# OREGON SUPREME COURT DECISIONS

(Continued from Page 3.)

pick apples from that tree; that it was very close to the worm of the fence. He also identifies the other trees and briars, and other indications on the ground, of the fence line.

Jesse Edwards, who has been there 29 years, testified as to a haw tree that indicates distinctly where the fence was, its limbs having spread between the rails; that the apple tree stood in the corner of the fence and the rose briars along the fence all indicated the fence row.

Hoskins, who lived there since 1879 says: "There was a fir tree stood well up to where that road junctioned with the Portland road, up close to the corner (the N. E. corner of block 12) * * * farther down * * * probably six rods there was an apple tree; and still farther down, but a little east or a little west was another apple tree, but before you get to that apple tree there was a haw bush or thorn, crab-tree or something stood between the apple trees * * *. The lower apple tree was inside of the field * * *. The fir tree * * * and the first apple tree was very nearly the corner of the lock of the fence * * *. The thorn tree was out in the field a little;" and except the one apple tree, they were in the line of the fence.

Oliver, Butler, C. J. Edwards, Vestal, Hagey and Smith, all testify more or less definitely as to the briars, the thorn tree, apple trees, and the fir, as indicating the line of the fence. The testimony of W. R. Everest and Granville Everest, sons of David Everest, tends to contradict the location of the apple tree, the stump of which is still standing within defendant's building. It had been many years since they moved away from their father's place and they have not noticed the trees much since, and evidently identified the tree that the other witnesses say was out from the fence a little way as the one evidenced by the stump. The other witnesses state that the tree in the fence row bore yellow apples, while the Everests say that the tree they have in mind bore striped apples, and their testimony is not convincing. The evidence tends to show that there were three apple trees, two in or near the fence and one lower and out from the fence a little, and the Everests must have in mind the one out from the fence. And we conclude that these trees, especially the haw tree and apple tree stump indicate the line of the fence which was built in 1871 and stood there until probably 1895 or later, a period of 24 years, and has served as a barrier or boundary of the road on the northwest as traveled and used by the public.

We have before us also the county surveyor's field notes of the road filed in the road proceedings in 1871, and it is conceded that the portion of the survey between angles 20 and 21 is the portion of the road involved here, and in these notes the course is given "N. 46¼ degrees E."

Witness Herring, who gives us his tracings of the Everest tract, runs that line on the course N. 47 degrees, 20 minutes E., bieng 50 minutes east of the county surveyor's course. This also tends to corroborate plaintiff's contention as to the location of the fence at block 12. This is further corroborated by the location of a blacksmith shop built at the present site of the new building. Smith testified that this new building is longer than the old shop. "This building is a great deal longer (it extends farther south) * * * especially the east part of it extends a great many feet * * * farther back than the other part. The east part of the old building was short." Furguson gives the dimensions of the old shop on the west side as 9 feet 2 inches shorter north and south than the new building, and 10 feet 6 inches shorter on the east side, indicating that it was wholly inside the line of the old fence; and it was built when the location of the fence could not have been in doubt, thus indicating that defendant's acts in extending the new building were the first encroachments at that point beyond the line of the fence. Everest and his successors in interest are bound by the location of the fence as indicating the north west boundary of the road.

Defendant pleads estoppel against the city, but the estoppel alleged is that plaintiff has recognized the fence for more than ten years as the northwest line of the road, but as we have found that the fence was the northwest boundary of the road we need not enter into any discussion of the estoppel. Neither defendant nor his predecessors have occupied the lot beyond the fence line as here found nor been induced by any acts of the city to do any act or make any expenditure upon the ground beyond the fence line.

The deed from Everest to Force, a prior owner of defendant's lot, does not give the exact dimensions of the lot conveyed but conveys to the center of the road "subject to all road claims." Defendant knew that there was a question as to the location of the street line; talked about it with the chairman of the street commission before he had done more than lay the foundation of the building. He had sufficient knowledge to put him on inquiry and what he did thereafter he did at his peril. He admits that he left the construction of the back end of the building to the last and put in an extra force of workmen to rush the work before he could be stopped, and he cannot now be heard to complain. And we conclude that the apple tree stump, now within a part of defendant's building, and the haw tree southwest of it and on block 12, indicate approximately the line of the fence as originally built and determines the northwest boundary of the road adjacent to block 12; that is to say, that the two trees mentioned indicate the inside line of the fence worm referred to in the evidence as a four-foot worm, while the outside line of the worm must be the boundary of the road.

Judgment of the lower court is reversed.

**Schubel v. Olcott, Original Jurisdiction**

Decided January 23, 1912.

G. A. Schubel, plaintiff, v. Ben W. Olcott, defendant. Original jurisdiction. Argued and submitted January 4, 1912. C. E. S. Wood, W. S. U'Ren, E. S. J. McAllister (Williams, Wood & Linthicum, and Erskine Wood on the brief) for plaintiff. A. M. Crawford, attorney-general, F. W. Mulkey (J. H. Van Winkle, James W. Crawford on brief) for defendant. Bean, J. Peremptory writ ordered.

Bean, J. This is a proceeding in mandamus, instituted in this court under the provisions of Art. VII, section 2, of the constitution of Oregon, adopted November 8, 1910, for the purpose of requiring the defendant, as secretary of state, to file an initiative petition for a local law for the county of Clackamas to exempt from taxation all trades, labor, professions, business, occupations, personal property and improvements on, in and under land, and to require that all taxes levied and collected within said Clackamas county shall be levied on and collected from the assessed values of land and other resources, separate from the improvements thereon, and on and from the assessed value of public service corporation franchises and rights of way.

The following facts are alleged: That said petition was prepared and circulated in compliance with an act of the legislature of 1907, entitled, "An act to provide for carrying into effect the initiative and referendum powers reserved by the people in section 1 and section 1a of article IV of the constitution of the state of Oregon on general, local, special and municipal legislation; to regulate elections thereunder; * * *." That the petition was signed by six hundred and seventy-four legally qualified voters of the county of Clackamas, more than the percentage required for that purpose; that the same was presented to defendant for filing, who, awaiting the opinion of the attorney general relative to filing, receipted therefor, and thereafter refused to file such petition; that defendant, as secretary of state, is the legal custodian of all such petitions as the one offered by plaintiff for filing, and is the official with whom the law provides that all initiative and referendum petitions appertaining to the state as a whole, or a district thereof, shall be filed; that by virtue of said legislative act, plaintiff is entitled to have the petition filed according to the terms thereof.

To the alternative writ of mandamus defendant answered in effect, that under the laws said petition should not be filed.

It is contended by the attorney general and counsel for defendant that Art. IX, section 1a, of the constitution of Oregon is not self-executing; that counties are not municipalities within the meaning of Art. IV, section 1a, of the constitution, and that the procedure indicated by section 3470 et seq. L. O. L., does not apply to them.

The theory of plaintiff is that Art. IV, section 1a, confers upon counties the power to initiate county legislation; that the act of 1907 provides the machinery by which such right may be exercised, that Art. IX, section 1a, gives to counties the power to regulate taxation within their boundaries.

In order to consider the questions presented, we will refer to the portions of the amendments of the organic law of this state, applicable thereto. The first, adopted by the people June 2, 1902, being Art. IV, section 1, relating to legislative authority, style of bill, initiative and referendum, makes, among others, the following provisions: "The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, * * *. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

Art. IV, section 1a, adopted June 4, 1906, relating to the initiative and referendum on local, special and municipal laws, and parts of laws, is as follows: "* * * The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town."

Art. IX, section 1a, proposed by initiative petition and adopted by a majority of votes at the election November 8, 1910, provides as follows: "No poll or head tax shall be levied or collected in Oregon; no bill regulating taxation or exemption throughout the state shall become a law until approved by the people of the state at a regular general election; none of the restrictions of the constitution shall apply to measures approved by the people declaring what shall be subject to taxation or exemption, and how it shall be taxed or exempted whether proposed by the legislative assembly or by initiative petition; but the people of the several counties are hereby empowered and authorized to regulate taxation and exemptions within their several counties, subject to any general law which may be hereafter enacted."

Art. IV, section 1a, and Art. IX, section 1a, of the constitution, are not self-executing in respect to counties as they make no provisions regarding the manner of their enforcement. By the first of these, the initiative and referendum powers reserved by the people are further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character, in their respective municipalities and districts. By the second, the people of the several counties are empowered and authorized to regulate taxation and exemptions within their several counties subject to any general law which may be hereafter enacted. In Art. IV, section 1a, it is specifically provided that the manner of exercising such powers shall be prescribed by general laws except as to cities and towns, neither section containing rules by means of which this right may be given the force of law as regards local legislation in counties. Cooley's Constitutional Limitations, 7 ed. 121; Long v. City of Portland, 53 Or. 92, 96; Reeves v. Anson, 13 Wash. 17 (42 Pac. 625); Stevens v. Benson, 50 Or. 269. Hence we must look at the general laws of this state for the manner of executing these sections of the organic law. Turning to the legislative enactment of 1907, being sections 3470 et sequi, L. O. L., it appears that the legislature intended to and did make all the necessary rules for carrying into effect the initiative and referendum provisions of the constitution. The following legislative decrees affirm this in directing that if the secretary of state shall refuse to accept and file any petition for the initiative or for the referendum, any citizen may apply, within ten days after such refusal, for a writ of mandamus to compel him to do so; section 3474, L. O. L.; that when a measure shall be filed with the secretary of state to be referred to the people of the state, or of any county or district composed of one or more counties, either by the legislative assembly, or by the referendum petition and when any measure shall be proposed by initiative petition the secretary of state shall forthwith transmit to the attorney-general of the state a copy thereof, and within ten days thereafter the attorney general shall provide and return to the secretary of state a ballot title for such measure; section 3475, L. O. L.

An examination of section 6 (3476, L. O. L.) of the same act reveals that the reason of the legislative rule requiring the filing of an initiative petition with the secretary of state, when only one county is interested in the measure, is to avoid confusion in the numbering of the initiative measures on the ballot.

It is urged that this act was passed prior to the amendment of the constitution contained in Art. IX, section 1a, and is not applicable thereto. Though the machinery for carrying this amendment into effect was created before the birth of the amendment, yet such machinery or provisions of the enabling act, fit with almost exact nicety, and we do not think it necessary for the people or the legislature to re-enact the provisions of this law.

In Acme Dairy Co. v. Astoria, 48 Or. 520, 533, this court, speaking through Justice Moore, in construing Art. IV, section 1a, said: "The words 'municipality' and 'district' as used in the clause of the amendment adverted to are evidently expressions of equivalent import, for a district legally created from a designated part of the state and organized to promote the convenience of the public at large is a municipal corporation."

A county is a municipal or quasi-municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law. Words and Phrases, Vol. 2, 1656; 11 Cyc. 342. A county is not, in a strict sense, a municipal corporation. In a certain sense it comes within the rules and principles of law applicable to such corporations. Words and Phrases, Vol. 2, 1656. Judge Dillon, in his work on Municipal Corporations, Vol. 1 (5 ed.) on page 25, says: "In general, all of our American cities, towns and counties are public corporations, full or quasi. They are created by the legislature, and are invested with power to decide and control local and subordinate matters pertaining to their respective localities."

In Straw v. Harris, 54 Or. 437, we find this language: "Municipalities are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject always to its control." See also Words and Phrases, 4622. On page 434 of the same opinion (Straw v. Harris) Mr. Justice King speaking for the court says: "To begin, let it be remembered that municipal corporations of the class under consideration do not come within those designated as counties, cities or towns, and that it was intended that municipalities other than those enumerated might be created, is obvious from the language used in section nine of the same article, namely: 'No county, city, town or other municipal corporation,' etc. The clause other 'municipal corporation' clearly implies and indicates that the framers understood and recognized that there may be corporations other than those enumerated, of which we have school districts, irrigation districts, road districts, drainage districts, and ports, * * *."

In Simon v. Northup, 27 Or. 487, a case construing the legislative enactment requiring Multnomah county to pay the bonds of the city of Portland, we quote from the brief of the learned counsel, at page 492, as follows: "The legislative assembly cannot transfer from one municipality (city of Portland) to another (Multnomah county) an idebtedness already resting on the former and make it an obligation of the latter."

In Cook v. The Port of Portland, 20 Or. 580, 585, Mr. Justice Bean quotes with approval from the case of Curry v. The Dist. Twp. of Sioux City, 62 Ia. 104, as follows: "The word municipal, as originally used in its strictness, applied to cities only; but the word now has a much more extended meaning, and when applied to corporations the words political, municipal and public are used interchangeably."

A county is a public corporation classed with cities, towns and villages, and invested with subordinate legislative powers to be exercised for local purposes connected with the public good and subject to the control of the state. 2 Kent. *275.

In construing a written constitution the object is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the law giver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not prevail in the particular case, nothing remains except to enforce it. The thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning involving no absurdity and no contradiction between different parts of the instrument, then that meaning, apparent on its face is the only one we are at liberty to say was intended to be conveyed. In such case there is no room for construction. We have no right to add to or take away from that meaning. Endlich Interpretation of Statutes, section 507; Cooley's Constitutional Limitations, 7 ed., p. 69.

It is undoubtedly true that a constitution is a law differing from statutes in its paramount force in cases of conflict, being supreme over all of them (Cooley's Constitutional Limitations, p. 78). A constitution which provides for the future as well as the present is to be interpreted so as to carry out the great principles of government, and to this end the application of arbitrary rules of construction is to be resorted to with hesitation and only with much circumspection. Endlich's Interpretation of Statutes, sec. 506.

As to what laws are local or special, we notice the following authorities: "An act is local when the subject relates to a portion only of the people or their property, and may not, either in its subject, operation, or immediate necessary results, affect the people of the state or their property in general." 36 Cyc. 987, note, citing Sedgwick St. & Const. Constr. (2 ed.) p. 589 note (quoted in Earle v. San Francisco Bd. of Education, 55 Cal. 489, 491; State v. Pond, 93 Mo. 606, 640, 6 S. W. 469.

"The term 'local' as applied to statutes is of modern origin, and is used to designate an act which operates only within a single city, county or other particular division or place, and not throughout the entire legislative jurisdiction. In this sense, the term 'local' is the antithesis of general'." 36 Cyc. 987, note, citing State v. Sayre, 142 Ala. 641, 39 So. 240. See also McGregor v. Baylies, 19 Ia. 43.

The qualifying words "local" and "special" relating to municipal legislation used in Art. IV, section 1a, are synonymous terms, and mean enactments intended to affect only certain persons or to operate in specified localities only. Acme Dairy Co. v. Astoria, supra.

The principle of local self-government is regarded as fundamental in American political institutions. It is not an American invention, but is traditional in England, and is justly regarded as one of the most valuable safeguards against tyranny and oppression. From Blackstone and the elementary writers we learn that the civil divisions of England, counties, towns, etc., date back to the times of Alfred the Great. In no changes of policy, dynasty, peace or internal war or even conquest, have these organizations been abandoned. They are in effect the same now as they were before the Norman invasion. Wherever the Anglo-Saxons have gone with their language and laws, these communities, each with a local administration, have gone with them. Here have been the seats of modern civilization, the nurseries of public spirit, and the centers of constitutional liberty. They are the opposites of those systems that collect all power at a common center. This right of self-government should be carefully guarded, and every infraction or evasion thereof, condemned. This important principle finds its ideal counterpart in the New England town meeting, which is a legal assembly composed of the qualified voters of a town, and held for the election of all town officers and the discussion of all matters pertaining to the public business, property and expenses of the town. Black's Constitutional Law, 3 ed. 504, 505.

In pursuance of this general principle, municipal corporations are established in all the states and invested with rights and powers of government subordinate to the general authority of the state, but exclusive within their sphere.

The principle of local government being thus firmly implanted in our political system, it rests with the legislative authority of each state, which, in this state includes the legal voters by means of the initiative, to apply and adjust this principle to the varying needs of its own people. That sovereign authority must determine what municipal corporations shall be created, and what shall be their powers and the limit of their jurisdiction according to the requirements of the different sections and districts of the state, and their capacity and need of local government. In some of the states the right of local government is guarded by constitutional provisions forbidding the legislature to make any private or special laws "regulating the internal affairs of towns and counties." In others it is considered as one of the rights inherent in the people at the time of the adoption of the constitution and reserved to the people by that instrument, except as modified by the grant of authority to the legislature. Black's Constitutional Law, section 185.

In this state we have a dual system of legislation. By the provisions of our constitutional amendments, the right to enact local, special and municipal measures is reserved to the legal voters of their municipalities and districts. This authority is to be exercised in the respective localities by means of the initiative process. Whatever have been the duties or powers of counties, prior to the adoption of these amendments, we see no reason why such quasi municipalities or districts cannot be endorsed with legislative functions by the plean provisions of the constitution.

For the origin of the provision for local self-government, by direct legislation, we must look to Art. IV, section 1a, of the constitution, wherein the people of this state declare as a fundamental law that "the initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district."

And a county is clearly a municipality or district within the meaning of this section. Acme Dairy Co. v. Astoria, supra; Cook v. The Port of Portland, supra. The word "district" as used in this section has a broader or more elastic signification than "county," and may designate a territory comprising more than a county or containing a less area. In defining the power conferred by Art. IX, section 1a, the framers used the word county which is more specific than municipality or district, although the former is included in the latter. Briefly stated, the word county is, by the constitutional provision contained in Art. IJ, section 1a, for the purpose therein expressed, practically incorporated into, and made a part of Art. IV, section 1a.

Counsel for defendant make the further contention that Art. IX, section 1a, conflicts with Art. IV, section 22, subdivision 10. This is tantamount to a claim that a constitution cannot be changed. It is apparent from a careful examination of both of these sections that Art. IX, section 1a, being the later, modifies the provisions of subdivision 10 to a certain extent by providing that "None of the restrictions of the constitution shall apply to measures approved by the people declaring what shall be subject to taxation or exemption and how it shall be taxed or exempted, whether proposed by the legislative assembly or by initiative petition."

This would appear to signify that while we think the constitution is still paramount to the statute, there is now less difference than formerly between a constitutional provision and a statute enacted by the people pursuant to the initiative power. It should also be borne in mind that section 23 of Art. IV is an inhibition upon the passage of local or special laws by the legislative assembly.

Carrying out the precepts contained in these portions of our constitution by giving them the meaning clearly indicated by the language used therein, and as generally understaad by those for whom their provisions were intended, and proceeding in accordance with the legislative enactment known as the enabling act, we conclude that the initiative power, or power to propose and enact laws reserved by the pepole in Art. IV, section 1 was further reserved by Art. IV, section 1a, to the legal voters of every municipality and district as to all local, special, and municipal legislation of every character, in or for their respective municipality or district, and that the people of the several counties are authorized by Art. IX, section 1a, to regulate taxation and exemption within their several counties in the manner provided by Art. IV, section 1a. This is to be done in a manner subservient to any general law of the state which may be enacted, thus utilizing the power conferred upon counties as political subdivisions of the state.

The proposed measure is not contained in the record, and we are not called upon to construe its provisions or decide whether or not it is local. The relief prayed for should be granted, and the petition filed. It follows that the peremptory writ should issue and it is so ordered.

McBride, J. (Concurring.) I concur in the general line of reasoning pursued in the majority opinion, and in the result arrived at thereby. I do not think the propriety or even the constitutionality of the proposed measure is properly before us. I agree with Justice Burnett in the conclusion that, if the proposed legislation infringes upon, or in any way hinders the state in the collection of its revenues, it is void to that extent. The right of the state to collect in full and in its own way the revenues necessary for its support, is an attribute of its sovereignty and canont be taken away by local legislation. But in my view of the case the secretary of state is not the proper officer to pass upon these questions, and as I understand his position he does not attempt to do so. His duties are purely ministerial, and when a measure, properly and honestly petitioned for any complying with the law of procedure, and proof is presented to him for filing, it is his duty to file it, leaving to the proper tribunals the question of its constitutionality after it shall have been adopted.

Suppose a bill should be presented to the legislature and ordered printed in its regular course. Would anybody seriously contend that the state printer could say: "This bill is unconstitutional, and I, therefore, refuse to print it?" Surely not. I can see no difference in the two cases: the duty to file in the one case, and the duty to print in the other, seem to me to stand upon the same footing. The whole of the proposed bill is not before us judicially, and there may be possible doubts suggested as to its constitutionality, but these questions, as well as those as to its propriety, should be left—the first to the courts, and the second to the people—in their regular course.