

SEIDENSTRICKER *v.* HOLTZENDORFF.

4-8739

217 S. W. 2d 836

Opinion delivered February 14, 1949.

1. BOUNDARIES—ACQUIESCENCE.—Acquiescence by owners of adjoining lands in a boundary line as shown by a division fence for more than seven years will ordinarily confirm the boundary line thus located.
2. BOUNDARIES.—Better that ancient wrongs be unredressed than that ancient strife be renewed.
3. BOUNDARIES—ACQUIESCENCE.—Although a fence line be established without a prior dispute as to the true line, a recognition of the fence as the line between the lands of the parties for long years will show a quietude and acquiescence sufficient to raise a presumption that the line was agreed to by the parties.

4. BOUNDARIES—PRESUMPTION OF AGREEMENT AS TO BOUNDARY.—The evidence is sufficient to show that the line fixed by the trial court had been acquiesced in for more than 30 years, and it has thus become the boundary line between the farms of the parties.
5. DAMAGES.—The evidence is sufficient to show that appellee was damaged to the extent of \$675 by reason of appellant's interference with her cultivation of the land during 1946 and 1947.

Appeal from Prairie Chancery Court, Southern District; *Frank H. Dodge*, Chancellor; affirmed.

Wm. C. Gibson and *W. A. Leach*, for appellant.

Frances Drake Holtzendorff, *John D. Thweatt* and *Cooper Thweatt*, for appellee.

ROBINS, J. This suit originated in a dispute as to boundary line between owners of two adjoining tracts in Prairie county. Alleging that she was the owner of the fractional west half of section five, township one, north, range five, west, appellee brought suit in the lower court against appellant, who owned lands lying immediately east of her farm, asking that appellant be enjoined from constructing a fence so as to enclose part of appellee's land and seeking damages for trespass already committed. She alleged that for fifty-five years there had been a well defined boundary between the two tracts, consisting of an old fence, which had been recognized during that period as an agreed dividing line; and that appellant had recently fenced approximately fifteen acres, including a well owned by her and used for pumping water on her rice fields, thereby depriving her of the use of the land to her damage in the sum of \$900. The answer was a general denial.

When appellee's complaint was filed a temporary order, restraining appellant from further trespass and directing him to remove the fence already built by him, was made. On final hearing the court found the dividing line to be located as claimed by appellee, enjoined appellant from trespassing across this line, and awarded appellee \$675 damages for appellant's interference with cultivation by appellee of land along the dividing line during the years 1946 and 1947. This appeal ensued.

These questions are presented for our determination:

I. Whether the boundary established by the lower court is the correct line, as shown by the government survey; and, if not, whether this line has been established by acquiescence or agreement of the owners of the two tracts.

II. Whether the evidence supports the finding of the lower court that appellee was prevented by appellant from cultivating a portion of her land during the years 1946 and 1947, and also the finding as to amount of damage recoverable by appellee therefor, were correct.

I.

Each of the litigants presented the testimony of a surveyor, as well as that of other witnesses, tending to establish the boundary line between the northwest quarter of section five, owned by appellee, and the northeast quarter of said section, owned by appellant, in accordance with their respective contentions.

While the surveyors testified from information gathered in surveys made by each of them, there is some uncertainty about the findings of both of them. It did not appear that either surveyor began his survey at any definitely established government monument. Furthermore, it appeared that at the northeast corner of section five there was what is popularly known as a "jog," of 2.49½ chains, there being that distance between said northeast corner of section five and the southeast corner of section thirty-two, township two, north, range five, west, lying immediately north. These two corners ordinarily would coincide.

The irregularity of section five is further exemplified by the fact that, whereas the conventional section, as shown by government survey, contains 640 acres in a square, with each side measuring 80 chains, or one mile, this section, as shown by the original government survey, contains 712.59 acres. The north boundary line of the section is 78.87 chains in length, the west line is 88.62

chains, the east line is 90.08 chains, and only the south line is the standard length, 80 chains.

All these irregularities in the survey, together with others not mentioned here, tend to make somewhat uncertain the precise location of the true line, according to the government survey, between the parties.

But, while it is not shown exactly when the fence was first constructed, it was proved very clearly that for more than thirty years before the controversy between appellant and appellee arose, there was a fence leading south from the southeast corner of a square two acre plot used as a cemetery, located about the middle point of the north line of section five, extending to the middle point of this section, and that this structure was recognized by the owners and their tenants as a division fence. One witness, William Orlicek, testified that this fence, some of the old posts and wire of which were still there, had been, to his knowledge, in existence on this location for twenty-five years, and that during seven years of that time he was appellee's tenant and "plowed up to the old fence line." There was other testimony of like import. The former owner of appellant's land testified that when he was in possession thereof he recognized this old fence as the dividing line and plowed up to it on the east side.

The witnesses and parties all gave their testimony in open court and the surveyors pointed out to the court, on the plats, locations, which, from the testimony as shown in the record, we are unable to identify. Thus the lower court had a better opportunity to evaluate the evidence than is afforded to us.

Acquiescence, by owners of adjoining lands, in a boundary line, as shown by a division fence, for more than seven years will ordinarily confirm the boundary line as thus located, even though the fence may not be placed on the true line between the tracts.

In the case of *Gregory v. Jones*, 212 Ark. 443, 206 S. W. 2d 18, dealing with a question similar to the one involved here, we said: "In *Goodwin v. Garibaldi*, 83 Ark. 74, 102 S. W. 706, Mr. Justice RIDDICK, in sustaining

a long-existing boundary between adjacent owners, quoted the classic language of Hon. U. M. ROSE, as found in *Cunningham v. Brumback*, 23 Ark. 336: ' . . . better that ancient wrongs should be unredressed than that ancient strife should be renewed.' *Robinson v. Gaylord*, 182 Ark. 849, 33 S. W. 2d 710, is another case in which an old line was sustained, even against a new survey. Appellee argues that the original rail fence line was established by a mutual mistake, and should be changed to the 1946 line, and cites *Randleman v. Taylor*, 94 Ark. 511, 127 S. W. 723, 140 Am. St. Rep. 141, as authority for such contention. Furthermore, appellee says that there was no *dispute* prior to the establishing of the rail fence line, so—appellee says—the rule stated by Chief Justice HART in *Robinson v. Gaylord*, *supra*, and restated in *Peebles v. McDonald*, 208 Ark. 834, 188 S. W. 2d 289, does not apply to this case. It is true that in this case the original rail fence line was established without a prior dispute as to boundary; but the recognition of that line for the many intervening years (34 in this case) shows a quietude and acquiescence for so many years that the law will presume an agreement concerning the boundary. In *Deidrich v. Simmons*, 75 Ark. 400, 87 S. W. 649, there had been no dispute prior to the establishment of the fence line which had been accepted as the common boundary for many years; and in that case Justice McCULLOCH, speaking for this court, said: 'The proprietors of adjacent lands may by parol agreement establish an arbitrary division line, or an agreement may be inferred from long-continued acquiescence and occupation according to such line, and they will be bound thereby.' So in the case at bar the recognition of a common boundary for a long period of time is evidence of agreement and acquiescence, which may well exist without the necessity of a prior dispute. See 8 Am. Juris. 804. As stated in the annotation in 69 A. L. R. 1491: ' . . . where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time, . . . they and their grantees are precluded from claiming that the boundary line thus recognized

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and acquiesced in is not the true one, although such line may not be in fact the true line according to the calls of their deeds.' ”

We conclude that, regardless of whether the line as determined by the lower court is the correct line as shown by the government survey, a preponderance of the evidence established that the division line as fixed by the lower court had been acquiesced in and recognized by each of the owners of the two tracts for more than thirty years and has therefore become the boundary line between their respective farms.

II.

There was a sharp difference in the testimony as to appellant preventing the cultivation of appellee's land, and also as to amount of his liability therefor. There is little doubt, however, that appellant's action in 1946 in fencing up, without any notice to appellee, part of her land, including the well from which she had to pump water on her rice fields, and in warning off appellee's tenants in 1947, did interfere with her cultivation of the land in controversy, and possibly some adjoining acreage. The lower court made no specific finding as to how the amount of damage was computed; but a review of the testimony does not show that this finding was against the preponderance of the evidence.

The decree of the lower court is affirmed.

ARKANSAS-MISSOURI POWER CORPORATION v.
CITY OF RECTOR.

4-8729

217 S. W. 2d 335

Opinion delivered February 14, 1949.

1. MUNICIPAL CORPORATIONS—SPECIAL ELECTIONS—COST OF IMPROVEMENTS.—The city of R having passed an ordinance to “build and construct a light plant and provide a distributing system therefor” and providing for an election to determine the sense of the voters on the sale of \$65,000 in bonds for that purpose, appel-

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- lant's complaint alleging that the electors were misled by the recital in the ordinance, notice in the election and ballot title to believe that the plant could be erected at a cost not to exceed \$65,000 when in fact it would cost more than twice that sum, stated a cause of action to enjoin the city from collecting an illegal tax.
2. ELECTIONS.—It was to the recitals in the ordinance and in the ballot title that the electors had the right to look to ascertain what they were asked to approve and not to discussions in the council meeting, nor speeches made at a mass meeting which may or may not have been largely attended.
 3. ELECTIONS—BALLOT TITLE.—The ordinary meaning of the words used in the ballot title which were “to issue bonds in the sum of \$65,000 with the proceeds of which to build and construct an electric light plant in and for said city and to provide a distributing system therefor” is that it was proposed to construct the plant with the proceeds of the bond sale with no intimation that such proceeds were intended merely to supplement other sources of revenue to be used for that purpose.
 4. MUNICIPAL CORPORATIONS—ORDINANCES.—Where ordinary words are used they must be construed in their popular and general sense which in this case meant the construction of a complete electric light plant with the proceeds of the bond issue.
 5. ELECTIONS.—If the electors had been advised that they were voting for a supplementary source of revenue it would not defeat the bond issue, but they had a right to be correctly advised as to the plans for the construction of the light plant.
 6. ELECTIONS.—The electors might consent to the erection of a plant costing only \$65,000 and yet be unwilling to consent to the erection of one costing much more, since rates for electricity probably would be controlled by the cost of the plant producing it.
 7. ELECTIONS—BALLOT TITLE.—Ballot titles used in a special election with reference to a public improvement must not be misleading in any statement or implication as to the cost thereof.
 8. ELECTIONS—BALLOT TITLES—LIMITATIONS AS TO COSTS.—The cost of the proposed public improvement as stated in the ballot used in a special election in reference thereto is a limitation upon subsequent official acts based upon a favorable vote.
 9. PARTIES.—Appellant being a tax payer on property in the city of R, though a foreign corporation, had the right to sue to prevent what it alleged to be an illegal exaction in taxes on its property. Constitution, Art 16, § 13.
 10. INJUNCTIONS—ILLEGAL TAX.—Appellees will be enjoined from selling the bonds the result of which would be to impose an illegal tax on appellant's property.

Appeal from Clay Chancery Court, Eastern District;
Francis Cherry, Chancellor; reversed.

P. A. Lasley, Ponder & Ponder and Verlin E. Upton,
for appellant.

T. A. French, Arthur Sneed and E. G. Ward, for ap-
pellee.

SMITH, J. In the endeavor to construct and operate a municipal light plant and distribution system in and for the City of Rector, the council of that city passed Ordinance 212 on February 12, 1946, entitled:

“An Ordinance Calling, Authorizing, and Directing a Special Election to be Held in the City of Rector, Arkansas, for the Purpose of Testing the Sense of the Qualified Voters of Said City upon a Proposition to Issue and Sell Bonds on Said City of Rector in the Amount of \$65,000, with the Proceeds of Which to Build and Construct an Electric Light Plant in and for Said City and to Provide a Distributing System Therefor.”

Section One of the ordinance ordered and called a special election to be held on March 26, 1946, “for the purpose of testing the sense of the qualified voters of said City upon a proposition to issue and sell bonds of the said City of Rector in the amount of \$65,000 with the proceeds of which to build and construct an electric light plant in and for said City and to provide a distributing system therefor.”

Other sections of the ordinance designated the polling places, and the rate of interest the bonds should bear, and provided that all of the money realized from the sale of bonds should be used to build and construct the electric light plant and distributing system to be used for the purpose of providing and furnishing to the city and its inhabitants electric power or energy for light and other purposes. Provision was made for giving notice of the election and section eight provided that the ballot to be used at the election should be in the following form:

CITY OF RECTOR.
"SPECIAL BOND ELECTION
BALLOT

City of Rector, Arkansas

PROPOSITION:

"To issue and sell bonds of the City of Rector, Arkansas, in the sum of \$65,000, with the proceeds of which to build and construct an electric light plant in and for said City and to provide a distributing system therefor.

FOR THE BONDS
AGAINST THE BONDS."

The preamble to Ordinance 212 recites that "The Council finds that the estimated cost of said plant and distributing system is Sixty-five Thousand Dollars, and that the ordinary income and revenue of said City are insufficient to meet an expenditure of such an amount."

Due notice of the election was given, which recited that the election was called for the purpose of testing the sense of the qualified electors of said city upon the proposition above stated.

Pursuant to this notice, the election was held on March 26, 1946, and a large majority of the electors voting thereat voted in favor of the bond issue, and a week later, on April 2, 1946, an ordinance, No. 213, was passed, levying the tax for the purpose of paying the bonds authorized by ordinance No. 212. Section 2 of ordinance 213 reads as follows:

"In order to better secure the payment of said bonds, the Mayor of the City of Rector is hereby authorized and directed to pledge the net revenues derived from the operation of an electric light plant and distributing system constructed by and with the proceeds of said bonds, over and above the necessary expenses incurred in operating such light plant and distributing system. It is intended by this section to authorize the irrevocable pledge of all revenues derived by the City of Rector from the operation of an electric light plant and distributing system

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purchased with the money derived from the sale of said bonds, after having first paid all necessary expenses incurred in the operation of said electric light plant and distributing system.”

Section three of ordinance 213 directs the City Clerk to transmit a copy of the ordinance to the County Clerk to the end that the taxes may be extended.

Appellant power company filed a complaint on April 24, 1946, against the City, its Mayor, the City Aldermen, the City Clerk, the Board of Commissioners of the City, and the County Clerk and Collector of Clay county, in which county the City of Rector is situated, praying that ordinances 212 and 213 be declared void, and that the defendants be enjoined from constructing the proposed plant, the issue and sale of said bonds, and the collection of the taxes to pay therefor.

The plaintiff brought this suit as a taxpayer of the City of Rector, to enjoin what is alleged to be an illegal attempt to collect taxes upon its property. Certain citizens intervened, joining in the plaintiff's prayer for relief. The interventions were dismissed along with plaintiff's complaint as being without equity, and the interveners have not appealed, but the plaintiff power company has.

The answer denied that a Board of Light Commissioners had been constituted and that allegation is not denied. The complaint and the answer, together with the exhibits to both pleadings and the testimony in the case, raises the issues which we shall discuss.

The complaint alleges that the electors were misled by the recitals of the ordinance, the notice of the election and the ballot title, to believe that the plant could be erected at a cost not to exceed \$65,000, whereas its cost would be more than twice that amount, and that the Council had caused no estimate of cost to be made when ordinance 212 was passed.

It is conceded that no estimate of cost had been made before ordinance 212 was passed. The Mayor was asked: “You knew when ordinance 212 was passed that the plant

could not be built for \$65,000, did you not?" And he answered: "At no time have we attempted to establish that. The \$65,000 was used because it was the amount of taxable bonds we were able to vote."

It is strenuously denied that there was any attempt to deceive the electors or that they had been deceived. Testimony was offered that the matter had been discussed not only in the sessions of the City Council, but by the citizens generally and at a mass meeting held the night before the election when it was explained that while the plant could not be erected out of the proceeds of the bond sales, it was planned to issue revenue bonds in an amount sufficient, with the \$65,000 which the electors were asked to authorize to construct the plant and distributing system.

Notwithstanding all this, the fact is undisputed that nowhere in the title of the ordinance, in the preamble thereof, or in the body thereof, or in the proposition to be voted on in the ballot, or in the notice of the election, is there anything to indicate that the bond issue was to partially construct an electric light plant and distributing system, or merely to contribute to the cost thereof.

On the contrary, the language used was to "build and construct a light plant and to provide a distributing system therefor."

It is to the sources just mentioned that the electors had the right to look to ascertain what they were asked to approve, and not to discussions in the Council meetings, or to street conversations, or to speeches made at a mass meeting which may or may not have been largely attended. *Neal v. Morrilton*, 192 Ark. 450, 92 S. W. 2d 208; *Phillips v. Rothrock*, 194 Ark. 945, 110 S. W. 2d 26.

The ballot title is the final word of information and warning to which the electors had the right to look as to just what authority they were asked to confer, and we think its implication and ordinary meaning is that it was proposed to construct the plant with the proceeds of the bond sale. There is no intimation that the proceeds of

the bonds were intended merely to supplement other sources of revenue.

In the case of *Hoffman v. Kline*, 300 Pa. 485, 150 Atl. 889, the Supreme Court of Pennsylvania said: " 'Where ordinary words are used in the Constitution, they must be construed in their popular and general sense, as the people who voted for it would understand them.' This principle is particularly applicable in the present case. There are no express words or sentences in the entire section which invest the term 'construction' with other than its general, popular meaning, such as is ordinarily given to it by the people at large, by architects, and by those engaged in building enterprises. The standard dictionaries unite in defining the word 'construct' as 'to build,' 'to erect,' 'to make,' in the sense of to create; and the term 'construction' they define as the act of constructing or making a completed structure."

In opposition to the relief which the taxpayer seeks, that is that the levy of the tax be enjoined, it is urged that the plan of the Council is to issue revenue bonds and that the proceeds of the sale thereof, together with the proceeds of the sale of the \$65,000 bond issue, will suffice to construct the proposed plant. This may be true and we assume that it is, but the question here presented is that of the validity of the \$65,000 bond issue.

We do not mean to hold, and we are not holding, that the proceeds of the bond issue, authorized by the electors, must alone suffice to build the light plant, and cannot be supplemented by federal grant, or the issue of revenue bonds or otherwise. We held to the contrary in the case of *Rhodes v. City of Stuttgart*, 192 Ark. 822, 95 S. W. 2d 101. There a bond issue was upheld for certain street improvements which admittedly was insufficient to pay the cost thereof, but the bonds were voted to be used in connection with a donation of the Federal Government through the P.W.A. agency, of which the electors were advised when they voted for the bond issue. So here, had the electors been advised that they were voting for a supplementary source of revenue, it would not defeat the

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bond issue because the issue of itself would be insufficient to erect the plant, but the electors had the right to be correctly advised as to the Council's plans. It is readily conceivable that the electors might consent to the erection of a plant costing only \$65,000 and yet be unwilling to consent to the erection of a plant costing much more, for the reason, if for no other, that the light rates would be influenced, if not controlled, by the cost of the plant producing the required electricity.

The subject of the "Statement regarding cost of proposed public improvement in ballot for special election in that regard" is annotated in the case of *Drenning v. Topeka*, 117 A. L. R. 894. The annotator summarizes his review of the cases cited with these statements: Independently of statutory provisions or inferences, there is no requirement that ballots used in special election with reference to a proposed public improvement shall state the cost or the estimated cost of the improvement. But the cases cited in the note are to the further effect as summarized by the annotator that the ballots used in a special election with reference to a public improvement must not be misleading in any statement or implication as to total costs. And further that the cost of the proposed public improvement as stated in ballots used in a special election in reference thereto is a limitation upon subsequent official acts based upon a favorable vote. This statement accords with our holding in the case of *Cisco v. Caudle*, 210 Ark. 1006, 198 S. W. 2d 992.

The right of appellant, a foreign corporation, to maintain this suit is questioned. But this is a taxpayer's suit, brought to enjoin the imposition of what is alleged to be an illegal exaction. Appellant is a taxpayer on property in the city, which will be subject to the tax, if it is imposed, and the suit is authorized by § 13 of Art. XVI of the Constitution. In the case of *McCarroll, Commissioner, v. Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977, it was said: "We are of the opinion, therefore, that an individual has the right to go into a court of equity to enjoin the enforcement of any illegal tax or exaction and that this same right in-

ures to the corporation, appellee, in the instant case, since a corporation is a person within the meaning of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.”

It follows from what has been said that an illegal exaction is being imposed upon the property within the City of Rector, and the decree from which is this appeal is therefore reversed, and the cause remanded with directions to enjoin the collection of the proposed tax.
