# OREGON SUPREME COURT DICISIONS

Continued from Page two.)

had to take it up with George M. Moulton.

This testimony is not sufficient to prove any authority in Mitchell to bind the defendant. The mere understanding of the witness is hearsay. To say that Mitchell was held out by the defendant as its agent is but stating a conclusion of law. The actions or declarations of the defendant in that connection should have been disclosed in order to determine whether they amounted to holding him out as agent. Further: Although Mitchell, as a witness, would be a competent witness to prove his agency yet his letters or even his oral declarations reported by other witnesses are not sufficient to establish such agency.

On the assumption, however, that his agency is proven, we pass to the letters themselves. His first letter, apparently a circular addressed "Esteemed Comrade" without designating any one by name, after directing that quarterly dues b hereafter remitted direct to the company, proceeds as follows:

"Immediately upon receipt of your first remittance, this company will send you a 'Guarantee Slip' which you will attach to your Order of Washington Contract. This 'Guarantee Slip' will be countersigned by Geo. M. Moulton, President Western Life Indemnity Company, and it agrees to fulfill all the conditions of your present certificate for one year, upon your paying your regular dues and assessments. This arrangement gives you double protection without additional cost.

A little later you will be sent a list of the several kinds of insurance certificates issued by the Western Life Indemnity Company, and then, if you wish, you may exchange your present certificate for any certificate issued by the Western Life Indemnity Company within the year.

Upon receipt of your first remittance you will be mailed an official receipt, as well as a 'Guarantee Certificate'. Make your remittance by Post Office Money Order, Bank Draft or Express Money Order."

His letter of March 25, 1908, addressed to plaintiff says:

"Enclosed herewith please find receipts covering the amount of your remittance, and also you will find enclosed guarantee certificate to be attached to your Order of Washington certificate as per agreement entered into by and between the Order of Washington and the Western Life Indemnity Company.

Kindly send your next assessments direct to this office to keep your protection well secured.

The reinsurance contract is going forward successfully in every degree and every comrade's certificate is now worth 100 cents on the dollar. We all have much cause for rejoicing over this change."

His third letter addressed to plaintiff encloses a receipt for assessment No. 5, and besides that, is no more than an expression of his pleasure over the good condition of the company.

Conceding for the sake of argument, that Mitchell had authority as agent to sign for the defendant, none of the letters in evidence purporting to bear his signature, as such, contains any definite memorandum of any agreement and certainly does not express a consideration in any sense whatever. None of them comes anywhere near meeting the requirements of the statute of frauds.

It was admitted that one, George M. Moulton, was the president of the defendant and his signature to the letters and documents now here referred to was admitted. These documents follow:

"Geo. M. Moulton
President.
The Order of Washington
Department.
Western Life Indemnity Company.
Masonic Temple,
Chicago.
Chicago, Feb. 22, 1908.

To the Comrades of The Order of Washington:

You have already been officially advised by your Supreme President and Supreme Secretary that by the unanimous action of the Supreme Union of your order, and with the approval of The Insurance Department of Washington, the insurance on your life in the Order of Washington has ben lawfully transferred to The Wesern Life Indemnity Company of Chicago.

In behalf of this company, I extend to you a fraternal greeting with the glad hand of fellowship and cordial welcome int othe bosom of our organization.

By the payment to our company of the next monthly payment due by the terms of your present Life Benefit Certificate you thereby become one of us and one with us, I trust until death do us part.

Immediately upon our receipt of such payment, a formal agreement or guarantee will be transmitted to you for attachment to your present Life Benefit Certificate, which will bind our company to fulfill all the obligations heretofore imposed upon the Order of Washington, under such certificates, until such time as a policy for an equivalent amount can be issued on our forms and at our premium rates in accordance with the provisions of the reinsurance contract entered into between the Order of Washington and this company.

Continue the monthly payments on your present certificates as heretofore in the same amount and in the same way. By so doing you may rest assured that your rights thereunder will be fully safeguarded and adequately protected. Come with us—live with us—die with us. You will never regret either.

Faithfully yours,
GEO. M. MOULTON,
President."

"WESTERN LIFE INDEMNITY CO.,
CHICAGO.

Kindly atach the enclosed rider agreement to your life Benefit Certificate as evidence that this company has assumed a liability under said certificate pursuant to the terms of the reinsurance contract entered into between this company and The Order of Washington.

Faithfully yours,
GEO. M. MOULTON,
President."

The enclosure referred to in this last letter is as follows:

"WESTERN LIFE INDEMNITY COMPANY

Geo. M. Moulton, President.
Home Office, Masonic Temple,
Chicago.

This Certifies, That all the covenants and obligations heretofore imposed and undertaken by the Order of Washington under and by virtue of a certain Life Benefit Certificate No. 245, issued by said The Order of Washington on the life of H. A. L. Spande, are hereby assumed by the Western Life Indemnity Company to the extent and in the manner as are set forth in a certain contract of reinsurance made and entered into by and between The Order of Washington of Portland, Oregon, and the Western Life Indemnity Company of Chicago, Illinois, on the 15th day of February, A. D., 1908.

Executed and delivered at the Home Office of the Western Life Indemnity Company in Chicago, Illinois, this 21st day of March, 1908.

WESTERN LIFE INDEMNITY CO.,
By Geo. M. Moulton, President.'

As in the case of the Mitchell letters, so with the Moulton letters. Neither singly nor collectively do any of them comply with the statute of frauds in expressing the consideration of the agreement alleged to have been made between the defendant and the plaintiff.

There is still further defect in the proof of the plaintiff as based upon these letters. That is that while frequent reference is made to an agreement entered into by and between The Order of Washington and the defendant, specifically referred to in the certificate of the dfendant accompanying the letters of Moulton, as "the contract of reinsurance made and entered into by and between The Order of Washington, of Portland, Oregon, and the Western Life Indemnity Company of Chicago, Illinois, on the 15th day of February, A. D., 1908," that agreement was not introduced in evidence by the plaintiff. Not only so, but the bill of exceptions shows that it stoutly resisted introduction of any evidence whatever of that agreement on the part of the defendant. The agreement mentioned was evidently that embodied in "Exhibit A", already quoted, and in order to complete the evidence of the contract pleaded by plaintiff, so far as it depends upon the letters and certificate which he offered in evidence it was incumbent upon him to produce the agreement referred to in those documents. It is a rule of construction of contracts that where an instrument refers in terms to another instrument as containing part of the stipulation between the parties, that other instrument is itself a part of the contract between the parties and must be produced in order to fully substantiate the allegation regarding the agreements of the contracting parties. Bradstreet v. Rich, 74 Maine 303; In re Commissioners of Washington Park, 52 N. Y. 131; Casey v. Holmes, 10 Ala. 776.

At best, the plaintiff introduced only part of his evidence regarding the contract binding the defendant, whatever it may have been, whether directly with him or indirectly with him as one made for his benefit by The Order of Washington. On account of the action not having been brought in the name of the real party in interest; for the reason that the testimony is not sufficient within the statute of frauds to prove the contract alleged in the complaint; and also because of the omission of the contract alluded to in the documents by which the defendant sought to bind the plaintiff, the evidence was insufficient to authorize the submission of the cause to the jury and hence the judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice McBride did not participate in the decision of this case.

**Hafer v. Medford & Crater Lake Railroad Co. et al., Jackson County.**

Decided October 3, 1911.

Edgar Hafer, plaintiff, v. Medford & Crater Lake Railroad company, A. A. Davis, B. F. Adkins, R. H. Whitehead, J. M. Keene and W. I. Vawter, defendants, A. A. Davis, claimant and appellant, v. J. F. Reddy, receiver of the Medford & Crater Lake Railroad company, respondent. Appeal from the Circuit Court for Jackson county. Hon F. M. Calkins, judge. Motion to dismiss appeal. George H. Durham and William M. Colvig, for appellant. A. E. Reames, for respondent. Eakin C. J. Allowed.

Defendants Davis, Adkins, Whitehead, Keene and Vawter, as promoters and incorporators, incorporated defendant company for the purpose of constructing a railroad from Medford to Crater Lake in Jackson county, Oregon, with a capital stock of 500,000 shares of the par value of one dollar per share.

In the complaint it is alleged that the original incorporators issued to themselves, as fully paid, 60 per cent of the stock of the corporation, namely: 260,000 shares, when, in fact, nothing was paid for it, except it was shown by the minutes of the corporation that a resolution was adopted to purchase from one of their number all the rights of way, surveys, estimates and franchises for the sum of $260,000, and made it appear on the stock books and record that the $260,000 had been paid on the stock subscribed by them, and that amount paid for the rights of way, estimates, etc.; that the whole proceeding was a device on the part of the promoters to secure a majority of the stock, fully paid up, without expense to them; and that thereafter plaintiff and other citizens of Jackson county were induced by the promoters to, and they did, subscribe for stock in the corporation, and paid the face value thereof to the amount of $21,000; that, after spending in construction work the $21,000, $35,000 borrowed by the company and secured by mortgage upon the property of the company, and certain moneys advanced by Davis, as manager of the company, the work was abandoned.

Plaintiff, as a stockholder, commenced this suit on behalf of himself and such other stockholders as should ask to be joined with him as plaintiffs, to have a receiver appointed to take charge of the property of the corporation, to collect the unpaid subscription of stock; and to settle its affairs. A receiver was appointed, who sold the property of the corporation for the sum of $82,500, $46,457.52 of which amount was paid in satisfaction of the mortgage debt of the company. After the sale of the property of the company by the receiver, defendant A. A Davis presented to the receiver a claim against the corporation for $21,753.42, for money advanced by him to the company and applied in construction work, which claim was disallowed by the receiver. Plaintiff and other stockholders, who had paid for their stock, filed with the clerk of the court their formal appearance in writing, and protested against the allowance of payment of the claim of Davis, which came on for hearing before the court, the protestants appearing by their counsel, and after the evidence was heard the court adjudged that the claim of Davis cannot be allowed as an indebtedness against the orporation for the reason that, at the time Davis advanced to the corporation the money which makes up the claim, he was indebted to the corporation in a sum greater than the amount so advanced, and that his claim should be set off against his debt to the corporation, but that he be considered as having paid up stock in the corporation to the amount of his claim. Davis appeals from this decision.

The notice of appeal is directed to J. F. Reddy, receiver, and Reames, his attorney, due service of which notice was accepted by Reames. The receiver now moves the court to dismiss the appeal for the reason that the notice was not given to or served upon the adverse party in the decree.

EAKIN, C. J. The rule is that every party to a litigation who is interested in sustaining judgment or decree appealed from is an adverse party and must be served with notice: Moody v Miller, 24 Or. 179. A party to a judgment must be one who was made a party at the commencement of the case or brought in thereafter by order of the court or became a party in some manner recognized by law: Medynski v. Theiss, 36 Or. 397, 399; Inman v. Sprague, 30 Or. 321. At least Hafer, plaintiff in the case, who appeared and protested against the allowance of the claim of Davis, is an adverse party. He is directly interested in sustaining the appeal and, therefore, must be served with notice thereof. Whether the other stockholders who appeared at the hearing of this proceeding are parties, within the decisions last above cited, need not now be decided. The only person served was the receiver, who is not a party to the suit nor interested in the subject of the litigation, other than as an officer of the court and interested in protecting the creditors and stockholders. Therefore, the notice was not served on any adverse party. The motion to dismiss is allowed.

Taffe v. O. R. & N. Co., Wasco County.

Decided October 3, 1911.

I. H. Taffe, respondent, v. The Oregon Railroad & Navigation company, a corporation, appellant. Appeal from the circuit court for Wasco county. Hon. W. L. Bradshaw, judge. Argued and submitted Sept. 14, 1911. A. S. Bennett (Bennett & Sinnott, on brief), for respondent. A. C. Spencer (and W. W. Cotton and W. A. Robbins, on brief), for appellant. McBride, J. Affirmed.

This is an action for damages on account of the alleged destruction of plaintiff's cannery and cold storage warehouse by fire, occasioned by sparks emitted from defendant's locomotive.

At the close of plaintiff's testimony defendant moved for a nonsuit on the ground that no evidence had be submitted sufficient to justify a verdict for plaintiff, which motion was overruled. After the conclusion of the testimony defendant moved for a directed verdict, which motion was also denied. Plaintiff had a verdict for $20,000 and defendant appeals. Other facts appear in the opinion.

McBride, J. It is difficult to discuss the matters included in the refusal of the court to grant a nonsuit or the motion for a directed verdict, without discussing and comparing the testimony generally, and this course would involve incumbering the reports with a long detail of facts which would be entirely useless hereafter to the courts, the public or the persons concerned. We will, therefore, state briefly the conclusions we have drawn from the testimony and apply the law to these findings.

The fire was discovered near the southeast corner of the cannery between the hours of half-past one and two o'clock in the afternoon of September 10, 1908. When first discovered it was a small smoking spot, occupying only a few inches, but rapidly spread, destroying the cannery and other buildings northwesterly from the cannery. At a time variously estimated at from 10 minutes to a half hour, and probably about 15 minutes before the discovery of the fire, one of defendant's west-bound trains, drawn by a locomotive burning coal, stopped at the platform about 150 to 200 feet from where the fire originated, the engine being approximately in a southeasterly direction from the spot where the fire was discovered. About the time this train left, a locomotive, burning wood, of the Portage railway, operated by the State of Oregon, and having attached to it two loaded cars, ran in on a track between defendant's track and the cannery, stopped at a distance of from 75 to 100 feet southeast from the place where the fire originated, switched to another track, and departed. The weather was exceedingly dry, the wind high, and there was no cause suggested for the fire except that it started from the sparks from one or the other of these locomotives. From the testimony we have no doubt that it did so originate, and the principal contention of the defendant upon the trial seems to have been that the circumstances tended largely to indicate that the fire started from sparks from the locomotive of the Portage road instead of from its own.

Under these circumstances, the direction of the wind, the condition and equipment of the locomotives and the comparative liability of coal-burning and wood-burning locomotives to emit sparks became the principal subjects to which the testimony was directed. On behalf of the plaintiff, witnesses were introduced who testified substantially that the wind blew directly from where defendant's locomotive stood toward the buildings where the fire originated, and this testimony was somewhat strengthened by the circumstance that the buildings to the northwest of the cannery building were burned, while those to the west and southwest were not destroyed. There is also testimony tending to show that sparks emitted from burning coal would retain their vitality longer than sparks from wood; that defendant's train was somewhat difficult to start; that the wheels spun around on the track; and that a hard start of this character would require a greater exhaust and probably tend to emit more sparks than if the start were easy.

Defendant's witnesses claimed that the wind was practically from the east, and that the spark arrester of the Portage railway locomotive was in bad repair and unsuitable for the purpose; and it was contended that, considering the closer proximity of this engine to the place where the fire originated, it was most probable that it was the efficient cause or at least that the testimony left the matter in such a condition that the origin of the fire was a mere matter of conjecture and speculation.

Upon a careful consideration of the whole testimony we do not coincide with defendant's contention. We are of the opinion that there was testimony upon which a reasonable man might well have come to the conclusion that it was more probable that the fire originated from sparks from defendant's locomotive than from the locomotive of the Portage railway, and that it was much more probable that it originated in that manner than from any other cause. It is true that the testimony was contradictory in some particulars, but every court in this state is required to instruct the jury that it "is the judge of the credibility of the witnesses and the value and effect of the evidence," and it was for the jury to say what part of the evidence produced conviction in their minds.

It is contended that the court erred in permitting evidence of the throwing of sparks by other engines of defendant, but the admission of testimony of this character has been sanctioned by other decisions of this court and the law upon that subject may be considered as settled in this state: Koontz v. O. R. & N. Co., 20 Or. 3; Hawley v. Sumpter Ry. Co., 49 Or. 509.

It is often difficult for a plaintiff to show which one of several locomotives caused a fire, although it may be certain that some one of them did so. It is in evidence here that other locomotives of defendant passed within a short time before the fire, and while plaintiff may have felt that it was most probable that the one going west was the source of the conflagration, he could not be absolutely certain until the facts were developed on the trial. The scattering of sparks generally by other locomotives was also admissible to show the general care exercised by defendant in the management and equipment of its locomotives. Plaintiff could not know beforehand the particular name, number and type of the locomotive used on a particular train on a particular day. Railways usually have some uniformity in equipment and management, and if a particular engine differs from the usual type it is easy to point this out by testimony.

It is also claimed that, even admitting that the fire was kindled by sparks from defendant's locomotive, the testimony introduced by defendant, as to the inspection and good condition of its locomotive and spark-arresting apparatus, was sufficient to rebut the prima facie case of negligence made by plaintiff, and to require the court to direct a verdict.

Where the evidence as to inspection and good condition is not conclusive, and it seldom is, the jury is the proper tribunal to judge of its sufficiency. As was said in Chenoweth v. Southern Pac. Co., 53 Or. 111, 117: "A jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement." This is especially the case when the statements come exclusively from the servants of the defendant, and where, as in this case the netting of the stack was not produced for the inspection of the jury, and where defendant's report from September 10 to the 21st, indicates that the locomotive was not sent out, or if sent out was not inspected; and further shows that on September 30 a second-hand diamond stack with new netting replaced the one in use on September 10. It is not enough that the evidence offered by defendant should rebut the prima facie case made against it, to the extent of showing that the appliances were in good condition and suitable, but it should also rebut the presumption of want of care in the case of these, and defendant's evidence falls short of this or, at least, a reasonable and fair juror might conclude that it did not come up to the required standard in that respect. The weather was very dry and the wind high, and, as plaintiff's witnesses contend, was blowing directly from the defendant's engine toward plaintiff's buildings. A jury might well conclude that under such circumstances it was the duty of the defendant's servants to observe such surroundings and to use greater care to avoid a sudden and rapid exhaust and consequent increase of sparks than would be necessary under different circumstances.

It must be admitted that the case is not one entirely free from difficulty, but we do not believe that the court committed error in any of the respects claimed by defendant. The judgment will be affirmed.







**James C. Dahlman, "Cowboy" Mayor of Omaha, "Throws the Lariat".**

Mayor Jas. C. Dahlman is of an interesting and impressive personality. Starting his career as a cowboy, he is at present mayor of Omaha, and has the following record to his credit: Sheriff of Dawes county, three terms; mayor of Chadron, two terms; Democratic national committeeman, eight years; mayor of Omaha, six years, and in 1910 candidate for governor of Nebraska. Writing to Foley & Co., Chicago, he says: "I have taken Foley Kidney Pills and they have given me a great deal of relief, so I cheerfully recommend them." Yours truly,

(Signed) "James C. Dahlman."

—Red Cross Pharmacy (H. Jerman.)

**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.

**Motor Car Insurance.**

We write insurance on automobiles and all kinds of power driven vehicles at the lowest rates, and insure against damages from fire under any and all circumstances, whether in private or public garage or on the road or in accident. More cars are destroyed by fire than by all other causes put together. Rates the lowest. E. Hofer & Sons, 213 S. Commercial street. 5-22-tf

A couple of workmen at Hillsboro, in removing an old pavement found 58 brand new $10 gold pieces. They proved to be counterfeit.

**A Household Medicine that Gives Confidence.**

Is Foley's Honey and Tar Compound. Mrs. T. J. Adams, 522 No. Kansas Ave., Columbus, Kas., writes: "For a number of years my children have been subject to coughs and colds. I got some of Foley's Honey and Tar Compound and have found that it cured their coughs and colds in a very short time, so I keep it in the house all the time."—Red Cross Pharmacy, (H. Jerman.)

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