No. 5202.

The State of Texas, Appellant,

vs

C. W. Post, Appellee.

Opinion on Motion for Rehearing.

Findings of Fact.

1.- The following map shows the position of the land in controversy, and of the adjoining surveys.-

1257 1251 1249 1245 1246 1240 1239
Cobb Corner
1429 1426 1258 1252 1254 1253 1255 1256 1257
1430 1425 1423 1422 1421 1254 1252 1281 1282
5 6
Land in Controversy
4 3
1427 1414 1416 1418 1420 1421 1301 1302 1297
1 2
1428 1413 1415 1417 1419 1403 1303 1304 1401
505 502 501 1411 1409 1407 1405 1404 1305 1306 1237
519 503 504 1412 1410 1408 1406 1310 1309 1308 1307
520 521 562 1372 1371 1373 1374 1320 1318 1316
529 522 561 1370 1369 1322 1321 1319 1317 1315 1313
528 527 556 1368 1367 1365 1323 1325 1327 1329 1331
Land in Controversy
559 557 555 554 553 1366 1324 1326 1328 1330 1332
B.B. Cor.
466 558 557 559 551 552 404 403 10
465 604 605 606 559 1361 1406 405
Camp Branch Corner.
Grapevine Corner.

2.- The corner marked "Cobb" is a well identified corner. No other corners in the block of surveys lying north or east of the land in controversy can be identified by any natural or artificial objects called for in their field notes.

3.- The corners marked "Camp Branch, "Grapevine" and "B.B." are well identified corners. There are other recognized corners in the blocks of surveys lying south and west of the land in controversy.

4.- The surveys in the block north and east of the land in controversy show by their calls to have been run from east to west and are tied by their intervening calls to the Cobb corner. All of said surveys except Nos. 1413, 1414, 1425, 1426, 1427, 1428, 1429 and 1430, were made prior to the time the surveys on the south and west were made.

5.-- The surveys on the south and west were made from the south and west to the north and east, and there is no dispute in the testimony in the record as to the true location of such surveys. Their boundaries are shown to be as indicated on the above map.

6.- The state surveyor, Twitchell, in 1905 and 1906, under the direction of the Commissioner of the land office, who assumed to act under the law of 1887, ran out the surveys indicated on the above map, and extended the surveys on the east and north of the land in controversy to the west and south so as to include in said surveys the land in controversy. If said surveys be run from the Cobb corner, course and distance, as called for in their field notes, the western side of said block of surveys will be fixed 104 varas further east than is claimed by the state and shown by said map. This for the reason that Standifer, who made the survey for the State recognized rocks found at the N. E. and N. W. corners of survey 1255, but not called for in its field notes, as the corners of said survey, thus giving Surveys 1255, 1256 and 1257 a total excess of 104 vrs. Running out said surveys course and distance from the Cobb corner fixes the south boundary of said block of surveys as claimed by the state and shown on said map.

7.- Twitchell made said survey at the request and expense of the owners of said surveys, but said surveys were all patented at said time, and the patents have never been surrendered for cancellation and no patents have issued upon Twitchell's survey.

--:O P I N I O N:--

1.--In our former opinion herein we held that the survey made by thestate surveyor under the act of 1887 was conclusive against the state as to the true location of the land owned by appellee. A further consideration of the case has led us to conclude that we were in error in the construction that we placed upon said act. Aside from this act, when said survey was made a surveyor could not correct the field notes of a previous survey, without having the certificate in his hands, unless such survey was in conflict with land previously appropriated, and then only to the extent of such conflict, and he could not include in the corrected field notes any land not included in the original file or location. R.S. 1895, Arts 4130 to 4141; Ry.Co vs Thompson, 65 Tex., 186; Adams vs Ry. Co., 70 Tex. 252, 7 SW, 729; Sanborn vs Gunter, 84 Tex., 285, 17 SW, 117, 20 SW, 72; Childress L. & C. Co. vs Baker, 56 SW, 756. We quote from the last case above cited as follows: "We think the charge of the court announced with reasonable fairness and correctness the rules of law applicable to the case". While it does not appear in the opinion, the record in the case discloses the fact that the land in controversy had been resurveyed by a state surveyor under the act of 1887; that it was the contention of appellant that the resurvey precluded the state from claiming the surveys in controversy according to the original location, and that the court, among other things, charged the jury as follows: "The resurvey made by the state surveyor Long, under the direction of the land commissioner and approved by the land commissioner under the act of 1887, may be considered by you for what you may deem it worth, if anything, in connection with all the other evidence in the case, to enable you to determine where the original survey really placed the land, but for no other purpose." Our attention was not called to this case on the original hearing.

Counter 75577

2.- A state surveyor appointed under the act of 1887 had such authority as had therefore been conferred by law upon district and county surveyors, and their deputies, and none other, except that at the request of owners of patented lands, alternating with surveys made for the common school, university or asylum funds, or other lands belonging to the state, or in which the State was interested, he might survey such patented lands without having the certificates for the same in his hands, but the corrected field notes so made by him had not force unless the owners of such patented lands surrendered their patents and accepted new patents in accordance with such resurvey. This was not done in the instant case.

3.- The purpose of the act of 1887 in addition to fixing and marking upon the ground the true lines and corners of public lands, so that purchasers thereof could know what they were getting, was, as is declared in the first section thereof, "for the purpose of ascertaining conflicts and errors, and making proper correction of surveys" etc.

The resurvey as made by the state surveyor Twitchell does not disclose any conflicts in any of the original surveys, and if any such exist he did not attempt to correct them. Said resurvey did not disclose any errors in the original surveys, except excesses in some of the surveys to the west and south of the land in controversy, which errors he did not attempt to correct, and should not have done so as to corners identified by objects found on the ground, and also errors in calls for the corners of other surveys. For instance, the N.E. corner of survey 403 calls for the S.E. corner of 1326; the N.E. corner of 552 calls for the S.W. corner of 1365; the N.E. corner of 556 calls for the S.W. corner of 1370; the N.E. corner of 561 calls for the S. W. corner of 1372. To have extended these surveys to the corners called for would have materially altered their configuration. For example, the east line of 403 would have been extended 537 vrs north and 103 vrs east, and east line of 561 would have been extended 349 vrs north and 570 ~~vrs~~ east. The state surveyor

did not correct said surveys calling for said corners by extending them to the corners called for, but extended the surveys called for to the surveys calling for them. Calls for course and distance in the field notes of a survey, may, in a proper case, be extended and varied to fulfil other calls in its field notes, but cannot be so extended or varied to satisfy the calls in another and junior survey. These calls for the corners of prior surveys were calls for open, unmarked prairie corners, and, under the facts and circumstances in evidance, appear to have been made from conjecture, and will not prevail over calls for course and distance. As above stated, they were not attempted to be given effect by the state surveyor, in so far as they affected the location of the surveys in which such calls were made, but what he did was to extend the surveys to the north and south of the land in controversy, so as to make them cover the same. In the absence of natural or artificial marks called for in the field notes showing error in course and distance, and in the absence of proof as to how surveys were actually made, they must be run out course and distance from known corners with which they connect by their callings.

4.- The commissioner of the land office has no authority, except such as is conferred upon him by law. Hendrick vs Cavanaugh 60 Tex., 24; Gaither vs Howrick, 69 Tex., 97, 6 SW, 619; N.Y.L.Co. vs Thompson, 83 Tex., 181, 17 SW, 920; Day vs State, 68 Tex., 553, 4 SW, 865; Ry. Co. vs State, 36 SW, 116. Certainly no law prior to the act of 1887 conferred upon the commissioner the power to establish the boundary between land owned by the state and patented surveys by appointing a surveyor and having him run such line,- nor did the act of 1887 do so. The power conferred upon him to have lands in which the state was interested resurveyed so as to correct errors in previous surveys, did not authorize him, by approving erroneous surveys, to thereby change the lines and corners of patented surveys, so as to include therein land not included in the field notes of such patented surveys as originally run and patented.

5.- If the lands in controversy were not in fact included

within the bounds of appellee's patented surveys, as the same were originally made, they were public lands, and if the act of 1887 authorized the commissioner to extend the bounds of such surveys so as to include, in addition to lands within said surveys as originally made, the land in controversy, such act would be without constitutional authority. Not only so, but as the resurvey was made in 1905 and 1906, and as all public lands in this state had been set aside to the school fund by the act of 1900 (Acts of First Called Session, p. 31) the Legislature was positively prohibited by the Constitution from disposing of these lands, and from authorizing the commissioner to do so at the time of such resurvey, except by selling the same. Const. of Tex. Art 7 Sec. 4. To include the lands in controversy in appellee's patented survey by extending the lines thereof beyond their original location is not to sell such lands as required by the Constitution, but is to give them away. It will not be presumed that the Legislature intended an act to be so construed as to render it unconstitutional. But even if it could be held that the act of 1887 intended to empower the land commissioner to give away public lands under the guise of establishing boundary lines, such act, in so far as it applies to the land in controversy, must be held to have been repealed by the act of 1900 above referred to.

6.- It was immaterial under the construction which we gave to the act of 1887 in our former opinion whether all or only a part of the land in controversy was not included in appellee's patented surveys, as originally run, but such fact becomes material under the construction of said act as herein given. We have carefully examined the field notes and the testimony in the record, and find therefrom that none of the land in controversy was so included in said patented surveys.

7.- Appellee contends that inasmuch as surveys 1430, 1427 and 1428 call to connect with the surveys to the east, and also with the surveys to the west, they having been made subsequent to the making of the surveys to the east and also on the west, and

in each instance the calls are for unmarked prairie corners, it cannot be told whether the vacancy, if any, is on the east or on the west of said surveys, and that therefore the state has failed to make out its case as to this tract. The court takes judicial cognizance of the fact that the state was originally the owner of all lands in Texas not granted by the government of Spain, or of Mexico, or the Republic of Texas prior to the organization of this State. This presumption makes a prima facie case in favor of the state as to any lands for which it may bring suit, and such prima facie case can be met only by showing a grant to such lands. The State is the common source, and whatever title appellee had must have been derived from the State. State vs Delesdenier, 7 Tex., 96-7. Hamilton vs. State 152 S.W. 1120 Appellee claimed that land by virtue of his ownership of surveys Nos. 1430, 1427 and 1428. He who claims by virtue of a grant, when the boundaries of the same are in issue, must show the location of such boundaries, and that the land in controversy is included therein.

For the reason above stated, the appellant's motion for a rehearing is granted; the judgment of the trial court is reversed and judgment is here rendered for appellant for the land described in its petition.

C. H. JENKINS,

Filed Oct. 22, 1913. Associate Justice.

On account of facts which have come to my knowledge since the former judgment of this Court was rendered, I have not participated in the consideration and decision of the motion for rehearing.

W. M. Key,
Chief Justice

Counter # 75581

File No. 20

Old Miscellaneous County

Court Opinion on Case 5202

Filed Dec 13 19 84

GARRY MAURO, Com'r

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