

THE JUDGE'S DECISION IN THE DWIGHT INJUNCTION CASE.

G. W. Kiger's Poor Memory Gets a Severe Roasting from the Bench.

Owing to the large amount of interest that was taken in the Dwight injunction suit against Giebisch & Joplin, which was decided in favor of the latter last week, Judge Webster Holmes' opinion is worth reading. As is characteristic with Judge Holmes, he renders his decision right from the bat and does not keep litigants waiting in taking cases under advisement for several months. Following is the court's opinion in the case:

In this suit, in which Mr. Dwight is the plaintiff, he sets out, which the evidence substantiates, that he was the owner of an undivided one-half interest in the property described in the complaint, and upon which this quarry is located,—situated. The evidence shows, and also the pleadings, that Kiger is the owner of the other undivided one-half interest, and that they were tenants in common. The complaint alleges that the defendant Giebisch and Joplin without any right or authority, have been committing waste by cutting and destroying the timber growing upon that portion of the land which is an undivided state between Kiger and Dwight, and they were wrongfully and unlawfully removing stones from this quarry. And they also claim they are destroying the soil, and removing the soil and earth, and converting it into their own use, and they allege the value of the different things and ask for an injunction.

The complaint states a good cause of suit as far as that is concerned. The defendants by way of answer, so far as Kiger is concerned, undertake to set out a contract with Kiger, and they set out the alleged proposition submitted to the United States Engineers, to the Government, for the jetty work with reference to the stone in this quarry. And it is claimed by the defendants that that was really the basis or moving cause in their minds for selecting this site, provided the stone proved to be of the proper quality and suited for the jetty purposes, and it is also claimed further in the answer that they had a contract with Kiger to take this at a specific price, to take the stone, and they were to clear away the trees, and soil on the premises at their own expense, and that Kiger was to have a stipulated price, by the government weight, for the stone removed, and this offer describes in a portion of the land set forth in the complaint different from that where the quarry is actually situated, and it is claimed that Kiger put them into possession of the land described in the offer. The answer has been amended in one part to correspond with the proof that they were not put into possession of the land described in the offer, but upon the portion where the quarry is actually located, but the answer does not set forth there was any mistake upon the part of Kiger or themselves in this offer, nor are there any allegations in the answer by amendment, or otherwise, that they had simply and purely an oral contract, which would take it out of the Statute of Frauds, and make much a contract by that conduct and act, if it took place, as could be specifically enforced. The evidence here I think is sufficient to support that theory. I think there is evidence here that would bind Kiger. There has been such a partial performance, but this Court is powerless to specifically enforce it because the answer is not drawn upon that theory,—so we get back to the first analysis of the case.

Council for plaintiff have apparently, (at least, it so impressed me) taken the position here that the burden is entirely shifted upon these defendants and if the defendants have not made out sufficient showing that they had such an arrangement with Kiger that could be specifically enforced, the plaintiff must necessarily recover, but that cannot be true, because the plaintiff must make out his case as alleged. So the situation here, purely and simple, is this. This plaintiff is asking for extraordinary relief. An injunction is never asked excepting in extraordinary cases, or should not be at least, and the rule can be no better than stated by Spelling on Extraordinary Remedies, Vol. 1, Second Edition, page 238, and this applies to cotenants, this rule, (1) in the absence of fraud and where there is no privity between the parties, the Court will not interfere in the instance of a person so claiming, to grant a receiver against the parties in possession, (this rule does not apply; (2) nor will it interfere in a like instance to restrain waste except malicious or destructive waste, for example, by pulling down buildings, stripping the estate of its timber, or other like acts, which no owner could do, which would destroy the property before they could be arrested at law. (3) But flagrant acts of this character would, at the present day, be restrained and that before judgment of law, and notwithstanding the plaintiff be out of possession and his title taken on oath by the defendant.

This rule applies to these parties, as well as to strangers. It is alleged here, and it is necessary for the plaintiff to prove that the defendants were there without any right or authority, in other words, they were trespassers. One cotenant cannot trespass against his cotenant, because each has a right to possession of the whole. One cotenant can commit waste, and under certain circumstances an injunction would lie, and the test is whether it is destroying the free-hold or rendering it less valuable. Otherwise, an action at law will suffice.

Now the only waste here, which it is claimed, there is,—the question is, who is committing it? As I remarked, before the plaintiff can recover he must prove these parties had no right there at all. In my judgment there has been sufficient transaction be-

tween Kiger and these other defendants to take this out of the Statute of Frauds and Kiger is bound, and they have a right through Kiger, so far as he is concerned, to do what they are doing, and have been doing, and Kiger has not conveyed the land, so they would not, the defendants would not stand in the relation of tenants in common with Dwight and Kiger. Kiger has simply given them a right or license or permission to take this stone from the quarry. There has been no attempt to convey anything, orally or otherwise. Nothing more than this bare rock. So, if anyone is committing waste there, Kiger is committing it, and Dwight should seek to restrain him, if there is a destroying of the free-hold, but instead, of that, Dwight and Kiger are going hand in hand in this litigation so far as the pleadings show. While they evidence does not show or disclose they were acting together, in the sense that they were partners, this matter being a matter of public interest, they must have known something would be done near those premises and Dwight knew they were prospecting there, and knew they were investing large sums of money, and by the least degree of diligence or inquiry could have ascertained by what right, and could have restrained Kiger from allowing them to go ahead, before they spent large sums of money, which he should have done as a matter of good conduct and fair dealing. And Kiger is the man for Dwight to get after in this business; and it makes no difference whether Kiger is getting too small an amount for this rock or not, so far as Dwight is concerned, if it is worth ten cents a ton to Dwight, his portion of it, he can make Kiger pay that if he can prove it, by proper proceedings, and the Statute gives him the right to treble the amount of whatever the verdict might be, if he does not see fit to ratify what Kiger has done.

So in view of these matters, I disagree with council on both sides as to the law applicable to this case, in this far, at least, as to the application of the rule of co-tenancy, as between the defendants and Dwight and Kiger, there is no such relation in my judgment, existing between the defendants and Dwight and Kiger, so the rules would not apply which have been cited.

And I think too, that Dwight, as a matter of law, while it may not be necessary to pass upon it at this time, I am simply expressing my views, I think the doctrine of estoppel would apply to him, so far as these defendants are concerned. While it has been said by both Kiger and Dwight that each of them knew nothing of what the other was doing in this transaction, there is evidence here that when the contract was taken that was submitted in evidence, the unsigned contract, to Mr. Kiger in his office by Mr. Woodward, that he said his partner was going out to Portland and would take it up with Giebisch and Joplin there. Mr. Kiger says he did not say any such thing, but without implying that Mr. Kiger would deliberately falsify his memory was the very worst I have ever encountered, as bad anyway,—at least he seemed to have a very poor memory of what occurred, on the witness stand yesterday, remarkably so. On the other hand, Mr. Woodward seemed to have a very clear recollection of what transpired, and whether he said that or not, the evidence shows that Mr. Dwight did take this matter up immediately afterward in Portland, personally, and followed it up by a letter. So that suggests they did know something about what was going on, and we can't get away from it there is conduct that speaks more forcibly sometimes, than words. And it is the duty of every man, when he finds property is being disturbed or interfered with, especially where people are laying out large expenditures,—to take some steps—it is nothing more than a matter of right and fair dealing to try and prevent it in its inception. A man must always use some diligence to try and protect his own property.

So to sum this case up as it now stands in the mind of the Court, the plaintiff has failed to prove such facts as would entitle him to the relief prayed for in the complaint, and the defendant having failed to come into Court in answer, declaring upon the contract as the evidence discloses has been inaugurated and is now in existence between the defendants Giebisch and Joplin, and Kiger, the only decree to be entered is one dismissing the suit and that will be the decree of the Court,—defendants to recover costs and disbursements.

A Common Bond.

"What Makes a Town?" Is it wealth evidenced by fine homes and splendid store buildings? These may attest to the ability and thrift of certain people, but they offer no great inducements to commercial and moral progress. Is it the spirit of good order and law observance? That is a factor only. The sleepest old hamlets that dot the map have this spirit in abundance. Is it the schools and Churches? May their number ever increase, but they don't make a town,—they only culture it. Is it the geographical location, the character of the country surrounding, the shipping facilities, the natural advantages? None of these are essentials.

"What is it that makes a town?" Just one thing—the unity of the people, the existence of a common bond which causes business and social enemies to put aside all differences when it comes to boosting a town. No town ever made real progress on the way to substantial success without the get-together spirit unanimously adopted. It has rejuvenated old hulks of towns that were yawning their way into endless sleep. It has infused new life and made thriving cities out of parasitic villages. Natural advantages

count for much, and prosperity cannot be built on shifting sand, but any town with half a chance can be made to grow and thrive when its citizens join with one accord in the boosting program.—Polk County Observer.

GRANGERS DISCUSS BUDGET.

Have All Day and All Night Session.

The Tillamook County Pomona Grange met at Nehalem on Dec. 3rd, about 90 members being present. A class of 29 new members were initiated and new officers elected and installed.

Following is the list of officers for the next two years: Master J. H. Dunstan; Overseer, Fannie Smith; Lecturer, Mrs. M. N. Bays; Stewart, L. J. Rodberg; Asst. Stewart, R. C. Magarell; Chaplain, T. A. Porter; Treasurer, Wm. Maxwell; Secretary, R. C. Jones; Gate Keeper, Emily Johnson; Ceres, Millie Sappington; Pomona, Alma Redberg; Flora, Mrs. Geo. Loerpable, and R. C. Magarell.

The proposed County Budget was then taken up item by item and discussed at some length. The action of the grange on those items was as follows:—

- Clerk's office—Recommended that the second deputies salary be cut from \$780 to \$600.
- Sheriff's office—Approved as read.
- Treasurer's office—Recommend reducing from \$4000 to \$3200.
- County assessor—Recommend cutting out one deputy or a reduction of \$500.
- Surveyor's office—Approved as read.
- County Court—Approved as read.
- Circuit Court—Approved as read.
- Justice Court—Approved as read.
- Court House—Approved as read.
- Coroner—Approved as read.
- School Superintendent—Passed over without recommendation or approval.
- Health, Widows, Poor, veterinary, Indemnity, Sealer of Weights and Measures, Auditing and County Fair.—Approved as read.
- School Fund—Approved as read.
- Printing—Approved as read.
- County Agriculturist—Approved as read. Recommend continuation of office of Sealer of Weights and Measures with it.
- Truant Officer to State Taxes—Approved as read.
- Road estimate.—Approved as read. Resolution adopted.

Whereas, the present road out of Tillamook County via. Dolph and Wilamina contains many steep grades and is also impassable about ten months in the year, there be it

Resolved, that it is the sense of the Tillamook County Pomona Grange that a new county road should be built around Dolph Hill via. Bear camp to connect with Polk and Yamhill Counties thereby eliminating many steep grades; and that we take this matter up with the counties concerned and urge the County Court to do the same; Also that we take it up with the State Legislature and the State Auto Club seeking their cooperation and aid in bringing this about.

The executive committee was also authorized to take steps, with the County Court and State Humane Society, toward having a humane officer for Tillamook County, appointed.

We believe that the Pomona Grange established a record among granges for perseverance in the matter of their business meeting for the meeting was called to order at ten a.m. Dec. 3 and did not adjourn till 5:30 a.m. Dec. 4. A recess was taken at noon to eat and another for the same purpose at night but aside from that the time was filled with business and discussions.

R. C. Jones, Sec.

End of an Old Terror.

The question raised by the submarine, and the ocean mine, touches more than the battle ship. It includes the question whether vast expenditures for the making and placing of great fortification guns on works in harbors need be continued on the present scale or on the larger scale which has been contemplated. In the latest annual report of Brig. Gen. Grozier, chief of the Bureau of Ordnance, the statement is made that the government arsenal at Watervliet has been tested, and have proved the eff-year past in making heavy guns for coast defense work.

Among them are the new style 14-inch guns of greater caliber than those heretofore installed in American defenses, and of a much higher power of propulsion. They will discharge shells weighing 1600 pounds each, with a maximum effective range of a little more than ten miles. At that range projectiles will pierce 11.2 inches of steel armor. The guns have been tested, and have proved the efficiency claimed for them, at the range named and against the resistance indicated. During the time they were being manufactured, twenty-three of the latest type of 12-inch mortars were made and sent to the Panama Canal. Some of the 14-inch guns will also be sent there as well as to the Philippines, for the protection of Manila.

Such assurances are cheering, following so many doleful cries about our unpreparedness, and our utter lack of effort to prepare. Nobody will raise, just yet, and question of the utility of such work for coast defense operations. If coast defense were dependent solely on big guns mounted on fortifications, more arsenals than the one at Watervliet should be kept running day and night for the making of more such guns. If the mass of Americans cannot be

convinced that we need a big army, it is only because they are convinced that coast defenses can be so perfected that a big army never can be landed here to oppose them. They will not be niggardly in appropriation of money for the making of big fortification guns. But if the mine and submarine continue in demonstration of their value of coast defense, what public opinion in the United States will demand will be the making of submarine vessels of the most approved types and in sufficient numbers for distribution along the longest shore lines in the world. There seems left no room for reasonable doubt, although the point is not a very material one, that the British dreadnaught Audacious was sunk by a submarine, and not by a mine. The explosion at the stern of the ship would seem to be conclusive on the point. Fortifications and their heavy guns can never be entirely relegated, as the huge battleship easily may be, and that ere long. The old terror of bombardment of our Atlantic and Pacific ports may soon end.

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Notice of Completed Contract.
Notice is hereby given, that U. G. Jackson, County Surveyor, for Tillamook County, Oregon, has filed in this office his certificate for the completion of the contract of M. M. Mead & Son, by E. J. Claussen, trustee in bankruptcy, which has been done by the Tillamook Bay Construction Co. for the grading of the J. M. Harrison road between Miami bridge and Garibaldi, and any person, firm or corporation having objection to file to the completion of said work, may do so within two weeks from the date of the first publication, Dated this the 10th day of December, 1914.
J. C. Holden
County Clerk.

The jingoes sang that they had the ships, the men and the money, too. Secretary Daniels improperly applies the name to those who merely insist that we ought to have the ships and the men, for emergencies.