MEMORANDUM

TO: GLO File

FROM: Jack Giberson, Chief Clerk

DATE: July 29, 1976

RE: Offatts Bayou, 49 SW 720, Baylor, et al v. Tillebach, et al

Milton Richardson of the Attorney General's Office, Herman Forbes, director of the surveying division, and I met today to discuss ownership of Offatts Bayou in Galveston County.

We have determined that the State is the current owner of Offatts Bayou. In arriving at this conclusion, we discussed the case of Baylor, et al v. Tillebach, et al., and realizing that it was a Court of Civil Appeals case in which the State is not involved, we feel that this case was not binding upon the State of Texas and ownership of the above Bayou still lies in the State of Texas.

Jack Giberson
Chief Clerk

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Galveston Co. Sk. File 47

Counter 23454

August 4, 1976

Mr. William C. Richardson
6400 Westpark Plaza
Suite 230
Houston, Texas 77027

Re: Offatts Bayou
Galveston County

Dear Sir:

Please refer to the enclosed copy of a memorandum for the position of this office.

If you wish to present any facts or maps that might have a bearing on the location of the original shoreline, prior to any artificial changes, please do so.

Sincerely yours,

Herman Forbes
Director, Surveying Division
Telephone: 512-475-3145

HF/dc

Counter 23455

tiff was struck by said bridge and injured, yet if you find that at the time he was struck he was not exercising ordinary care for his own safety,—that is, if he was acting in a way that an ordinarily prudent and careful person under similar circumstances would not have acted,—and if this aided in causing his injury, then you will find for the defendant, even though you may find that the defendant was also guilty of negligence." "(7) The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant company was guilty of negligence, and that such negligence caused him to be struck by said bridge and injured, and also that he did not contribute to his injury by his own failure to exercise ordinary care for his own safety; and, unless he has done so, you will find for the defendant." See Railway Co. v. Shieder, 88 Tex. 158, 30 S. W. 902. Now, the only contributory negligence pleaded by defendant was the "want of ordinary care"; and the court, it will be seen, submitted the issue in exactly the terms contained in the plea. The rule laid down in Railway Co. v. McGlamory, 89 Tex. 635, 35 S. W. 1058, and Railway Co. v. Rogers, 91 Tex. 57, 40 S. W. 956, is invoked to sustain these assignments. In the McGlamory Case the contributory negligence of plaintiff relied upon to defeat the recovery was drunkenness, and was specially pleaded. The evidence tended to support the plea, and the defendant asked a special charge presenting the defense as pleaded and proved, which the court below refused, because a general charge on the subject of intoxication had been given. Our learned Justice Denman, in delivering the opinion of the court, said: "But the charge of the court nowhere undertakes to apply the law to the evidence adduced in support of said special plea of contributory negligence. This being true, the correct rule is that defendants had the right to prepare, and demand the giving of, a charge requiring the jury to find whether the evidence established the existence of any specified group of facts, which, if true, would in law establish such plea, and instructing them that, if they found such group of facts to be established by the evidence, to find for defendants. And this would be true, if proper charges had been asked as to each of the several special pleas of contributory negligence presented by the record. Any other rule would deprive litigants of their right to have the court explain to the jury the principles of law applicable to the very facts constituting a cause of action or defense, so that they may intelligently pass upon the various complicated issues frequently presented for their determination in one case, under our practice;" citing Railway Co. v. Shieder, 88 Tex. 166, 30 S. W. 902. In the report of the Shieder Case it does not appear whether the facts embodied in the special charge as constituting contributory negligence of plaintiff were pleaded or not, but what was said there on the point here under consideration is in the nature of obiter dictum, because the requested charge in that case was held to be properly refused for another reason; and the same may be said of the case of Railway Co. v. Rogers. We therefore consider the McGlamory Case as the leading case in Texas on the point under consideration, and certainly the most carefully considered one; and in that case the facts, as grouped in the charge asked, had been grouped in the pleading of defendant as well. In the case at bar the plea of contributory negligence sets up no fact or group of facts,—only that, if plaintiff was injured, it was "caused by his own negligence and want of ordinary care,"—and the court's charge therefore was as specific as the defendant's plea. We therefore conclude that in such cases the party is not entitled to a charge grouping the evidence. He must specify and group the facts in his plea, in order to entitle him to have them specified and grouped in the charge; and this rule we understand the McGlamory Case to establish, and, thus construed, it is reasonable and correct. At all events, this is all that is authoritatively decided on the question in that case. We are of opinion, furthermore, that, as the only act of the plaintiff which could have contributed to his injury was the protruding of his head out of the window further than was necessary to perform his duty of looking at the smokestack, the court's charge in putting the burden on plaintiff to prove "that he did not contribute to his injury by his own failure to exercise ordinary care for his own safety," as shown in the seventh paragraph thereof, necessarily required the jury to consider and determine the points of fact embraced in the special charges asked. Besides, as to one of the charges asked, there was no evidence that appellee put his head out further than was necessary to see the smokestack around the front end of his cab, except what may be inferred from the collision itself, but, on the contrary, he testified that he did not put his head further out than was necessary to perform his duty; and the undisputed testimony of the engineer, appellant's witness, was that it was his duty to do this, whether passing through bridges or not.

Considering the injury, the verdict was not excessive. We find no error in the judgment, and it is affirmed.

BAYLOR et al. v. TILLEBACH et al.

(Court of Civil Appeals of Texas. Feb. 1, 1899.)

PUBLIC LANDS — NAVIGABLE WATERS — GRANTS — LOST DEEDS — EVIDENCE — CERTIFIED COPIES — CIRCUMSTANCES — PARTITION — DECREE — RECORDS.

1. Loss of a patent from the republic of Texas being shown by affidavit, the grant may be proved by certified copy from the records of the county court.

2. The soil under public navigable waters may be the subject of a grant by the sovereign.

3. Except as against bona fide purchasers, a decree of partition that has not been recorded in the records of deeds may be proved by certified copy from the court rendering it.

4. A lost deed may be proved by circumstances.

5. To establish a lost trust deed, of which there was no valid record because of insufficient authentication of the instrument, the record thereof was introduced. The record was in the handwriting of the then county clerk, who was a careful clerk and copyist, and was never suspected of falsifying the records, and he was acquainted with the grantor. All parties and witnesses to the deed were dead. After foreclosure, the grantor never claimed the premises. The purchaser went into possession, and improved the place, and lived there many years, and, after his death, the property was partitioned among his heirs. *Held*, that the question of the execution of the deed was for the jury.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Sallie S. Baylor and another against C. Tillebach and others. From a judgment for certain defendants, plaintiffs appeal. Reversed.

Hume & Kleberg, for appellants. S. T. Fontaine, S. S. Hanscom, Johnson & Johnson, and F. W. Fickett, for appellees.

NEILL, J. This is a suit in trespass to try title brought on September 3, 1895, by Sallie S. Baylor, who is joined by her husband, G. W. Baylor, against C. Tillebach, N. C. Tillebach, John Hoeffel, S. T. Fontaine, Nicholas Zupanna, and Bartolo Fillol, to recover 200 acres of land, which is a part of Offatt's Bayou, formerly called "Oyster Bayou," situated on Galveston Island. The petition of appellants was in the ordinary form of trespass to try title.

The first four named appellees (defendants below), by their answer, pleaded not guilty, a statute of limitations of 10 years, a pre-emption claim to the land in controversy, use and occupation thereof for more than 20 years, improvements thereon in good faith, and that the patent to the land under which appellants claim, if ever issued, is void. The other two defendants answered separately, by general demurrers and pleas of not guilty. The attorney who answered for N. Zupanna withdrew from the case, stating as his reason therefor that, since filing the answer for his client, plaintiffs had settled with him. Other parties intervened, but before the cause was tried, with the permission of the court, withdrew their petition in intervention. By supplemental petition, in replication to appellees' pleas of limitation, appellant Sallie S. Baylor pleaded coverture. The cause was tried with a jury, who, under a peremptory instruction of the court, returned a verdict against appellants, upon which a judgment against them was entered in favor of all the appellees.

For convenience, we will state here the supposed chain of title relied upon by appellants to recover the property, and then consider the several links in it claimed by appellees to be broken or defective. It is as follows: (1) A patent issued by the republic of Texas on November 15, 1840, to Edward Hall and Levi Jones, granting them 18,215 acres of land on Galveston Island, which land includes the premises in controversy. This patent was, by a special act of the legislature of the state of Texas, on the 18th day of February, 1854, confirmed, and by said act the state disclaims any title to the land described in the patent. (2) A decree of the district court of Galveston county, Tex., entered on May 18, 1844, dividing 18,215 acres of land described in the above patent in 14 sections, of 1,280 each, allotting the odd sections to Edward Hall, and the even sections, including section 2, of which the land in controversy is a part, to Levi Jones. (3) A deed of trust, which purports to have been executed on June 14, 1847, by Levi Jones and J. S. Sydnor to Oscar Farish and Pryor Bryan, trustees, for the benefit of Joseph Emerson, to secure a note of that date made to him for $2,478 by the grantors in said trust deed, payable December 14th following, conveying, with other lands, the 1,280 acres constituting section 2, allotted to Levi Jones in the partition between him and Hall; it being recited in the instrument that said section 2, except 20 acres previously sold, is the property of Levi Jones. This instrument empowers the trustees, or either of them, to sell the premises in default of payment of the note, and directs that sale be first made of the property of Levi Jones, described therein. This deed of trust was acknowledged by the grantors before Oscar Farish (one of the trustees therein), clerk of the county court of Galveston county, and from the records of deeds appears to have been recorded in the office of the county clerk of Galveston county on June 15, 1847. (4) A deed which purports to have been made on May 22, 1849, by Oscar Farish, as trustee, by virtue of the deed of trust above mentioned, conveying to J. S. Sydnor 1,185 acres, a part of the 1,280-acre tract designated as section 2 in said deed of trust. This deed refers to a release of 75 acres of the land originally embraced in the trust deed, and excludes from its conveyance the quantity of land so released. It also purports to be signed by the beneficiary, Joseph Emerson, who, according to its recitals, acknowledges that he received the purchase money paid by Sydnor at said sale. This instrument also purports to have been acknowledged by the grantor, Oscar Farish, before himself as clerk of the county court of Galveston county, on July 10, 1849, and filed and recorded in the office of said county clerk on the same day, and it appears of record in said office, in Book J, p. 83. (5) John S. Sydnor died in the latter part of 1869. He left a will, which was duly probated by the county court of Galveston county on the 25th day of October, 1869, which provides for an equal distribution of his estate among his children, one of whom is the appellant Sallie S. Baylor. In the decree of partition of the estate of J. S. Sydnor among his children, which was made on April 12, 1880, by the

county court of Galveston county, the 200-acre tract in Offatt's Bayou, on Galveston Island, in Galveston county, originally granted to Hall and Jones in section 2 of their division, which embraces the land in controversy, was allotted to Sallie Sydnor Baylor, wife of George W. Baylor.

Had the original instruments constituting appellants' supposed chain of title been brought from proper custody, and introduced in evidence, a complete chain of title to the land in controversy, emanating from the sovereignty of the soil and terminating in the appellant Sallie S. Baylor, would have been shown, and, to have defeated her right of recovery, appellee would have had to show either a superior title emanating from the same source from which Mrs. Baylor's sprung, or that they had acquired title to the land, and she was precluded from recovering it by virtue of the statute of limitation. There is, however, no testimony tending to show the common source of title, and the uncontradicted evidence discloses that appellants were married on the 22d day of April, 1863, and that Mrs. Baylor has remained covert ever since. Her coverture, therefore, prevented the running of the statute of limitations against her until April 1, 1895, when article 3201, Rev. St. 1879, was so amended as to make the statute of limitations run against a married woman. Therefore, unless appellees had acquired title to the property in controversy by limitations prior to the date of appellants' marriage, the statute of limitations could not avail them as a defense. If there is any evidence at all tending to show that the statute of limitations began to run in favor of any of the appellees prior to April 22, 1863, the date of appellants' marriage, it certainly does not possess such cogency as would warrant the court to withdraw the question of limitations from the jury, and instruct a verdict upon such issue against appellants. Therefore the trial court must have based its peremptory instruction to the jury upon the theory that one or more links in the chain of title asserted by appellants, as above stated, was not sufficiently established by the evidence.

The patent from the republic of Texas to Hall and Jones, affidavit of the loss of the original having been made, was proven by a certified copy from the records of the county court of Galveston county. But, by cross assignment of error, it is contended by appellees that a certified copy of a patent from the records of the county clerk's office was not admissible in evidence. It is held, however, by the supreme court, in Rio Grande & E. P. R. Co. v. Milmo Nat. Bank, 72 Tex. 467, 10 S. W. 563, that such a copy is subject to the same rules, as to its competency, as are copies of instruments duly recorded, save when offered to show a common source of title. The legislative confirmation of the grant was proven by certified copy of the special act, under the hand and seal of the secretary of state. It may be said, therefore, that the first link of the appellants' chain of title is established beyond controversy. But appellees here contend that the property involved in this suit is navigable waters, and therefore not subject to grant. There is nothing in this contention, for it is well established that a state may grant to individuals or corporations the soil of public navigable waters. Gould, Waters, § 36, and authorities cited in note.

The second link in appellants' chain of title, i. e. the decree of partition made by the district court on the 18th day of May, 1844, of the land between Jones and Hall, was proven by a certified copy of same from the minutes of said court.

The facts recited as constituting the fifth link in appellants' chain of title are established by undisputed testimony. But by cross assignment appellees contend that their objection to the introduction of the certified copy of the decree of the probate court of Galveston county allotting the land in controversy to Sallie S. Baylor should have been sustained, upon the ground that said decree of partition was not recorded in the records of deeds of Galveston county. This contention cannot be sustained. It is for the purpose of notice and protection of innocent purchasers for value that decrees of partition of real property are required to be recorded in the records of deeds in the county where the land is situated, and, as appellees are not purchasers, they were not affected by such decree, not being recorded in the record of deeds.

This leaves for our consideration only the third and fourth links in appellants' chain of title, i. e. the purported deed of trust made by Levi Jones and J. S. Sydnor to Oscar Farish and Pryor Bryan, trustees for the benefit of Joseph Emerson, and the purported deed made by Oscar Farish, as trustee, to J. S. Sydnor. Affidavit was made by appellant G. W. Baylor of the loss, search for, and inability of appellants to produce, the original instruments, and, as they were not properly authenticated for record, each being acknowledged by a party to the instrument, appellants undertook to prove their execution by circumstantial evidence. A proper predicate being laid for the evidence, it is well established that the execution of a deed may be proved by circumstances. Mapes v. Leal's Heirs, 27 Tex. 345; Stroud v. Springfield, 28 Tex. 663; Newby v. Haltaman, 43 Tex. 314; Bounds v. Little, 75 Tex. 316, 12 S. W. 1109; Id., 79 Tex. 128, 15 S. W. 225; Ammons v. Dwyer, 78 Tex. 639, 15 S. W. 1049; Brown v. Perez, 79 Tex. 157, 114 S. W. 1055; Holmes v. Coryell, 58 Tex. 685; Allen v. Read, 66 Tex. 17, 17 S. W. 115; Crain v. Huntington, 81 Tex. 615, 17 S. W. 243; Jones v. Reus, 5 Tex. Civ. App. 629, 24 S. W. 674; Johnson v. Lyford, 9 Tex. Civ. App. 89, 29 S. W. 57.

Among the circumstances introduced in evidence by the appellants to show the exe-

cution and contents of the trust deed of June 14, 1847, and the deed of May 22, 1849, are the following: The original record books from the county clerk's office containing the record of said instruments; evidence that the records of the instruments were wholly in the handwriting of Oscar Farish, then county clerk of Galveston county; that said Farish held said office continually from 1840 to 1869; that he was a careful clerk and copyist, well acquainted with Levi Jones, J. S. Sydnor, and their handwritings, had frequent business dealings with them, and, as county clerk, recorded many instruments executed by them, and was never suspected of transcribing a false instrument in said records; that Jones, Sydnor, Farish, and all parties and witnesses in said instruments, were long since dead, and that search for the originals thereof had been repeatedly and fruitlessly made; that Levi Jones, for many years after the execution of said instruments, lived on Galveston Island, and that he never, after the date of the deed made by Farish to Sydnor, claimed any part of the land conveyed thereby, nor paid any taxes thereon; that, after Sydnor's purchase at the trust sale, he went into possession of section 2, of which the land in controversy is a part, claiming it as his own, paying taxes thereon, and established a beautiful home upon it, where he resided with his family 9 or 10 years, after which he moved with his family and established a home on another part of said subdivision, and lived there for some time; that his title to the property was never questioned by any one from the date of his deed to the time of his death; that, after his death, the property covered by said deed was inventoried by the executor of his estate, who paid taxes on it, and claimed it as the property of the estate until it was allotted in the partition to the appellant Sallie S. Baylor; that it has ever since been claimed by Mrs. Baylor, and that for years she has paid, through her agents, taxes thereon, claiming the property as her own. There was other testimony introduced tending to show the execution and contents of said instruments, but we have recited enough to demonstrate that the trial court erred in withdrawing from the jury the issue as to their execution and peremptorily instructing a verdict against appellants; for which error the judgment of the trial court is reversed, and the cause remanded.

CALDWELL v. DUTTON et al.

(Court of Civil Appeals of Texas. Jan. 28, 1899.)

SALES—FRAUD—JUDGMENTS—MONEY DEMANDS—APPEAL—ASSIGNMENTS OF ERROR—FINDINGS.

1. A finding of the trial court on conflicting evidence is conclusive.

2. Where there is no request for findings, an assignment of error complaining of the court's failure to find certain facts will not be considered.

3. A party defrauded in the purchase of goods cannot retain the goods and escape his obligations on account of the fraud.

4. A seller, as was agreed, accepted notes of a third person in payment, but returned a portion of them, for indorsement by the buyer, who refused to return them, and, holding both goods and notes, sought to be relieved from the contract for fraud. The court adjudged the buyer liable, charged the seller with a note retained by him, ordered the buyer to return the notes, and gave a money judgment for the seller for the balance. *Held*, that the seller was entitled to a money judgment for the balance, after deducting the note retained by him, since, on refusal of the buyer to return the notes under the contract, the liability became a money demand.

Appeal from district court, Franklin county; J. M. Talbot, Judge.

Action by T. B. Caldwell against Dutton & Rutherford to recover for goods sold and delivered. There was a judgment, from which plaintiff appeals. Modified.

The appellant, T. B. Caldwell, brought this suit in the district court of Franklin county, Tex., by his petition filed on the 10th day of March, 1897, against H. O. Dutton and John L. Rutherford, composing the firm of Dutton & Rutherford, the appellees. The plaintiff's cause of action set out in his petition was for goods sold and delivered, amounting in value to the sum of $5,804.16, sold and delivered by appellant to appellees about the 6th day of January, 1897, in the town of Hubbard City, Hill county, Tex. The plaintiff pleads specially a contract of sale as follows, to wit: That said goods sold were a stock of goods in a storehouse in Hubbard City, exposed for sale at retail; that plaintiff sold to the defendants said stock of goods at the cost prices marked on said goods, to be invoiced at said market cost, and delivered to the defendants in said Hubbard City; that the defendants agreed to pay plaintiff for said goods certain promissory notes of other persons, secured by the vendor's lien on lands, at the stipulated valuation of $3,600, and, if the invoice of said goods should amount to more than $3,600, that defendants should pay the excess over $3,600 in cash; that, if said goods, by the invoice to be made, should amount to less than $3,600, then the plaintiff agreed to pay the defendants, in cash, the difference between such invoice and $3,600, the agreed valuation of the notes. And plaintiff alleges that the invoice of said goods at said agreed price amounted to the sum of $5,804.16; that the said goods were delivered to the defendants, and the defendants failed and refused to deliver to plaintiff the said notes and to pay the plaintiff for said goods. Plaintiff prays for judgment for the value of the goods. On May 13, 1898, the defendants filed their first amended original answer, consisting of general demurrer, general denial, and special answers as follows: (1) That the said sale was executory; that the said goods were to be shipped by plaintiff to defendants, at Mt. Vernon, Tex., subject to inspection; that the plaintiff warranted said goods to be good,

Sketch

File No. 47

Galveston County

Offatts Bayou Ruling

Filed August 4 1976

BOB ARMSTRONG, Com'r

By James E. McCarty

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