THE CAPITAL JOURNAL

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FULL LEASED WIRE TELEGRAPH REPORT

SALEM'S PROGRESSIVE SCHOOL POLICY.

The new progress of study adopted for the Salem public schools is distinctively progressive.

There is more space given to industrial work and art than to the old-fashioned classics.

Boys are to learn the rudiments of woodwork, girls are to learn the foundation of cooking and needlework.

Drawing has been extended to all grades, including the four years in the high school and the teachers' class.

The high schools of Oregon, under the new course of study adopted by the state boards, are to do normal school work.

City Superintendent Powers can sen the Salem course of study anywhere in the civilized world and show Salem is leader.

Salem public schools are one of the best advertisements the city has and will compare with any in the nation.

THE COMMISSION CHARTER ELECTION.

So far there has been no interest aroused in the election for the adoption of the commission charter.

The requirement that all intending voters register again for this special election is a nuisance.

If the citizen is registered once in two years that ought to entitle him to vote at all elections.

If the charter is adopted it will abolish the present mayor and the present council at once.

If the charter is adopted three commissioners will have to be chosen by the people in December.

By indirection this election will be a test of the popularity of the Lachmund administration.

If the commission charter is adopted it will end his public career in the middle of his first term.

OH, HOW DEAD WE ARE.

The Capital Journal of Salem for September 9 contains a lengthy editorial that sheds new light on the matter of the Oregon City locks. The present gleam of hope is faint, for the right of way on the east side, it is said, would cost $2,000,000 before removing a spadeful of earth, an almost prohibitive expense. Thus the schemes of the schemers succeed, while the people plod on under their burdens.—Yamhill County Record.

The Yamhill Record, above quoted, has a faint glimpse of the iniquity of the whole job.

First the people held conventions and made public sentiment in favor of free locks and canal.

Then the legislature passed bills several times making the necessary appropriations for thefree locks.

On the urgent recommendation of Cognressman Hawley the state and nation were to bear equal shares of expense.

Then the senators put the appropriation through congress after Mr. Hawley let the bill go through without it.

The next thing the United States engineers were engineered to have the canals located on the east sid of the river.

It took a hard fight in the last open river convention, held at Oregon City, by the Commercial Club there, to keep the gang from endorsing the east side of the river for the locks and canal.

All they were fighting for was a plan to kill the whole enterprise by tying it up with litigation.

The Albany Open River Convention appointed a committee to investigate the locks at OregonCity to determine which would be the better plan, for the government to purchase the old locks, or build new ones on the east side.

This plan originated with some corporation politicians in Oregon City, who have always opposed any proposition tending to an open free river. The Clackamas county delegation, led by Senator Hedges, in the senate, and J. U. Campbell, in the house, both in the session of 1907 and 1909, bitterly opposed the $300,000 appropriation for the purchasing of the old or the building of the new locks. As soon as congress had appropriated the $300,000 to purchase or build said locks the old gang began to get quite busy.

The Capital Journal is very much afraid that the public agitation by certain Oregon City people will lead to long and continued litigation and keep the river closed for a long time. When the bill for free locks was pending, both in 1907 and 1909, it did not have a single friend in the Oregon City delegation who would stand up and fight for it.

The govrenment could very easily take over the old locks and canal, enlarge it and furnish the people free passage there.

That would not involve the government in litigation for the right of way, as the east side enterprise will.

But there is method in the east side push—delay until the federal appropriation lapses, and then the work will have to be done all over again.

But what do the thrifty politicians care for the whole matter, but to howl about it just beforethe primaries?

In the mean time the producer pays the additional fifty cents a ton on all the freight that comes and goes out of Western Oregon.

Kicked by a Mad Horse.

Samuel Birch, of Beetown, Wis., had a most narrow escape from losing his leg, as no doctor could heal the frightful sore that developed, but at last Bucklen's Arnica Salve cured it completely. Its the greatest healer of ulcers, burns, boils, eczema, scalds, cuts, corns, cold-sores, bruises and piles on earth. Try it; 25 cents at J. C. Perry's.

Journal "Want Ads" Bring Results.

CASE OF FORD AGAINST O. E. TURNS ON NICE POINT OF LAW IS "AGAINST PUBLIC POLICY"

OREGON SUPREME COURT DECISIONS

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

Ford v. O. E. Ry. Co., Marion County

Frank Ford, respondent, v. Oregon Electric Railway Company, a corporation, appellant. Appeal from the circuit court for Marion county. The Hon. Wm. Galloway, judge. Argued and submitted July 25, 1911. Kaiser & Pogue, attorneys for respondent. Harrison Allen and John H. McNary, (Carey & Kerr on the brief), attorneys for appellant. Bean, J. Reversed.

Decided September 26, 1911.

This is a suit in equity. The defendant, an electric railway corporation, appeals from a decree requiring it to stop its local trains for the accommodation of passenger at a road-crossing near the house on the land of plaintiff, in performance of a contract, executed August 25, 1906, by Tilmon Ford, accepted by defendant, and duly recorded, the material parts of which, omitting description of the land, is as follows:

"Know all men by these presents, That Tilmon Ford, unmarried, of the county of Marion in the state of Oregon, in consideration of the sum of six hundred dollars and other good and valuable considerations hereinafter expressed, to him paid by the Oregon Electric Railway Company * * * the receipt whereof is hereby acknowledged as to said money, and the other considerations hereinafter expressed; has granted, bargained, sold and conveyed," etc. * * * * "a right-of-way for its railroad. * *"

(Several covenants are then inserted in said deed as to fencing the right of way and building cattle-guards and road crossings, as to said grantee its successors and assigns, and then the following:)

"Said grantee, its successors and assigns, in operating said railway, shall stop its local trains for the purpose of taking on or putting off passengers at the road crossing easterly from where the house now stands on said premises, together with all and singular the tenements, heredtaments, or appurtenances thereunto belonging, or in any wise appertaining, subject to the terms and conditions of said conveyance."

It appears that after the execution of the right-of-way deed, the defendant, the Oregon Electric Railway Company, constructed its railroad from Portland to Salem, over which it has been operating its trains since January 1, 1908. The farm of plaintiff, Frank Ford contains 220 acres, upon which there is situated the farm house mentioned and other buildings, eight-tenths of a mile from Chemawa station on the south, and one and four-tenths miles from Quinaby station on the north. The crossing in question is situated near the center of the 220 acre tract, and it is asserted by plaintiff that about 40 or 50 people would be better accommodated with a station at that location. It appears that the wagon road crossed by defendant's electric line is a private roadway; that the plaintiff desires to cut up and sell his land in five-acre tracts, concerning which facts, in answer to the question: "In order to allow the public to use your crossing, you would have to give your permission to go across your land and lay out a road. If the train would stop, you would either have to let the people come across your place or lay out a road?" the plaintiff replied "Yes sir." Plaintiff demanded of defendant that its trains be stopped according to its contract, and contends that he is entitled to have the contract specifically enforced as his only adequate remedy.

On behalf of defendant it is asserted that there are about 25 people residing within one-half mile of the proposed station; that from four to six local trains stop at all of the stations on the road, making 30 stops, the schedule time for the run between Portland and Salem being two hours. Two other through or special trains make the run in one hour and 40 minutes, covering the distance between Chemawa and Quinaby stations in four minutes; that the passenger business handled in and out of Chemawa and Quinaby between June 8th and November 30th, 1908, was, for the former station, 1912, an average of about 70 passengers per day, and for the latter 689, a daily average of four passengers. The total number of passengers for this period passing Chemawa and Quinaby both north and south, exclusive of those moving in and out of such stations, was 66,800, making the daily average of passengers passing these stations about 380; that the establishment and maintenance of another station in this vicinity would consume additional time, and delay the freight and passenger traffic on the line; that the income to be derived from such station would not equal the actual expense of stopping and starting the trains, and that such a requirement would work a hardship and injustice to defendant. That the consideration of $600 paid for the land for the right of way was the full value thereof. It is further contended on the part of defendant that the "Necessities and convenience" of plaintiff, and all the inhabitants in the vicinity of his land, have, since the operation of the railroads, adequately been served by the stations of Chemawa and Quinaby; that at no time has there been enough passenger or freight business to warrant the establishment of any more stations on this part of the line.

It appears that Tilmon Ford was for many years and up to the time of his death, the owner in fee of the lands described in the deed, through which the right of way extends. He died March 1, 1908, and since his death by his devise the plaintiff, Frank Ford, has been the owner and in possession of the lands; that such lands are in a sparsely settled community; that the private roadway on the premises leads to a county road, which in turn leads to Chemawa and Quinaby stations, and that except by this private road, the crossing referred to is inaccessible.

Bean, J. We deem it better to consider the facts alleged in the complaint, combined with the evidence in the case. It is argued upon the part of defendant that, as the land was devised to plaintiff by Tilmon Ford, the covenantee, the covenant is merely personal to Tilmon Ford; that the covenant extends to a thing not in esse, and does not run with the land, and for this reason the plaintiff cannot maintain this suit, citing authorities based upon Spencer's Case, 5 Coke, 16 a, 1 Smith Lead. Cas., 174, (Note 11 Cyc., 1080), from which we quote as follows: "Spencer demised a house and lot to S. for years. S. covenanted for himself, his executors and administrators, that he, his executors, administrators, or assigns, would build a brick wall on part of the land demised. S. assigned the term to J. and J. to Clark. Spencer sued Clark for a breach of the covenant to build the wall. The court by the first resolve held that a covenant only bound the assignee when it was concerning a thing in esse, parcel of the demise, not when it related to a wall to be built. By the second resolve, they held that if the covenant had bound the 'assigns" by express words, it would have bound the assignee, although it was for a thing to be newly made, as it was to be upon the thing demised; but that if the covenant was for a thing to be done collateral to the land, and did not touch or concern the thing demised, in any sort, as if it were to build a house upon other lands of the lessor, the assignee should not be charged, although the covenant was for the covenantor and 'his assigns.' The two principles thus settled have always been acknowledged as law: that the assignee when not named is not bound by a covenant, except it relates to a thing in esse at the time; and that when named, he is not bound by a covenant collateral to the land but only for things to be done on or concerning the land."

In Alkin v. Albany V. & C. R. R. Co., 26 Barb. (N. Y.), 289, 293, it is said: "A covenant which is beneficial to, or binding on, the owner, as owner, and on or to no other person, runs with the land. * * * (Citing 5 Barn. & Adol. 11; 2 Kern, 302.) * * * * Yet it is also held that where the thing covenanted for, though not in esse touches or concerns the thing demised, the covenant does run with the land." (Citing 3 Denio, 285.)

"Covenants are to be regarded as affecting the land, though not directly to be performed upon it, provided they tend to increase or diminish its value in the hands of a holder." 11 Cyc., 1081, citing Van Rensselaer v. Smith, 27 Barb., 104.

"In order that a covenant may run with the land, that is, that its benefit or obligation may pass with the ownership, it must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed. Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied, for if this be the case, every successive assignee of the land will be entitled to enforce the covenant.

"A covenant which may run with the land can do so only when there is a subsisting privity of estate between the covenantor and the covenantee, that is, when the land itself, or some estate or interest therein, even though less than the entire title, to which the covenant may attach as its vehicle of conveyance, is transferred; if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase frrom one of the parties to the contract. In such a case the covenants are personal and collateral to the land. On the other hand if there is a privity of estate, a covenant which may run with the land will pass as an incident to a subsequent conveyance. But if any estate passes, so as to create privity, it is sufficient to carry the covenants, and the decided weight of authority is to the effect that covenants run with incorporeal as well as corporeal hereditaments." 11 Cyc., 1080, 1083. See also Gilmer v. Mobile & M. Ry. Co., 79 Ala., 569, 572; Taylor v. Florida E. C. Ry. Co., 54 Fla., 635.

It is said in Duffy v. New York & H. R. R. Co., 2 Hilt., 496, quoted from by Mr. Justice Moore in Brown v. Southern Pacific Co., 36 Or., 128, "But this nice distinction, originating at a time when it was necessary to use the word 'heirs', or other words of inheritance, in a conveyance, in order to grant or convey an estate in fee, cannot be now said to exist, as in Norman v. Wells, 17 Wend, 136, it was determined that those covenants run with the land, which are made touching or concerning it, and affect its value, and are not confined to those which relate to some physical act or omission upon it." As said by Mr. Justice Moore in that case, the word "heirs" is not now necessary to create or convey an estate in fee simple. All of the grantor's estate passes by his deed unless the intent to convey a less estate appears by express terms, or is necessarily implied from the language of the deed. L. O. L., Sec. 7103. See also Ruhnke v. Aubert, 113 Pac., 38, in which Mr. Justice McBride, in construing the reservation in the deed of right of way for an irrigating ditch, says: "In determining whether a right granted is appurtenant or in gross, courts must consider the terms of the grant, the nature of the right, and the surrounding circumstances, giving effect, as far as possible, to the legally ascertained intention of the parties, but favoring always the construction of the grant as of an easement, appurtenant rather than of a right in gross. (Citing 10 A. & E. E., 405; Wash. on Ease., 4 ed., 45; Stovall v. Coggins Granite Co., 116 Ga., 376, 42 S. E., 723.) And the rule that the rights of parties to a deed must be ascertained from its words is in cases of this kind subject to the modification that surrounding circumstances may be taken into consideration in order to ascertain the intention of the parties." (Citing Jones on Ease., Sec. 38; Jones on Real Prop., Sec. 344.)"

The covenant in question is in the nature of a reservation, providing for a means of travel to and from the land mentioned and over the right of way granted to the railroad company. Tested by the rules laid down in the foregoing authorities, and many others to the same effect which might be cited, it is clear that if by the covenant the right for a footpath or bridlepath had been reserved for the use of the owner or people occupying this farm along the right of way mentioned, there would be no question but that such a covenant would run with the land. The covenant is for the benefit of the other person. It has been held that the covenant to furnish gas for lighting and fuel to be used in buildings upon certain lands, would run with the land. Ind. Nat. Gas. Co. v. Hinton 159 Ind., 398. See also a covenant to furnish water to be used upon land. Stanislous W. Co. v. Bachman, 93 Pac., (Cal.) 858; Ruhnke v. Aubert, supra; Tone v. Tillamook City, 114 Pac. (Or.), 938. We see no reason why a covenant to furnish electricity for lighting or telephone service or car service for the benefit and convenience of the

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