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HIGH COURT DIVISION.

LENNOX, J. NOVEMBER 22ND, 1920.

FARYNA v. OLSEN.

Negligence—Death of Plaintiff's Son—Action under Fatal Accidents Act—Failure to Prove Negligence of Defendant—Withdrawal of Case from Jury—Dismissal of Action—"Nonsuit"—Meaning of—Costs.

Action to recover $5,000 damages for the death of the plaintiff's son, who was killed by a boat, which he was assisting to hoist, falling upon him, owing, as the plaintiff alleged, to the negligence of the defendant, the owner of the boat.

The action was tried with a jury at a Toronto sittings.

T. J. Agar, for the plaintiff.

W. H. Kirkpatrick, for the defendant.

LENNOX, J., in a written judgment, after referring to the evidence, said that he refused to allow the case to go to the jury and intimated that he would direct judgment to be entered dismissing the action, because there was no evidence whatever of negligence, no evidence in fact that any one was blameworthy or negligent.

Counsel for the plaintiff asked the learned Judge to direct a nonsuit, saying that the plaintiff would then be in a position, without more, again to set the action down for trial, and at a new trial to adduce more satisfactory evidence. The learned Judge did not understand that to be the law or practice. Since the Judicature Act, a judgment of nonsuit is a judgment for the defendant. Even if an easy method of prolonging the litigation could be found, the learned Judge would not be inclined to apply it in this case. On the contrary, he thought it his duty to prevent it by making a conditional order as to costs. The action should not have been brought, and reasonable investigation would have shewn this to be so.

Substantially the plaintiff failed to prove any material allegations made in the statement of claim, except the death of the plaintiff's son and the ownership of the boat, neither of which was actually in dispute.

There should be judgment dismissing the action with costs; but, in the event of the litigation ending with this judgment, the dismissal should be without costs.

MIDDLETON, J. NOVEMBER 25TH, 1920.

WADE v. PEDWELL.

Fraudulent Conveyance—Gift of Land by Husband to Wife—Voluntary Settlement—Solvency of Husband at Time—Subsequent Insolvency—Intent—Hazardous Business—Subsequent Creditors.

Action by the assignee for the benefit of the creditors of Charles Pedwell to set aside a conveyance of land by Pedwell to his wife.

The action was tried without a jury at Walkerton.
David Robertson, K.C., for the plaintiff.
J. L. Killoran, for the adult defendant.
O. E. Klein, for the infant defendants.

MIDDLETON, J., in a written judgment, said that the conveyance was made in 1912, when Pedwell was carrying on business as a saw-miller and lumberman. The transaction was entirely voluntary, and Pedwell's evidence satisfied the learned Judge that the land was the subject of a gift by him to his wife. Pedwell was at that time solvent, but during the next year suffered severe financial reverses; he struggled on until 1919, when, being badly insolvent, he assigned for the benefit of his creditors. The assignee did not desire to attack the transfer of the land to the wife; but one Tackaberry, a creditor and the real plaintiff, made the attack, in the name of the assignee, under the provisions of the Assignments and Preferences Act. Tackaberry was not in a position to complain on his own account, for he was paid his entire claim existing at the time of the transaction, and was a party to the arrangement under which the land was conveyed to the wife. He was, however, a creditor with respect to dealings which took place long afterwards.

Pedwell's wife was now dead, and his interest in her estate, as well as his rights under a license to cut timber upon the land conveyed to her, granted by her, passed to the assignee. The object of the action was to get at the interest which, on the wife's death intestate, passed to her infant children.

The attack was based on two grounds: first, that unpaid claims existed at the date of the transaction; and, second, that the lumbering business was of so hazardous a nature that the Court must find that the transfer to the wife was made for the purpose of defeating those who might thereafter become creditors in connection with that business.

In the learned Judge's view, the action failed; for, upon the facts, it must be found that no such intent as is necessary, under the Statute of Elizabeth, to invalidate a voluntary settlement, existed. It is the duty of the Court in each case to deal with the facts of that case; and the existence of the intent which invalidates is a question of fact to be determined in each action.

Reference to May on Fraudulent Conveyances, 2nd ed., pp. 26 et seq.; Ex p. Mercer (1886), 17 Q.B.D. 290.

Nothing was further removed from Pedwell's mind than the idea of defeating or defrauding any creditor. The gift to his wife was in truth an integral part of a transaction out of which he then expected, and not unreasonably, to make much money. It was done openly, with the knowledge and approval of the bank, then his only creditor for any sum of moment, and with the approval of the man who was now attacking the transaction. The value of the property given to the wife was infinitesimal compared with the supposed wealth of the husband.

A voluntary settlement made by a man on his wife on the eve of entering into a hazardous business for the purpose of putting his property out of the reach of creditors whom he may have, although he hopes that the business may result prosperously, cannot be supported; but this proposition must not be made too wide; the Court must still judge of the intent and object with which the settlement is made: Buckland v. Rose (1859), 7 Gr. 440.

The learned Judge had no hesitation in finding that there was not in the settlement of this piece of property any intent to defraud or defeat or delay those who thereafter became the settlor's creditors.

Action dismissed with costs.

MEREDITH, C.J.C.P. NOVEMBER 26TH, 1920.

RE ANDERSON.

Will—Construction—Devise—Life-estates—Remainder Devised to Childern of Life-tenants—Gift to Class—Time at which Class to be Ascertained.

Motion, upon originating notice, by George Tocher Anderson and Isabella Jessie Anderson, for the opinion, advice, and direction of the Court on a question arising as to the construction of the will of William Anderson, deceased.

The clause of the will which gave rise to the difficulty was as follows:—

"I give devise and bequeath unto my trustees and executors hereinafter named to the use of my son George during his lifetime upon trust that they the said trustees and executors and the survivor of them and the executors and administrators of such survivor shall and do by and with the said estate as they shall deem most expedient for the support and maintenance of my said son George and his family my farm on lot number 22 in the 2nd concession of the said township of Whitby containing by admeasurement 90 acres . . . to have and to hold the same to my trustees and executors hereinafter named to the use of my said son George during his lifetime as aforesaid and after his decease to the use of his wife and after the decease of his said wife I give devise and bequeath the last mentioned land and premises unto the children of the said George Anderson to have and to hold to them their heirs and assigns forever."

The motion was heard in the Weekly Court, Toronto.

W. J. Beaton, for the applicants.

F. W. Harcourt, K.C., for the infants.

MEREDITH, C.J.C.P., in a written judgment, said that it was stated that George Anderson had four children, two of whom died during the life-tenancies; but the necessary facts had not been set out so that particular rights could be considered. It would, however, be enough to state generally who were entitled, and the facts of each case could then be applied so as to make individual rights plain.

The gift was to a class, and the main question involved was: At what time are the members of that class to be ascertained?

If the testator had expressly or impliedly fixed the time, that must govern: it was his will which was to be given effect.

As the gift in question, expressly, was only after the death of the life-tenants, as it was only then that the testator gave and bequeathed the land to the children, it might be thought that that was the time the testator meant—that the children then living, and so the only children who could actually take and have the benefit of the gift, were the only children who could have been meant.

But the cases have long rejected such an interpretation, holding that in such cases as this the gift is immediate to those living at the death of the testator, and that to children born after that and during the life-tenancy there is a gift to each at birth: the intervening life-estate merely postponing the receiving and enjoyment of their gifts. By one of the Vice-Chancellors it was said that in effect a gift from and after a life-estate gives a life-estate and remainder: In re Stuart's Trusts (1876), 4 Ch.D. 213: a view of the law which seems to have been readily accepted and given effect by some of the Judges of this Province: Latta v. Lowry (1886), 11 O.R. 517; Rogers v. Carmichael (1892), 21 O.R. 658; and Re Brown (1913), 4 O.W.N. 1401: though the result can hardly be always that which the testator intended, for instance the case of a child born, during the life-tenancies, on one day only to die the next.

The cases relied on by Mr. Beaton were inapplicable: in them the death of the child happened before that of the testator: In re Harvey's Estate, [1893] 1 Ch. 567; Re Williams (1903), 5 O.L.R. 345.

The result was, that children, if any, living at the time of the testator's death, and children born during the life-tenancies, took vested interests, that is, were within the class; and that such of them as were living, and the legal representatives of such as were dead, took the property in question, one equal share for each child.

Costs, as usual, out of the property in question.

MEREDITH, C.J.C.P. NOVEMBER 26TH, 1920.

DAVIES v. CANADIAN NORTHERN ONTARIO R.W. CO.

Water—Damming Waters of River by Railway Bridge and other Works and Obstructions—Injury by Flooding to Riparian Owner up-stream—Destruction of Bricks in Course of Manufacture—Liability—Damages—Injunction.

Action for damages for injury caused to bricks, which the plaintiffs were making in their brickyards in the valley of the Don river, in Toronto, by the spring flood waters of that river, in 1920, dammed back by a bridge of the defendants which spans the river, upon the defendants' land adjoining the plaintiffs' land on the down-stream side of it.

The action was tried without a jury at a Toronto sittings.

M. H. Ludwig, K.C., for the plaintiffs.

D. L. McCarthy, K.C., and R. A. Reid, K.C., for the defendants.

MEREDITH, C.J.C.P., in a written judgment, first considered the question of damages, and, sitting as if he were a jury, assessed them at $8,000.

Upon the question of liability, he said, the whole case depended upon whether the flooding of the plaintiffs' goods and kilns was caused by the defendants, and, if so, to what extent, if not altogether. At the trial it became common ground that the water which caused the plaintiffs' injury was backed up from the defendants' down-stream and lower lying land, and the question was, what was it that caused the "back-water?"

Upon the whole evidence, it seemed plain that there were three different causes, each causing a part, viz.: (1) the defendants' tracks, cars, buildings, and other structures; (2) the defendants' bridge across the bed of the river; and (3) the other artificial obstructions in the river and valley below the defendants' land. Two-thirds of the extent of the wrong done by these three causes was attributable to the defendants' obstructions and one-third to the obstructions farther down. For, at the least, the injury actually caused by the defendants they should be held liable. The plaintiffs could not in this action recover damages for any part of that one-third injury and loss. The case was not at all like one against joint wrongdoers; indeed, no wrong may have been done to the plaintiffs in respect of the down-stream obstructions.

There should, therefore, be judgment for the plaintiffs and $5,333 damages, with costs.

The case was not one for an injunction, for that would make the defendants' land practically useless for their purposes. The bridge might be raised, and all, or all but one, of the piers removed; but an elevation of the tracks, buildings, etc., so as to leave a free water-way under them was manifestly impracticable. The plaintiffs had sustained but one loss of the character in question in all the years during which they had been making bricks upon their land; and, indeed, in a quarter of a century there appeared to have been but three floods that could have caused them any such injury; and for their loss they could be fully compensated in damages, the payment of which might be a lesser evil to the defendants than even the construction of a new bridge only. Judged by past events the future liability for damages such as the defendants are now required to pay is not appalling; nor is the future outlook of the plaintiffs, especially if both parties take all possible measures for meeting the onslaughts of Don floods.

ROSE, J. NOVEMBER 27TH, 1920.

PILLON v. EDWARDS.

Husband and Wife—Hotel Property Conveyed to Wife—Action by Husband for Declaration of Trust in his Favour—Evidence—Hotel Conducted by Wife and Partner—Profits Invested in another Property—Absence of Agreement—Statute of Frauds.

Action for a declaration that two properties, an hotel and a dwelling house, were held in trust by the defendants for the plaintiff.

The action was tried without a jury at Sandwich.

J. H. Rodd and R. S. Rodd, for the plaintiff.

F. C. Kerby, for the defendants.

ROSE, J., in a written judgment, said that the hotel was bought in 1902. The negotiations for the purchase seem to have been conducted by the plaintiff and his wife, the defendant Zoe Pillon; but in the formal agreement Zoe Pillon was named as the purchaser, and the conveyance, which was executed in 1909, after the whole of the purchase-money had been paid, was to her. The first instalment of the price ($200) was, as Zoe Pillon swore, and as

the learned Judge believed, paid by Zoe Pillon with her own money: the other instalments and the interest were paid out of the profits of the business which the husband and wife carried on in the hotel: the license to sell intoxicating liquors was always in the name of Zoe Pillon.

If the plaintiff had acted alone in the purchase, and had paid the whole of the purchase-money, but had directed the vendor to convey the property to his wife, there would have been no resulting trust in his favour: see Slater v. Slater (1918), 13 O.W.N. 429; and, *a fortiori*, no such trust arose in this case, where the first payment was made out of the wife's own money and the later ones were made out of moneys which she helped to earn. Moreover, it was impossible to find upon the evidence that there was an express agreement that the hotel should belong to the husband, either alone or jointly with his wife: the husband's evidence was very vague; whereas the wife swore positively that the venture was her own, and the circumstances were entirely consistent with the truth of her statement. Therefore, apart altogether from any defence based upon the Statute of Frauds, any claim that there was an express trust for the plaintiff must fail.

The dwelling house stood in the name of Zoe Pillon and the defendant Edwards. In the spring of 1919, Zoe Pillon engaged Edwards to manage the bar and some other parts of the hotel, she looking after the other parts, and she and Edwards dividing the profits equally between them. The plaintiff, willingly or unwillingly, consented to this arrangement, and, at least as early as July, 1919, engaged in some other business. The house was bought in December, 1919, and was paid for out of moneys earned by Edwards and Zoe Pillon. The plaintiff had nothing to do with its purchase; and his case in regard to it was based solely upon his claim to an interest in the profits derived from the business. He was not the owner of the hotel, and his claim to an interest in the moneys out of which the house was paid for was even weaker than his claim to the hotel. The claim to an interest in the house therefore failed.

Action dismissed with costs.