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FULL LEASED WIRE TELEGRAPH REPORT



SUPREME COURT EXAMINES INTO A VERY DRY WATER CASE

It Goes Into All the Dips, Spurs, Angles and Variations of the Matter, Discusses More or Less Learnedly Some Abstruse Facts and Finally Lets the Litigants Come Out of the Same End of the Hole at Which They Went in, With the Privilege of Going to Law Again Over the Matter in as Many Directions as Once as Their Sweet Wills Dictate.

OREGON SUPREME COURT DECISIONS

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

Allen Ditch Co., et al. v. Donnelly, et al., Umatilla County.

Fred Andrews, Joseph Cuhna, Odd Teel, George T. Higginbottom, Mildred Spike, Elvira Teel and The Allen Ditch company, a corporation, respondents, v. Frank Donnelly, William H. Daughtrey and J. G. Thomas, appellants. Appeal from the circuit court for Umatilla county. Hon. H. J. Bean, Judge. Argued and submitted at Pendleton, May 3, 1911. Raley & Raley, for respondents. Carey & Kerr, Harrison Allen, R. R. Johnson and Frederick Steiner, for appellants. Burnett, J. Reversed.

Fred Andrews and other private persons comprising the Allen Ditch Co., a corporation, unite with that company as plaintiffs and bring this suit to enjoin the defendants from diverting any of the water of the Umatilla River, a non-navigable stream, from a point above the intake of an irrigation canal which plaintiffs aver they own and maintain by virtue of an appropriation prior and superior to any right of the defendants.

Concerning the plaintiffs, the moving parties assert in substance that the natural persons are the real parties in interest and that the corporation plaintiff, of which they are all and the only members, was organized by them for convenience and as a holding concern to manage the business of the diversion and distribution of water to them as individuals through their irrigation plant. They allege in substance that the natural persons plaintiff are the owners of large tracts of what was formerly arid land in certain sections in township 3 north, range 35 east of Willamette meridian incapable of profitable use without irrigation; but the complaint does not describe the acreage owned by each individual of the irrigation requirements of any single tract or the use to which it is put. The complaint goes on to state that about 1870 the plaintiffs and their grantors and predecessors in interest built a ditch and flume tapping the Umatilla River at a point named and, diverting thereby 1080 inches of the water of the river, miners' measurement under a 6-inch pressure, have continually used it on their lands for domestic purposes, watering live stock and the irrigation of crops, all in an open, notorious, exclusive and uninterrupted manner whereby they have reclaimed and seeded about 600 acres of these lands to alfalfa, orchard, shrubbery and ornamental trees, all of which would die but for the use of the water. The plaintiffs then charge that about July 16, 1907, the defendants constructed a dam across the river at a point above the intake of plaintiffs' ditch, thereby turning the water entirely away from plaintiffs' irrigation system and that defendants have continued and will continue to maintain the dam but otherwise divert the water unless restrained. The prayer is for the removal of the dam and to prevent the defendants from interfering with the flow of waters to plaintiffs' ditch and for general relief.

The defendant Thomas denied every allegation of the complaint and further disclaimed any interest in the controversy. The defendants Donnelly and Daughtrey admit the non-navigable character of the Umatilla River and that they will continue to maintain their dam but otherwise traverse every allegation of the complaint. They state also in substance that since May 18, 1907, they have been and are now the owners of certain lands in section 16 township

3 north, range 29 east described by metes and bounds upon which at all times mentioned in the answer was a grist and feed mill, the machinery of which is propelled by water conducted to it by a race and flume also the property of defendants, and that ever since December 27, 1883, they and their predecessors in title by means of said race have appropriated from the Umatilla River and conducted to the mill a sufficient quantity of water to operate the mill and to irrigate lands along the line of the ditch. As a basis of their right to do this they aver that, in the years 1883-4-5 after this appropriation of the water, J. H. Kootz, their predecessor in title, "obtained from the owners of all of the riparian lands on both sides of said Umatilla River from and adjacent to said point of intake of said mill race to and adjacent to said point of outlet of said mill race the right to divert from its natural channel and convey from said Umatilla River and through said mill race such portions of the water of said Umatilla River as might be necessary for the irrigation of the lands along the line of said mill race, and also to propel by water power any flouring mill, which might then or thereafter be constructed on the lands of the defendants, and ever since said time the said rights, so obtained by the said James H. Kootz, have been continuously enjoyed by him, defendants' other predecessors in title, and these defendants."

The defendants contend that the water thus appropriated is essential to the operation of the mill and the irrigation of lands under their ditch and that their appropriation is prior and superior to any right of plaintiffs. Defendants also seek to estop the plaintiffs from alleging anything stated in the complaint because of the conveyances to Kootz by the former riparian owners of the right to divert water to his mill and for irrigation purposes some of which riparian owners were predecessors in title to some of the plaintiffs and as further ground of estoppel charge that at the time defendants and their predecessors appropriated the water they knew that Kootz had taken the water and was using it for the purposes of the mill and irrigation. They pray that the plaintiffs be estopped to allege anything stated in the complaint; that the right of defendants to use sufficient water of the river to operate the mill and to irrigate along their race be decreed to be superior to any right of plaintiffs and that the bill be dismissed with costs.

The reply traverses the answer in almost all its averments and affirmatively pleads an estoppel against defendants' allegations about the deeds from the former riparian owners on the ground, in substance, that in 1889 after the execution of said deeds to Kootz, plaintiffs' predecessors in title, including the riparian grantors of Kootz together with Kootz himself, then a land owner on the west side of the river, built a dam in the river at or about the point of the present intake of plaintiffs' ditch and reconstructed the ditch and thereby openly and notoriously made a further visible and exclusive appropriation of 1080 inches of the water of the river for use and which was used on their lands and the lands of Kootz since then for the beneficial purposes of irrigation, domestic affairs and watering live stock.

The decree was in effect that the defendants were first of all entitled to enough water, without naming the quantity, to keep their wooden flume

from drying up in the summer time; that plaintiffs are next entitled to have 500 inches, miners' measurement, flow down their ditch; that thirdly, defendants have enough water to operate their mill and to irrigate not to exceed 100 acres of land under their ditch; after which, fourthly, plaintiffs should have 530 inches of water, making the total of 1080 inches claimed at the outset. The defendants were enjoined from interfering with plaintiffs' rights as thus defined and were cast in costs and disbursements amounting to \$1083.15. The defendants appeal.

Burnett, J. The Umatilla River is an unnavigable stream which takes its rise in the Blue Mountains near the eastern boundary of the county bearing its name, and after receiving various affluents, flows in a general north to northwest course in passing the lands mentioned in this suit. The change of the plaintiffs are on the west side and premises of the defendants are on the east side of the river. After the fall rains have set in and until the melting snows of the mountains are gone in the early summer, there is enough water for all purposes; but by July the river gets low and, until some time in September, there is a scarcity of water for late crops, such as the second and third crops of alfalfa, and not enough to operate the defendants' mill to its full capacity.

The pleadings cannot be construed into a suit to ascertain and declare the respective rights and priorities of the parties in the use of the waters of the river. The plaintiffs pray for the utter demolition of the defendants' dam so that the whole river may flow without hindrance to the intake of the Allen ditch; while the defendants, by the erection of a concrete dam entirely across the river above the diversion plant of plaintiffs, coupled with their avowed purpose to continue that policy, evidently intend to keep the water entirely away from the plaintiffs when their need is the sorest. In brief each party wants all the water.

Both plaintiffs and defendants claim as appropriators and not as riparian owners. The defendants argue that at the time the plaintiffs diverted the water in the first instance, the stream was not one from which water could be appropriated in the legal sense of the word because the riparian ownership of the lands before the point of diversion had passed from the general government into private hands prior to the Act of Congress of March 3, 1877, known as the Desert Land Act, and prior also to the diversion upon which plaintiffs found the inception of their claims. The defendants construe the act mentioned to mean that whereas, before its enactment, appropriation could only be made where all the lands adversely affected were in the public domain, now since its passage the first appropriator may lawfully take the water of a stream without regard to whether the lower riparian owners are private individuals or the general government; but that plaintiffs cannot claim the benefit of that Act because they diverted the water before its passage. But we think that neither the plaintiffs nor the defendants are in a position to raise this objection to appropriation as against each other because none of them is a riparian owner and the claim on both sides is that of appropriation. No one can claim both as a riparian owner and as an appropriator at the same time. While he may be one or the other of those characters he cannot be both. Davis v. Chamberlain, 51 Or. 304. Some riparian owner defending or attacking as such might, in a proper case, raise that question, but no such party is before the court in this proceeding. We conclude that as between the parties and on the record before us the waters of the Umatilla River at all the times mentioned in the pleadings were the subject of appropriation in the legal sense of the word.

The plaintiffs assert title to the use of 1080 inches of water and offer as proof of that amount the deeds of this court in the case of the Oregon Land and Construction Co. v. The Allen Ditch Co., a plaintiff in this suit. The case is reported in 41 Or. 209. The plaintiff there as a lower riparian proprietor sought to enjoin the Allen Ditch Co. from diverting the water of the river in question away from the down stream lands of the plaintiff; but that suit was successfully defended on the ground that the defendant had acquired by prescription to the use of 1080 inches of water as against the plaintiff, having used the water adversely for more than 10 years continuously. But the conclusion reached in that litigation bound only the parties to that suit and hence cannot be used by the successful contestant there as evidence in its favor against the defendants here who are strangers to that proceeding. Excluding that decree from the evidence here, as we ought, no definite testimony remains even as to the aggregate amount of water diverted or needed by the plaintiffs, much less as to the particular amount required or useful for the separate tracts owned by the several individual plaintiffs.

Equally indefinite is the testimony on behalf of the defendants relating to the actual amount of water originally appropriated by their predecessors in title to the mill property or requisite for the purposes in contemplation at that time. In 1883 Mr. Kootz, the founder of the milling industry there, built a flouring mill having a capacity of 50 barrels every 24 hours. After it had been in operation for about two years it was destroyed by fire and he afterwards built a new mill with the enlarged capacity of 150 barrels per day, requiring greater water power. Machinery for manufacturing alfalfa meal has also been added to the milling plant since the first appropriation on the east side of the river.

The defendants seem to count upon the deeds from the former riparian owners to Kootz as giving the present owners of the mill unlimited and exclusive right to take the water of the stream in quantities ever increasing in proportion as their milling plant is enlarged even to the diversion of the whole river into the mill race. We do not so construe the terms of those deeds nor give them the effect desired by the defendants. The deeds conveyed to Kootz the right to divert from its natural channel and convey from the land of the grantors through the mill race "such portions of the water of the Umatilla River as may be necessary for irrigating purposes along the line of

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said mill race and also to propel by water power any flouring or other mill which may hereafter be constructed by the said James H. Kootz, his heirs or assigns at or near the town of Echo." This language of those deeds clearly indicates only a partial and not a total diversion of the stream as contemplated by the parties. It amounted to a license to the grantee to appropriate water sufficient for the enterprise then in view. He had the right to make one appropriation and to follow it up by actual application to the useful purpose designed within a reasonable time; but that would determine his right as of that date, if indeed it did not exhaust his privilege under that license. At any rate each new enterprise or material enlargement of the old one requiring additional water would call for a new appropriation.

The parties to the deeds by their subsequent conduct put upon those writings a construction in consonance with the idea that the mill was to have only a part of the water. Without dispute, it appears in the testimony that after the mill had commenced operations, its then owner, Mr. Kootz, joined with his grantors in those deeds and parties, plaintiffs' predecessors, in building headgates and dams and reconstructing the ditch now owned by plaintiffs, whereby the water was taken upon and made an appurtenance not only to their lands, but also to his own land on the west side of the river which he afterwards conveyed to plaintiff Andrews "with all the tenements, hereditaments or appurtenances thereunto belonging or in anywise appertaining." There the water for users on both sides of the river. Mr. Kootz could not in equity and good conscience avail himself of the assistance of his then co-workers to reclaim his land and make the water appurtenance thereto as well as to their holdings and destroy the appurtenance after he had conveyed the land to one who bought on the faith of the then situation created by Kootz himself. His grantees stand in no better condition. They also took with knowledge of the situation as it then stood and were put upon their inquiry.

Before the country was so thickly settled as it is now the practice for the appropriator of water "to keep all you get and get all you can" was in many cases tolerated; but yielding to reason and justice to all, the later authorities have established a different rule. We conceive it to be the law, except as modified by statute, that the right of a prior appropriator is paramount, but the right is limited to such an amount of water as is reasonably necessary for such useful purpose and project as may be fairly within contemplation at the time the appropriation is made. Following the appropriation the appropriator is entitled to a reasonable time within which, by ordinary diligence, he may complete the project and actually apply the water to the useful purpose intended. What is reasonable both as to the amount of water and as to the time any given project may be completed must depend upon the facts and circumstances of each particular case. Ison v. Sturgill, 109 Pac. 573 and Porter v. Pettengill 110 Pac. 393 are instructive cases on these matters. Under the principle already noticed we carry out the intent of the deed that any material enlargement of an original project or the inauguration of a new enterprise requiring additional water would call for a new appropriation which must be in subordination to the rights of others as then existing, the testimony on the part of the plaintiffs is not clear as to the scope of the undertaking in which they and their predecessors in interest at first engaged. We are unable to determine whether either plaintiffs or defendants have merely carried out their original designs or whether they have gone on into new and enlarged ventures demanding more and more water until, as appears by the pleadings, they both want all the water.

We are satisfied from the evidence that plaintiffs and their predecessors were using the water for domestic purposes, watering live stock, and irrigating on the west side of the river before the diversion of water to the mill on the east side; but to what extent either in the aggregate or as to any particular tract is not disclosed by the record before us. Both plaintiffs and defendants have devoted their energies in this litigation, in the main, to the establishment of mere priorities without reference to what is a reasonable amount of water to be used or what amount was in fact appropriated in the first instance. Under such circumstances, while we are satisfied that all the parties have rights in the water as against their opponents here, the record does not furnish us sufficient data upon which to declare or to define those rights with that certainty necessary to support the extraordinary remedy of injunction. To authorize an injunction, the rights which it is designed to protect should be established with certainty and to that end all persons interested in the thing about which the dispute has arisen should be brought before the court. This was done in Hough v. Porter 51 Or. 313; 95 Pac. 732; 95 Pac. 1083, where Justice King points out the futility and waste of effort in attempting to settle such a controversy by piecemeal.

We conclude that the decree of the circuit court should be reversed and the suit dismissed without costs or disbursements to either party and without prejudice to any other suit either may deem it advisable to institute concerning the matters in dispute.

Children Cry FOR FLETCHER'S CASTORIA

CRUISER BOSTON IS ON HER WAY

WILL BE GIVEN A BIG AND NOISY WELCOME WHEN SHE REACHES PORTLAND, PROBABLY TOMORROW AFTERNOON.

The famous old fighting cruiser, Boston, has been turned over to the state of Oregon, in her old age, the transfer having been made yesterday at Bremerton, Wash. She has sailed for her home port, Portland, and is expected to enter the Columbia this afternoon. Governor West, Adjutant-General Finzer, Mayor Simon and other great of Oregon will go down to meet her at Rainier, and she will then come on to Portland tomorrow. All the available craft at Portland will go down to the mouth of the Willamette to meet her, and she will be given as glad and noisy a welcome at Portland as the innumerable vessels can give her with whistles, sirens or any other steamboat equipment capable of making a noise. It is the intention to send her on a cruise to Coos Bay in the near future, as her maiden trip under her new ownership.

COUNTRY WORKED UP OVER HILL MURDER

Milwaukie, McMinnville and Oregon City each think the murderer of the Hill family, at Ardenwald, is in their section. Mrs. R. F. Kuhn, of Milwaukie, has received a letter with a newspaper clipping of the murder story, and the threat "You are the next." The police think it only a senseless joke, but are keeping close watch of the house. A man acting strangely has been arrested at McMinnville and another has been chased by a gang of men at Oregon City, who was suspected of being the murderer, but no clues are yet found.

Teachers' Examinations.

Notice is hereby given that the county school superintendent of Marion county will hold the regular examination for applicants for state papers at the Salem high school, commencing Wednesday, June 21, at 9 o'clock a. m., and continuing until Saturday, June 24, at 5 p. m., as follows:

- For state certificates (one-year, five-year, life).
 - Wednesday a. m.—Arithmetic, civil government, English literature.
 - Wednesday p. m.—Geography, grammar, physics.
 - Thursday a. m.—Orthography, theory and practice, bookkeeping.
 - Thursday p. m.—Writing, physiology, geology.
 - Friday a. m.—U. S. history, physical geography, botany.
 - Friday p. m.—School law, psychology, geometry.
 - Saturday a. m.—Reading, algebra, general history.
 - Saturday p. m.—Composition, American literature, history of education.
- For state primary certificates.
 - Wednesday a. m.—Methods in reading, methods in Arithmetic.
 - Wednesday p. m.—Methods in language, methods in geography.
 - Thursday a. m.—Orthography, theory and practice.
 - Thursday p. m.—Writing and physiology.
 - Friday a. m.—Thesis. Subjects for thesis: Lessons by stories, language work in primary grades, number work in primary grades, busy work in primary grades, possibilities of nature study in primary grades, phonics in primary grades, child study. Applicant chooses one subject.
 - Friday p. m.—Psychology

Note. Questions on theory and practice, writing, arithmetic, physiology and psychology will be the same for primary certificates as for other certificates. W. M. SMITH, County School Superintendent. 6-10-91-dly- 1t wk



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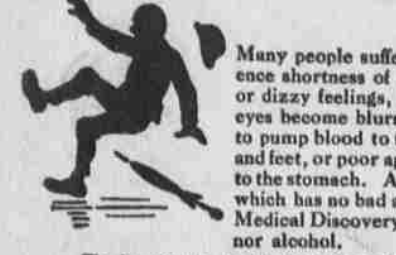
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