

SPANN v. CITY OF DALLAS et al.
(No. 3090.)

(Supreme Court of Texas. Nov. 2, 1921. Re-hearing Denied Nov. 30, 1921.)

1. Property ⇨—“Property” consists of ownership, possession, and unrestricted right of use and disposal.

“Property” in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

2. Constitutional law ⇨81—“Police power” defined.

“Police power” is a grant of authority from the people to their governmental agents for the protection of the health, safety, comfort, and welfare of the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

3. Constitutional law ⇨81—Police power cannot invade fundamental liberties of citizen.

Police power is subject to the limitations imposed by the Constitution upon every power of government and will not be suffered to invade or impair the fundamental liberties of the citizen.

4. Property ⇨1—The right to acquire, own, and use property is a natural right not originating in Constitutions.

The right to acquire and own property and to deal with it and use it as the owner chooses and so long as the use harms nobody is a natural right and does not owe its origin to Constitutions.

5. Constitutional law ⇨81—Police power founded on public necessity.

Police power is founded on public necessity, and only public necessity can justify its exercise.

6. Constitutional law ⇨87—Particular use of private property cannot be abridged unless it endangers public health, public safety, or public welfare.

Since the right of a citizen to use his property as he chooses and so long as he harms nobody is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort, or welfare.

7. Municipal corporations ⇨601—Ordinance prohibiting construction of business house in “residence district” held improper exercise of police power.

An ordinance which prohibits the construction of a business house within a “residence district,” defined as a district having more dwelling houses than business houses, within a radius of 300 feet from the place where a business house is sought to be constructed without the consent of three-fourths of the prop-

erty owners of the district and the approval of the building inspector, held void, not being a proper exercise of the police power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Residence.]

8. Municipal corporations ⇨591—Ordinance prohibiting construction of business house in residence district unless approved by building inspector void.

Ordinance prohibiting construction of business house in residence district, except upon building inspector’s approval of design of building, without specifying any rule or standard to govern the applicant in fashioning the design of his building or to govern the inspector in approving or rejecting it, held void, in that it leaves the right to construct a building subject to the arbitrary discretion of the inspector.

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

Suit for mandamus and for writ of injunction by John R. Spann against the City of Dallas and another. Judgment denying writs affirmed by the Court of Civil Appeals (189 S. W. 999), and plaintiff brings error. Reversed.

Read, Lowrance & Bates, of Dallas, for plaintiff in error.

C. F. O’Donnell, City Atty., Barry Miller, Jas. J. Collins, and Carl B. Callaway, all of Dallas, for defendants in error.

PHILLIPS, C. J. The question in the case is the validity of an ordinance of the City of Dallas, prohibiting, under penalty, the construction of any business house within what the ordinance denominates a residence district of the City, except with the consent of three-fourths of the property owners of the district, and on the building inspector’s approval of the design of the proposed structure.

The ordinance defines a residence district to be any part of the City where there are more dwelling houses than business houses within a radius of 300 feet from the place where any business houses intended for the barter and sale of goods and merchandise of any description or for the conduct of any business, is sought to be constructed.

Any one desiring to erect such a business house at any place within the City outside the fire limits, as designated at the time of the enactment of the ordinance or as may be hereafter designated by ordinance, is by the ordinance required to apply to the Board of Commissioners for a permit for that purpose, showing the location of the proposed building. If the Board is satisfied that there are not more residences than business houses within a radius of 300 feet from the proposed site, “and that the applicant is entitled to such permit,” then, under the ordinance, the permit shall issue.

If, however, the site of the proposed business house be within "a residence district," that is, a district containing more residences than business houses within a radius of 300 feet from the contemplated site, there must accompany the application the consent of three-fourths of the property owners owning property within the district. In such event the permit shall issue, provided "that the building for which such permit is granted must be of a design approved by the building inspector."

Where, within "a residence district," there are two or more adjoining business houses which were erected prior to the enactment of the ordinance, and the proposed business house is to be constructed "adjoining, immediately contiguous to or in extension of an existing business house," then the consent of property owners as otherwise required is not necessary.

Violation of the ordinance is made a misdemeanor, subject to a fine of not less than \$50.00 nor more than \$200.00. Every act done toward the location and erection of a business house without the required permit, is made a separate offense.

The plaintiff owns a lot at the corner of Ross and Fitzhugh Avenues in the City of Dallas, fronting 80 feet on Ross Avenue, and within "a residence district" as defined by the ordinance. It was purchased by him for the purpose of erecting business houses upon it. As a residence lot it was worth at the time of the trial \$4,500.00; as a business lot, \$8,500.00. The ordinance was not in force at the time plaintiff contracted to purchase the lot in May, 1915. It was not enacted until July 19, 1915. Before purchasing the lot the plaintiff was advised by the City Attorney that there was no law prohibiting its use for store houses, but that one might be enacted. Early in June, 1915, the plaintiff sought a permit for the erection of his houses, but it was refused by the Commissioner of Streets and Buildings. He renewed his effort on July 14, by written application, stating that the proposed store houses were to front on Ross Avenue, to be of brick, one story in height, of artistic design, set back at least ten feet from the property line, to cost approximately \$6,500.00, and to be constructed in accordance with the laws of the City. His application was again denied. A few days later the ordinance was enacted.

The suit was one to compel the issuance of a building permit and to restrain the City and its officers from interfering with the plaintiff's erection of store houses on his lot. The ordinance was pleaded as the defense to the action.

A judgment for the defendants was affirmed and the validity of the ordinance sustained by a majority of the Honorable Court of Civil Appeals for the Fifth District (189

S. W. 999), Associate Justice Talbot dissenting from the decision.

The ordinance takes no heed of the character of business to be conducted in the store house which it condemns. It disregards utterly the fact that the business may be legitimate, altogether lawful, in no way harmful and even serve the convenience of the neighborhood. Its prohibition is absolute. No business house of any kind, for the sale of goods of any character, or for the conduct of any business whatsoever, is its command, shall be permitted within "a residence district" without the consent of three-fourths of the property owners of the district, and, in addition, the building inspector's approval of the design of the structure. Even if the necessary consent of the property owners is obtained, and though the building is to be one safe and substantial, yet, according to the ordinance, if its architectural design does not accord with the taste of the building inspector, its construction is no less positively interdicted. No rule, no standard, no regulation of any kind is given whereby the applicant may know to what particular design of building he must conform. If the design, whatever its merits, does not suit the inspector, it is within his uncontrolled power to prohibit the building.

The justification for this far-reaching municipal law, as urged on behalf of the City, is that it is but a rightful exercise of its police power, as conferred by a general charter provision granting it the authority to protect by ordinance "health, life and property," abate nuisances, preserve and enforce "the good government, order and security" of the City, and to protect "the lives, health and property" of its inhabitants.

Passing by the question as to whether the specific power to regulate the location of store houses—limiting rights of property secured to every citizen under the general laws of the State, may be deduced from any such general charter provision, or may not be exercised by a city at all in the absence of express statutory or charter grant (*Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *People v. City of Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. [N. S.] 438, Ann. Cas. 1915A, 292; *Clements v. McCabe*, 210 Mich. 207, 177 N. W. 722), we will deal at once with what we consider the larger question in the case, namely: Whether under the authority of the police power the citizen may be denied the right to erect, and in effect the right to own, a store house in a residence portion of a city, for the conduct of a lawful, inoffensive and harmless business.

[1] Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substan-

tial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership.

[2, 3] The police power is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public. In its nature it is broad and comprehensive. It is a necessary and salutary power, since without it society would be at the mercy of individual interest and there would exist neither public order nor security. While this is true, it is only a *power*. It is not a *right*. The powers of government, under our system, are nowhere absolute. They are but grants of authority from the people, and are limited to their true purposes. The fundamental rights of the people are inherent and have not been yielded to governmental control. They are not the subjects of governmental authority. They are the subjects of individual authority. Constitutional powers can never transcend constitutional rights. The police power is subject to the limitations imposed by the Constitution upon every power of government; and it will not be suffered to invade or impair the fundamental liberties of the citizen, those natural rights which are the chief concern of the Constitution and for whose protection it was ordained by the people. All grants of power are to be interpreted in the light of the maxims of Magna Charta and the Common Law as transmuted into the Bill of Rights; and those things which those maxims forbid cannot be regarded as within any grant of authority made by the people to their agents. Cooley, Const. Lim. 209. In our Constitution the liberties protected by the Bill of Rights are, by express provision, "excepted out of the general powers of government." It is declared that they "shall forever remain inviolate," and that "all laws contrary thereto shall be void."

[4] To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.

It is not a right, therefore, over which the police power is paramount. Like every other fundamental liberty, it is a right to which the police power is subordinate.

It is a right which takes into account the equal rights of others, for it is qualified by the obligation that the use of the property

shall not be to the prejudice of others. But if subject alone to that qualification the citizen is not free to use his lands and his goods as he chooses, it is difficult to perceive wherein his right of property has any existence.

The ancient and established maxims of Anglo-Saxon law which protect these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history—the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men.

Laws are seldom wiser than the experience of mankind. These great maxims, which are but the reflection of that experience, may be better trusted to safeguard the interests of mankind than experimental doctrines whose inevitable end will be the subversion of all private right.

[5] The police power is founded in public necessity, and only public necessity can justify its exercise. The result of its operation is naturally, in most instances, the abridgment of private rights. Private rights are never to be sacrificed to a greater extent than necessary. Therefore, the return for their sacrifice through the exercise of the police power should be the attainment of some public object of sufficient necessity and importance to justify warrant the exertion of the power.

The public health, the public safety, and the public comfort are properly objects of this high importance; and private rights, under reasonable laws, must yield to their security.

[6] Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages. Cooley, Const. Lim. 248.

These established rules provide the test for the validity of this ordinance.

[7] The ordinance is clearly not a regulation for the protection of the public health or the public safety. It is idle to talk about the lawful business of an ordinary retail store threatening the public health or endangering the public safety. It is equally idle in our opinion to speak of its impairing the public comfort or as being injurious to the public welfare of a community. Retail stores are places of trade, it is true, but as ordinarily conducted they are not places of noise or confusion. This is particularly true of small stores, such as it appears the plaintiff contemplated erecting. The ordinary trading that goes on within them is reputable and honorable, and can hurt nobody. According to common experience it is done in an orderly manner. It could disturb or impair the comfort of only highly sensitive persons. But laws are not made to suit the acute sensibilities of such persons. It is with common humanity—the average of the people, that police laws must deal. A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class. The ordinance visits upon ordinary retail stores, engaged in a useful business, conducted in an orderly manner, frequented and availed of by respectable people, and doubtless serving as a convenience to many, all the proscription visited upon common nuisances. In the face of common knowledge that they are ordinarily respectable and peaceable places for the conduct of perfectly lawful pursuits evolved out of recognized customs and habits of the people as old as American life, the ordinance deals with them as though they had all the offensive character of a nuisance. But their treatment, in effect, by the ordinance as a nuisance does not make them so. It is a doctrine not to be tolerated in this country that either State or municipal authorities can by their mere declaration make a particular use of property a nuisance which is not so, and subject it to the ban of absolute prohibition. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.

If the presence of a store in a residence district of the City is a hurtful thing, so much so as to warrant its proscription by law, certainly it is not rendered less harmful by the fact that three-fourths of the property owners of the immediate area—many of whom may not reside there at all, consent to its presence. Yet, this ordinance, while treating the presence of a store as so injurious to the public as to justify the extreme penalty of its absolute prohibition, recognizes that if a certain number of property owners of the district approve of its presence, all of its injurious properties will disappear.

This feature of the ordinance, in our opinion, reveals its true purpose. It reveals with reasonable clearness that its object is not to protect the public health, safety or

welfare from any threatening injury from a store, but to satisfy a sentiment against the mere presence of a store in a residence part of the City.

It is doubtless offensive to many people for a store to be located within a given area where they own residence property. Others would possibly regard the store as a convenience. An æsthetic sense might condemn a store building within a residence district as an alien thing and out of place, or as marring its architectural symmetry. But it is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors. The law is that he may use it as he chooses, regardless of their tastes, if in its use he does not harm them. Under the Common Law and in a free country a man has the unqualified right to erect upon his land non-hazardous buildings in keeping with his own taste and according to his own convenience and means, without regard to whether they conform in size or appearance to other structures in the same vicinity, even though they may tend to depreciate the value of surrounding improved and unimproved property. *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 304.

It would be tyranny to say to a poor man who happens to own a lot within a residence district of palatial structures and his title subject to no servitude, that he could not erect an humble home upon it suited to his means, or that any residence he might erect must equal in grandeur those about it. Under his constitutional rights he could erect such a structure as he pleased, so long as it was not hazardous to others. It might proclaim his poverty; it might advertise the humbleness of his station; it might stand as a speaking contrast between his financial rank and that of his neighbors. Yet, it would be his "castle"; and the Constitution would shield him in its ownership and in its use.

If the citizen is not to be left free to determine the architecture of his own house, and the lawful and uninjurious use to which he will put it; if he is not to be permitted to improve his land as he chooses without hurt to his neighbors; if by law he is to be allowed to do these things only as officials or the public shall decree, or as may for the time suit the taste of a part of the community, the law might as well deal candidly with him and assert that he holds his property altogether at public sufferance. It might as well prescribe the kind of clothes he and his family shall wear and the sort of food they shall eat. Some people are as much offended by the clothes and diet of other people as they are by the style of their houses. As a great judge has warned:

"Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned by the Constitution, while

far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions." In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

City ordinances of the same kind as this one, seeking to interdict the presence of stores within residence districts of cities, have generally been held unconstitutional by American courts, as an unwarranted invasion of the right of private property and not to be suffered under the guise of the police power. *People v. City of Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915a, 292; *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828, 44 L. R. A. (N. S.) 1030; *Calvo v. City of New Orleans*, 136 La. 480, 67 South. 338; *St. Louis v. Dorr*, 145 Mo. 485, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; 2 *Dillon, Munic. Corp.* (5th Ed.) § 695.

Like municipal regulations interfering with private property rights and founded upon purely æsthetic considerations, are universally held invalid. *Haller Sign Works v. Physical Culture School*, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. (N. S.) 998; *City of Passaic v. Paterson Bill Posting, etc., Co.*, 72 N. J. Law, 285, 62 Atl. 267, 111 Am. St. Rep. 676, 5 Ann. Cas. 995; *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216; *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 1 South. 625, 60 Am. Rep. 62; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 464; *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, L. R. A. 1915C, 981; *State v. Stahlman*, 81 W. Va. 335, 94 S. E. 497, L. R. A. 1918C, 77; *Varney & Green v. Williams*, 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88; *People v. Murphy*, 195 N. Y. 127, 88 N. E. 17, 21 L. R. A. (N. S.); *Freund on Police Power*, § 181.

[8] A further vice in the ordinance is that even with the necessary consent of the property owners of the district, a business house may not be erected within it except upon the building inspector's approval of the design of the building. No rule or standard is given to govern the applicant in fashioning the design of his building or to govern the inspector in approving or rejecting it. The ordinance leaves it to the unbridled discretion of the inspector to disapprove the design, resulting in a refusal of the permit and the prohibition of the building. This leaves the right to construct the building subject to the arbitrary discretion of the inspector, and of itself renders the ordinance void. The

very essence of American constitutions is that the material rights of no man shall be subject to the mere will of another. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

Ordinances containing similar provisions have repeatedly been held unconstitutional. *Mayor of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394; *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180; *City of Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *State v. Tenant*, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715; *City Council of Montgomery v. West*, 149 Ala. 311, 42 South. 1000, 9 L. R. A. (N. S.) 659, 123 Am. St. Rep. 33, and notes, 13 Ann. Cas. 651. And see Judge Davidson's dissenting opinion in the Broussard Case, 74 Tex. Cr. R. 333, 169 S. W. 665, L. R. A. 1918B, 1091, Ann. Cas. 1917E, 919.

Two decisions of the Supreme Court of the United States are relied on by the Honorable Court of Civil Appeals in support of the validity of this ordinance. They are: *Silgh v. Kirkwood*, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, and *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900. Neither decision is authoritative upon the question here. The first affirmed the validity of a state law directed at the shipment of citrus fruits which were immature and unfit for consumption. The law was readily sustainable as a regulation for the protection of public health. The other decision upheld the ordinance of a city making it unlawful to conduct the business of a livery stable; likewise sustainable as a regulation in the interest of public health.

Other decisions upholding the validity of city ordinances interdicting billboards in populous residence districts, such as *Cusack Co. v. City of Chicago*, 242 U. S. 526, 37 Sup. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594, relied upon by the defendants in error, are without any bearing here. In the *Cusack Case* the court but gave effect to the decision of the State Supreme Court (267 Ill. 314, 108 N. E. 340, Ann. Cas. 1916C, 488) which had found that billboards in such districts created danger from fire, because of the lodgment of combustible material against them, and that they also afforded protection to disorderly and law-breaking persons.

Another decision, strongly relied on by the defendants in error is *In re Opinion of the Justices*, 234 Mass. 597, 127 N. E. 525. The decision sustains the validity of an ordinance segregating manufacturing and commercial buildings from homes and residences. But the ordinance, it appears, was passed under an express amendment to the Constitution of Massachusetts, granting to the legislature

the express power to limit buildings, according to their use or construction, to specified districts of cities and towns. We have in Texas no such constitutional provision.

The ordinance here is, in our opinion, clearly unconstitutional and void. The judgments of the Court of Civil Appeals and District Court are therefore reversed, and judgment is here rendered for the plaintiff in error awarding him the relief he sought in the trial court.

The motion for rehearing in the case of *John R. Spann v. City of Dallas et al.* was overruled, but the court, of its own motion, modified the judgment heretofore rendered, and ordered that the city of Dallas, its officials, etc., be enjoined and restrained from interfering with plaintiff in error, John R. Spann, in the erection of the storehouses on the lot described in his original petition.

MCCARDELL et al. v. LEA et al. (No. 3187.)

(Supreme Court of Texas. Nov. 30, 1921.)

1. Evidence \Leftrightarrow 82—Every reasonable intentment in favor of judicial sale.

Courts will not scrutinize the proceedings of judicial sales with a view to defeating them, but, on the contrary, every reasonable intentment will be made in their favor, so as to secure, if it can be done consistent with legal rules, the object they were intended to accomplish.

2. Partition \Leftrightarrow 36—Intention of probate court in describing land to be sold to control.

The description in orders for the sale and conveyance of land by an administrator in a partition proceeding is sufficiently certain where it may, by means of extraneous evidence, be so applied to the land as to reasonably identify it, and controlling effect should be given to the intention of the court as it may be reasonably gathered from the entire record of the administration.

3. Partition \Leftrightarrow 36—Description in administration proceedings held to authorize administrator's deed.

Where the language of an order of sale, report of sale, and order of confirmation, in administration proceedings, when applied to land by means of extrinsic evidence, reveal the intention of the probate court to authorize the sale and conveyance of certain land, the administrator's deed thereto is not subject to collateral attack for want of sufficient description of the land in the administration proceedings.

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

Suit by W. K. McCardell and others against J. V. Lea and others. From a judgment of the Court of Civil Appeals (200 S. W. 562), affirming a judgment for defendants, plaintiffs bring error. Affirmed.

C. F. Stevens and Kittrell & Kittrell, all of Houston, and C. W. Nugent, of Galveston, for plaintiffs in error.

E. B. Pickett, Jr., of Liberty, for defendants in error.

GREENWOOD, J. Plaintiffs in error brought this suit against defendants in error for the recovery of an undivided $\frac{23}{56}$ interest in a tract of some 1,431 acres of land out of the J. D. Martinez leagues in Liberty county numbered 6 and 9. Defendants in error answered with a general denial and a plea of not guilty, and filed a cross-action against plaintiffs in error for the recovery of the entire 1,431-acre tract.

Trial without a jury resulted in a judgment that plaintiffs in error take nothing by their suit, and that defendants in error recover on their cross-action the title to, and possession of, the 1,431 acres of land. On appeal to the Court of Civil Appeals, the trial court's judgment was affirmed (Civ. App.) 200 S. W. 562.

James Davis died owning land in the J. D. Martinez leagues, some of it lying east and some of it lying west of the Trinity river, including that in controversy on leagues 6 and 9, both of which lie west of the river. Plaintiffs in error were heirs of James Davis, and as such heirs claimed the undivided interest for which they sued. Defendant in error J. V. Lea claimed the land recovered by him as purchaser at a sale made by the administrator of the estate of James Davis. The question presented by plaintiffs in error is: Was there such description of the land in the administration proceedings as to authorize the conveyance of the estate's title by the administrator?

The facts to be considered in determining whether the probate court had empowered the administrator to sell and convey the land in controversy, may be briefly stated as follows:

James Davis at one time owned all of the Martinez leagues numbered 6 and 9. He conveyed two tracts, aggregating 960 acres, out of the two leagues. Soon after his death, the heirs of James Davis conveyed 1,280 acres out of said leagues in two tracts, by deeds reciting that it was the intention of James Davis to convey the tracts in his lifetime, and that the grantees were equitably entitled thereto. Prior to July 9, 1875, the administrator of the estate of James Davis had conveyed six tracts out of the two leagues, aggregating 4,028 $\frac{1}{2}$ acres. If each of the two leagues had in fact contained 4,428 acres, there would have remained of same 2,587 $\frac{1}{2}$ acres, which had not been conveyed by James Davis or his heirs or the administrator of his estate. The actual acreage belonging to the estate and subject to distribution between the heirs, on July 9,