
In Supreme Court of State of Texas.

FIFTH ASSIGNMENT.—AUSTIN TERM, 1890.

W. C. DENNY AND H. G. LEE, APPELLANTS.

VS.

FRANK B. COTTON ET. AL. APPELLEES.

APPEAL FROM EL PASO COUNTY.

BRIEF OF APPELLEES.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

WALTER B. HULL & CO., PRINTERS.

Received of Hon P. F. Edwards
C. von Rosenberg

Counter 21954

In Supreme Court of State of Texas.

FIFTH ASSIGNMENT.—AUSTIN TERM, 1890.

W. C. DENNY AND H. G. LEE, APPELLANTS.

VS.

FRANK B. COTTON ET. AL. APPELLEES.

APPEAL FROM EL PASO COUNTY.

BRIEF OF APPELLEES.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

Appellees acquiesce in appellants statements of the nature and result of the suit.

APPELLEES' FIRST COUNTER PROPOSITION UNDER SIXTH AND SEVENTH ASSIGNMENTS OF ERROR.

First.—The land in controversy is ALLUVION, formed on the north bank of the Rio Grande river, since the date of

the patent to the Burdett survey No. 2, under which appellees deraign title; and as said survey and patent call for said river for its southern boundary, the addition made by such accretion belongs to the appellees by virtue of their riparian rights.

Second.—The patent of the Burdett survey No. 2, shows that the Rio Gaande river is its southern boundary, and it is a legal deduction that there is no vacant and public domain left for appropriation between the river and the river boundary of said tract.

Third—The riparian right to future alluvion is a vested right, and an inherent and essential attribute to the original property, and, as the evidence shows that the pre-emption surveys of the appellants are in conflict with the lines of the prior Burdett patent, extended to the Rio Grande river, said surveys are null and void, and confer no right or title to the land in controversy, upon the appellees.

STATEMENT.

Appellees adopt and copy, literally, appellants' statements under their first and second propositions, under the above assignments, and we only add a few matters of record which we deem essential.

Appellees introduced in evidence a patent, (known as Burdett survey No. 2.) dated February 20, 1858, from the

state of Texas to Joseph Magoffin, assignees of N. W. Burdett, to the land described in said patent, as follows :

Beginning at the southwest corner of survey No. 1, thence north 2368 varas, thence west 672 varas, thence south 3008 varas to a stake on the bank of the Rio Grande river. thence DOWN THE SAME TO THE BEGINNING, containing 320 acres. (Trans. p. 15-17.)

Appellees also read in evidence patent (known as Burdett survey No. 1.) dated February 20, 1858, from the state of Texas to Joseph Magoffin, assignee of N. W. Burdett, which showed that the southwest corner of survey No. 1 and the beginning corner of survey No. 2, were both on the Rio Grande river. (Trans. p. 17.18.) Appellees also showed a regular claim of title from Magoffin and wife down to themselves, for the Burdett survey No. 2. (Trans. p. 19.)

Appellees also introduced a map, or plat, showing the land described in said patent and the land in controversy. (Tr. p. 30.) And further they introduced the testimony of L. Heldt, county surveyor of El Paso county, Texas, who (Tr. p. 20.) testified that he had compiled the map referred to from the county records of El Paso county; pointed out on said map the lines and corners of Burdett survey No. 2, (appellees' patented survey) and of appellants' pre-emption surveys (the land in controversy); and stated that these surveys could be found on the ground by reference to the astro-

nomical point at old Fort Bliss, established by the United States government, old Fort Bliss being on a survey adjoining said Burdett No. 2, known as Burdett No. 1, patent to which (Tr. pp. 17.18.) was also introduced by appellees, further testifying (Tr. p. 20.) that the map referred to showed that the Denny and Lee pre-emption surveys (the land in controversy) all lay south of the south line of the Burdett and Manning survey—the Burdett being appellees' patent tract. Appellees also introduced in evidence a deed from Joseph Magoffin, dated January 12, 1881, (Tr. pp. 19-20.) conveying to appellees' vendors Burdett survey No. 2, including the land between the distance called for in the patent to the river, and the actual distance at the date of said conveyance, to the north boundary of the Rio Grande, the survey as conveyed then containing five hundred and twenty and a fraction acres according to the field notes of said conveyance, and included most of the land in controversy.

Appellees' witness, Heldt, also testified as follows (Tr. pp. 20-21.): "The map shows also where the Rio Grande river ran in 1889 as found by me, and where it was in 1859 as shown in field notes of Burdett. The Rio Grande ran in 1859, at the date of the Anson Mills survey of the Ponce de Leon grant, as shown by his field notes of said grant, about one hundred varas south of the line of the Burdett survey No. 2, as shown by the field notes of the said Burdett survey

according to the distances called in field notes of said survey, the Rio Grande in 1858, according to the distances called in field notes, struck the west boundary line of the Burdett survey No. 2 at the point where the said line now intersects the north boundary line of the W. C. Denny survey, and it would strike the southeast corner of the said Burdett survey at the same date, and I mark both these points on the said map. The map shows from the records where the river ran in 1858 and represents four actual surveys made by me in 1889 where the river ran at that date." Witness, shown (Tr. p. 21) deed in appellees' chain of title from Tays to Frank B. Cotton and others, dated January 12, 1881, notes on map where land included in said deed lies and designates its southeast and southwest corners. Witness then made field notes of that portion of Appellant Denny's pre-emption survey shown on said map to be in conflict with the Burdett survey No. 2, if the east and west lines of said Burdett survey were extended south to the Rio Grande as it ran in 1889, and he also made a calculation of the quantity of land within the lines of said field notes giving said field notes. (Tr. p. 22.) Witness also (Tr. p. 22) made field notes and calculation of quantity of land of H. G. Lee pre-emption survey which would be in conflict with said Burdett survey No. 2, were its east and west line prolonged to where the river ran in 1889, field notes given. (Tr. p. 23.)

Cross-examined: Witness stated solid lines on map represented correctly from the records the lines of the original surveys—Burdett No. 2 and Denny and Lee pre-emptions—while dotted lines represented the extension of the original east and west lines of said Burdett survey down to the Rio Grande.

The record, (Tr. pp. 37, 36,) shows that the date of the inception of the pre-emption proceedings of appellants was April 9, 1867. Appellants introduced witness L. C. Criss, who testified, (Tr. p. 43) that he had lived in El Paso for eight years past, that he came to El Paso in 1858, remained there nearly two years, then left, returning in 1868, and had been there almost every year since until he came to reside permanently in 1881; that when he left in 1860, the Rio Grande ran considerable north of where it now runs, (Tr. p. 44), the north bank being quite up to where the Santa Fe railroad now turns to the river and being near where McLean's hide house now is and running east to about where the park now is; that the north bank of the river was then north of where the International smelter now is about 100 or 150 yards, whence it ran in a northeast direction in near a straight line to old Fort Bliss; that he did not know the location of the south line of the Burdett survey No. 2; that on witness' return to El Paso in 1868 the river was not where it was in 1860, being nearer to Paso del Norte by probably

about from 300 to 400 yards; that witness recalled that in 1860 a man had a house, vineyard and orchard in Mexico near the river bank, which, when witness returned in 1868, had all disappeared; that since witness' said return the river had constantly receded to the south, the changes in the channel being made by high water, when the river would rise, overflow the surrounding country, and, on its fall, the channel would go to a point further south; that during such rises the south or Mexican bank would wash and crumble off, and when the river fell, it would make a new channel, leaving a strip of land from one foot to hundreds of yards (Tr. p. 45) wide, on the northern side between the old high-water bank and the new channel.

Cross-examined: (Tr. p. 45.) Witness said that he meant that when river fell, it would make a new channel and leave the old one, the new channel being sometimes north, but generally south, of the old one, the trend of the channel being always at this point to the southward.

Appellants' witness, George Rand, testified (Trans. p. 45.) that he lived in El Paso, having come there about June, 1862, and made it his home since 1865; that he knew where north bank of Rio Grande was in 1862—it then running about where the store of Ketelsen & Degatau now is, and thence southeast; that old bank of river in 1862, was away this side and north of the point where the street car

track now crosses a bridge over a ravine, say about one hundred or one hundred and fifty yards; that in 1862 the north bank of the river was north of the new ditch, over two hundred yards, in his estimation, and that at that time said bank was this side, north, of the International smelter; that where there is now an old line of cottonwood trees was where the north bank of the river was in 1862; that about November or December, 1864, (Trans. p. 46.) witness returned to El Paso and found that river had changed its channel, and was running south some two hundred yards from its old channel; that river always went south, and that witness' experience of river was that when it rose and fell it made a new channel always to the south, leaving a strip of land to the south of the old bank, from fifty to sixty, and sometimes two hundred feet in width.

Cross examined: (Trans. p. 46.) Witness testified that he was a soldier when he came in 1862 to El Paso, where his company stayed for thirteen months; that he could not state positively how far the north bank of the river in 1862 was north of the International smelter; that when witness returned in 1864 he did not pay much attention to where river was below where smelter now is; that when river is at its ordinary stage, the waters are probably fifty yards wide; that banks on Mexican side are higher than on this side,

and at every rise would wash and be worn away, leaving, when river fell, a strip of land on north side of river.

Re-examined: (Trans. p. 46-47.) Witness said that he did go down, on Sunday morning last, on the land north of the International smelter, and there saw a row of cottonwood trees standing about where the old river bank was in 1862; that in 1862 he was in El Paso some four or five months, being a soldier in the volunteer service of the United States; that he was in El Paso in 1863 from four to five months; again in 1865 on furlough for some fifteen days, and that in 1865, being discharged from the service, he returned to El Paso, where he has remained ever since.

Appellants' witness, Martin Alderete, testified (Trans. p. 47.) that he had lived at Ysleta, El Paso county, Texas, for seventy-three years; that in crossing the Rio Grande near El Paso, he had often seen the stream since 1862, and the changes made every year since; that he remembered that in 1861 the river changed very slowly, but that it changed very greatly in 1862; that he knew that where street car now made a turn to go to Mexico; that the bank of the river in 1862 was where there is now a little arroyo, where the street cars now cross; that he remembered that the last time he passed by he saw the arroyo, and that about where the arroyo now is, the bank of the river was in 1862; that he remembered seeing some trees near the bank years

ago, but did not recall having seen them lately; that the north bank of the river in 1862 was north of the street car bridge some varas; that he knew where old Fort Bliss was in 1862, it being where Magoffin lived at that time; that the river changed its course in 1862 to the south, leaving a strip of land between the north bank of its old course, before its rise, and its new one, said strip being, witness supposed over one hundred varas wide; that he could see the strip of dry land (Trans. p. 48.) between the old north margin and the new north margin immediately that the water went down, and believes that there must have been one hundred varas of dry land left between the old banks and new banks; that the rise in 1862 began in May, getting back to low water in August; that the next rise in the river took place in 1863 and was not quite as great as the rise of 1862; that when the river rose it ran in the same channel, but worked on the land on the south side, making a bar on this side, smaller than in 1862; that the next big rise in the river took place in 1868 or 1869; that there was, witness believed, a rise in 1865 or 1866; but not so large as those of either 1862, 1868 or 1869; that in 1865 and 1866 the river went south and the land was left on this, the north side; that in 1869, after the great rise, the river run still further south, witness didn't remember the quantity of land left, but it was much larger than that left by any of the other floods spoken of by

witness; that he thought it was more than fifty yards, perhaps more than one hundred yards; that when the river rose in 1862 and fell, it left a strip of land which had been a part of the bed of its former channel, which part of the bed as it was first, was filled in with sand and left dry when the river fell, the same being the case in the other rises.

Cross-examined (Tr. p. 49):

Witness said that he observed the river after the several rises spoken of from the road leading from this side to Paso del Norte, which road ran about where the street car track now runs; that he only knew about the river where he saw it from the road he was traveling; that the banks on the Mexican side are higher than on this; that witness had lived in the country for seventy-three years and remembered back for more than fifty-five years; that in the old days long ago the river ran near the court house, but that it has been gradually running south; that witness never could recognize any of the identical land brought over from the Mexican side, but remembered that there were orchards and vineyards flooded from the other side and that pieces of dirt fell in the river and were brought to this side.

Appellants' witness, Jose Maria Gonzales, testified (Tr. p. 49) that he lived at Ysleta and had lived there ever since he was born there in 1825, that in 1862 the north bank of the river was about where the street, railway track crosses

the little arroyo on the bridge, from which point, (with) the arroyo, trending northeast and running towards old Fort Bliss, is now a bank on which are some straggling cottonwood trees, that some of thee trees (Tr. p. 50) are near the bank and some on it, and that they marked the north high water bank of the Rio Grande before the rise in 1862.

Cross-examined (Tr. p. 50):

Witness said that Ysleta is some twelve miles from El Paso; that he came to El Paso in 1860, because invited by Magoffin to confer with him about damage being done by river, on which occasion witness particularly examined river from old Fort Bliss up to El Paso, but had seen the part of the river in question many times since from the road; that the river did not change in 1860 much, in fact but very little; that he believed he could trace the line of the river as it was in 1860 in the BOSQUE near old Fort Bliss; that river, when it rises, is a torrent, running very fiercely, and is a little muddy, having dirt mixed with it when it is high.

Re-examined (Tr. p. 50.): Witness stated that he only saw that place where the trees are in 1860; that where are now the cottonwood trees spoken of by witness was in 1860 the north bank of the river, and that the sand banks spoken of by witness formed south of the street car track after 1860.

Appellants' witness, John S. Gillette, testified (Tr. p.

50) that he resided in Paso del Norte, but had resided in this country, or near El Paso, for forty-one years; that he was familiar with the course of the Rio Grande (Tr. p. 51.) from a point opposite the warehouse of Ketelson & Degetau, and thence down the river; that he knows a bank extending northeastward from where the street car track crosses a little bridge, which bank has cottonwood trees on it; and that in 1860 this was the north high water bank of the Rio Grande, no change taking place from then until 1862, in either the channel of the river or this bank.

Cross-examined: (Tr. p. 51.) Witness testified that the high-water of 1866 ran up to about where the trees testified about are.

Re-examined: (Tr. p. 51.) Witness testified that there was very high water in 1862, and while he did not remember about where it was after the fall, yet at the place where the trees are, it moved its channel at a point south of the street car stables and formed a strip much more than five feet in width, the land thus left being a part of the former bed of the river.

Appellant's witness, L. Heldt, testified (Tr. p. 51.) that Ketelson & Degetau's warehouse is on a map made by witness (Tr. p. 30.) where witness designated it by writing on the map the words Ketelson & Degetau; that witness also designated on the map the McLean hide house, by marking

McLean's name at place where it is; that he also marked on said map the place where street car track (Tr. p. 52.) crosses the little arroyo; and that he has also marked on the map the position of the International smelter.

Appellees' witness, Nicholas Kohlhaus, testified (Tr. p. 52.) that he resided in San Elizario and had lived there twenty-six years; that he came to El Paso in December, 1855, and staid there about a month at Fort Bliss, and then went Fort Quitman, returning to El Paso in 1860, and staying in the county ever since; that he was in the town of El Paso every week or two during the time mentioned; that the river ran, in 1860, about where is now the house of Ketelsen & Degetau; that it commenced changing since 1860, but not much, but that it changed considerably in 1862, moving to the south; that in 1862 the river rose very high and an orchard on the Mexican side was carried away by the flood, and that the banks could be heard falling in all night long; that the river commenced to rise in May and stayed up until August, the waters rising and covering the flat up to where the street car stables are now; that witness saw pear trees and grape-vines washed off from the other side of the river and saw them carried down the river and landed up-side down on this side near old Fort Bliss; that the dirt and land washed off by the river is carried down by it; that the banks on the south side of the river (Trans. p. 53.) are high and

on this side low, hardly any at all, and that when the river went down deposits were made on this side, which you could not see while it was going on, only when the river went down you could see what had been made; that when the river is full the average width is about one hundred yards; that when the river rises the water undermines the bank on the south, melts it, and, when it goes down, leaves a little strip on this bank from the sediment; that since witness came to El Paso the river had changed from where Ketchelson & Degetau's warehouse is, to where the river is now; that each year, by these freshets, strips of land were formed on this side of an average width, probably of twenty to twenty-five yards; that the river, during its annual rise, is very swift and muddy, the worst witness ever saw, and gradually undermines the Mexican bank and forms land on this side at this point.

Cross-examined; (Trans. p. 53.) Witness said that after the water went down he could distinguish the land that had been formed; that after the river went down in 1862 it left a strip of land forty or fifty yards, or probably more, in width; that every time there was a freshet land was deposited on this side and witness never saw any land being made on this side except by a freshet.

It was agreed (Trans. p. 54-55) that the line of cottonwood trees testified about by the witnesses, are on the north

line of the Denny survey, as shown by the map. (Trans. p. 30.)

Appellees' witness, Joseph Magoffin, (Trans. p. 23) testified that he had lived at or near old Fort Bliss since he came to El Paso county in 1856, except during the period from 1862 to 1869, when he was absent; that (Trans. p. 24) his father, James W. Magoffin, had the two Burdett surveys in El Paso county made in 1854, and, at about the same time, had the James Taylor survey made; that part of the Burdett survey No. 2 were cultivated from 1856 to 1881, (when witness sold it) part of the time by his father and from 1868 to 1881 by himself; that the river has made considerable changes affecting the Burdett survey No. 2 since witness first knew it, the river having washed off its banks on the south or Mexican side opposite said survey, such changes of the river's position having been made every year, the washing of the river being always at the point of this survey, it bearing to the south and making land on its north side in front of this survey; that houses and cultivated fields were on the south side of the river and that these have been washed off by the action of the river; that below the Burdett survey No. 2 the river has also made changes in its banks, but there it has washed off its north side leaving land to the south; that the river commenced to wash off the bank on its north side in part of and south of the Burdett

survey No. 1, on which was old Fort Bliss, about 1858; at which time the north bank was about 600 varas south of the Fort; that it washed away witness' father's house at the old Fort Bliss in 1868; that (Trans. page 25) the corrals then there south of witness' father's house were gradually, from year to year, washed away; that the river came within the edge of old Fort Bliss in 1868; that the river washed away the houses of many of the old citizens of Paso del Norte, opposite Burdett survey No. 2, during its rise in 1868; that in 1868, when witness returned to El Paso, the land which had been washed on the front of Burdett survey No. 2 was fit for cultivation; that he saw the land when it was formed before the trees grew and saw trees growing on it and preserved them from want; that he had, during the time the river was up, seen the banks on the other, the south side, when they would fall in from the action of the water; that there was never any change of the channel of the river from one place to another at one time, the change always being gradual; that the bank on the south side was always very high and much higher than on the north side, and that Burdett survey No. 2 was in inside of bend where the river ran with force against the south bank, which was some fifteen feet high; that the river rises periodically and regularly every year from the melting of the snow in the mountains, this rise beginning in May and continuing until the latter part of

July or August, and this so regularly that the Mexicans have a feast day know as the Feast of High Water on a Friday, the 15th of May (Trans. p. 26) of each year, at which time the river is at its highes, the highest, however, not being always on that day, but within a few days of it, that rains and the usual causes where rainfall is heavy have no effect in the river.

Cross examined (Trans. p. 26):

Witness said that he thought that in 1856 the Rio Grande ran a little south of the south line of Burdett survey No. 2, as shown by map (Trans. p. 30); that river washed away its south bank on the Mexican side every year and formed land on the north side, this usually occurring during and after a high rise in the river; that when the river would fall after a rise is would run from twenty to twenty-five varas south of the north line of the old bed, this occurring from year to year opposite said Burdett, survey No. 2.

Re-examined (Trans. p. 26):

Witness stated that river when it rises runs very rapidly and has a fierce and violent current, eating the bank on one side and forming sandbanks on the other.

Appellees' witness, Noyes Rand, testified (Trans. p. 26) that he purchased part of Burdett survey No. 2, in 1882, and was present at making of survey of it for himself; that he has lived on the land since 1881 and has noticed how the

Rio Grande has changed its course since then; that on the south side of the river there are high banks resting on sand which washes away and causes the bank to drop in the river; that whenever (Trans. p. 27) there is high water, the sand-bar on this side is covered with water and when the waters recede the sand bar is found covered with mud and extends further south; that the land on the south or Mexi-side of the river is higher than that on the north side; that there is a gradual slope of the land south from witness' house until one gets about two hundred feet from it when there is a drop-off, or sudden fall-off, of the land of about three or three and a half feet, the land then sloping gradually south until about four blocks from the river there is another drop-off not quite so great as the first, and thence sloping down gradually to the water's edge, this all being in front of said Burdett survey No. 2; that in ordinary high water the river washes up to the Texas and Pacific railway grade, which acts as a level, the main part of the grove of trees near the river on what witness claims as his land deeded to him in 1881, overflowing in ordinary highwater; that the bank on the south side of the river is too high and the river cannot run over it; that high water occurs at El Paso ordinarily in summer—called the June rise—usually commencing in May and lasting until August or September, the water being low from September till May; that ordinarily

the river is dry, or nearly so, in December and the rises occur from the melting of snow in the mountains; that the river may be said to be regular in its habits of rising; that (Trans. p. 28) there was a very high water in 1884.

Cross examined (Trans. p. 28):

Witness said that when the waters receded after the flood of 1884 they left a strip of land of, witness would judge, probably forty or fifty feet in width, and that after a every high rise of the river land is left on this side; that when he spoke of drop-offs in the land he cou'd not tell how they were made, but thought they were caused by sloughs and by recessions of the river; that immediately after every rise and the subsidence of the water it can be seen that land has been left on this side and has been added to the land; that witness has always noticed it as he was interested in adjoining land on which it was so formed; that, of course, the land so formed was, prior to the formation, the bed, of the river; that it was part of the former bed raised by deposit of (land) and left dry by the recession of the stream towards the Mexican bank.

Appellees' witness, Joseph Magoffin, recalled, (Tr. p. 30.) testified that the Rio Grande usually rises in April and is at its highest usually about May 15th to June 1st, it being up from that time till August; that the river usually rises about seven feet, a ten-foot rise being an extraordinary

one; that witness has frequently seen river over the flat below street car stables; that it was over it in 1886, the rise not being an unusual one, that one cannot detect any change in the river's course while it is up, but when it goes down down one can perceive it on the land or sand left; that after the waters go down weeds and brush commence to grow almost immediately, the high winds pile up the dirt and sand around them, more land accumulates and in this manner, after the first sand is left by the wash of the river, soil continues to be formed.

Appellants Denny and Lee introduced in evidence (Tr. p. 3.) at the same time admitting that their locations covered the land shown on the map to be in conflict with the lines of Burdett survey No. 2, if extended to the north bank of the river, and south of the southern termination of said survey as determined by course and distance from the field notes in the patent.

I. Transcript from the records of the general land office, duly certified by R. M. Hall, commissioner, February 20, 1890 (Trans., p. 36), showing and containing—

1 Application to W. C. Denny, dated April 9, 1887, (Tr. p. 30.) to county surveyor of El Paso county to pre-empt land claimed by him—now survey No. 109—and for survey of same sworn to by W. C. Denny before F. S. Clark,

county clerk of El Paso county; Texas, April 9, 1887. (Tr. pp. 30-33.)

2. Field notes (Tr. p. 33.) of survey made in accordance with said application for W. C. Denny, by B. F. Eubank, deputy surveyor of El Paso county, Texas, April 11 1887, with (Tr. p. 34.) certificate of said deputy surveyor of actual survey, also with (Tr. p. 34.) surveyor's certificate of examination and approval, and that they have been recorded in his office, certificate dated April 15, 1887.

Accompanying said field notes is also a certificate by J. W. Eubank, county surveyor of El Paso county, Texas, dated April 15, 1887, of actual occupancy by applicant, W. C. Denny of the land applied for to be surveyed. (Tr. p. 34.)

Field-notes and certificates filed in general land office April 18, 1887. (Tr. p. 34.)

3. Certificate of W. C. Denny, pre-emptor to county surveyor of El Paso county, Texas, dated April 15, 1887, that survey was made according to pre-emptor's request and directions. Filed in general land office, April 18, 1887, (Tr. pp. 34, 35.)

4. Letter of J. W. Eubank, county surveyor of El Paso county, Texas, dated April 22, 1887, to R. M. Hall, commissioner general land office, noting corrections made in Denny and Lee pre-emptions surveys, (Tr. p. 35.) Filed in

general land office April 25, 1887. Endorsed on wrapper \$140.60, deposited 6, 13, '87, by Carleton & Ruggles, O. N. H. Rec'r.

II. Transcript from the records of the general land office duly certified by R. M. Hall, commissioner, February 20, 1890, (Tr. p. 41), showing and containing:

1. Application of H. G. Lee, dated April 9, 1887, (Tr. pp. 36-38), to county surveyor of El Paso county, Texas, to pre-empt land claimed by him—now survey No. 111—and for survey of same, sworn to by H. G. Lee before F. S. Clark, clerk county court, El Paso county, Texas, April 9, 1886, (Tr. p. 38), and filed in general land office April 18, 1885, (Tr. p. 38.)

2. Field-notes (Tr. pp. 38-40), of survey made according to said application for H. G. Lee by B. P. Eubank, deputy surveyor El Paso county, Texas, April 12, 1887, with said deputy surveyor's certificate of actual survey, and surveyor's ticket of examination and approval of field-notes, and that they have been recorded in his office. Date of certificate April 15, 1887.

Accompanying is certificate of J. W. Eubank, county surveyor, dated April 15, 1887, and filed in general land office April 18, 1887, of actual occupancy by applicant, Lee, of the land applied for the land to be surveyed, (Tr. p. 40.)

3. Certificate of Lee, pre-emptor to the county sur-

veyor El Paso county, dated April 15, 1887, filed in general land office April 28, 1887, that survey was made according to pre-emptor's request and direction, (Tr. p. 40.)

4. Certificate of Lee's actual occupancy of his pre-emption, signed by Eubank, county surveyor of El Paso county, dated July 16, 1887, and filed in the general land office July 19, 1887. (Tr. pp. 40-41) Endorsements on file \$130.50 deposited 6, 13, '87, by Carleton & Ruggles, O. N. H. Rec'r. (Tr. p. 41.)

III. Certificate of payment in full of money on Lee pre-emption, signed by R. M. Hall, commissioner general land office, and dated February 21, 1890. (Tr. p. 42.)

IV. Certificate of payment in full of money due on Denny pre-emption, signed by R. M. Hall, commissioner general land office dated February 21, 1890. (Tr. pp. 42-43.)

AUTHORITIES.

St. Clair Co. vs. Livingston, 23 Wall. 46-69.

New Orleans vs. U. S., 10 Pet. 662.

Sandlet vs. Shepherd, 4 Wall. 502.

School vs. Riskey, 10 Wall. 110.

R. R. vs. Schurmier, 7 Wall. 272.

Yates vs. Milwaukee, 10 wall. 110.

Jones vs. Soulard, 24 How. 44.

Benson vs. Morrow, 61 Mo. 353.

Lenticum vs. Coan, (M. D.) 2 Cent 623.

Gould vs. Waters, section 76, 155 and 85.

APPELLEES SECOND COUNTER PROPOSITIONS UNDER SIXTH
AND SEVENTH ASSIGNMENTS OF ERROR.

1. The evidence shows that the land in controversy was formed by a gradual and imperceptible accretion from, and consequent reliction of, the water, extending over a period of twenty-five years, from 1862 to 1887, resulting from the deposits made upon the north bank and the erosion of the south bank of the Rio Grande river from year to year. *During* the annual and periodic floods commencing in April and lasting until August or September.

2. The Rio Grande river is one of the great torrential rivers of the west; having its annual periodic floods, resulting from the melting snows in the Rocky Mountains of the north. During its floods, in which the bed and banks of the river are often submerged for four or five months constantly changes are brought in the banks and the channel of the river by the erosions made on the ^{one} ~~other~~ side, and increment deposited on the other, but this increment is always deposited when the river is at its flood, and under its muddy torbid waters, and cannot be perceived until after the flood subsides and the waters seek its deepest channel.

3. When land is formed through a length of time, whether the stages of progress could be perceived or not, it

is immaterial. The test of gradual and imperceptible in the sense of the rule, is that though the witness may see from time to time that progress has been made; they could not perceive it while the progress is going on.

STATEMENT.

See statement under ^{first} ~~counted~~ propositions.

//
Magoffin testified:

That the river has made considerable changes in Burdett survey No. 2. The river having washed off its banks on the Mexican side, opposite said survey; such changes having been made every year. The washing of the river being always at this point of survey; it bearing south and making land on the north side in front of this survey; that below survey No. 2, the river also makes changes in its body, but there it washed of the north side, leaving land to the south. (Tr. p. 24.) There was never any change of the channel of the river from one place to another at one time; the change being always gradual; that the banks on the south side was always very high, much higher than on the north side and the Burdett No. 2, was on the inside of a bend, where the river ran with force against the south bank. The river rises periodically and regularly every year from the melting snows in the mountains; so regularly that the Mexicans have a feast day, known as the "Feast of High Water, on the 15th of May, (Tr. p. 26), of each year, at

which time the river is at its highest; when the river rises, it runs very rapidly and has a fierce and violent current, eating the banks on one side and forming sand-banks on the other. (Tr. p. 26.)

The river usually rises in April and is at its highest on 15th of May and continues up until August. (Tr. p. 30.)

Noyes Rand testified:

That whenever there is high water the sand-bar on this side is covered with water, and when the waters recede the sand-bar is found covered with mud and extends further south. The land on the south side is higher than on the north side. (Tr. p. 27.) Immediately after every rise and the subsidence of the water, it can be seen that land has been left on this side and added to the lands that of course the lands so formed, was prior to the formation of the bed, or part of the bed of the river, that is, it was part of the former bed raised by deposits of land, and left dry by the iscession of the stream toward the Mexican bank. (Tr. p. 28.)

L. C. Criss testified;

That since his return (in 1868), the river had constantly receded to the south, the changes in the channel being made by high water, when the river would rise and overflow the surrounding country, and on its fall would go to a point further south; during the rise the Mexican bank would wash

and crumble off, make a new channel, leaving a strip of land from one foot to hundreds of yards. Trans. p. 45.

George Rand testified:

That in 1862 the north bank of the river was where there is an old line of cotton wood trees, and when he returned to El Paso in 1864, he found that the river was running south some two hundred yards; when the river rose and fell it always went to the south. Trans. p. 46.

Martin Aldrite testified:

That the river changed its course in 1862 to the south leaving a strip of land between the north bank of its old course before the rise and its new one: witness supposed over 100 varas wide. (Trans. p. 48); that he could see the strip immediately after the water went down, that the river began to rise in May, getting back to low water in August, that when the river rose it ran in the same channel, but worked on the land on the south side making a bar on this side. that when the river rose in 1862 and fell, it left a strip of land which had been part of the bed of its former channel, which was filled in with sand and left dry when the river fell, the same being the case with the other rises. Trans. p. 48.

Nicholas Kolhans, testified:

That in 1862 the river rose very high; commenced to rise in May and staid up until August, and covered the flat

up to the street car stables, that the dirt and land washed off by the river is carried down by it, the banks on the south side are high and on this side low, hardly any at all, and when the river went down deposits were made on this side which you could not see while it was coming on, only when the river went down you could see what had been made, that when the river rose the water undermines the bank on the south, melts it, and when it goes down leaves a little strip on this bank from sediment; that each year by these freshets strips of land were formed in average width 20 or 25 yards, that the river during its annual rise is very swift and muddy, the worst witness ever saw, and gradually under mines the Mexican bank and forms land on this side. Trans. p. 53.

AUTHORITIES.

St. Clair vs. Livingston, 23 Wall. 46-69.

Benson vs. Marion, 61 Mo. 251.

Linthicum vs. Boan, (M. D.) 2 Cent. 623.

Gould on waters, see 155.

APPELLEES' THIRD COUNTER PROPOSITIONS UNDER SIXTH AND SEVENTH ASSIGNMENTS.

1. The Rio Grande is not by nature a navigable river, and the treaty of Guadalupe Hidalgo declares it a navigable stream, did not change the rights of riparian proprietors, and in all cases where the river itself is used as a boundary, the

law will expound the grant as extending "AD FILUM MEDIUM AQUAE."

2. But whether the river is navigable or not the title of appellees would extend AT LEAST to the margin of the stream, and they would be entitled to all the rights and incidents of riparian proprietors, and as such proprietors, entitled to all accretions adjacent to this land.

STATEMENT.

See statement under first and second counter propositions.

AUTHORITIES.

St. Clair Co. vs. Lovington, 23 Wall. 46-69.

Yates vs. Milwander, 10, Wall. 110.

Benson vs. Morrow, 61, Mo. 353.

FIRST INDEPENDENT PROPOSITION.

The narrow and contracted definition of avulsion and accretion concerning lands bounded by the sea, or ^{navigable} ~~navigable~~ waters at common law, are not applicable to the great western torrential rivers, of this county.

Beason vs Morrow, 61, Mo. 353.

DAVIS, BEALL & KEMP

and PEYTON F. EDWARDS,

Attorneys for Appellees Frank B. Cotton, et. al.

El Paso 10

Brief of Appellees in
case of McDenny & H Glee
Appellants

vs
Frank B Cotton, et al
Appellees.

1890

counter 21999