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BRIEF AND ARGUMENT OF RESPONDENT, J. T. ROBINSON, COMMISSIONER

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This is an action for a writ of mandamus to compel the Commissioner of the General Land Office to award to relator two tracts of submerged lands of eighty acres each, lying in Harris County, under the shallow waters of San Jacinto Bay, which is an arm of Galveston Bay, which, in turn, opens into and is a portion of the Gulf of Mexico.

All and every portion of the two tracts of land aforesaid is within tide water limits, and under the ebb and flow of the tides from the high seas through the Gulf of Mexico, Galveston Bay and San Jacinto Bay. At mean diurnal low water the waters of San Jacinto Bay cover the aforesaid two tracts of land to a depth of about eighteen inches, and that portion of San Jacinto Bay is now navigable by water craft of various kinds of light draft, and is reasonably susceptible of being made navigable by various kinds of water craft of much greater draft, and of the average draft of such steam and sailing vessels as usually ply upon such waters, lakes and bays opening into the Gulf of Mexico, and in the Gulf of Mexico, and along the coast, seagoing vessels excepted.

The attention of the Court is called to the plats which are attached as exhibits A and B to respondent's answer.

In the light of modern engineering the aforesaid portions of San Jacinto Bay, covering the submerged lands in controversy, may, at no far distant day, become of great value and importance from a standpoint of navigation and commerce.

With this prefatory statement, we turn to a consideration of the rights, powers and duties of the Commissioner of the General Land Office in the premises under relator's applications to purchase such submerged lands as mineral lands for the purpose of exploiting same in the hope of obtaining therefrom natural gas and petroleum.

His applications to purchase were filed under R. S. Article 3498j, which reads as follows:

"Art. 3498j. Within twelve months after the filing of the affidavit hereinafter provided for, any person or association of persons qualified as required by Article 3498a, shall have the right to purchase and obtain patent by compliance with this ~~provision~~ title, or on any of the lands of the State which are specified or included in Article 3498a, containing valuable deposits of kaolin, baryta, salt, marble, fire-clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marl, natural cement, clay, onyx, mica, precious stones or any other non-metallic mineral and stones valuable for ornamental or building purposes or other valuable building material, in legal subdivisions, in quantity not exceeding one section; provided, that where any such parties shall have heretofore expended, or shall hereafter expend, five thousand dollars in developing the aforesaid mineral resources of any of said lands, such party shall have the right to buy one additional section and no more, and to include in the purchase any section or part thereof on which the work may have been done. The land so purchased may be in different sections, and all embraced in one or more obligations, not to exceed the quantity stated. The purchaser shall pay not less than fifteen dollars per acre where the land shall be situated ten miles or less of from any railroad in operation, and not less than ten dollars per acre where the land is over ten miles from such railroad, one-tenth of the purchase-money to be paid in cash to the State Treasurer on or before the expiration of the twelve months aforesaid; and the purchasers shall file the treasurer's receipt with the commissioner of the general land office, together with an obligation to pay the State of Texas the remainder in nine equal annual installments, with interest at four per cent. per annum from date, subject to for-

feiture as in other cases; and all said lands are reserved from sale or other disposition than under this title; and where application is made to buy any of the lands herein named except under this title, the purchaser shall swear that there are none of the minerals named in this title on said lands, so far as he knows or has reason to believe or does believe; provided, further, that any party hereinbefore named, who shall prior to the passage of this title, have been the first to work on said lands for the development of said mineral resources, and who has not abandoned said work, and in qualified at passage of this title to buy, shall have a prior preference right of doing so for thirty days after this title goes into effect; provided, further, this article shall not authorize the sale of lands containing valuable deposits of gold, silver, lead, zinc, copper or other valuable metal; provided, further, that any person desiring to acquire any lands under the provisions of this article shall have the right to prospect said lands for a period of twelve months before making any payment thereon, upon condition that said prospector shall file with the proper surveyor his affidavit in writing setting forth that he has gone upon the land in good faith with the intention of purchasing the same under the provisions of this article, and in said affidavit give a reasonable description of said land. After the filing of said affidavit the said surveyor shall immediately forward same to the commissioner of the general land office, who shall take said section off the market until the expiration of said twelve months after the filing of said affidavit with the surveyor."

This section applies to "lands of the State which are specified or included in Section 1 of this Act." Section 1 reads as follows:

"Be it enacted by the Legislature of the State of Texas: That all public school, university, asylum and public lands specially included under the operation of this act, all the lands now owned by the State situated within the reservation known as the 'Pacific Reservation', which were taken off the market and reserved from sale by an act approved January 22, 1883, containing valuable mineral deposits, are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law, by citizens of the United States and those who have declared their intention of becoming such; provided, that all who have located and recorded valid claims under previous valid laws have a prior preference right for ninety days after the passage of this act in which to relocate same under this act."

The act of January 22, 1883, appears on page 508, Vol. 9 of Gammel's Laws, and Section 1 thereof reads as follows:

"Be it enacted by the Legislature of the State of Texas: That all the public lands heretofore authorized to be sold, under the act entitled

'An Act to provide for the sale of the unappropriated public land of the State of Texas, and the investment of the proceeds of such sale', approved July 14, 1870, be and the same is hereby withdrawn from sale; Provided, that nothing contained in this act shall be construed to return the land reserved by an act entitled 'An Act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale', approved July 14, 1870, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, but the sale shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act, until the Legislature shall otherwise provide."

The Act of July 14, 1870, appears on page 80, Vol. 9 of Gammon's Laws and applies to vacant and unappropriated land situated in certain western counties and "all the unappropriated lands situated and being within and included in the Pacific Reservation, and together with such separate tracts of unappropriated public lands, situated in organized counties of this State, as contain not more than six hundred and forty acres." San Jacinto Bay covers more than six hundred and forty acres.

We will endeavor to briefly treat the questions involved under the following propositions:

I.

THE SUBMERGED LANDS IN CONTROVERSY ARE NOT WITHIN THE SCOPE OR MEANING OF THE ABOVE MENTIONED MINERAL STATUTE AND ARE NOT SUBJECT TO SALE BY THE COMMISSIONER UNDER SUCH STATUTE.

SAID STATUTE PROVIDES FOR SALE OF LANDS, BUT THE APPLICATIONS OF RELATOR ARE IN LITERAL EFFECT APPLICATIONS TO PURCHASE WATER.

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Webster, in defining the word land, says: "Earth, or the solid matter which constitutes the fixed portion of the globe, in distinction from the waters, which constitute the fluid or movable part." Under this definition there is a

marked distinction between land and water, so that when the word land is used it cannot be so construed to include water.

In Farnham on Waters and Water Rights, Vol. 1, page 213, it is stated that "a general statute permitting the grant of State land does not include land between high and low water mark", and two North Carolinian decisions are cited in support of the proposition.

In Mann vs. Tacoma Land Company 44 Fed. Rep., 27, it was held that the words "unoccupied and unappropriated public lands of the United States" did not apply to lands covered by high tide.

In Mann vs. Tacoma Land Company, 133 U.S., 273, script had been located upon tide lands covered and uncovered by the flow and ebb of the tides, and situated ^{near} ~~within~~ the city of Tacoma. The statute under which the script was issued authorized its location upon "unoccupied and unappropriated public lands." The Supreme Court held that the term "public lands" did not include tide lands, ^{the} ~~and~~ expression public lands is alluded to as a term having this accepted meaning.

The same construction was followed in Morris vs. United States, 174 U.S., 237.

In I. C. R. R. Co. vs. City of Chicago, 173 Ill., 492, the Legislature had authorized the railroad company to "enter upon and take possession of and use all and singular any lands, etc.", and it had taken possession of a shallow strip of water along the shore of Lake Michigan. The Supreme Court of Illinois held that "the word lands as used cannot mean any portion of Lake Michigan unless that word is given a meaning different from what is generally understood when the word has been used."

In Baer vs. Moran Bros. Co., 27 Pacific Reporter, 476, the Supreme Court of Washington held that a tract over which

the tide ebbcd and flowed was not "public land" within the meaning of an act of Congress, saying: "Within the meaning of the Acts of Congress, and the policy thereby clearly established from the earliest times, the decisions of courts, and the general understanding, this is not land but water, to which none of the public or special and private land laws, including the Valentine Script Act, have any application."

The court further observes that the universally sustained rule is that public land means upland and not soil beneath the water.

This case was affirmed by the Supreme Court of the United States in 185 U.S., 267, and the view expressed by the State court was therein adopted.

Rosborough vs. Pictou, 12 Texas Civil Appeals, 118, involved the validity of that portion of a grant which included a part of Hynes' Bay, a navigable arm of the Gulf of Mexico, embracing an area of more than 1,200 acres thereof. In deciding that question, Associate Justice Williams, speaking then for the Court of Civil Appeals, said:

"We think that there is no doubt that the proposition that the title to the land covered by the navigable waters of the bay did not pass by the grants, is well founded. According to both the common and civil law, an ordinary grant of land along the sea-coast, made by the ministerial officer of the government, did not pass the title to land under water or beyond the coast line. This line was fixed by the common law at the point reached by ordinary high tide, and by the civil law at the mark of the highest tide. The exterior boundary line of the grant to Power and Hamilton was the sea-coast (Sayles' Early Laws, 108; Hamilton v. Bonifoe, 11 Texas, 718), and no authority was given them over the waters of the sea, or of the bays and inlets, or of the soil under them. These are, by well settled principles, reserved for common use. Hence, the grants by the Commissioner of that Colony passed title only to land which was not under the waters of the sea. Galveston v. Menard, 25 Texas, 340; Galveston Surf Bathing Co. v. Heidenheimer, 83 Texas, 588; Arnold v. Munday, 1 Halstead (N.J.), 1; Don v. Sawyer, 2 Hawk's Law and Eq. (N.C.), 228; Martin v. Waddell, 19 Peters, 399."

The attention of this court is also called to the following, which is taken from the brief of appellant in that cause:

"No grant under the Spanish-Mexican-Civil law, and made by a ministerial officer having general authority to grant lands, is valid, unless the existing supreme sovereignty of the country directly authorized the grant of the land under water, and unless the grant contain express words directly mentioning and conveying the lands under water. City of Galveston v. Menard, 25 Texas, 349; Galveston City Surf Bathing Co. v. Heidenheimer, 65 Texas, 562, 563; Justinian's Institutes (Cooper's translation), lib. II, tit. I, secs. 5, 1, 2, 3; Partidas, Part 3, title 28, laws 3, 4, 5, 6, 29; compare laws 6, 7, 8, 27 same book and title (Moreau, Lislet and Carleton's trans.); Recopilacion de Leyes de las Indias, lib. IV, tit. 17, and White's Recop., vol. 2, p. 56, and Sayles' Early Laws, vol. 1, arts. 22, 47, 48, 53, 52; Sayles' Early Laws, art. 100, sec. 2; Pas. Dig., art. 238; Arnold, vs. Randy, 1 Halst. (N.J.), 1; 10 Am. Dec., 366; Eaton v. Sawyer, 2 Hawks (N.C.), 286; Commonwealth v. City of Roxbury, 9 Gray, (Mass.), 492-495; East Haven v. Hemmingway, 7 Conn., 186; Middleton v. Sage, 9 Conn., 221; Norfolk City v. Cooke, 27 Gratt., 435; Elliott v. Stewart, 15 Cr., 239; Gould on Waters, secs. 128, 129."

II.

THE SETTLED PUBLIC POLICY OF THIS STATE HAS ALWAYS BEEN AND IS NOT TO CONSTITUTE A STATUTE AUTHORIZING A PURCHASE OF LAND AS AUTHORIZING A LOCATION OR AWARD OF SUBMERGED LANDS LYING UNDER THE SHALLOW WATERS OF THE LAKES AND BAYS OR ALONG THE GULF COAST OF THE STATE, OR A GRANT OF LAND AS EMBRACING SUCH SUBMERGED LANDS IN THE ABSENCE OF SOME EXPRESS STATUTORY PROVISION TO THAT EFFECT. IN THE NATURE OF AN EXCEPTION TO THE GENERAL RULE.

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By an Act entitled "An Act to define the boundaries of the Republic of Texas", approved December 19, 1836, (1 Gam., 1193, bot.), the first Congress of Texas declared "that from and after the passage of this Act, the civil and political

jurisdiction of this Republic be, and is hereby declared to extend to the following boundaries, to-wit: beginning at the Sabine River, and running West along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning."

And after annexation to the United States of America, the Legislature of Texas reaffirmed its "exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas", excepting such as may be vested in the United States, by Constitution of the United States and by the joint resolution of annexation. (Mart. Dig. Arts. 1831 and 1854.)

Under the aforesaid statutes asserting jurisdiction coupled with the inclination and ability to enforce the jurisdiction so asserted, the ownership, jurisdiction and sovereignty, of the Republic of Texas and of the State of Texas over the lands here in controversy seems, under the usage of nations and the rules of the common law, unquestionable.

But for what purposes are such submerged lands so held by the State?

By the terms of the Act of February 23, 1900, defining the permanent school fund of the State of Texas, partitioning the public land between said fund and the State, and adjusting the question between said fund and the State, and setting apart and appropriating to said school fund in part payment of said account the residue of the public domain of the State, to which said fund was entitled under Section 8, Article 7, of the Constitution of 1876, it was expressly declared that "this act shall not have the effect to transfer to the school fund any of the lakes, bays and islands on the Gulf of Mexico within tide water limits, whether surveyed or unsurveyed." (Acts 1900,

page 31). Said statute, by reiteration, emphasizes the fact that not even the public school fund should acquire title to "any of the lakes, bays and islands on the Gulf of Mexico within tide water limits, whether surveyed or unsurveyed."

This carefully safeguarded and emphatic restriction relative to the disposition of lands situated like these in controversy in this case is full of significance and meaning, and evidences a definite policy upon the part of the Legislature to reserve for the use of the public or for subsequent disposition, under other statutory provisions, the waters of the lakes, and bays and land situated thereunder, and also the islands on the Gulf of Mexico within tide water limits.

We believe that a careful reading of existing statutes and of former statutes of this State relating to the sale of public lands, and especially those found in Revised Statutes, Title 71, will embrace any reasonable mind with the idea that they were not intended by the Legislature to be applicable to such submerged lands, even though it were conceded that the phraseology therein employed is sufficiently broad and comprehensive when read and construed literally to embrace such submerged lands.

This court has held, in effect, that the laws providing for the sale of public lands should be construed in the light of the surroundings and history of the times in which they were engaged and with due regard to all other legislation concerning the public domain, all with a view of giving effect to the legislative purposes rather than with a view of adhering rigidly to the particular phraseology employed in a given statute.

It will be remembered that in a number of instances the Legislature has authorized the purchase of specific portions of shallow bays and tide water lands, and islands along

the Gulf Coast. The first Congress of the Republic granted, by Act of December 9, 1836, to Michael B. Monard and his associates, a league and labor of land situated on the east end of Galveston Island. (1 Cas. 1130, bot.)

By Act approved June 12, 1837, the Congress made special provision for the disposition by the Secretary of the Treasurer by sale at public auction of the island of Galveston, except the league and labor sold to M. B. Monard and associates, and all other islands in the Republic in lots of not less than ten nor more than thirty acres. (1 Cas., 1837, bot.)

The Thirtieth Legislature made special provision for the sale of ^{the} lands constituting a portion of the public domain and situated upon Mustang Island, the plan of sale being widely different in many respects from that prescribed by the general statute authorizing the sale of such lands. (General Laws of 1907, Chapter 122, page 323).

This court recently held that Mustang Island was not within the operation and scope of the general statutes, providing for sale of public lands, and that consequently an attempted location upon that island of a certificate which has been granted by the Legislature to William A. A. (Big Foot) Wallace was invalid.

See also State vs. Delesdenier, 7 Texas, 76; Franklin vs. Hiernan, 36 Texas, 624; Galveston vs. Heldenheimer, 65 Texas, 159.

See Acts of 1891, page 160; Acts 1897, page 223; Acts 1903, page 47.

These express statutes providing for disposition of such lands amount to a legislative construction and declaration to the effect that such statutes were necessary in order to give the right of purchase in such instances.

Other instances might be given, but these will suffice to show that it has been and is the general policy of the Legislature, in dealing with the islands along the Gulf Coast, to treat the subject by specific Legislation and not to place or leave the disposition of such lands under the operation of the general land laws.

It can hardly be doubted that the Legislature would in the same manner have made express and specific provision for the sale or other disposition of submerged lands in the lakes and bays of the State or along the Coast of the Gulf of Mexico had it intended that such lands should be sold or otherwise disposed of by the Commissioner of the General Land Office.

Indeed, such special provisions have been made for disposing of such lands under certain conditions to channel and dock corporations, and to deep water corporations for certain public, or quasi public purposes. (Revised Statutes, Title 81, Chapters 14 and 15).

III.

SUBMERGED LANDS UNDER SHALLOW WATERS OF THE LAKES AND BAYS OF THE STATE AND ALONG THE GULF COAST WITHIN TERRITORIAL JURISDICTION OF THIS STATE ARE OWNED AND HELD BY THE STATE, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF THE STATE FOR PUBLIC, OR QUASI PUBLIC PURPOSES, SUCH AS NAVIGATION, FISHING, ETC., AND ARE NOT SUBJECT TO DISPOSITION BY THE LEGISLATURE OR UNDER ITS DIRECTION FOR PRIVATE OWNERSHIP OR PURPOSES.

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From the beginning it has been the settled policy of the Republic of Texas and of the State of Texas, to hold the submerged lands under the shallow waters of the lakes

and bays and along the Gulf Coast in trust, as it were, for the public rather than to permit them to be appropriated to private ownership or purposes.

Indeed, that has been the settled policy of practically all civilized governments from time immemorial. (City of Galveston vs. Howard, 23 Texas, 343).

This court, in the case last cited, speaking through Judge Roberts, says: "By the civil law, the shores of the sea, of bays, and navigable streams generally, as well as the tide-waters, were jealously guarded from private appropriation, and reserved for common use. As early as 1837, Congress, in establishing a general land office, for the distribution and disposition of lands, enacted 'that all streams, of the average width of thirty feet, shall be considered navigable streams', and 'shall not be crossed by lines of a survey'. Hart. Dig. Art. 1878. The same act made provision for diminishing the front line of tracts, surveyed on navigable streams, indicating an anticipated advantage in the use of such streams for navigation. Art. 1882."

It may be added that both of these statutes, in substantially the same form, are in force today.

It is obvious that if the right of applicants to purchase such submerged lands be recognized and award of such lands made, the erection of derricks and other structures thereon may seriously and permanently obstruct navigation, interfere with fishery rights and materially impair or interfere with the riparian rights of owners of land heretofore sold by the State fronting on such lakes, bays and gulf.

Every consideration of public policy forbids the disposition of such submerged lands for purpose of private ownership.

The attention of the court is called to a discussion of the questions here involved to be found in Farnham on Waters

and Water Rights, Volume 1, page 172, et seq., in which the following language from an opinion of the Supreme Court of the United States, speaking through Mr. Justice Field, in *Illinois Cen. R. R. Co. vs. Illinois*, 146 U.S., 337, is quoted with the author's approval:

"The State holds the title to the land under the navigable waters in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purposes, no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases with as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve each waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

See, also, Florida vs. Black River Phosphate Co., 21 E.R.A., 139; I. G. R. R. Co. vs. City of Chicago, 173, Ill., 193; McCloskey vs. Pacific Coast Company, 180 Fed. Rep., 794; Conrad Investment Co. vs. United States, 181 Fed. Rep., 830.

One of the attorneys for respondent, in a brief which was submitted to the Commissioner of the General Land Office, in support of respondent's applications to purchase, mentioned two patents as furnishing precedent for award of said two tracts of land under respondent's applications to purchase.

The first of these patents, No. 487, Volume 56, dated January 7, 1897, and signed by Governor John Ireland, was for a lot of land measuring 300 by 1100 feet "in Galveston County on the eastern end of Galveston Island".

The second of these patents, No. 533, Volume 52, dated December 8, 1895, was signed by Governor O. M. Roberts, and was for "a certain circular tract of sub-marine land, having a radius of 579 feet, in Galveston County."

Each of these patents shows upon its face that it was issued in accordance with the provisions of section 54 of Article 18 of the Constitution of Texas and Article 331 of Revised Statutes, the numbers of the sections and article of the Constitution being transposed, however, in said Patent No. 487.

In other words, these two tracts of land were patented to the United States Government, for ~~military~~ military purposes under constitutional and statutory provisions authorizing a sale of the public lands to the United States for that purpose.

It is an interesting fact that said Patent No. 533 was signed by the distinguished jurist who wrote the exhaustive, and learned opinion of this Court in City of Galveston vs. Menard,

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Whether the grants of land evidenced by these two patents were authorized by then existing laws or not, it will be noted that the purpose and effect of said grants were very different from what would be the probable and necessary purpose and effect of sales to individuals by the Commissioner of the General Land Office of submerged lands such as those in controversy here.

We respectfully submit that a fair construction of existing laws and public policy alike unquestionably require that the applications of relator in this case should be denied.

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Attorney General's Cases

No. 1930.

F. J. DE METITT,

vs.

J. J. TERRELL, COMMISSIONER.

BRIEF AND ARGUMENT FOR

RESPONDENT.

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File No. 19

Old Miscellaneous County
Brief & Argument

Filed Dec 13 19 84

GARRY MAURO, Com'r

By Lk

County # 75574