

THE STATE OF TEXAS,)
 No. 12,293. vs.) In District Court of Travis
 THE LEON & H. BLUM LAND CO.,) County, for 26th Jud.
 ET AL.) Dist, October Term, A.D.1898.

This is a suit by the State of Texas, acting through her Attorney General, as plaintiff, against the Leon & H. Blum Land Company, a private corporation, and others, as defendants, in the form of "Trespass to try title", to recover 1012 Sections of Land of 640 acres each, described in Plaintiff's Petition, and situated in Yoakum and Terry Counties, constituting the entire County of Yoakum and the western one-third of Terry County.

The defendants disclaim as to all the even numbered or school sections so sued for, and as to the remainder plead a General Denial and Not Guilty.

The plaintiff, by Supplemental Petition, alleges that the defendants claim the land in controversy by virtue of the location of certain Certificates issued by the Commissioner of the General Land Office of the State of Texas to John H. Gibson for work claimed to have been done by him in cleaning out the San Bernard River and a portion of Caney Creek in said State under and by virtue of the following Act of the Legislature of said State, approved March 13, 1875, to-wit:

" An Act to improve the navigation of Oyster Creek, Bernard and Cany.

Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS, That a board of three commissioners, any two of whom may act, be appointed by the Governor for each of the following streams: Oyster Creek, Bernard and Cany; said commissioners to be selected from the inhabitants living on said streams, who are hereby constituted with full power to superintend, contract for and control the opening

and clearing out said streams in this State;

Sec. 2. That the said board of commissioners so appointed shall, within six months from the date of the passage of this act, enter into contract with solvent, responsible and experienced contractors, to open and clean out a channel in said rivers and creek, at least sixty feet wide, by cutting or sawing off, digging out, or otherwise removing all obstructions below what is now considered too low water for navigation, and to girdle or cut down all trees likely to obstruct the navigation of said rivers or streams, for each and every of said streams, from the mouths of the same to head of navigation on each; also, for cutting canals through shoals, oyster banks, bend or bends of said rivers.

Sec. 3. That the Governor of the State is hereby authorized and required to appoint a competent engineer to examine and pass upon each mile of said stream or streams so opened and freed from obstruction, who shall, under oath, file a certificate with the Comptroller, after he has inspected said work, setting forth the number of miles worked on in said streams, opened and cleaned out, as required by this act; and for each and every day actually employed in inspecting said work so done on said stream or streams, the said engineer shall be entitled to receive the sum of eight dollars per day, to be paid by the contractor or contractors.

Sec. 4. That upon the filing of the certificate of the engineer, as provided for in the third section of this act, the Commissioner of the General Land Office shall issue, or cause to be issued, to the contractor or contractors who shall have done the work, for each and every mile of said stream or streams so opened, eight certificates, each for six hundred and forty acres of land; said certificates issued

under this act shall be located in alternate sections, the even sections being reserved to the school fund, as other lands granted in aid of other works of internal improvement under the laws regulating the same, on any of the unappropriated or previously unsurveyed or unlocated land of the State; Provided, Always, that the State of Texas shall not be responsible for deficiency of public domain.

Sec. 5. That said contractor or contractors shall complete the work by the first day of December, A. D. 1876.

Sec. 6. That the land obtained under the provisions of this act shall be alienated within sixteen years; and a failure to comply with the provisions of this section shall work a forfeiture of all lands not alienated as required by this act; and the engineer appointed under provisions of this act shall be paid by the contracting parties.

Sec. 7. That this act shall take effect and be in force from and after its passage.

Approved March 13th, 1875. "

Plaintiff alleges that under the provisions of said act the contractor was required to clean out a channel in said stream for the width and in the manner provided in said act and contract for said streams, but that the work was not done as provided for in said act and contracts, nor was there any substantial compliance by said contractor with said act in doing work on said streams, and on a considerable portion of said streams, for the cleaning out of which certificates were issued, no work was done at all, and that the engineer and agents of the State, whose duty it was under said law to examine and pass upon the work so done, did not perform their duties under the law, but fraudulently colluded with the contractor and falsely certified that said contractor had cleaned out the San Bernard River for a distance of 55 3/4 miles and the Caney Creek for 13 3/4 miles in the manner called for in said act and by means of said false certificate of said engineer

and other false representations of said contractor and his agents and representatives, said certificates which were located upon the land in controversy in this suit were procured to be issued, under which locations defendants in this suit claim.

Wherefore, plaintiff says that because of the failure of said contractor to comply with the law under which said certificates were issued, and of the fraud practiced to secure their issuance, the same should be cancelled and the land located thereby recovered by the State.

The defendants answer this Supplemental Petition by a General Denial.

The questions of fact, as well as of law, being submitted to the Court, without a jury, I find the following to be the facts shown on said trial by the evidence, to-wit:

(1) That the law as set out in plaintiff's supplemental petition was passed by the Legislature of Texas, and approved on March 13, 1875.

(2) That T. A. Washington was at that time an engineer, and, under said act, he was appointed by the Governor of the State of Texas to inspect and pass upon the work involved in this controversy, and had issued to him the following commission:

" In the Name and by the Authority
of
The State of Texas.

To all to whom these Presents shall come:

Know ye, That I, Richard Coke, Governor of Texas, reposing special trust and full confidence in the integrity

and ability of T. A. WASHINGTON, of the County of Galveston and State of Texas, do, by virtue of the authority vested in me, by an act of the Legislature, entitled "An Act to improve the navigation of Oyster Creek, Bernard and Caney", approved March 13th, 1875, constitute and appoint him, the said T. A. WASHINGTON, examiner, to examine and pass upon each mile of said stream or streams, so opened and freed from obstruction; giving and hereby granting to him, the said T. A. WASHINGTON, all the rights, privileges and emoluments appertaining to said appointment.

In discharging his duties under this commission, the Inspector is instructed to be governed by the opinion of the Attorney General, a copy of which is herewith enclosed, and to review the work heretofore done by the contractors; and when not done in accordance with the Law, or their contract, to require all deficiencies and shortcomings properly removed, so as to bring it up fully to what should have been done. He is further instructed, whenever an inspection is to be made of work, to make it in the presence of the commissioners, or a majority of them, and when he and the commissioners or a majority of them, may differ in opinion as to any point growing out of or connected with the work, that the view of the commissioners shall control.

The said T. A. WASHINGTON is also instructed, whenever an inspection is made, to report his action through this office, to the office named in the Law.

In Testimony Whereof, I have

hereto signed my name and caused the Seal of State to be affixed, at the City of Austin, this 2nd day of October, A. D. 1876.

(signed) Richd. Coke,
Governor.

(L. S.)

By the Governor:

(signed) A. W. De Berry,

Secretary of State. "

(4) That under said act, John Adriance, J. C. McNeil and J. H. Shappard were appointed by the Governor to act as commissioners on the San Bernard river to contract for and superintend the cleaning out of the same, and that J. K. White, H. W. Bowie and Felix Gibson were appointed like commissioners for Caney Creek.

(5) That J. H. Shappard and J. C. McNeil, two of the commissioners for the Bernard river, made and entered into the following contract, to-wit:

" State of Texas,)
County of Brazoria.) This Indenture made and entered into this the 24th day of May, A. D. 1875, between John Adriance, J. C. McNeil, and J. H. Shepard, commissioners appointed by his Excellency Richard J. Coke, Governor of the State of Texas, to contract for removing obstructions to the navigation of the Bernard River of the first part, and J. H. Dance & Andrew Bunker and such other persons as the said Dance & Bunker may associate with them of the second part

Witnesseth, that the parties of the first part have contracted with, and do hereby contract with the parties of the second part to open and clean out a channel in said Bernard River at least sixty feet in width by cutting or sawing off, digging out or otherwise removing all obstructions below what is now considered low-water for navigation on said river.

And the parties of the second part furthermore agree and bind themselves to remove all obstructions to navigation in said river up to Underwoods Bridge on said River and as much further up said Bernard River as may be

deemed advisable by said Board of Commissioners or the Engineer appointed by the Governor of the State of Texas to inspect said improvements of the Bernard River. And the parties of the second part further agree and hereby bind themselves to clear said river from all obstructions to navigation from the mouth of said river up to, said Underwoods Bridge demanding payment of the State under said law for all that portion of said Bernard River on which they may bestow or perform labour that is necessary to the thorough removal of all obstructions to navigation of said river as required by the Act of the Legislature of the State of Texas, passed on the 13th day of March, 1875.

And further the parties of the second part agree within ten days from this date to give a good bond and security in the sum of ten thousand dollars conditioned on the faithful performance of said work according to the requirements of said law and also to compensate said commissioners for all loss of time, trouble and expense that they may incur or be at in superintending the improvement of said river, and to do and perform all such things labour or work that may be necessary to be done or performed in order to the, complete execution of the provisions of said Act of the Legislature of the State of Texas.

(signed) J. H. Shapard)
 J. C. McNeil) Commissioners.

Andrew Bunker)
 J. H. Dance,) Contractors. "

Which contract was afterwards assigned to J. H. Gibson before any work was done. And that a like contract in same terms was made by the Commissioners for Caney Creek with said Gibson, or his assigns, with reference to Caney Creek.

(6) That under said contract J. H. Gibson worked upon Caney Creek from its mouth to Thompson's bridge, the point where the work involved in this suit on said Creek began, and that his work was approved by the acting engineer and certificates issued to him for such work which are not involved in this suit.

(7) That J. H. Gibson, under said contract, also worked upon Caney Creek, pulling out and sawing off snags in the channel, and cutting down trees and overhanging limbs on the banks of said stream, from Thompson's bridge to Gibson's plantation, which was the head of navigation on said stream, a distance of 13 3/4 miles, for which he received the 110 certificates numbered from 447 to 556, both inclusive, involved in this suit.

(8) That the commissioners appointed to make the contract as to Caney Creek and to superintend and control said work, did make the contract as set out in the 5th finding herein, but they never saw, directed, superintended, controlled or in any manner designated where, or how, any work was to be done under said contract, and did nothing but make said contract, and after said contractor claimed to have completed said work on Caney said Commissioners, in company with the contractor and engineer T. A. Washington, appointed to inspect said work, did inspect the 13 3/4 miles involved in this controversy and said commissioners refused to receive or approve said work as having been done in compliance with the contract therefor, and they never at any time approved or accepted said work as satisfactory or in compliance with the contract.

(9) That while work was done, by said contractor, on said Caney Creek for the 13 3/4 miles in controversy, yet, he did not open and clean out a channel in said Creek 60 feet wide, nor did he remove all obstructions in said channel for the space of 60 feet, below what was then considered too

low water for navigation, for such boats as then usually navigated said stream, nor did said contractor substantially do such work or comply with the provisions of said act.

As to this 13 3/4 miles the obstructions in the channel of the same were nearly all removed to a point beneath the surface of the water by pulling some out entirely, and sawing others off beneath the surface of the water, but many of those sawed off were left from within six inches to three feet of the surface of the water at mean tide and as such constituted material obstructions to navigation of said stream far more dangerous than if no work had ever been done.

(10) That T. A. Washington, the engineer appointed to inspect said work on Caney Creek, did inspect same and made the following certificate under oath:

I, T. A. Washington, Engineer acting by virtue of appointment made by Hon. Richard Coke, Governor of the State of Texas, in pursuance of an act of the Legislature of said State styled "An act to improve the navigation of Oyster Creek, Bernard and Caney, in the State of Texas" and approved March 13th, 1875, having been called upon by Jno. H. Gibson, Contractor to examine the work done by him on Caney between Thompsons bridge and Gibsons plantation on Caney, have inspected, examined and passed upon each and every mile of said Caney opened and freed from obstructions of, said Contractor, and found upon inspection, that the said Contractor had thoroughly cleaned out a channel in said Caney at least 60 feet in width by cutting sawing off digging out and otherwise removing all obstructions from the banks and bed of said Caney below what was at the time of the passage of the act, and what at the present time in my opinion is below low water navigation on said Caney for each and every mile from Thompsons Bridge to Gibsons Plantation 13 75/100 miles up said Caney, All

of said work being from Thompsons Bridge to Gibsons Plantation
13 75/100 miles on said Caney, And that there was no
necessity for cutting canals through shoals Oyster banks
or any bend or bends of said Caney. And I further
certify that the number of miles worked on in said Caney
by said contractor is 13 75/100 miles. ---

T. A. Washington
Engineer.

State of Texas)
County of Galveston.)

Before me this day

John S. Shields A Notary Public for Galveston County,
duly commissioned as such personally appeared before the
undersigned T. A. Washington to me well known, who being
duly sworn, makes oath and says that the matters and
things set forth in the above certificate are true. In
testimony whereof I have signed my name and affixed my
official Seal at my office in the City of Galveston this
the 13th day of December, A. D. 1876.

Jno. S. Shields,

(SEAL)

Notary Public. "

(11) That said certificate set out in the last above
finding was materially false and was fraudulently made by
the said Washington for the purpose of enabling the con-
tractor to secure the issuance of the certificates
therefor, or else he was guilty of such gross neglect and
misconduct in making an examination of said stream at said
time as would imply a fraudulent purpose on his part, and
that said certificate was not made by said engineer in
the exercise of an honest judgment as to the character of
work done on said stream or the facts stated in said
certificate.

(12) As to the San Bernard River, I find that the com-
missioners appointed to let the contract and superintend

and control the work of cleaning out said stream, did enter into the contract set out in the 5th finding herein, but they never directed, superintended, controlled or in any manner designated where, or how, any work was to be done under said contract, and did nothing but make the contract and inspect the work in company with the engineer Washington after the work was claimed to have been completed by the contractor. Two of said commissioners approved the work done on this river, the third disapproved it.

(13) That no work was done by the contractor of the character called for in said Act of the Legislature on said San Bernard River from the mouth of said river to the Mims place, a distance of twenty-five miles, and that there were no obstructions to navigation on said part of said stream for such boats as then usually navigated the same, and no trees on the banks of said stream on this part of the same which would likely interfere with navigation, and no work was necessary on said part of said stream under said law and contract; and there was a channel more than 60 feet wide in said stream for said distance free from all obstructions to navigation below what was then considered too low water for navigation, and there were no trees along the banks likely to obstruct navigation on this part of said stream at the time said act was passed and said contract for cleaning out said river made. There was some evidence that some work was done on said river between its mouth and Mims Ferry, but the preponderance of the evidence was to the contrary.

(14) I find that work was done by the contractor on said Bernard river from the Mims place to the head of navigation thereon a distance of $(30 \frac{3}{4})$ thirty and three-fourths miles of the character provided for in said Act, and it is not shown by a preponderance of the evidence that said work on this thirty and three-fourths miles of said river was not done in substantial compliance with the pro-

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visions of said act and contract.

(15) That T. A. Washington, the engineer appointed to inspect the work done on the San Bernard River did inspect same and made the following certificate:

" I, T. A. Washington, Engineer acting by virtue of appointment made by Hon. Richard Coke, Governor of the State of Texas, in pursuance of an act of the Legislature of said State styled "An Act to improve the navigation of Oyster Creek, Bernard and Caney in the State of Texas" and approved March 13th, 1875, having been called upon by Jno. H. Gibson contractor to examine the work done by him on Bernard River between the mouth and a point on said river, have inspected, examined and passed upon each and every mile of said river opened and freed from obstructions by said contractor and found upon inspection, that the said Contractor had thoroughly cleaned out a channel in said River at least 60 feet in width, by cutting, sawing off, digging out and otherwise removing all obstructions from the banks and bed of said River below what was at the time of, the passage of the act, and what at the present time, in my opinion is below low water navigation on said River for each and every mile from the mouth to a point 55 75/100 miles up said River - all of said work being between the mouth and a point 55 75/100 miles on said Bernard River, and that there was no necessity for cutting canals through shoals, Oyster banks or any bend or bends of said river, and I further certify that the number of miles worked on in said Bernard River by said Contractor is fifty five and three fourths miles.

T. A. Washington,
Engineer.

State of Texas,)
)
County of Galveston.)

Before me this day

Jno. S. Shields, a Notary Public for Galveston County,

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duly commissioned as such, personally appeared before the undersigned T. A. Washington to me well known, who being duly sworn makes oath and says that the matters and things set forth in the above certificate, are true.

In testimony whereof I have signed my name and affixed my official Seal at my office in the city of Galveston this the 12th day December, A. D. 1876.

Jno. S. Shields,

(SEAL)

Notary Public. "

(16) I find that the certificate of T. A. Washington, the engineer, as to work done by said contractor on the 25 miles of said Bernard river from its mouth to the Mims place was false and fraudulently made.

(17) I find that A. M. Hobby, the agent and representative of the contractor for said streams, secured the issuance by the Commissioner of the General Land Office, of the Certificates Nos. 447 to 556, involved in this suit, for the 13 3/4 miles of work on Ganey Creek, and of two hundred of the 446 certificates Nos. 1 to 446, inclusive, for the 25 miles on San Bernard river from its mouth to the Mims place, by means of the false and fraudulent certificates of said T. A. Washington, engineer, and also by means of other false and forged instruments and false and fraudulent representations made by said agent to said Commissioner of the Land Office of Texas.

(18) That A. M. Hobby was the financial backer of said contractor and his authorized agent in all that he did to procure the issuance of said certificates.

(19) That the defendants, and those under whom they claim, had notice of the failure of said contractor to comply with the law in the respects above set out and of the fraud practiced in securing the issuance of said certificates prior to their purchase of the same, and that said

certificates were transferred by the original grantee to the defendants in this suit or those under whom they claim on the _____ day of _____, 1877.

(20) That both of said certificates of said engineer Washington as set out in the 10th and 15th finding of fact herein were made by him and filed with the Comptroller of the State of Texas, as required by law, and the Commissioner of the General Land Office duly and legally advised thereof, prior to the issuance of said certificates.

(21) That said 556 land certificates involved in this suit were all issued in the name of J. H. Gibson and are all in proper legal form, and that all of said certificates except the following, as set out in Exhibit to agreement filed herein as shown by Map from the Land Office, were in the time required by law located upon vacant unappropriated public domain in Yoakum and Terry Counties, Texas, being the same land involved in this suit, and proper field notes returned as required by law to the General Land Office, but that said locations have never been patented, the Governors of this State, from the issuance of said certificates to this time, having continuously denied the validity of said certificates and locations, because of the facts alleged in plaintiff's petition.

(22) That at the time of the location of said land certificates the official maps of the General Land Office of Texas showed a portion of New Mexico to be a part of Yoakum County, Texas, and being misled thereby the following numbered certificates were located in New Mexico, to-wit: The certificates and parts of certificates as shown by the map from the Land Office attached as an exhibit to agreement of counsel filed herein, amounting to seventy two and eight-tenths (72 8/10) certificates, or ~~46,592~~ 46,592 acres, of which land so located by said certificates in New Mexico, 8896 acres

thereof was located by virtue of certificates issued for work on the 13 3/4 miles on Caney Creek and 37,696 acres was located by virtue of certificates issued for work done on San Bernad river and it was not discovered that said certificates had been located in Nex Mexico until 1893 when an official survey of the boundary line disclosed the mistake and that said certificates were never floated.

(23) That the location of said certificates except those located in New Mexico were all regularly made as required by law and equal number of surveys made for the public free schools, which constitute the even numbered surveys involved in this suit, and that the locations of all the certificates involved in this suit were properly and regularly made, the only question being as to the validity of the certificates themselves.

(24) That the certificates in question were executed by the then Land Commissioner at his home in the City of Austin during his absence from the Land Office on account of sickness and the usual fees for issuing such certificates were paid and said certificates delivered to A. M. Hobby at a place in the City of Austin other than the General Land Office.

Under the foregoing facts and pleadings the first inquiry is to determine the meaning and proper interpretation of the Act of the Legislature under which this work was done, and, next, whether under the facts found said act was complied with by the contractor; and, if ~~not~~, then whether the plaintiff can have the matter reviewed in the Courts, or, are the matters complained of res adjudicata by reason of the State's agents and officers whose duty it was to inspect and pass upon said work and to issue the certificates in this case, having passed upon the same and

determined that the contractor was entitled to the certificates in controversy, and having issued and delivered said certificates to said contractor.

The Act of the Legislature providing for the work done, which is here in controversy, is in itself quite brief and is incomplete as to the details or method by which its provisions are to be carried out, as well as vague and uncertain in some of its terms, and because of the doubtfulness of the meaning of some of its provisions it is necessary to construe said Act. In applying the ordinary rules of construction to it in order to determine the legislative intent or meaning of the language used in said Act, we look first to the language thereof itself, and next to the construction put upon said Act by the parties entering into the contract thereunder, as expressed in said contract, and in this case to the construction placed upon said Act by the executive department of the government at the time of its passage and when the work was done thereunder, and also look to the object the Legislature had in view in passing said act and to the conditions as they existed at the time the same was passed.

The three streams intended to be cleaned out under said Act were tide water streams near the coast in which the tide ebbed and flowed and which were then and had for many years been navigated from their mouths to the head of tide water, which was considered the head of navigation on each stream. These streams were short and deep, being from five feet deep at the head of navigation to twenty-feet deep at the mouth, and were wide near the mouth, the San Bernard river being from fifty to one hundred and fifty yards wide on the lower twenty-five miles of its length next its mouth. Along the banks of the greater portion of said streams grew large trees which when the streams were

narrow interfered with the sails of boats navigating the same, and there were many snags in said streams and other obstructions to navigation. There were bars in the bay at the mouths of two of said streams upon which the water was only from three to six feet at ordinary tide and said streams were navigated almost entirely by sail boats of light draught such as could pass over the bars at the mouth. The boats which navigated said streams were from 40 to 50 feet long and 15 to 25 feet wide and less.

It evidently was not the intention of the Legislature by this act to require the removal of the bars in the bay at the mouths of said streams, because the language used will admit of no such construction.

Without the removal of these bars no boats except those drawing from three to six feet of water and less could navigate said streams whether they were free from obstructions or not.

By the use of the following language in said act, to-wit: "to open and clean out a channel in said streams at least 60 feet wide, by cutting or sawing off, digging out, or otherwise removing all obstructions below what is now considered too low water for navigation, and to girdle or cut down all trees likely to obstruct the navigation of said streams, for each and every of said streams, from the mouths of the same to head of navigation on each", was meant, that all obstructions to navigation in said streams for a width of sixty feet, should in some way be removed below what was at that time considered low water navigation for such boats as could and did then navigate said streams, that is for boats that could cross the bars at the mouths of said streams. In other words, all obstructions in said channel of 60 feet in said streams were to be removed "by cutting, sawing off, digging out or otherwise" to a depth in said waters that was below low water navigation

at that time, or was below the water used in navigating said streams at low tide. The water used in navigating said streams was from three to six feet deep from the surface, and all obstructions were intended to be removed below this depth at low tide.

The contention of the defendants that it was meant to cut off or remove these obstructions just under the surface of the water at low tide would make the act ridiculous because no boat uses only the surface of the water in navigation. To give such construction to the act would require us to believe the Legislature really meant to lay pitfalls and conceal snags and obstructions for boats so they could not avoid them and thus to render navigation of said streams impossible instead of improving the same. On the other hand, if it had been intended to remove all obstructions from said channel of 60 feet from the mouths of said streams to the head of navigation the act would not have contained the qualifying language, to-wit: all obstructions below what is now considered too low water for navigation. Besides it was unnecessary to remove obstructions to the bottom of a stream fifteen feet deep that could only be navigated by boats drawing three to six feet of water and less. It was further intended by said Act only to cut down such trees on the banks as were likely to obstruct the navigation of said stream, and it was not intended that a contractor should receive eight sections of land per mile by cutting down trees on the margin of a river one hundred yards wide when at the time only a channel sixty feet wide was provided for.

The Legislature by providing that commissioners for each stream should be appointed and selected from the inhabitants living on said streams, "who were constituted with full power to contract for, superintend and control the opening and cleaning out of said streams" evidently intended

not only that they should make such contract, but they were to superintend and control such work because of their acquaintance with said streams they would know what work and where the same was necessary to be done to improve said streams in the manner provided for in said act.

The commissioners, however, having made contracts practically in the general terms of the statute without designating or particularizing the work to be done, the contractor must look alone to the act to determine how and where he should work, and if he did work which was not called for in said act he cannot receive compensation therefor, or if he did work but did not do the same substantially in the manner provided for in said act he should not receive compensation therefor. It further was not intended by said act to pay the contractor except for such part of said river as he actually did, some work upon of the character called for in said act and if any considerable portion of said streams in one body received no such work then the contractor was not entitled to certificates therefor whether said portions of said streams needed no work or not.

The State having appointed commissioners to superintend and control said work and an engineer to inspect and pass upon the same, the State would be concluded by their judgment in the absence of fraud where work was actually done, and if the only questions in this case were whether or not the work done was up to the requirements of the contract and the State's agents for the purpose of passing upon this question determined that it was, then such act would be binding upon the State in the absence of fraud. However, neither the engineer nor the commissioners had any authority to approve the contractor's claim for any part of said stream upon which he did no work, nor did the Commissioner of the Land Office have any power to issue certificates for any portion of said streams upon which

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no work was done by the contractor and all such certificates are void.

And all work done on said streams by the contractor under said act which was not done in substantial compliance with the provisions of said act and where the engineer appointed by the Governor to inspect said work, accepted the same with knowledge that the law had not been complied with, and made his certificate to the Comptroller either fraudulently or was guilty of such gross misconduct in reference thereto as would imply fraud upon his part, then such certificates for land as were issued for this character of work would be voidable in the hands of parties chargeable with notice of such failure to comply with said Act, and of such fraud, and the State would not, in such case, be concluded by the act of her agents.

I, therefore, conclude:

(1) That certificates Nos. 447 to 556, both inclusive, issued for the work done on the 13 3/4 miles on Caney Creek, which was not done in accordance with the provisions of said Act, and which certificates were procured to be issued by the false certificate of the engineer Washington, and the false and fraudulent representations of the agents of the contractor, should be cancelled and the land located by virtue thereof should be recovered by the State from the defendants, who purchased said certificates with notice of these facts.

(2) That the certificates issued for work done on twenty-five miles on the San Bernard River, from its mouth to the Mims place, where no work was really done by said contractor of the character provided for in said Act, were void and the Commissioner of the General Land Office had no power to issue such certificates, and these certificates to the number of two hundred out of those numbered

one to 446, both inclusive, in this suit should be cancelled and the lands located thereby recovered by the State.

Whether or not the fraud practiced by the contractor or his agents in procuring the issuance of this series of certificates Nos. 1 to 446 as a portion of said series should invalidate the whole, is a serious question. It is not a case merely of an excessive grant, but the recovery is based upon fraud used in the procurement of the issue of at least a portion of said series of certificates. However, under the findings of fact herein, the contractor was entitled to 246 certificates for 640 acres each, these were earned and due under the law and the facts; and it is not believed that fraud in the procurement of an excessive issue of certificates would invalidate those justly earned nor deprive the contractor of his right to receive the same. If, then, the issue of certificates Nos. 1 to 446 is only void for the excess, that is for such number above those justly earned, it would result in 246 of said certificates being valid. In addition to this, there was nearly 59 of said certificates, or more exactly 37,696 acres of land, located by virtue of said San Bernard certificates, which was in New Mexico and never located on the public lands of Texas. Deducting this amount, 37,696 acres, from the 128,000 acres, the State is entitled to recover of this series of certificates, would leave 90,304 acres which the plaintiff is entitled to recover out of the grant of 446 Bernard River certificates which have been located upon the public domain of the State of Texas.

But, as said series of certificates 1 to 446, were issued at one time, and it is impossible to distinguish the valid from the invalid, and as the defendants had the right of selection in the first instance of the lands which it would survey for themselves out of the unappropriated

public domain, it is believed the defendants should now be allowed to select from the 247,744 acres of land located by virtue of said Bernard River certificates Nos. 1 to 446 in the State of Texas, 157,440 acres, and the State should have judgment for the balance of said grant or for 90,304 acres. The defendants shall make such selection on or before Dec. 23, 1898, and file description of same with the Clerk of this Court, and upon their failure to make such selection within such time the plaintiff shall have and recover judgment for an undivided interest in said 247,744 acres of land of 90304/247744 of the same and the defendants recover the balance of said 247,744, and that the following named commissioners be appointed to partition said lands according to their interest as above stated and make their report to the next term of this Court. And if such selection is made by defendants the plaintiff shall have judgment & writ of possession for said lands as follows:

(1) All the even numbered or school sections described in plaintiff's petition.

(2) All the lands located by virtue of certificates Nos. 447 to 556, both inclusive, issued for work done on the 13 3/4 miles on Caney Creek.

(3) For 90,304 acres of lands located in said Yoakum and Terry Counties, Texas, by virtue of certificates Nos. 1 to 446, both inclusive, issued to John H. Gibson for work done on San Bernard river; all of which lands are described in plaintiff's petition.

Judgment accordingly.

R. E. BROOKS,
Judge 26th Judicial District of Texas.

(Endorsed) #12,293. The State of Texas v. Leon & H. Blum Land Co. et al. Findings of fact & Conclusions of law. Filed Oct. 31st, 1898. Jas. P. Hart, Clerk.

THE STATE OF TEXAS,)
COUNTY OF TRAVIS.)

I, J A S. P. H A R T, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the Findings of Fact and Conclusions of Law, with all endorsements thereon, in cause No. 12,293, of the State of Texas vs. Leon & H. Blum Land Company, et al, as the same appears now on file in this office.

Given under my hand and seal of office,
at Austin, Texas, this the 28th
day of December, A. D. 1898.

Clerk District Court, Travis County, Texas.

YOAKUM COUNTY
SKETCH FILE 17.
THE STATE OF TEXAS

— VS —
THE LEON ^{AND} H. BLUM
LAND CO

No 12293.
OCT. TERM A.D. 1898

N.S.

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