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PLAINTIFFS HAVE NO TITLE TO ANY PORTION OF THE BED OF THE CANADIAN RIVER

STATEMENT OF FACTS

Plaintiffs claim that they have some right, title or interest in the bed of the Canadian river due to their ownership, through award and patent, ~~to~~ Section 64, Block 46,H&T.C.Ry.Co.Survey, Hutchinson County, Texas.

This section was first surveyed in 1874 by Francis M. Maddox. It was an office survey based on information from other surveying done in the same area. This office survey has consistently been held incorrect. Phillips Pet. Co. v. State, 63 S.W.2d 737 (Tex.Civ.App.1933); Sanborn v. Gunter and Munson, 84 Tex. 284, 17 S.W.117, 20 S.W.72.

A resurvey and the first ground survey of Block 46 was made by George Spiller in 1888. This survey meandered the stream in its northern calk. Patents to the odd-numbered blocks (railroad blocks) were issued on the basis of the Spiller field notes.

Spiller's field notes, or Section 64, read, in part, as follows:

> "Beginning at a stake on the south bank of said river set for nothwest corner No. 63 and northeast corner this survey from which a cedar on bluff bears S 46 1/4 E. Thence with the meanders of said river S 31 W. 523 varas and S. 55 W. 630 varas to a stake on said bank for northwest corner. . . ."

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In 1900, Benjamin G. Miller, predecessor in title to the plaintiffs, made application to purchase Section 64. Proof of occupancy was made in 1903. The section was awarded to Miller on April 21, 1900.

On February 25, 1926, H. T. Trigg resurveyed the area ~~in 1926~~. His survey was made by triangulation from the back lines of the Block and is an office survey. Between the time of the Spiller survey and 1926 the river had widened to a considerable degree. Trigg's field notes, which make no mention of the river or river bed, read in part:

> "Beginning at the NW corner of Survey No.63, Block 46, H. & T.C.R.Co.; thence S 31°W 523 vrs., S 55° W. 830 vrs; thence W 11 vrs., thence S. 16°20' W. 3457.7 vrs; thence S 89°53' E. 955.9 vrs.; thence N. 16°20' E. 4380.1 vrs. to beginning of the tract."

The survey was patented to Miller on April 18, 1927 on the basis of Trigg's field notes.

AT THE TIME OF THE AWARD AND THE TIME OF THE TRIGG SURVEY, THE NORTHERN BOUNDARY OF SECTION 64 WAS THE CANADIAN RIVER BANK.

Spiller, in his survey in 1888 intended to make the river bank the boundary of the survey and meandered the river bank. His field notes read, "Beginning at a stake

on the south bank of said river. . . Thence with the meanders of said river . . . to a stake and said bank. . . ."

It is a well established rule that meander lines of surveys of land adjacent to or bordering on a stream are not the boundaries, but the boundary is the stream.

In Stover v. Gilbert, ___ Tex. ____, 247 S.W. 841 (1923) the rule is stated in the following language at page 843:

> "It is a rule of general acceptation that meander lines of surveys of land adjacent to or bounding upon a stream are not to be considered as boundaries, but they are to follow the general course of the stream, which in itself constitutes the real boundary."
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> ". . .
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> "The rule is concisely stated in Corpus Juris, Book 9, p. 189, as follows:
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> "'The general rule adopted by both state and federal courts is that meander lines are not run as boundaries of the tract surveyed, but for the purpose of defining the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey. The stream, or other body of water, and not the meander line as actually run on the ground, is the boundary, the purpose of meander lines being merely for the benefit of the government in ascertaining the quantity of land in the survey for which it requires payment.'
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> "In Ruling Case Law, book 4, p.97, the same rule is expressed in this landugage:
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> "'In surveying land adjacent to a stream, whether navigable or not, lines are often run from one point to another along or near the bank or margin of the stream, in such a manner as to leave a quantity of land lying between these lines and the thread or bank of the stream. These are called meander lines, and they are not the boundaries of the tract, but they merely define the sinuosities of the stream which constitute the boundary, and as a general rule the mentioning of

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in a deed or grant of a meander line on the bank of a river as a boundary, will convey title as far as the shore unless a contrary intention is clearly apparent."

"We select from the authorities only a few cases, as follows: Galveston County v. Tankersley, 39 Tex.652; Burkett v. Chestnutt (Tex.Civ.App.) 212 S.W. 271; Griffin v. Barbee, 29 Tex. Civ.App. 325, 68 S.W. 698; Hardin v. Jordan, 140 U.S.371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N.E.296, 12 L.R.A.(N.S.) 690; City of Los Angeles v. San Pddro, L.A. & S.L.R.Co.182 Cal. 652, 189 Pac. 449; Stonestreet v. Jacobs, 118 Ky. 745, 82 S.W. 363, 1012." ~~82x3xWx363x 1012x~~

This rule is of universal application and has been applied in many Texas decisions, as well as in decisions of the Supreme Court of the United States.

Rosetti v. Camille, 199 S.W.526 (Tex.Civ.App.19___)

Graham v. Knight, 240 S.W. 981 (Tex.Civ.App.1922)

State v. Atlantic Oil Producing Co., 110 S.W.2d 151, (Tex.Civ.App.1937)

Oklahoma v. Texas, 268 U.S. 252 (1925)

The Texas courts have held that where the river is meandered there is no question of fact but that the question of whether the river, rather than the course and distance lines, constitutes the boundary is one of law for the courts. State v. Atlantic Oil CO., 110 S.W. 2d 151 (Tex. Civ.App.1937) and cases cited therein.

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As accretion and erosion apply to a riparian survey, the river bank was still the boundary at the time of the award.

Land included within a riparian award is, of course, subject to accretion and erosion. Manry v. Robison, Tex. , 56 S.W.3d 438 ( ); Sharp v. Womack, Tex. , 93 S.W. 2d 712 ( ). The award was made on the basis of ~~x~~ Spillers' survey which at the time of the award in 1900 had for its northern boundary the river bed.

At the time of the resurvey of Section 64 by Trigg in 1926, the land included within the survey and the award was bounded on the north by the Canadian River.

The resurvey was unauthorized and invalid insofar as it might have land in the river bed at the time of the resurvey.

Article 5305, V.C.S. (Acts 1871, I.C.S., p.11), which was in effect in 1926 at the time of the resurvey reads:

"The Commissioner shall cause a plain statement of the errors in any field notes in in the land office with a sketch of the map, to be forwarded by mail, or by the party interested, to the surveyor who made the survey, with a requisition to correct and return the same; and said surveyor shall do so at once without further charge."

On February 10, 1926, Mr. Dudley, attorney for E. B. Johnson, predecessor in title of the plaintiffs, wrote the Land Commissioner requesting a statement as to the amount due in order to patent Section 64, Block 46, and other lands. J.H. Walker, the acting Commissioner replied as follows:

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"I have yours of the 10th instant, giving a list of school land sections in Hutchinson County which you desire to pay out and have patented, and you want advice from this office as to the full amount of principal, interest and fees.

"I have made a preliminary examination as to the field notes for the various tracts on file here to see whether or not we have sufficient field notes on which to issue patents, and in view of the fact that most all the tracts will have to be resurveyed I do not send you a statement at this time.

". . .

"Corrected field notds will be required for Section 64, 66,68,70,72 and 74 of Block 46, H. & T.C. Rwy Co., 2,4, and 6, Block 1, B&B, 20,22,28,30,34,36, and 40, Block Y, A&B on account of excess.

"Now inasmuch as corrected field notes for a number of these surveys are required, I do not make a statement on the first five mentioned tracts above, but suppose you will want to patent all of the tracts together. You understand no filing fees will be required on any of the field notes called for except for the W 1/2 of 38, Block Y. When the corrected field notes are filed, I can determine the exact acreage and then make you up a statement showing the amount required to pay out each tract and also give you fees and advice as to whom the patents will issue to."

Therefore, in accordance with Art.5305, the Commissioner required field notes on Section 46 for the purpose of correctly showing excess. No other changes in the survey were required or authorized. As the original surveyor was unavailable it was left to the prospective patentee to convey the instructions to the surveyor doing the work.

We, therefore, see that Mr. Trigg was authorized to survey only for the purpose of including excess.

Trigg knew, or should have known, that he had no authority to extend the survey into the river. On May 19, 1922, Trigg filed in the General Land Office corrected field notes of 358 acres covering a portion of Section 16, Block 47, H& T.C.RR Survey, another survey in these blocks. These corrected field notes went into the river bed and encompassed a portion thereof. The Land Commissioner directed that these notes be corrected to go to the river bank. Trigg knew, or should have known, that these same instructions would apply to Section 64. It is interesting to note that Trigg's field notes of Section 64 , his letter and map sent therewith nowhere indicate on their face that he crossed the river bank.

Mr. Trigg was not authorized to resurvey Section 64 except for the purpose of apportioning the excess and his resurvey is ineffective to accomplish any other purpose.

Nor can a resurvey include any land not within the original survey. In State v. Post, Tex. , 169 S.W. 407 (1914), the Supreme Court said that "neither the commissioner nor the surveyor had authority to so change the said field notes as to embrace land not included in the original survey." In this case the original survey was bounded by the river

bed and the resurvey should have followed the meanders of the stream at the time of said resurvey.

In Weatherly v. Jackson, Tex , 71 S.W.2d 265 (1934) Judge (then Commissioner) Smedley stated,

> "It is not to be assumed that the corrected survey included any land not included within the original survey, for if it had it would have been to that extent unauthorized."

The proposition that a surveyor cannot include land to which the awardee or patentee is not entitled in a resurvey is also recognized in Turner v. Smith, Tex. , 61 S.W.2d 792, 801 (1933); Post v. State, Tex. , 171 S.W. 707, 708 (1914); and Brooks v. Slaughter, 218 S.W.633, 634, 635 (Tex.Civ.App.1920).

> The patent to Johnson does not by its terms include any part of the bed of the Canadian River.

The resurvey by Trigg and the patent describe Section 64 as follows:

> "Beginning at the N.W. corner of Survey No. 63, Block 46, H. & T.C.RRCo.; Thence S. 31°W.523 vrs., S.55° W. 830 vrs; thence West 11 vrs; thence S 16°20' W. 3457.7 vrs.; thence S. 89°53'E. 955.9 vrs.; thence N. 16° 20' E.4380.1 vrs. to the beginning corner of this tract."

In this description there is only one point from which to construct the survey, <u>the beginning point</u>. No other

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point is described other than by courses and distances from the beginning point.

In determining the location of Section 64, it is necessary to refer to the description given rather than the intention of the surveyor. Blackwell v. Coleman County, 94 Tex. 216, 59 S.W. 530 ( ); Weatherly v. Jackson, Tex. , ___ S.W.2d ___ ( ). The testimony of the surveyor as to his intention is not admissible. Blackwell v. Coleman County, supra. Therefore, even if Trigg intended to extend the survey into the river his intention is irrelevant. The field notes of Section 63 last surveyed in 19___ read as follows:

This survey calls for a meander of the stream. This call of course controls over the courses and distances and the northwest corner of Survey 63 is on the bank of the river. The resurvey of Section 64 starts at this point.

By st arting at the northwest corner of Survey 64 and running course and distance, the survey includes no portion of the river bed. Even if the calls could be reversed no different result would be reached. There are no points

from which to begin on any of the lines or at any of the corners other than at the beginning point. To reverse the calls from the beginning point would reach the same result.

To construe the field notes of Trigg as including a portion of the river bed two presumptions must be overcome. First, it is presumed that a survey does not go into the river. Phillips v. Ayres, 45 Tex.601 ( ). Secondly, it is presumed that the surveyor dod not include in the resurvey land not included in the original survey. Weatherly v. Jackson, Tex. , 71 S.W.3d ( ).

Article 5329(a) is not applicable to this case.

The first one-year statute was passed in 1905 to aid the State in its policy of selling school, university and asylum lands. (Acts 1905, ch.29 p.35). This Act was interpreted in the case of Erp v. Tillman, 103 Tex. 574, 131 S.W. 1057. On page 1061 of this case the court said:

> ". . . It ought not to be forgotten, though it often is, that the interests of the two contestants over school land which has been sold to one of them, are not the only ones involved. The State has an interest in the maintenance of sales made for the benefit of its school fund, and it was largely to give such protection that this statute was passed. . ."

A new act was passed in 1921 by amendment to Article 5435, R.C.S. 1911, which applied to the State as well as to natural persons on all sales of school and asylum lands without condition of settlement. Acts 1921, R.S.,Ch.57,p.118. This new

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act was carried into the 1925 revision in its present form, being Article 5329, R.C.S., 1925. Articles 5458 and 5459, R.C.S.1911, which embodied the 1905 Act and applied to school, university and asylum lands, were no longer needed for school and asylum lands and so now appear as Article 2603, R.C.S. 1925, relating to University land alone.

Article 5329 is a part of Title 86, ch.3, 1925 Revision. This chapter relates to "surface and timber rights." The first provision of Chapter 3 reads, in part:

> "Article 5306. Sale and lease of public lands provided for
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> "All lands set apart for the benefit of the public free schools, the lunatic asylum, the blind asylum, the deaf and dumb asylum, and the orphan asylum shall be sold and leased under the provisions of this chapter."

Article 5329, the next to the last provision of this chapter of the revised statutes, relates to the transfer and patenting of school and asylum lands after purchase.

The one year statute, which is the next to the last sentence in Section 4, supra, relates to a specific price of school and asylum lands, those sold "without condition of settlement."

> "No sale made without condition of settlement shall be questioned by the State or any person after one year from the date of such sale."

In the case of State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065, the court on page 1073 discussed the history

of legislation pertaining to river beds and channels of navigable streams and concluded on page 1075 that the Settlement Act of 1900 did not place river beds under the school fund and used the following language:

> "By referring to the act of 1900 it is found to contain no specific language setting apart to the school fund river beds and channels of navigable streams. At most the language used is general and, because of the general language used in the act, it is contended that it embraced river beds and channels. Likewise, it will be found that in the act of 1913 general language was used, and it was contended that, by reason of the use of such language in that act, which could be construed to include river beds and channels, it was the intention to include them in the act and make them subject to sale or lease for minerals, as provided for in the act. It will be noticed that the acts mentioned do not contain specific language that river beds and channels were embraced therein."

The Court also concluded that Section 2 of Article VII of the Constitution did not place one-half of the public domain, including beds and channels of navigable streams in the permanent school fund, and used the following language:

> "We have carefully considered that section of the Constitution, and find no language contained therein which discloses the intention of the makers of the Constitution to appropriate beds and channels of navigable streams to the school fund."

Article 5414a is not applicable to validate this patent even if it did extend into the river.

Article 5414a was passed on March 3, 1929 to validate all patents to and awards of land lying across or partly across water courses or navigable streams which had been issued and outstanding for a period of 10 years. It is the argument of the State that the statute was intended to apply a retrospective application and was never intended to apply to validate grants or patents which had not been in existence 10 years at the date of the passage of the act.

In the case of State v. Bradford, supra, page 1072 the court said:

> "It is therefore shown that the Small Bill expressly purports to be retrospective and to validate the titles to lands whose surveys have heretofore been made across streams, now claimed to be navigable, and which had theretofore been awarded or patented . . ."

As early as 1837 the Republic of Texas defined a statutory navigable stream and clearly stated that such a stream shall not be crossed by the lines of any survey. This early statute is now incorporated in Article 5302, V.C.S. This clearly stated a long standing policy to save the river beds and channels as the property of the State and its people, and this present policy is still in effect today. Article 5302, V.C.S. Article 5414a, V.C.S., however, was passed mainly to validate surveys located in West Texas because

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the greater part of the blocks was laid outfrom the railroad grant and were office surveys and the surveys unintentionally ran across a number of streams, since the surveyors did not know the true positions of the rivers, and due to the arid and _____ conditions in that area at the time the surveying was done, the suveyors did not have the time or equipment to definitely locate the rivers.

State v. Bradford, supra, page 1069 says:

"It is a matter of common knowledge that these

> surveys were generally located in large blocks, that the railroad companies received the odd numbers of the sections and the school fund the even numbers, and that rarely, if ever, were the lines of each section actually run on the ground; the method usually followed by the surveyor being to run and make a base line for an entire block and on this line block and plat a system of 640 acre surveys. For these reasons might it not be urged, with some force, that the surveyors were not impressed with the future to which this part of the state might and did attain, and were not as careful in making their surveys as they might have been had they known that in due course of time it would support substantial towns, villages, cities and schools? Because of the conditions that existed at the time the surveys were made should the rights of the whole people of the state in lands under waters and navigable streams be waived or destroyed?"

The same conditions obviously did not apply in 1929 when the statute validating the surveys was passed. The area was well settled and rich with oil. Cities were established all throughout the area and surveyors were familiar with the rivers and their locations. Article 5302 continued to be the law and the policy as stated by the Legislature, and no part

has ever been repealed by inference or by direct holding.

Article 5414a is not applicable to validate a survey which "tops" into the river since such a survey is neither "across or partly across a navigable stream."

Trigg's survey in 1926 was at most an attempt to resurvey a section which had been granted on field notes which went to the edge of the river. Therewas obviously no attempt on the part of Trigg to cross the river or to partly cross the river. The statute was passed to validate the old railroad surveys which did not know the location of the river and as a consequence ran across the river. It was also applicable to surveys which ran partly across the river and the legislative intent was to validate the older railroad surveys which slide off a part of the river as the line moves on. It was never intended to apply to a survey made in 1926 which was at best a resurvey of a section of land and made no attempt to cross the river.

HUTCHINSON COUNTY SKETCH FILE NO. 40

Plaintiffs have no title to any portion of the bed of the Canadian River.

Statement of Facts

Re: Section 64, Block 46, H&TC RY CO, Hutchinson County.

Filed: July 18, 1952

PHOTO $7.50

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