THE CAPITAL JOURNAL

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FULL LEASED WIRE TELEGRAPH REPORT

COMPLAINT THAT WE ARE A LITTLE SLOW.

At the Board of Trade luncheon, given E. P. McCornack upon his return, that gentleman gaveutterance to some criticisms.

He said, in substance, "How Slow We Are, How Slow We Are," to the tune of "How Dry I Am, How Dry I Am."

He deplores the fact that no progress has been made in good roads legislation since he left for his trip.

He expresses regret that nothing has been done to get public ownership of water since he left for his trip.

He deplores that while the people put up the money for a library site, nothing has been accomplished in that matter.

But in spite of all this Salem has made some progress, and is today the most promising city in the interior of the state.

It does a community good at times to jar it hard with a little cold, frozen truth.

CREATE A SPECIAL PARK FUND.

The Capital Journal has a suggestion to the gentlemen of the city council.

The city council seems to be composed mostly of men who are progressive, and want to see the city go ahead.

Now we all know this city in the future will need some public parks, and there is even talk of playgrounds for the children.

Now there are a number of special lines of business that could stand a higher license tax, and that would create a park fund.

The editor of this paper served as alderman for the short period of one year, and in that time he found one way to get money.

He got a bill through which made the banks city depositories and they pay two per cent on daily balances, a nice little income to the city.

There are many ways to get revenues on these lines, and there are business men who could create a park fund in this way.

Come, gentlemen, rack your brains a little, that the pipe flowing into the cistern is bigger than the one flowing out.

SUPREME COURT PASSES UPON TREASURE TROVE

AFFIRMS DECISION GIVING OWNERSHIP OF MONEY FOUND IN WAREHOUSE TO PARTY FINDING IT AGAINST ALL BUT THE TRUE OWNER.

Roberson vs. Ellis, Columbia County.

R. H. Roberson, respondent v. Mike Ellis, appellant. Appeal from the circuit court for Columbia county. Hon. J. U. Campbell judge. Argued and submitted February 24, 1911. Dan. J. Malarky and E. B. Seabrook, for appellant. W. H. Powell, for respondent. Burnett J. Affirmed.

In this case the plaintiff alleges "that on or about the 14th of May, 1907, while the plaintiff was engaged in removing goods, merchandise and old rubbish from a certain old warehouse in Rainier, Oregon, he discovered and found in said warehouse 22 gold coins of money of the coinage of the United States of America of the value of $10 each, which money had been lost prior hereto; that the owner and loser of said money prior to the date of the finding by plaintiff, was at said date of finding, at all times prior thereto and at all times since has been unknown to the plaintiff and all other persons whomsoever; that the plaintiff was and is the finder and discoverer of said money, and he is now and ever since the date of finding aforesaid has been the owner thereof as such finder and discoverer, and entitled to its immediate possession; that on the same day of finding of said money aforesaid the defendant took and received from plaintiff 21 of said gold coins of money of the value of $210 upon the express understanding and agreement and not otherwise that defendant would keep it for plaintiff until called for by him, unless the loser and original and true owner thereof should before such call be found and claim said money; that the said loser and original or true owner of said money has never at any time been found or known by either the plaintiff or defendant or any other person or persons whatsoever." He further alleges in substance a demand upon the defendant for the return and repayment of the money, the defendant's refusal and the defendant's continued wrongful and unlawful detention of the money from the plaintiff in the sum of $210.

The defendant denies the finding or loss of the money; denies that the owner was unknown; that the plaintiff is the finder, discoverer or owner or entitled to the possession of the money and denies that he agreed to keep the money for the plaintiff. For affirmative defense he states that prior to the alleged finding one Tom Ellis was the owner and in the actual possession of the mony in dispute, "and for the purpose of safekeeping and preserving the same, deposited and concealed the same in the warehouse of this defendant at Rainier, Oregon, to which warehouse no one other than said Tom Ellis and this defendant had access. That a short time prior to May 14, 1907, the said Tom Ellis departed from Rainier, and Columbia County, Oregon on a visit and before doing so appointed and named this defendant as his agent and representative to care for and have the custody and control of all his property in Columbia County, Oregon. That during the absence from Rainier of said Ellis, this defendant desiring to remove from said warehouse certain goods, wares and merchandise he had on storage there, hired and employed the plaintiff to remove the same gave plaintiff access to said warehouse for that purpose. That during said employment the plaintiff took from its place of deposit in said warehouse the said gold coins and delivered 21 thereof to defendant. That at said time defendant did not know who was the owner thereof, but, as the owner of the warehouse where said coins had been deposited and left, defendant retained the said coins for the benefit of the owner thereof. That thereafter upon the return of said Tom Ellis to Rainier, defendant discovered and learned that he, the said Tom Ellis, was the owner of said coins and defendant paid and delivered the same to said Tom Ellis, who has ever since retained the same."

The reply denies the new matter in the answer. As the result of a jury trial there was a verdict and judgment for plaintiff for the full amount claimed, from which judgment the defendant appeals.

Burnett, J.: The first assignment of error relied upon by the defendant is based upon the ruling of the court in admitting the testimony of the plaintiff about a conversation which he claimed he had with Tom Ellis, in substance as follows: After the return of Tom Ellis from a trip away from home the witness asked him if he had ever lost any money, and he said that he had not. Witness then asked him if he had ever put any money away. He said he had not, and asked: "Why" Plaintiff told him he had found some money. Ellis then asked him how much he had found and where. Plaintiff did not state the amount, but said he had found it in the warehouse. Ellis asked him how much he found; five or 10 dollars. Plaintiff answered: "Yes, I found that much all right enough; and he said 'Twenty dollars?' and I said there was $20 all right enough, and that's all I said, and turned and walked away."

It is claimed by the appellant that because he was not present at that conversation it was purely hearsay on that ground was not admissable against him. This contention leaves out of consideration the defense pleaded here, which is, in substance, that the defendant took the money from the plaintiff and retained it for the benefit of the owner, all because the money was found in the defendant's warehouse. The defendant thus assumed to act as the agent or bailee of Tom Ellis, whom he claims to have been the owner of the money. So far as the conversation with Tom Ellis as detailed by the witness goes, it tends to show an admission by Tom Ellis that he was not the owner of the money in question. If Tom Ellis was the principal and the defendant his agent for the purpose of holding the money for the account of Tom Ellis, (which is the substance of the affirmative defense) the admission of the principal would certainly bind the agent and the doctrine of hearsay would not apply. The only objection that can be urged against the admission of this evidence is that it was properly rebuttal testimony which should be heard only in case the defendant entered upon his defense. This objection, however, involves only the order of proof, which is within the discretion of the court and in the substance of an abuse of discretion this court will not disturb the ruling of the court below.

The appellant further complains that the court instructed the jury about abandoned property as well as about lost property and he contends that because the complaint alleges that the money was lost the jury is precluded from the consideration of abandoned property. However, it must be remembered that the gist of this action is in trover and to recover damages for the detention of the money in question in breach of the contract of bailment between the parties. To sustain the action it was incumbent upon the plaintiff to allege and prove some property in the money. In support of the allegation that he was the owner of the coin he would be at liberty to prove either a general property or a special property within the meaning of the rule laid down in Reinstein v. Roberts, 34 Or. 87. In that case it was held that under an allegation of general ownership the plaintiff was entitled to show that he had a chattel mortgage upon the property in question, the condition of which was broken in that the debt for which it was security was overdue and unpaid. The rule is also laid down in general terms in Weeks v. Hackett 19 L. R. A. (NS) 1201, 71 Atl. 858, 104 Me. 267. The history of how the plaintiff came to be the owner of the money is evidential only, or a matter of testimony, the allegations concerning which might have been stricken out as redundant or as pleading evidence. In this action it cannot concern the defendant whether the plaintiff proved a qualified property by means of the rules relating to treasure trove or lost property, which the modern authorities make practically synonymous, or whether he makes out an absolute ownership through the discovery of abandoned property. If the property is purposely abandoned by the original owner thereof, it is restored to the common stock and afterwards becomes the property of the one who first discovers and takes it into his possession. If it is really lost property which has become separated from the possession of the true owner without his knowledge or if it is treasure trove where money is secreted and found by another it becomes the property of the finder as against everyone except the true owner. For the purpose of this case the result would be the same whether the plaintiff proved his allegation of ownership by one means or the other. There are circumstances in the case from which the jury would be authorized to conclude that the property had been abandoned. The defendant alleges that he and his brother were the ony ones who had access to the warehouse in question and there is testimony tending to show that both disclaimed any interest in the money in question. There is other testimony tending to show that many people stored furniture and household goods in the warehouse and that roving steamboat hands and fishermen had access to it. The jury have concluded that some of these transient people left the money there designedly and having gone away to sea or to some distant part of this or another country had found it inconvenient to return for the money and so had abandoned it. It is possible to abandon property anywhere, even in a warehouse, and it is only when nothing else is shown except the place of finding that attention must be given to the distinction of its being found upon the ground instead of in some place of deposit. Hence there was testimony from which the jury might have concluded that the property was abondoned and so to instruct upon that question was not error.

It is also urged by the appellant that the court below erred in overruling his motion for nonsuit at the close of the plaintiff's case on the ground that the plaintiff had not proved a cause sufficient to be submitted to the jury. The question is, then; was there any evidence in the case which the jury had a right to consider? The defendant contends that the plaintiff was his employe and that his taking possession of the money was in law and effect the defendant's possession. The allegation of the answer is, in substance, that the plaintiff was employed by the defendant to remove from the warehouse certain goods, wares and merchandise which the defendant had on storage there. This was the scope of the employment of the plaintiff. The handling of the property of other people not connected with the defendant was not in the line of the plaintiff's employment and would neither impose responsibility nor confer privilege upon the defendant.

The defendant also contends that the money having been found in the warehouse of which he was the tenant, that fact establishes a qualified property in the defendant as against the plaintiff. In support of this contention he cites sundry cases where customers casually left property in such places as barber shops, stores and banks. McAvoy v. Medina 11 Allen 548; State v. McCann, 19 Mo. 249; Loucks v. Gallogly 23 N. Y. Sup. 126; Lawrence v. State, 1 Humph. 227; Kincaid v. Eaton, 98 Mass. 139. In this class of cases a quasi privity of property arises between the proprietor and his customers who attend at his place of business for the purpose of trade. They are clearly distinguishable from the case in hand. There is some testimony in the case tending to show that both the defendant and his brother for whom he professes to act disclaimed any connection with the money in the first instance. Moreover it was a private place to which the defendant alleges only he and his brother had access. These circumstances are sufficient to take the case to the jury as against the contention of the defendant that the money having been found in his warehouse by his employe would give the defendant at least a qualified property in the money. The case is rather like the case of Hamaker v. Blanchard, 90 Pa. St. 377. In that case a chambermaid found $60 on the parlor floor of the hotel in which she was employed. On reporting it to the landlord he said perhaps the money belonged to a certain guest of the hotel. The maid thereupon deposited the money with the landlord to be given to the guest or returned to her if it was not the property of the guest. It proved to be not the property of the guest and the court sustained the maid in her action to recover the money from the landlord, holding, in substance, that the landlord owed no duty to anyone not his guest and that the place of finding, although in his hotel, conferred no right in his favor as against the chambermaid respecting property lost by a stranger. The testimony is abundant on the question of this money being treasure trove for, in the language of Danielson v. Roberts, 44 Or. 108, "it was money or coin found hidden or secreted in the earth or other private place, the owner being unknown." It seems to be the principle respecting treasure trove, owing to its peculiar nature of being coin, that the present property is in the finder as against everyone but the true owner provided that the true owner is unknown, and it matters not where or when the same is found, so that it is secreted in the earth or other private place. This court laid down this rule in the above case: "The fact that the money was found on the premises of the defendants, or that the plaintiffs were in their service at the time, can in no way affect the plaintiffs' right to possession, or their duty in reference to the lost treasure." The defendant seeks to avoid the effect of that case as applied to the case in hand by the fact that the coin in question there had been in the place where found for a great length of time. This, however, only affects the weight of the testimony concerning the circumstances of the finding and the condition of the money when found. There is testimony in this case that the comb cases in which the money was found were mouldy and covered with dust, indicating that the money had been placed where found within no very recent period. We cannot say as a matter of law how ancient the deposit must be in order to include it within the rule of Danielson v. Roberts or how recent it must be to take it out of the operation of that decision. It is sufficient to say that there is evidence on that question which must be left to the jury as against the motion for nonsuit. The case is distinguished from Ferguson v. Ray, 44 Or. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 1 A. & E. Ann. Cas. 1, 102 Am. St. Rep. 648. That case was concerning gold bearing quartz which had been mined and buried on the property of the landloard who, when nothing else was shown was declared to be entitled to its possession as against his tenant. The quartz was not treasure trove, which alone would serve to distinguish that case from this.

The rulings and instructions of the circuit court were substantially correct. There was evidence in the case sufficient to go to the jury for its decision on the questions of fact involved.

The result is that the judgment of the circuit court must be affirmed.

Notice to Contractors.

Sealed proposals will be received at the office of H. A. Johnson, clerk of school district No. 24, Salem, Oregon, for th erection of an addition to the Salem high school building, according to plans and specifications prepared by F. A. Legg; architect. Bids to close at 7:30 o'clock p. m., March 25, 1911, and then publicly opened. A certified check of 5 per cent of bids, made payable to the order of W. P. Babcock, chairman of the board, must accompany each bid. Plans and specifications may be had of the architect.

The board reserves the right to reject any or all bids.

H. A. JOHNSON, JR.,
3-16-3t-eod Clerk

Everybody loves a lover, because lovers usually afford everybody an excuse for smiling.

The heart unlocked by a key of gold is usually found empty when opened.

THE HELP COLUMNS

"Help Wanted" and "Situations Wanted" are columns of great usefulness to the masses of the people. On account of the wide circulation of the "Journal" its want ads attract greater attention and bring more results than its contemporaries.

It will pay you to remember to place your help ads in the "Journal".