

## CITY OF NEW ORLEANS v. PAINE.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 32.

## PUBLIC LANDS—SURVEYS—AUTHORITY OF LAND OFFICE.

A surveyor, acting under special instructions based upon an opinion of the secretary of the interior, surveyed an old Spanish grant, and reported the same to the surveyor general. Protests were filed against the survey; but the surveyor general approved the same, and forwarded it, together with the protests and evidence, to the commissioner of the general land office. The latter accepted the survey in part, but reserved the remainder for further consideration, meantime directing the surveyor general to withhold the filing of the triplicate plats from the local land office. The matter was then referred to the secretary of the interior, who held that the survey did not comply with the decision of his predecessor, and directed a new survey. *Held*, that the action of the surveyor general and the commissioner did not exhaust the authority of the land department, but that the matter was still lawfully pending therein, and the courts, therefore, had no authority to enjoin the obliteration of the old survey or the making of the new one. 49 Fed. Rep. 12, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill by the city of New Orleans against Ruffin B. Paine, a deputy surveyor, to enjoin the obliteration of an old survey and the making of a new one directed by the secretary of the interior. An injunction was denied and a temporary restraining order dissolved. 49 Fed. Rep. 12. Complainant appeals. Affirmed.

*J. L. Bradford*, for appellant.

*Wm. Grant*, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The appellant is the owner of certain lands on the left bank of the Mississippi river, about 50 miles above New Orleans, embraced in a grant made by the French authorities on the 3d of April, 1769, to one Dupard. The land was described in the grant as having "30 arpens of front to the river, upon the whole depth which shall be found unto Lake Maurepas." The front of the grant was increased to 40 arpens, which is accounted for by the action of the river increasing the arc of the bend. The authorities of the land department have uniformly recognized the grant as a completed grant of former governments; and no substantial difficulty has been encountered in fixing its front on the river, and the direction of its side lines, following the rule that has obtained in the survey of riparian grants in Louisiana, that side lines shall be extended at right angles to the general course of the bank at the points from which they depart. The front of this grant being on the convex side of a bend of the river, the side lines rapidly diverge; the course of the upper or western line being N., 27° 48' W., and the course of the lower or eastern line being N., 17° 10' E. But much contention and difficulty, and diversity of views by various officials of the land depart-

ment, and the successive owners of this grant, and parties having rights in the adjacent lands, have been experienced in fixing the depth of this grant and correctly establishing its rear line.

Lake Maurepas is situated towards the rear of this grant, but is not now immediately in its rear, as no extension of its side lines would touch or include any part of that lake. It seems to be certain that the western shore of the lake has receded, and the southern boundary extended, since the date of this grant. The Amite river, whose waters connect with the lake, is to the rear of this grant, and the owner of the grant has claimed that the side lines should be extended to that river; and this claim appears to have met at one time the approval of the surveyor general for Louisiana, but encountered the opposition of the state of Louisiana, which was interested in the question by reason of the grant to her by act of congress of the adjacent swamp lands. Such has been the controversy as to the rear line of this grant that it is not seriously contended that its correct location was ever fixed until after a decision made by the secretary of the interior on the 6th of January, 1888, in which decision the secretary, addressing the acting commissioner of the land office, announced his ruling as follows:

"In this case a line drawn through the center of the grant, from the front to the rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake, would seem to determine accurately a depth as far back as Lake Maurepas. It seems to me that this is the only rule by which the depth of this grant can be ascertained in accordance with the terms of the grant. I am therefore of the opinion that the depth of this grant only extends as far back as the southern shore of Lake Maurepas, and that the side lines of the grant should not be extended further than that depth. \* \* \* Your decision is reversed, and you will direct that the survey of these public lands (adjacent) be closed upon this grant in accordance with the rule above stated."

Thereupon the commissioner of the land office directed the surveyor general to have the survey made in accordance with said decision. The surveyor general, in executing that direction, made a contract with the appellee, covering the work of making the survey, and instructed said deputy, November 11, 1889, that—

"The back line of the claims of McDonogh and Fontenot, being the back line of the grant to Dupard, as restricted in depth by the aforesaid decision, you will survey and locate in the following manner:

"You will carefully examine the southern shore line of Lake Maurepas, and if entirely satisfied, from reliable evidence, such as is contemplated under the head of 'Private Land Claim Surveys,' p. 111 of the printed manual, or from any other reliable proof, and your own examinations, that there has been a change in said shore line since the grant was made, viz., 1769, you will proceed, under such proof and upon your own responsibility, as a sworn officer, to ascertain the position of such shore line in 1769, as near as may be.

"And if it cannot be thus ascertained, to your satisfaction, where it was, so far back as 1769, you will ascertain where it was at any time since then, if this can be done safely and satisfactorily.

"If you find no reasons to think the shore has changed, or if the evidence resulting from your examinations and from the other evidence you may obtain is not satisfactory on this point, or will not enable you to fix it in any

other position than it now occupies, you will conclude that its position now marks its position in 1769, when the grant was made.

"Having thus satisfied yourself as to the true southern shore line of the lake at the date of the grant, you will run a blank compass line, without marking or measuring the same, from the most southern point of such shore line, so ascertained, in a west course, to the lower side line of the Fontenot claim, heretofore directed to be extended from the south line of T. 10 S., R. 6 E.; you will at such point of intersection establish the lower back corner of the grant and of the Fontenot claim.

"From that point you will prolong the line west, marking and measuring the same, to the upper side line of McDonogh, as surveyed by John Kap, establishing a corner at the intersection of the lower side line of that claim, and taking connections with all township and section lines, and establishing corners at such intersections."

On the 24th February, 1890, the foregoing instructions were thus modified:

"The secretary having held, as I am now advised by the commissioner, that such back line should not run west from the southern extremity of Lake Maurepas, but should run therefrom on such a course as will be perpendicular to the axis of the Dupard grant, your former instructions are modified as follows:

"Having satisfied yourself of the true position of the lake, as directed in your former instructions, you will run the back line therefrom on a compass direction which will be at right angles to a line which would run through the center of the French grant. But this center line or axis of the grant need not itself be run on the ground. Its course will be a mean between the courses of the upper and lower side lines of the grant, as heretofore established, and to be established by you, as heretofore directed.

"In running such back line, you will mark it, establish corners on it, and take connections of other lines it may intersect, as heretofore instructed, in every respect as though no other change had been made in your former instructions, except as to the course of the same."

The appellee, as deputy surveyor, having made the survey under these instructions, reported the same to the surveyor general's office, showing that he had thoroughly examined the lake and its shores, and had taken the affidavits on the subject, of all the old and reliable settlers he could readily find, which affidavits he made a part of his returns; that he could form no definite conclusion from his examination and the estimates of the settlers as to where the shore line of the lake was at the date of the grant; that the only thing which seems certain is that it was then a long way from where it now is. And he further says:

"In fixing upon the distance of 104.87 chains, I have tried to adopt a location which would probably give the claims all the depth they are entitled to, without extending them so far as some of the evidence would require."

Against the adoption of this survey, Hon. John McEnery, as agent for the state of Louisiana, and W. H. Rogers, attorney general of Louisiana, and Messrs. J. L. Bradford and C. W. Holcomb, attorneys for the cities of New Orleans and Baltimore, and others, protested. The report of the survey, with diagrams, plats, transcript of the field notes, the affidavits made part of the returns, and the protests above mentioned,