

3957

DEED — DESCRIPTION — WHERE WORDS INTERSPERSED APPEAR: "AT THE POINT WHERE THE SOUTH BANK OF": "TO THE SOUTH BANK": "THENCE WESTERLY ALONG SAID SOUTH BANK," OF A CREEK TO PLACE OF BEGINNING, THE NORTHERLY BOUNDARY LINE OF SUCH REAL ESTATE IS THE SOUTHERN EDGE OR BORDER OF CREEK, AT LOW WATER MARK, WHEN WATER IS AT AVERAGE AND ORDINARY STAGE, DURING ENTIRE YEAR — NO REFERENCE TO EXTRAORDINARY FRESHETS OF WINTER AND SPRING OR EXTREME DROUGHTS OF SUMMER OR AUTUMN — TOWN CREEK, VAN WERT COUNTY.

SYLLABUS:

Where the description in a deed provides that the first call shall begin "at the point where the south bank of" a non-navigable creek crosses the east line of a certain street and various calls are set forth until the eastern boundary of such premises is continued "to the south bank" of such creek, "thence westerly along said south bank" of the creek to the place of beginning, the northerly boundary line of such real estate is the southern edge or border of such creek, at low water mark, when the water in the creek is at its average and ordinary stage, during the entire year, without reference to the extraordinary freshets of the winter and spring or the extreme droughts of the summer or autumn.

Columbus, Ohio, July 2, 1941.

Brigadier General W. S. Bird, Adjutant General of Ohio,
Columbus, Ohio.

My dear General Bird:

I have your request for my opinion which reads:

"Request your opinion as to the ownership of the retaining wall adjoining State owned property at Van Wert and your opinion as to by whom the same should be rebuilt.

This wall separates the State Armory site from Town Creek and is in a dilapidated and dangerous condition and liable to collapse at any moment, thereby endangering the stability of the Armory.

The deeds to the armory are fully repeated in an opinion from your office No. 3116 dated October 19, 1938, and the original deeds and abstract are on file with the State Auditor.

In consideration of the location of the county seat at Van Wert, various lands were donated to the County Commissioners of which the armory site and Town Creek were part.

If, in your opinion, this retaining wall is a part of the State owned property, we will be obliged to construct a new wall to protect the Armory. However, if in your opinion the same is the property of the County Commissioners, we desire an extra copy of your opinion to present to the said County Commissioners with a request that they rebuild the wall at once."

The deeds to the State of Ohio, on file in the office of the Auditor of State, convey without restriction or burdens of any kind, and by quit claim deed, the following described property:

" * * * situated in the City of Van Wert County of Van Wert and State of Ohio, to-wit:

Beginning at the point where *the south bank of Town Creek* crosses the east line of Washington Street; thence south along said east line of Washington Street about one hundred and four (104) feet to a stone; thence south forty (40) degrees east fifty-eight (58) feet to a stone; thence north seventy-eight (78) degrees east about ninety-eight (98) feet to the line between Sub-division 149 and 150 if extended northward; thence south about fourteen (14) feet to a pipe marking the northwest corner of Sub-division 150; thence east fifty-seven (57) feet to a stake and stone marking the southwest corner of Sub-division 151; thence along the west line of Sub-division 151 *to the south bank of Town Creek; thence westerly along said south bank of Town Creek* to the place of beginning and containing .6 of an acre, more or less.

Also the following described premises:

All of that part of Sub-division number one hundred and fifty-one (151) lying west of the west line of the alley running through said Sub-division and excepting therefrom a strip of land off of the west side thereof now used as a part of what is known as the Fourth Ward Park in said City of Van Wert, Ohio, said strip so used as part of said park being fifty-seven (57) feet wide." (Emphasis mine.)

The title to this property was approved by this office in Opinion No. 3116, Opinions, Attorney General, 1938, Vol. III, p. 1919, referred to in your letter.

I have examined all deeds and the abstract of title pertaining to the above described premises on file in the Auditor's office, and I find nothing whatever therein in anywise referring to the retaining wall by which your inquiry was engendered. It becomes necessary, therefore, (first) to determine what is meant by the operative language of the descriptions contained in the deeds in question as above set forth, and (second) to ascertain the location of the retaining wall in which you are interested. The first of these questions is a question of law, while the second is a question of fact determinable only by an examination of the property involved with particular reference to the location of the retaining wall and the south border of Town Creek at low water mark at mean average level. And unless you have an accurate and adequate map or plat available, a personal investigation by an engineer or other competent person may be necessary.

Generally speaking, the presumption is that the boundary line between owners of lands bordering on streams or watercourses is in the middle thread of the watercourse. As stated in 8 Am. Jur., 761, when "such lands are conveyed with the stream or watercourse described as a boundary, it is frequently held that there is a presumption that the grantor intends that the boundary of the lands of the grantee should extend to the middle of such stream or watercourse." This presumption, however, is a rebuttable one and "may be rebutted by any words which clearly indicate an intention to restrict the grant to the edge or shore of the stream or some point other than the thread of the stream." *Id.*, 762. See also, Annotations, 42 L. R. A. 506; 74 A. L. R. 597.

In 5 O. Jur. 710, the rule is stated thus:

"A call for a nontidal river or stream, whether in fact navigable or non-navigable is construed as intending the boundary to be the middle of the bed of the river or stream, *unless apt terms are employed to limit it.*" (Emphasis mine.)

As early as 1828, in the case of *Gavit v. Chambers and Coats*, 3 Ohio 496, it was held that, in Ohio, owners of lands situate on the banks of navigable streams running through the state, are also owners of the beds

of the rivers to the middle of the stream, as at common law. The same rule was laid down as to non-navigable streams in the case of *Benner's Lessee v. Platter and others*, 6 Ohio 504 (1834).

The first branch of the syllabus in the case of *Lamb v. Ricketts*, 11 Ohio 311 (1842) would seem to be dispositive of the meaning of the language underscored in the description of the premises with which we are here concerned. This part of the syllabus reads:

“Where a deed calls for an object on the bank of a stream, thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning, the stream, at low-water mark, is the boundary.”

The *Lamb* case was cited with approval in the case of *Lembeck v. Nye, etc.*, 47 O.S. 336 (1890), in which the court applied the principles above enunciated and said in branch 2(b) of the syllabus that where “the call in the description be (is) to and thence along the margin of the lake * * * the title of the purchaser will extend to low-water mark only.”

In the case of *The City of Dayton v. The Cooper Hydraulic Company et al.*, 7 O.N.P. 495 (1900), Judge Kumler, of the Court of Common Pleas, Montgomery County, citing among others the *Lamb* and *Lembeck* cases, *supra*, held as stated in the fifth headnote:

“When the call in a deed is, ‘thence southwesterly along the meanderings of the south bank of Mad river,’ such description carries the northern boundary line to the south bank of Mad river, at low water mark, when the water in the river is at its average and ordinary stage, during the entire year, without reference to the extraordinary freshets of the winter and spring or the extreme droughts of the summer or autumn.”

In view of the foregoing and in specific answer to your question, in so far as the same may be answered specifically with the information furnished by you and obtainable at the office of the Auditor of State, it is my opinion that the northerly boundary of the premises about which you inquire is along the southerly edge or border of Town Creek. Whether or not the retaining wall in which you are interested is on the property to which the State has title is a question to be determined by a survey and investigation by an engineer or other competent person.

Respectfully,

THOMAS J. HERBERT,

Attorney General.