THE BOARD OF ST. LOUSE PUBLIC SCHOOLS — v — RISLEY HEIRS

March 1867

Court of St. Louis

574/3

*2ND FILE

In Supreme Court of Missouri
March Term, 1867

The Board of President & Directors of the St Louis Public Schools
Appellant,

vs

David R. Risley & Sarah Risley, Heirs of Wm Risley,
Respondents.

And now come the said David R Risley by R. M. Field, his attorney & said Sarah Risley an infant by her curator George D. Humphreys, and say that there is no error in the proceedings & judgment of the court below; wherefore they pray that the proceedings & judgment be in all things affirmed &c

R. M. Field
Geo. D Humphreys curator
by R. M. Field atty

Public Schools

vs

Risley's Heirs

Joinder in Error

Filed March 18. 1867
O. T. Fishbeck Clk
per E. McCarty Dep

The Schools
v
Schoenthaler

The respondent makes a very brief reply to some arguments adduced by the appellant: which he hopes to be pardoned for not having anticipated.

The first objection to the record, which was insisted on in argument by Mr Taussig was founded on the admission of the tax receipt signed by Richard Dowling as Deputy of Francis Molair, City marshal, in 1857. — "The genuineness of this instrument", says Mr Taussig "is nowhere shown by the record". He says this, in the face of the fact that the record does show that Dowling held the instrument in his hand at the trial; that its genuineness was not questioned; that it is the act of the plaintiffs grantor; that the only objection made to it at the trial was that it was "incompetent & inelevant" and that it was clearly good to show possession in the ancestor of defendant at the time when it was given. To all which it may be added that it is quite plain that the admission of this paper did not in any degree affect the issue.

"We will give no countenance, no law to an objection made for the first time in this Court, when if it had been made below, it could have been immediately obviated by proof" says Judge Ryland, delivering the opinion of this Court in Clark v Conway, 23 Mo. 462. The learned Judge goes on to say "The proof of execution, in all probability, was at hand, and therefore the want of it not pointed out below." (The italics are my own.) What is conjecture there & there, is proved & demonstrated here.

2d. It is next objected that in the instruction secondly given for defendant below, the Court did not confine

the time within which the supposed facts must have occurred to the period preceding Dec 20. 1803. The instruction thus criticised is to be found at the foot of p. 6. and the top of p. 7. of my printed statement. Mr Taussig claims great weight for this objection. and will have it, that the Counsel for respondent feels its force. very sensibly — If so, the Counsel for respondent is a silly alarmist: for after all what does this instruction say?

It tells the jury that unless certain things occurred, then a certain matter alleged as a bar to the right set up by the defendants (now respondents) can have no place. The office of the instruction then is to limit an objection to the ~~title~~ defence set up by the defendant. If this limitation must have occurred within a limited or defined period. it is of course narrower than if the period within which it might occur were more extended. If the instruction had told the jury that the existence of a road or path in front of Levelliers ~~right~~ lot. under certain defined conditions, prior to 1803. was no bar to the extension of that lot to the river's Edge, pray, would the ~~objection~~ plaintiff have been more or less damnified by it. that if it had said that a road under such conditions could at no time thus preclude that extension? The Schools claim that the condition of things prior to & on 20th Dec. 1803. must determine the rights of the claimants of this property: which may be admitted. The defendant had then a right to the confining of all evidence respecting a road

to that period. The fact (if the criticism were put in matter) that the instruction does not so confine it does actually extend the time when and the circumstances under which, the defendants title may be impaired - Is it not a little singular that [not the defendants, but] the plaintiff should complain of this? - that he should object that the limitation imposed on his own bar is too narrow? that the jury was not told to disregard all such limitations except such as occurred within a narrow that period of time? — The respondents insist that this instruction cannot possibly have been construed as Mr Taussig contends that the jury may have construed it. But if such a construction be really possible, the only person to complain it can by any chance have been prejudicial, is the respondent - and the respondent does not complain of it -

3d. It is gravely objected that the Court below did not give any instruction respecting "riparian rights"

It is certainly true that these words are not to be found in any instructions given to the jury: and it is no less true that none of the instructions refused contained an essay on this head. But the doctrine of riparian ownership so far as it was involved in this case was nevertheless very clearly laid down. - The jury was told that if Levellier went to the river prior to 1803. and the water of the river afterwards receded. all the land thus left bare between 2d Street and the middle

of the main Channel, belongs to Levellier + and that the Schools can, in that case, claim no land lying East of this West line (2° Street) ~~North of this South line~~ and west of the main Channel of the river, included between this north + South lines extended Eastwardly to the water's Edge in its new position. That is quite a good application of all the law respecting riparian right applicable to the present case - and for the court to give a more extended hearing on the subject would be quite out of place. It seldom happens that the law on such a question is more clearly covered by the charge to the jury.

4° It is said that Levellier's representatives procured a confirmation from the recorder in 1866 -

The best answer perhaps to this is, that this does not appear by the record. And there it might be my duty to stop. I will add however that it was not shown, because the fact was otherwise, that Levellier or his wife, ever presented any claim to the recorder in all which that officer did in respect of this lot. he acted not officially, but officiously.

The title of those who came within the first section of the act of 13th June 1812 was complete the moment that act was passed. nothing ~~was~~ remained for them to do by way of perfecting their title. but "to show, whenever their rights are disputed in courts of justice that their cases are within the act". Gurno v Janis. 6 Mo 334

citing Vasseur v Benton 1 Mo R. 296. — The latest affirmance of this doctrine which need be noted here, may be found in Garrison v Savignac 18 How. 136. and Guitard v Stoddard 16 How. 494 —

If the facts proved on the part of Levellier bring his case within the first section of that act (13th June 1812) he had a title by virtue of its provisions which no survey or other formality was necessary to assure: and "that title being perfect" "could not be assailed by the Government nor any one claiming subsequently to" his "confirmation." Vasquez v Ewing 24 Mo. p. 37.

If Levellier had a confirmation by the act of 1812 the U.S. could not, by any proceeding in 1816. impair that title: and as little (or still less) could they so impair it in 1855. — I ask pardon for dwelling on so plain a point.

May I be permitted to say one word in respect of the case of Greenleaf v Birth 6 Peters p. 302? A sentence occurring in the opinion of the Court delivered on that occasion by Mr Justice Story has been adopted, bodily, by Mr Casselberry. and was given by the Court below as an exposition of the law relative to an "outstanding title". It is a little singular that in the case before Judge Story there was no question at all of an "outstanding" title as that expression is generally understood: and even if it had been otherwise this Court has more than once expressed its disapproval of the reverance

of one sentence from the context of a decision and giving that sentence, as an exposition of the law on that subject, to a jury.—

But the Court in that case was not considering the subject of 'outstanding' titles at all: and it is only by an inaccurate use of language that the Reporter has misled McCasselberry.— An outstanding title is shown in ejectment when it is made to appear that neither the litigants has the title to the land in controversy: when neither litigant has the title — i.e. the "jus in causa possidendi" — it results necessarily that some one else, it does not matter who, has the title (except in the very rare cases where the title is in abeyance, which does not qualify the conclusion announced); and as the action of ejectment can only be maintained by him who is legally entitled to the possession", ~~what then~~ whatever shows that the plaintiff is not then entitled, defeats the action — and I have yet to learn that in an action of ejectment it is one whit less fatal to the success of the plaintiff to prove that a third party is the person entitled to sue, than to show that the defendant himself is clothed with the title. In either case, the plaintiff's claim is disproved.

and when shown by proof that some third person has title — in which case the title is said to be 'outstanding'

In the case before Justice Story, the plaintiff's deed was a good muniment of title, unless the land sued for was within a possible exception to its describing clause. Prima facie Mr Justice Story

speaking for the Court was of opinion that this deed embraced the property in dispute. If it did, the plaintiff must recover. He was of opinion that the burden of showing that the property in dispute was within the exception of the plaintiff's deed rested on the defendant - and that plaintiff should not be held to prove the negative of this proposition - This was all. - And it is clear that the counsel for the defendt in the Court below must have misapprehended the scope of the decision quoted, in a signal degree. No stress need be laid on the circumstance (in itself surely very striking) that the Chief Justice Marshall dissented from the opinion of the Court: holding that it was necessary for the plaintiff by affirmative evidence to exclude the conclusion that the land in controversy was within the exception (p. 315): because it is sufficiently shown that the Court intended no innovation upon the well settled rule that proof of an outstanding title in a grantment is just as fatal as proof of title in the defendant himself. If the plaintiff cannot recover, it suffices. It is no matter, who can.

Respectfully submitted
Wm. T. Gantt
for Respondent.

The Board of Public Schools.

Schoenthaler's Reps.

Remarks on the reply of Mr. Taussig.

Filed April 5 1867
C. J. Fishback Clk
per E. S. McCarty Dep

The Board of President and Directors of the St Louis Public Schools. Appellants

vs.

Gottfried Schoenthaler's Admr. et al. Respondents.

In the Supreme Court of Missouri in October Term 1866.

~~Appellants~~ Statement and Brief ~~for~~ of Counsel for Appellants

by James Bussey

In January 1861 plaintiff commenced an action of ejectment against Gottfried Schoenthaler to recover the possession of a lot of grand in block 856 of the city of St. Louis, having a front of sixty feet on Front street and running westwardly for depth about three hundred feet to Main street and embraced within the limits of U.S. Survey No. 400 in favor of the Public Schools. On the 31st day of January 1861, the venue in the cause was changed to the St. Louis Circuit Court and the defendant there filed his answer in the usual form. At the February Term 1862 the death of the defendant Schoenthaler was suggested, the administrator of his estate, his widow and children were made parties defendant. The action was afterwards dismissed as to the children of Gottfried Schoenthaler and the other defendants filed their answer and at the March Term 1864 the cause was tried -

The plaintiff gave in evidence the record of incorporation of the old town of St. Louis in 1809, the survey of the outboundary of the town of St. Louis approved December 8th 1840 and the assignment and survey to the St. Louis Public Schools of block 856 made and approved December 10th 1855 - (numbered 400)

The plaintiff also gave in evidence an act of the Legislature of Missouri, approved March 3rd 1851 entitled "an act about swamp lands" and a deed from the city of St. Louis, dated December 26th 1857 conveying to plaintiff the title of the city of St. Louis to the land in controversy; and plaintiff thereby proved that it had acquired whatever title the State and the city of St. Louis had to the premises in controversy.

The plaintiff here rested —

The defendants read in evidence a concession by the Spanish Lieutenant Governor to Charles Deville dated March 1st 1788, of a lot of ground of sixty feet front by one hundred and fifty feet in depth in the town of St. Louis bounded on one side by Louis Ridé's heirs, on the other by the Kings domain, on its rear by the Mississippi river and on its principal front by the road which leads from second street to the Prairie à Catalan.

The defendant then offered oral testimony of witnesses tending to prove that Charles Deville, a free negro, occupied and cultivated the southern half of block 44 prior to the change of Government; that his fences ran close to the river bank; that there was a pass way or foot path along the river bank between the eastern fence and the river; that Main street extended only as far south as Plum street; that from Plum street southwardly the river were away and abraded the bank so that the fences had, from time to time, to be moved westwardly; that this condition of things continued until 1844, at which time the river commenced to recede, accretions

commenced to form, of which the eastern part of block 44, the present Main street and the land in controversy are part.

p. 39 of Record

The defendants then read in evidence a receipt in the following words: "Execution No. 90 & 93 Received St. Louis May 4th 1854 of G. Schoenthaler Esq. Seventy nine 30/100 Dollars in full for his assessment by the City of St. Louis in opening South Main street in blocks No. 44 & 856 in the city of St. Louis"

$29 30/100

Francis Molair - City Marshal
by R. Dowling Deputy.

No evidence was offered of the execution, genuineness or delivery of this instrument - The plaintiff objected to the reading of the same, his objection was overruled and plaintiff excepted -

The defendant gave no evidence whatever tending to show that Schoenthaler claimed the lot under or derived title from Leveille or his representatives -

The plaintiff in rebuttal offered testimony tending to prove

that in Spanish times there always was a road from twelve to sixteen feet in width between the easternmost lot in the Southern part of the town and the river; that there was a road from fifteen to sixteen feet wide between Lavielle's lot and the river; that it was a continuation of Main street and that it was the common understanding of the people that it was for public use as everybody used it as a public pass-way.

The plaintiff also proved that block 856 was not possessed or occupied by defendant or anybody else until 1859; and the defendant admitted that he did not set up title to the land in controversy under any statute of limitations —

The plaintiff also gave in evidence Fontaine, Conway's and Englebrough's plat of the town of St. Louis to prove that block 44 was bounded on the East by a street —

The plaintiffs also gave in evidence United States Surveys of blocks 43, 44 and 45 of the town of St. Louis made and constructed in 1835 in which surveys the blocks named are bounded on the East by Main or First street —

p. 53. The plaintiff also gave in evidence U. S. Survey No. 394 to Charles Leveille and confirmation to Charles Leveille of a lot in block 44 having sixty feet front by a depth of One Hundred and fifty feet and bounded on the East by a lot of Joseph Navales, whose lot is bounded on the east by a street intervening between it and the river —

pp. 61-66. The plaintiff also gave in evidence the concession, confirmation and survey in favor of Louis Rice of the lot immediately North of the lot in controversy, calling for a

street as the eastern boundary of the lot.

p. 68. The plaintiff also gave in evidence a deed dated February 25th 1825 executed by Francoise Deveille, the widow of Charles Deveille to Pierre Langtuin in which she conveys to him the eastern portion of the lot occupied by Charles Deveille and describes it as bounded on the east by a road which separates it from the Mississippi.

The plaintiff also read in evidence an abstract or list from the United States Recorder of Land titles of lands fronting on the river or tow-path in front of the old town of St. Louis. Most of the lots described in the list call for the tow path or Front street as the eastern boundary.

The defendant in reply gave additional testimony tending to show that Main street did not extend South-wardly from Plum street and that if extended it would have run into the river.

The Court then gave the following instructions asked by the plaintiff:

1. The eastern boundary line of the corporation of St. Louis of 1809 read in evidence and the eastern line of the out boundary of December the 8th 1840, read in evidence, both extend to the eastern boundary of the State of Missouri, which is the middle of the main channel of the Mississippi river.

2. The defendant in this case has set up no title in himself or those whom he represents or under whom he claims, but seeks to maintain his possession as a mere intruder by setting up a title in third persons with whom he has no privity. In such a case it is incumbent on the party setting up the defence to establish the existence

of such an outstanding title beyond all controversy —
It is not sufficient for him to show that there may possibly
be such a title. If he leaves it in doubt that is enough
for the Plaintiff. Where the Plaintiff has a prima facie
good title he has a right to rely on such title and is
not bound to furnish any evidence to assist the defence —
It is not incumbent on him negatively to establish the
non-existence of such an outstanding title, but it is the
duty of the defendant to make its existence certain —

The Plaintiff then asked the following instructions
which the Court refused to give and to which action of the
Court the Plaintiff immediately excepted, to wit:

1. If the Jury believe from the evidence that in accordance
with the Plan of the town of Saint-Louis as laid out in
1764, there was between the front row of lots and the
river, a space of ground left for a street, road, tow-path
or levee or dedicated to any other use common to the
inhabitants thereof or the public, then said lots are not
riparian and not entitled to alluvions.
2. The Jury are instructed to disregard all parol
evidence tending to establish a boundary ~~line~~ of a lot
varying from that of the other lots in the same tier, if
they are satisfied from all the evidence in the cause that
such uniformity was a part of the Plan of the Spanish
town of Saint-Louis.
3 — If the Jury believe that Block 44 to which the
land in controversy is claimed as an accession through

alluvion, was by the United States surveys in 1835 surrounded on all sides by streets and that said surveys have stood from that time to the present as the approved surveys of the town, without appeal the owners of the lots thus surveyed are estopped from claiming any ground beyond the street which is by said survey made its eastern boundary -

4. The call for the river on the eastern boundary of the lot of Labeville in the original concession of the Lieut Governor is not conclusive evidence that the lot is riparian; but if the Jury believe from the maps and plans in evidence and all the evidence in the case that the Spanish authorities intended to leave a space between the tier of lots of which block 44 is one and the river for continuation of Main street or Front street or for any other public purpose, said call will be disregarded -

5. The Jury are instructed that as a question of law the owners of lots in the town of Saint Louis as said town existed prior to December 20th 1803 have never had any riparian rights -

6. If the Jury believe from the evidence that there was a street or bridle-path or pass way for the use of the public between the Mississippi river and the most eastern row of lots in the former town of St. Louis as said town existed prior to December 20th 1803 then and in that case the owners or claimants of said lots are not riparian proprietors of the lands between said lots and the said river -

7. If the Jury believe from the evidence that prior to December 20th 1803 there was a road or pass way between the front row of the lots in the former town of St. Louis and the Mississippi river and that the river after that time washed away the land so that the western edge or bank thereof was west of said road or pass way and west of the eastern boundary line of said lots and that afterwards the river receded, so that the present western or bank thereof is no further west than where it was prior to December 20th 1803 the owners of said lots are not entitled to riparian rights.

8. The Jury will find for the plaintiff, if they believe from the evidence, that all of the maps, plats, surveys, deeds and other documents and instruments, read in evidence by the plaintiff are genuine and that the premises in controversy are within the boundaries of the corporation of 1809 read in evidence and within the outboundary of December the 8th 1840 read in evidence and also within the School assignment being survey No. 400 read in evidence and that the land described in the deed from the City of Saint Louis to the plaintiff read in evidence includes the land that is described in the ~~deed~~ petition of the plaintiff and also that the land described in said petition is not within the boundaries of any land confirmed to any person or persons.

9. If both the confirmations and the surveys of the United States to private individuals for the most eastern row of lots west of the premises in controversy do not call for the Missis-

Siffi river as a boundary, then the owners of said lots are not entitled to said premises as riparian proprietors —

10. If the Jury believe from the evidence that the defendants claim under a confirmation and that the survey of such confirmation does not call for the River as a boundary, they are estopped by said survey and cannot claim any right as a riparian Proprietor —

The defendants then asked and the Court gave the following instructions to the Jury.

1. The Jury is further instructed that if they find from the evidence, that there was for the convenience of those who occupied the lot of Deville and the adjoining neighbors and others, a road left along the front of it, between it and the river, and that when the river receded this road was moved farther east and when the river rose it was extended farther west, and that the same was the case with the inclosure of Deville, there is no presumption then arising against the ownership of Deville and those claiming under him up to the middle of the main channel of the river subject to the easement of the Public to use the river as a highway and to corde the boat used in navigating it by means of the road above spoken of.

2. The Jury is instructed that if they believe from the evidence that prior to and on the 20th of December 1803 a

person named Leveille inhabited, cultivated and possessed a lot of ground in the town of Saint Louis, bounded west by second street, on the east by the river Mississippi on the South by a line parallel to Hazel street and near to it; on the North by another parallel line and sixty feet distant from the first parallel. That Leveller claimed this lot as his own, That he continued on the same lot until his death which occured before 1812, but that his widow claiming the same under him continued to reside there until and after 1812, that the west or right bank of the river was then nearer to Second street than it now is, and that the premises in controversy are included within Second street on the west, the Mississippi on the east and the north and south lines of Levellers possession extended to the bank of the river in its new position, then the plaintiff cannot recover and the Jury must find for the defendants.

3. The Jury are instructed that the concession to Leveller read in evidence dated 1 March 1788 is evidence of the extent of his claim to the ground therein described and evidence that he claimed to the Mississippi river.

4. The Jury is further instructed that the first section of the act of 1812 confirmed the titles of the town of Saint Louis to lots inhabited, cultivated or possessed by them on the 20th December 1803 according to their claims thereto.

5. The Jury is further instructed that nothing done by any

officer of the United States subsequently to the 13th June 1812 has any effect to limit or impair any rights accruing to any individual under that act.

The plaintiff objected to the giving of said instructions for the defendant, the objection was overruled by the Court and the plaintiff immediately excepted.

The Jury returned a verdict for defendant. A motion for a new trial was made in proper time and overruled and the plaintiff perfected its appeal to this Court.

8

In the Supreme Court of Missouri
The Board of President and Directors of the St. Louis Public Schools ~ Appellants.
vs.
G. Schoenthaler's legal Rep. Respondents

Appellant's statement.

Filed April 8 1867
C. F. Fishback Clk
per E. M. Craig Dep.

In the Supreme Court of Mo.
March Term 1867.

The Board of President and Directors
of the St. Louis Public Schools ~ Appt.

vs.

Gottfried Schoenthalers legal
Representatives ~ Respondents ~

~ Appellants Brief ~

This case differs from the case of Risley in the following points:

1. In the case of Risley there was no evidence of any concession, confirmation or survey in favor of Madam Charleville or her legal representatives. In the case at bar the defendant shows a concession to Charles Deveille, calling for the river as an eastern boundary and the plaintiff gives in evidence the confirmation and survey of the lot conceded to Charles Deveille, both of which call for a street as the eastern boundary of the lot.

2. In the Risley case the respondent claims to have adduced a regular derivative title from Madam Charleville which is denied by the appellant; in the case at bar there is no pretence, that the respondent has shown a title in himself under Charles Deveille. He stands in the position of a trespasser.

3. In the case at bar all the instructions asked by plaintiff bearing upon the question of riparian rights were refused and the Jury was left without any correct instruction on this branch of the case.

4. In the Risley case the defendant gave evidence tending to show that the lot conceded to Louis Ride was not in block 44 but in block 6. In the case at bar the concession, confirmation and survey to Louis Ride was given in evidence and the correctness of its location in block 44 was not disputed.

On behalf of the appellant it is submitted:

1. The Court improperly permitted to be read in evidence, the receipt purporting to be signed by Francis Molair, City Marshal. (see p. 39 and bottom of p. 41 of Record.)

a.) There was no evidence, adduced by defendant, of the genuiness of the paper and of the signatures thereto.
b.) There was no evidence adduced to show the official character of Francis Molar or of his right to execute the receipt.
c.) Admitting the genuiness and official character of the paper, it was not competent evidence to prove either possession or boundary.
d.) The defendant expressly declared that he offered this receipt in aid of evidence of possession by Schoenthaler of the premises in controversy. (see bottom of p. 41).
It is very evident that Schoenthaler could have been assessed for the opening of South Main street without having ever possessed or claimed an inch of

ground on that street. The receipt did not tend to prove Schoen. -thaler's possession, and it was not offered or competent as evidence for any other purpose.
e.) The defendant expressly announced that he did not set up title to the land in dispute under any statute of limitations. (pp. 43 & 43 of Record.)

II. The plaintiff by its proof established a prima facie title and was entitled to recover unless the defendant succeeded in convincing the Jury that the land in controversy was confirmed to another person.

The eighth instruction asked by plaintiff should have been given.

Kissel vs. Schools 18 Howard 25.
Poland vs. Jones 24 do. 41.

III. The first, second, third, fourth, sixth and seventh instructions asked by plaintiff and refused, are correct declarations of the law regulating riparian rights as declared by this Court.

Smith vs. Public Schools 30 Mo. 295
and cases cited in my brief is Schools vs. Risley -

The refusal of the Court to grant any of these instructions deprived the Plaintiff of the benefit of all the testimony introduced by them to show the existence of a street or tow-path as the eastern boundary line of the river lots.

Morgan vs. Livingston - 6 Martin 235 -
Cochran vs. Fort - 7 Martin (n.s) 626 -
The Cotton Press Cases - 18 Louisiana Rep.
Livingston vs. Hermann 9 Martin 656.
Packwood vs. Holden 7 do. (n.s) 88
U. S. vs. New Orleans 10 Peters 662 -

III. The first instruction given for the defendant was erroneous in not restricting its effect, and the subject matter of inquiry for the Jury to the condition of the lot prior to the 20th of December 1803.

Under this instruction the Jury were directed to find for the defendant, if they found from the evidence that the state of things described in the instruction existed at any time before the commencement of this action, although the Jury may at the same time have believed that before the change of Government, the road in front of Deville's lot was established by law, permanent in its nature, dedicated to, and owned by, the public.

V.

The fifth instruction, given for defendant, although correct in the abstract, was not applicable to the case at bar and ought not to have been given —

The defendant offered testimony tending to show possession and cultivation, prior to 1803, by Charles Levellier and read the Spanish concession, to him, in evidence of the extent of his claim. The plaintiff read in evidence the confirmation in 1816 by Recorder Bates and survey of Levellier's ~~claim~~ concession to show that Levellier's lots, as confirmed, was bounded on the East by a street. This instruction precluded the Jury from giving any effect or weight to the confirmation and survey as bearing on the question of extent of claim. This was particularly erroneous in the case of a trespasser — as against him, the confirmation and survey were not only evidence, but conclusive evidence of the extent of Levellier's claim.

The representatives of Charles Leville, instead of relying on their confirmation under the act of June 1812, voluntarily appeared before Recorder Bates in 1816, claimed and obtained a confirmation of a tract of land which then for the first time obtained specific boundaries.

By the boundaries thus established the claimant must abide as the effect of his voluntary act. At all events the proceedings before the recorder are the best evidence of the extent and boundaries of the claim as set forth by the claimant himself —

Where a confirming act does not ~~require~~ provide for a survey, and the boundaries of the land confirmed are defined by a Spanish survey or otherwise, no survey is necessary. But if a survey is required by the confirming act or is necessary because of the absence of definite boundaries, it becomes binding between the confirmee and the Government.

See Act creating Surveyor General's Office Vol. III p. 325. U. S. Stat. at large -

West vs. Cochran 17 Howard 412-17.
Maguire vs. Tyler 1 Black. 198.
Dent vs. Sigerson 29 Mo.
Cutter vs. Waddingham. 33 Mo. 282.
Burgess vs. Gray - 16 How. 48. 65 -

The granting of the said instruction and the refusal of the Court to grant the plaintiffs fourth and tenth instructions, would necessarily lead the Jury to consider the concession to Sevellier as conclusive on the question of boundary, and to reject all the testimony on the subject adduced by the plaintiffs.

VI. The seventh, eighth and twelfth propositions advanced by appellants in the case of the Schools vs. Risley, argued at this term, are applicable to this case and are respectfully submitted to the consideration of the Court.

8

In the Supreme

Court of Missouri

The Board of President and Directors
of the St. Louis Public Schools

vs.

G. Schoenthaler's legal Representⁿ

— Appellant's Brief —

Filed April 8. 1867
O T Fishback Clk
per E M McCarty Dep

In the Sup. Ct. Mo
March 7, 1867.

Public Schools Appltts
v
Wm Risley's Heirs Res. } Appeal from St Louis Cir Ct.

Opinion of the Court.

This was an action of ejectment which resulted on the trial below in a verdict and judgment for respondents. The property of which the title was drawn in question is block 856, in the City of St Louis, and lies between Hazel and Lombard streets, and east of the old City block 44. It is shewn that previously to 1844, the Mississippi river ran along the eastern border of block 44, and considerably west of the present Main street. After the great flood of 1844, accretions began to form, and, in a few years, the shore in front of block 44 had reached several ~~feet~~ hundred feet. This

led to a new arrangement of streets, Main street, which had previously run no further south than Plum street, was extended through the new made land, with an enlarged width, Lombard and Hazel streets were prolonged to the new bank of the river, and in this way block 856 was formed.

The City of St Louis originally claimed the ownership of the block in controversy, contending that the lots in block 44, did not extend to the river, but were separated from it, by a street, parsway, or open place, which belonged to the City, and attracted the accretions,

The board of Public Schools set up claim to ownership, under the reservation, in its favor, by act of Congress of 1812, of all vacant lots; asserting that riparian rights did not attach to urban property, and that as the town of St Louis extended to the middle of the river, and that, as the bed of the

river was not rightfully claimed, at the date of the act, by any private individual, it fell, of course to the public schools. Before the commencement of this action the City conveyed to the public schools all its title to block 856,

The proprietors of block 44 the respondents being one of them also claimed the said block, insisting that their rights of property extended to the river, and the new made land belonged to them as being a riparian accretion

On the trial, the plaintiffs, as proof of title, gave in evidence the record of the incorporation of the town of St Louis, made by the Common Pleas Court in 1809; the out boundary survey of St Louis, by the Surveyor General, in 1840; the assignment of block 856, to the Board of Public Schools, by the Surveyor General in 1857, said survey numbered 400; act of Legislature, approved November 28, 1857, authorizing a compromise

rise of conflicting claims between the City and the school board; the deed of the City conveying block 856 to the school board; and an act of the Legislature, approved March 3, 1857, in relation to swamp lands in St Louis County.

Plaintiff then introduced in evidence several maps and a large mass of documentary evidence, which is not sufficiently material to require being set forth here; and among others a concession to Louis Rideand a confirmation of the same, together with a survey of the same confirmation by the Surveyor General. According to this survey the claim was located in the northwest quarter of block 44 and extended easterly, no farther than 150 feet.

Also much testimony tending to prove (though slightly conflicting) that the original grant or concession of block 44 was bounded on the east by a road which bifurcated it from the Mississippi

and that it did not extend to the river,

The defendant proved that the old City block 44 which lies immediately west of the block in controversy, was inhabited and cultivated for many years prior to December 20, 1803; one Leveille living on the south half, and Madame Chauveille on the north half. The fact of such cultivation and inhabitation was fully proven, the contest was in regard to the extent of the lots of Leveille and Chauveille towards the east, the defendant insisting that they extended to, and were bounded by, the river; while the plaintiff contended that they ran no further eastward than a public roadway or other space that separated the lots from the river. This was the real controversy and the main issue of fact before the jury.

The defendant introduced a concession by the Spanish Governor, dated March 1, 1788, to the free negro, Charles Leveille, for a lot in St Louis

of 60 by 150 feet, and described in the concession as follows; "Bounds on one side by the heirs of Louis Rio, on the other by his Majesty domain, on the rear, by the Mississippi [Nor detras al Rio Mississippi]; and on the main front, by the road which follows from the second main street to the Prairie a Catalan" The defendant also introduces a concession by Gov Manuel Perez to Augustin Amiot, dated September 2, 1788, of a lot, in the southern part of St Louis, describes as follows in the concession; "120 feet front, by 150 feet deep; bounds on the north side by the lot of the free negro called Charles, on the other side by the royal domain, on the rear by the Mississippi, and on its principal front by the royal road leading to the Prairie a Catalan"

Parol evidence was introduced by both parties, tending to show on the one side, that, in Spanish times the lots ran to the river; that there was never any street between the east and

of the lots and the river; that the ends of the fence would sometimes have to be moved back, on account of the abrasion or falling in of the river bank; the river, for some years prior to 1844, occasionally slightly receded from the east bank, in low water, but in consequence of high water, in 1844, the ground afterwards made rapidly eastwardly; the accumulations were also caused by the materials used in constructing cross streets out in the river.

On the other side the naval evidence tended to prove, that there was always a path or road (sentier) between the lots and the river in Spanish times, and that the road extended the whole length of the town; that the Government always left a strip of land along the rivers for voyageurs, but that the road along the river was retained by the voluntary act of the people living along the road, and not by any public authority or public taxes.

Defendant gave in evidence a resolution of the Board of Aldermen of

the City of St Louis, authorizing a survey and mark of the city, and a lithographic copy of Pauls mark of 1823, which was proved to be a true copy of the original made under such resolution. It was admitted that the field notes of the survey and the original mark were lost, From this mark it appeared that Main street extended, at the date of the mark, no further south than Plum street, and that the river covered all the eastern part of block 44.

Defendant then introduces the ordinance of the City passed in 1851, opening Main street south of Plum and through block 44, and proves that defendant, in conformity with the ordinance, relinquished the right of way,

Also a tax sale of the lot of Leveille for the City taxes of the year 1826. The certificate of sale and the assessment describe the lot as bounded east by the river,

Defendant then showed in evidence the tax receipts for defendants property for the years 1837,

1838, 1839, 1845, 1846, 1847, 1848, 1849, 1853, 1854, 1855, 1856, 1857. From these records it appears that up to 1853, the defendant was taxed for a lot in block 44 as bounded on the east by the river. The depth of the lot is described as increasing from 150 feet in 1837 to 800 feet in 1854. In 1854 and following years, the defendant was taxed for the property in dispute as lying between Main and Front streets. Defendant also showed that he had been assessed by the City, and had paid in 1854 a tax on the property in question for abutting street, and then introduced a map of Risley's addition, recorded in 1855.

Defendant then introduced George Marshall as a witness, who testified that he was an examiner of titles, that he had examined almost all titles to lands in the City of St Louis and who gave it as his conclusion that the land of Risley was north of Elm street. Also read in evidence the deed of Payon to Pakin in 1832, in which the lot is described

as bounded eastwardly by the Mississippi river, or street if any there be; also, the deed of Pabin to Steames and Risley, containing the same boundaries; also, the deed of Steames to Risley in 1836, with the same boundaries,

There was much other testimony on both sides, but the above constitutes essentially, the controlling proofs, and the balance was merely auxiliary or cumulative.

Several objections were taken on the trial to the admissibility of evidence on the part of the appellant; but the objections were mostly of a general character, without specifying any particular reasons, against the admission and where such is the case, this Court has held that it will not look into the question to see or conjecture, on what ground the evidence was objectionable, Evidence may be admissible for one thing in the course of a trial, when it would be wholly excluded for another; and it is the duty of a party objecting to state specifically

his reasons therefor, It is insisted that the court erred, in receiving the receipts of the Collector of State and County taxes paid by Risley from 1857 to 1859 on his lot in block 44 and that the case of St Louis vs Gorman 29 Mo 593. is an authority directly against the admission of the evidence. But the cases are not analagous. In Gormans case the body relies on tax receipts, as passing the title of the city by estoppel. It clearly appeared there that the officers of the Corporation, without any authority, assessed the property of the Corporation against a person for taxation, and returned the same as delinquent for non-payment of taxes, bought it at the tax sale, and conveyed it upon redemption, and this was held not to estop the city from claiming its property against the unauthorized acts of its officers. But no such state of facts were set up in this case. The payment of taxes singly and by itself would amount to very slight evidence

but in some circumstances such payment is a fact which may be submitted to the jury and be weighed by them in making their verdict.

Payment of taxes has been admitted in questions of adverse possession, and may have an important bearing, as it is not usual for one owning realty to neglect paying taxes for a period which would be sufficient to constitute a bar under the statute of limitations, or for one to pay taxes, having no claim or color of title.

The locality here however, was in possession, and the evidence was introduced ostensibly for the purpose of defining the boundaries, We think the evidence was properly allowed to go to the jury as a circumstance to show what was the understanding of the parties as to the lines and boundaries of the lot. As to the testimony of Marshall, it is clear that his admission was not admissible, there is certainly nothing in the law of evidence, which would make the admis

-ion of an examiner of titles, evidence of location in case of conflicting and doubtful lines. A practical surveyor may express his opinion, whether the marks on trees, piles of stones, &c, were intended as monuments of boundaries; but he cannot express an opinion, that from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram, 1 Greenl. on Evid, § 440,

But granting that the evidence was entirely incompetent, when the other proofs are considered together with the original concession we do not see that the appellant was injured by it.

It is objected that the deeds of Papin and Steames were not admissible to show title in the respondent because they were offered and read in reply to the rebutting testimony of the appellant. Although the respondent had rested, and these deeds were necessary to show his derivative title, yet the introduct

sion of testimony out of its regular order, or after a party has closed his case, when he has omitted a material link through inadvertence, is a matter resting in the sound discretion of the Court below and will not be reviewed here.

In the present case the dispute between the parties, grew out of the existence of a road along the eastern line of the lot. The law seems to be well settled, that tradition, reputation and hearsay, are admissible to prove the extent, character and existence of public rights, as regards the location and boundaries of things of a public nature. The only question here being as to whether the eastern line of the lot was bounded on a public highway, it follows that it falls fully within the rules admitting hearsay, reputation and tradition. But it is needless and supererogatory to examine with particularity and detail all the questions that have been raised in argument

The very important point in the whole case, turns on the question as to whether the proprietors of the lots, are entitled to riparian privileges, This question has been considered twice before in this Court, and once in the Supreme Court of the United States, and must be considered as settled as res-judicata, and no longer a subject for discussion In the case of Jones v Soulard 24 How U S 41, it is expressly decided that the call for the eastern line, of the boundary of St Louis in the incorporation of 1809, makes the City a riparian proprietor upon the Mississippi, and as such entitles it to all accretions as far out as the middle thread of the stream, In Smith v Public Schools 30 Mo 301, it is held that if the river is the boundary of a town lot, it may be riparian just as much as a tract of land would be in the country, And the question is again examined, affirmed and approved in LaBeau

v Gaven 37 Mo 556, That the calls and descriptions contained in the original concession to Leveille, called for the bank of the Mississippi as its eastern boundary cannot be for a moment gainsayed or doubted,

Whatever evidence there was bearing on the subject, was given to the jury, under instructions of the most favorable character for the appellants,

We have been unable to detect any error in the action of the court, in either giving or refusing instructions, and we accordingly order its judgment to be affirmed.

The other judges concur.

David Waguer

Public Schools.

v

Wm Risley's Heirs

Opinion of the
Court
Hagner

Filed April 15. 1867
O. S. Fishback clk
per E. M. Cartz Dep

Affirmed

KNOW ALL MEN BY THESE PRESENTS, That we, the Board of President and Directors of the St. Louis Public Schools, as principal, and Julius Conrad and Charles F. Meyer as securities are held and firmly bound unto David R. Risley and Sarah R. Risley by her Curator, George D. Humphreys, legal representatives of William Risley, deceased

in the full and just sum of one thousand dollars.
to be paid to the said David Risley and George D. Humphreys Curator as aforesaid or to their

heirs, executors, administrators, or asisgns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty fourth day of April in the year of our Lord one thousand eight hundred and sixty seven

WHEREAS lately at the March term 1867 of the Supreme Court of the state of Missouri in a suit depending in said Court, between the Board of President and Directors of the St. Louis Public Schools and the above named legal representatives of William Risley, deceased

judgment was rendered against the said Board of President and Directors of the St. Louis Public Schools
and the said Board of Public Schools

having obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said David R. Risley and Sarah R. Risley by her Curator, George D. Humphreys

citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now the Condition of the above Obligation is such, That if the said Board of President and Directors of the St. Louis Public Schools

shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

SEALED AND DELIVERED IN PRESENCE OF

Geo. B. Kellogg

The Board of President & Directors of the St. Louis Public Schools By
J. D. Barlow President SEAL
Charles Meyer SEAL
Julius Conrad SEAL

APPROVED BY

This Bond is deemed by the Court sufficient and the writ of error operates as a supersedeas in the case within named –

David Wagner

Chief Justice of the Supreme Court of Missouri

~ Bond ~

The Board of President and Directors of the St. Louis Public Schools –

vs.

David R. Risley and Sarah R. Risley by her Curator George D. Humphreys, legal representatives of William Risley, dec^d

Filed April 24, 1867

O. F. Fishbacker

per E. M. Kaiser Dep