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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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WILFRED W. NIELSEN and DEANNA NIELSEN,

Plaintiff-Appellees,

vs.

HERMAN STRATBUCKER, STATE OF IOWA, et al.,

Defendant-Appellants.

Filed April 27, 1982

2-47
2-66110

Appeal from Harrison District Court - E. F. Hanson, Judge.

Defendant State appeals from an adverse decree in which the trial court quieted title of accreted land on the Missouri River in plaintiffs. AFFIRMED.

Thomas J. Miller, Attorney General of Iowa, and John P. Sarcone, Assistant Attorney General, for defendant-appellant.

Robert Scoville of Ryan & Scoville, South Sioux City, Nebraska, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

The defendant State appeals from an adverse decree in which the trial court quieted title of accreted land on the Missouri River in plaintiffs. Quiet title actions are heard in equity, and our review is **de novo.** Iowa R. App. P. 4. Having reviewed all of the evidence, we affirm the trial court.

I. Procedural Background. Plaintiffs Wilfred W. and Deanna Nielsen originally filed their amended petition to quiet title in these disputed 7.87 acres of land on October 27, 1977. On August 28, 1978, title was quieted in plaintiffs against all defendants, including the State, which was found to be in default for not having answered. On October 26, 1978, the State filed a motion to vacate the default judgment and a counterclaim praying that title to the land be quieted in the State. On December 14, 1978, the default judgment was set aside, and the case between plaintiffs and the State was tried October 7 and 8, 1980.

II. Historical Background. In the late 1930's the U.S. Army Corps of Engineers designed a channel for the Missouri River that would contain the river and keep it from wandering, flowing in more than one channel, and concomitantly changing the boundaries of states between which it flowed. For historical discussion of this problem, see Dartmouth College v. Rose, 257 Iowa 533, 536, 133 N W.2d 687, 690 (1965). The Corps' work on the design channel was interrupted by World War II, but resumed shortly thereafter. Id. Prior to this time, by decree of the United States Supreme Court, the boundary between Iowa and Nebraska was "a varying line" so far as affected by "changes of diminution and accretion in the mere washing of the waters of the stream," but was not a varying line where the river was shifted by avulsion: "By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; . . . unless the waters of the river returned to their former bed, [such center line] became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel." Nebraska v. Iowa, 143 U.S. 359,

370, 12 S. Ct. 396, 400, 36 L. Ed. 186, 190 (1892); decree at 145 U.S. 519, 12 S. Ct. 976, 36 L. Ed. 798 (1892).

Experience soon showed, however, that "the fickle Missouri River ...refused to be bound by the Supreme Court decree [of 1892]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'that of avulsion.' " Erickson, Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927). Consequently, Iowa and Nebraska agreed by compact in 1943 upon a permanent location of the boundary line despite natural changes of the river or changes brought by the U.S. Army Corps of Engineers. Nebraska v. Iowa, 406 U.S. 117, 119, 92 S. Ct. 1379, 1381, 31 L. Ed. 2d 733, 736 (1972).

Because of changes to the river bed brought about by both natural means and the acts of the Corps in gradually forcing the river into a permanent design channel, land abutting the river or within the river appeared or disappeared, sometimes by avulsion, more often by reliction or accretion. An avulsion is a sudden and rapid change in the channel of a stream where the old bed is changed and the stream seeks a new one. Dartmouth College v. Rose, 257 Iowa at 535, 133 N.W.2d at 689. Accretion results from a gradual and imperceptible addition to the shoreline by action of the water to which the land is contiguous; land may accrete to an island or to the riverbed itself, as well as along the shoreline. Mather v. State, 200 N.W.2d 498, 500 (Iowa 1972). There is a presumption of accretion as against an avulsion. Kitteridge v. Ritter, 172 Iowa 55, 59, 151 N.W. 1097, 1098 (1915). Reliction is the term applied to land added and uncovered by a gradual subsidence or waning of water from any cause. United States v. Wilson, 523 F. Supp. 874, 896 (N.D. Iowa 1981). Although there may be more than one channel of the river, particularly during a period of gradual change by either reliction or accretion, there is generally only one thalweg or main channel. See Dartmouth College v. Rose, 257 Iowa at 535, 133 N.W.2d at 689.

III. Legal Background. The Missouri River is a navigable stream and, under Iowa law, the State owns the bed of the stream from the ordinary high water mark to the thread or center of the stream. Preamble, Constitution of Iowa, page xiviii, The Code 1981. One who owns land fronting on a navigable steam owns to the ordinary high watermark, which has been defined as being "coordinate with the limit of the bed of the water, and that, only, is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes." Mather v. State, 200 N.W.2d at 500. Title to accretion land vests when such land rises above the ordinary high-water mark. Dartmouth College v. Rose, 257 Iowa at 536, 133 N.W.2d at 689-90. In Iowa, an island which forms in a navigable river upon and over state-owned river bed is considered accretion to the bed and is owned by the State as is all accretion thereto. Meeker v. Kautz, 213 Iowa 370, 372, 239 N.W. 27, 28 (1931).

Land which accretes at or above the ordinary high water mark becomes the property of the landowner to whose shore it attaches; land which accretes to an island in a navigable stream becomes the property of the State. Mather, 200 N.W.2d at 500. When new land has appeared, the method of its appearance is often a matter of honest differences of opinion. As has been said many times, the answer to the question is factual, to be arrived at after a consideration of all the relevant testimony. Tyson v. Iowa, 283 F. 2d 802, 809 (8th Cir. 1960).

IV. Evidence in the Present Case. Construction work by the U.S. Army Corps of Engineers on dike 719.6 to force a change in the channel of the Missouri River near the contested land began in June of 1959. Numerous witnesses were called by both the plaintiff-Nielsens and defendant State of Iowa; they testified to the appearance of the river before the dike's erection, the change in the river as the dike took effect, and the appearance of the land after the original channel was moved to its new bed. The State's theory is that it owned the bed of the river

and, as a result, the uncovered land as well as any additional land accreted thereto continued to belong to the State after the channel changed. The plaintiffs concede that all land in the bed of the river originally belonged to the State, but argue that, as the channel changed, the visible land first attained permanence when it attached to their high bank above the high water mark. Several witnesses testified as to the formation of the land in question, and conflicting opinions were given concerning how the land formed and where it first appeared. There was some evidence that the land first appeared as a sandbar north of the dike and attached to plaintiffs' predecessor in title's land before continuing to appear south of the dike. Both parties agree that water separated the new land from the high bank at times, and that a depression continues to exist between plaintiffs' high bank and the disputed land, roughly where the Missouri River channel was prior to the building of the dike. Conflicting testimony was given concerning water which sometimes appeared in the depression; some witnesses said that the water was flowing river water, while others testified that the water was only slack or stale water.

V. Trial Court Disposition. The trial court found that the approximately 7 87 acres of land along the Missouri River, whose ownership is here in question, was formed by accretion because of the U.S. Army Corps of Engineers having built dike number 719.6 as part of its continuing work on a design channel for stabilization of the river. The court found that the contested land formed south of this dike and was part of the bed of the river prior to construction of the dike by the Corps.

Construction of the dike began in June of 1959 and was completed by May 2, 1960. Aerial photographs, admitted as exhibits, show that by July 31, 1960, a sandbar had formed south of the dike over almost all of the disputed land and that, although a narrow area of water appeared between the sandbar and the high bank

to the east (plaintiffs' land), the water did not appear to be a true channel. The photographs showed no evidence of vegetation at that time.

The court further found that two subsequent photographic exhibits, taken in August 1965 and September 1966, showed the disputed area to be land, with vegetation, and having a swale or depression along the line of the old high bank. Later aerial maps showed the continued existence of the swale, which apparently contained water at certain times of the year, but which was in no way connected to the river where now located. Because of this evidence, the court found that the land attached first to the east high bank, that the swale or depression between the old high bank and the sandbar was not a flowing stream or part of the Missouri River, and that the land had not taken on the classification of an island prior to attachment because, to be an island, the land would have had to attain some stability of its own, vegetation, and some well-defined separation from the mainland by a definite channel of Missouri River water.

VI. Appeal Issues. On appeal, the State argues that the trial court was in error in holding that the State owns only those accretions that acquire island status before attaching to the shore, in failing to find that the State proved that the disputed land accreted to the bed of the river, in concluding that the plaintiffs caried their burden of proving that the disputed land formed as an accretion to the Iowa high bank, and in refusing to allow a State's witness to testify, thus denying the State its right of full review on appeal. Because the first three issues are so intertwined, we will deal with them together; the fourth issue will be treated separately.

A. Formation of the Disputed Land. The applicable law to determine ownership of newly accreted land, previously delineated, is deceptively clear. The deception lies in the lack of ease with which this clear body of law may be applied to any given factual setting. The State's theory of recovery is that the disputed land formed first as an island, thereby vesting ownership in the State. The

plaintiffs do not deny that the land appeared first as a sandbar; rather, they believe that the mere appearance of land above water level does not convey upon it island status, and that it isn't until that land acquires some sort of stability that its nature, and therefore its ownership, can be determined. In resolving this issue, factual as well as legal questions arise.

On a factual basis, the trial court heard the testimony, studied the exhibits, and evaluated the credibility of the witnesses. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, even though we are not bound by them. Iowa R. App. P. 14(f)(7). We see no basis for interfering with the trial court's conclusion that the land in question achieved stability and permanence only as a result of attaching to the high bank of the plaintiffs' land and had previously enjoyed no permanence or stability as an island. To determine whether accreted land has achieved island status, all of the surrounding circumstances under which accretion occurred should be taken into account, including the extent of the accretion itself, the growth of trees and vegetation, and nature of the water which surrounds the body of land, the topography of the land, and the testimony of the witnesses concerning its appearance, identification, and permanency. Mather v. State, 200 N.W.2d at 502. It is apparent from reading the trial court's decision that the court considered all of the appropriate factors, based upon the evidence heard and admitted at trial, and concluded that the sandbar visible in the 1960 photograph had not yet achieved that condition of permanency as defined in Mather which would raise the sandbar to the status of island.

The next matter which must be determined is whether a sandbar which has attached to the bed of the stream but which lacks the permanency required to be an island becomes the property of the landowner to whose shore it attaches as a result of the combined effect of accretion to the sandbar and accretions to the adjacent shoreline. This is essentially a legal question, the answer to which is not

clearly stated in the decided cases. The State urges that under said circumstances only that land clearly shown to have accreted outward from the adjacent shoreline can be claimed by plaintiffs by virtue of accretion. It argues that the cases have held that land which attaches to the bed of the stream becomes the property of the State. It therefore urges that in the present case all land attaching to the bed of the stream prior to the time of its attachment to the shoreline became the property of the State.

Some support for the State's position is found in the court's statement in Mather, 200 N.W.2d at 500, that "the State owns the riverbed from the ordinary high water mark to the center or thread of the stream. Land which accretes to an island in a navigable stream or to the bed of the stream itself becomes the property of the State." (emphasis added). The holding in Mather does not serve to directly answer the question now posed, however, because the court there found that the land in question had first accreted to land which did enjoy the permanent characteristics of an island. We must conclude, however, that much of what was said in Mather concerning the characteristics of an island would have been unnecessary if accretion to nonpermanent protrusions from the riverbed enjoyed the same status as accretions to an island. We therefore interpret the language in Mather, heretofore quoted, which indicates "land which accretes . . . to the bed of the stream itself becomes the property of the State" as granting permanent ownership to the State of only those accretions to the riverbed which have attained the characteristic of an island. Conversely, sandbars and other nonpermanent accretions to the riverbed which attain permanency only as a result of attachment to the shoreline from the combined accretions to the sandbar and to the shoreline become the property of the adjoining owner. See also in support of this conclusion, Payne v. Hall, 192 Iowa 780, 789, 185 N.W. 912, 914 (1921). We therefore conclude that the trial court's determination of the title to the disputed property is correct.

B. Excluded Testimony. The State sought to qualify Gerald Jauron, a former employee of the Iowa Conservation Commission, as an expert so as to give his opinion as to how the disputed land formed. Plaintiffs objected to his being allowed to give an opinion on the land formation for lack of foundation and his incompetency with respect to land formation along the Missouri River surface. On three different occasions the objection was sustained. On the last instance, plaintiffs pointed out that Mr. Jauron had no experience or knowledge of the effect of the dikes upon land and no familiarity with the area at the exact time the dike was being built and the land formed. The State made no offer of proof.

The receipt of opinion testimony, lay or expert, rests largely in the sound discretion of the trial court; we will not reverse its ruling absent manifest abuse of that discretion to the prejudice of the complaining party. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). We do not find an abuse of discretion in the trial court's refusal to allow Mr. Jauron to offer an opinion because, from the foundation offered, the court was free to believe that Mr. Jauron did not have the personal knowledge of the dike and river in question in 1960 such as to permit him to render a qualified opinion. Because no offer of proof was made, even though this matter was heard in equity, we do not have before us what opinion Mr. Jauron would have given had he been permitted to testify. The State argues that no offer of proof was necessary because the court should have allowed him to give his opinion in the first place and, in the second place, this court should be able to infer from the surrounding circumstances that he would have testified that the disputed land formed first as an island before it attached to the Iowa high bank. We disagree and believe that the failure to make an offer of proof is fatal to the State's position. In any event, no abuse of discretion by the trial court has been shown with respect to this evidentiary ruling.

VI. Conclusion. After de novo review we find ample evidence to support the trial court's conclusion that the disputed land formed by accretion and

attached to the high bank before it ever achieved permanence or stability as an island. The trial court did not abuse its discretion in excluding opinion testimony since a proper foundation was not laid as to the witness's competency. Title in the disputed land is quieted in the plaintiffs, and the decree of the trial court is affirmed.

AFFIRMED.