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FULL LEASED WIRE TELEGRAPH REPORT

OREGON SUPREME COURT DECISIONS

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Gallagher v. Kelliher, et al, Douglas County.

A. M. Gallagher, respondent, v. W. J. Kelliher and —— Sawyer, appellants. Appeal from the circuit court for Douglas county. The Hon. J. W. Hamilton, judge. Argued and submitted March 23, 1911. O. P. Coshow (Coshow & Rice, on brief) for respondent. J. O. Watson (Cardwell & Watson, on brief) for appellants. Eakin, C. J. Affirmed.

This is an action in ejectment. Plaintiff alleges that he is the owner and entitled to possession of the following described real estate in Douglas county, Oregon, "the same being a part of the Donation Land Claim of George B. Finch, in township 27, south of range 5 west, of Willamette meridian, and particularly described as: Beginning at the northwest corner of the tract of land commanly known as the "Pine Grove Church Property," and running thence southerly along the western boundary of said "Pine Grove Church Property," to the southwest corner thereof; thence easterly along the southern boundary of said Church property and the southern boundary of the said Donation Land Claim of George B. Finch, 10 feet and five inches; thence northerly to the northern boundary of said "Pine Grove Church Property" at a point six feet 10 inches easterly from the northwest corner thereof, and thence westerly along the northern boundary of said "Pine Grove Church Property," six feet 10 inches to the place of beginning, said land described being a portion of that tract of land particularly described in the deed from G. W. Genger and wife to the Trustees of the United Brethren Church of the Deer Creek Class of Douglas county, Oregon, and recorded in page 149 and 150 of Vol. 10 of the Deed Records of said Douglas county;" that until ousted by defendahts plaintiff has been in the open, notorious, exclusive and adverse possession thereof, under a claim of ownership for more than 20 years; and that on April 28, 1909, defendants by stealth unlawfully ousted plaintiff therefrom.

Defendants deny that they ousted plaintiff from possession of the premises as alleged, or at all, withhold the same from him, which answer amounts to a disclaimer. The cause was tried before the court without a jury, and the facts were found in favor of plaintiff. From the judgment thereon defendants appeal.

Eakin, C. J.: The real controversy at the trial was whether the description of the property, sought to be recovered, as set out in the complaint, will justify a recovery without proof that it is included in the description contained in the deed from Genger to the trustees. There being no issue as to plaintiff's ownership of the property, he confined his proof to the erection of a fence on the western line of the property and his occupancy of the premises from the year 1888. There was no proof to show the location upon the ground of the west line of the tract as described in the deed; nor does it appear from the complaint that the property described in the deed from Genger to the trustee is the property known as the "Pine Grove Church Property," but that fact appears from the evidence.

David Hunter, a witness for plaintiff, testified, in substance, that he is acquainted with the Pine Grove Church property; has known it for about 25 years; was for 15 years a trustee of the United Brethren church; that he knows where the west boundary of the property has been during that time; that in the fall of 1888 he helped build the fence on that line, (referring to the fence rmoved by defendants); that "there was an understanding with Genger. He made some objections in regard to where the line ran, and he also said that what he lost at one end next to the creek he would gain on the other, and he said all right, to put it up. * * * I cannot say in what way they agreed with Genger, only I know that it was questioned at the time we were talking about putting up the new fence;" and that Genger agreed that the fence should be put where it was built and it has remained the boundary since 1888. The evidence is conclusive that the United Brethren Church was in possession of the property to that fence all that time and that the fence was put on the western boundary on the division line between Genger's land and that of the United Brethren Church. This proof we think was, at least, prima facie sufficient to establish the western boundary of the tract described in the deed.

In Turner v. Baker, 64 Mo. 238, it is said: "That when proprietors of contiguous estates, the boundaries of which are indefinite and unascertained, agree upon the lines dividing their estates, the calls in their respective deeds, fasten themselves upon the property to which they are thus applied, and the title passed by the conveyances covers and includes every part of the property so identified as being comprehended within the description." This language is quoted with approval in Lennox v. Hendricks 11 Or. 33, 37. In Egan v. Finney, 42 Or. 599, Mr. Chief Justice Moore holds that a division line, agreed upon between adjacent owners of real property, and acquiesced in for a long time, is a circumstance tending to show that it was built upon the true boundary.

We think the possession of the tract to the fence by plaintiff and his grantors claiming under the deed, long acquiesced in, is, as against a stranger to the title, prima facie evidence, at least, that the tract described in the complaint is within the boundaries mentioned in the deed, and, therefore, evidence of possession of the property described in the complaint. Prior, actual possession of the land is enough to enable the possessor to recover it against a mere trespasser who enters without any title. This rule concedes that he who secures possession of real property thereby obtains a prior right against all persons except the owner, and is recognized in Browning v. Lewis,39 Or. 11, 17; and Sommer v. Compton, 52 Or. 173. Therefore, we conclude that, under the description in the complaint, plaintiff has established a prima facie case.

On the trial defendants admitted that they removed the fence as alleged in the complaint, and offered some evidence to establish that the true west line of the property described in the deed to the trustees is 8 or 10 feet east of the old location of the west fence. Germond, deputy county surveyor, is the only witness who attempts to testify upon that matter. He says that he surveyed a piece of property there for Mr. Gallagher and established the northwest corner of the Church property (which is the beginning point for defendant's fence). He testifiess to no facts in regard to the survey or the data from which he made it. This is not competent evidence of the true location of the corner or line but only his opinion. A surveyor's opinion as to the result of the survey, unsupported by the details of the survey, both as to the data upon which it is based and the manner of reaching the result is not competent, but when he gives the details of his work it is a question of law whether his method was correct and a question of fact whether his result is correct: Seabrook v. Coos Bay Ice Co., 49 Or. 237, 242; 54 Or. 172.

There is no evidence before us tending to prove that defendants were entitled to possession of the tract in question. Neither were defendants entitled to offer evidenc of title thereof, having pleaded neither right nor title. Therefore they were naked traspassrs: Sec. 328 L. C. L.; Oregon Railroad & Nav. Co., 26 Or. 216.

Judgment of the lower court is affirmed.

State of Oregon, Ex Rel. H. C. King, v. Webster, Multnomah County.

State of Oregon, Ex Rel. H. C. ing, appellant, v. Lionel R. Webster, respondent. Appeal from the circuit court for Multnomah county. The Hon. Earl C. Bronaugh, judge. Argued and submitted March 29, 1911. H. C. King, for appellant. Zera Snow, for respondent. Eakin, C. J. Appeal dismissed.

Eakin, C. J.: This is a proceeding upon a writ of mandamus issued upon the relation of H. C. King, requiring the defendant, Webster, county judge of Multnomah county, to render a verified statement to the county auditor of the amount due him for services each month since July 1, 1906, and to set out in detail the time he was absent from his office during that period, other than on official business, as required by Sec. 3059 L. O. L., or show cause why he should not be required to do so. A demurrer to the writ was sustained by the circuit court and the cause dismissed. Plaintiff appeals.

It appears that the defendant resigned from the office of county judge in May, 1910, at which time he ceased to exercise the office or act as county judge of Multnomah county, and Sec. 3059, if applicablpe to county judges, which we do not decide, is functus officio as to duties required of defendant during the time he exercise the office. The controvrsy is at an end. The conditions have so changed that any judgment rendered upon this appeal could not be made effective: State ex rel v. Grand Jury, 37 Or. 542; Moores v. Moores, 36 Or. 261; State ex rel v. Fields, 53 Or. 453. Therefore, this court will not determine the question suggested. The appeal is dismissed.

Zelig v. Blue Point Oyster Co., et al, Multnomah County.

M. A. Zelig, respondent, v. Blue Point Oyster Company, et al, appellants. Appeal from the circuit court for Multnomah county. The Hon. W. N. Gatens, judge. On petition for rehearing. Dismissed, March 7, 1911. 113 Pac. 852. Julius Silvestone, for respondent. Claude Strahan and Waldemar Seton, for appellants. Burnett, J. Motion to dismiss is overruled.

Burnett, J.: Since the petition for rehearing was filed in this cause, challenging the correctness of the order dismissing the appeal, it has for the first time come to the knowledge of the court by the statement of the clerk that the transcript herein reached his possession a least by October 2, 1910, which day being Sunday, according to his custom he marked it filed as of the following day. This being true, the appellant was in time with his transcript. The former order dismissing the appeal is set aside and the motion to dismiss the appeal is overruled.

Francis v. The Mutual Life Insurance Co., Multnomah County.

Mary C. Francis, plaintiff and appellant, v. The Mutual Life Insurance Company of New York, a corporation, defendant and respondent. Appeal from he circuit court for Multnomah county. Hon. John B. Cleland, judge. Motion to strike out the bill of exceptions. Miller Murdoch and John F. Logan, for appellant. Jerry E. Bronaugh, for respondent. Per Curiam. Motion denied.

In this action a judgment was rendered on the verdict for defendant June 11, 1910. On December 10, 1910, the plaintiff filed her notice of appeal with proof of service indorsed thereon and on the 20th of that month filed her undertaking on appeal. On January 6, 1911 a judge of the circuit court in which the cause was tried made an ex parte order allowing the plaintiff till January 31st" to present her bill of ceptions. Afterwards on January 30 the same judge made a further ex parte order allowing the plaintiff five days additional time to present her bill of exceptions. The record sent to this court discloses that the circuit court has prescribed, among others, rule 19, as follows: "Any party to a civil or criminal action may, within 30 days after the entry of final judgment, or after the granting or refusing of a new trial if a motion for a new trial is filed, prepare and file a bill of exceptions. It shall not be necessary to enter an order in the Journal granting time to file a bill of exceptions, unless the court, by special order, extends or shortens the time within which to file it. * * * The court, upon being satisfied that the adverse party or his attorney has had due notice thereof, may, on application of either party, grant an extension of time to file a bill of exceptions, or a statement of objections thereto, or fix a time for the settlement thereof, but written notice shall not be required." The case is here presented upon the motion of the defendant to strike out the bill of exceptions because when it was certified by the court eblow the time, as provided by the rules of that court in which said bill might be settled and certified, had long since elapsed.

Per Curiam. The syllogism of the respondent in support of this motion consists of the major premise that a rule of practice established by a court has the same force and effect as law and of a minor premise that this bill of exceptions was not presented within the term prescribed by the rule from which the conclusion sought to be deduced is that the bill should be stricken out.

The major premise may well be conceded. The statute relating to the transaction of business in the circuit court of the fourth judicial district prescribes that "the judges of said court, or a majority of them, shall jointly have power to make all needful rules and regulations, not inconsistent with law, to render effectual the provisions of this section and facilitate the transaction of business." L. O. L. Sec. 913. This statute is but delcaratory of the power inherent in all courts of record to establish rules relating to the disposition of business before such courts and it is settled by the case of Coyote G. & S. M. Co. v. Ruble, 9 Or. 121, that such rules have the force and effect of law and are obligatory upon the court making them as well as upon suitors.

The question then is remitted under the minor premise to a construction of rule 19. The code itself does not prescribe any particular time within which a bill of exceptions may be presented for settlement and in the absence of any rule on that subject the course of authority is uniform in this state that it is discretionary with the court whether or not it shall settle a bill of exceptions at any time after the trial. Hayes v. Clifford, 42 Or. 568. The effect of the rule in declaring that any party to a civil or criminal action may within 30 days prepare and file a bill of exceptions is to obviate the necessity of making an order in each particular case prescribing the time within which the bill shall be presented. The restriction is applied only to the parties. Under this rule the trial court in its discretion might say to the party: "You have not availed yourself of the time allowed by the standing rule," and so deny the application for an extension. On the other hand the court might, without a showing, extend the time without any abuse of its prerogative. The rule does not amount to an abdication in any degree of the power of the court in that respect. On the contrary the last paragraph of the rule expressly reserves to the court the discretion of allowing the extension of time to file a bill of exceptions. It is not stated in the rule that the application for such extension must be made within the 30 days first mentioned. The minor premise of the syllogism is not sustained by a fair construction of the rule.

We cannot say, therefore that the court has abused its authority and in the absence of any showing on that subject, aside from the application of the rule, the motion to strike out the bill of exceptions must be denied.

COULD NOT WRITE

Versailles, Ky.—Mrs. Elisha Green, of this place, says, "I could not write all the different pains I had, when I first tried Cardui. I could scarcely walk. Now I am able to run the sewing machine and do my work; and my neighbors tell me the medicine must be good, for I look so much better." Cardui is a specific, pain-relieving, tonic remedy, for women. In the past 50 years, it has been found to relieve women's unnecessary pains, and female misery, for which over a million suffering women have successfully used it. Try Cardui for your troubles. It will help you. At the nearest drug store.

A Kansas man fell into a barrel of hard cider and broke his wrist. That's hard.

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Sometimes liver, kidney and bowels seem to go on a strike and refuse to work right. Then you need those pleasant little strike-breakers—Dr. King's New Life Pills—to give them natural aid and gently compel proper action. Excellent health soon follows. Try them, 25c at J. C. Perry's, Druggist.

Saving Himself.

A little boy was asked by his mother to bring in some wood. Five minutes later his mother, looking out and seeing him sitting in the yard, asked why he did not fetch the wood.

Oh, I am tired," he replied, "and if I use all my strength now, when I am a boy, what will I do when I'm a man."—Omaha World Herald.

Rescued From Whaler.

[UNITED PRESS LEASED WIRE.]

San Francisco, April 12.—Melvin Donlin, 13, missing from Oakland since last week, was rescued from the whaling ship Lapita in the bay today just as the vessel was hoisting anchor for a cruise in the Arctic. The rescue was made by a posse of harbor police. The lad had confided to a companion that he was going to sea for $35 a month and the companion notified the boy's parents.