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Illinois ends where Kentucky begins—but where's that?

by Robert H. Abrams

State of Illinois
v.
Commonwealth of Kentucky
(Docket No. 106, Original)

Argument Date: March 18, 1991

This case presents a relatively uncomplicated boundary dispute between two states. Settling these cases has long been a staple of the original jurisdiction of the Supreme Court.

ISSUES

In this case both sides agree that the low water mark on the Illinois side of the Ohio River forms the boundary. The parties disagree only on whether the low water mark in question should be measured as it stands today, or in accordance with some other equitable principle.

FACTS

Kentucky was formed in 1792 from lands that were at one time claimed by Virginia. Following nationhood, Virginia ceded those lands to the national government. This historical tidbit explains why the boundary between Kentucky and her Ohio River neighbors to the north is fixed at the low water mark on the northerly side of the river and not at the live thread of the stream as is the norm in boundary cases. In the words of Chief Justice Marshall, "when, as in this case, one State is the original proprietor, and grants territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only." *Handly's Lessee v. Anthony*, 5 Wheat. 374, 377 (1820).

Over the years, the Ohio River has, like all rivers, undergone changes in its channel as a result of natural and artificial forces. Here, there are claims by Kentucky that the channel has moved northward by the gradual processes of accretion and erosion. Nevertheless, it appears that the principal cause of change in the river's position relative to its banks is due to dams on the Ohio River in the Illinois-

Kentucky stretch of the river that have raised the water level generally, with the result that the present low water mark on the Illinois side of the river has moved farther north than it was before the dams were built.

The case, in accord with usual practice, was referred to a Special Master. Senior Judge Robert Van Pelt served in that capacity for approximately a year until his death in 1988. Matthew Jasen succeeded him, and completed the hearings and filed a Report in favor of Illinois. He concluded that a fixed boundary was consistently adopted by previous Supreme Court cases determining the location of the northern border of the Virginia Cession. He proposed an order fixing the boundary as of 1792 and remitting the parties either to agree on the precise location, to agree to a joint survey that would determine the location, or, absent agreement, to have a Special Master hold hearings on the matter.

BACKGROUND AND SIGNIFICANCE

In reading the submissions of the parties, this case seems unusually lifeless. State boundary disputes most often have significant (although parochial) consequences. Other recent state boundary disputes have featured oil fields located below the Mississippi River or taxing and regulatory jurisdiction over a part of Savannah, Georgia's port area. Here, the parties' submissions give no hint of a burning controversy. Indeed, the most interesting testimony in the case was Kentucky's effort to prove by the fact that Kentucky coroners had investigated all Ohio River drownings that Illinois had acquiesced to Kentucky's control over the whole river as it presently stands.

Outside of the record there is a potential benefit for Illinois should it prevail. Well after this suit had been filed, Illinois passed legislation authorizing riverboat gambling within certain of its waters. This legislation would include the Ohio River, if enough of it is located on the Illinois side to allow for a riverboat to be moored there. Beyond that, it appears that a number of Illinois fishermen have sought to be able to fish portions of the Ohio River free of the need to obtain a Kentucky license.

ARGUMENTS

For the Commonwealth of Kentucky, taking exception to the Report of the Special Master (Counsel of Record, James M. Ringo, Assistant Attorney General, Capitol Building, Frankfort, KY 40601; telephone (502) 564-7600):

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1. Precedents involving the Ohio River boundary between Kentucky and the states of Ohio and Indiana are not controlling in this case.
2. Illinois has acquiesced in Kentucky actions that would have exceeded Kentucky's authority were the boundary not one that changes with the changes in the river.
3. The equitable defense of laches is available to Kentucky because Illinois delayed its claim for so long a period.

For the State of Illinois, in reply to Kentucky's exceptions to the Report of the Special Master (Counsel of Record, John Brunsman, Assistant Attorney

General, 500 South Second Street, Springfield, IL 62706; telephone (217) 782-9062);

1. The consistent line of prior Supreme Court decisions that fix Kentucky's Ohio River border at the 1792 northernly low water mark is indistinguishable from this case.
2. The record does not support Kentucky's claims of acquiescence and laches.
3. The construction of dams on the Ohio River has raised the water level, and the present low water mark on the Illinois side of the river is now north of the 1792 low water mark.

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