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HON. MR. JUSTICE BRITTON. JULY 16TH, 1913.

RAINY RIVER NAVIGATION CO. v. WATROUS ISLAND BOOM CO.

4 O. W. N. 1593.

Waters and Watercourses—Boom Company—Alleged Obstruction of River by—Evidence—Reasonable Conduct by Defendants—Dismissal of Action.

BRITTON, J., dismissed an action by a steamship company against a boom company for damages for alleged obstruction of a navigable river with booms, holding that plaintiffs had not established that there was any unreasonable obstruction of the river.

Action by plaintiff company for damages on the ground that the defendant company, on or about the 18th of June, 1911, by their sawlogs floating on Rainy River, and by their booms used to gather and keep said sawlogs in control, delayed the steamer "Agwinde," belonging to the plaintiff, for several hours when on her regular route in navigating Rainy River. Tried at Fort Frances without a jury.

The plaintiff company says further, the same steamer on her return trip was in this way delayed for several hours; and, again, that the same steamer was similarly delayed on 23rd, 24th, 25th and 27th days of June.

It is charged that the defendant placed piers in the middle of the channel which further obstructed and delayed the "Agwinde," by reason of which the plaintiff company sustained damage and claims $10,000.

This case was tried with one by the same plaintiff against the Minnesota and Ontario Power Company and the Ontario and Minnesota Power Company.

In that case damages were claimed from these other defendants by reason of their so interfering with the natural

flow of Rainy River, as to prevent navigation by the same steamer during the same period.

I. F. Hellmuth, K.C., and Bartlett, for plaintiffs.

Glyn Osler, for defendants.

HON. MR. JUSTICE BRITTON:—In this case there is no evidence that the defendants erected piers in Rainy River, or that any pier in such river so obstructed navigation as to delay the steamer "Agwinde" as charged.

I find that the defendants in floating their sawlogs, and in using the boom or booms as they did, were using the river in a reasonable way under all the circumstances, and that there was no wilful or wrongful obstruction of navigation.

The defendants so opened their booms and so moved their logs as to inconvenience the steamer of the plaintiff as little as possible.

The defendants did all that could reasonably be expected of them, in making way for the steamer.

The defendant company was not guilty of any negligence or of any wilful wrongdoing, and I am of the opinion that the plaintiff company, although delayed for a short time on certain occasions when passing the logs, did not incur any appreciable or measurable damage by reason thereof.

The defendants' logs, had, subject to reasonable limitations, an equal right upon the river with the steamer belonging to the plaintiff.

The steamer must be so navigated and used as not measurably to prevent the defendant keeping together and moving the sawlogs to their destination.

The defendant must not so fill the river with logs and booms as to prevent navigation by the steamer.

There must be give and take.

In this case the defendants' servants made the openings within a reasonable time, and gave the plaintiff reasonable facility in navigating the steamer.

The plaintiff's claim in this action is quite inconsistent with the claim in the other, where damages are, at least in part, sought for detention of the same vessel, covering the same period, because of keeping back the water necessary for navigation purposes.

The action should be dismissed with costs.

Thirty days' stay.

2ND APPELLATE DIVISION. JULY 22ND, 1913.

EADIE DOUGLAS, LIMITED v. H. C. HITCH & CO.

4 O. W. N. 1597.

Mechanics' Lien—Report of Master—Appeal and Cross-appeal from —Remoteness of Damage—Evidence—Disallowance of Certain Items—Costs.

SUP. CT. ONT. (2nd App. Div.), dismissed an appeal by the defendants in a mechanics' lien action from the report of the Local Master at Ottawa, but reduced the amount allowed as damages against plaintiffs from $1,492.19 to $542.19.

Appeal and cross-appeal from the Master at Ottawa in a lien action tried by him to the Supreme Court of Ontario (Second Appellate Division) heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. E. Caldwell, for the defendants H. C. Hitch & Co.

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

HON MR. JUSTICE CLUTE:—During the course of the argument the appeal of the defendant, Hitch & Company, in respect of certain items, was disallowed, and that appeal dismissed except as to the question of costs.

With respect to the cross-appeal by the plaintiffs as to the sum of $1,492.19, allowed by the local Master: After a careful perusal of the evidence, I agree with the learned Master that there was unreasonable delay in delivery of the terra cotta. I also think there is evidence to support item (b) $125 and item (c) $190. I also think items (e) $83.75 and (f) $143.44, were properly allowed. As to item (g) $350, allowed by the Master for labour, cartage and rented yard for storing the terra cotta in Lyon street yard, and repacking and removing from Lyon street and Besserer street yards. It was claimed that this was necessary owing to so much material being sent that it could not be set on account of its not being shipped course for course. The result was that the building could not hold it all. Out of the claim of $591.75, the sum of $231.35 is charged for moving material from the plaintiff's Besserer street yard. The Master states that while the mode of shipment may have been negligent, he cannot say from the evidence, that the plaintiffs are responsible for the whole trouble. That probably the defendant miscalculated

his amount of space from the fact of the storage of so large a quantity of heavy material in the building which rendered necessary its removal, and refers to the evidence of Dunn, the superintendent in charge of the building operations of the Rideau Club, who explains why the repacking and removal was necessary. He says, page 39: "The terra cotta for the addition and the alteration, it was all mixed up, and the whole dumped in the addition, and the result was the floors were overloaded, and it was necessary to take the stuff and put it in storage. There was no room in the building, and this was the time that was spent taking it out of the building and putting it in storage until such time as we could start on the alteration of the old building."

From the evidence it would appear to me that this expense was caused by the want of care on the part of the contractors in not properly placing the terra cotta when it arrived. There was certainly no obligation on the part of the plaintiffs that they would become responsible for storage yards or removal in case the floors were overloaded. In any view the damage is too remote to give a right of action against the plaintiffs. It did not in any way arise out of their contract, nor did it naturally arise by reason of the delay in delivery. This item should be disallowed.

Item (h) $4,000, of which the Master allowed $600. The witness Hitch says in regard to this item that the claim is made "on account of delays in terra cotta which affected the general contract, the general construction of the whole building, and extended operations upwards of a year, during which time we had to maintain an organization, and which otherwise would not have been necessary." The items going to make up this claim are, as appears by Dunn's evidence:— $1,500 for superintendent's salary, $280 for watchman's wages, $159.93 lighting and power, $47 for telephone, and $50 for rent of yard, making a total of $2,036.93.

The Master says he is not sure how the rest is made up, no more am I. He thinks, however, $600 would be a reasonable amount to allow under this head.

The terra cotta, Dunn says, was all shipped at the same time, that is to say, the terra cotta for the addition and alteration was all shipped together and all mixed up in the different boxes, and had to be unpacked. It was picked up haphazard and packed in the boxes without any system of shipping, course for course. This necessarily required sorting. Dunn states that it was necessary to keep up the organization

longer than they otherwise would, owing to their not having the terra cotta on hand when they were ready for it. That it delayed the completion of the whole contract. That if they had had the terra cotta on hand they would have been able to finish the interior during the winter of 1909. This occasioned further delay because they could not start the alterations during the winter. The window frames had to be taken out, and that would have exposed the whole building to the weather.

I do not think, from the evidence, that had the delivery been within a reasonable time the alterations could have been completed before winter set in. The charge of the superintendent's salary for fifty weeks at $30 per week, even if any allowance should be made upon that item, is absurd. $150 is charged for heating. It is not shewn that this was caused by reason of the delay; on the contrary, it is quite apparent from the evidence, that had the terra cotta been delivered within a reasonable time to enable the work to go on without interruption during the winter, the heating would still have been necessary, and so in regard to the lighting and watchman's wages. The rent of the yard for storing cannot be charged to the plaintiffs, nor can I find any evidence, nor was any evidence referred to, which shews that the defendants have a reasonable claim to any further damages, arising out of the delay, than that already allowed. There is no claim, in my mind, made out for any part of the $600 under item (h) allowed by the Master. This item should be disallowed.

The result is that the plaintiff succeeds on his cross-appeal, except as to $542.19.

The defendant's appeal should be dismissed with costs, and the plaintiff's cross-appeal allowed (except as to the $542.19), with costs fixed at $50.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON MR. JUSTICE LEITCH, agreed.

COUNTY OF HURON ASSESSMENT APPEALS.

HIS HONOUR JUDGE DOYLE. JULY 29TH, 1913.

RE RATTENBURY & TOWN OF CLINTON.

RE McCAUGHEY & TOWN OF CLINTON.

RE PIKE AND REINHARDT & TOWN OF CLINTON.

4 O. W. N. 1607.

Assessment and Taxes—Assessment of Hotel Properties—Effect of Local Option By-law—Reduction in Value—Business Assessment—Inapplicability to Hotel without License—Assessment Act, 4 Edw. VII. ch. 23, sec. 10 (h).

DOYLE Co.C.J., *held*, that hotel keepers who are not carrying on the business of a hotel in respect of which a tavern license has been granted are not liable for business tax.

That in fixing the value of hotel property in places which have passed local option by-laws, the assessment must be placed at what these properties would sell for, at the time of the making the assessment.

Squire qui tam v. *Wilson*, 15 C. P. 284, followed.

Appellants' assessments were greatly reduced.

Appeals by Joseph Rattenbury, John J. McCaughey, and Thomas G. Pike and Joseph E. Reinhardt, hotel-keepers in the town of Clinton, from decisions of the Court of Revision for the town, affirming the assessments of the appellants.

Yet, as shewn by the case cited, the value of land is the price it will bring at the time it is offered for sale.

Adopting McCaughey's present valuation, for assessment purposes, of his hotel property, including stable and sheds, which I believe to be a reasonable estimate, I order and adjudge that the assessment of the said property be and the same is hereby reduced to $2,500; the rink property to remain at the sum at which it is assessed. There was evidence shewing that the hotel building is from fifty to sixty years old.

I order and adjudge that the assessment of the hotel property, including the stable and sheds, of the appellant Joseph Rattenbury, be and the same is hereby reduced on the assessment roll to $3,500. The buildings on this property are new, and the whole property is certainly worth $1,000 more than the McCaughey hotel property.

And I also order and adjudge that the assessment of the Pike hotel property, including all of the buildings, be and the same is hereby reduced to $800.

As to the business tax, assessed against these appellants, when they were assessed, those three hotels were "licensed,"

and properly assessable as "licensed" hotels, for a business tax. But, subsequently, and before appeal, the local option by-law was passed by the respondents, which deprived the appellants of the opportunity to renew their licenses.

The appellants are now all hotel-keepers, but not "licensed;" and, therefore, they are not in the class of persons mentioned in the Act as liable to business assessment: see the Assessment Act, 4 Edw. VII. ch. 23, sec. 10 (l) (h).

The only hotel-keeper defined by that Act, as liable to a business tax, is "every person carrying on the business of a . . . hotel in respect of which a tavern license has been granted." No tavern license having been granted to any one of the appellants, they are clearly not within the Act.

In America, "hotel" has been held to be a synonym for "inn": *Cromwell* v. *Stevens,* 2 Daly 15.

"I agree that the words 'hotel' and 'tavern" are undergoing a change in their meaning, there being temperance hotels and temperance taverns, as well as houses for the sale of excisable liquors:" per Chitty, L.J., in *Webb* v. *Fagotti,* 79 L. T. R. 684.

"An inn or hotel may be defined to be a house in which travellers, passengers, wayfaring men, and other such like casual guests are accommodated with victuals and lodgings and whatever they reasonably desire for themselves and their horses, at a reasonable price, while on their way:" Stroud's Judicial Dictionary, 2nd ed., 978, tit. "Inn," and cases cited. 'Neither a boarding-house, restaurant, nor coffee-house, is an inn:" *ib.*

Inn, hotel, tavern, public-house, the keeper of which is now by law responsible for the goods and property of his guests, are treated as synonymous in the English Act, 1863, 26 & 27 Vict. ch. 41.

"Taxing Acts must be construed strictly, and any ambiguity will entitle the subject to be exempt from the tax:" Weir's Assessment Law, p. 49, and cases cited.

I order and adjudge that the "business tax" assessed against each of the appellants be and the same is hereby disallowed, and I order that it be struck out of the assessment roll.

And I order the said assessment roll to be amended according to all of the foregoing adjudications.

The appellants, being all clearly entitled to succeed, I allow them their costs.

HON. MR. JUSTICE BRITTON. AUGUST 2ND, 1913.

McDOUGALL v. C. CLOVIS PAILLE, EXECUTOR, ETC.

4 O. W. N. 1602.

Gift—Sum of Money in Bank Standing to Credit of Deceased Person —Money Received from Wife of Deceased—Action by Administratrix of Wife to Recover from Estate of Deceased Husband —Assertion of Gift from Wife to Husband—Evidence—Onus—Corroboration—Undue Influence—Mental and Physical Weakness of Wife.

Action originally brought by Martha Nolan against her husband, P. John Nolan, to recover a sum of money belonging to plaintiff, deposited in a bank to credit of defendant. Both parties died, *pendente lite*, and action was continued in name of present plaintiff, administratrix of estate of deceased Martha Nolan, against present defendant, as executor of will of deceased P. John Nolan.

BRITTON, J., *held*, that the onus had not been discharged by defendant to shew that the money received was a gift *inter vivos*. Wife was mentally and physically weak, suffering from a tumor in the head when she handed the money over to her husband, and could not appreciate the nature and effect of the acts, which would deprive her own children by her first husband, of the money, and enable her second husband to give it to his children, by a former wife.

Parfitt v. *Lawless* (1872), L. R. 2 P. & D. 462, followed.

Tried at Fort Frances without a jury.

G. S. Bowie, for plaintiff.

A. D. George, for defendant.

The plaintiff resides in the city of Winnipeg, and is a school teacher. She is the daughter of the late Peter McDougall and Martha McDougall, his wife.

Her father died in September, 1905, and her mother, Martha McDougall, married John Nolan in August, 1907.

At the time of his marriage John Nolan was a locomotive engineer residing at Winnipeg.

Shortly after the marriage Nolan and his wife left Winnipeg and took up their residence in Rainy River in the province of Ontario.

In 1910 Mrs. Nolan became sick. She suffered from a growth or tumor in the brain. The disease proved fatal, and she died on or about the 25th November, 1911.

The defendant John Nolan became ill at a later date than the beginning of the sickness of his wife, and he died in July, 1911.

No children were born to John Nolan and Martha McDougall, but two children were born to Martha and Peter

McDougall, and two children were born to John Nolan and his former wife.

Martha Nolan became possessed, and was the owner, of a large sum of money, part received by her from her former husband Peter McDougall, and part from property which became hers and was sold by her. Of this money at least $4,800 was, prior to January 21st, 1911, on deposit to the credit of Mrs. Nolan in the Canadian Bank of Commerce at Rainy River. Of this money the sum of $2,100 was drawn out of that bank upon the cheque of Mrs. Nolan and deposited to the credit of P. John Nolan in the Bank of Nova Scotia at its branch at Rainy River.

The balance of the $4,800, viz., the sum of $2,700, was drawn out by the wife, she getting a draft for it upon the Canadian Bank of Commerce at Belleville. This money was also received by the deceased John Nolan. Some of it was expended by him in his care for and the search for the restoration of his wife's health; but a very considerable part of it was retained by the husband. It is said that he expended money upon himself, not wisely—his habits having become bad.

This action was commenced during the lifetime of the parties, the present plaintiff suing as next friend of her mother.

The action abated by the death of John Nolan, and was revived as against the present defendant, as executor of the will of John Nolan.

Then Martha Nolan died, and the action is now continued by the plaintiff as administratrix of Martha Nolan.

An interim injunction was obtained against John Nolan drawing out and expending any more of the money.

Of the money which Martha Nolan had, there is the sum of $3,724.81 and interest, in the Bank of Nova Scotia at Toronto, standing to the credit of P. John Nolan.

P. John Nolan was the original defendant, and this money is the subject of the present controversy.

It is hardly in dispute that the money was the money of Martha Nolan, but John Nolan asserted, and his executor now asserts, that it was given to John Nolan by his wife Martha.

To establish this gift *inter vivos*, the onus is upon the defendant. In my opinion that onus has not been satisfied.

Upon this first point, which goes to the root of the matter, the plaintiff is entitled to recover.

There is really no corroboration of the statement of John Nolan. All the facts in connection with the transfer of the money from Martha—the sick wife—to her husband. are more consistent with there being no gift than that there was a gift. No gift can be implied from the fact and circumstances as stated by John Nolan.

Martha Nolan was not, at the time of the alleged gift, in a state of mind able to appreciate the nature and effect of the acts which are alleged to constitute the gift. The effect would be to deprive her own children of the money and to enable her husband to give it to his children. Such a gift by her would be an improvident act, and one she would not, if in sound mind, be likely to commit.

Although it so happened that Mrs. Nolan survived her husband, her disease, which later on proved fatal, was such as to render her mentally unfit to make a will or a valid gift such as alleged.

In considering the question of burden of proof, it is important to note the difference between influence to obtain a gift *inter vivos* and influence to obtain a will or legacy.

The case of *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462 (1872), was cited by counsel for plaintiff, and is very much in point. In that case the claim was under a will. There was no evidence to go to the jury on the question of undue influence, and the difference mentioned above is thus emphasized:—

"Natural influence exerted by one who possesses it, to obtain a benefit for himself, is undue, *inter vivos*, so that gifts and contracts *inter vivos* between certain parties will be set aside, unless the party benefited can shew, affirmatively, that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be fully exercised to obtain a will or legacy. The rules, therefore, in Courts of equity, in relation to gifts *inter vivos*, are not applicable to the making of wills."

The many cases cited upon the argument and in the judgment in *Parfitt* v. *Lawless* are applicable to the case now in hand.

When the money passed from Martha Nolan to her husband she was of "feeble mental capacity and in a weak state of health." She could easily be induced to allow her husband to have control of the money.

Upon the whole evidence in this case, the plaintiff is entitled to recover.

There will be judgment for the plaintiff against the defendant executor for the sum of $3,724.81 and the interest allowed by the bank.

There will be a declaration that the money in the Bank of Nova Scotia at Toronto, viz., the $3,724.81 standing there to the credit of P. John Nolan, is money belonging to the estate of Martha Nolan and that it may be paid over to the plaintiff as administratrix of the said Martha Nolan.

Payment to the plaintiff of this money will be in full satisfaction of this judgment.

The plaintiff asked for a reference to take the accounts against the estate of the late P. John Nolan.

In an ordinary case of this sort the plaintiff would be entitled at her own risk to such reference, but in this case it is quite clear that plaintiff would gain nothing by having an account of how John Nolan expended his wife's money.

The judgment will be without costs payable by the defendant.

The plaintiff's costs will be payable out of the money belonging to the estate of Martha Nolan.

Thirty days' stay.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 26TH, 1913.

BANCROFT v. MILLIGAN.

4 O. W. N. 1605.

Cancellation of Instruments — Fraudulent Conveyance—Priority of Mortgage—Will—Election—Costs.

Action for declaration that a conveyance of land by defendant John C. Milligan to defendant Maude Milligan was voluntary, fraudulent, and null and void, and that a certain mortgage had priority thereto and for other relief.

FALCONBRIDGE, C.J.K.B., gave plaintiff judgment with costs.

Trial at Cornwall.

G. A. Stiles, for the plaintiff.

R. A. Pringle, K.C., for the defendants, John C. and Maude Milligan.

J. G. Harkness, for the other defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that the plaintiff has proved all the material allegations in the statement of claim. I give judgment for the plaintiff in terms of the prayer of the statement of claim, with costs against defendants John C. and Maude Milligan.

The death of Nancy since the trial has removed her contentions from the arena. I think I should have held, in any event, that she had elected to take under the will. The plaintiff was willing, if she had lived, to pay her $100 a year as claimed in paragraph 3 of the counterclaim.

No costs for or against the defendants other than John C. and Maude Milligan.

Thirty days' stay.