

COUNTY BOUNDARIES: Not changed by avulsion.

6-17
June 10, 1935.



Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This will acknowledge receipt of your letter
which is as follows:

"Pursuant to our conversation with you on
Thursday, May 9, relative to the Mr. Sam
Heckmann's Island located in the Missouri
River between Gasconade and Montgomery
counties desire to have you give me your
opinion on the question: In what County
is this island located and which county
is entitled to the taxes for said Island?

"The facts are:

"Mr. Heckmann purchased the island from
the Gasconade County Court in 1922 and
has paid his taxes to Gasconade County up
to and including 1933. He has the signa-
tures of 15 competent rivermen including
licensed pilots that 5 years previous to
his purchase the thread of the channel of
the Missouri River was on the north side
of this island. He has maps to show that
the channel had not changed in 1926, also
a letter from a licensed pilot of an
official channel forecasters the U. S. Snag-
boat, Missouri, that the channel was still
on the north side of said Island in the fall
of 1927.

"The U. S. Eng. Dept. built a system of
Dikes west and across the head of this

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Island in 1928, and since had dredged the south side on three different occasions. During the period of construction, gaps were left in two dikes immediately west of the island, due to lack of water on the south side. Due to this Government construction work the channel has changed to the south side.

"With the river at an 8 ft. stage on the gauge at Hermann, Missouri, water still courses through between the north side of the island and the Montgomery County shore.

"I am enclosing herewith an official Government survey of this island and the river, which may assist you in this matter."

We construe your inquiry to be that, assuming that no change has been made in the county boundaries except by the actions of the Missouri River, has such disputed tract been transferred from Gasconade to Montgomery County.

Land formed by accretion belongs to the riparian owner against whose bank it is deposited and is governed by the same rights of ownership that pertain to the mainland of such riparian owner.

Benne v. Miller, 149 Mo. 228;
Widdecombe v. Chiles, 173 Mo. 195;
McCormack v. Miller, 239 Mo. 463.

The latter case was in ejectment involving fifteen acres of land on Salt River which formed the northern boundary. The channel of the river moved to the south, forming land on the other side of the river. The fifteen acres were formed over a period of seventeen years. The court said:

"A running stream, forming the boundary line between contiguous lands, continues to be such boundary line, although the channel may change, provided the change is by the gradual erosion and cutting away of its banks and not by a sudden change leaving the old channel and forming an entirely new and different channel. (Cases cited.) In determining whether a riparian owner has title to land in controversy by

accretion, the length of time in which it is in course of formation is of no importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion; but if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion and the boundary line remains the same as before the change of the channel."

The statutes in force at the time of the adoption of the Constitution of 1875, now Sections 11919 and 11955, R. S. Mo. 1929, made "the middle of the main channel of the Missouri River" the boundary between Montgomery and Gasconade Counties.

As affecting county boundaries, the Constitution, Article IX, contains these provisions:

"Section 1. The several counties of this State, as they now exist, are hereby recognized as legal subdivisions of the State.

"Section 3. No county shall be divided or have any portion stricken therefrom without submitting the question to a vote of the people of the county, nor unless a majority of all the qualified voters of the county or counties thus affected, voting on the question, shall vote therefor; * * *"

"Section 4. No part of the territory of any county shall be stricken off and added to an adjoining county without submitting the question to the qualified voters of the counties immediately interested, nor unless a majority of all the qualified voters of the counties thus affected, voting on the question, shall vote therefor. * * *"

It will be noted that the north boundary of Gasconade County and the south boundary of Montgomery County are one and the same line, to-wit, the middle of the main channel of the Missouri River.

Section 12005, R. S. Mo. 1929, is as follows:

"Whenever a county is bounded by a water-course, it shall be construed to be the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

In the case of State ex inf. Mansur v. Hoffman, 318 Mo. 991, the Supreme Court had under consideration a set of facts and a controversy very similar to your inquiry. In discussing where the middle of the main channel of the Missouri River was with reference to fixing or ascertaining the line between two counties in that case, the court said, l. c. 994:

"For there is nothing in the language of either the statute or the Constitution to indicate that the framers in the one case or the Legislature in the other intended to alter or abolish the rules of the common law relating to running water as a boundary. In dealing with questions touching such a boundary, the Supreme Court of the United States has uniformly applied those rules (which are the same as those of the civil law and the law of nations), whether the boundary was one fixed by treaty or by Act of Congress. (Missouri v. Kentucky, 11 Wall. 395; Nebraska v. Iowa, 143 U. S. 359; Missouri v. Nebraska, 196 U. S. 23; Washington v. Oregon, 211 U. S. 127.)

"For a statement of the rules referred to in the preceding paragraph we cannot do better than quote from the opinion of Mr. Justice Brewer in Nebraska v. Iowa, supra, at page 360:

"It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States*, 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (Citing cases.)

"It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In *Gould on Waters*, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." (Citing cases.)

"These propositions, which are universally recognized as correct where the boundaries of private property touch on streams are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on

boundary, but leaves it in the centre of the old channel.'

"After quoting in part an opinion of Attorney-General Cushing in which were reviewed the authorities not only of the common law but of the civil law and the law of nations as well, the opinion proceeds:

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying centre of the channel, and that avulsion would establish a fixed boundary, to-wit: the centre of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jefferis v. Land Company*, 134 U. S. 178, 189. A question between individuals, growing out of changes in the very place now in controversy, was then before this court; and in the opinion, after referring to the general rule, it was observed: "It is contended by the defendant that this well settled rule is not applicable to land which borders on the Missouri River, because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid, and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away. But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and, that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi,

the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law."

"For a further review of the common law authorities see Fowler v. Wood, 73 Kan. 511, and Bellefontaine Co. v. Niedringhaus, 181 Ill. 426.

"The rules of law which fix the rights of the parties where a river changes its course by gradual, insensible accretions, and those which obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed, as laid down by the authorities cited and quoted from, have always been given recognition by this court."

To the extent that the case of Northstine v. Feldmann, 298 Mo. 364, conflicts with the views in the case of State ex inf. Mansur v. Hoffman, supra, the court overrules the Northstine case.

Continuing, l. c. 996, the court says:

"At common law such a boundary is more or less migratory, in that it may shift with the gradual shifting of the stream due to imperceptible changes occasioned by accretion and reliction on its banks, as has been heretofore pointed out. Now the boundary between Franklin and Warren counties was originally fixed by statute. The Constitution merely confirmed the boundary as defined by the statute and made it impossible for the Legislature to change it without the consent of the people of the two counties. But the statute must be construed agreeably to the principles of the common law, nothing appearing in its context or otherwise to indicate the contrary.

"Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines

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rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. If words from its vocabulary are employed in them it expounds them. If the statutes are in derogation of it, it yields and bides its time; if they are cumulative, it still continues. Rules of interpretation and construction are derived from the common law, and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles.' (2 Lewis-Sutherland on Stat. Cons. (2 Ed.) sec. 453.)

"The Northstine case, to the extent of the holding just referred to, should be and is overruled."

See, also, the case of Randolph v. Moberly Hunting & Fishing Club, 15 S. W. (2d) 834.

CONCLUSION

If the thread of the stream was at a given time north of the land comprising McGirk's Island and was suddenly by high waters, or by the work of engineers or others, caused to run south of said land (said land or substantial portions thereof remaining intact and not being washed away by the gradual and imperceptible cutting and depositing of particles of soil, sand, gravel, etc.), then the jurisdiction of Gasconade County over said land continues as though the river continued to run north of the said land.

Yours very truly,

DRAKE WATSON
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

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