ECTOR COUNTY
ROLLED SKETCH NO. 12

T. & P. RY. CO. vs STATE et al

COURT OF CIVIL APPEALS
52 S.W. REPORTER 2nd.
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ECTOR CO. RLD SK. 12.

TEXAS & PACIFIC RAILWAY COMPANY

IS DENIED MINERAL RIGHTS (TITLE IN FEE)

ON RIGHT-OF-WAY IN ECTOR COUNTY

Texas Court of Civil Appeals affirms

judgment of Trial Court

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52 South Western Reporter, Second Series

Pages 957 through 960

Appeal from District Court, Denton County; B. W. Boyd, Judge.

Suit by J. L. Zumwalt against Dr. Charles Saunders. From an adverse judgment, defendant appeals.

Reversed and remanded.

Joe S. Gambill, of Denton, for appellant.

Ed. I. Key, of Denton, and J. A. Templeton, of Fort Worth, for appellee.

CONNER, C. J.

This suit was instituted by J. L. Zumwalt on the 14th day of February, 1931, against Dr. Charles Saunders, seeking injunctive proceedings to compel Dr. Saunders to move the fence maintained by him on the east line of his land, alleging that said fence had been erected and maintained in and upon some 15 feet of what is alleged to be a public road extending north and south between the lands owned by Dr. Saunders and the land owned by plaintiff Zumwalt.

Defendant, besides exceptions and demurrers, denied that the road designated by plaintiff was a public road, and further alleged that, if it ever had been, it had long since been discontinued and abandoned, and that the fence as now existing had been maintained in its present location more than 10 years. He further alleged that, at the time of his purchase, which was under a valid general warranty deed from the lawful owner, the fence in question was in its present location, and that he purchased for a valuable consideration without notice that it to any extent encroached upon the alleged public road.

The trial was before the court without a jury. The court filed findings of fact and conclusions of law which support the claim of plaintiff, and judgment was rendered commanding the defendant, Saunders, to move his fence back some 15 feet from its present location, as prayed for by the plaintiff, within 15 days from the date of the judgment, which was rendered on July 18, 1931.

Defendant excepted to that judgment, gave notice of appeal, gave a supersedeas bond, and the case is now before us for determination.

The material question presented for our determination is whether the evidence sufficiently supports the trial court's findings of fact and the judgment. We have concluded, after a careful examination of the evidence as presented both in the briefs of counsel and in the statement of facts, that it does not, and that the judgment must be reversed and the cause remanded on this ground.

The title of neither of the present litigants is questioned, nor is it disputed that the line of appellant's fence as now existing is located upon the true east line of his tract of land. We shall not with any great particularity discuss the evidence in view of another trial, but in a general way it shows that the north boundary line on appellant's land is bordered by Clear creek; that from Clear creek a roadway, designated as the Martin Valley and Valley View road, originally extended south between the lands in question and on and across a public road extending east and west along the south boundary line of appellant's land, to what was designated as the Martin schoolhouse; that the Martin schoolhouse has been abandoned more than 20 years, and the evidence fails to show whether the road which extends south from the southeast corner of appellant's land to the schoolhouse as formerly located is traveled at all. The road in question terminated on the north at the south bank of Clear creek where a gate was maintained. It further appears that it is now, and has been for an indefinite period, practically impassable except on horseback, because of washes and chug holes. No order of the commissioners' court was introduced showing that the road had ever been established as a public road of any class or had been recognized or worked under the direction of the commissioners' court or of any road commissioner having jurisdiction of roads in that vicinity.

[1, 2] In the case of City of Galveston v. Williams, 69 Tex. 449, 6 S. W. 860, it is held that a right to an easement on land acquired by deed is lost by an occupancy of the property by another, claiming under a deed recorded after five years of such occupancy, and the evidence fails to show that the road in question has been traveled or used to any material extent for some 10 or 15 years, and was termed by some of the witnesses as a wood road to and from the timbered land on the south bank of Clear creek. There is also cogent evidence on the part of previous owners of the Saunders land, whose title Saunders acquired, that the fence in question as now extended is substantially as it was originally built more than 10 years ago, and that appellant at the time of his purchase did so in good faith without knowledge on his part of any encroachment upon the road in question. It further distinctly appears that for as long as 10 years or more the members of the commissioners' court having jurisdiction over the public roads in the vicinity failed to recognize the road as a public road, and all parties seem to have failed for many years to make any effort to work or keep it in repair. The record further discloses that appellant throughout the course of the introduction of the testimony made a number of objections, which were overruled, to testimony of witnesses in behalf of appellee on the ground that it was hearsay or otherwise incompetent. While such rulings cannot be made the basis of a reversal, the trial having been before the court, we do not feel entirely convinced that the court in making his conclusions of fact may not, to some extent at least, have considered and been influenced by some objectionable testimony. So that, under all of the circumstances as they appear in the present record, we feel unwilling to sustain an order which in its effect will constitute a taking of a portion of appellant's land without compensation in violation of section 17 of our Bill of Rights, declaring that "no person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such person, * * *" or to impose upon Denton county the necessary expense involved in the performance of the duty of its road commissioners to "see that all roads and bridges in his district are kept in good repair, * * *" as required by article 6738, Rev. Civ. Statutes.

For the reasons stated, we conclude that the judgment should be reversed, and the cause remanded for another trial.

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TEXAS & P. RY. CO. v. STATE et al.*

No. 7690.

Court of Civil Appeals of Texas. Austin.

May 4, 1932.

On Rehearing June 1, 1932.

1. Statutes ⇐229.

Resolution to secure construction of national railroad must be construed as a whole, and no section can be construed apart from its single general purpose (Acts 3d Leg. [1849–50] c. 124).

2. Statutes ⇐226.

Proviso may relate to act as a whole, and should be given such application where legislative intent to do so is clear.

3. Public lands ⇐172(11).

Proviso in resolution inserted at end of third section which donated ten sections per mile for construction of national railroad, and recited that "this resolution" shall cease if federal government fails to adopt route by March 4, 1851, applied to entire resolution; hence failure to accept state's offer within prescribed time gave federal government no rights in lands (Acts 3d Leg. [1849–50] c. 124; Act Cong. March 3, 1871, § 8 [16 Stat. 576]).

The fact that the term "this resolution" was added by way of amendment to the third section of Acts 3d Leg. (1849–50) c. 124, while the matter was under discussion before the Legislature, did not limit its application to that section alone.

4. Public lands ⇐172(11).
Railroads ⇐5.

That railway company was chartered by United States did not relieve it from regulation by state laws relating to construction of railways, so far as state's public lands or police power were concerned (Act Cong. March 3, 1871, § 8 [16 Stat. 576]; Rev. St. 1925, art. 6339).

Appeal from District Court, Travis County; J. D. Moore, Judge.

Proceeding by the Texas & Pacific Railway Company against the State and others. From the judgment, the Railway Company appeals.

Affirmed.

W. A. Keeling, of Austin, and T. D. Gresham and M. E. Clinton, both of Dallas, for appellant.

James V. Allred, Atty. Gen., and Geo. T. Wilson and R. W. Yarborough, Assts. Atty. Gen., for appellees.

BAUGH, J.

Two questions presented in this case are, first, whether the Texas & Pacific Railway Company owns in fee the title to its right of way across Ector county, Tex.; and, second, if it owns only an easement over said lands, whether under article 6317, R. S. 1925, it may extract the oil from underneath said right of way and use same in the operation of its trains. The litigation resulted from the discovery of oil in that county, and the issues here presented are based upon the action of the trial court in sustaining special exceptions of the state to the railway company's pleadings, and in excluding certain evidence offered by the railway company.

The first contention made by appellant is that the resolution of the Legislature of Texas, approved February 9, 1850 (Acts 3d Leg. c. 124), granted and conveyed to the United States in præsenti a railroad right of way in fee over the public lands of the state of Texas, to be subsequently located; and that the United States Congress, in chartering the Texas Pacific Railroad Company in 1871, vested such right of way in said federal corporation.

Appellant has very ably presented the historical background for its contention. It appears that the matter of a transcontinental rail route to the Pacific Coast had become a national demand in 1849, accentuated no doubt by the discovery of gold in California. In that year the President in his message

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Writ of error granted.

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to Congress urged that a survey of proposed routes be made with a view to granting federal aid, or, if advisable, to a construction of such road by the federal government itself. In December, 1849, the Governor of Texas, in his message to the Legislature, urged co-operation by the state of Texas in such enterprise, and the designation of a southern route through Texas. In consequence the resolution of February 9, 1850 (Acts 3d Leg. c. 124), was passed, the pertinent portions of which read as follows:

"Joint Resolution Authorizing the Government of the United States to Construct a National Railroad Through the Limits of the State of Texas, to The Pacific Ocean:

"Section 1. Be it resolved by the Legislature of the State of Texas: That the State of Texas hereby grants and guarantees to the United States the right of way through this State, for a National Railroad, to be located and constructed under the authority of an act of Congress, from the Gulf of Mexico or Mississippi River, to the Pacific Ocean, and hereby authorizes the officers, agents and contractors, acting under an act of Congress for that purpose, to locate, construct, use and control the said railroad; and such railroad may commence at such point in this State on the coast of the Gulf of Mexico, or may enter this State at such point on the eastern or northeastern boundary line of the State, and leave the same at such point on its western boundary as may be determined on by or under an act of Congress. * * *

"Sec. 2. Be it further resolved, that the State of Texas, agrees to extend to the United States all reasonable and proper facilities and co-operation in the construction of said road, and hereby declares that all public lands within one hundred yards of the center of the road, shall belong to and vest in the United States; and all locations, surveys and patents, made on the same, after the road has been definitely laid out, shall be void.

"Sec. 3. Be it further resolved, That should the line of said road commence at any point in this State on the coast of the Gulf of Mexico, or enter this State at any point on the eastern or northeastern boundary south of the thirty-fourth degree of latitude, and leave this State on its western boundary at the town of El Paso on the Rio Grande, or at some point on the said river not farther north than one hundred miles distant from the said town, the State of Texas in addition to the right of way and the grant of lands heretofore guaranteed and declared, doth hereby agree, that all public lands lying within ten miles from the line of one hundred yards from the center of the railroad above granted, shall be divided into sections of six hundred and forty acres each, or some less size when from the nature of the ground such may be more convenient; and that every alternate section shall belong unto and vest in the United States, the said alternate sections to be appropriated to the construction of and for the use and benefit of said road; * * * provided, the expense of laying off the sections and alternate sections, shall be incurred by the United States; and provided further, that if the government of the United States shall not have adopted this route for the construction of the road, by the fourth day of March, 1851, then, and in that case, this resolution shall cease, and have no force or effect.

"Sec. 4. Be it further resolved, That each alternate section is hereby reserved to the State, and shall not be subject to location; but shall be held and reserved to the use of the State, and subject to future disposition by the Legislature.

"Sec. 5. Be it further resolved, That in granting the provisions in this act, they are granted upon the express condition, that the State of Texas reserves the right to construct or authorize to be constructed, any other railroad within her limits which she may deem proper, which may connect with the main track of the railroad to be constructed by the United States, or by its authority."

Surveys were made by the federal government on this route in 1850, 1851, and 1852. In 1853 Congress directed the Secretary of War to make further surveys on several proposed routes, one of which was along the thirty-second parallel of north latitude, and in February, 1855, Jefferson Davis, Secretary of War, reported to Congress that the route along the thirty-second parallel was the most practical and economic route. In 1853 the Gadsden Purchase from Mexico was effected, primarily to afford an extension of such proposed route along the thirty-second parallel to the Pacific Coast. The intervention of the Civil War, however, deterred further action on this matter. On February 14, 1871, the Texas Legislature renewed its efforts and adopted another resolution (Acts 12th Leg., Joint Resolutions, c. 6) providing inter alia: "Be it resolved by the Legislature of the State of Texas, That the Congress of the United States is earnestly requested to pass a bill for the construction of a railroad from the eastern boundary of Texas to the Pacific Ocean, on or near the thirty-second parallel of latitude, as soon as possible, and to grant the same aid for the construction of this railroad that has been granted to secure the building of the Northern Pacific Railroad."

By act of Congress, approved March 3, 1871 (16 Stat. 573), the Texas Pacific Railroad Company was incorporated; section 8

of said act (page 576), providing: "That the right of way through the public lands be, and the same is hereby, granted to the said company for the construction of the said railroad and telegraph line. * * * Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands. * * *"

Appellant's railroad was constructed in 1881, at which time the lands in Ector county were wild public lands of the state. When Texas entered the Union, it reserved to itself all of its public domain over which the federal government had no control and no power to make grants. Appellant contends, however, that by the resolution of February 9, 1850, the state made an unqualified grant out of its public domain to the federal government of right of way lands for a railroad, to be thereafter constructed by the federal government or under its authority; that this right of way land was in turn granted to appellant in the act of Congress incorporating it; and that, when the road was located and built in 1881, its title became effective as of date of the original grant, i. e., February 9, 1850; that is, that the proviso at the end of section 3 relates to, and applies only to, said section 3; and does not relate to nor limit the grant made in section 1 of the resolution. Cases to sustain this contention are cited which arose from the construction of the Northern Pacific Railroad and other federal land grant railways, wherein similar grants of federally owned public lands were made. If the resolution of February 9, 1850, made an express grant in fee in præsenti of Texas public land to the federal government, appellant is correct.

[1] But we do not so construe this resolution. We think the resolution must be construed as a whole, and no section can be construed apart from its single general purpose —to secure the construction of a railroad across the state to the Pacific. The caption of the act so indicates. Section 1 relates to a right of way; section 2 to the co-operation of the state in the construction of such railroad; and section 3 to the donation of 10 sections per mile for the construction of the road. When considered as a single act or resolution indivisible as to sections, as we think it must be, the purport of it in its entirety merely constituted a tender or offer by the state to the federal government to make certain grants and do certain things on condition that the federal government accept it according to its terms, the prime condition being that the federal government adopt the "route for the construction of the road by the fourth day of March, 1851," otherwise "this resolution shall cease, and have no force or effect."

[2, 3] The term "this resolution" obviously applies to the act in its entirety. The fact that it was added by way of amendment to section 3 while the matter was under discussion before the Legislature does not limit its application to that section alone. Appellant cites in support of its contention that such proviso modifies and relates only to section 3, particularly Potter v. Robison, 102 Tex. 448, 119 S. W. 90; City of Quanah v. White, 88 Tex. 14, 28 S. W. 1065; and Campbell v. Wiggins, 85 Tex. 428, 21 S. W. 599. The Supreme Court in the Potter Case held that the natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Such is the general rule, but it is equally true that, where the intent is clear, a proviso may relate to the act as a whole, and should be given such broader application where it is clearly the legislative intent to do so. Jester v. Lancaster (Tex. Civ. App.) 266 S. W. 1103, 1105 (writ refused); McDonald v. U. S., 279 U. S. 19, 49 S. Ct. 218, 73 L. Ed. 582; 25 R. C. L. §§ 232, 233, pp. 986, 987. We find no reasonable hypothesis for making the proviso in question apply to section 3 only. The donation of ten sections of land per mile of railroad built was clearly contingent upon and dependent upon first surveying and adopting the route of the road. Until that was done, no definite surveys could be made of such lands, and no reason obtains for limiting the time as to that alone. On the contrary, cogent reasons did obtain for limiting the time in which the route of the road should be adopted. The President and Congress then in office were favorable to the enterprise. On March 4, 1851, the session of Congress would terminate and a new presidential term begin; and it was doubtless the purpose of the Legislature by such limitation to thereby seek to induce favorable action promptly by the federal government on the offer of the state. Clearly the proviso, we think, applied to the resolution as a whole, and the federal government, not having accepted the state's offer within the prescribed time, obtained no rights of any character in and to the lands in question.

Consequently as a part of the public domain of the state the federal government could not grant any rights therein to appellant corporation when it was chartered in 1871.

[4] Appellant next contends that, pursuant to section 5 of said resolution of February 9, 1850, the Legislature by Act of February 16, 1852 (Sp. Acts 4th Leg., c. 192), incorporating the Texas Western Railroad Company, whose name was changed to the Southern Pacific Railroad Company, granted to the company the right to take and hold public lands of the state as therein prescribed, in the construction of a railway to connect with such trans-

continental line. And that appellant company acquired such lands through acquisition of all properties and rights of the Southern Pacific Company. This contention is not sustained for two reasons: First, because this act of 1852 was not in any manner based upon the resolution of 1850, because that resolution, by its own terms, had become a nullity. Second, because no railroad under that act was ever constructed further west than Longview. The Southern Pacific did in 1859 survey a route as far west as eight miles north of Abilene, but this route from Fort Worth west was never adopted by appellant, and no route selected nor construction ever undertaken through such territory prior to the chartering of appellant company. The Act of May 24, 1871 (Gammel's Laws, vol. 6, p. 1623), shows that prior to that time three railroad companies had been incorporated in an effort to secure construction of a railroad from the eastern border of Texas to El Paso, none of which had done so. And on February 14, 1871, the Texas Legislature had passed another resolution asking the federal government to construct such line to the Pacific. The legislative history of the state is replete with efforts to encourage railroad construction, and discloses numerous offers, grants, and resolutions which were never accepted nor acted upon. It was not until subsequent to 1870 that any extensive construction was accomplished. Meantime the Legislature in 1861 enacted what is now article 6339, R. S. 1925, expressly providing that a right of way secured by condemnation over either public or private lands should not be construed to include the fee-simple estate. Without further discussion of the matter we think it is clear that, when appellant railroad company undertook the construction of its road over the public lands of the state in 1881, it did so subject to the laws of the state then in force relating thereto. The fact that it was chartered by the United States did not relieve it from such regulation so far as the state's public lands or police power were concerned. We conclude, therefore, that under the pleadings and the agreed statement of facts appellant does not have a fee-simple title to its right of way over the lands in question.

The issue as to whether appellant is entitled under the provisions of article 6317, R. S. 1925, to produce and use the oil beneath its right of way in the operation of its trains was decided adversely to appellant's contention by the Supreme Court in Right of Way Oil Co. v. Gladys City Oil Co., 106 Tex. 94, 157 S. W. 737, 51 L. R. A. (N. S.) 268, and we deem it unnecessary to discuss it further here.

We have not undertaken to discuss the several propositions made by appellant, all interestingly and well presented, nor the numerous authorities cited and discussed in the brief; but have confined our discussion to the issues we consider as determinative of the case.

Finding no error in the record, the judgment of the trial court is affirmed.

Affirmed.

On Motion for Rehearing.

Appellant calls our attention to the fact that our statement in our opinion that: "On March 4, 1851, the session of Congress would terminate and a new Presidential term begin, * * *" is historically incorrect. In this appellant is correct. A new presidential term did not begin until March 4, 1853. We make this correction for the purpose of accuracy. It does not, however, affect the conclusions reached. To this extent the motion is granted. In all other respects it is overruled.

Granted in part and in part overruled.

TAYLOR v. STATE.

Cr. 3814.

Supreme Court of Arkansas.

Sept. 26, 1932.

1. Criminal law ⇐741(1), 742(1).
Credibility of witnesses and weight to be given their testimony is for jury.

2. Criminal law ⇐1159(2, 3).
Where evidence is conflicting, jury's verdict is conclusive, and, if verdict is supported by substantial evidence, it cannot be disturbed by Supreme Court.

3. Criminal law ⇐628(7).
Where indictment for selling liquor did not name buyer, admission of testimony of buyer whose name was not indorsed on indictment *held* not reversible error (Crawford & Moses' Dig. § 3010).

Admission of testimony was not reversible error, since Crawford & Moses' Dig. § 3010, requiring the names of witnesses to be indorsed on the indictment, is directory, and the question of the witness' name not being indorsed on the indictment was not raised in motion for new trial, defendant made no request to have names of witnesses indorsed on the indictment, and no request was made for a list of names of witnesses. Furthermore, defendant would not be entitled to new trial on account of buyer's testimony without making some showing that, if new trial was granted, he could produce witnesses to contradict such testimony.

Appeal from Circuit Court, Pope County; J. O. Kincannon, Judge.

H. T. Taylor was convicted of selling liquor, and he appeals.

Affirmed.

Robert Bailey, of Russellville, for appellant.

Hal L. Norwood, Atty. Gen., and Pat Mehaffy, Asst. Atty. Gen., for the State.

MEHAFFY, J.

The appellant was convicted of the crime of selling liquor, and his punishment was fixed at one year in the penitentiary. This appeal is prosecuted to reverse said judgment of conviction.

The first count in the indictment, the count on which appellant was tried, is as follows: "The Grand Jury of Pope County in the name and by the authority of the State of Arkansas accuses H. T. Taylor of the crime of selling liquor committed as follows, to wit: The said H. T. Taylor in the county and State aforesaid, on the 15th day of October, 1931,

"Did wilfully, unlawfully, and feloniously sell and give away, and was wilfully, unlawfully and feloniously interested directly and indirectly in the sale and giving away of ardent, vinous, malt, spiritous and fermented liquors and alcoholic spirits and a certain compound and preparation thereof commonly called tonics, bitters and medicated liquors.

"Against the peace and dignity of the State of Arkansas."

[1, 2] It is contended by appellant, first, that the evidence is not sufficient to sustain the verdict. J. A. Worsham and Fred Martin each testified that he bought whisky from appellant. This evidence was contradicted by appellant and his witnesses, but whether the evidence of the state's witnesses was true or not was a question for the jury and not for the court. It would serve no useful purpose to set forth the evidence. Where the evidence is conflicting, as it is in this case, the verdict of the jury is conclusive. It is the settled rule in this state that the credibility of the witnesses and weight to be given their testimony are questions for the jury, and if the verdict is supported by substantial evidence, it cannot be disturbed by this court.

"Under the settled rule in this state, the jury are the judges of the credibility of the witnesses and, where there is any evidence of a substantial character to support the verdict of the jury, we are not at liberty to disturb it on appeal, notwithstanding we might believe it was against the weight of the evidence." Fields v. State, 154 Ark. 188, 241 S. W. 902; Cox v. State, 160 Ark. 283, 254 S. W. 542; Rhea v. State, 104 Ark. 163, 147 S. W. 463; Nelson v. State, 139 Ark. 13, 212 S. W. 93.

[3] Appellant also contends that the testimony of Fred Martin was inadmissible, and that it should have been excluded. It is insisted that appellant was placed on trial in the case wherein J. A. Worsham was the prosecuting witness. There is nothing in the record tending to show this. Appellant was not charged with selling whisky to Worsham. It will be observed from the indictment above set out that he was simply charged with selling whisky without naming the party to whom it was sold. The evidence of Martin was therefore inadmissible.

Appellant says that the sale to Martin was not charged in the indictment. We have already shown that the indictment did not name the person to whom the whisky was sold. It is true that Worsham's name was on the indictment and Martin's name was not indorsed on the indictment, but the

TEXAS & PACIFIC RAILWAY COMPANY

IS DENIED MINERAL RIGHTS (TITLE IN FEE)

ON RIGHT-OF-WAY IN ECTOR COUNTY

Texas Supreme Court adopts opinion of

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We are not deciding that he can or he cannot. We are merely deciding that the holding in this case, in effect that he can recover such damages is not in conflict with any of the cases cited by plaintiff in error. We have no right to pass upon such question *unless the conflict of holding alleged actually exists.* * * *

"It can make no difference that a writ has been improvidently granted if in fact the court upon further consideration determines that the jurisdictional grounds are wanting. In such a case, the writ should be dismissed." (Italics ours.)

The writ of error heretofore granted is dismissed for want of jurisdiction.

Opinion adopted by the Supreme Court.

TEXAS & P. RY. CO. v. STATE et al.

No. 1827—6313.

Commission of Appeals of Texas, Section A. Jan. 30, 1935.

1. Public lands ⇐172(11)

Proviso, at end of third section of resolution donating land for construction of transcontinental railroad, reciting that "this resolution" should cease if federal government failed to adopt route within specified time, applied to entire resolution, not merely to section containing proviso, and made adoption of route by specified date condition precedent to granting of rights specified by resolution (Acts 1849–50, c. 124, especially §§ 2, 3, 6).

2. Public lands ⇐172(11)

Resolution making adoption by United States of route for transcontinental railroad by specified date condition precedent to grant of public lands never became effective as grant, where route was not adopted within specified time, regardless of whether condition was unreasonable because allowing insufficient time for necessary work preliminary to laying out route (Acts 1849–50, c. 124, especially §§ 2, 3, 6; Act Cong. March 3, 1871, 16 Stat. 573; Act Cong. May 2, 1872 [17 Stat. 59]).

3. Public lands ⇐172(11)

Acceptance by railroad of act defining railroad's rights, which stated that rights granted should be accepted by railroad in full satisfaction of all claims for land against state, divested railroad of all rights respecting land which railroad's predecessor had received from state, except easement rights granted predecessor by statute (7 Gammel's Laws, p. 1018, especially § 9; 3 Gammel's Laws, p. 1245, especially § 20; 4 Gammel's Laws, p. 622).

4. Railroads ⇐69

Statute authorizing railroad to use any earth, timber, stone, or "other material" upon its right of way necessary to construction and operation of railroad *held* not to entitle railroad to drill for and produce oil and gas from its right of way for use in operating railroad, since "other material" means material of the same class as materials enumerated (Rev. St. 1925, art. 6317).

[Ed. Note.—For other definitions of "Other Materials," see Words & Phrases.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Proceeding by the Texas & Pacific Railway Company against the State and others. Judgment for the State was affirmed by the Court of Civil Appeals [52 S.W.(2d) 937], and plaintiff brings error.

Affirmed.

W. A. Keeling, of Austin, and T. D. Gresham and M. E. Clinton, both of Dallas, for plaintiff in error.

James V. Allred, formerly Atty. Gen., and Geo. T. Wilson and R. W. Yarborough, formerly Asst. Attys. Gen., and Clay Cooke, of Fort Worth, for defendants in error.

HARVEY, Presiding Judge.

In this case, the plaintiff in error, the Texas & Pacific Railway Company, claims title, in fee, to its right of way through Ector county. The trial court gave judgment for the state, and the Court of Civil Appeals affirmed that judgment. 52 S.W.(2d) 957.

In the year 1850, and for some twenty-odd years afterward, the western part of the state, for a distance of some five hundred miles, was wild land belonging to the state. The land in this region was unappropriated, unsurveyed, and uninhabited. In the year 1850, the matter of a transcontinental railroad constituted a subject for animated discussion in the halls of Congress and by the public generally throughout the United States. A number of routes for the road were under discussion. One of the routes was commonly referred to as the "Southern Route" which, in its course westward, would

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cross Texas. On February 9, 1850, the Legislature of Texas adopted the following Joint Resolution:

"Joint Resolution Authorizing the Government of the United States to Construct a National Railroad Through the Limits of the State of Texas, to The Pacific Ocean:

"Section 1. Be it resolved by the Legislature of the State of Texas: That the State of Texas hereby grants and guarantees to the United States the right of way through this State, for a National Railroad, to be located and constructed under the authority of an act of Congress, from the Gulf of Mexico or Mississippi River, to the Pacific Ocean, and hereby authorizes the officers, agents and contractors, acting under an act of Congress for that purpose, to locate, construct, use and control the said railroad; and such railroad may commence at such point in this State on the coast of the Gulf of Mexico, or may enter this State at such point on the eastern or northeastern boundary line of the State, and leave the same at such point on its western boundary as may be determined on by or under an act of Congress. * * *

"Sec. 2. Be it further resolved, that the State of Texas, agrees to extend to the United States all reasonable and proper facilities and co-operation in the construction of said road, and hereby declares that all public lands within one hundred yards of the center of the road, shall belong to and vest in the United States; and all locations, surveys and patents, made on the same, after the road has been definitely laid out, shall be void.

"Sec. 3. Be it further resolved, That should the line of said road commence at any point in this State on the coast of the Gulf of Mexico, or enter this State at any point on the eastern or northeastern boundary south of the thirty-fourth degree of latitude, and leave this State on its western boundary at the town of El Paso on the Rio Grande, or at some point on the said river not farther north than one hundred miles distant from the said town, the State of Texas in addition to the right of way and the grant of lands heretofore guaranteed and declared, doth hereby agree, that all public lands lying within ten miles from the line or one hundred yards from the center of the railroad above granted, shall be divided into sections of six hundred and forty acres each, or some less size when from the nature of the ground such may be more convenient; and that every alternate section shall belong unto and vest in the United States, the said alternate sections to be appropriated to the construction of and for the use and benefit of said road; and the said alternate sections which may under the provisions of this act be allotted to the State of Texas, and all the proceeds arising from the sale thereof shall be, and the same are hereby set apart, reserved and appropriated exclusively for the payment of the public debt of the late Republic of Texas; and all locations made upon the lands herein reserved (after the route of said road has been designated), by virtue of any headright certificate, bounty warrant or land scrip, shall be, and are hereby declared null and void; provided, the expense of laying off the sections and alternate sections, shall be incurred by the United States; and provided further, that if the government of the United States shall not have adopted this route for the construction of the road, by the fourth day of March, 1851, then, and in that case, this resolution shall cease, and have no force or effect.

"Sec. 4. Be it further resolved, That each alternate section is hereby reserved to the State, and shall not be subject to location; but shall be held and reserved to the use of the State, and subject to future disposition by the Legislature.

"Sec. 5. Be it further resolved, That in granting the provisions in this act, they are granted upon the express condition, that the State of Texas reserves the right to construct or authorize to be constructed, any other railroad within her limits which she may deem proper, which may connect with the main track of the railroad to be constructed by the United States, or by its authority.

"Sec. 6. That the Governor of this State is hereby requested to furnish our Senators and Representatives in the United States Congress with a copy of these resolutions." Acts 3d Leg. Tex. (1849–50) c. 124.

The federal government took no action in respect of the foregoing resolution, or of a transcontinental railroad through Texas, prior to March 4, 1851. By Act of Congress approved March 3, 1871 (16 Stat. 573), the Texas Pacific Railroad Company was incorporated, and given authority to construct and operate a railroad to the Pacific Ocean. In said act it was provided: "That the right of way through the public lands be, and same is hereby, granted to the said company for the construction of the said railroad and telegraph line. * * * Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public

lands. * * *" Section 8. A little more than a year later, Congress passed an act changing the name of said corporation to "Texas and Pacific Railway Company." Act Cong. May 2, 1872 (17 Stat. 59).

[1, 2] The company contends that by section 2 of the Joint Resolution of February 9, 1850, a present conveyance of a right of way, in fee, across public lands in Texas, was effected. In this respect, the company contends that the last proviso, contained in section 3, which reads: "And, provided further, that if the United States shall not have adopted this route for the construction of the road by the 4th of March, 1851, then, and in that event, and in that case, this resolution shall cease, and have no force or effect," modifies section 3 alone, and therefore did not affect the operation of section 2, as a present conveyance, in fee, of land to be subsequently identified. The contention is based mainly on the fact that each of the sections of said Joint Resolution, including section 3, begins with the words, "Be it further resolved," and on the further fact that in section 6 the term "these resolutions" is used. It thus appears, so the company contends, that section 3 was regarded by the Legislature as a distinct resolution, having no immediate connection with section 2, and therefore the term "this resolution," as used in the proviso, has no reference to section 2. We do not so interpret the legislative intent. It is plain from the caption, and the nature of the general subject with which the Joint Resolution deals, that the Legislature regarded the Joint Resolution as a composite whole, and that the term "this resolution" as used in the proviso in question means such composite whole.

In this connection it does not appear that, previous to the passage of this Joint Resolution, there had been any negotiations between the federal government, or any of its departments, and the state of Texas, regarding the construction of a railroad through Texas. The Joint Resolution appears to have been the voluntary act of the Texas Legislature, unsought by the federal government. Manifestly the Joint Resolution is, in its nature, but a proposal by the state to grant the rights therein specified, on the condition precedent that the route through Texas, for a transcontinental railroad, be adopted by the United States by March 4, 1851. Counsel contends that since the matter of adoption of said route would require such a vast amount of preliminary investigation and work—involving surveys, explorations, reports, etc.—the condition was impossible of performance within the allotted time, and therefore was unreasonable. Perhaps so; but the Legislature had the right to impose such a condition, unreasonable though it was. There can be no doubt that the condition was meant to be imposed, and same not having been met the Joint Resolution never became effective, in any respect, as a grant or conveyance.

[3] The plaintiff in error also claims title, in fee, to the right of way in question, under the act of the Legislature passed on February 16, 1852, incorporating the Texas Western Railway Company (3 Gammel's Laws, p. 1245). By section 2 of that act the corporation was granted the right to construct and operate a line of railroad from the eastern boundary of the state to the western boundary at El Paso; the railroad to run on "such a course as said company shall decree and determine to be most suitable." By section 20 of said act it was provided: "Section 20. The said company shall have the right to take and hold so much of the public land, not exceeding two hundred feet wide, as the said railway or any of its branches may pass through, for the track thereof, and such additional width as shall be absolutely necessary for any depot or other work for the purpose of said railroad that the company may deem proper to establish. * * *"

In 1856, the name of the last-mentioned corporation was changed to "Southern Pacific Railroad Company." 4 Gammel's Laws, p. 622. The plaintiff in error, in the year 1872, acquired all the property rights of the Southern Pacific Railroad Company, as will be explained further on, and is now, in this suit, claiming title in fee, to the right of way through Ector county under the provisions of section 20 just quoted. Even though said provisions were interpreted as investing a fee estate in the right of way land, of the width of two hundred feet, the plaintiff in error still could not maintain its claim to such fee estate, for the reason that the company has been divested of all title and rights to land that the Southern Pacific Railroad Company acquired from the state. The reasons for our saying this are as follows:

The plaintiff in error, in the year 1872, under sanction of Congress and of the Texas Legislature, took over and acquired, by means of consolidation, all the property rights belonging to the Southern Pacific Railroad Company. At that time the last-mentioned company had completed a line of railroad from the eastern boundary of the state to Longview, and had surveyed and properly designated as provided by law, the line from

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Longview as far westward as Abilene, upon which its proposed railroad was to be constructed. After said consolidation occurred, the Legislature, in May, 1873, passed an act (7 Gammel's Laws, p. 1018) which reads partly as follows:

"An Act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific Ocean.

"Whereas, By the terms and conditions of an act entitled 'An act to encourage the speedy construction of a railway through Texas to the Pacific Ocean,' passed May 24th, 1871, and an act supplementary and amendatory thereto, passed November 25th, 1871, authority was given to the Southern Trans-Continental Railway Company, and to the Southern Pacific Railroad Company, incorporations created by acts of the Legislature of the State of Texas, to become consolidated with the 'Texas Pacific Railroad Company,' an incorporation created by an act of the Congress of the United States; and

"Whereas, it appears from documentary evidence on file in the office of the Secretary of State of the State of Texas, that such consolidation has been effected; and as a difference of opinion may arise as to the construction of the acts of the Legislature hereinbefore referred to, in regard to the amount of lands to which said Texas and Pacific Railway Company may be entitled under the said acts of incorporation, and other laws of this State; and

"Whereas, it is desirable that there should be a complete and final adjustment of the rights of said Texas and Pacific Railway Company, as the assignee and successor of the said Southern Pacific Railroad Company, and the said Southern Trans-Continental Railway Company, under the laws of this State, and a definitive understanding as to the obligations of the State, and to the further end that said company be encouraged to the speedy construction of said railway; therefore,

"Section 1. Be it enacted by the Legislature of the State of Texas, That the 'Texas and Pacific Railway Company,' a corporation created by an act of the Congress of the United States * * * And the said Texas and Pacific Railway Company, as the successor of the 'Southern Pacific Railroad Company,' a corporation created by the laws of the State of Texas, shall construct its road from its present western terminus at Longview, in Upshur county, as now located through the town of Dallas, to the point of junction at Fort Worth by the first day of July, 1874; and said Texas and Pacific Railway Company shall construct a single track railroad from the said point of junction at Fort Worth westwardly, on the most practicable route, to a point not less than one-fourth nor more than one-half mile from the court house in the town of Weatherford, in Parker County, at which point said company shall establish and maintain a freight and passenger depot; * * * and thence westwardly on the most practicable route to the Rio Grande river at a point in the county of El Paso, opposite the town of El Paso, in Mexico; * * *

"Sec. 2. That the State of Texas hereby grants and donates to the said Texas and Pacific Railway Company twenty sections of land, of six hundred and forty acres each, for every mile of its road completed in good substantial running order in the State of Texas. * * *

"Sec. 9. That the above grants, donations, and reservations are made to the said Texas and Pacific Railway Company, a corporation created by an act of the Congress of the United States, approved March 3rd, 1871, as the assignee of and successor to the rights, privileges and franchises of the Southern Trans-Continental and Southern Pacific Railroad companies, corporations created by the laws of Texas, with the intent and distinct understanding that the same shall be accepted by said Texas and Pacific Railway Company, in full satisfaction of any claims for money, bonds, or lands, to which said company might be entitled under the act entitled 'An Act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean,' passed May 24th, 1871, and 'An Act amendatory of and supplementary thereto,' passed November 25th, 1871, or by virtue of the consolidation of said Texas and Pacific Railway Company with the Southern Trans-Continental Railway Company and the Southern Pacific Railroad Company, or by virtue of the charters of either of said railroad companies, or by virtue of any railroad franchise granted by the State of Texas, purchased or acquired by either of said companies or by the Texas and Pacific Railway Company, or by virtue of any general or special law of this State, and in full satisfaction of all claims or demands for bonds, lands or money of the said Southern Pacific and Southern Trans-Continental Railroad Companies against the State of Texas; and said Texas and Pacific Railway Company shall be subject to such general laws as may be en-

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acted by the Legislature, applicable to other railroads constructed within this State. And that all the property of the said corporations, or either of them, now or hereafter situated in this State, shall be hereafter subject to taxation by the laws of this State. * * *

"Sec. 11. That said Texas and Pacific Railway Company, by their board of directors, shall, within fifteen days from the date of approval of this act, signify to the Governor, by telegraph or otherwise, the acceptance or rejection of the terms and conditions of this act, and within thirty days from the date of approval of this act, shall file a formal acceptance or rejection of the same with the Secretary of State of the State of Texas.

"Sec. 12. That all laws and parts of laws, in conflict or inconsistent with the terms and provisions of this act, be and the same are hereby repealed.

"Sec. 13. That this act take effect and be in force from and after its passage."

The plaintiff in error duly accepted the above act, and the terms and conditions thereof, as prescribed in the act. The line of railroad from Longview to El Paso was completed in the year 1881, by the plaintiff in error.

We have no reason to doubt that the acceptance by the plaintiff in error of the terms and conditions of the Act of May, 1873, set out above, effected a complete divestiture of all rights respecting land, whether right of way land or not, which the Southern Pacific Railroad Company had received from the state, and which the plaintiff in error had acquired. Language more definitely disclosing such a purpose, than does the language contained in section 9 of said act, could scarcely be framed. To hold, as we are asked to do, that rights respecting right of way land are excepted from the all-embracing language contained in said section, would require reading into said language words that are not there. After such acceptance by the plaintiff in error, the company had no rights concerning any land which the Southern Pacific Railroad Company acquired from the state, except easement rights in such land as the last-named company, prior to the consolidation, was entitled to "take and hold" under the above-quoted provisions of section 20 of the Act of February 16, 1852. In section 1 of the Act of May, 1873, language occurs which reasonably implies a grant of such easement rights. We refer to the provisions contained in the last-mentioned section which provide for the construction, by the plaintiff in error, of the railroad, as far as Fort Worth, on the line previously located—inferentially by the Southern Pacific Railroad Company—thence on westward to El Paso, as provided in said section.

[4] This brings us to the contention that, under article 6317 of the Revised Statutes of 1925, the plaintiff in error has the right to drill for and produce oil and gas from its right of way in question, for its own use in operating its railroad. This statute reads as follows: "Every such corporation shall have the right of way for its line of road through and over any lands belonging to this State, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land."

It will be observed that this statute provides for the use by the corporation of "earth, timber, stone or other material upon such land." It is settled that the term "other material" means material of the same class as the materials ennumerated; and since oil and gas do not belong to that class, it follows that this contention, too, must be overruled. Right of Way Oil Co. v. Gladys City Oil, Etc., Co., 106 Tex. 94, 157 S. W. 737, 51 L. R. A. (N. S.) 268.

The judgment of the trial court and that of the Court of Civil Appeals are affirmed.

Opinion adopted by the Supreme Court.

KANSAS LIFE INS. CO. v. FIRST BANK OF TRUSCOTT.

No. 1507—6260.

Commission of Appeals of Texas, Section B.

Jan. 30, 1935.

1. Insurance ⇐400

Incontestability clause precluded, after lapse of period of contestability, defense of fraud to action on life policy, notwithstanding insurer's agent participated in fraud (Rev. St. 1925, art. 4732, subd. 3).

2. Principal and agent ⇐150(2)

Where agent acts for other party in making contract for his principal, without principal's knowledge, contract is voidable at principal's option, but not wholly void.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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23.

3. Contracts ⇐98

Fraud in material matter inducing execution of contract vitiates contract in sense that contract may be avoided at instance of defrauded party, but does not make contract a nullity.

Error to Court of Civil Appeals of Eleventh Supreme Judicial District.

Action by the First Bank of Truscott against the Kansas Life Insurance Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals [47 S.W.(2d) 675], and defendant brings error.

Affirmed.

Charles M. Howell and K. W. Halterman, both of Kansas City, Mo., James A. Stephens, of Benjamin, and Joiner & Cook, of Plainview, for plaintiff in error.

D. J. Brookreson, of Benjamin, for defendant in error.

SMEDLEY, Commissioner.

The Court of Civil Appeals affirmed a judgment of district court in favor of defendant in error against plaintiff in error for $2,500, the face amount of a policy of insurance issued by plaintiff in error on the life of one Burgess, and for the additional sums of $300 as penalty, and $200 as attorney's fee. 47 S. W.(2d) 675.

The policy had been assigned to defendant in error as security for Burgess' indebtedness to it in a sum exceeding the amount of the policy. Pursuant to the requirement of subdivision 3 of article 4732, Revised Civil Statutes of 1925, the policy contained an incontestable clause in the following language: "This policy shall be incontestable after one year from date of issue, except for the nonpayment of premiums or violation of its terms as to military or naval service in time of war, and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any."

The date of the policy was July 16, 1929. The insured died July 28, 1930.

[1] The sole question presented here is whether the Court of Civil Appeals correctly held that the incontestable clause precluded the defense specially pleaded in the answer. The substance of the allegations contained in the answer is as follows: Burgess, the insured, who was indebted to defendant in error in a large amount and was in straitened circumstances financially, had long been in ill health, which caused him to have high blood pressure and made him an undesirable risk for life insurance, all within the knowledge of defendant in error and its vice president, Mrs. Evelyn Clark. Mrs. Clark, upon her own application, was appointed an agent of plaintiff in error to take applications for life insurance, and a short time thereafter defendant in error, acting through Mrs. Clark, and in order to protect itself against loss, induced Burgess to make application for a policy of life insurance in the sum of $2,500. When the application was made Burgess was in ill health and under the care and treatment of his physician in Hale Center, but Mrs. Clark caused him to go to Plainview and be examined there by another physician, who falsely made a favorable report as to his physical condition. In reliance upon this report, plaintiff in error issued the policy of insurance. It would not have issued the policy had it known the truth as to the physical condition of Burgess. The policy was applied for with the intention of assigning it to defendant in error, and after its delivery it was so assigned. The disease from which Burgess was then suffering continued and caused his death. The facts as to the condition of the health of Burgess and his indebtedness to the bank were unknown to plaintiff in error. Defendant in error paid the premiums for the policy and had the policy in its possession at all times after its delivery, and even before its assignment. By the said acts of defendant in error, Mrs. Clark and the physician in procuring the making of the application for the insurance, in causing the physical examination to be made, and in making and causing to be made the false report as to the physical condition of Burgess, a fraud (it is alleged) was perpetrated upon plaintiff in error and the policy of insurance was made void.

These are allegations of an unconscionable fraud in the procurement of the issuance of the policy, which if proven would, in the absence of the incontestable clause, constitute a complete defense to a suit on the policy.

However strongly we may be tempted, on account of the nature of the facts alleged, to admit them as a defense in this case, we cannot do so without doing violence to the language of the incontestable clause and without conflict with the decisions construing that clause and the statute which requires its presence.

Subdivision 3 of article 4732 provides that no policy of life insurance shall be issued unless it contains a provision substantially as

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

TEXAS & PACIFIC RAILWAY COMPANY

IS DENIED MINERAL RIGHTS (TITLE IN FEE)

ON RIGHT-OF-WAY IN ECTOR COUNTY

United States Supreme Court

denies writ of certiorari

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the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 75 F. (2d) 989.

No. 68. ASSOCIATED INDEMNITY CORP. *v.* WILSON. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. R. Boone* for petitioner. No appearance for respondent. Reported below: 74 F. (2d) 896.

No. 71. LIGGETT & MYERS TOBACCO CO., INC. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Richard S. Holmes* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. P. Jackson* for the United States. Reported below: 77 F. (2d) 65.

No. 72. MICCA *v.* WISCONSIN NATIONAL LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John E. Cassidy* for petitioner. *Mr. R. A. Hollister* for respondent. Reported below: 75 F. (2d) 710.

No. 73. JOHN T. RIDDELL, INC. *v.* ATHLETIC SHOE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. R. Rummler* for petitioner. *Messrs. Cyril A. Soans* and *Frank H. Marks* for respondent. Reported below: 75 F. (2d) 93.

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No. 74. AULL *v.* LIDEPA CORPORATION ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Frederick W. Schmitz* for petitioner. No appearance for respondents. Reported below: 118 Fla. 408; 159 So. 808.

No. 77. TEXAS & PACIFIC RY. CO. *v.* TEXAS ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. T. D. Gresham* and *M. E. Clinton* for petitioner. *Messrs. William McCraw* and *Scott Gaines* for respondents. Reported below: 124 Tex. 482; 78 S. W. (2d) 580.

No. 80. HOLLIDGE *v.* COLONIAL TRUST CO. October 14, 1935. Petition for writ of certiorari to the Superior Court in and for the County of Norfolk, Massachusetts, denied. *Mr. Brenton K. Fisk* for petitioner. *Mr. Lawrence E. Green* for respondent. Reported below: 290 Mass. —; 194 N. E. 711.

Nos. 85 and 86. CAMPBELL *v.* ALLEGHANY CORPORATION. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Llewellyn A. Luce* for petitioner. *Messrs. George Weems Williams* and *W. T. Kinder* for respondent. Reported below: 75 F. (2d) 947.

No. 88. LAMBORN ET AL. *v.* AMERICAN SHIP & COMMERCE NAVIGATION CORP. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Alfred C. B. McNevin* and *Farnham P. Griffiths* for petitioners. *Messrs.*

TEXAS & PACIFIC RAILWAY COMPANY

IS DENIED MINERAL RIGHTS (TITLE IN FEE)

ON RIGHT-OF-WAY IN ECTOR COUNTY

United States Supreme Court

dismisses appeal

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No. 82. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BLUMENTHAL. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Argued November 21, 1935. Decided December 9, 1935. *Per Curiam:* Decree reversed. *Douglas* v. *Willcuts, ante,* p. 1, and *Helvering* v. *Schweitzer, supra. Assistant Attorney General Wideman,* with whom *Solicitor General Reed* and *Mr. Sewall Key* were on the brief, for petitioner. *Mr. Eugene Blumenthal* for respondent. Reported below: 76 F. (2d) 507.

No. —, original. ARIZONA *v.* CALIFORNIA ET AL. December 9, 1935. A rule is ordered to issue requiring the defendants to show cause on or before January 13, next, why leave to file the Bill of Complaint herein should not be granted. Complainant shall have three weeks from the date of service of the returns to the rule within which to reply thereto if so advised.

No. —, original. EX PARTE PIERGIOVANNI. December 16, 1935. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Mauro Piergiovanni, pro se.*

No. —, original. EX PARTE POLLITT. December 16, 1935. Motions for leave to file petition for writ of mandamus and for leave to institute suit against the State of Virginia denied. *Mr. Basil H. Pollitt, pro se.*

No. —. IN RE DEPPE. December 16, 1935. The motion of William P. Deppe of October 25, 1935, is denied. *Mr. William P. Deppe, pro se.*

No. 149. TEXAS & PACIFIC RY. CO. *v.* TEXAS ET AL. Appeal from the Supreme Court of Texas. Argued December 17, 18, 1935. Decided December 23, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Zucht* v. *King,* 260 U. S. 174, 176; *Sugarman* v. *United States,* 249 U. S. 182, 184; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. T. D. Gresham,* with whom *Messrs. M. E. Clinton* and *Herbert Fitzpatrick* were on the brief, for appellant. *Mr. H. Grady Chandler,* Assistant Attorney General of Texas, and *Mr. William McCraw,* Attorney General, with whom *Mr. Scott Gaines,* Assistant Attorney General, was on the brief, for appellees. Reported below: 124 Tex. 482; 78 S. W. (2d) 580.

No. 13, original. NEBRASKA *v.* WYOMING. December 23, 1935. The motion for leave to file amended and supplemental answer is granted. It is ordered that the State of Colorado be made a party defendant to this suit and that process issue against the State of Colorado in accordance with the prayer of the amended and supplemental answer of the State of Wyoming, returnable on Monday, March 2 next. *Mr. Ray E. Lee,* Attorney General of Wyoming, and *Messrs. Robert R. Rose* and *William C. Snow* for defendant, in support of the motion.

No. —. BURT *v.* GENERAL ELECTRIC CO. January 6, 1936. The application of John C. Burt, dated December 28, 1935, is denied. *Mr. John C. Burt, pro se,* in support of the application.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 7, 1935, TO AND INCLUDING JANUARY 6, 1936.

No. 283. BALTIMORE NATIONAL BANK *v.* STATE TAX COMMISSION OF MARYLAND. See *ante,* p. 538.