

DECISION RELATIVE TO SIXTH STREET PAVING HANDED DOWN

Points of law involved in the opinion handed down by Circuit Judge Knowles last Saturday afternoon dealing with the Sixth street paving question, are set forth in the appended excerpts from the opinion itself:

The proceedings of the city council relative to the improvement of Sixth street and certified to this court show that a meeting of the council was held on the 17th day of June, 1910, at which time a resolution was adopted by the council appointing Councilman A. V. Andrews, Bernard Logsdon and G. T. Fleming, commissioners and authorizing and requiring said commissioners "without unreasonable delay to make a report in writing to the council which shall set forth the following: First, the bounds of the district to be benefited or affected by the improvement. Second, the character and description of the improvement proposed. Third, the estimated cost of the proposed improvement. Fourth, an estimate of the valuation and extent, if any, of the benefits to be derived by each separate lot or tract of said property by reason of said improvement and the name of the owner or reputed owner of each separate lot or tract within said district."

That thereafter two of said commissioners, to-wit: A. V. Andrews and G. T. Fleming, filed with the city recorder their report as such commissioners.

It is contended by counsel for the plaintiffs that the proceedings of the council of the city in the matter of the improvement of this street are void, among other grounds for the reason that the report should have been made by all the three commissioners and that a report made by two commissioners, although a majority, does not comply with the charter of the city.

It is well settled in this state that in the matter of assessing property for street improvements that the charter provisions must be strictly followed. *Smith vs. Minto*, 30 Ore. 351, *Applegate vs. city of Portland*, 53 Ore. 553, and that compliance with the charter provisions and requirements must appear from an inspection of the record. *Applegate vs. city of Portland*, supra, *Northern Pacific Terminal company vs. city of Portland*, 14 Ore. 24, *Towns vs. Klamath county*, 33 Ore. 255. In the case of *Smith vs. Minto*, supra, the supreme court of this state in its opinion says:

"The power of a city council in the matter of street improvements is a specially delegated authority and its acts are legal only when in strict conformity with the authority conferred."

Also in the case of *Applegate vs. city of Portland*, 53 Ore. 553, the supreme court of this state in its opinion says:

"An attempt on the part of municipal authority to subject private property to the burden of an assessment for a local improvement is a proceeding in invitum to uphold which against direct attack, it must appear from an inspection of the record of the tribunal that the statutory requirements prescribed as a condition precedent

to an exercise of the power conferred, have been observed."

In the case of *Towns vs. Klamath county*, supra, the supreme court of this state in its opinion says:

"The case of *Northern Pacific Terminal company vs. city of Portland*, 14 Ore. 24, is not in point here because it involves the validity of the proceedings of the common council of the city of Portland in appropriating private property for the purpose of opening and establishing a street and as said by the writer of the opinion, in a subsequent case (*Bewley vs. Graws*, 17 Ore. 274) the common council cannot be said to be a court, in any sense of that term but it has certain specified and limited powers conferred upon it, to lay out and widen streets, etc., which it may exercise by complying with the charter."

It is contended however, by counsel for the defendants that the making of the report is simply for the purpose of advising the members of the council whether or not it is advisable to improve the street and therefore the making of the report is not jurisdictional.

We cannot accede to this contention. In the first place subdivision 9 of section 35 of the charter of the city of La Grande above quoted provides that the council "shall" appoint three commissioners who "shall" make an examination of all property upon which said assessment is to be levied as to the valuation and extent, if any, of the benefits to be derived by said property by reason of said improvements."

This subdivision of section 35 further provides that the commissioners shall make their report to the council in writing and that before an assessment is levied that the council shall give notice to the respective property owners to be affected by the proposed improvement that the council will at a designated time meet and consider the proposed levy and granting to any person feeling aggrieved, a hearing before said council. If the position of counsel for the defendants is correct that in the adoption of the new charter that Ordinance No. 4, series of 1893 which provided for a notice to the property owners of any proposed improvement of a street might be defeated by a remonstrance signed by two-thirds of the abutting property owners, was repealed by implication then the above provision is the only provision that provides for any notice to the property owners of the special assessment for street improvements and giving him an opportunity to object. It is well settled that in the matter of street improvements by special assessment that the property owner must be given an opportunity at some time during the proceedings and prior to the final assessment to object. Furthermore, subdivision nine of section 35 after providing that three commissioners shall be appointed and that they shall make their report to the council and that the council shall give notice to the property owners interested that at a designated time it will consider the proposed levy and hear objections there to also provides "After a compliance with this sub-division, the council

shall be deemed to have acquired jurisdiction to order the making of such improvements." Clearly showing that under the terms of the charter itself that the making of the report is jurisdictional.

In the case of *Houck vs. city of Roseburg*, 108 Pac. 186, Judge Eskin, in rendering the opinion of the court, says: "The proceedings necessary to jurisdiction are that the council, having determined to construct a sewer at some designated location shall declare by ordinance whether the cost thereof shall be assessed to the property directly benefited, the appointment of the council of disinterested viewers who shall view the street and location of the proposed sewer and ascertain and determine what property is directly benefited thereby and the extent and proportion of such benefits and publication by the recorder of the notice provided by section 100 of the charter."

Again it is contended by counsel for the defendants that a report signed by two of the three commissioners is sufficient.

The great weight of authority appears to be against the defendants upon this proposition. *Hinkle vs. city of Mattoon*, 48 N. E. 908, *Markley vs. Chicago*, 48 N. E. 952, *McCheaney vs. People*, 35 N. E. 734, *Hamilton on Special Assessments*, Sec. 517.

In the case of *Hinkle vs. City of Mattoon*, supra, the supreme court of Illinois, in its opinion, says:

"There was no claim or evidence that the report was made in writing by the three members of the committee. It was signed by only two of them and was correctly set out in the original petition. It was the rule at common law that 'where a number of persons were entrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their act will be the act of the whole. Under this view where three viewers were appointed by the court county in a proceedings establishing a highway, it was held, that where all were present and consulting the majority might decide. *Louk vs. Mills*, 15 Ill., 256. The ninth clause of section one of chapter 131 of the revised statutes provides 'Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons.' In the case of public officers who constitute a corporation, the rule goes further, and all need not be present if there is a quorum of majority for the transaction of business. A committee appointed to make an estimate has none of the qualities of such a corporation, and hence does not come under the latter rule; but, when all are present and consulting, a majority may determine upon the estimate which shall be reported as that of the committee. They are required to report their action in writing to the city council and their report is the evidence of the action taken by them under their appointment. It is urged that the report need not be signed, but we think that the requirement for a report in writing implies that it must be signed by those making it, and that a paper not signed or authenticated in any way by the signatures of the committee would not be a compliance with the statute. As the report is evidence of what the committee does, it should show the presence of all, and if there is a disagreement or a mere majority report, the fact should be brought to the notice of the council, according to the usual practice, by the report, for the action of the council thereon. It is true that in some cases, where a report has been signed by only two of three persons authorized to act, it has been presumed that the third one was present and consulting; but we have not applied such a presumption in cases of this kind, in a direct proceeding to review the judgment."

Our own supreme court has never passed directly upon the sufficiency of a report signed by two of the three commissioners. In the case of *Beekman vs. Jackson county*, 18 Ore. 283, Chief Justice Thayer in rendering the opinion of the court says, "The appellants counsel complains in regard to the action of the county court in setting aside the report of the first viewers and appointing others in their places. I think, however, that there were more grounds for complaint against the court in its acting upon the view and report of the second viewers as it appears that only two of them met and exercised the authority

conferred upon the three."

The language of Justice Thayer in the above opinion was referred to in the opinion in the case of *Jones vs. Polk county*, 36 Ore. 539. In 37 Ore. at page 94 the author says, "In laying out of streets and roads where commissioners have been appointed, they must act as a body and not separately and if there be a vacancy in the board the remaining members cannot act even to make a report."

Also at page 93 of the same work as follows: "Under some of the statutes it is held that a majority of the commissioners or viewers can act in laying out the road. This is, of course, where the statute expressly so provides or even where there is a general statute providing that majorities of boards of this kind can act. Under other statutes it is held that when several persons are authorized to view a road they must all deliberate and view the proposed road, although a majority may decide or make the report, unless the statute otherwise expressly provides."

Also page 384-28 Ore. we have the following, "A report signed by only two of the three commissioners appointed is nugatory."

Page and *Jones on Taxation by Assessment*, a very modern work, in Vol. 2 at page 901 says, "Where less than all may act, failure to give notice to one of the commissioners so as to enable him to take part in the proceedings, invalidates the proceedings."

This notification to the other member not acting and joining in the report must affirmatively appear from the record of the proceedings. *Applegate vs. city of Portland*, *Northern Pacific Terminal company vs. city of Portland*, *Towns vs. Klamath county*, *Hinkle vs. city of Mattoon*, supra. It follows from the above conclusions that the writ should be sustained and the proceedings of the council of the city of La Grande regarding the improvement of Sixth street annulled.

We have reached this conclusion with a great deal of reluctance on account of the expense and trouble the city has incurred in attempting to make this improvement.

Subdivision nine of section 35 of the charter, however, contains ample provisions for re-assessment of the property benefited by this improvement. It is as follows, "If any assessment is set aside by order of any court, the council may cause a new one to be made in like manner for the same purpose, for the collection of the amount so assessed."

J. W. KNOWLES,
Circuit Judge.

UNION STUDIES ROAD MATTER

UNCERTAIN WHAT BUSINESS MEN WILL DO ABOUT NEW LINE

Plan to Haul Freight From Station by Trucks, It Is Said.

(Union Scout.) From all reports that can be learned the C. R. of O. will have their new tracks laid to Hot Lake within the next ten days, but it is understood that regular trains will not be put on the new road for a month or so.

There is a move on foot among the business men to have their freight brought from the present depot to the city in case the old road to the depot is abandoned. They say this method will be used until a better means can be afforded. There is considerable talk about building an electric road from the present depot to the city in case the old road is vacated and to form a stock company and extend the line up Catherine creek to the timber belt. By this means our city could have the benefit of saw mills affording a pay roll that the city at present is much in need of.

The sentiment is so strong about abandoning the old depot, that this week G. W. Huffman is taking the sentiment of all business men who have freight hauled from the O-W, as to giving him a contract for the hauling of the same. It has been reported to a Scout representative that the majority of the business men have expressed their desire to contract with Mr. Huffman for the purpose of hauling their freight in case the old line is vacated. Mr. Huffman tells us that

in the event he gets enough freight guaranteed him, that he will in the near future put on an up-to-date wagon to properly carry all kinds of freight from the O. W. depot to the city in a satisfactory manner.

The management of the railroad is not saying what they will do in the matter and it is hard to find out exactly what their present intentions are, excepting that they are going to run trains to Hot Lake. As to when this will be done and as to whether they will abandon the old track or not, nothing is being said by the management.

The breach between the management and the citizens seems to be widening and as to just what both parties will do in the matter is being watched with interest. There are parties here who seem to not care where the track or depot is, so long as they can get good transportation service, while the business men seem to be unanimous in holding the present line to the present depot on the O-W.

Calendar of Sports for the Week Monday.

Annual championship tournament of Women's Western Golf association begins at Chicago.

Opening of fall race meeting of the Windsor (Ont.) Fair Grounds and Driving Park association.

Opening of four days' horse show at Ohio state fair, Columbus.

Cricket contests between the United States and All-Canada teams begin at Toronto.

Colorado championship tennis tournament opens in Denver.

International open tennis tournament begins at Niagara-on-the-Lake, Ont.

Southwestern Nebraska championship tennis tournament opens at Arapahoe, Neb.

Allegheny Mountains championship tennis tournament opens at Cumberland, Mr.

"One Round" Hogan vs. Tommy Langdon, 6 rounds, at Philadelphia.

Joe Coster vs. "Kid" Julian, 10 rounds, at Syracuse, N. Y.

"Knockout" Brown vs. Willie Lewis 10 rounds, at New York city.

Opening of Grand Circuit race meeting at Readville, Mass.

Annual tournament of Iowa State Chess association opens in Cedar Rapids.

Corinthian football team of England scheduled to play at Vancouver, B. C.

Opening of annual regatta of the Lake Yacht Racing association at Toronto.

Elimination races (motor boat) to select International Cup defenders begin on Huntington Bay, L. I.

Annual bench show of the Wilmington Kennel club, Wilmington, Del.

Opening of horse show at Warren-town, Va.

Tommy Gary vs. Grover Hayes, 10 rounds, at Cleveland, O.

Matty Baldwin vs. Willie Ritchey, 20 rounds, at San Francisco.

Annual championship tournament of Michigan State Golf league opens at Grand Rapids.

Annual fall meet of the Maryland United Hunts opens at Pimlico.

Pal Moore vs. Tommy Murphy, 10 rounds, at New York city.

Opening of the annual national rifle tournament at Sea Girt, N. J.

Opening of three-day automobile race meet at Old Orchard Beach, Me.

Reliability run for truck of Chicago Motor club at Chicago.

Jimmy Clabby vs. Mike Gibbons, 10 rounds, at Milwaukee.

Mickey Sheridan vs. Freddie Dan-

als, 15 rounds, at St. Joseph, Mo., Saturday.

Opening of 12 annual open-air horse show at Lake Forest, Ill.

Middle Atlantic association A. A. U. swimming championships at Philadelphia.

Opening of annual fall golf tournament at Hotel Del Monte, California.

Opening of tri-state championship tennis tournament at Cincinnati.

Corinthian football team of England scheduled to play at Victoria, B. C.

Frank Moran, of Pittsburg, vs. Fred Drummond, 20 rounds, at London, England.

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Large ten room house on Sixth, close in. Renting for \$50.00 which can easily be increased to \$75.00. Especially adapted for housekeeping suites, East frontage. Nice shade trees, cement walks, lawn. Lot 80 by 110. Excellent location for large apartment house. Easy terms. For further particulars apply to Geo. H. Currey, 108 Elm street. 8-17-12t

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Take two-thirds of a glass of cold sparkling SAM-O, add one-third of any of the following fruit juices: Lemon, Orange, Pineapple or Grape

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It's good for what ails you in this kind of weather."