

DECISION OF JUDGE BOISE

In the Silverton Injunction Case Favored the Plaintiff

THE DEMURRER TO THE SECOND DEFENSE OF JOHN LICHY, REGARDING TRANSMISSION OF POWER BEYOND WATERSHED OF A STREAM, WAS SUSTAINED.

(From Saturday's Daily.)

The State's report of Judge Boise's decision in the case of the Union Light & Power Company, plaintiff, vs. John Lichy, defendant, published yesterday morning, was incorrect, and the plaintiffs were done an injury. Judge Boise sustained plaintiff's demurrer to the first and third separate answers and defenses of the defendant and overruled the demurrer to the second separate answer and defense. The State's error consisted in giving what purported to be the third point of defense which was incorrect, that involving the question of transmitting power beyond the watershed of a stream, when this was in fact the second point the demurrer to which was overruled. The second answer of the defendant is in part as follows:

"That the plaintiff is seeking to transfer the power generated by Silver Creek beyond the natural watershed of said Silver Creek, to the towns of Mt. Angel and Woodburn, to the injury and damage to the riparian rights of this defendant and other riparian owners along Silver Creek.

"That all the inconvenience and alleged damage and injury claimed by plaintiff is on account of its attempted unlawful and wrongful diversion of the power of Silver Creek beyond the watershed thereof."

Judge Boise, in giving his verbal opinion in the case said:

"I shall now decide the motion to dissolve the temporary injunction and the demurrer to each of the further and separate answers in the suit Union Light & Power Company vs. Lichy. The second separate answer sets up that the use of this water power is being transferred beyond the watershed of Silver Creek. That is the purpose of the second separate defense; that plaintiff had no right to use this power in generating electricity and take it out of the valley of the creek. Where one has a water power he has a right to use it on the property that belongs to him—he is entitled to the use of the power, and I think it would make no difference whether he uses it within the watershed or has it transferred by electricity to some other place, to the place where the water runs into the Willamette. I do not think that makes any difference. He is entitled to the water power to use it to the best profit. The court will sustain the demurrer to that second further and separate answer, and overrule the demurrer as to the other two defenses.

"As to the question of the disposition—I mean the vacating of the injunction. In this case the defendant has a large amount of logs on the upper portion of Silver Creek which he desires to float down to his mill and is building flood dams for that purpose. The Hallock and Sulist case that was decided by the Supreme Court related to the use of the waters of the Rickreall—the question as to the use—there were three dams in that creek—one on the premises of Mrs. Hallock who was plaintiff, who had brought suit to have the dam removed; it was on her place and had been built without her consent, and that was the question which was tried in that case and was as to whether they had a right to use these two upper dams, but that was not discussed in the court below before Judge Hewitt; and that might still be an open question.

"There were two questions involved in that case—one was the right to complete the dam; they claimed the right to build the dam because they had complied with the act of the Legislature which gave them the right to use the Rickreall, and it had been declared by the county court a navigable stream for floating timber and they were justified under the law, and it was contended there on the part of the defendants in that case that they had complied with the law, and it was claimed that the creek was a navigable stream for the purpose of floating logs, and if it was a navigable stream for the purpose of floating logs, building dams something becomes necessary and was incidental to navigation by floating logs and was a profitable use of the creek. The upper portions of the creek even in the highest times would not be able to bring out the timber and they consequently used those dams and are using them now. That is a very important question which will probably have to be determined by the Supreme Court. No cases were cited yesterday out of the depths of the mountains where it would otherwise be unavailable if it was not for these streams.

"That was the view taken by the Supreme Court at first time and I think that is the law. In that case followed the cases in the Eastern states. It is a general rule I think in the United States in the matter of the navigability of these small streams and for the floating of logs and getting the timber out of the mountains. The same rule I would apply I think to Silver Creek. I think that parties owning land on the upper portions of the creek, if it is necessary in order to get timber out, may build dams; they would have a right to do that to that extent. I do not think they would have a right to do what is complained of in the complaint.

do not think they would have a right to build a dam which would endanger the property of the riparian owners below—that is endangering their dams and other property, but I think they might build such dams for the purpose of floating the logs down the creek and that question will probably be more fully developed, and what ought to be done in the case when the testimony is taken and the case is on final hearing.

"It would seem now from what appears in the case and from the proposition made by the plaintiff that at the present time there would be no essential damage to the plaintiffs in this case if the injunction were modified, I think it ought to be modified so that Mr. Lichy may be able, if he can, to get his logs out of the upper portions of Silver Creek in order that he may save his property and be able to operate his mill. The court will modify the injunction and will suspend the action of the injunction until the 1st of September, and at that time I will set the case for hearing and you can at that time take it up and determine the whole thing.

Mr. Carson: "The injunction is not vacated but only suspended."

Court: "I do not dissolve the injunction entirely but I suspend the injunction. The same thing was done in the Rickreall case. Mr. Sulist had a large amount of timber he could not get out and similar permission was given him."

In the second department of the State Circuit Court yesterday Judge Boise heard the closing argument in the suit for a nomenclature and a settlement between Thomas Pomeroy, et al., plaintiffs, vs. F. E. Woodward, et al., defendants, the testimony of which was concluded on Thursday, and took the case under advisement until 10 o'clock a. m. today.

SUMMER SCHOOL CLOSED

PROF. J. J. KRAPS PRESENTED WITH A TOKEN OF HIS PUPILS' ESTEEM.

(From Saturday's Daily.)

As the final examinations for the closing of the summer school, which is conducted by Professor J. J. Kraps in the upper apartments of the First National Bank building, takes place on Monday and yesterday was the closing day of the school year, it was set aside as a holiday by the students and the veteran instructor and devoted to enjoyment of an excellent voluntary program, rendered by the students, and made the occasion for jollification generally.

Following the program Professor Kraps was made the happy recipient of an elegant book cabinet presented by the students of the school, as a manifestation of their gratitude for his patient and able tutelage, and Professor Kraps demonstrated his appreciation of the magnificent gift, significant of his scholars' good will and affection, in a few well chosen remarks of acceptance which caused a great lump to rise in the throats of the donors.

At the conclusion of the festivities in the school rooms the entire school, composed of about fifty young ladies and fifteen young men, marched to the city hall where they took a position on the east steps and a splendid group picture was taken.

THE BIG STATE FAIR

SPOKANE DAIRYMAN WILL BRING HIS STOCK—HE IS AN ENTHUSIAST.

(From Saturday's Daily.)

Letters received from J. L. Smith, manager of the Hazelwood Creamery Company, of Spokane, and who exhibited a large number of fine Jersey and Holstein cattle here at last year's State Fair, are to the effect that he has sold all his Jerseys to T. S. Griffith, of Spokane. Mr. Smith will come to the Fair again this year, and will exhibit his Holstein cattle, his hogs and poultry. Mr. Smith, in concluding his letter, says: "I think you will have a great fair this year."

No time in the history of the Oregon State Fair has there been such a good feeling among the agricultural classes towards the success of the fair as exists at the present time. Every section of the state seems to be taking an interest in the fair and promises to give it their hearty support. There are reasons for this awakening of the people to the support of the fair. One is the management has worked hard and faithfully to make the fair as broad as the state itself. The transportation companies have come to their assistance and made very liberal rates on the exhibits of all kinds. Another is the people are beginning to realize that it is time to let the outside world know of the wonderful resources of our state, and believe that the State Fair is the proper place to meet the fairer class of home-seekers. This will make the fair doubly valuable. It will give those who are looking for homes on the Pacific coast an opportunity to see in a body what our state can produce, and where it is produced, with all traveling all over the state at great expense. It will also give the exhibitors the best possible opportunity of showing his products, whether it be grains, grasses, fruits, vegetables, livestock, minerals or manufactured goods.

REBELS AT BARCELONA.

PORT OF SPAIN, Island of Trinidad, Aug. 6.—News has reached here from Venezuela that Barcelona, in the State of Bermudez is at present being surrounded by revolutionists, estimated to number 200 men under the command of General Palacios. They demand the surrender of Barcelona. The Government soldiers in the town number 200, and it is not believed that they will offer resistance.

"I Stood in a Draught"

with my coat off and caught this wretched cold," says the sufferer. He needed not pay heavy penalty if he followed his act of folly with an act of wisdom. Soak the feet in hot water with Epsom salt. A few teaspoonfuls of Perry Davis' Painkiller in it. Take a teaspoonful of Painkiller in hot sweetened water at bed time and be thankful for a simple and speedy way to break up a cold. There is but one Painkiller, Perry Davis'.

CHICAGO, Ill., Aug. 7.—President Roosevelt will receive the honorary degree of LL. D. from the University of Chicago, during his visit to Chicago in the fall.

WORK OF THE COUNTY COURT

Contract for Two New Bridges Was Awarded Yesterday

THREE INCORPORATED TOWNS IN MARION COUNTY RECEIVE THEIR ANNUAL ROAD TAX PAYMENT—ROAD PETITIONS RECEIVED

(From Saturday's Daily.)

The Marion County Commissioners' Court held a very busy session yesterday, during which a number of petitions for new county roads and other matters of importance were taken up and disposed of.

The contracts for the construction of two new bridges across the Abiqua river and the Pudding river were awarded to J. B. Tillotson, he having submitted a bid offering to construct both bridges for the sum of \$1,400 and to construct the approaches thereto at the rate of \$140 per foot. Six bids were submitted in answer to an advertisement and were opened by the county court yesterday, as follows:

J. B. TILLOTSON.	For both bridges.....\$1400.00
For approaches, per foot.....	1.40
J. E. MCCOY.	For Morley bridge.....\$1450.00
For Lechly bridge.....	\$65.00
For approaches, per foot.....	1.50
L. E. BRALEY.	For Morley bridge.....\$1450.00
For Lechly bridge.....	\$100.00
For approaches, per foot.....	1.50
J. M. ESKIEW.	For Morley bridge.....\$125.00
For Lechly bridge.....	\$30.00
For approaches, per foot.....	1.40
R. M. GILBERT & SON.	For Morley bridge.....\$1452.00
For Lechly bridge.....	\$121.00
C. F. ROYAL & SON.	For Morley bridge.....\$1275.00
For Lechly bridge.....	\$1170.00
For approaches, per foot.....	1.20

It was ordered that the contract be awarded to J. B. Tillotson when that gentleman had furnished a bond in the sum of \$1,500 for the faithful performance of the same. The "Morley" bridge is to be constructed across the Abiqua river, on the Silverton-Scotts Mills road near the John Morley farm and the "Lechly" bridge across the Pudding river, on the Salem-Silverton road, about four miles this side of Silverton, at the location of the Lechly sawmill.

Three incorporated towns in Marion county which under their charters are entitled to receive the amount of money collected on the 1921 tax roll on account of the 1% mill road tax which was levied upon the property within their corporate limits, were allowed a portion of the total amounts due them in proportion to the amount collected. County Clerk J. W. Roland prepared a report upon the matter, designating the towns entitled to the money and specifying the amounts to which each was entitled, and the court, having examined this report and the charters of the respective towns, concluded that Woodburn, Silverton and Stayton were entitled to receive the amounts specified in the clerk's report as being due each of the above towns, to-wit: Woodburn, \$338.56; Silverton, \$605.65, and Stayton, \$717.17, and it appearing to the court that three-fourths of the amounts due had been collected; it was ordered that the county clerk draw warrants in favor of the treasurers of each town, as follows: Woodburn, \$178.92; Silverton, \$302.88, and Stayton, \$358.57.

B. H. Miller, not having qualified as constable of Jefferson district, the county court appointed W. L. Jones to fill the vacancy upon the petition of Justice of the Peace S. T. Johnson.

The petition of County Assessor Chas. Lembeck for an extension of the time for returning the assessment roll for 1922, to the county clerk, from the first Monday in September to the first Monday in October was allowed.

The petition of R. P. Myers, et al, for the establishment of a new road in township 2, south of range 3 west, was allowed and John W. Jorg, Frank Davey and W. J. Culver were appointed assessors to meet with B. B. Herick, Jr., county surveyor, on August 27th, to view out said road and report their findings.

The petition of Henry Miering, et al, for the establishment of a new county road in section 16, township 6 south, range 2 west, was allowed, and Dennis Miering, of Gervais, Alonzo Perkins, of Brooks, and W. J. Culver of Salem were appointed appraisers to meet with the county surveyor, on August 26th, to view out said road and file their report.

The report of County Roadmaster W. J. Culver upon the work of cutting down a hill on the Whitaker-Silver Creek Falls road, showing that the same had been completed and that the appropriation of \$60 had been expended, was accepted and placed on file.

The petition of O. C. Whitney, et al, for the establishment and maintenance of a free ferry across the Willamette river between St. Paul and Newberg, at a point near the farm of H. B. Garin, was continued over to the September term.

In reference to the petition of W. Schmidt for damages aggregating the sum of \$21.50 in the event of the laying out of a new county road in township 3 south, range 3 west, according to the petition of Joseph Etzell, et al, the matter was continued to the September term.

John Hickey was reinstated upon the county pauper list with an allowance of \$5 per month and J. N. Woods was appointed as his disbursing agent.

IN THE SUPREME COURT

A MARION COUNTY CASE DECIDED BY THE COURT YESTERDAY.

In the Supreme Court, yesterday, six cases were decided. They are: Joseph W. LaFollett, respondent, vs. McKinley Mitchell, appellant, appeal from Marion county, Hon. J. W. Hamilton, judge, affirmed. Opinion by Associate Justice R. S. Bean.

This was an action to recover damages for the breach of a contract. Mitchell, in 1918, contracted to purchase LaFollett's potatoes, the contractor agreeing to supply the sacks and pay an agreed price for the crop, delivered at the Willamette river landing. Later Mr. Mitchell desired to change the contract in the matter of delivery, as he wished to take the potatoes from the farm of Mr. LaFollett, and the latter demanded payment before the potatoes were removed. Mitchell declined to make a settlement in that way and demanded the return of a \$50 advance payment and the value of the sacks. LaFollett declined to pay, and Mitchell brought suit, attached the potatoes, which were later sold at 10 cents a bushel and brought suit for damages for breach of contract. In this case LaFollett secured judgment for costs, and the latter brought a damage suit against Mitchell for \$372.15 general damages. The only questions arising on the appeal were that the officer assuming to attach the potatoes had no authority to do so; that his return upon the writ is conclusive in this action, as to the number of bushels attached, and that judgment in a former action is a bar to the present one. The Appellate Court overruled the points made by the appellant, and affirmed the decision of the lower court.

W. H. Goltz, Executor of the estate of Hugh Fields, deceased, appellant, vs. Jane Penland, executrix of the estate of Wm. Penland, deceased, respondent; appeal from Morrow county; Hon. W. R. Ellis, judge; reversed and new trial ordered. Opinion by Associate Justice R. S. Bean.

The action was brought by plaintiff's testator against the defendant, for the recovery of the value of sheep furnished to the defendant's testator by the plaintiff, to be on shares. This value of the sheep, it is alleged, was \$10,306. At the trial, Fields testified as to the value of the sheep, and other witnesses testified as to the value of sheep at the time these were placed in Penland's care, and as alleged converted by him to his use, but the court struck out all this testimony, except that of Fields, and directed a verdict for the defendant, and this appeal was taken. The Appellate court holds that all testimony in the case should have gone to the jury. The case is reversed and a new trial ordered.

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Edgar Poppleton, respondent, vs. George W. Jones and F. G. Adams, appellants; appeal from Yamhill county, Hon. George H. Burnett, judge; affirmed. Opinion by Chief Justice F. A. Moore.

S. Normie, respondent, vs. The O. R. & N. Company, appellant; appeal from Clatsop county, Hon. T. A. McBride, judge; reversed. Opinion by Associate Justice C. E. Wolverton.

John W. Gardner, respondent, vs. D. C. McWilliams, appellant; appeal from Douglas county, Hon. J. W. Hamilton, judge; affirmed. Opinion by Chief Justice F. A. Moore.

W. C. Wilson, et al, appellants, vs. G. W. Wilson, et al, respondents; appeal from Douglas county, Hon. J. W. Hamilton, judge; reversed. Opinion by Chief Justice F. A. Moore.

ATTEMPT TO ROB BANK

UNSUCCESSFUL EFFORT MADE BY BURGLARS IN HOQUIAM ON FRIDAY MORNING.

HOQUIAM, Wash., Aug. 9.—An unsuccessful attempt was made to rob the First National Bank in this city early yesterday morning. The burglars had drilled through the concrete wall in the rear and gained access to the basement. Here they attempted to cut through the floor to gain access to the vault, but unexpectedly ran against the bottom of the big steel safe. Several attempts at drilling through were made until one side of the concrete foundation gave way and the big safe toppled over. This the burglars tried to straighten up by means of a jack-screw, but as the heavy safe had broken half way through the floor they could not move it and in its position they could not gain access to the vault. After many efforts to effect an entrance the burglars gave it up, abandoning the place and leaving a full kit of tools and a jack-screw on the scene. Cashier Adams discovered the attempted robbery in the morning, but kept the matter quiet in hopes of securing some clue to the robbers.

The work must have been going on for several nights, as it would require more than one night to cut through the concrete wall. Authorities believe the robbers to be the same who cracked the safe in the postoffice a few weeks ago.

IN RECORDER'S COURT

BICYCLE THIEF GETS TWENTY-FIVE DAYS—CASE AGAINST BOY DISMISSED.

Charlie Smith, a 14-year-old lad of this city, who was arrested on Saturday evening, charged with assault and battery, committed upon Cleo Kress, the 13-year-old son of T. J. Kress, was given a hearing before City Recorder N. J. Judah yesterday morning, and as not enough evidence was produced to convict, the case was dismissed upon motion of Deputy District Attorney J. H. McNary.

In the same court, A. J. Horner, who was arrested early Sunday morning, caught in the act of stealing a bicycle from the rack in front of the Statesman office, pleaded guilty to the charge at 3 o'clock yesterday afternoon and was fined \$50, with default of which he was committed to the county jail to serve a term of twenty-five days.

BURIED AT HOME.

MANCHESTER, Mass., Aug. 11.—The body of the late United States Senator McMillan, who died Sunday, will be taken to Detroit, Senator McMillan's home. At Detroit funeral services will be held Thursday afternoon which will be public.

HOME FROM MANILA.

WASHINGTON, D. C., Aug. 11.—The transport Maeda has sailed from Manila August 9th for San Francisco, with headquarters, ten companies and 592 enlisted men of the Fifteenth Infantry.

R. D. Holman returned yesterday afternoon having completed the job of installing a 125 horse power boiler for the Albany Wooden Mill Company.

CASTORIA

for Infants and Children.

Castoria is a harmless substitute for Castor Oil, Paregoric, Drops and Soothing Syrup. It is Pleasant. It contains neither Opium, Morphine nor other Narcotic substance. It cures Colic, Wind Colic, It relieves Teething Troubles and cures Constipation. It regulates the Stomach and Bowels, giving healthy and natural sleep. The Children's Panacea—The Mother's Friend.

The Kind You Have Always Bought

Bears the Signature of
Charles H. Fletcher
In Use For Over 30 Years.

EXCURSION TO NEWPORT

Southern Pacific and C. & E. Roads Carry Many Sunday Visitors

party arriving here a little before 2 o'clock Monday morning. The excursion throughout—for an excursion—was a success, and the travelers, in the main, enjoyed the trip very much. Many, of course, found themselves crowded in the cars, but this was on the return trip, and was caused by the delay of the Albany and Eugene visitors until their train had gone and they, therefore, crowded the Salem train. The change in the cars was also an unfortunate mistake, but, beyond causing a change of cars by some of the passengers, caused no trouble. The people going on the excursion enjoyed it all until the return trip was commenced, and as all were more or less wearied with the long day, found the fast end of the trip less pleasant. The excursion was a complete success, due largely to the efforts of Agent W. Merriman, of this city, and Traveling Passenger Agent J. P. Jones, both representing the Southern Pacific, and who accompanied the party, and did everything possible to provide for the comfort of this invasion by the Southern Pacific, and many eager inquiries are already coming in as to the date of the next one from Salem to picturesque Yaquina Bay.

TO THAT MOST POPULAR OF OREGON SUMMER RESORTS—PLEASURES OF AN EXCURSION ONLY SLIGHTLY MIXED WITH DISAPPOINTMENTS

The excursion to Yaquina Bay, from Salem, over the Southern Pacific and C. & E. Railroads was a success, and brought a larger crowd of visitors to that little town than ever before seen there on one day in its history. It is estimated that 1,000 people came in for the day, and all seemed to enjoy the day at the seaside to the full.

The train taking the Salem party was delayed one hour in arriving here, by the large crowd coming from Silverton and Woodburn, the agent at the last named place alone selling 150 tickets. When the train arrived at Salem at 7 a. m. Sunday, a large crowd was at the station, and about 7:30 boarded the cars bound for a day's enjoyment at the seaside. The run to Albany was brief, and as it was found that the accommodations were taxed to the utmost, more cars were taken on there, and all provided with seats. The Salem Military Band occupied the observation car, and throughout the trip, the lively airs, for which this musical aggregation was responsible, floated out upon the soft breezes, enjoyed alike by the excursionists and the public along the road.

At Corvallis a couple of coaches of West Side excursionists were attached to the train, a second engine hitched on, and the run to the summit was made in good time, the excursionists, many of whom had never seen that portion of a day's enjoyment at the seaside. The run to Albany was brief, and as it was found that the accommodations were taxed to the utmost, more cars were taken on there, and all provided with seats. The Salem Military Band occupied the observation car, and throughout the trip, the lively airs, for which this musical aggregation was responsible, floated out upon the soft breezes, enjoyed alike by the excursionists and the public along the road.

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Newport was full. Sixteen hundred excursionists, added to the regular summer colony filled the town, and on every side they found familiar faces in the Salem contingent predominating in that town. The afternoon was spent in visiting the beaches, and seeing the sights. Unfortunately a fog overhung the sea, and the surf-bathing for the day was not as good as usual at this time of the year, but many took a dip in the Pacific and all spent a portion of the afternoon on the beach.

The first train left Yaquina for Albany at 6 p. m. and it was announced that the Albany excursion should go out first. A fair sized crowd crowded the bay, and when the train had gone, the steamer Richardson returned for the second contingent. It was after 10 o'clock before the big crowd was stowed away on the steamer and the barge attached—a writhing though weary lot of humanity, and the trip across the bay consumed nearly an hour. Arrived at Yaquina, a scramble for seats ensued. Unfortunately, by some mistake, the first train going out had taken the S. P. coaches that carried in the Salem, Woodburn and Silverton contingents, and these people were compelled to occupy the cars left instead. Another difficulty was caused by the fact that several hundred excursionists remained in Yaquina with the Salem train, and the result was a perfect jam—every car being crowded beyond its capacity, with the exception of the observation car (with open windows and no lights) in which a few spooning couples made the return trip, but which was found too cold for many people who preferred rather to make the trip standing in the day coaches. The train was heavy and the trip was not made on too fast a schedule, but Corvallis was reached at midnight, and here some of the Salem people changed to other coaches, as the two West Side cars occupied by them, were cut off. At Albany the Southern Pacific coaches stood in waiting for the Salem people, and all were soon aboard and the run to Salem made in a short time, the

FINE CONCERT TONIGHT

WILL BE GIVEN AT EASTWOOD PARK—MOVING PICTURES AND BEST OF MUSIC.

The first open-air concert of the season by the Beechhammer orchestra and band in Eastwood Park will be given tonight, and a splendid program has been arranged for the occasion. The concert will open promptly at 8 o'clock and admission will be free to all who play fare for the round trip on the street car, while others will be asked to pay only 10 cents at the gate.

Among the attractions will be the moving pictures, by the latest make Edison machine, and the following excellent musical numbers: March—Hofmann, W. Paris Chambers Overture—"Crown of Diamonds".....E. Meyer March—Independence.....J. B. Hall Cornet Solo—Surf Police. Beechhammer Prof. Opfinger.

MALFEASANCE CHARGED

DENVER, Colo., Aug. 2.—Assistant District Attorney George A. Smith has filed an information, charging Thomas Phillips, Fred W. Watts, Frank J. Bishop, H. Brown Cannon, and Charles A. Berget, the county commissioners of Arapahoe county, with malfeasance in office and failure to perform their duties in connection with the payment for printing and supplies, which are declared to be exorbitant.

Stone's Healed Drops cure Hay fever.