment and coveted admission to the Academy of France; David Thompson, gone to his too little distinguished grave, leaving a continent his debtor by the magnitude and accuracy of his scientific exploration; David Dale Owen, Schoolcraft, James D. Doty, now being honored as the "founder of Wisconsin," Alexander Ramsey, first governor of Minnesota Territory; Mackenzie, voyager to the frozen northern seas and discoverer of the mighty river that bears his name,—all pause to register confirmation of its long standing significance and bring to a converging focus from their diverse angles, one continuous, undeviating, historic meaning of the phrase."

While one may doubt whether the court was required to take judicial notice of all the writings of the statesmen and explorers on which Wisconsin relied, (practically none of which were introduced in evidence), and while the positiveness and vividness of the conclusions quoted may be a bit exaggerated, those conclusions are borne out substantially by the facts. Minnesota's contention on this point was based almost exclusively on the physical aspects of the situation: where the mouth of the river actually was; while Wisconsin's position was based on the historical data: where Congress must have intended to locate the mouth of the river, taking into consideration the information which must have been called to its attention.

The other phase of the controversy is the more important, not only as indicative of the development of the principles of law involved in this type of cases, but in the decision itself, though until the bringing of the action it was largely neglected by Minnesota's adherents. Wisconsin took the position that the "curving channel along the west side of Grassy Point" was the main channel of the St. Louis River and hence the state line. Minnesota claimed that the shallower but more direct course also described by the court in the above quotation, was the main channel within the contemplation of the Enabling Acts, assuming that the disputed waters were part of the river and not of the lake. On this point almost all of the early navigators in these waters were called. Their testimony contains much of the early history of the development of a new country, and, coming as it does from
the very men who in a large measure made that history, it bears an added interest. Indeed it is almost an autobiography of the country at the head of the Lakes.

Only a summary of the evidence adduced and positions taken by the two states on this point can be included herein. No evidence of navigation in 1846 was obtainable. Admittedly, as stated by the court, "such vessels as plied there in 1846 and long thereafter, moved with freedom in different directions." But Wisconsin contended with great earnestness—and this contention was very much the corner stone of its argument on this point,—that in the absence of navigation the line of deepest soundings determined the boundary. Notwithstanding this insistence that the line of deepest water controlled, Wisconsin took issue with Minnesota as to the actual line of navigation when navigation came to these waters and in this connection called many elderly navigators who testified in substance that the deep water channel through these waters was used exclusively in the navigation of the early days, except in going on the so-called cut-off course south of Big Island. (Neither state contended that the cut-off course was the boundary, whatever rights Minnesota may have had so to contend admittedly having been lost years before the beginning of the action.) The number of Wisconsin's witnesses on this point was larger than that of those for Minnesota, but on the whole they did not disclose so much experience in navigation as did the witnesses for Minnesota. But Wisconsin's case in this connection was supported by the more or less uniform understanding of the officers and employees of the corps of engineers stationed at Duluth to the effect that the channel contended for by Wisconsin was the main channel of the St. Louis River. On one of the maps published by the corps of engineers (1886) the words "main channel of the St. Louis River" are superimposed on the channel contended for by Wisconsin, and in later maps the words "channel of the St. Louis River" are so superimposed. In a survey of Fisherman's Island made for the General Land Office of the Department of the Interior the words "main channel of St. Louis River" are clearly marked on the Wisconsin channel, and, finally, in 1903, Captain Gaillard, the officer then in charge of Duluth office, at the request of the chief of engineers, wrote to the governors of Minnesota and Wisconsin that the line contended for by Wisconsin was thought to be the boundary between the states, and suggested that a new line be
agreed upon in view of the changes made by the government improvements and by industrial developments.

Minnesota took issue with Wisconsin squarely on its deepest soundings theory, and argued that the navigation which first came to these waters and continued up to the government improvements in the early nineties was determinative of the main channel of the river (if it was a river), and that this navigation, in so far as it went north of the Island, was on the shorter course near the middle of the bay. Minnesota's witnesses, including many of the living early navigators of these waters, testified positively that, while the southern channel was largely used, the boats that went north of the Island followed the course contended for by Minnesota because it was shorter, broader and of sufficient depth for the boats of that day, and that the only time the deep water channel was used was in going to a small sawmill on Grassy Point. Minnesota argued that the corps of engineers had no power to determine the boundary line between states, that the maps relied on by Wisconsin were made at times and under circumstances which indicated clearly that the engineers had no appreciation of the criteria going to determine a boundary line between states bordering on a navigable river,—an argument that was illustrated by the evidence of the only government engineer called by Wisconsin, whose testimony showed that his idea of the boundary was the line of deepest water, and who admitted that Minnesota's witnesses were better qualified than he to determine as to the actual navigability and navigation of these waters.

Such were the claims of the two states. Minnesota: that the mouth of the river was at Big Island, generally supported by the physiographic and hydrographic conditions; Wisconsin: that the mouth of the river was at the Superior Entry, supported by historic and biographic references indicating an understanding that such was the fact; Minnesota: that the main channel of the river through the waters in question was on the short course near the middle of the bay, based on actual navigation thereon when such navigation came to these waters, but somewhat lessened in effect by the fact that the larger portion of the traffic went not to the north of Big Island, but to the south thereof, and on a course not claimed as the boundary line by either state; Wisconsin: that the line of deepest soundings controlled in the absence of navigation, but that the actual navigation of the early
days was in fact on the deep water channel, and that the corps of engineers, in a more or less decisive manner, had always regarded such channel the main channel of the river.

V. THE DECISION OF MARCH 8, 1920.

The court decided the location of the mouth of the river in two short paragraphs:

"The complainant maintains that within the true intendment of the statute the 'mouth of the St. Louis river' is southeast of Big Island, where end the banks, channel, and current characteristic of a river and lake features begin. On the other hand, the defendant insists, and we think correctly, that such mouth is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin points,—'The Entry.'

"It is unnecessary to specify the many facts and circumstances, historical and otherwise, which lead to the conclusion stated. They seem adequate notwithstanding some troublesome objections based upon the peculiar hydrographic conditions."

No law was involved in this point and its determination without discussion is probably as satisfactory as if the reasons inducing the court to come to its conclusion had been outlined in detail. The decision, in this connection, when the arguments of both states are considered, can be taken to mean that the court is concerned more with what must have been in the mind of the Congress than what the actual conditions were,—a conclusion that is hardly in line with the theory of the thalweg,—but the point is narrow and the court has put its decision in such form that the general proposition remains open,—it may be that Minnesota's evidence as to the actual conditions was not thought convincing.

As to the second point the court says:

"The doctrine of thalweg, a modification of the more ancient principles which required equal division of territory, was adopted in order to preserve to each state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."
"As we view the whole record, the claim of Wisconsin cannot prevail unless the doctrine of thalweg requires us to say that the main channel is the deepest one. So to apply it here would defeat its fundamental purpose. The ruling depth in waters below Upper bay was 8 feet and practically this limited navigation to vessels of no greater draft. For these there was abundant water near the middle line. Under such circumstances Minnesota would be deprived of equality of right both in navigation and to the surface if the boundary line were drawn near its shore.

"A decree will be entered declaring and adjudging as follows: That the boundary line between the two states must be ascertained upon a consideration of the situation existing in 1846, and accurately disclosed by the Meade Chart. That when traced on this chart the boundary runs midway between Rice's point and Connor's point, and through the middle of Lower St. Louis Bay to and with the deep channel leading into Upper St. Louis bay, and to a point therein immediately south of the southern extremity of Grassy point; thence westward along the most direct course, through water not less than 8 feet deep, eastward of Fisherman's island, and, as indicated by the red tract "A, B, C" on Minnesota's exhibit No. 1, approximately 1 mile, to the deep channel and immediately west of the bar therein; thence with such channel north and west of Big island up stream to the falls."

The decision, therefore, was wholly in Minnesota's favor, though on a point that was not much argued in the many years the question had been at issue prior to the bringing of the action. As a practical result of the decision the Minnesota shore line is rendered vastly more valuable than if a contrary conclusion had had been reached, and in all probability the Minnesota owners who have paid taxes to Wisconsin (in one case more than $40,000) will be able to recover the sums so paid.

The decision definitely determines that the deep water channel is not necessarily the main channel of a navigable river constituting the boundary line between states, either in the absence or presence of navigation at the time the states were formed. The basic purpose of the doctrine of the thalweg, it seems, clearly justifies this holding, though there are some statements in the textbooks and in the decisions which indicate a contrary understanding. In definitely settling this question, so earnestly argued by counsel for Wisconsin, the decision in this case adds distinctly to the body of law applicable to cases of its type, and defines the rules theretofore laid down in such cases.

Wisconsin's deep channel theory out of the way, the difficulty with Minnesota's case lay not in the strength of Wisconsin's evidence but in the weakness of Minnesota's own testimony. As
has been indicated, Minnesota's evidence showed that the bulk of the early traffic was to the south of Big Island in a channel conceded not the state line. After stating that the south channel was never accepted as the line, the court says:

"The evidence convinces us that as navigation gradually increased prior to 1890, the northerly course in Upper St. Louis Bay commonly followed by vessels going to or coming from points above Big Island was not along the narrow curving channel skirting Grassy Point, but over the shorter one near the middle of the bay."

The conclusion to be drawn is not that the court thought the main channel shifted from one channel to another, but that the northerly course argued for by Minnesota satisfied the underlying theory of the principles of law applicable, and accomplished a solution that was not only practical but altogether just. The course determined upon by the court may not, to him who reads the evidence in detail, seem to have borne the largest amount of the early commerce, but it did bear more than the channel contended for by Wisconsin, and the underlying reasons supporting the doctrine of the *thalweg* seem fairly to require its application to the course chosen in the absence of a claim that the south course was the main channel. The decision, in this connection, shows the court is interested keenly in the real justice of the matter, possibly even more so than in the technical application of the precedents, a conclusion which, at least in cases of this type, must commend itself generally.

One further point may be mentioned in connection with the case. It was argued in the case of *Whiteside v. Norton*, that when the federal government, under its reserved power to improve navigation, has straightened and deepened the navigable channel within the original banks, the boundary line should follow the channel so deepened and straightened. The circuit court of appeals directly disapproved this argument and held the changes caused by the government analogous to avulsion. The same point was argued, though only briefly and somewhat parenthetically, by counsel for Minnesota in this case, but it was not referred to directly in the court's opinion. The opinion, however, does contain the following sentence:

"It seems appropriate to repeat the suggestion made in *Washington v. Oregon*, 214 U. S. 217, 218, 55 L. Ed. 971, 972, 29 Sup. Ct. Rep. 631, that the parties endeavor, with consent of Congress, to adjust their boundaries."
On authority which cannot be questioned it may be stated that the court in the portion of the opinion last quoted had in mind the advisability of both states' agreeing that the dredged channel should be the state line, and to this extent at least the point must have impressed the court. Indeed it seems not inconceivable, in view of the court's general attitude in this case, that this argument might be adopted in a case where no other solution accomplishing justice could be reached. Perchance, too, the man who first suggested that "the constitution follows the dredge," taunted though he has been by his friends for his argument based thereon, may one day be taken to have been something of a prophet.

Although the decision was in Minnesota's favor the costs of the action were divided equally between the two states, in accordance with the rule in this type of cases above indicated. In its opinion the court failed to follow the usual practice of appointing or providing for the appointment of a commission to survey the line determined upon, and for that reason no decree has been entered up to the present time. But a joint commission is being agreed upon by the states, and after a survey by that commission, the line stated in the opinion will be adjudged and decreed to be the boundary between Minnesota and Wisconsin. Probably in no future case will so much of the early history of the two states be available; certainly it will not be available in the form used in this case. The opinion is not only a scholarly statement of the facts and law on a series of questions not entirely clear on either side, but extends and defines the principles of law previously laid down in cases of this type in a manner which accords that high measure of justice which should obtain in all controversies between sovereign states.

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Harvey Hosihour.