

JUDGE'S FINDINGS IN PAVEMENT CASE.

Technical Error Fatal-- Pavement Not Up to Specifications.

In the Circuit Court of the State of Oregon for Tillamook County: F. R. Beals, A. G. Beals, G. H. Ward, et al, plaintiffs, vs. the Warren Construction Co. defendants.

The above entitled cause having heretofore come regularly on for trial before the above entitled court, J. U. Campbell, a judge of the Circuit Court of the State of Oregon for the 6th Judicial District presiding, he having been duly assigned thereto, and the court having heard the evidence and the argument of counsel for the respective parties and being now fully advised in the premises.

Finds The Following Facts:

I. That the several lots and parcels of land in the amended complaint in this cause described are owned, located and abut on the streets of Tillamook City as in said complaint alleged.

II. That defendant Warren Construction Company is a corporation as in said complaint alleged and the defendant Tillamook City is a municipal corporation as alleged, and the defendant J. R. Harter is and was during the time mentioned in the complaint the mayor of said city, and the defendants M. F. Leach, F. L. Sappington, G. L. Dick, Erwin Harrison and Emmet Bales were during said time and are councilmen of said city and members of and constitute the council thereof, and the defendant P. W. Todd is the Recorder of said city.

III. That by the provisions of the charter of said city, before any street improvement can be undertaken or made by the city or a contract therefor entered into by the city, it is incumbent on the council to give notice to the owners of the lots abutting thereon and adjacent thereto to make such improvement within 30 days, under the supervision of the street commissioner, and if such owners or any of them fail to make such improvement within such 30 days, council is then, and not otherwise, authorized to proceed to make such improvement and assess the cost thereof upon the property.

IV. That before undertaking the improvement or entering into the contract set forth in the said complaint with the defendant Warren Construction Company, the common council of said city did not give such notice or any notice to such property owners to make such improvement and did not afford such property owners or any of them an opportunity to make the improvement.

V. That Ordinance No. 235 of said city, entitled "An Ordinance to amend Sections Numbered 1, 2, 3, 4, 5, 7, 8, 9, 11 and 16 of Article VII. of an Act entitled 'An Act to incorporate the City of Tillamook City, in Tillamook County, State of Oregon, and to Repeal all Acts and parts of Acts in conflict herewith.' Filed in the office of the Secretary of State February 13th, 1893, as originally passed and as amended or attempted to be amended by subsequent Act or Ordinance," was first filed with the Recorder of said city on the 29th day of March, 1912, on which date it was passed by the common council of said city and was approved by the Mayor of said city on the first day of April, 1912, and which said ordinance was submitted to the voters of said city by ordinance No. 240 of said city entitled "An Ordinance providing for the holding of a special election in Tillamook City, Oregon, to be held on the 12th day of April, 1912, for the submission to the legal voters of said city, for their adoption or rejection, Ordinance Number 234, 235 and 236 passed by the common council of said city on the 29th day of March, 1912, and Ordinances Number 237, 238 and 239, passed by the common council of said city on the 29th day of April, 1912, providing thereby for amendments of the Charter of said Tillamook City, and declaring an emergency."

VI. That said Ordinance No. 240 was introduced in and passed said council on the 2nd day of April, 1912, and was approved on the 4th day of April, 1912, by the mayor of said city, and which ordinance last mentioned provided for an election to be held in said city on the 12th day of April, 1912, to vote on said ordinance No. 235 as an amendment to the Charter of said city.

VII. That at the time of the introduction and passage of said Ordinance No. 240 and said Ordinance No. 235 the City of Tillamook had not by ordinance or otherwise or at all provided for the manner of submitting to the voters of said city proposed amendments to the charter thereof, and said council was without power or authority to submit said proposed amendment embodied in said Ordinance No. 235 to the voters of said city at an election held within 60 days subsequent to March 20th 1912.

VIII. That the said defendant Warren Construction Company pretended to enter into the contract alleged and set forth in said complaint with said Tillamook City at the time alleged in said complaint, whereby the said Warren Construction Company undertook, contracted and agreed to furnish the materials and implements and perform the labor necessary for the improvements in said contract specified in accordance with the charter and resolutions of said city and in conformity with the terms, conditions and requirements of the plans and specifications for said improvements.

VIII. That by the terms of said contract the wearing surface was required to be not less than 2 inches in thickness in the streets paved with standard bitulithic pavement, while the other streets, or those paved with the light bitulithic, were required to have a wearing surface not less than 1 1/2 inches in thickness.

IX. That by the terms of the contract and specifications it was required that the wearing surface should be composed of carefully selected sound, hard, crushed stone, varying from 1 1/2 inches to 1-10 inch in diameter, mixed with bitumen in the manner provided in the specifications and contract. That such stones and bitumen were required to be assembled and made into one mixture.

X. That the Court personally examined and inspected the pavement and witnessed the taking of samples therefrom at various places and from such examination and inspection and the testimony the court finds that the said Construction Company did not lay said pavement of the required thickness but in many places throughout the entire improvement where standard bitulithic, or pavement having 2 inches of wearing surface was required, a wearing surface of substantially less than 2 inches was laid, and where 1 1/2 inches in thickness of wearing surface was required a wearing surface of substantially less than 1 1/2 inches was laid, and throughout the said improvement the wearing surface or the mixture thereof was not made up in one mixture but on the contrary was made into two mixtures and laid separately, the first mixture being composed of a greater portion of large stone than was provided by the contract and specifications, while the second mixture or upper portion of the wearing surface, ranging from 1/2 to 1 inch in thickness, was composed entirely of natural sand and rock dust or crushed rock of the fineness of sand, being 50 per cent of natural sand and 50 per cent of rock dust or crushed rock of the fineness of sand mixed with bitumen or bituminous cement.

XI. That by the terms of said contract (Continued on Last Page.) the said contractor was required to grade the street to the subgrade as given by the city Engineer and to take out and remove all soft and spongy places and refill the same with proper material carefully rammed or rolled so as to make such filling compact and solid, and then the roadway was required to be rolled until thoroughly compacted and solid. That said contractor did not remove all the soft and spongy places or refill the same with any material, but certain portions of the roadway was soft and spongy and the same was left by the contractor in that condition and no attempt was made to remove the same or to replace the same with proper material, and the roadway was not rolled so as to make it compact and solid, but the said surface composed of natural and artificial sand as above stated was placed on top of said pavement for the purpose of supplying a surface which would be pliable and respond and conform to the undulations of the subgrade or foundation under heavy traffic and prevent the same from cracking and disclosing the imperfect workmanship. And the court finds that in the respects herein mentioned there was a substantial and wilful departure from and violation of the terms of the said contract by the said Warren Construction Company, the contractor, whereby the pavement was rendered less valuable, its durability lessened, and the rights of the property owners prejudiced.

XII. That at the time of the commencement of this suit the said Construction Company, was claiming that it had practically finished and completed said contract and improvement and was demanding acceptance thereof by the said City, and the common council of said city was about to accept such improvement completed in the manner aforesaid and assess the cost thereof upon the property of the plaintiffs in the complaint described, and would have done so had this suit not been instituted.

XIII. That the plaintiffs have a common interest in the relief sought in this suit and said plaintiffs have not nor has any of them been guilty of any action or omission which should, in equity, estop them or any of them from demanding such relief.

Conclusions of Law. As conclusions of law the court finds: I. That the attempted amendment of the charter of the said City of Tillamook was and is void and of no force or effect.

II. That the said Construction Company did not substantially comply with its contract and the improvement made is not a substantial compliance with or performance of such contract, and the plaintiffs are entitled to a perpetual injunction and restraining order restraining and prohibiting the common council of the said city from assessing any part of the cost of said street improvements against the property of the plaintiffs in the complaint described.

(Signed) J. U. Campbell, Judge.

DECREE. Now at this time came the plaintiffs in the above entitled cause, by their attorneys Geo. R. Bagley, E.B. Tongue, Geo. G. Bingham, and Fulton & Bowerman, and came the defendant Warren Construction Company, by Dan J. Malarky and R. W. Montague, its attorneys, and came the other defendants answering herein by their attorneys Messrs John M. Gearin and H. T. Botts, and thereupon counsel for plaintiffs moved the Court for a decree in accord with the Findings of Fact and Conclusions of Law heretofore made by the court and filed with the Clerk of this Court, and said motion is allowed by the Court.

IT IS THEREFORE ADJUDGED AND DECREED by the Court that the proceedings taken, had and done by the Common Council of the City of Tillamook in the matter of the improvement of the streets of said city in the amended complaint of the plaintiffs in this suit described and set forth were taken and had by said Common Council without jurisdiction or authority, and the said defendant the Warren Construction Company failed and neglected to perform and comply with the terms of its contract in making the improvements in the streets in said amended complaint described, and the said proceedings were and are void and the said Warren Construction Company is not entitled to have and the said city or the Common Council thereof is not entitled to assess any part of the costs or expenses of such improvements or any thereof against the property of the plaintiffs in said amended complaint described or any thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendant City of Tillamook and defendants J. R. Harter as Mayor and M. F. Leach, F. L. Sappington, G. L. Dick, Erwin Harrison and Emmet Bales, as Councilmen of said City, and each of them and their successors in office and the successor of each of them in office, be and they are hereby commanded and required to refrain and desist and are perpetually restrained and enjoined from accepting the alleged street improvements or any thereof made by the defendant Warren Construction Co. in the City of Tillamook aforesaid and in the amended complaint in this suit described and set forth and from adopting or passing any resolution whatever assessing upon the property of the plaintiffs in said complaint described or any thereof any sum or sums of money or amount what ever for or because of or to pay the expense of any of said street improvements constructed adjacent to or abutting upon the property of the plaintiffs in said complaint described or any thereof, and that the said defendant P. W. Todd as Recorder of said city of Tillamook and his successors in office be and they are commanded to refrain from and they are hereby perpetually restrained and enjoined from entering in the docket of city liens in the City of Tillamook any assessment whatever upon the property of the plaintiffs in said complaint described or any thereof for or because of the expense or any expense or costs of said street improvements or any thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs have and recover of and from the defendants in this cause their costs and disbursements herein taxed at \$_____, and that execution issue therefor. DONE AND DATED this ____ day of December, 1913. J. U. Campbell, Judge.

Wants Paved Roads.


CORVALLIS, Ore., Dec. 18.—Protesting against the further expenditure of money for other than paved roads, A. J. Johnson, a local banker, at a Commercial Club meeting on good roads last night, outlined a plan for paving 106 miles of roadway radiating from Corvallis into the main sections of Benton County.

It was shown that in five years \$300,000 has been expended on road improvement in this county and that only gravel roads in medium condition is the result. A change of plan, involving the construction of paved roads by the unit system was demanded and endorsed by the meeting. A move to raise a fund by Corvallis business men for the proper improvement of the Linn County east side road from Albany over the new Willamette steel bridge at Corvallis was started. At least a small portion of the present levy by the County Court will be spent to provide a sample of paved road.

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It is somewhat wide of the fact to say that constitutionalists in Mexico now control about two-thirds of the area of the country. Various bands of insurrectionists, outlaws and plain bandits, differing much in degree and purpose, occupy and terrorize enough territory to make that proportion when all added together, but they have not a common purpose nor are they under common leadership. There is no assurance that they would or could work together in the event of the overthrow of the present Federal Government. If the future may be judged by the past we may be sure they would not. When Madero overthrew Diaz, and by the usual military controlled election was chosen president, all the elements of insurrection did not unite with him in giving stability to his government. They will no more unite now. Each leader must be appeased with something worth while in the way of personal aggrandizement.

To Correspondents. CONSTANT READER OF THE HEADLIGHT.—When communications are sent to the office for publication the signatures of the writers must accompany them, not necessarily for publication, but to show good faith, and as your letter does not comply with this requirement, we decline to publish it. Another thing, you make libelous statements about our doctors that it would be difficult for you or the editor to prove. If you are in business, and we believe you are, have you ever entered into a combination with others in your line to keep your charges at the top notch and how much higher are they than in the East?—En.

Sidney E. Henderson, Pres., Surveyor.
John Leland Henderson, Secretary Treas., Attorney-at-Law, Notary Public.

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