LOBENSTINE v. UNION EL. R. CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 291.

FEDERAL COURTS—STATE DECISIONS.

The decisions of the supreme court of Illinois to the effect that an abutting lot owner in that state cannot stop the construction of a railroad in the street, that his remedy is in damages, and that a proceeding to enjoin must be by the city or attorney general, are binding upon the federal courts.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

On November 16, 1895, William C. Lobenstine, a citizen of the state of New York, filed his bill in the circuit court of the United States for the Northern district of Illinois against the Union Elevated Railroad Company, a corporation organized under the laws of Illinois, to enjoin the construction of an elevated street railway track on Wabash avenue, in the city of Chicago, in front of premises owned by complainant, and abutting on that street. The east boundary of complainant's lot is part of the frontage on Wabash avenue between Lake and Harrison streets. The bill shows an ordinance enacted October 17, 1895, by the common council of the city of Chicago, granting to defendant "the right to construct and operate its elevated railroad on Wabash avenue, between Lake and Harrison streets, in said city." It is provided by statute in Illinois (sections 201, 202, c. 114, and section 90, par. 63, art. 5, c. 24, Starr & C. Ann. St.) that a city cannot enact such an ordinance without the consent of persons owning at least one-half the frontage along the line of street where the proposed improvement is to be constructed. The bill disputes the validity of the ordinance, and hence the right of the defendant to proceed, on the ground that the consents of frontagers owning at least half the abutting property were not, in fact, obtained, or, if obtained, that a money consideration was unlawfully paid or promised by the defendant for such consents. Complainant moved in the circuit court for a preliminary or pendente lite injunction. Defendant filed no answer or affidavit, but resisted the motion, on the ground that the bill showed no cause of action. The motion was denied by the judge holding the circuit court, and complainant brings the record to this court on appeal from that order.

A. W. Green and H. S. Robbins, for appellant.

Clarence A. Knight and John R. Wilson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

By the rule in Illinois, the remedy of complainant is an action at law to recover against defendant whatever damages, if any, complainant sustains by the building and use of the railway track on the public street. In Illinois the right to stop such a use of the public street as is here objected to is not incidental to complainant's ownership of an abutting lot. As declared by the highest judicial authority of the state, the frontage statute adds nothing to the property right of a frontager. In building its railway track in the street, the defendant acts under color of the ordinance; that is to say, under an assumed grant from the city. A judicial proceeding to enjoin defendant—in other words, to determine whether the ordinance is valid or invalid, whether the additional use of the street is lawful or unlawful—must be by the city, or the attorney general as representing the public.

Under the constitution (section 13, art. 2) and laws of the state, the frontager may, as already said, recover whatever damages he sustains by reason of the additional public burden on the street; but he cannot control the public use of the street as a highway by preventing the construction thereon of additional facilities for the traveling public. To this effect are the decisions of the supreme court of Illinois. Patterson v. Railroad Co., 75 Ill. 588; Corcoran v. Railroad Co., 149 Ill. 295, 37 N. E. 68. Doane v. Railroad Co. (opinion filed on the 16th day of October, 1896, in the supreme court of Illinois, and not yet officially reported) 46 N. E. 520.

The ownership of real estate in Chicago by a nonresident is subject to precisely the same limitations as though vested in a person residing in that city. The local law, as declared in the Illinois constitution and statutes, and in the judicial opinions of the highest court of the state, is determinative in the one case, as in the other. No question arising out of the constitution of the United States, or any federal statute, is here involved. The subject-matter of the litigation is local, and not transitory; and it is the rule of land law in Illinois, and not elsewhere, which must measure the rights of the parties. By that rule, the dominion and proprietorship which this complainant exercises over his lot on Wabash avenue does not comprehend the right to stop the proposed improvement on the public street in front of his lot. This court cannot, therefore, disturb the ruling appealed from. The assignment of error here, namely, that the circuit court erred in not granting the preliminary or pendente lite injunction, is overruled, the order appealed from is affirmed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

BRAZORIA COUNTY et al. v. YOUNGSTOWN BRIDGE CO.[1]

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 534.

1. APPEAL—PRACTICE—WAIVER OF OBJECTION TO DEMURRER.
When a demurrer is irregularly filed, it may be wholly disregarded or taken from the files upon motion of the complainant, and, where neither of these things has been done, the complainant will not be heard to complain upon appeal that the demurrer was irregularly filed because unaccompanied by the required certificate of counsel and affidavit of defendants.

2. CONSTITUTIONAL LAW—CONTRACTS BY COUNTIES—FAILURE TO LEVY TAX.
Under Const. Tex. art. 11, § 7, which provides that "no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund," a contract made by a county for the building of two bridges, to be paid for in county bonds, is void, in the absence of any provision for the levy of a tax to pay the interest and to provide a sinking fund; and the county cannot be compelled by mandamus to issue the bonds to the bridge company, although the bridges have been constructed and the county is using them.

[1] Rehearing pending.