SUPREME COURT PASSES ON SEVERAL SMALL CASES

OREGON SUPREME COURT DECISIONS

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Pointer v. Klamath Falls Land & Transportation Co., Klamath County.

H. E. Pointer, respondent, v. Klamath Falls Land and Transportation Company, appellant. Appeal from the circuit court for Klamath county. The Hon. George Noland, judge. Argued and submitted July 27, 1911. Richard Shore Smith and (Horace M. Manning on brief) for respondent. J. J. Barrett, and (Thomas Drake and Benson & Stone on brief) for appellant. McBride, J. Reversed and new trial ordered.

McBride, J. The defendant had constructed a street railway in Klamath Falls, and plaintiff, while driving a wagon heavily loaded with lumber along one of the streets, found it necessary to make a turn and in doing so ran against a rail that projected above the surface of the street, and he was thrown from his wagon and seriously injured. Plaintiff claims that the injury resulted from the careless and negligent manner in which the rails were left projecting above the surface of the street, whereas the ordinance granting the franchise required that the rails should be maintained flush with the pavement.

Defendant pleaded, among other defense, contributory negligence on plaintiff's part, and upon the trial laid particular stress upon the fact that plaintiff was standing on the load instead of sitting, and called several witnesses, who claimed to be experienced drivers, to show that under the circumstances the usual, correct and customary position while driving was to sit on the load. Plaintiff called several witnesses and, over the objection of defendant, propounded substantially the following question: "In handling four horses, would you consider it careless to stand on a load of lumber and drive them in coming up an incline and making a turn?" And also this question: "Would you consider it careless, reckless or negligent to stand upon a wagon loaded with lumber, upon which there is no seat, driving four horses up a street with an incline and making a turn? Both these questions were answered in the negative and defendant appeals.

We are inclined to think that the testimony of skilled drivers as to the proper and customary position of a driver, under the circumstances detailed, is admissible: but the question went further than that and practically required the witness to give an opinion upon the ultimate fact to be decided by the jury, namely the fact of plaintiff's negligence. This was a usurpation of the functions of the jury and was reversible error.

"The issue of negligence can in most cases be determine by the judgment of a jury and the inference, conclusion, or judgment of witnesses is rejected. This rule has been applied, for example, to the question whether a bridge, road, roadway, sidewalk, track or other place, machinery, mechanical appliance, rate of speed, situation, or other thing or collection or combination of things is safe or dangerous. The rule has also been applied to the question whether certain conduct of a person was careful or careless. And it has also been applied to other questions as to conduct; as whether it was cautious, dangerous, 'in the line of duty,' necessary, negligent, proper, prudent, reasonable, professionally skilful, safe, usual, or unusual." 17 Cyc. 56 et seq and cases there cited. While not following the rule to the extent indicated in the text of the excerpt above quoted, and not indorsing all that is held in the cases cited in the text, we think it reasonably well settled that where either negligence, recklessness or carelessness, constitute the ultimate fact for the jury to decide, that it is not competent for an expert witness to express an opinion upon that ultimate fact, but he can only go so far as to state the usual customary method of doing an act or state from his experience the dangers, if any, attendant upon doing it in a manner suggested by the question put to him.

Outside of this error the case seems to have been properly tried and we deem it unnecessary to discuss the remaining assignments. The judgment of the circuit court is reversed and a new trial ordered.

Johnson v. Parshley, et al, Multnomah County.

Ed. Johnson, respondent, v. A. W. Parshley, Ed. Kiesendahl, G. Leo. G. Wo, and the Dragon Restaurant Company, a corporation; Fred Olson, Justice of the Peace, and Lou Wagner, constable, appellants. Appeal from the circuit court for Multnomah county. The Hon. Wm. M. Gatens, judge. Submitted on brief September 5, 1911. Harry Yanchwich, for appellants. No appearance for respondent. Eakin, C. J. Affirmed.

On the 9th day of January 1909, plaintiff purchased from defendant, Dr. Wo, the Dragon Restaurant, together with the lease of the premises —149-151 Seventh street, Portland— in which it was conducted, for the sum of $3500, and went into possession thereof at that time. Defendants, E. Kiesendahl and Parshley, acted for Dr. Wo in negotiating the sale. Mrs. Hamilton was the owner of the premises, and on September 6, 1907, leased the same to Kiesendahl for a term ending April 1, 1911. On October 1, 1907, Kiesendahl sub-let the same to the Dragon Restaurant Company for the balance of the term. Dr. Wo claims to be the successor in interest to the Dragon Restaurant Company. By the sub-lease the lessee was required to deposit in advance $600, equal to three months' rent, to apply as the rental for the last three months of the lease. It was agreed in advance of the sale that, in case Johnson purchased the restaurant and secured a transfer of the lease, then he was to pay and return to the present owner of the Dragon Restaurant the $600. In completing the sale of the restaurant to Johnson, he gave six promissory notes of $100 each for the $600. The lease was not assigned to him and when sued on the notes, he commenced this suit to enjoin their collection, and also asked to have the sale rescinded, and he tendered back the property. Subsequently, but before the trial he filed a supplemental complaint, alleging that he had sold the restaurant and asked to have that portion of the cause eliminated. Upon the trial of the case a decree was rendered in favor of plaintiff, adjudging the notes to be void and enjoining their collection. Defendant appeals.

Eakin, C. J. On the appeal the defendants present but two questions, viz: (1) That by reason of respondent's sale of the restaurant, the appellants cannot be placed in statu quo. (2) A partial recession of an entire contract cannot be had.

It was conceded throughout the trial that the orginal lease stipulated that Kiesendahl shall not sublet the premises without the consent of the owner; that he was a stockholder and a managing officer of the Dragon Restaurant Company, and that the sublease was consented to by Mrs. Hamilton for that reason, and Kiesendahl testified that he was authorized by Dr. Wo to sell the restaurant and did participate in the negotiations for the sale, and on January 7, 1909, agreed in writing with Johnson, with a view of a sale to him of the restaurant, that he was the owner of the lease of the premises and as Johnson was desirious of buying the restaurant and having transferred the lease to him, he would aid him in making the purchase, and that "Whereas, six hundred ($600.00) has been advanced by the present owner of the said Dragon Restaurant upon the lease for the last three (3) months of the said lease; and, Now in case the said Johnson shall purchase the said restaurant, and have the lease transferred to him, then and in that event he agrees to pay and return to the present owner of the said Dragon Restaurant, the said six hundred ($600.00) dollars, upon the terms and conditions heretofore agreed upon."

It was for this sum that Johnson gave the six promissory notes mentioned, and the whole negotiations were conducted and consummated upon the basis of this preliminary agreement. And it was understood between Johnson, Idleman and defendant Parshley, acting for Dr. Wo, when the notes were delivered, that Parshley would see that the lease would be transferred the next day. The lease was not transferred. Dr. Wo had no interest therein that was transferable by him and it ws only through Kiesendahl and Mrs. Hamilton that Johnson could acquire a right to the possession of the premises. Therefore, the notes were without consideration and their cancellation does not depend upon a rescinding of the contract of sale or that defendants shall be placed in statu quo. The decree is affirmed.

Leadbetter v. Hawley, Multnomah County.

F. W. Leadbetter, appellant, v. W. P. Hawley, respondent. Appeal from the circuit court for Multnomah county. Hon. John B. Cleland, judge. On petition for rehearing. Cake & Cake for appellant. Chamberlain, Thomas & Kraemer, Dolph, Mallory, Simon & Gearin and Lester W. Humphreys for respondent. Burnett, J. Denied.

As we understand the defendant's petition for a rehearing of this action, he complains that the effect of our decision reversing the judgment of the circuit court is to allow the plaintiff to allege the fraud of the defendant as a cause of action and to recover on proof of the illegality of the transaction narrated in the complaint and testimony.

He insists, also, in substance, that if the plaintiff would recover his bonds because of the vice of the agreement by which he was induced to part with them, he must in so many words confess its unlawfulness and ask to be relieved from its burdens.

As to the fraud, it is alleged as the inducement which led the plaintiff to make the contract whether legal or not. No one seeks to recover damages for fraud but rather for its hurtful effect. It is a mere incident of the transaction in question. Indeed, for the purpose of recovering property with which the plaintiff may have parted under an agreement void as against public policy but which is yet executory, it matters not whether he entered into the arrangement by reason of the fraud of the other party or of his own free will and accord. Although in pari delicto, as held in Cone v. Russell infra, the recanting party may be restored to his own if the place of repentance has not been passed by the complete execution of the illegal contract. Much more is he entitled to relief if he has been deceived by the other party and drawn into an offense against public policy.

Again, it is not necessary as a matter of pleading that the plaintiff should come into a court of law prefacing his complaint with a peccavi and a general confession of his faults in the matter in hand, for those are legal conclusions.

He has stated all the facts from his standpoint, including the guile of the defendant leading the plaintiff into the situation from which he asks the court to extricate him. On any pleading, the party making it is entitled to the benefit of any legal conclusion which may be properly drawn from the facts stated. So in this case, if it can be discerned as a matter of law that the agreement in pursuance of which the plaintiff parted with his bonds was contrary to public policy and hence void, he may rely on the further conclusion that he is entitled to recover the property, provided the unlawful convention is still in the executory stage.

The legal effect of the complaint is that the moving party is proceeding in disaffirmance of the iniquitous agreement in question. That it is yet executory arises from the fact that the delivery of the bonds by the plaintiff is the only act of performance by either party. None of the things to be done by the defendant has yet been performed. While this condition exists, the plaintiff may retrace his steps and by appropriate litigation recover his property for, if the agreement was void as against public policy, it would not operate to pass the title to one who is a party to the illegal transaction.

In Spring Co. v. Knowlton, 103 U. S. 49, the trustees of a corporation devised a scheme to increase its capital stock whereby on payment of 80 per cent of the par value of the new stock, as called for by the trustees, subscribers to the same should receive fully paid certificates; but in default of meeting all the calls, a delinquent should forfeit what he had already paid. Knowlton, a party to this arrangement, paid part of the 80 per cent and failed to pay the remainder. The corporation refused to issue to him the new stock or to repay the money he had advanced. The court sustained him in recovering his payments on the ground that, although the scheme was void as against public policy and he was a party to it, yet as it was still in part executory, he was entitled to his money.

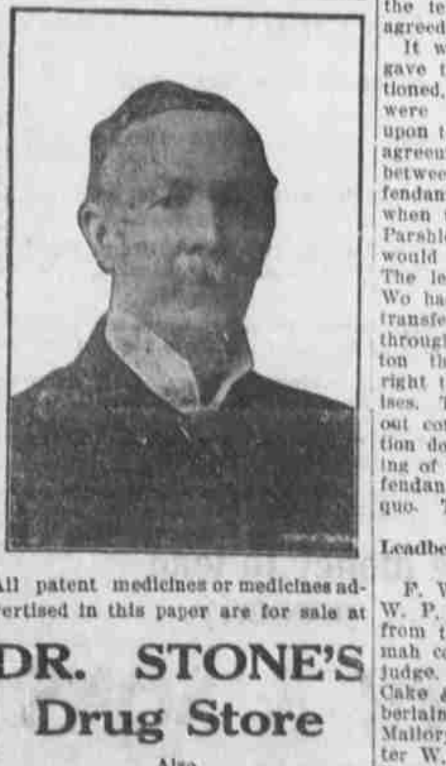
In Cone v. Russell 48 N. J. Eq. 208, the complainants had executed a proxy, irrevocable in its terms, empowering the defendants to vote certain shares of stock owned by complainants so as to accomplish certain results in the management of the corporation issuing the stock, among others, the employment of one of the complainants as manager of the concern at a large salary. The vice chancellor held that, although the complainants were in pari delictu, they were entitled to relief against the illegal agreement, to have the proxy cancelled and to be restored to their former situation.

To the same effect is Sheppard v. Rockingham Power Co. 150 N. C. 776. Many other cases might be cited, but the controlling principle in them all is that, until an agreement void as against public policy is fully executed, either party may retreat and by appropriate proceeding the courtss will restore him as far as possible to his previous estate.

The case of Phoenix Bridge Co. v. Keystone Bridge Co. 142 N. Y. 425, cited by defendant, is easily distinguishable from the one in hand. There several manufacturing concerns formed an association agreeing to contribute to a common fund to be used as a guaranty and for other purposes and providing that in case of the expulsion of any member, the amount that it had already contributed should be forfeited to the association. The complaint alleged that, without a hearing, the association had found the plaintiff in default and was about to forfeit the contribution it had made to the guaranty fund and expel it from the confederation. The prayer was to enjoin the accomplishment of this result. The court held that the agreement, being a combination to enhance prices, was illegal but refused to grant the plaintiff relief in that suit because it proceeded in affirmance and support of the void arrangement. In other words, the plaintiff sought to enforce its supposed rights under the agreement.

The conclusion was that the judgment of the court below dismissing the suit "should be affirmed without prejudice to the commencement of an action by plaintiff, if it be so advised, to recover back moneys it had paid to the association, on the ground that the agreement forming it was illegal."

The petition for a rehearing is denied.



TO DETERMINE WATER RIGHTS

November 16 was the date set yesterday afternoon by the state board of control for a final hearing for the determination of the water rights on Sucker creek and Althouse creeks, in Josephine county, and the date set for the determination of the water rights on the North Powder river. There are about 75 water users involved on the two first streams and about 100 on the last named.

At the same time a final hearing will be had on the contest of Andrew Anderson against the application of C. Schollmeyer for the appropriation of the water of Bobbs creek. Two appeals from the decision of the engineer in the granting of permits will also come up before the board then for consideration.

THE SALEM, FALLS CITY & WESTERN RAILWAY COMPANY SUNDAY EXCURSION RATES

Commencing Sunday, June 4, 1911 and until and including Sunday, October 1, 1911, the following Special Round Trip Fares will be in effect, between stations named below, on Sundays only:

Between—	
West Salem and Black Rock	$1.25
Dallas and Black Rock	75c
West Salem and Falls City	$1.00
Dallas and Falls City	50c
West Salem and Dallas	75c
Falls City and Dallas	50c
Black Rock and Dallas	75c
Dallas and West Salem	75c
Falls City and West Salem	$1.00
Black Rock and West Salem	$1.25

Children—Children of half fare age, one-half of the adult fare

Date of Sale—Sundays only.

Limit—Tickets will be good for continuous passage in each direction, good only on date of sale.

Baggage—No baggage will be checked on these tickets.

Issued May 23, 1911, Dallas Oregon.

Effective June 4, 1911.

LOUIS GERLINGER, JR., General Manager.

State of Ohio, City of Toledo
Lucas County, ss.

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FRANK J. CHENEY.

Sworn to before me and subscribed in my presence, this 6th day of December, 1886. A. W. GLEASON,
(Seal) Notary Public.

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John Cougar,, 845 North Seventeenth street, Salem, Oregon, says: "Doan's Kidney Pills have been used in my family with great benefit. I also know of other people who have taken this remedy for kidney trouble with the best of results."

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Ely's Cream Balm has been tried and not found wanting in thousands of homes all over the country. It has won a place in the family medicine closet among the reliable household remedies, where it is kept at hand for use in treating cold in the head just as soon as some member of the household begins the preliminary sneezing or snuffling. It gives immediate relief and a day or two's treatment will put a stop to a cold which might, if not checked, become chronic and run into a bad case of catarrh.

Chamberlain's Colic, Cholera and Diarrhoea remedy is today the best known medicine in use for the relief and cure of bowel complaints. It cures gripping, diarrhoea, dysentery, and should be taken at the first unnatural loosentss of tht bowels. It is equally valuable for children and adults. It always cures. Sold by all dealers.

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You never tried anything like TIZ before for your feet. It is different from anything ever before sold.

TIZ is not a powder. Powders and other foot remedies clog up the pores. TIZ draws out all poisonous exudations which bring on soreness of the feet, and is the only remedy that does. TIZ cleans out every pore and glorifies the feet—your feet.

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