NEW RULE IN PORT DECISION

(Continued from page 1.)

number of voters residing in the territory April 19, 1909, were less than the number of electors who were registered for the election held in November, 1908. The statute regulating the incorporation of ports contains clauses as follows: "The judges and clerks appointed by the county court for the preceding general election shall act as judges and clerks of such special election, and the register of voters used at such preceding election shall be used at such special election, and no one but persons authorized to vote within such district at a general election held therein shall be authorized to vote at such special election. . . . The polls shall be kept open between the hours provided for in case of general election, and notice of the time of such special election shall be posted in each polling precinct in which such measure is to be voted upon in like manner as is provided for in cases of general elections. L. O. L. 6116.

The evidence received at the trial herein shows that at the election held in November, 1908, there were 2002 voters registered in the several precincts comprising the proposed port. If the testimony admitted had disclosed that any one or more of the persons so enrolled had moved out of the district prior to April 19, 1909, the registration would have been diminished to that extent. The number so enrolled would have been augmented also by testimony showing that qualified electors had moved into the district after November, 1908, or were living therein at that time but were not registered, and were entitled to vote at the special election.

The testimony, to the introduction of which objection was made, consists of the declarations of witnesses who stated that the number of voters in the district April 19, 1909, was less than at the preceeding election, and that more qualified electors had moved out of the territory after November, 1908, than had come into it. No name of any person was given who either moved into or out of the district within the time specified, so as certainly to determine therefrom an increase of, or a reduction in the number of registered voters.

The finding of fact that the number of qualified electors in the territory involved on April 19, 1909, was approximately 1950 is not founded on any competent evidence and errors were committed in admitting the opinions of witnesses on that subject. The finding respecting the approximate number of voters, seems expressly to be contradicted by the finding that "on or about the tenth day of April, 1909, actual notice of the time of holding said election was mailed to at least 1764 registered voters within said territory proposed to be incorporated" and the finding, "that the voters sworn in at the Port of Coos Bay election in April, 1909, was 309," thus disclosing that the number of qualified electors was 2073 instead of 1950, the number so estimated.

Testimony was admitted over objection and exception tending to show that the question of the incorporation of the port was discussed at public meetings held in some of the precincts and in newspapers published in the district. The election held April 19, 1909, was special (L. O. L. 6116) and as the statute prescribed the particular manner of giving notice thereof, as hereinafter stated, the method thus provided for is exclusive. Wright vs. McMinnville, 117 Pac. 298. Errors were therefore committed in admitting evidence of the public meetings at which the question of incorporating the port was discussed, and of the newspaper comments relating to the same subject. Whether or not the misapplication of the legal principles referred to were prejudicial will depend upon a consideration of the number of ballots cast at the special election when compared with the number of electors who were registered for the preceding November election.

Whatever the rule may be in other states it is settled in Oregon that at a special election the notices thereof, required by the statute to be given, constitute a condition precedent which must be observed in order to validate measures to be voted upon. Marsden vs. Harlocker, 18 Or. 90; Guernsey vs. McKinley, 52 Or. 555; Wright vs. McMinnville, 117 Pac. 298. When, however, an inspection of the number of votes cast in a precinct at a special election, when compared with the number of registered voters therein at that time, it conclusively appears that no different result could have been possible in the entire district affected by the majority vote, the failure strictly to comply with the requirements of the statute in respect to giving notice will not invalidate the election. Roesch vs. Henry, 54 Or. 230. The doctrine thus announced proceeds upon the principle that if the votes cast in the precinct, in which the required notice was not given, were rejected the result of the special election in the whole territory would not possibly be changed.

Pursuant to the rule so adopted, attention will be called to the provisions of the general election law, which by proper reference are made a part of the statute authorizing the incorporation of ports. L. O. L. 6116. The clauses thus alluded to are, as far as material herein as follows: "The county court shall, at the regular term in January preceding a general election, appoint three judges and three clerks of election for each election precinct, to serve for the period of two years." Id. 3305. "In all election precincts in which were cast one hundred and fifty (150) or more ballots at the last general election, . . . the county court may . . . at said January term, appoint a second or additional board consisting of three judges and three clerks for each precinct, who shall hold their offices for two years." Id. 3306. "It shall be the duty of the county clerk, thirty days before any general or presidential election, and at least ten days before any special election, to prepare printed notices of the election and mail two of said notices to each judge and each clerk of election in each precinct; and it shall be the duty of the several judges and clerks to immediately post said notices in public places in their respective precincts." Id. 3307.

In the 12 precincts composing the district more than 150 ballots having been cast in each of three of them, the county court appointed an additional board, consisting of three judges and three clerks for each of such more populous divisions of the county. By computation it will be seen that in the 12 precincts designated there were 72 judges and clerks regularly required and also 18 extra members duly appointed, making 90, each of whom was ordered to post two election notices in his precinct, or 180 notices that should have been put up in the entire district. It will be remembered that the court found that of the number of notices so demanded there had been posted by the judges and clerks only 105; by third parties at their request 8; by other persons 9; unaccounted for, 14; and that there was a neglect to put up 44.

In elections to incorporate ports, neither the judges nor the clerks are required to make any return of the posting of election notices. Bennett Trust Co. vs. Sengstacken, 58 Or. 333.

The duty never having been imposed by statute it will be assumed, without deciding the question, that the 14 notices, in respect to which no evidence was offered, were properly presumed by the trial court to have been regularly posted. L. O. L. 799 subdv. 15; White vs. Smith, 50 Ark. 266, 276.

The purpose designed to be subserved by the statute in requiring notices of election to be given, is to inform legal voters of the time, place and objects of an election. As found by the trial court it will be taken for granted, without determining the matter, that though the duty to post such notices has been imposed on judges and clerks of election, their appointment by the county court does not create such a relation of trust and confidence that the obligation resting upon them cannot be legally discharged by other persons. If election notices emanate from the proper source, are issued pursuant to law, afford the requisite intelligence and have been displayed in public places for the designated time, it would seem to be immaterial who posted them, and for that reason it will be conceded, though not necessary to a decision herein, that the 17 notices that were put up by persons other than the judges and clerks of election were properly posted.

Considering the notices, in proof of posting which the trial court invoked the presumption, and those that were put up by third persons as having been posted by the judges and clerks, the number of notices put up and omitted to be displayed in the several precincts, composing the proposed port, are respectively as follows: Coos City, 8 and 4; Coos river north, 11 and 1; Coos river, 9 and 3; Empire, 10 and 2; Lake, 8 and 4; Marshfield north, 16 and 8; Marshfield south, 22 and 2; Newport, 10 and 2; North Bend, 14 and 10; South slough, 10 and 2; Sumner, 10 and 2; and Tenmile, 8 and 4. It will be noted that in each of these precincts there was a failure to post the required number of election notices, varying from one to ten.

It will be kept in mind that the court found from the evidence taken that at the election held April 19, 1909, there were 1234 votes cast, of which 309 were sworn in as having been polled by electors who had not been registered, and that the result of the vote was 992 in favor of the incorporation of the port and 221 against the measure, thereby disclosing that 21 ballots were evidently placed in the boxes without any marks thereon to indicate the choice of the electors. The total number of votes polled being 1234 of which 309 were sworn in, it will be seen that only 925 ballots were cast by registered voters, and as there were enrolled at that time 2002 electors, it is quite manifest, if the contradictory finding made by the court be disregarded, that 1077 registered voters took no part in the special election.

This computation does not bring the case within the principle announced in Roesch vs. Henry, 54 Ore. 230, for it cannot be said with certainty that if the 1077 voters, who were registered in Nov., 1908, but did not participate in the special election, had attended and cast their ballots the result could not possibly have been changed.

The vote upon any measure, determined at a special election, ought not to be disturbed if it can be avoided, and a diligent effort has been made to find, if possible, some way to escape the conclusion which has been forced upon us. In the pioneer days of Oregon it was necessary that notices should have been posted in public places, in order to impart requisite information of pending elections and of other matters in which a party of the public might have been interested. The time has arrived, however, when such notices should be given by being printed in a newspaper, if one be published in the county. By the means suggested greater publicity would undoubtedly be given, for but few persons ever pause to read posted notices while nearly everyone reads the local papers. The absurdity of requiring 150 election notices to have been put up is apparent, and in case of a general election the failure to comply with the command of the statute would have been immaterial, but as the election herein was special and a different result might have been possible, there is no getting away from the determination to which we have arrived and still maintain legal principles which have been solemnly adjudicated. If, however, an easier or more effecient method of imparting the required information, respecting special elections, be desired, the authority must be secured from the legislative department.

It follows that for the errors adverted to the judgment is reversed and as the entire testimony has been brought up pursuant to section 3 of Article VII of the Constitution, as amended November 8, 1908, judgment is here given for the plaintiff as prayed for in the complaint.

STATEMENT BY J. W. BENNETT

(Continued from page 1.)

at the previous general election. Never thinking that some of them might have died between that time and the present or might have moved out of the county. Why didn't they provide that notice be given by publishing it in the newspaper? That would be less expensive and it would have been read by every body and then the printers' affidavit would be on file to show that it was printed.

Then it says, the election shall be held for not less than forty nor more than sixty days, as the county court shall determine. What a ridiculous absurdity to require that an election be held not less than forty days nor more than sixty days! But that's the law and the court can't change it. Now what does it mean? Why does it not say that the election shall be held for one day? The unfortunate part of that is this, that question has not been settled by the Supreme Court yet. Another important question is, will it be possible to sell bonds before that question is settled. Bond holders would not buy the bonds until the question of the organization of the port had been settled and all the questions raised unless they should happen to get some incompetent attorney, who would give an opinion, that the organization was according to law. But people who have five hundred thousand dollars to invest, do not generally employ that class of intelligence. The law itself is the foundation for the evils. The very first step which was taken was a mistake. How can it be remedied? Now, that takes time. I did not draw the law and had nothing to do with it and never saw it until after it passed the legislature.

Justice Moore in his opinion recently rendered, says the court has made every effort not to disturb the election and are unable to find any way under the law, as an apology for so doing. Now just think of it. When you stop and think that every judge on the bench was in favor of up holding the port election and the law upon which it is founded was so defective that they cannot find any way by which it can be done, that certainly ought to satisfy any one that the foundation of the port is the root of the evil.

Another question in the case and upon which the recent case was decided, was the question of notice. That was the one question which I believed the court could not avoid and when Judge Burnett decided the other case in favor of the Port, he said this question of notice would have to be tried in a quo warranto proceeding. He therefore showed a reluctance to pass upon it and tried to avoid it if possible. But the bond buyers would not purchase until that question was settled and you can very readily see the wisdom for their so doing, and there may be a great many more discovered, upon a careful investigation by competent parties.

I was satisfied from the start that when that question of notice came before the court squarely, they could not dodge it; there was no escape, and my predictions have been correct.

I tried to get the court to pass upon the second question in this last suit, as to the holding of the election for forty or sixty days and that has not been done and will it be possible to sell the bonds until it is passed upon?

In testing a law of this kind, where the object is to get it settled finally in the courts, every question regarding its validity which can be discovered, should be passed upon and then there would be no difficulty with the bond holders' attorney giving an opinion that the port was properly organized.

The government project provides for a channel eighteen feet deep at low tide and two hundred feet wide from the bar to the head of navigation and by reason of the work done under that appropriation by U. S. Engineer Leefe with the Dredge Oregon, the coming and going of the Bessie Dollar, with her immense cargo has been accomplished and no portion of any bond issue has been used to bring these results about. Therefore there has been no calamity by reason of the delay: at the same time a number of improvements can be made to still widen the harbor and the enlargement of the tidal area and then some portion can be usefully expended in the improvements of inlets, although there is no question but the law is defective in saying or going into detail as to what the Commission can do with the money, and what shall be considered a harbor improvement and it may be possible that a port commission will be hampered from time to time by litigation where some improvement is undertaken, in some section, which is unsatisfactory in another.

The Remedy: — Looking this condition squarely in the face, what is best to be done? Shall we proceed again in attempting to organize a port of Coos Bay under the present law as it stands, and endeavor by cautiousness and careful efforts to avoid the illegalities which occurred in the former attempt to organize, or shall we wait for the legislature to convene next January and get the law amended, not only in the particulars mentioned, but after investigation by some competent persons who will look over the situation and look into the future and go into the same details as you would in your private business or when drawing up a contract which has to be kept in force for years? If we make a stagger at it again under the law as now created, will the port be able to sell the bonds, and would it not be wise to limit the indebtedness which the Port Commissioners can incur, without a vote of the people, or do you believe it will be wise to permit the law to remain as it is so that the Commission, without consulting the people, can bond the district to the extent of ten per cent of its assessed valuation, something like nearly a million dollars at the present time? The situation is a serious one. My idea would be to proceed to reorganize under the law at once and with the understanding that the new commissioners would be pledged to incur a liability of not more than $300,000, which we already voted upon, without they were requested to do so by a majority vote at an election held for that purpose. Then it would be up to the bond buyers to determine whether or not they consider the organization good without any further trips to the Supreme Court.

Then if the sale of the bonds becomes impossible under the present law, an entirely new law can be enacted at the next legislature, or the present law can be amended so as to make it practicable, seems about the only thing left to do.

Present Pressing Necessitites

The decision seems to have brought about chaos and confusion in the minds of many and a solution of the question of how to cope with the present pressing necessities appears to predominate, but as Dr. McCormac has called a meeting of the Chamber of Commerce for this evening, perhaps it will not be out of place for me to suggest what I believe is the solution.

The Supreme Court has already held that the port of Coos Bay is a defacto corporation and the present decision will not be in force until the mandate from the Supreme Court is filed with the County Clerk. It is customary to send it to the attorney for the plaintiff, who urged the case in the Supreme Court and I presume in due time it will be sent to me. Then I believe the filing can be withheld any reasonable time so that the present commissioners will have plenty of time to close up the affairs and provide for the Dredge Oregon doing whatever may be necessary, and possibily long enough so that the Port Election can be held and the people have a chance to say who they want for commissioners.

Then persons who have already paid their port tax can have no complaint, as it was done voluntarily and those who have not yet paid can have it in their descretion to pay the three mills and aid in the work and I believe when the situation is understood there will be but few who will refuse to make the payment.

The C. A. Smith concerns and other heavy tax payers have already paid the port tax, after being advised that the decision would probably be as it is and they have no desire to recall it and there are possibly many others who will follow in their foot steps.

Another means of delay would be to file a petition for re-hearing, but that would appear to be an insult to intelligence.

When five honest, capable, conscientious gentlemen, who comprise the Supreme bench, unanimously say: "A diligent effort has been made to find, if possible, some way to escape the conclusion which has been forced upon us," would it not be an insult to them, as well as to one's own intelligence, to ask that the decision containing these words be re-heard, but that is not for me to say, it is with the Commissioners to determine. And again, the thought that the present members of the Port Commission should be held personally to account for the moneys expended, should not have a thought with any one. I have never investigated the law on the matter and I do not propose to.

I feel absolutely friendly to every member of the Commission and headed the petition for the nomination of L. J. Simpson and C. S. Winsor at the last election and I surely would not want any financial injury done them. Then there is Brother Henry, whom I have joshed for forty years. I would not take a shingle off his roof if I could, and then there is Dr. Mingus, who is so energetic in these public affairs that he gets so interested in his work that he gives me a jolt once in a while. I could not feel provoked with him long, if I wanted to. Then there is a whole lot of good in Colonel Grimes and Brother Horton and it's a whole lot of fun in defending myself and pretending that I am on the war-path when they attack me, and last, but not least, there is my old pal Mike, who is even criticized when seen laughing with me on the street, after he has hit me a hard jolt. Do you think that I would say an unkind word about them maliciously? We are all neighbors and I feel entirely friendly to each and every one of them as I do to every body else and it gives me more pleasure to be of service to a neighbor than to say anything unkind of any one, except to offset an attack and then that's only fun and I do not mean everything I say all the time and I am not built on the lines of wanting to wound any body.

But let's quit guying and get down to business. The improvement of Coos Bay is important to all of us. The organization and maintainance of a Port of Coos Bay on conservative business principles is all important to us. Whatever will facilitate navigation and aid in the encouragement of Mr. C. A. Smith's marveleous ability and enterprise which furnish employment to so many, especially at a time when there are so many thousands unemployed and suffering for want of food in other parts of the world, should meet with the most decided efforts and support of every citizen on Coos Bay.

We can profit by the experience we have had and proceed on the lines suggested for progress and prosperity, and so far as I am concerned there is no reason why I cannot help those who wish to be active now as I did before when Dr. Tower, Eugene O'Connell and myself, appointed ourselves a harbor commission and boosted the county, when the mass meetings were only attended by ourselves.

Sure—We want a Port of Coos Bay, organized in a legitimate manner on business principles so that outside capital will invest in the bonds and let the money be spent as to help every legitimate interest on Coos Bay and so that every member of the Port Commission can point to his record as a monument for his children's children to look back to as one who was a substantial help in making Coos Bay one of the finest harbors on the Pacific Coast, where vessels like the Cunarders, White Star boats and the Inman line steamships will ply between European ports, through the Panama Canal, to the haven of safety, "Coos Bay."—God Bless us all.—God bless me, too.

—J. W. BENNETT.