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FORT WORTH, TEXAS

May 1, 1913.

Mr. Ernest Von Rosenberg,
General Land Office,
Austin, Texas.

Dear Sir:

We beg to hand you herewith copy of the opinion of Judge Hendricks of the Court of Civil Appeals at Amarillo in the case of H. B. Crosby et al vs Stevenson et al. You will be glad to see that your department and particularly you have been vindicated in this litigation.

With best personal wishes, we are

Yours very truly,

Goree & Turner

Dic.BKG.

Howard B. Crosby, et al, Appellants

No. 410 vs

April 26, 1913.

N. A. Stevenson, et al, Appellees.

In deciding this cause, and the matter of boundary, the inserted map indicated the conflict involved in accordance with the Key and the light and heavy dotted lines manifested upon same; but the record is no voluminous with such a multitude of facts, it is difficult to illustrate the controlling issue, which of itself may be rather simple:- Surveyor Maddox in 1874, in accordance with a scheme of surveying, which began in Lipscomb county (the northeast county of the Panhandle), established in Hansford county (immediately west of Lipscomb), certain corners on and near Palo Duro Creek; and then ran west in the same county to what was then known as Rabbit Ear Creek, (now known as the Coldwater) and established several connecting corners on and near this creek, in Block No. 2, G. H. & H. Ry. Co. Survey, in the western portion of that county; and finally, and from one of these established corners on the Rabbit Ear Creek, in said block close to the west line of Hansford county, he continued on west and south in Sherman county following the west line of Block 45, in said county, and thence on to the Canadian river, meandering this river east into Hutchinson county, where north of said river, this land is situated:- and the identity of the river surveys relative to the matters involved here, are determined and affixed; this surveyor then projected, without any actual survey, Block 5-T, from his work on the Rabbit Ear Creek, in Hansford county,--tying the same to the southeasterly portion of Block No. 2 G. H. & H. Ry. Survey in said county, extending said block 5--T from said Block 2 down into Hutchinson county.

From the river base established upon the ground, this same surveyor, through intermediate surveys, projected north of the Canadian river the head right surveys partially shown upon this map, and designated as the Neil, the Hall, the Walters and the Bason; and the map first constructed by the Land Office, based upon the work of Maddox, of course indicated a vacancy between the said head rights and 5--T, as that block tied to Block 2, G. H. & H. Ry. Co. Survey, in Hansford County, with connections upon the Rabbit Ear Creek, and 5--T was never closed with and never intended to meet the head rights projected from, and connected to, the basic river surveys.

The extent of the vacancy between 5--T, with its connections on Rabbit Ear Creek, and the head rights connected to the Canadian river, could not, of course, become definitely known until actually surveyed. It seems, however, to be conclusive in this record that the head right surveys mentioned, constructed from the connections on the river, have never been in dispute and their relative positions from the identified points on the river, from the time determined by Maddox, have never been changed,--the variation of distance and location of these head rights by different work being so slight as to be immaterial.

After this work by Maddox in 1874, Surveyor Summerfield in 1879, put in Block R--2, tying it on to 5--T, and from this work another map was made by the Land Office, at the same time moving Block 5--T over a mile further north than indicated by the first map, (delineated upon the work done by Maddox,) moving it opposite and still north and east of the head rights, the "Neil" and the "Hall". This subsequent map still indicated a vacancy between the head rights (the Neil, the Hall, the Walters and the Bason) and Block 5--T; and in 1881 E. C. McLean, another surveyor, for the purpose of absorbing this vacancy, put in Block M--24 involved in this suit. The situation, according to the maps at the time McLean did his work, and the map measurement, resultant from same, placed 5--T at this time 1312 varas further south and 254-1/2 varas further east than was thereafter determined, which, of course, would make the real situation of that block that much further north and west;--and this real situation was determined by the State Surveyor Gray, assisted by Deputy Surveyor Spiller, who in 1890, by course and distance, from the correct connection on the Rabbit Ear Creek, in Hansford county, established 5--T and R--2 upon the ground. Sec. 135, in Block 5--T, the northwest corner of which was not directly ascertained by Spiller and Gray, but which was easily ascertain^{ed} by Twichell, from known points established by the former, from course and distance,--is not in dispute; and in 1908 W. D. Twichell, who made the survey, indicated by the light dotted lines, began at the actual northwest corner of 135 in Block 5--T, in order to obtain Survey M--24,--because McLean, in his field notes for Sec. 1 of M--24, when he surveyed it, twenty-seven years previously, said that said Sec. No. 1 began at that corner;--Twichell constructing Block M--24 according to the light dotted lines, and merging it into the heavy dotted lines of the old survey, when they coincide, as indicated by the map, covered the Day Land & Cattle Company survey, as therein shown and conflicted with the other sections of the old survey to the extent indicated;--the appellees contending in this cause that the real N. W. corner of Sec. 135 in 5--T, surveyed by Twichell, based upon Gray and Spiller's work, should control, as a beginning corner in the construction of M--24; the appellants asserting that McLean's northwest corner of 135, Block 5--T, as the beginning corner of Survey 1, Block M--24, is not known and further contending that Block M--24 should not be disconnected from the head rights on the west and south, for which M--24 also calls.

In putting in Block M--24, McLean in September 1881, by the field notes of Sec. 4 of that survey, fastened it to the Bason, the Walters and the Hall; For Sec. 3 in said block he called for the Neil at a point 752-1/2 varas north of the north line of the Hall head right, and then east 23-1/2 varas to the northeast corner of the Hall, making Sec. 3 conform to the jog in the lines of the Neil and the Hall; and he also tied Sec. 2 of that block to the Neil at a point 1429-1/2 varas on the east line of the William Neil, south from the northeast corner of same, and calls for the southwest corner of Sec. 1 of M--24, on the east line of the William Neil 1429 varas south from the northeast corner of that survey; and adding 1550-1/2 varas, gives the full length of the west line of Sec. 1, in M--24 and the northwest corner of same,--and 1212 varas east of that point is the northeast corner of Sec. 1 and the supposed northwest corner of Sec. 135, Block 5--T.

When Gray and Spiller surveyed Block 5--T from the proper connections on the Rabbit ear Creek, in 1890, and actually located it on the ground, the General Land Office moved that survey, and Block R-2 tied to it, to a point north and west in accordance with its actual location on the ground; but with its maps, the Land Office asserted the position of M--24 on the ground, maintaining its original status with the head rights to which McLean had fastened it and logically made it conform to Sec. 50, M--23, in said block on the southeast located by McLean in February 1882, and which was a part of a scheme of the McLean surveys, practically put in at the same time--the Land Office rejecting the survey of Twitchell; and while of course, the determination of that department upon past work, is not a determination of a grant previously made, we think, however, its action in this instance is clearly correct. 5--T, and R--2 tied to and following it, should be moved to an appropriate position according to its locations on the ground,--5--T begins in Hansford county and its to Block 2, G. H. & H. in that county and to the connections on Rabbit ear Creek, and were never tied to the head rights, as stated-- but because the beginning corner of Survey No. One, in Block M--24 begins to call at the northwest corner of Sec. 135 in 5--T, and because certain lines of other sections in M--24 call for R-2, it does not necessarily conclude that M--24 is to follow 5-T and R--2 and is to be torn from the head rights,--moved west entirely off the head rights and away from the Bason and Walters, and logically moving it from the scheme of some of the McLean surveys made practically at the same time; and necessarily, if it were not proper to tear M--24 from the head rights, and from M--23 and M--17 and 18, (to which latter three it inferentially belonged) a vacancy and not an excess was existent between M--24, and 5--T and R--2, which was covered in 1890 by the Day Land & Cattle Company's Certificate No. 21. If 5--T and R--2 were properly moved north and west, (which is admitted); and if M--24 was properly retained adjacent to the head rights (which is denied) this vacancy and not an excess properly existed and this certificate appropriated the land.

Block In determining the above question, as well as other conflicts, and in attempting to ascertain where McLean landed for the northwest corner of Survey No. 135, 5--T, it is noted that the distance between the northeast corner of the Neil Survey and the northeast corner of the Robert Sikes Survey (which is survey No. 54 M-23) is 1550-1/2 varas; and the original sketch returned by McLean to the General Land office, with his field notes of Block M-24, the northwest corner of Survey No. 1 in that block is just 1500-1/2 varas north of the northeast corner of the William Neil and we believe with appellants that at least if you consider his field notes and calls for the head rights, and according to McLean's conception of the northwest corner of Sec. 135, 5--T, that corner was located 1550-1/2 varas north and 1212 varas east of the northeast corner of the William Neil, considering the east line of the Sikes. In short, according to the conformation of the surveys,--that is the head rights and the Sikes in M--23, and the identity of distances around the surrounding surveys, according to calls, there is a coincidence in the mathematical results of the length of these lines, which without something fixed upon the ground, indicates very strongly an adherence by McLean to the southern work. If McLean, two years after Summerfield's work, actually established the northwest corner of Survey 135, in Block 5--T, at the place Twitchell

established it in 1908, (the latter following Gray and Spiller's work in 1890) the appellees' position would be sound. If they identify McLean's corner for 135 with the corner Twichell surveyed, it is done by conjecture without any evidence that McLean ever arrived at the same place in 1881;--we have to speculate where McLean ascertained the northwest corner of 135, if he surveyed it at all in attempting to locate that corner. Twichell, who erected appellees' survey, testified that his information was, that "if block 5--T was run out by course from the known corners on the Palo Duro in Hansford county, they do not occupy the same position as if located from connections on the Coldwater." When Gray and Spiller ran out 5--T in 1890 from the Colwater, it was found that Maddox (if not previously known) is establishing his corners on Rabbit Ear Creek, from connections he made on the Palo Duro, made a mistake of 1312 varas north and south, and 254-1/2 varas east and west; the only evidence we have of McLean is a statement to the Land Office as to his connecting lines for M--24; and it is not very clear just what McLean did,--except that it is clear he did not connect 5--T with the connections on Rabbit Ear Creek, and it is strongly inferable when you consider his whole statement, that he intended to connect M--24 to his other work on the south, the head rights on the west, as well as to connect with the established corners on the Palo Duro. He says in his certificate, ("On N side of river the surveys in B and B-2 were found and identified also surveys number 11 and 12, in Block H and the SE corner of Survey Number 11 in Block M-17, and NE corner of survey number 2, Block M--16.

The surveys in Block 5--T, block R and block M-16 and the surveys attached thereto, were located by careful connections made with well identified corners in block No. 45 for the H. & T. C. R. R. Co., they being the nearest controlling corners, that could be identified with absolute certainty, see field notes of surveys No. 32, 43 and 48 in Block 45 for H. & T. C. R. R. Co. in Hansford county, with which surveys connections were made. Careful connecting lines were run between the various surveys that were identified as hereinabove named and their respective and relative locations are truly set forth in the certain sketch 5, in the General Land Office on the 26th day of July, 1882, showing all surveys made by me previous to that date in Hutchinson county which sketch is hereby made a part of this certificate. The distances called for in the field notes returned by me are also referred to as evidence of the exact locations of all surveys found by me on the ground. All surveys not found by identifying corners or bearings were given the positions that course and distance from points that could be identified would give them except the surveys fronting on Canadian river. Filed 11/8/1882. Dated 18th day of Oct. 1882.")
("Dated 18th day of Oct. 1882.")

The southeast corner of Survey No. 11 in Block M--17 and the northeast corner of Survey No. 2 in Block M--18 were mentioned by him as having been identified in connection with M--24. Those sections were a part of the "various surveys" used by him in his connections for that purpose. The Land Office plat, "the certain sketch 5", filed by him July 26, 1882, and in this record, clearly exhibits Blocks M--17, M--18, M--23 and M--24, (the latter in controversy) as connecting by succession as adjoining surveys. After McLean surveyed M--24, there was a vacancy left by him upon the east

and southeast, afterwards absorbed by Sec. 50, in M--23, and the field noted for this section ~~xx~~ call for Surveys 28 and 30 in that same block, M--23, as well as the south line of 8 in Block M--24, and calling for the Bason, to which Sec. 4, M--24 is fastened. For survey 49 in Block M--23, not shown on this map, and which took up a part of the vacancy after he surveyed M--24, it is true he calls wholly for surveys in Block R--2, which it will be remembered is tied to 5--T; but it could not be contended with any degree of reason that Sec. 49 with or without a resurvey, should ever be torn out of Block M--23 and follow R--2 to the north.

When McLean says in his certificate with reference to connections for M--24, that the surveys in Block 5--T and Block R--2, ~~xxxxxxx~~ were located by careful connections made with well identified corners, in Block 45, on the Palo Duro in Hansford County, we cannot construe his statement to mean that he actually ran it out from the Palo Duro like Gray and Spiller did by course and distance from the Rabbit Ear Creek; there is not a trace of him in this record as to any such work and the probabilities from the evidence in this record, are strongly against it. When he says his "careful connecting lines were run between the various surveys that were identified" the surveys in Blocks B-- and B--2, 11, and 12, in Block H, and the common corner of surveys in M--17, M--18 were only meant--they were the ones identified; but he only says he "located" 5--T by careful connections made with the well "identified corners" on the Palo Duro. You may "locate" by careful connections "made with well established corners" without a survey on the ground. He ran "the other connecting lines between the surveys where were "identified", but his certificate does not say he ran from the Palo Duro to Block 5--T. He "located" it by "careful connections." However, assuming that he did actually survey to same point for the northwest corner of 135 in Block 5--T, to get the beginning corner of No. 1 in M--24, his field notes do not call for any object and this record is silent if he ever made any,--Twichell did not find any. Appellees have to assume that McLean arrived at the same place Twichell did, whose ~~xxxxxxx~~ resurvey they are relying on, when Twichell's survey is connected to the Rabbit ear, McLean's to the Palo Duro and an absolute absence of identity.

We believe a few simple principles with reference to the location and appropriation of grants will solve this question. Necessarily, "it is the purpose of the government and the locator to select a particular tract of land and designate it from the mass of the public domain." *Safford vs King*, 30 Texas, 259. Of course this appropriation in the order of strength and dignity, according to natural or artificial objects, or course and distance should control, where applicable; but it was begun to be declared as early as the case of *Hubert vs Barlett Heirs*, 9th Texas 104, that "there are many cases where the course and distance will control natural marks or boundaries, as where it is apparent on the face of the grant that these (natural or artificial objects) were inserted by mistake, or were laid down by conjecture and without regard to rule.." We all know they are not absolute rules of law, and as Chief Justice Gill expressed it in the case of *Gordon vs Fitzgerald*, 40 Civil Appeals, p. 626, "at most, they are rules of evidence and are relative in their application," and as Justice Gould expressed it

~~in the case of Gordon vs Fitzgerald, 40 Civil Appeals, p. 606, "at most, they are rules of evidence and are relative in their application", and as Justice Gould expressed it in the case of Robinson vs Doss, 53 Texas, p. 507, "to hold otherwise would be to give a greater importance to the rule itself than to the reason of the rule"; and while the applicability or non-applicability of the seniority of these rules, according to their strength and dignity, are not in question here for the location of the surveys involved, the principles enunciated are illuminative,--if an alleged controlling call in this case is clearly shown to have been a mistake, or is one purely conjectural; and in that case, "that rule must be adopted which is most consistent with the intention upon the face of the patent read in the light of the surrounding facts and circumstances."~~

Stafford vs King, 30 Texas 257. We think it is clear from ~~this~~ this record that the appellees' ground their case upon the beginning call of Survey No. One, Block M--24, beginning at the northwest corner of Survey No. 135, Block 5--T; --and although Block E--2 was originally tied to 5--T (to which former Block, R--2) some other surveys in M--24, are tied,--still the solution of the location of Block M--24 "hears" back to 135, 5--T, and appellee claims under a re-survey by Twichell in accordance with that theory. In a sense there is a partial break in the calls of the sections by McLean in M--24, all the sections in said survey not having been consecutively tied to each preceding section in every instance, but M--24 is shown conclusively to have been a homogenous survey by him and cannot be torn apart, and they have necessarily so treated it.

"The order in which the surveyor gives the lines and corners in his certificate is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate." Phillip vs Ayers, 45 Texas 601. Again quoting the Supreme Court for the principle only there invoked:--

"Appellee relies upon the oft announced doctrine, that the actual identification of the survey, the footsteps of the surveyor upon the ground should always be followed by whatever rule they may be traced. Stafford vs King, 30 Texas 257. This doctrine, however, cannot be invoked unless the facts show it to be applicable. The actual survey must be found and identified. The footsteps of the surveyor must be traced before course and distance should be ignored. Anderson vs Stamps, 19 Texas p. 465. Robertson vs Mosson, 26 Texas 248. To extend the east and west lines beyond the distance stated in the patent, it devolved upon the appellee to prove that a line north of that claimed by appellant was actually traced by the surveyor." Williams vs Winslow, 84 Texas p. 376. While this is not so much a case of extending lines as it is one of changing them entirely, and reconstructing practically a different survey by tearing lines from what is ascertained to be known and placing them at a place, where it is not shown that the Surveyor knew existed; however, we think the principle in the Winslow case, supra, applicable.

With reference to the determination of the relative importance of locative calls, designations for "adjacent surveys" are within the category of artificial objects in determining the boundaries of grants. Phillips vs Ayers, 45 Texas, p. 606.

It is true we have no evidence here that the head rights, at the time McLean made his survey of M--24, were marked and well known upon the ground, which condition evidently has to occur to fully invoke the principle of calls for adjacent surveys as con-

trolling calls; however, this evidence is replete with the suggestion that at the time he made said survey, and subsequently, from the maps and field notes the head rights could be easily located. If he assumed the proper locations of these head rights, which he, of course, did, otherwise it was his duty to have run them out before he tied on to them as the vacancy to the north and east of them was what he was after,--his assumption was correct; although he may have assumed the position of the head rights in his calls for adjacent surveys,--still this record showing such easy ascertainment from the bearings upon the river 12 or 13 miles away of the correctness of said head rights, the appellant's proposition is analagous to the position, and almost complete, of making the unknown yeild to the known. Sanborn et al vs Gunter and Munson, 84 Texas p. 297.

Again, on this particular proposition, the authorities are settled "that the beginning corner in the plat or certificate of survey, is of no higher dignity or importance than any other corner of the survey." Phillips vs Ayers, 45 Texas, p. 607. Of course this principle is like many others,--applicable to locative grants. A beginning call, as well as an intermediate call, may be the controlling call, "read in the light of the surrounding facts and circumstances.; but here, we have no light by the surrounding facts and circumstances to make this beginning call important, or even of equal dignity with the other calls for the head rights, and our judgment is that the other calls should prevail.

The defendants, Stevenson, and McFarland and specially pleaded an agreed boundary with the appellants Crosby and Hatcher, and we do not think the evidence sufficient to prove the issue. There seems to have been some agreement in writing, not introduced in evidence, as to the settlement of the lines by the surveyor Twichell, providing for a re-survey of the land. Mr. Twichell testified, "In tying M--24 on to R--2 and 5--T, I followed the calls of McLean's original field notes and ran course and distance called for in those field notes." On analysis he means, of course "course and distance" from the northwest corner of 135 M--24, in accordance with the Gray survey, and as we held, without any proof, that McLean ever arrived at that point; in a letter to Judge S. H. Cowan of Ft. Worth, in explanation of his work, among other things, he said;--"I ran the block out from this beginning (meaning the northwest corner of 135, Block 5--T) ignoring the calls for head rights on the west as they could be reached by no other course nor distance. All the settlers agreed to abandon the calls on the west and south and accept course and distance and the state contended that the land in which they still have an interest could not be held the excess under the original field notes." There is no testimony in this record that Crosby and Hatcher agreed to disregard the calls on the west and south and ~~ignore~~ ignore the calls for the head rights and run out M--24 in accordance with course and distance with Gray's survey and Mr. Twichell did not so say on his examination with reference to Crosby's participation in the matter, with whom he had a conversation in regard to same, but summed up the matter finally by saying, "as to what I instructed Crosby I was to do, I was to retrace the lines of the original surveyor as near as science would enable me to do it,--I was intending to retrace the lines of the original

surveyor", which the evidence does not show that he ever did. If appellees are dependent upon any agreement with Crosby, by letter or otherwise, for the purpose of binding Hatcher, there is not sufficient agency shown that Crosby, who was a joint owner of the land with Hatcher, could bind him. It is true the testimony does ~~not~~ show that Hatcher agreed to a removal of the fences, and instructed Stevenson to move the lines made by Twichell, but it is not shown that this was in accordance with the agreement the other settlers ~~made~~ had with Twichell to disregard the calls for the head rights, and survey the land only by course and distance from B-S and S-T.

It is also true that Stevenson said that he did not agree with any of them as to the manner in which Twichell was to run out the lines, and further said, that "Mr. Hatcher and I signed an agreement as to the lines--that they should be where Twichell set them; the only agreement I had with these men was in writing." The whole record is cogent with the idea and deducible direct from Twichell's testimony that he arbitrarily disregarded the calls for the head rights, and the theory that M--24 should be run out so as to retain its position with the southern work; he testified explicitly, "that they (meaning the appellees) agreed to abandon all calls for the head rights on the west and south" in addition to what he wrote to Cowan. While Stevenson might not have agreed directly as to the manner in which Twichell was to run out these lines, the record convincingly bespeaks another agreement, distinct from any written agreement--to the effect that the head rights, on the southern work should be disregarded entirely. The principal explanation we have as to what constituted the written agreement is contained in the letter from Twichell to Cowan, mentioned above, where he says:--"I have surveyed practically all the land north of the Canadian and south of Block 5, doing the work for Mr. Munson and others, myself working as State Surveyor, regularly appointed under the Act providing for such work in the Acts of 1887, Title 99 (89) R. S. 1895. This Act is referred to in my corrected field notes. Aside from this Act, the land owners in M--24 all signed an agreement to make the general survey under the Act referred to for the purpose of determining the correct line. I think your client signed this agreement and that would probably prevent further difficulty."

Mr. Twichell, in his corrected field notes of M--24 upon which appellees depend, does say that the survey was made by him "as State Surveyor by virtue of Title 79 (meaning 89) Chap. 1, R. S. Civil Statutes of 1895", which Act clearly contemplates that the corrected survey shall be accepted by the Land Office, which was never done in this instance; and if this written agreement for Twichell "to make the general survey under the Act referred to" was the only agreement Stevenson made, or the others ~~xxx~~ for that matter, the acceptance by the Land Office of this re-survey is a precedent condition to the consummation of the agreement, unless waived by Hatcher and Crosby. If the side agreement was made to disregard the other calls in constructing the survey, and the written agreement embodies the legislative act, under which Twichell as State Surveyor made the survey, and this present record forces us to that conclusion, the evidence must show acquiescence by Crosby and Hatcher in the collateral agreement and a waiver by them of the other, and when Hatcher instructed Stevenson to move the fence, he was not aware of the other agreement, and did not waive by his acts the failure of the Commissioner of the General Land Office to accept Twichell's survey, he would not be bound,--

waiver imports knowledge and circumstances not in this record. This discussion is referable to the matter of agreement only;-- as to the matter of acquiescence after the fence was moved, the testimony shows correspondence with the Commissioner of the General Land Office in regard to his acceptance of the survey in the year 1909, and this suit was filed in September 1911. It is not incumbent upon us to discuss acquiescence to prove agreed boundary or acquiescence distinct of itself; we hold this evidence insufficient.

We have concluded to reverse and remand this cause as a whole without intending to disturb the judgment previously rendered in the cause of Geo. B. Lucas vs Geo. G. McFarland, No. 396, on the docket of this court. We disposed of that cause in accordance with the field notes and the matters there presented and it can take care of itself, and if the evidence of agreed boundary is the same in this cause, upon another trial, as in this trial this case is remanded with instruction to render a judgment in accordance with this opinion. Reversed and remanded.

Hendricks, A. J.

Filed April 26, 1913.

Clerk.

W. J. Spencer et al
vs
Howard W. Croaph et al
in Cause No 410
Judge A. Hendricks opinion

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Apr 26 1913

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Judge Asthendricks opinion
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Howard N Crosby, et al,
- vs -

W A Stevenson, et al.

Dated May 1, 1913.

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Filed April 26, 1913.

Hendricks, V. J.

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