(71 Tex. 239.)

ARNOLD v. STATE.

(*Supreme Court of Texas.* June 19, 1888.)

1. OFFICE AND OFFICER—LEGISLATIVE CONTROL—CREATION OF NEW OFFICES.
Act Tex. April 12, 1883, created a land board composed of the governor, attorney general, comptroller, treasurer, and commissioner of the general land-office, to sell and lease the public school-fund lands. Const. Tex. art. 4, §§ 22, 23, provide, as to heads of the executive department other than the governor, that they shall perform, in addition to the duties expressly imposed upon them by the constitution, "such other duties as may be required by law." *Held*, that the duties imposed by such act pertain to the executive department, and that it creates no new offices.

2. PUBLIC LANDS—IRREGULAR ACTS OF STATE BOARD.
The exercise of powers, by the state land board, not authorized by the act by which it was created, does not affect the validity of acts done by it in accordance with the act.

Appeal from district court, Travis county.

Action by the state against R. H. Arnold, upon lease of school-fund lands, for rent. Judgment for plaintiff, and defendant appeals.

Maxey & Fisher and *Temple Houston*, for appellant.

STAYTON, C. J. This cause presents essentially the same facts presented in the case of *Smissen* v. *State*, *ante*, 112, (this day decided,) and, without restating the grounds for our opinion, we held, for the reasons stated in the case referred to, that the act of April 12, 1883, and the lease contract made between the appellant and the state under it, were valid. In addition to the question presented in the case before referred to, it is urged that the act of April 12, 1883, created new offices, to be held by the heads of the executive department, without warrant of law, and imposed upon them new and additional duties, in contravention of the constitution. All the officers made members of the land board were of the executive department, and the duties imposed on that board were such as pertained to that department. The governor is the chief executive officer of the state, and the constitution expressly provides that the other heads of department of the executive branch of the government, made members of the board, shall perform, in addition to the duties expressly imposed upon them by the constitution, "such other duties as may be required by law." Sections 22, 23, art. 4, Const. The fact that the land board may have assumed to exercise powers not authorized by the act creating the board could not affect the validity of acts performed by them in accordance with the act. If there were parts of the act not authorized by the constitution,—a matter that need not now be considered,—these parts of the act were not so connected with the entire act as to invalidate it *in toto;* nor have such parts of the act any bearing on the validity of the lease made the basis of this action. The judgment of the court below will be affirmed.

(74 Tex. 480.)

TUGWELL *et al.* v. EAGLE PASS FERRY CO.

(*Supreme Court of Texas.* June 19, 1888.)

1. FERRY—ESTABLISHMENT OVER RIO GRANDE—POWER OF COMMISSIONERS' COURT.
Under Rev. St. Tex. art. 1514, giving commissioners' courts authority "to establish public ferries whenever the public interests may require it," such courts are authorized to grant a franchise for a ferry across the Rio Grande, which forms a part of the boundary between Texas and Mexico, the franchise extending as far as the political jurisdiction of the state; that is, to the middle of the river.

2. SAME—INCORPORATION—ACQUISITION OF RIGHT TO OPERATE FERRY.
A ferry company does not, by virtue of its incorporation under Rev. St. Tex. art. 642 *et seq.*, relating to bridge and ferry companies, acquire the right to operate a ferry between the points named in its articles, without first obtaining a license from the commissioners' court of the proper county.

Appeal from district court, Maverick county; JOHN H. JAMES, Special Judge.

J. A. Ware, for appellant. *John H. Clarke* and *Robertson & Williams*, for appellee.

GAINES, J. This suit was brought by appellants, a ferry company, to enjoin appellee, a ferry corporation, from operating a ferry-boat across the Rio Grande river between Eagle Pass, Tex., and Piedras Negras, in Mexico. The plaintiffs claimed an exclusive right to operate a ferry between the towns named by virtue of a license granted to them by the commissioners' court of Maverick county in June, 1886. The defendant company in its answer claimed its right to maintain a ferry between the points designated—*First*, by virtue of its incorporation as a ferry company, under the general laws of the state, on the 7th of July, 1885; and, *secondly*, by prescription. Its charter was for the express purpose of operating a ferry between Eagle Pass and Piedras Negras. It also alleged that it had tendered to the commissioners' court $100 for a license, and that the court had refused to grant it. By order of the judge of the district court of that judicial district a bond was given and an injunction sued out, but upon final hearing the injunction was dissolved, and a judgment rendered for damages in favor of defendant, against plaintiffs, and against the sureties on the original bond, and also against the sureties upon an additional bond given by order of the court during the progress of the cause. The case was submitted to the judge without a jury, who filed the following conclusions of fact: "(1) That the proceedings had between the county commissioners' court of Maverick county and A. P. Tugwell, relative to a grant of ferry privilege between Eagle Pass and Piedras Negras, was intended to be, and was in effect, an exclusive license to the said Tugwell to land a ferry at the Eagle Pass bank of the Rio Grande river, and that defendant had no license therefor; (2) the said river over which this ferry was to operate is a boundary water-course between the United States and the republic of Mexico; (3) that the defendant [appellee] was operating a rival ferry between said towns after the license had been granted to said Tugwell, and continued to interfere with said A. P. Tugwell's ferry for four days, when the latter, and his partner, Madison, sued out this injunction; (4) that the facts fail to show a prescriptive right in either party to exclusive ferry privileges between said towns." As applicable to the facts so found, the court concluded the law to be "(1) that the statutes of Texas do not authorize the county commissioners' court of a county to establish or license ferries over boundary streams, such as the Rio Grande; (2) that article 4438 of the Revised Statutes does not confer such authority; (3) that, in the absence of statutory authority, the county commissioners' court of Maverick county have no power to grant exclusive license to any person to operate a ferry on said river; (4) that the injunction was improperly sued out, and should be dissolved, and actual damages awarded the defendant."

The findings of fact are supported by the evidence. The only controverted issue found by the judge is as to the prescriptive right of the defendant corporation, and we think the evidence wholly insufficient to show such right. But we do not concur in the conclusions of law. It is true that article 4438 of the Revised Statutes does not confer authority upon the commissioners' court to establish a ferry across a stream "which makes a part of the boundary line of this state," and, indeed, we may look in vain, in the entire chapter upon the subject of ferries, from which this article is taken, to find any express authority for granting ferry licenses to any persons except the owners of the land fronting upon the streams, lakes, or bays in the state, except in cases where the owners of ferries shall refuse to keep the same at the rates allowed by the commissioners' court. Rev. St. art. 4442. Yet no one is permitted to keep a public ferry and charge fees without obtaining a license from the court, and giving bond as required by the statute. Id. art. 4450. To keep a ferry, and to receive anything of value for crossing persons or property,

without first obtaining license as is required by law, is made punishable by the Penal Code. Pen. Code, art. 415. It was certainly not intended that the important matter of the establishment of public ferries should be left to the caprice of those who might perchance own the land at the points at which the public convenience might require them. This seeming difficulty is removed by reference to article 1514 of the Revised Statutes, which defines the powers of the commissioners' courts. They are there given authority "to establish public ferries whenever the public interest may require." The grant is as full as the legislature can make it. Chapter 6 of title 87 of the Revised Statutes contains merely the regulations of the power delegated to these courts. Article 4439 provides that any person wishing to establish a ferry shall apply to the commissioners' court, and shall show that he is the owner of the land on which the ferry is sought to be established. It is said that the statutes merely give a preference to the land-owner, (*Hudson* v. *Emigration Co.*, 47 Tex. 56;) and we incline to the opinion that this right of preference does not exist at points where public roads have been established across the streams of the state. In acquiring the right of a public road along any designated route, by condemnation or otherwise, it would seem the public acquires the right to use such means as are necessary and proper for the ordinary purposes of travel. This is indicated by article 4436, which contains the provision that, should the owner of the land upon one bank of the stream be unable to get the consent of the owner of the land on the opposite bank, he may establish his ferry by procuring an order of the court to lay out a public road from such opposite bank. These considerations impel us to the conclusion that the Revised Statutes confer upon the commissioners' courts the power to license public ferries in their respective counties in all cases except in those instances where the legislature has specially granted the privilege of establishing a ferry to some person or persons, or some municipal body.

But the question arises, has the state the right to grant a franchise for a ferry across a stream which constitutes a boundary between it and another state, or between it and a foreign nation? The answer to this is that it has the right, as far as its territory extends; that is, in ordinary cases, to the middle of the stream. This principle is distinctly announced by the supreme court of the United States in *Conway* v. *Taylor's Ex'r*, 1 Black, 603. It is held, in that case, that the power to establish ferries is co-extensive with the legislative jurisdiction of the state, and that an exercise of this power over a stream which is the boundary of a state does not infringe that provision of the constitution of the United States which gives the congress power to regulate commerce between the states and with foreign nations. See, also, *Marshall* v. *Grimes*, 41 Miss. 27; *People* v. *Babcock*, 11 Wend. 586; *Bridge Co.* v. *Geisse*, 38 N. J. Law, 39; *Memphis* v. *Overton*, 3 Yerg. 387. In *People* v. *Babcock, supra*, in speaking of the jurisdiction of the state of New York over the Niagara river, the court says: "So far as jurisdiction is concerned, it is as complete over this river, to the center thereof, as over any other stream in the county. The privilege of the license may not be as valuable to the grantee by not extending across the river; but, as far as it does extend, it is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place." The cases cited above are decisive of the question. That relied upon by counsel for appellee (*Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826) is not in point. It was there held that the property of a ferry company chartered by the state of New Jersey to operate a ferry across the Delaware river between the town of Gloucester, in New Jersey, and the city of Philadelphia, which was merely used in the transportation of passengers and freight, and which was not owned in the state of Pennsylvania, could not be taxed by the latter state. Speaking of the company's freedom from the imposition of such taxes, the court say: "Freedom from such impositions does not, of course,

imply exemption from reasonable charges as compensation for the carriage of persons in the way of tolls and fares, or from ordinary taxation to which other property is subjected, any more than like freedom of transportation upon land implies such exemption." The right of neither state to establish ferries upon the river was involved in the decision of the case; and the court further say that "the question, therefore, respecting the tax in the present case, is not complicated by any act of that state [meaning Pennsylvania] concerning ferries." In *Ogden* v. *Lund*, 11 Tex. 688, Judge LIPSCOMB says: "The manner in which ferries are to be established over water-courses forming county boundaries has been defined; but there has been no legislation upon the subject when the river is a national boundary, and consequently no authority given to the county court to establish a ferry over such streams. * * * The third section of the act of 23d of January, 1850, makes a provision for ferries on rivers forming the boundaries of the state; but this act, being subsequent to the injuries for which this suit is brought, can have no influence. It provides for a system of reciprocity, and this is all that can be done in such cases by legislation. Any attempt to give a privilege or franchise beyond the jurisdiction of the state would be void." The opinion itself shows that these remarks are mere *dicta*. The political jurisdiction of the state extends to its boundary, which, by article 5 of the treaty of Guadalupe Hidalgo, is fixed, on the west, at the middle of the Rio Grande river. 9 U. S. St. at Large 926. The commissioners' courts, then as now, had power to establish ferries; and the authorities we have cited show that the state had the same authority over such parts of the streams which formed its boundaries as were within its political jurisdiction as it had over streams entirely within its borders. To hold that the commissioners' courts have no authority to license ferries on the Rio Grande would be to deprive the public of the convenience of public ferries on that stream, because, as we have shown, it is a penal offense to take toll for ferriage without first procuring a license therefor. The third section of the act of 1850 (now article 4438 of the Revised Statutes) we think provides for a system of retaliation rather than of reciprocation, and, in our opinion, its validity may be seriously doubted. *Ferry Co.* v. *Pennsylvania*, *supra*. It was evidently not intended to provide either for the establishment or regulation of ferries. It follows, from what we have said, that, in our opinion, when appellants procured their license from the commissioners' court of the county, they acquired the right to operate a ferry as far as the political jurisdiction of the state extended; that is, to the middle of the river. Beyond this the court had no power, and further it should have had no concern. Its grant is good as far as its power extended.

It becomes important, then, to inquire by what right the appellee claims a ferry privilege. The court properly found that it had not shown a right by prescription. It is claimed, however, that by virtue of its incorporation under the general laws of the state, (Rev. St. art. 642 *et seq.*,) with power to operate a ferry between Eagle Pass and Piedras Negras, it acquired the right to exercise the ferry privileges claimed by it. But we think this claim is based upon a misapprehension of the scope and effect of our general incorporation laws. Their object is simply to enable individuals to associate themselves together, with the powers, privileges, and incidents of a corporation for the promotion of certain purposes. So far as they relate to ferries, they merely provide a mode by which a corporation may be created for the purpose of maintaining a public ferry. The franchise they grant is the power, as a corporation, by acquiring another franchise, namely, a ferry privilege, to operate and maintain a public ferry. After the incorporation is completed, the corporation has the same right to acquire a ferry property and privilege, and no more. It was certainly not intended to enable any number of individuals, by the mere fact of filing articles of incorporation as required by the statute, to acquire a ferry privilege itself at any point that should be designated in such

articles. This construction is inconsistent with our civil and criminal statutes upon the same subject. The secretary of state has no discretion, when applied to, to file a charter prepared as required by the law. But there should be some officer or tribunal to whom is confided the important function of deciding whether the right to operate a public ferry should be granted or not when application is made therefor. This jurisdiction, in our opinion, is conferred by our laws upon the commissioners' courts of their respective counties, and we think their action is not subject to review in a collateral attack. *Haynes* v. *Wells*, 26 Ark. 464. The commissioners' court of Maverick county refused appellee's application for a license; whether correctly or not we need not inquire. Nor need we decide whether they exceeded their authority in attempting to grant to appellants an exclusive privilege. Appellants have the only license; and appellee, at the time the injunction was sued out, was operating a ferry in competition with appellants' ferry, and in violation of law. Upon the conclusions of fact found by the court, the injunction should have been perpetuated on the final hearing. The judgment will be accordingly reversed, and here rendered for appellant.

(71 Tex. 246.)

PEARSON *et al.* *v.* COX *et al.*

(*Supreme Court of Texas.* June 19, 1888.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—WIFE OF INSANE GRANTOR.
An insane husband sold to defendant a tract of 280 acres of land used as a homestead, and some personal property, at the gross price of $2,500, and coerced his wife into joining in the deed. Defendant was ignorant of the insanity and coercion. The vendor with his family removed to land purchased by him with the proceeds of such sale, and, soon after, died. The latter tract cost $1,300, and the wife received, out of said $2,500, $1,000 in money. *Held*, in a suit by the widow and minor children to recover the homestead, and the value of the personal property, that plaintiffs were entitled to the land upon repayment of the sum of $2,500, less the value of the personal property.

2. SAME—ACTION BY WIFE OF INSANE GRANTOR—DECREE.
The decree in such case should be to allow plaintiffs, within six months, to pay said sum into court for defendant's use, upon which a writ of possession in their favor should issue; but, upon their failure to so pay, the land should be sold to satisfy and discharge said sum.

Appeal from district court, Fannin county.

Action by M. M. Ussery and J. G. Ussery, her husband, against Hugh Cox, to recover 280 acres of land, alleged to be their homestead, and the value of certain personal property. J. G. Ussery dying pending the suit, the female plaintiff married one David Pearson, and the suit was revived in her name, and that of the minor children of her first husband; and Pearson, refusing to join as plaintiff, was made defendant. From the decree, which gave the land to plaintiffs upon the payment of $1,700.22, plaintiffs appealed.

W. W. Wilkins and *R. B. Semple*, for appellants.

WALKER, J. March 24, 1884, M. M. Ussery and her husband, J. G. Ussery, brought suit against Cox, to recover 280 acres of land, alleged to be the homestead of the plaintiffs, and for the value of certain personal property appropriated by Cox. Pending the suit the husband died, and the widow married David Pearson. The suit was revived in name of M. M. Pearson and her five minor children, the heirs of J. G. Ussery; it being alleged that there was no administration, and facts showing no need of one. David Pearson, the husband, refusing to join with his wife as plaintiff, he was made defendant. The pleadings showed that Ussery and wife had occupied the land as their homestead; that November 29, 1883, while they were thus occupying the land, and in possession of a large amount of stock cattle, milch cows, provender, etc., Ussery sold said land and personal property to Cox; that Ussery, at the time, was of unsound mind, and that Cox knew it, and, taking advantage of his