KENEDY PASTURE CO. et al. v. STATE et al. (No. 3043.)

(Supreme Court of Texas. May 18, 1921.)

1. Courts ⊜247(10)—Court of appeals' judgment as to boundary respected, where whole case does not depend upon boundary controversies.

Although the Supreme Court might determine boundary disputes where necessary on other matters properly appealed in an action of trespass to try title, yet where the whole case does not depend upon the determination of the boundary controversies, the finality of the judgment of the Court of Civil Appeals as to them should be respected.

2. Appeal and error ⊜1094(2)—Findings of trial court and Court of Civil Appeals upon questions of fact are conclusive on Supreme Court.

Upon error to review an action in trespass to try title, where the trial court's judgment on boundary disputes involved questions essentially of fact supported by evidence, the findings of the trial court and the Court of Civil Appeals are conclusive on the Supreme Court.

3. Public lands ⊜198 — Treaty of Guadalupe Hidalgo does not protect Mexican land grants not in existence when the treaty was signed.

The provisions of the treaty of Guadalupe Hidalgo, protecting Mexican land grants, cannot be construed to protect a grant made to one by a Mexican state in April, 1848, which was after the signing of such treaty.

4. Public lands ⊜199 — A nation may not grant title to land to which it has no title.

A nation cannot grant land to private individuals in territory to which it has no title, and a de facto possession could not supply title.

5. Public lands ⊜199—Power of Mexican government to grant land in territory ceded to this country ended with signing of treaty.

Treaties take effect from the date signed, and where disputed territory is ceded as by the treaty of Guadalupe Hidalgo, the power of the ceding government to grant land within it ends with the signing of the treaty.

6. Public lands ⊜223(1)—Party having paid for land and had it surveyed prior to 1836 acquired inchoate and equitable title protected by treaty.

Where land between the Nueces and the Rio Grande rivers was surveyed for grantee who paid the Mexican authorities for it prior to 1836, when it was finally claimed by the Texas Republic, such grantee acquired an inchoate or equitable title having its origin prior to December 19, 1836, which would be protected by the treaty of Guadalupe Hidalgo.

7. Public lands ⊜210—Copies of original letters, shown to be genuine and found in Mexican archives, held admissible to show equitable title.

Copies of letters found in the archives of a Mexican town *held* admissible in evidence, after admission of evidence as to genuineness of the originals, as compared copies to show equitable title in the grantee from a Mexican state prior to the ceding of the territory by Mexico, in an action in trespass to try title.

8. Public lands ⊜209—Abandonment of grant must be shown by unequivocal act evidencing intention, and mere failure to assert right is insufficient.

In an action in trespass to try title, plaintiff's contention that, if a grantee from a Mexican state acquired an inchoate right to the land, he thereafter abandoned it, is not well taken, where there was no unequivocal act on his part evidencing such intention, since his mere failure to assert such right could not operate as a forfeiture of it, besides such was a question of fact, concluded by the trial court's judgment.

9. Public lands ⊜210 — Parties buying from state held innocent purchasers as against record of invalid Mexican grant.

In a proceeding by the state and purchasers from it, in trespass to try title, opposed by claimants under a Mexican grant, where such grant was void, its record, with the field notes accompanying it, in the county, or the filing of a copy of it and the field notes in the Land Office, afforded no character of notice to such purchasers, and a resurvey, based upon the void grant, was wholly without authority and the filing of the field notes thereof could not operate as notice, so that, even if diligently pursued, such knowledge could only lead to ascertainment of the void grant, and the purchasers from the state are innocent.

10. Public lands ⊜210 — Parties purchasing from the state not required to search Mexican records of ancient towns.

Parties purchasing land from the state were not under the duty of searching through the records of ancient towns of foreign country for evidence of an adverse right, which was only discovered long after their rights accrued by extraordinary effort, in the archives of a Mexican town, for there can be no presumption of notice, where inquiry, pursued with ordinary diligence, would have been futile.

11. Public lands ⊜209 — Parties, allowing rights to slumber 70 years in buried records in foreign country with no possession, held not entitled to establish claim against innocent purchasers.

Where parties, claiming land against the state and holders of title from state, permitted the meager and fragmentary evidence of their right to slumber more than 70 years in the buried records of a foreign jurisdiction, with no possession on their part, with the land vacant and the state's claim openly asserted by appropriation at an early day, its resurrection now will not be suffered to defeat the title of innocent settlers, who purchased from the state in good faith.

12. Public lands ⊜223(1) — Claimants under Mexican grant cannot complain of judgment for innocent purchasers whom they did not reimburse.

Where purchasers of land from the state had not paid the full money consideration when

they first learned of defendant's claim under predecessor's inchoate right to title from a Mexican state, but had completed their settlement, improved the land, and paid the principal part of the consideration, and defendant claimant made no offer to reimburse them for consideration paid or improvements, or in any way to perform what equity would require, they are in no position to complain of a judgment protecting the rights of such purchasers.

13. Public lands ⟸203 — Appropriation void on its face does not give character of "titled land" or "land equitably owned" within constitutional provision.

An appropriation under a Mexican grant void upon its face cannot in its very nature give land the character of "titled land" or "land equitably owned" within the contemplation of Const. art. 14, § 2.

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

Trespass to try title by the State of Texas and others against the Kenedy Pasture Company and others. Judgment for plaintiffs, and the defendants appealed to the Court of Civil Appeals, which affirmed the judgment and denied rehearing in part and granted it in part (196 S. W. 287), and the defendants bring error. Judgment of the trial court and of the Court of Civil Appeals affirmed.

G. R. Scott, Boone & Pope, of Corpus Christi, James B. Wells, of Brownsville, Ike D. White and E. Cartledge, both of Austin, and Herbert Davenport, of Brownsville, for plaintiffs in error.

B. F. Looney, Atty. Gen., G. B. Smedley, Asst. Atty. Gen., Ball & Seeligson and C. W. Trueheart, all of San Antonio, John L. Terrell, of Dallas, and Lyndsay D. Hawkins, of Breckenridge, for defendants in error.

PHILLIPS, C. J. This suit involves about 30,000 acres of land in Willacy County—formerly a part of Cameron County. There are a great many parties to it and a number of complicated issues.

In the main, it is a controversy between the State and those holding under the State, on the one side, and John G. Kenedy, a large number of Mexicans, some interveners and the Kenedy Pasture Company, a corporation, on the other, concerning the title and the location of what the latter parties claim is the Santa Rosa de Abajo Grant, a grant made by the Mexican Government, and to which all of these parties except the Kenedy Pasture Company assert title.

The Abajo Grant, if located as these parties contend it should be, comprises part of forty-nine sections of land, now claimed by the State and those holding under the State, besides an additional strip of land and an insert lying immediately to the west of those sections.

The Kenedy Pasture Company claims certain of these forty-nine sections and parts of sections as included within the real boundaries of the original Mexican grants, the El Paistle and the Las Barrosas, both owned by it and lying immediately to the east and south of the sections. To such sections and parts of sections it also asserts a limitation title.

The suit also embraces a controversy between those of the parties called the Fant Heirs and those claiming the Abajo Grant, over the strip and the inset lying immediately west of the forty-nine sections. This strip and inset are claimed by the latter as within the true lines of the Abajo Grant. The Fant Heirs claim the same land as a part of the Arriba Grant, a survey owned by them and lying to the west of the Abajo and the forty-nine sections.

The effect of the contention of Kenedy and the other parties adverse to the State and the claimants under the State, is to locate the western boundary lines respectively of the Abajo, the El Paistle and the Las Barrosas Grants more than a mile further west than as maintained by the latter, and the northern line of the Las Barrosas slightly further north.

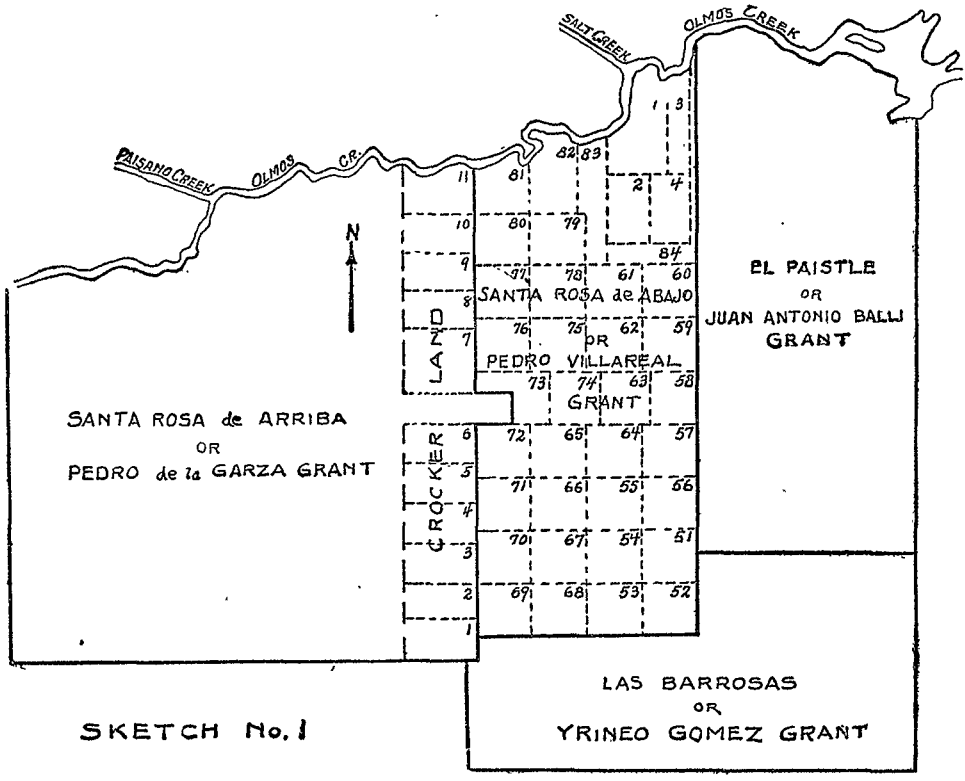
We subjoin two sketches which show with approximate correctness the situation of these grants and the land in controversy. The first shows the grants if located as contended for by the State and the parties in common with it. The broken lines indicated on the second show their location according to the contention of the parties adverse to the State and the claimants under it.

The El Paistle and Las Barrosas Grants were confirmed by the Legislature in 1852. There is no question as to their validity. They were surveyed and patented for Mifflin Kenedy in 1873. This was prior to the locations made on the Abajo Grant under the authority of the State. They were conveyed in 1892 by Mifflin Kenedy to the Kenedy Pasture Company.

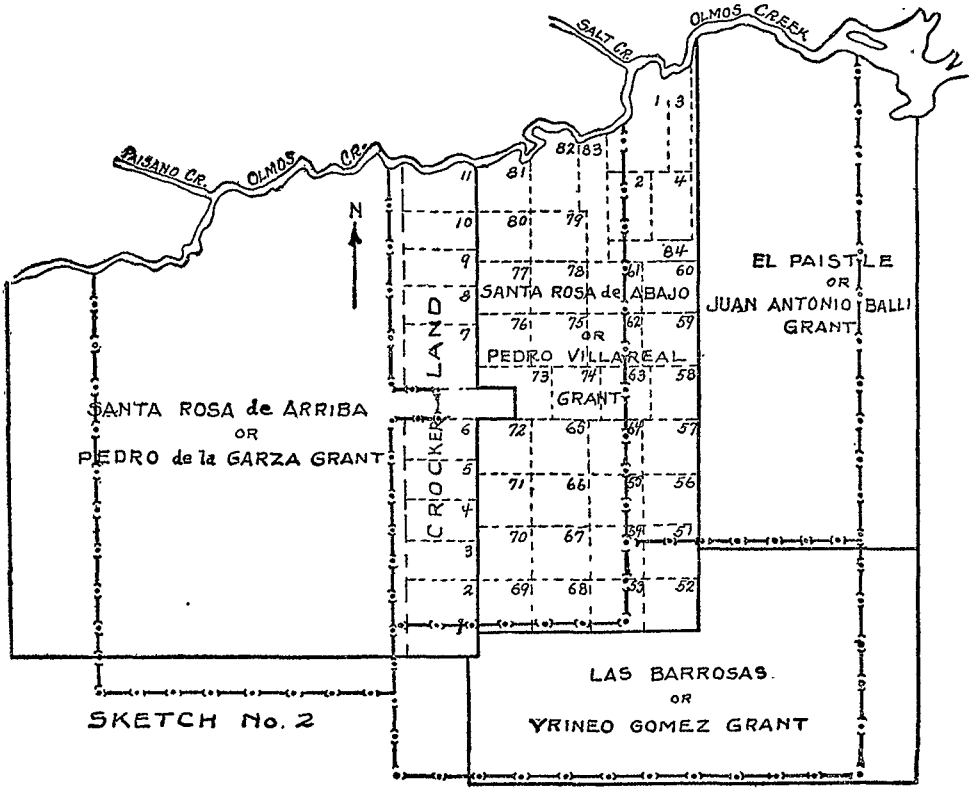
In 1904 the State, in a suit against D. R. Fant and D. Sullivan, recovered, as excess land of the Arriba Grant, what is delineated on the sketches as the "Crocker Land"—the tier of eleven sections lying to the west of the other thirty-eight sections here involved.

The State's suit, here, for the benefit of itself and those holding title under it, was for the land comprising these forty-nine sections. In its petition the land was substantially described as being bounded on the north by Olmos Creek; on the east by the west boundary lines of the El Paistle and Las Barrosas Grants as patented; on the south by the Las Barrosas as patented; and on the west by the east boundary line of the Arriba as established by the judgment in the suit of the State against D. R. Fant and D. Sullivan.

The thirty-eight numbered sections, other than the Crocker Land, shown on the sketch-



SKETCH No. 1



SKETCH No. 2

es: viz., Sections Nos. 81, 82, 83, 1, 3, 80, 79, 2, 4, 84, 77, 78, 61, 60, 76, 75, 62, 59, 73, 74, 63, 58, 72, 65, 64, 57, 71, 66, 55, 56, 70, 67, 54, 51, 69, 68, 53, and 52, were surveyed in the years 1879 and 1881 under railroad certificates owned by F. J. Parker, the nineteen odd numbered sections being surveyed for Parker, and the nineteen even numbered sections for the School Fund. The nineteen odd numbered sections were patented to Parker in 1888.

The Fant Heirs hold title to these nineteen odd numbered sections under the patents issued Parker: viz., Sections Nos. 81, 83, 1, 3, 79, 77, 61, 75, 59, 73, 63, 65, 57, 71, 55, 67, 51, 69, and 53.

Of the nineteen even numbered sections surveyed for the School Fund, nine: viz., Sections Nos. 66, 64, 72, 54, 70, 62, 76, 78, and 74, were sold to settlers in 1898, 1904 and 1908 on condition of settlement, the payment of one-fortieth of the purchase price and the execution by the purchasers of their obligations for the balance.

The remaining ten of the even numbered sections are held by the State for the School Fund, unsold.

The eleven sections delineated on the sketches as the "Crocker Land," lying to the west of the thirty-eight sections, were likewise sold by the State to the Crockers, in 1908 and 1909, on condition of settlement, payment of one-fortieth of the purchase money and execution by the purchasers of their obligations for the balance.

These purchasers from the State all completed their occupancy as required by law. Since their purchase they have continuously held possession of these several sections, as have the Fant Heirs of the nineteen sections held under the Parker title from the State, interrupted only by the extension of a fence by the Kenedy Pasture Company along what it claims are the true western lines of the El Paistle and the Las Barrosas. This fence was extended not in right of the Abajo Grant, but in right only of the Kenedy Pasture Company's claim as to the true location of the El Paistle and Las Barrosas. The right of these parties holding under the State remained unquestioned by the adverse claimants to the Abajo until the filing of a suit in Cameron County in 1904, which was consolidated with this suit.

Under the contention of the State and those in common with it as to the location of the Abajo Grant, the thirty-eight sections surveyed under the railroad certificates, alone, are upon the Abajo, and the Crocker eleven sections lie without it and to the west.

According to the contention of Kenedy and the other parties adverse to the state and its claimants as to the location of the El Paistle and Las Barrosas Grants, those two grants, as shown by the second sketch, conflict with the sections along the east of the thirty-eighth sections, with Crocker Section No. 1 and a part of Crocker Section No. 2 and the southern portions of Sections 68 and 69 and a part of the southern portion of Section 53; and if the Abajo be located as contended by them, it includes all of the remaining land of the forty-nine sections and, in addition, the strip and the inset to the west of them.

The trial court and Court of Civil Appeals sustained the contention of the State and its claimants as to the location of all three of these grants.

The facts concerning the Mexican title to the Abajo Grant asserted by Kenedy, the Mexican defendants and the interveners, and notice of it by the claimants under the State, are substantially these:

In 1832, Antonio Canales, a Survey General of the Mexican State of Tamaulipas, surveyed the land claimed to be comprised by the Abajo Grant and which then lay within the State of Tamaulipas, for Pedro Villareal, who was in possession of the land at that time. Following the survey and prior to 1835, Villareal paid to the proper Mexican authorities the purchase money for the land —$165.00, the amount at which it was appraised. His expediente was forwarded to the Governor of the State of Tamaulipas, and his right to receive final title or a grant was recognized by the authorities of the State.

Years later, on April 12, 1848, after the establishment of Texas independence and after the signing of the Treaty of Guadalupe Hidalgo, a purported grant to the land was issued to Villareal by the Governor of the State of Tamaulipas.

Villareal was in possession of the land in person or by representatives until 1850 or 1860. Since that time there has never been any possession by him or any one claiming under him. He nor any one claiming under him has ever paid any taxes on the land. It was rendered for taxes for his heirs but twice, in 1880 and 1881, by W. A. Crafts as attorney. In 1882 it was assessed against "Unknown Owners."

The grant issued to Villareal by the Mexican Governor of Tamaulipas and the field notes claimed to have been made by Canales, were filed by W. A. Crafts as attorney for the heirs of Villareal in the office of the County Clerk of Cameron County on August 8, 1879, and recorded as one instrument.

The field notes were filed by Crafts with the County Surveyor of Cameron County and a re-survey of the land requested, August 18, 1879.

In November, 1879, the County Surveyor made the re-survey as requested by Crafts. The field notes of the re-survey were filed in the Surveyor's office, December 15, 1879, and in the General Land Office, December 31, 1879 reciting that they were of a re-survey

of a grant "made for the heirs and assigns of Pedro Villareal to whom the land was originally granted by the State of Tamaulipas and surveyed by Canales, original map and field notes bearing date of December 21, 1832, and recorded in Clerk's office of Cameron County."

On February 3, 1887, a certified copy of the Cameron County record of the grant to Villareal and the field notes, was filed as one instrument in the General Land Office.

In the deed from the estate of F. J. Parker to R. and J. Driscoll and D. R. Fant, conveying the nineteen sections claimed by the Fant Heirs and through which they deraign title, and also in the deed from the Driscolls to D. R. Fant, the ancestor of the Fant Heirs, it was recited that those sections were located over a Spanish grant to Pedro Villareal which had become forfeited to the State of Texas.

At the time F. J. Parker located his surveys on the Abajo Grant he had notice that Judge James B. Wells, of Brownsville, had seen what purported to be a grant to the Abajo issued to Pedro Villareal on April 12, 1848, by the Governor of the State of Tamaulipas, and that it appeared on its face to be an original grant.

When the parties claiming under the State acquired title to their portions of the Abajo, there were on file in the General Land Office a number of official maps on which was indicated a survey of the Abajo Grant, there appearing within the lines of the survey on these maps the words, "Santa Rosa de Abajo, Pedro Villareal." As found by the trial court, the purchasers from the State of the nine even numbered sections of the thirty-eight, and of the Crocker sections, had notice of these maps, which we infer to mean actual notice.

Aside from the grant issued by the Mexican Governor of Tamaulipas to Villareal on April 12, 1848, the title of Villareal to the Abajo rested entirely upon the evidence afforded by copies of certain letters from Mexican officials dated in the years 1832, 1833 and 1834. These letters, after a prolonged search instituted by Jno. G. Kenedy for evidence of the Villareal title, were found by Frank C. Pierce, an attorney for Kenedy, in the archives of the Municipality of Reynosa, Mexico, in 1904 or 1905. It does not appear that any of the claimants under the State had any notice of these letters, or of the matters to which they purport to relate, until after this controversy over the land began.

In 1878, or prior thereto, F. J. Parker built a fence along or near the supposed east line of the Arriba Survey, which the trial court found to be approximately the west line of the Abajo. This fence extended from south of the south line of the Abajo north to a point south of Los Olmos Creek, thence running west, south of the creek, enclosing the Arriba Grant and other lands.

In 1883 the Kenedy Pasture Company, the owner of the El Paistle Grant, built a fence along the west line of that grant as claimed by it, being located approximately upon what the Kenedy Pasture Company and the other parties here adverse to the State and its claimants assert to be the dividing line between the Abajo and the El Paistle Grants, and extending from Los Olmos Creek on the north to the Las Barrosas Grant, as patented, on the south.

In the year 1885, or prior thereto, Mrs. King, who owned certain land north of Los Olmos Creek, erected a fence from a half mile to a mile north of the creek, running east and west parallel thereto and connecting the Kenedy Pasture Company fence on the east.

In the year 1885 D. R. Fant erected a fence extending east and west a short distance north of the south boundary line of the Abajo and connecting the fence erected on the west line of the Abajo with the Kenedy Pasture Company fence on the east.

In 1886 the Kenedy Pasture Company erected a fence along the north line of the Las Barrosas Grant, as patented, extending from the Kenedy Pasture Company fence on the east of the Abajo along the south line of the Abajo and connecting with the Parker fence erected along the west line of the Abajo. When this fence was erected by the Kenedy Pasture Company, D. R. Fant removed the fence which had been erected by him in 1885 along the south line of the Abajo.

In 1885 D. R. Fant extended the old Parker fence on the west line of the Abajo north across Los Olmos Creek, so as to connect with the east and west fence of Mrs. King above mentioned. This connection completed the enclosure of that part of the Abajo included within the boundaries of the Parker fence on the west and the Kenedy Pasture Company's fence running through the eastern portion of the survey of the Abajo as fixed by the trial court, there being included however in the enclosure certain other lands north of Los Olmos Creek.

About the year 1885 D. R. Fant ran a division fence from a point on the west line of the Abajo, and at about the southern portion of the off-set in the west line, connecting the Parker fence on the west with the Kenedy Pasture Company's fence on the east and dividing the Abajo into two enclosures, each containing about 5,000 acres of land. About the same time Fant also erected some fences for the purpose of enclosing certain small pastures near the ranch headquarters, some of such enclosures being east and some being west of Parker's old fence. The fences erected by the Kenedy Pasture Company were kept up by it; and the Parker fence and other fences erected by D. R. Fant, and

Mrs. King's fence running north of Los Olmos Creek, were kept up by Fant continuously from the time of their erection and were sufficient to turn stock.

When the Kenedy Pasture Company built its fence in 1833 along what it claims to be the west line of the El Paistle Grant, there was brought within the enclosure the eastern portion of the Abajo as the Abajo was located by the trial court, being that portion shown east of the broken line on sketch No. 2 extending north and south through the Abajo. This part of the Abajo as fixed by the trial court has since been in the continuous and exclusive possession of the Kenedy Pasture Company. The whole enclosure however of which it was thus a part comprised more than 5,000 acres of land, and there was no segregation of that part of the Abajo thus enclosed from the other land within the enclosure.

About the year 1885 D. R. Fant dug three wells on different ones of the nineteen odd numbered sections on the Abajo Grant claimed by the Fant Heirs, for the purpose of supplying water for cattle; and continuously from 1883 the Fant Heirs and their predecessors in title have grazed cattle on those sections and excluded other stock therefrom, except in isolated instances.

Since 1878, or earlier, and for a continuous period of more than ten years, F. J. Parker, the Driscolls and D. R. Fant, whose title is held by the Fant Heirs, had open, adverse possession of the strip of land and inset lying to the west of the Crocker lands, using and enjoying such strip and inset enclosed by a substantial fence, and such strip and inset being claimed as a part of the Arriba Grant owned by them.

The case was tried without a jury, and the trial court found, among other things, that the purported grant of the Abajo Survey, issued by the Governor of the Mexican State of Tamaulipas to Pedro Villareal, of date April 12, 1848, was void.

It further found that while this grant was void and vested no title in Villareal, yet prior to December 19, 1836, Villareal acquired, in accordance with the laws of Mexico in force at that time, the right to a grant of the Abajo Survey, and hence an equitable title to the Abajo Grant, good as against the State of Texas and as against purchasers from the State with actual or constructive notice of such equitable title. This holding that Villareal acquired an equitable title to the Abajo Grant was based upon the evidence afforded by copies of the letters of Mexican officials found in the archives of the Municipality of Reynosa, Mexico, which have been referred to in a previous part of this statement.

The court found that the Fant Heirs, holding the nineteen odd numbered sections on the Abajo under patents from the State, and the purchasers from the State of the nine of the remaining nineteen even numbered sections on the Abajo, were innocent purchasers for value of those sections without either actual or constructive notice of the Villareal equitable title to the Abajo Grant, and hence that their respective titles to those sections were superior to that equitable title.

It found that the Kenedy Pasture Company had failed to establish title by limitation to that part of the Abajo Grant within its fences.

It found that the Fant Heirs had title under the Ten Years Statute of Limitation to the strip and inset lying to the west of the Crocker land.

It found that the Fant Heirs had title under the Three and Five Years Statutes of Limitation to all of the odd numbered nineteen sections on the Abajo lying west of the fence built by the Kenedy Pasture Company through the eastern portion of the Abajo extending from Los Olmos Creek and south to the north line of the Las Barrosas Grant.

As has already been stated, the court fixed the location of the Abajo, the El Paistle and the Las Barrosas Grants as contended for by the State and those claiming under the State.

Judgment was accordingly rendered as follows:

In favor of the Fant Heirs for the nineteen odd numbered sections on the Abajo Grant and for the strip and inset lying to the west of the Abajo Grant and the Crocker land.

In favor of the Crockers for the eleven sections lying to the west of the Abajo Grant.

In favor of purchasers from the State, Tindall and wife, Mrs. Jeffers and Sam M. Boyd for nine of the nineteen even numbered sections on the Abajo Grant surveyed for the State and purchased by them: to-wit, Sections Nos. 66, 64, 72, 54, 70, 62, 76, 78 and 74.

In favor of John G. Kenedy, the Mexican defendants and the interveners for the remaining ten of the nineteen even numbered sections on the Abajo surveyed for the State; to-wit, Sections Nos. 80, 82, 4, 60, 2, 84, 52, 56, 58 and 68.

It was further adjudged that the Kenedy Pasture Company take nothing and that the State of Texas take nothing except its rights securing the unpaid purchase money due it on the sections adjudged to the purchasers from it.

The judgment was affirmed by the Court of Civil Appeals.

The important questions in the case are the validity of the grant made by the Governor of the Mexican State of Tamaulipas, April 12, 1848, to Pedro Villareal; whether, independently of the grant, Villareal acquired an equitable right or title to the land comprised in the so-called Abajo

Grant, as found by the District Court and Court of Civil Appeals; and if Villareal did acquire such a right or title, whether the purchasers from the State, Tindall and others, and the Fant Heirs, holding under patents from the State, have title to their respective sections superior to the Villareal right or title, as innocent purchasers for value without notice.

[1] The disputes as to the boundaries of the Abajo, the El Paistle and the Las Barrosas Grants and the limitation questions involved in those disputes, we do not feel called upon to determine. They are boundary controversies, pure and simple. It is evident that as to them there would have been no case except for the disputes over the location of the lines of those grants. Cox v. Finks, 91 Tex. 318, 43 S. W. 1. The limitation title asserted by the Kenedy Pasture Company to the eastern tier of sections and parts of sections and parts of some of the southern sections as delineated upon the sketches, as embraced within the El Paistle and Las Barrosas Grants, grows out of the disputes as to the boundaries of those grants, and is but a part of the controversy over their boundaries. The limitation title asserted by the Fant Heirs to the strip and inset west of the Crocker lands is equally but a part of a boundary dispute. The right of the whole case does not depend upon a determination of the boundary controversies, and we therefore have jurisdiction of it. But no other part of the case is concerned in the boundary disputes. Their adjudication affects, and can affect, no other issue. They are in the case as independent boundary controversies, of which, ordinarily, the jurisdiction of the Court of Civil Appeals would be final. All other issues in the case lie entirely without them, and the settlement of those issues in no wise involves their adjudication. With this true, we do not feel that a review of the boundary controversies is imposed upon this court.

Since the presence of other distinct issues, in no way involving the questions of boundary, gives the case an independent character other than that of a "boundary case," the boundary disputes do not, as we have said, affect our jurisdiction of the case. And if for the settlement of these other issues it were necessary to determine the boundary disputes, we would determine them. That would be essential to our jurisdiction over the other issues. Such was the condition in West Lumber Co. v. Goodrich (Tex. Com. App.) 223 S. W. 183. That case was an action for conversion involving the question of the boundaries of the land—analogous to Steward v. Coleman County, 95 Tex. 445, 67 S. W. 1016, as well as purely a dispute over the land depending entirely upon the ascertainment of its true boundaries. Since the case in respect to the action for conversion necessarily involved the boundary question, we felt warranted in approving the opinion of the Commission of Appeals in its determination of that question. In such a case the determination of the boundary controversy as involved in one phase of the case would necessarily determine it as to all phases. The settlement of the purely boundary dispute would result from its determination in the adjudication of the other part of the case, and as necessary to a consistent holding and judgment. But there is no such situation here as was presented in West Lumber Co. v. Goodrich. The boundary disputes here are independent and separable controversies. The other parts of the case do not involve them. The determination of the other issues does not depend upon their settlement. We therefore are of opinion that the finality of the judgment of the Court of Civil Appeals as to them should be respected.

[2] Aside from this, the questions of boundary and limitation here were essentially questions of fact. It cannot be reasonably contended that there is no evidence supporting the trial court's judgment in their regard; and we would therefore not be authorized in reversing that part of the judgment. Findings of fact by the trial court and the Court of Civil Appeals, with evidence to support them, are conclusive upon this court.

[3] The land in controversy lies in what was at one time the Mexican State of Tamaulipas, between the Nueces and Rio Grande rivers. This is the foundation of the claim, very earnestly pressed by Kenedy and others holding under Villareal, that the Governor of Tamaulipas had authority to issue Villareal a grant on April 12, 1848, and that the grant of that date in Villareal's favor is accordingly valid and protected by the Treaty of Guadalupe Hidalgo. This is a far-reaching contention, so we will examine it. It involves the sovereignty of Texas over this territory, and is a direct challenge of that sovereignty at the time this grant was issued.

One of the things demanded by General Houston of Santa Anna following the victory of San Jacinto was that he require his subordinate commanders the immediate withdrawal beyond the Rio Grande of all Mexican troops in Texas; and this was done. This was the first assertion by the new-born Republic of dominion clear to the utmost Mexican border. On December 19, 1836, the Congress of the Republic declared that the sovereignty of Texas extended to the Rio Grande, defining the southern and western boundary of Texas as beginning at the mouth of that river, and running thence up its principal stream to its source. In the annexation of Texas to the United States as a State, the Rio Grande was accepted as the boundary between Texas and Mexico.

It is fair to say that upon no other terms would Texas have consented to the annexation.

The acceptance of that boundary line was the basis of President Polk's policy in the opening of the war with Mexico. Its dispute by Mexico led to the war. Early in 1846, following the annexation of Texas in the previous December, President Polk ordered General Taylor to advance to the Rio Grande, which he did. The Mexican commander at Matamoras demanded General Taylor's withdrawal to the Nueces. He refused. On April 23rd the Mexicans crossed the river and ambushed a body of the American troops. Two weeks later they attacked General Taylor in the Battle of Palo Alto,—May 8, 1846, in which they were repulsed. On the next day Taylor drove them back across the river in a disastrous rout. And on the 18th of May General Taylor crossed the Rio Grande and occupied Matamoras.

The attack upon the American troops of April 23rd was the occasion of President Polk's message to Congress, declaring that Mexico had passed "the boundaries of the United States" and had shed American blood "upon American soil," and that in consequence a state of war existed.

The territory between the Nueces and the Rio Grande remained largely under the actual possession and jurisdiction of Mexico until 1846. But after the establishment of Texas independence through the defeat of Santa Anna's army, his recognition of Texas sovereignty, and particularly the resolution of the Congress of the Republic of December 19, 1836, that jurisdiction was never a rightful one. It was but a de facto possession.

Such as it was it came to a complete end when early in 1846 United States troops in behalf of Texas and for the enforcement of her rights with respect to this very area, occupied the territory and ousted the Mexicans from it. This has never been doubted. Not only was Mexican authority at an end in the territory early in 1846, but in September, 1847, United States troops had captured the Mexican capital and the entire country was subject to their arms.

With no right at all to this territory after 1836, it would be strange to admit the sovereignty of Mexico over it in 1848, when two years before the sovereignty of Texas had been perfected by reducing the territory to possession. It is equally anomalous to contend that in 1848 Mexican de facto possession of it continued, when in 1847 the entire country, with its capital, was in the hands of American troops and the defeat of Mexico an accomplished fact.

While Mexico's ouster from the territory was in progress, the Legislature of Texas, on April 29, 1846, enacted a joint resolution, declaring:

"That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the Government of the said Republic, that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the Constitution of the United States, and by the joint resolution of annexation, subject to such regulations and control as the Government thereof may deem expedient to adopt."

This was a reaffirmation of the sovereignty of Texas over all territory within the borders of the Republic as defined by the resolution of December 19, 1836, and proclaimed both its rightful and actual jurisdiction over this territory.

The Treaty of Guadalupe Hidalgo was signed February 2, 1848. It recognized the Rio Grande River as the boundary between Texas and Mexico, which was a recognition of the right of Texas to the entire area between the Nueces and the Rio Grande. It stipulated that the civil rights of Mexicans within the territory ceded by Mexico, as they existed under the laws of Mexico when the treaty was signed, should be protected.

The proposition asserted by the claimants under the Mexican title is therefore, that though the jurisdiction of Mexico over this territory was never rightful after 1836; though such jurisdiction as it exercised was terminated early in 1846 by its complete ouster from the territory by American troops,—not only so, but with the entire country of Mexico reduced by September 1847; and though this grant was issued in April, 1848, more than two months after the signing of the treaty of peace and Mexico's recognition in the treaty of the right of Texas to the territory, still, that a Mexican official, in April, 1848, had authority to exercise the sovereign power of granting away land within it; and that his acts in derogation and repudiation of the sovereignty of Texas, must, in the courts of Texas, be accepted as valid. The proposition largely sets aside the freedom from Mexican rule accomplished by the establishment of Texas independence. It ignores the constant proclamation of both the Republic's and the State's sovereignty over this territory after December 19, 1836, and the consummation of their rightful claim by effective possession. It asserts the authority of Mexico to grant land in Texas to which it had no right and of which it had no actual control. It attempts to extend the protection of the Treaty of Guadalupe Hidalgo to rights not in existence when the treaty was signed, but attempted to be created afterward. It is refuted by the decisions of this court and plain principles of international law.

[4] It is a novel proposition to say that a sovereignty having no right to given terri-

tory, long after its dispossession, its defeat in a war growing out of dispute over the territory, and its express recognition of the superior right by the provisions of a solemn treaty, may lawfully exercise the sovereign authority of disposing of it by grant. If this be the law a mere de facto jurisdiction over territory once obtained by an unlawful sovereignty, is of a greater force, though terminated, than the lawful sovereignty's de jure and de facto possession and control combined. It is met by the simple proposition that a nation cannot grant away territory to which it has no title.

Considerations of policy and justice of course require of a de facto government the preservation of order and the adjustment of private rights and claims between individuals. For this reason the acts of the de facto government in actual possession of disputed territory in the ordinary administration of its laws, in so far as they affect private rights, are valid. Its acts affecting public rights, however, are void, since they are necessarily in derogation of the rightful, the de jure, sovereignty. The granting of the public domain is of course an act affecting public rights. It has never been otherwise considered. Titles to land in ceded or even conquered territory acquired from a former sovereignty when it had the right to grant them are of course valid, even as against the succeeding sovereignty. But it is plain that this rule cannot apply to a grant of land in territory to which the sovereignty issuing the grant had at the time no right, even though it was in possession. If the sovereighty had no right to the territory, its possession was not rightful. An unlawful, even though an actual possession of land, cannot confer the power of disposing of the title. This is as true of nations as it is of individuals. In cases of disputed territory, when the true boundary is ascertained or adjusted by agreement, grants made by the unlawful sovereignty in the territory to which as thus ascertained it had no right, whether it had possession at the time of the grants or not, unless confirmed by express agreement, fail and are of no effect against the sovereignty to which the territory of right belonged. They fail simply because of want of title in the grantor. A de facto possession cannot supply the title. These principles are well established and are a part of the accepted law of nations. Coffee v. Groover, 123 U. S. 1, 8 Sup. Ct. 1, 31 L. Ed. 51.

Not only is a grant of land void where a part of territory to which the sovereignty making it had at the time no lawful right, even though it was in possession, but certainly after the signing of a treaty which recognizes the superior right of the opposing sovereignty, its power of granting away the territory is at an end. If its possession is not rightful, clearly its jurisdiction can obtain only for strictly municipal purposes. Until actual delivery of the territory it subsists for those purposes alone—to preserve the public order, the settlement of disputes between individuals and the like. But after the signing of the treaty its powers of sovereignty except strictly for those purposes, cease. It distinctly has no power to grant land or franchises. Such a power is one of the highest attributes of sovereignty, and its exercise would necessarily operate as a denial of the rights of the succeeding sovereignty. Davis v. Police Jury, etc., 9 How. 280, 13 L. Ed. 138; Trevino v. Fernandez, 13 Tex. 664.

This court has never recognized the right of Mexico after early in 1846 to grant land in this territory. It has denied such right in every instance where it has considered the question of such authority. It has, in fact, never recognized the validity of any Mexican title to land in this territory originating after December 19, 1836, the date the Congress of the Republic proclaimed that the sovereignty of Texas extended to the Rio Grande. The only Mexican titles to land in the territory which it has recognized as within the protection of the Treaty of Guadalupe Hidalgo, except such as the Legislature has confirmed, have been either those granted prior to December 19, 1836, or those which prior to that date were good in equity and hence in good conscience entitled to the sanction of Texas courts. This is plainly declared in Haynes v. State, 100 Tex. 426, 100 S. W. 912, where concerning lands in this same territory claimed under Mexican title it was said:

"The land was surveyed for the State in 1884, and there is, of course, no question of the State's right to it unless the plaintiff in error has shown a right to the land which originated at a date prior to the 19th day of December, 1836, and which right is protected by the treaty of Guadalupe Hidalgo between the United States and Mexico."

This is because the sovereignty of Mexico over this territory after December 19, 1836, was never rightful, and Mexico accordingly had no power after that date to create titles to land within it.

To the same effect is State v. Gallardo, 106 Tex. 274, 166 S. W. 369, where in relation to a Mexican title to land within the same territory and its protection by the Treaty of Guadalupe Hidalgo, it was said:

"The rights of the defendants should be determined, therefore, by the character of the title under which they claim as it existed on December 19, 1836."

In State v. Bustamente, 47 Tex. 320, there was before the court a grant by the Mexican Governor of Tamaulipas to land in this same territory, dated January 2, 1848—three

months before the date of the grant in the present case—the land having been surveyed in 1835. The authority of the Mexican Governor to make such a grant was denied in the opinion of Chief Justice Roberts in these words:

"The proof was therefore not sufficient, unless the Governor of Tamaulipas had, on the 2d day of January, 1848, the right to grant this land east of the Rio Grande, under the treaty of Guadalupe Hidalgo, concluded one month thereafter, to wit, on the 2d day of February, 1848.

"We are of opinion that he had not such right. Texas claimed the territory, in defining its boundaries, on the 19th of December, 1836. In 1846, the claim was perfected by possession and the actual exercise of exclusive jurisdiction, and from that time it was lost by the State of Tamaulipas, in Mexico, for all purposes whatever, whether of judicial action or the exercise of powers relating to eminent domain. And it never afterwards recovered such lost powers. The action of the Governor, in making concession, was without authority, and neither advanced nor prejudiced the imperfect title to the land, which may have been acquired previous to the 19th day of December, 1836. Halleck's Int. Law, page 798, section 22; Trevino v. Fernandez, 13 Tex. 664; Davis v. Police Jury of Concordia, 9 How."

It is said by counsel for the claimants under the Mexican title here that this part of Chief Justice Robert's opinion was dicta, since the court was considering a title under the Act of 1870 which related only to Mexican titles originating prior to December 19, 1836, whereas this title was shown by the date of the grant to have originated January 2, 1848. The holding cannot be disposed of in this way. It was not dicta. It is overlooked that there was a survey of the land made under Mexican authority in 1835, shown to have been presented with the claim as in part the basis of the right. The title was therefore one plainly within the Act of 1870, as the court recognized in simply holding the evidence insufficient and remanding the case for further trial. The same title was before the court again in the Haynes Case, 100 Tex. 426, 100 S. W. 912, where it is shown that the title plainly originated prior to December 19, 1836, and where because of that fact and its being good in equity on that date, it was upheld against the suit of the State.

In State v. Cuellar, 47 Tex. 295, there was before the court another Mexican grant made in 1848—November 21st—of land within what was the State of Tamaulipas. Concerning the power of the Mexican Governor to make a grant of the land, "in 1848," this was said by Judge Roberts:

"In reference to the first proposition, there can be no pretense that the instrument signed by Alejo Gutierez, in 1848, is, or possibly can be, a conveyance, in the nature of a grant, to a tract of land in the State of Texas, by virtue of any power vested in him as an officer of a foreign country (Tamaulipas), at the time he signed the paper."

In the Haynes Case, 100 Tex. 426, 100 S. W. 912, the Mexican grant, the same as before the court in the Bustamente Case, was dated January 2, 1848, and was to land, as already stated, also in the former Mexican State of Tamaulipas. The title was sustained, not because of the grant, but because the title was, on December 19, 1836, good in equity. The title as based upon the grant was entirely discarded by the court. It is plain from the decision that the title would have been rejected by the court had it possessed no other foundation than the grant.

In the Sais Case, 47 Tex. 307, it was distinctly affirmed that Mexico entirely lost all control of this territory early in 1846, since which time Texas has constantly exercised jurisdiction over it. The holding in the Gallardo Case, 106 Tex. 274, 166 S. W. 369, is to the same effect.

If this territory was under the de jure and de facto jurisdiction of Texas early in 1846, and that jurisdiction has since continued, as is the legal and historical fact, it is idle to say that in 1848 it was still subject to Mexican sovereignty and that the Mexican government had then the authority to dispose of land within it.

The grant considered in Clark v. Hills, 67 Tex. 141, 2 S. W. 356, cited by the claimants under the Mexican title, had been expressly confirmed by the Legislature. There is no intimation in that opinion, as there is none in any opinion of this court, that the Mexican government had authority to grant lands in Texas north or east of the Rio Grande after the signing of the Treaty of Guadalupe Hidalgo, or for that matter, after it lost its de jure jurisdiction in 1836.

In the opinion rendered in Texas-Mexican Railway Co. v. Locke, 74 Tex. 370, 12 S. W. 80, Chief Justice Stayton spoke of there being no evidence that the lands in controversy, originally titled to the Mexican predecessors of the defendants, did not belong to them "on July 4, 1848," the date the Treaty of Guadalupe Hidalgo was proclaimed, and if they did, that they were protected "in so far as valid titles against the State of Coahuila and Texas on March 2, 1836." The isolated use of that date in such connection does not affect the question here, much less control it. The grants upon which the Mexican titles rested in that case were issued in 1834, when the territory where the land lay was within the rightful jurisdiction of Mexico. The opinion makes no pretense of holding that Mexico had the right to grant away lands in Texas up to July 4, 1848, or any time after it lost its rightful sovereignty over Texas.

[5] With respect to the rights of either government under a treaty, the treaty takes effect from the date it is signed. Haver v.

Yaker, 9 Wallace, 32. Only as between individuals is its effect postponed to the date of proclamation, and this only upon the ground of notice.

As early as 13 Texas (Trevino v. Fernandez, 13 Tex. 664) this court fully recognized the doctrine already referred to, that where disputed territory is ceded by a treaty, the power of the ceding government to grant land within it ends with the signing of the treaty. It would be idle to conclude a treaty relating to disputed territory, if between its signature and proclamation the ceding government has the full right to grant the territory all away.

The Mexican grant here was in our opinion clearly void under the repeated decisions of this court, and, aside from express authority, upon plain and just principles of law. Not at this late day is it to be held that the authority of Mexico to dispose of the public domain of Texas existed after its sovereignty was ended by the valor of the Texas patriots and it was completely dispossessed from the soil.

[6] While the grant issued by the Mexican Governor to Villareal was void and conveyed no character of title, we are of opinion—contrary to the contention of the State—that the District Court and Court of Civil Appeals were right in their conclusion that there was evidence showing that the Abajo Grant was surveyed for Villareal and that he paid the Mexican authorities for it prior to 1836, and that by such authorities his right to the land was recognized, affording him an inchoate or equitable title having its origin prior to December 19, 1836. True, the proof was meager and fragmentary, as such proof would naturally be, adduced at this remote period, particularly in view of the destruction by French troops in 1864 of Victoria, the capital of Tamaulipas, with its archives. But we do not think it can be fairly said that there was no evidence to the effect stated.

[7] This proof rested largely in the official letters found in 1904 by Pierce, Kenedy's attorney, in the archives of the Mexican town of Reynosa. Complaint is made of the admission of the copies of the letters, but there was evidence of the genuineness of the originals, and the copies were admissible in our opinion as compared copies. The letters do not distinctly recite that the Abajo had been surveyed for Villareal or that he paid for that particular survey. But they do fairly show that a survey within that jurisdiction was made for Villareal, that he had paid for the land so surveyed, all prior to 1836, and that also prior to that year his expendiente, or instructive dispatch, had been forwarded the Governor for the issuance of final title. The Governor, as shown by the letters, received the expediente and directed that Villareal, with other persons named, appear at his office for the receipt of title. The forwarding of Villareal's expediente to the Governor would reasonably afford the presumption that he had paid for the land to which it related. Haynes v. State, 100 Tex. 426, 100 S. W. 912. Independently of the official letters, it was found by the Court of Civil Appeals that the Abajo was surveyed for Villareal in 1832 by Canales, Surveyor General of Tamaulipas. It was proved conclusively that Villareal was in possession of the Abajo until 1850 or 1860. These facts in connection with the letters show, at least circumstantially, that the land referred to in the letters as surveyed for Villareal, paid for by him and to which his right was recognized by the Mexican authorities, was the Abajo Survey. At all events, while the proof is not clear, we think that under it this holding is more in consonance with right and fairness than would be a contrary one.

[8] With respect to the State's contention that if Villareal acquired an inchoate right to the land he thereafter abandoned it, there was not shown any unequivocal act on his part evidencing such an intention. A mere failure to assert his right could not operate as a forfeiture of it. Besides, this was a question of fact, concluded by the judgment of the trial court; and as we have held upon the other fact questions, we will not review it.

[9-11] The holding of the trial court that the Fant Heirs and the purchasers from the State were purchasers for value of their respective sections without notice of the inchoate right of Villareal, should in our opinion be also sustained. There is hardly room for controversy upon this question. The grant issued Villareal being void, its record with the field notes accompanying it in Cameron County, or the filing of a copy of it and the field notes in the Land Office afforded, of course, no character of notice. The resurvey by Cocke of the Abajo at the instance of Crafts was based upon the void grant. It was hence wholly without authority, and the filing of the field notes could not, therefore, operate as notice. Whatever actual knowledge F. J. Parker, the predecessor in title of the Fant Heirs, had of Villareal's right, even if diligently pursued, would have led only to the ascertainment of the void grant. But any notice to him would not affect purchasers under him if they were innocent. Holmes v. Buckner, 67 Tex. 107, 2 S. W. 542. His deed to the Driscolls and Fant and the deed of the Driscolls to Fant, the ancestor of the Fant Heirs, which referred to the Villareal Grant, expressly contradicted the existence of any right in Villareal, by the recital that the land had been forfeited to the State. The only actual notice of anything in relation to Villareal's right had by those claiming under the State was of the maps in the Land Office, upon which was

indicated a survey of the Abajo for Villareal. But there is nothing whatever to show that those maps had any relation to Villareal's equitable right, or that they were referable to any title of Villareal's save that which the void grant purported to evidence. Inquiry produced by everything in the case having any character of actual notice would have led inevitably, we think, only to the void grant, shown to be void upon its face. Crafts, the attorney for Villareal, who was instrumental in filing the grant for record, in obtaining a re-survey of the Abajo and in thus affording evidence of Villareal's right, was not shown to have had any knowledge of the equitable right in Villareal, or of any right except that founded on the void grant. Inquiry of him would have given no knowledge in any way concerning Villareal's equitable right. Nobody, it appears, had any knowledge of the letters, without which there was no evidence of any right at all in Villareal, until 1904, when Pierce after prolonged search discovered them in the town of a foreign country. It is not to be held that those holding under the State were under the duty of searching through the records of ancient towns of a foreign country for evidence of an adverse right, which was only discovered, long after their rights accrued, by extraordinary effort. There can be no presumption of notice where inquiry pursued with ordinary diligence would have been futile. Slayton v. Singleton, 72 Tex. 209, 9 S. W. 876. Those now claiming the land against the State and the holders of its title permitted the meager and fragmentary evidence of their right to slumber for more than seventy years in the buried records of a foreign jurisdiction. With no possession on their part, with the land vacant, and the State's claim openly asserted by appropriation at an early day, its resurrection now should not be suffered to defeat the title of innocent settlers who bought from the State in good faith.

[12] There is no question as to full value having been paid for the Fant title. The purchasers from the State had not paid the full money consideration at the time when from this controversy they first learned of Villareal's inchoate right. But they had all long before completed their settlement upon the land. This was the chief part of the consideration to the State in its sale of the land to them. They had therefore paid the principal part of the consideration. They had also improved the land. The claimants of the Villareal right made no offer to requite them for the consideration paid, or for their improvements, or in any way perform what equity would in any event require at their hands. With this true, they are in no position to complain of the judgment protecting the rights of these purchasers in their sections by an award of such sections to them, or of the protection of the right of the State to the balance of the purchase money due on them.

[13] When the land was surveyed for the State and under the Parker certificates there was no evidence in the Land Office or elsewhere within the State of any appropriation of it in the right of Villareal save that which was referable alone to the Mexican grant, which was void upon its face. An appropriation void upon its face cannot, in its very nature, give land the character of "titled land" or "land equitably owned" within the contemplation of section 2, article 14 of the Constitution.

The right of the entire case was in our opinion attained by the trial court. Its judgment and the judgment of the Court of Civil Appeals are affirmed.

WHITNEY HARDWARE CO. v. McMAHAN et al. (No. 2987.)

(Supreme Court of Texas. May 25, 1921.)

1. Husband and wife ⟸102—Married woman liable for tort in connection with removal of roof on her building.

A married woman owning a rented building would be liable for a tortious wrong in negligently and carelessly removing the roof and not replacing it until after the tenant's property was damaged by rain; such liability being independent of her capacity to contract for repairs, and independent of her liability for an act or omission of agents.

2. Husband and wife ⟸102—Wife liable for tort, though connected with contract.

For a tortious wrong a married woman must respond in damages, though the wrong be committed in an attempt to perform a contract, whether binding or not on the married woman.

3. Husband and wife ⟸102—Wife, as well as husband, liable for wife's torts.

The statutes dealing with the rights of husband and wife leave the wife, as well as the husband, liable for the torts of the wife.

4. Husband and wife ⟸152, 213—Feme covert liable for breach of contract and negligence in management and control of her separate estate.

The power granted to a married woman by Acts 1913, c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624) to manage and control her separate estate and the rents to be derived therefrom carried with it the incidental and collateral power to contract with her tenant to repair her store building and to employ others to make such repairs, and she would be liable for the breach of her contract and the proximate results of negligence on the part of those employed by her in leaving the roof off during a rain and destroying tenant's property, without protection from her coverture.