OREGON SUPREME COURT DECISIONS

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NOTICE TO ATTORNEYS.

After February fifth The Capital Journal will discontinue the publication of the supreme court decisions.

Buchanan, v. Tennant, Douglas County.

Decided January 23, 1912.

J. A. Buchanan, appellant, v. Phoebe Tennant, respondent. Appeal from the circuit court for Douglas county. The Hon. J. W. Hamilton, judge. Argued and submitted Jan. 10, 1912. J. A. Buchanan (and Albert Abraham, on brief) for appellant. A. N. Orcutt (Fullerton & Orcutt, on brief) for respondent. McBride, J. Affirmed.

In June, 1906, plaintiff entered into a written contract with defendant to clear her title to certain land in Douglas couny from a cloud cast upon it by sales thereof made by the coutny for delinquent taxes. It was agreed thereby that if plaintiff failed to clear the title he should receive nothing for his services, but if he succeeded, by suit or otherwise, defendant was to make him a warranty deed to an undivided one-half interest in the land.

Thereafter plaintiff began a suit for specific performance of defendant's contract to convey the one-half interest, alleging that he began a suit to remove the cloud and that he had performed his part of the agreement; and that defendant had obtained thereby a good title but had refused to convey to him the half-interest. Defendant answered, admitting substantially the contract but alleging that upon its execution she directed plaintiff to take the necessary steps to have the cloud removed; and alleged that plaintiff delayed taking any action in the matter for several months; that in September, 1906, she employed her husband as her agent and attorney to take such proceedings in the matter as were necessary to establish her title to the lands in question; that in October, 1906, she ascertained through him that plaintiff had not commenced any proceeding or taken any steps to clear the title from the alleged tax liens, which constituted the cloud, but on the contrary had allowed the lien for the taxes of 1901, for which the property was sold in 1903, to proceed so far that that a tax deed had been made to J. F. Barker and G. R. Childs, the purchasers at the tax sale; that on account of plaintiff's delay in commencing proceedings, defendant cancelled the contract and notified plaintiff not to proceed further under it; that defendant's agent proceeded at once to clear the title, and contracted to purchase the interest of Child's and Barker to the same, the contract to be completed as soon as Childs, a resident of California, could execute a deed thereto; that plaintiff, notwithstanding that defendant had notified him that the contract was cancelled, and knowing that defendant had purchased the interest of Childs and Barker, comenced a suit in the name of defendant against Childs and Barker to quiet the title, verifying the complaint himself and well-knowing when he filed the complaint that the title was clear.

There was also pleaded a defense that the agreement was champertous and, therefore, illegal and void, and also that it was obtained by fraudulent misrepresentations as to the value of the property.

All the new matter in the answer having been put at issue by reply, the cause was heard and the court made the following findings of facts:

"First: That plaintiff, after the execution of the contract referred to in the pleadings herein, delayed the commencement of the suit agreed by him to be brought for defendant; that said delay was occasioned through plaintiff's desire to inform himself more particularly as to plaintiff's (defendant here) title to said real property forming the subject of said proposed suit.

Second: That plaintiff was not negligent in the prosecution of said suit.

Third: That the value of said real property referred to in the complaint herein at the time of the said contract being entered into between plaintiff and defendant was approximately $1500.

Fourth: That the opinion given by plaintiff to defendant at said time that said real property was of the probable value of $900 was not fraudulently given, nor did the plaintiff intend to deceive or cheat defendant in said matter.

"Fifth: That plaintiff agreed to bear the expenses of said litigation except $5 advanced by defendant.

Sixth: That before any suit was commenced by plaintiff in pursuance with said contract, defendant through her agent notified plaintiff not to commence said suit; that said matter was in process of settlement.

"Seventh: That said controversy was settled without suit by payment by defendant of $100 and by plaintiff of $42 in redemption of said real property from sale thereof for taxes."

Based upon these facts, the court made the following conclusions of law:

"First. That after making the said contract with the plaintiff it was within the power of the defendant to settle said controversy in relation to which plaintiff had been retained as attorney.

"Second. That in the event of such settlement made in good faith without the intent of defrauding plaintiff, plaintiff is not entitled to a decee of specific performance as for a contract the terms of which have been performed on his part.

"Third. That the complaint herein should be dismissed with costs to defendant."

Thereupon a decree was entered in favor of defendant dismissing the suit and plaintiff appeals to this court.

Upon the hearing here the court affirmed the decree and findings of the circuit court. The decree is as follows: "This cause having, on the 30th day of November, 1909, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions, made by counsel in their argument and brfefs, finds that there is not error as alleged. It is therefore ordered and adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is, in all things, affirmed. And the court having considered the evidence and the findings of fact made by the court below in this cause, finds that the said findings of fact made by the court below in this cause, finds that the said findings are correct, and are sustained by the evidence, and that the enclusions of law are correctly deduced in its conclusions of law therefrom, it is ordered by the court that the findings of fact and conclusions of law made and found in the court below in this cause be adopted and found in this court as such. And based thereon, and upon the whole record in this cause, it is further ordered, adjudged and decreed that the suit of the appellant herein be and it is dismissed, and that the respondent recover off and from the appellant her costs and disbursements in the court below, to be there taxed."

The opinion filed in the cause discussed but one feature of the case, namely, whether plaintiff had performed his contract to clear the title, and it was therein held that by certain tax sales, prior to those made to Barker and Childs, the county had acquired a lien, which had ripened into a title, to the land in controversy, and that the payment, by plaintiff, to the county of such taxes and penalties, and the assignment by the county to defendant of the tax certificates executed to it by the sheriff, did no operate to revert the title in defendant and that plaintiff and defendant were both wrong in assuming that the title was clear, and that consequently plaintiff's contention, that he had procured defendant a clear title, was not sustained, the court saying: "It would thus appear, not only that plaintiff has not fully performed the terms of his contract, without which he cannot recover, but also that the defendant, contrary to her and her agent's formerly self-conceived notions, had, and still has, much need of the plaintiff, or some other attorney, to perfect the title to the premises." (55 r. 121.)

Upon the rendition of this opinion plaintiff procured from the county a quit-claim deed completely clearing the title and again brought suit for specific performance. Defendant answered, pleading the judgment and decree of this court as a defense to the suit, and this plea being sustainod the suit was dismissed. Plaintiff appeals.

McBride, J. Plaintiff's argument proceeds upon the theory that, if the opinion rendered by the supreme court in the former case is to control, the ruling of the circuit court must be reversed; but, if the decree rendered is to control, the ruling below must stand. We will discuss the case from that point of view.

We think the rule well settled that, if the decree is ambiguous in its terms, resort may be had to the opinion to ascertain its meaning: II Van Fleet, Former Adjud., section 278; Legrand v. Rixey, 83 Va. 462; Burton v. Mill, 78 Va. 470; New Orleans, etc. R. Co. v. City of New Orleans, 14 Fed. 373.

But where the decree is unambiguous, resort will not be had to the opinion to contradict it or to show that matters apparently decided were not actually passed upon.

The force of the estoppel resides in the judgment itself. It is not the finding of the court nor the verdict of the jury which concludes the parties, but the judgment entered thereon. The reasoning of the court in rendering a judgment forms no part of the judgment as regards its conclusive effect; nor are the parties bound by the remarks made or opinions expressed by the court in deciding the cause, which do not necessarily enter into the judgment: 23 Cyc. 1218, and cases there cited.

The former decree of this court was conclusive of the whole issue, and while the opinion filed did not discuss some phases of the case included in the final decree, and seems at variance in some particulars with the decree itself, it is binding upon this court. We have frequently recalled mandates and corrected such discrepancies upon their being called to our attention, but such course was not pursued in this case, and in the absence of such procedure or any direct procedure to set aside the decree for mistake, it was binding upon the court below and is also binding upon this court. In any event the opinion rendered by this court held that plaintiff had not performed his part of the agreement at the time of the bringing of his first action, and it does not stand to reason that, several years later and after that suit had been dismissed and he had been discharged by defendant, he could, without a new arrangement with her, act as her attorney and complete the performance of his contract. The contract to clear plaintiff's title was entered into in June, 1906, and on January 4, 1910, this action was commenced. As no time was fixed for performance of the contract, the law implied a stipulation that it should be performed within a reasonable time. A delay of three years and a half, unexplained, is prima facie unreasonable, and while the plaintiff may have an action on quantum meruit for the value of his services, or for damages for his discharge, it would seem that even had the decree followed the opinion he would have had no case for specific performance.

The decree of the circuit court is affirmed.

City of Newberg v. Kienle, Yamhill County.

Decided January 23, 1912.

The City of Newberg, a municipal corporation, appellant, v. Edward J. Kienle, respondent. Appeal from Yamhill county. The Hon. William Galloway, judge. Argued and submitted December 21, 1911. S. B. Huston (and Clarence Butt, on brief) for appellant. McCain & Vinton (and F. W. Fenton, on brief) for respondent. Eakin, C. J. Reversed.

Eakin, C. J. The City of Newberg by this proceeding seeks to enjoin defendant from extending into the street a building he is erecting on block 12 of Everests' Addition to Newberg, and the dispute is as to the location of the northwest line of the street now called "Dayton Avenue,' formerly known as the "Dayton-Portland road," which we will hereafter refer to as the road. It was travelled as a road long prior to 1866, passing approximately north 47 degrees, 10 minutes east diagonally across the northwest corner of the Rogers' Donation Land Claim, which is now within the city of Newberg. In March, 1866, David Everest purchased from the heirs of Rogers 17 acres in the northwest corner of the claim, including that part of the claim northwest of the road. Until purchased by Everest, and for a few years thereafter, this portion of the Rogers' donation claim evidently was not enclosed. Richard Everest, a son of David Everest, says that about three years after his father traded for the 17-acre tract, he fenced it, namely, about the year 1871, which, so far as appears, was the only fence ever built along the northwest side of the road and enclosed the Everest tract, and which remained there until about the year 1895 when it began to disappear.

On March 1, 1888, Everest platted the tract into lots, blocks, streets and alleys. The notes of the survey of the platting, if any, are not in evidence and there is nothing on the plat to indicates the location of the southeast line of the platted ground. All the blocks bordering on the road are fractional blocks and their dimensions cannot be determined from the plat, but the southeast line of the blocks are indicated thereon by heavy black lines adjacent to the road. The tracing of the survey of the 17-acre tract, given in evidence by Herring, as taken from the deed, discloses that it included a portion of the road as now recognized, namely, about 15 feet. If the blocks and lots were staked on the ground when the addition was platted, it was not shown in the evidence, nor has there been any attempt to locate the corners or lines of the blocks bordering on the road. If Everest owned to the center of the road at the time he platted the ground, we would be justified, from the facts appearing, in holding that he dedicated to the public so much of the road as is included in his tract, but as we have before us no data as to these facts or the location of the road with reference to the plat, it does not aid us in determining the location of the road or rather its northwest boundary.

It apepars that the county made some effort in April, 1871, to lay out and establish the road as a county road under the statute but it is practically conceded that what was done in that matter was insufficient to establish a road, and the record does not aid plaintiff's case oher than it operates as color of title in the use of the road thereafter. It is to be noted that the building of the fence was approximately at the time of this attempt by the county to lay out the road and the use by the public will be presumed to extend to the fence.

It is said in Washington Borough v. Steiner, 25 Pa. Sup. Ct. 392, that "Where the right to a public highway is acquired by adverse user, an important element in determining the width thereof is the recognition of the limits of the way by the owners whose lands front thereon, as indicated by the monuments and fences which they themselves place upon the ground, and the lines which they fix for the same in making conveyances of their property."

In Kruger v. LeBlanc, 70 Mich. 79, it is said: "Highways by user are based upon the implied dedication by the owner of the land; and, where there is nothing to indicate a contrary intention, the presumption is that the owner intended to dedicate the land to the full legal width: Bumpus v. Miller, 4 Mich. 159. But where the owner has placed fences or other means, during the time the statute is running, within the statutory width, it indicates an intention not to dedicate to the full width, and the public is only entitled to claim the part which it has been permitted to use." See also Bump v. Miller, 4 Mich. 159.

It is conceded by defendant that this road was a legal county road and is now a city street by user, and he only questions its location or the location of its northwest boundary. These statements eliminate all the questions involved except the location of the boundary of the road as acquired by user. Adverse possession of the ground cannot aid defendant unless his possession continued for 10 years prior to the 25th day of May, 1895, when the state and county were exempted from the operation of the statute of limitations, and defendant makes no contention of such possession except by virtue of the orginal fence built in 1871 by Everest, and plaintiff seems to admit that the location of that fence is the northwest boundary of the road, and is the true boundary of the road, and we will attempt to ascertain the original location of the fence, referred to as a "rail worm fence."

At the time of the trial there was none of the fence remaining and plaintiff seeks to establish its original location by persons who were familiar with it. Many witnesses identify an apple tree as having stood within the worm of the fence on the ground that is now a part of defendant's lot, the stump of which is now intact and within defendant's building. A great deal of the testimony for both parties centered around this tree. They also identify a haw tree, which is still standing on block 12 and near defendant's lot, farther southwest, as having stood in the fence line. There are many other trees that are identified as either having stood in the fence line or very near it,—most of them still farther southwest, which are all very persuasive as to the location of the fence. The apple tree mentioned is the most important as it is within defendant's lot and if identified determines the line at the immediate point in controversy.

Wilson's testimony is to the effect that he lived there about 21 years and used to get upon the fence and

(Continued on Page 6)

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Administrator's Final Notice.

Notice is hereby given that the undersigned administrator of the estate of James Edsall Rutherford, deceased, has filed his final account in said estate, and that the county court of Marion county, Oregon, has fixed Wednesday, the 31st day of January, 1912, at 10 o'clock a. m. thereof, at the county court house in Salem, Oregon, as the time and place for hearing any objections to said final account, and for the settlement thereof.

Dated this 30th day of December, 1911. W. C. WINSLOW.
Administrator of the estate of James Edsall Rutherford, Deceased.
1-2-12-5t-tues

Charles Durham, Lovington, Ill., has succeeded in finding a positive cure for bed wetting. "My little boy wet the bed every night clear thro on the floor. I tried several kinds of kidney medicine and I was in the drug store looking for something different to help him when I heard of Foley Kidney Pills. After he had taken them two days we could see a change and when he had taken two-thirds of a bottle he was cured. That is about six weeks ago and he has not wet in bed since." Red Cross Pharmacy (H. Jerman).

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Mr. Jas. McCaffery, manager of the Schlitz hotel, Omaha, Neb., recommends Foley's Honey and Tar Compound, because it cures in every case. "I have used it myself and I have recommended it to many others who have since told me of its great curative power in diseases of the throat and lungs." Foley's Honey and Tar Compound is a reliable family medicine. Give it to your children, and take it yourself when you feel a cold coming on. It checks and cures coughs, colds and croup and prevents bronchitis and pneumonia. Refuse substitutes. Red Cross Pharmacy (H. Jerman).