THE CAPITAL JOURNAL

E. HOFER, Editor and Proprietor. R. M. HOFER, Manager

Independent Newspaper Devoted to American Principles and the Progress and Development of All Oregon

Published Every Evening Except Sunday, Salem, Ore.

SUBSCRIPTION RATES:
(Invariably in Advance)

Daily, by Carrier, per year..... $5.00 Per month..... 50c
Daily, by Mail, per year..... 4.00 Per month..... 35c
Weekly, by Mail, per year..... 1.00 Six months..... 50c

FULL LEASED WIRE TELEGRAPH REPORT

OREGON SUPREME COURT DECISIONS

Full Text Published by Courtesy of F. A. Turner, Reporter of the Supreme Court.

Lane v. Portland Ry. Light & Power Co., Multnomah County.

Isaac Lane, appellant, v. Portland Ry. Light & Power Co., a corporation, respondent. Appeal from the circuit court of Multnomah county. The Hon. C. U. Gantenbein, judge. Argued and submitted March 16, 1911. D. C. Latourette, (C. D. & D. C. Latourette on the brief), attorneys for appellant. S. C. Spencer, (Wilbur & Spencer, on the brief), attorneys for respondent. Bean, J. Reversed.

This is an action to recover damages for alleged injury to the person and property of plaintiff, result ing from the collision of defendant's electric car with his team and wagon on November 19, 1908, in the City of Portland, ocurring on Grand avenue, near its intersection with Hawthorne avenue, upon which street, running north and south, defendant maintains two parallel street car tracks.

At the time of the casualty a northbound car was standing on the east track, a short distance north of the north line of Hawthorne avenue. Plaintiff alleges that he was travelling north on the easterly side of Grand avenue; that the space between the standing car and the east curb of the street was occupied and blocked by teams and wagons, preventing his passage on that side, so that in order to proceed he was compelled to cross over to the west side of the street, passing the rear end of defendant's standing car, and that while he was in the act of so doing his view was necessarily obstructed by such car, so that he was prevented from seeing a south-bound car, which was approaching "at a high, and dangerous rate of speed along defendant's westerly track of said avenue, and the defendant, by its officers, agents and motorman on said car No. 356 without warning, negligently, carelessly and heedlessly ran said car No. 356 at such speed into and upon the wagon of this plaintiff in which he was riding, thereby colliding with the plaintiff's wagon and thereby throwing plaintiff out of the seat of said wagon and upturning the same," causing injury to plaintiff and his wagon and team. That defendant, by its agents on said car could and should have seen plaintiff's team emerging from behind its standing car in time to have "slowed up" and stopped its car, and so prevented the collision and the resultant injury to plaintiff, but that defendant, disregarding plaintiff's rights, failed and neglected to "slow up," and, without fault on the part of plaintiff, collided with his team and vehicle to his damage.

Defendant, by its ansyer, denies the material allegations of the complaint, and by its first separate answer, after describing the accident, alleges that plaintiff suddenly and unexpectedly, without any warning, drove his team and wagon from out behind the standing north-bound car and immediately in front of and into said south-bound car, before the latter could be stopped, although due care and diligence in that behalf was exercised, the collision ensuing, and that said accident was wholly unavoidable, and without negligence on the part of defendant. By its second separate answer defendant alleges contributory negligence on the part of plaintiff as the approximate cause of the injury complained of, in that he failed to look or listen for a car approaching on the west car track, and, without exercising any precaution for his own safety, suddenly and unexpectedly drove his team from behind the standing north-bound car directly in front of the south-bound car, so that before the latter car could be stopped, although due care and diligence in that behalf was exercised, the collision occurred. The reply put in issue the new matter contained in the answer.

Upon a jury being empaneled and sworn to try the cause, plaintiff's counsel made his opening statement, which appears in full in the record. After narrating to the jury some of the facts and circumstances surrounding the accident, what the plaintiff would prove by his evidence, and the alleged grounds of the negligence upon which he relied, he, among other things, stated: "It will appear, I think, from the evidence that he was unable to see north through this obstruction; in other words through this car that was standing there, and while he was making the crossing, this car of the defendant came in a south direction on the westerly track in front of the Brown building, and when he did see the car why he whipped up his horses and got pretty near across the track, but the car was coming at a very rapid rate of speed—too rapid—I don't know what the rate of speed will appear in evidence here. * * * The approach of the car was of such a character that the plaintiff here was not able to see, or not able to hear; and no gong sounded, or bell rung, no warning given, and the rate of speed was excessive—." The Court: "You say the plaintiff was not able to see the car, and was not able to hear it?" Counsel, proceeding: "The plaintiff was not able to see the car, and was not abl e to hear it. * * * Now, I will read the complaint, which, perhaps, states more fully the facts." And, after reading the complaint in full: "Now, gentlemen of the jury, the testimony will show you, I think, about this state of facts. * * * This is the complaint here, gentlemen of the jury, and we expect that the testimony will establish these facts." Thereupon defendant, by its attorney, made its opening statement to the jury. Upon plaintiff being called and sworn as a witness in his own behalf, defendant's counsel, based upon the opening statement of plaintiff's attorney to the jury, and upon the pleadings in the case, objected to the introduction of any evidence, and moved the court for an order dismissing the action.

The court rendered judgment in favor of the defendant on the pleadings and opening statement, from which plaintiff appeals.

Bean, J.: The state of this state, L. O. L., Sec. 132, provides that when the jury has been empaneled and sworn "the plaintiff shall state briefly his cause of action, and the issue to be tried; the defendant shall then in like manner state his defense." This statement is the privilege of the attorney for each party, if he sees fit to exercise it, and is obviously intended to advise the jury, concerning the questions of fact involved, in order to prepare their minds for the evidence to be heard, but is not intended to take the place of a complaint or other pleading, and how full it shall be, within reasonable bounds, is left to the attorney's discretion. To relate the testimony at length will not be tolerated. I. Thompson on Trials, Sec. 267. As we understand the record in this case counsel for plaintiff read the complaint, and in effect stated that he expected the evidence to prove the facts therein alleged; therefore the only question to be determined by the court is whether or not the complaint states the cause of action. This was practically conceded by the defendant when it filed its answer; moreover if defendant had the right, and desired to take advantage of counsel's statement for plaintiff, the better time would have been at the close of such statement, before plaintiff was called to the witness stand, and before defendant's counsel made his opening remarks to the jury. Assuming the statement of plaintiff's counsel to be fatally defective, we seriously question if the right to rely on such defect was not waived by defendant's failure to make a timely motion. We do not consider it a safe practice to decide a case upon the opening statement of counsel to the jury, that such a procedure is conducive to the rights of litigants, or that there is great necessity for exercising this power except in cases where it unimstakably appears that the action is based upon a contract prohibited by morality or public policy. In Oscanyan v. Winchester Arms Co., 103 U. S., 261, the statement disclosed that action was brought upon a contract for commissions on sale of arms to Turkey, of which government plaintiff was then consul general at the port of New York, and the contract as void, being corrupt and prohibited by morality and public policy. Mr. Justice Field, in his opinion on this case, at page 264 says, in substance, that if it should appear from the opening statement that the action is brought to obtain remuneration for acts which the law declares to be corrupt, immoral, or criminal, after full consideration and ample opportunity for the party making the statement to explain and qualify it, if then it clearly appears that there can be no recovery, the court should not hesitate to so declare. In Pietsch v. Pietsch, Cent. Law Jou. of Aug. 5, 1910, Vol. 71, 81, a suit in forcible detainer for the possession of a lot in Chicago, begun in the municipal court of that city, based upon the statement of counsel for defendant, admitting the legal title of the lot to be in plaintiff, the court instructed the jury to render a verdict in favor of the plaintiff. The appellate court for the first district affirmed the judgment, and the supreme court of Illinois, in reversing the case, on this point said: "A party is entitled to introduce evidence and prove a cause of action or to defend against evidence tending to sustain a cause of action if no statement at all is made, and is not confined in the introduction of evidence to the statement made in the opening, if one is made. The opening statment may be wrong as to some facts of the case, which may turn out to be different from the statement." Also in Fletcher v. London & Northwestern Ry. Co., 65 L. T. R., 605, an English case for personal injuries, where the trial judge nonsuited the plaintiff, for the reason that the opening statement of his counsel did not show a cause of action, it was held that the judge had no right to so non-suit plaintiff, except by the consent of his counsel.

The practice of granting a nonsuit, much less the dismissing of the complaint on the opening statement has never prevailed in Wisconsin, and in Haley v. Western Transit Co., 76 Wis., 344, and cases there cited) was not permitted, even though the counsel consented that such statement should be considered in connection with the complaint, and treated as a part thereof, but in Kansas such practice appears to have been sanctioned in Lindley v. A. T. & S. F. Ry. Co., 47 Kan., 432.

As we understand the record in this case, and the claim of counsel for defendant, the ruling was based principally upon the statement of plaintiff's counsel that plaintiff was "not able to see the car, not able to hear it." Very naturally counsel for defendant applies this statement as referring to the time before plaintiff crossed the tracks. By reference to the direct allegation in the complaint, that it was "while plaintiff was in the act of making such crossing with his team and light wagon before mentioned, his view was necessarily obstructed by defendant's aforesaid standing car so as to prevent his observation of another of defendant's cars," and the statement of plaintiff's counsel, to the effect that plaintiff was unable to see through this obstruction, it would seen that counsel for plaintiff had in mind the time when plaintiff was crossing the east track behind the standing car. We do not understand that either the complaint or the statement of plaintiff's attorney indicates how far, or what plaintiff could or could not see or hear before the time of crossing the tracks. This case illustrates the danger of deciding an issue upon so meager a showing of the facts. Donohoe v. Portland Ry. L. & P. Co., 107 Pac., 964, disposes of the point in regard to looking and listening adversely to defendant, where, in the language used by Mr. Justice Slater, 'it has also been held by this court that although it is negligence for the traveler not to look or listen for approaching trains before attempting to cross a railway track, the law does not undertake to determine whether he shall do so at any particular place or given distance from the crossing. It is only required that he shall look and listen at the time and place necessary in the exercise of ordinary care, and this is generally a question for the jury under all the circumstances of the particular case."

We do not deem it opportune to discuss this at length, although several questions that may possibly arise are ably presented by the briefs of the respective counsel. In our opinion the case should be tried. The judgment of the lower court is accordingly reversed, and the cause remanded for trial.

Burnett, J.: I concur in the result.

Every family and especially those who reside in the country should be provided at all times with a bottle of Chamberlain's Liniment. There is no telling when it may be wanted in case of an accident or emergency. It is most excellent in all cases of rheumatism, sprains and bruises. Sold by all dealers.
Get it at Dr. Stone's Drug Store.

With a clear sky and a clear conscience a man may be fairly happy.

CELEBRATE THE GOLDEN WEDDING

FIVE GENERATIONS OF THE BARNETT FAMILY GATHER AT THE HOME OF MR. AND MRS. JOHN BARNETT, AT TURNER.

Mr. and Mrs. John J. Barnett, of Turner, were surprised on the event of their golden anniversary, when the guests came with their well filled baskets and happy greetings to the host and hostess who have lived together for 50 years.

Of their 13 children, seven are living. Mr. Barnett was born in Canada September 24, 1828, living in New York until of age. Starting out for himself he went to Iowa, where he married Temperance F. Pearce on April 1, 1861.

Mrs. Barnett was born in Indiana in 1843. In 1877 the couple moved to Turner and have lived here since. Mr. Barnett, the oldest of a family of 13, has two brothers living in New York and two in California. Mrs. Barnett, the oldest of eight children, has living one brother, one sister and a mother, who is now over 88 years old. They all reside in Turner.

Mr. and Mrs. Barnett have 20 grandchildren and three great-grandchildren. Five generations were represented. This was the occasion of a double anniversary. Their son, H. M. Barnett, with his wife, whose maiden name was Mary Todd, also observed their wooden wedding anniversary.

SHE BROKE DOWN ENTIRELY

Lantz, W. Va., Mrs. Tebe Talbott, of this place, says, "I had been troubled with womanly ailments for some time, and at last I broke down entirely. I got so weak I could scarcely walk across the room. Thanks to Cardui, I improved right off. Now I do my housework, and am feeling well." During the past 50 years, more than a million women have been benefited by taking Cardui. You must believe that Cardui will help you, too, since it helped all these others. Cardui is a safe, harmless, vegetable remedy, of positive, curative merit, for women. At drug stores. Try one bottle. It will surely help you.

Averts Awful Tragedy.

Timely advice given Mrs. C. Willoughby, of Marengo, Wis., (R. No. 1) prevented a dreadful tragedy and saved two lives. Doctors had said her frightful cough was a "consumption" cough and could do little to help her. After many remedies failed, her aunt urged her to take Dr. King's New Discovery. "I have been using it for some time," she wrote, "and the awful cough has almost gone. It also saved my little boy when taken with a severe bronchial trouble." This matchless medicine has no equal for throat and lung troubles. Price 50 cents and $1.00. Trial botle free. Guaranteed by J. C. Perry.

WILL HAVE A STADIUM AT WILLAMETTE

Dr. Sweetland is making use of the bad weather at the University by having some of the students fix up the old nursery building, which has been lately used for religious meetings, into a stadium. The building is large enough to make an excellent indoor track of not more than 10 or 12 laps to the mile and will also furnish a place for indoor baseball. The dirt floor will allow high jumping, pole vaulting, shot putting and in fact all track events to be indulged in during the entire winter.

The renovating of the building and converting of it into a stadium will be a great thing for the university, in an athletic way, since it will bring many students who are interested in track work to the 'varsity, besides the condition it will tend to keep the present track men in during the winter.

The rain has greatly improved the baseball diamond. It is firmly packed, and will probably be as smooth as any in a week or two.

Diarrhoea should be cured without loss of time and by a medicine which like Chamberlain's Colic Cholera and Diarrhoea Remedy not only cures promptly but produces no unpleasant after effects. It never fails and is pleasant and safe to take. Sold by all dealers.
Get it at Dr. Stone's Drug Store.

Bids for Heating Plant.

Sealed proposals will be received at the office of H. A. Johnson, Jr., clerk of school district No. 24, Salem, Oregon, until 7:30 o'clock p. m. on the 15th day of April, 1911, and then opened at the regular meeting of the board at the high school building, for the installation of a heating and ventilating plant in the proposed enlarged high school building. Plans and specifications to be furnished by the bidders as per requirements of the architect, which can be had upon application to Architect F. A. Legg, at Salem, Oregon.

Bids to be with and without thermostatic control.

Certified check for 10 per cent of amount of bid to accompany each bid.

Board reserves the right to reject any or all bids.

H. A. JOHNSON, Clerk.
4-10-3t

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Clean up the back yards so that they may be a thing of beauty and a joy forever.

Do Ghosts Haunt Swamps?

No, never. It's foolish to fear a fancied evil, when there are real and deadly perils to guard against in swamps and marshes, bayous, and lowlands. These are the malaria germs that cause ague, chills and fever, weakness, aches in the bones and muscles and may induce deadly typhoid. But Electric Bitters destroys and casts out these vicious germs from the blood. "Three bottles drove all the malaria from my system," wrote Wm. Fretwell, of Lucama, N. C., "and I've had fine health ever since." Use this safe, sure remedy only. 50 cents at J. C. Perry's, Druggist.

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