

LITTLETON N. BANK v. P. & O. RAILROAD, and THOM, Tr.

The station agent of a railroad corporation, in a suit against it, is chargeable as trustee for money collected from the sale of passenger tickets and for freight carriage.

FOREIGN ATTACHMENT. The trustee is one of the station agents of the defendant corporation, and in his deposition disclosed money in his hands at the time of service of the plaintiffs' writ, and subsequently, received by him from the sale of passenger tickets and for freight. The question is on his liability as such trustee.

Bingham & Mitchell, for the plaintiff.

W. & H. Heywood, for the trustee.

ALLEN, J. The station agent is not a constituent part of the corporation. He is a servant, and, in a limited sense, an agent of that body, with special duties assigned to him, and having no general authority. He has no discretion in the disbursement of money received by him, except to pay it to the corporation or on its order, and in default of such payment may be sued for its recovery. One railroad may be held as trustee of another railroad, for moneys collected from freight and passengers—*Smith v. B. C. & M. R. R., and B. & M. R. R., Trs.*, 33 N. H. 337; and no reason appears why an individual, collecting such moneys for a railroad, should not as well be made liable as its trustee.

Trustee chargeable.

SAWYER and BINGHAM, JJ., did not sit.

COÖS.

CARTER v. THURSTON & a.

The navigability of a stream, for the purpose of bringing it within the denomination of a public river or highway, does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, or boats, or rafts, nor upon the difficulties attending navigation; it depends upon the question, whether the river in its natural state is such that it affords a channel for useful commerce.

A person, properly using a public stream by floating logs upon it, is not responsible at common law to a riparian proprietor for damages occasioned by the stranding of logs on his land, if the owner or driver of the logs has used every reasonable effort to retain them within the stream.

If logs become thus stranded by accident, and without the fault of the owner or driver, he may lawfully enter upon the land of the riparian proprietor, for the purpose of reclaiming and removing his logs, doing no unnecessary damage. If, in such reclamation, he inflicts unnecessary injury to the land-owner, he will be responsible therefor.

A witness, acquainted with the land and its value, may state his opinion as to the amount of damage occasioned by the hauling of logs over it.

TRESPASS, *quare clausum*. Facts found by a referee. The defendants, with their servants, were engaged in driving a large quantity of logs down Clear Stream, and into Androscoggin river at the mouth of Clear Stream.

The plaintiff's land is situated on both sides of the stream, and is all under cultivation. It is located about a mile and a half above the mouth of the stream, and about eight miles below the land of the Berlin Mills Co., from which the timber was cut by the defendants, under a contract with the company. The defendants, by permission of the company, used their dams for the purpose of assisting in driving the logs. Clear Stream has been used in the spring, in times of freshets and high water, more or less during the last thirty-five years, for the purpose of driving logs. While the defendants were engaged in driving the logs, jams formed on the plaintiff's premises, which caused some two hundred logs to run out and lodge upon the plaintiff's meadow, where they were scattered over several acres upon both sides of the stream, extending from the banks back about twenty rods. The defendants tried to prevent and to break the jams, but were unable to keep all the logs within the banks. The defendants removed the logs from the plaintiff's premises, hauling the same by means of oxen to the banks of the stream and rolling them in. The usual method of reclaiming stranded logs is by "sacking" and rolling them in with men, which would injure the grass much less than the use of oxen. Upon the trial before the referee, the plaintiff was permitted, against the defendants' objection, to show that the use of the water, by shutting the gates of the dams and holding the water, and then discharging it in unusual quantities upon the drives below, forced the logs out upon the plaintiff's meadow.

The plaintiff was permitted to testify how much, in his opinion, his meadow was lessened in value by drawing off the logs. To this evidence the defendants excepted.

The referee awarded damages for the plaintiff, and the court ordered judgment upon the report, to which the defendants excepted.

Aldrich & Parsons and *Shurtleff*, for the plaintiff.

Ray, Drew & Jordan, for the defendants.

Clear Stream has been a public highway for thirty-five years, suitable in size and capacity for floating logs in times of freshet and high

water, which occur, usually, spring and fall; in other words, it is a floatable stream or river, at certain seasons of the year, and the right in the public exists not only to use the stream, but its banks also, to float boats, rafts, or logs, for the purposes of trade and agriculture. *Brown v. Chadbourne*, 31 Me. 9; *Knox v. Chaloner*, 42 Me. 150; *Treat v. Lord*, 42 Me. 552; Angell on Highways, c. 1, ss. 53-58, and authorities cited; *Boissinault v. Olio*, Stuart (Low. Can.) 565.

The plaintiff had no lien upon, or right to detain, the defendants' logs. No lien or right of detention is set up in the cause. Although the defendants kept men stationed along the plaintiff's land to break jams of logs, still, by reason of the crookedness of the stream, and more especially by reason of the plaintiff's bridge, jams would form there; and the report shows that the defendants "were unable to keep all the logs within the river banks." The defendants had the right to go and haul the logs off with oxen or horses. It is absurd to claim that they were bound to employ men enough to lift and carry two hundred spruce logs, scattered over three or four acres of the plaintiff's land (and many of them twenty rods away), to the stream. They adopted the most practicable and expeditious method of removal, and one altogether less injurious to the plaintiff himself than to allow them to lay on his grass ground until they could be carried off by hand. This freshet, and the escape of two hundred logs upon the plaintiff's land, were unusual and extraordinary occurrences, and gave the defendants the right to make use of unusual, and perhaps extraordinary, means to reclaim their property.

The question put by the plaintiff's counsel to their client, calling for his opinion touching the question of damages, was incompetent. The testimony put in by the plaintiff, in regard to the use of the dams above the plaintiff's farm, was also incompetent. It had no possible bearing upon the issue tried, to wit, whether or not the defendants unlawfully broke and entered the plaintiff's close; and it had a direct tendency to prejudice the referee against the defendants. It was admitted, on the ground that the defendants' use of the dams was of itself unlawful as against the plaintiff, when, as before pointed out, the law is the other way. The report should be set aside because of the admission of incompetent testimony, unless the court is of opinion that the defendants are entitled to a judgment in their favor.

FOSTER, J. The right of the public use in American rivers and streams depends, not upon their navigability, in the technical sense of the term, as defined by the common law (Hall on the Sea Shore 3, 4, 13; *Attorney-General v. Chambers*, 4 DeG. M. & G. 206—the ebb and flow of the tide is not the test), but upon their capacity for trade and business. The public easement is not, as was formerly inferred by our courts (*Scott v. Willson*, 3 N. H. 321, 325), founded upon usage, custom, or prescription. Any stream capable of being generally and commonly useful for some purpose of trade, and the transportation of property, whether by steamers, or sailing vessels, or oar-boats,

or rafts, is a public stream. The facts found by the referee show that Clear Stream is naturally capable of floating logs at some times every year, and to a considerable extent, and that it is reasonably and substantially useful to the public for that kind of navigation. It is therefore a public highway. Lord Hale's *De Jure Maris*, cap. I, II, III; *Royal Fishery in the River Banne*, Davies 57; Angell on Highways, ss. 53-75; Hall on the Sea Shore 4-14; *Wadsworth v. Smith*, 2 Fairf. 278; *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 519; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *The Montello*, 20 Wall. 430, 442; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 548, 549.

The defendants, therefore, had the right to use the stream in a reasonable and proper manner for floating their logs. What is a reasonable use must depend upon a variety of conditions. If "shutting down the gates and holding the water, and discharging it in unusual quantities upon the drives below," was an unreasonable use of the stream, and this unreasonable conduct "forced the logs out upon the plaintiff's meadow," the defendants are responsible for the damage thus occasioned. The evidence concerning the manner of the use of the dams was properly received. But if the logs were cast upon the shore not by reason of an improper use of the stream, but by accident and without any fault of the defendants, they are not responsible at common law for the damage thus occasioned. Such streams, as well as our larger rivers, will, as experience has universally shown, from their windings and the rush of their waters, especially in times of freshets, cast floating logs upon the shores and banks. And the right of the public and of the defendants to the use of this stream for the purpose of floating their logs, involves the right of going upon the land of riparian owners for the purpose of reclaiming the logs that may have been washed ashore. Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, in a legal sense, nor in any way affects its public character. This right of pursuit and reclamation rests upon the same natural right as that which permits the owner of cattle to pursue into an adjoining field and recover his beasts straying from the highway; but in the pursuit and recovery of his cattle or his logs, the owner must do no unnecessary damage, and is responsible for any excess or abuse of his right. This right of reclaiming stranded logs is a common law right, a natural right, incident to the right of navigation. Hall on the Sea Shore 43; Phear on Rights of Water 52; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Eaton v. The B. C. & M. Railroad*, 51 N. H. 504, 530; *Brown v. Collins*, 53 N. H. 442, 449; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; *Treat v. Lord*, 42 Me. 563; *Rogers v. Judd*, 5 Vt. 223; *Forster v. Juniata Bridge Co.*, 16 Pa. St. 393.

Whether the plaintiff would have the right to enter upon the defendants' land to recover his logs, wrongfully placed there through a negligent or unreasonable use of the stream (*Hoit v. Stratton Mills*,

54 N. H. 109, 116; *Aldrich v. Wright*, 53 N. H. 398), is a question not raised by the case. It does not appear that any damages were given or claimed for a wrongful entry.

The plaintiff's opinion of the amount of damage sustained was properly received in evidence. Opinions concerning the value of property are admissible from witnesses found qualified to give opinions on the subject. It was competent for the plaintiff to express his opinion of the value of his land just before its invasion, and immediately after the removal of the logs, and to express an opinion obtained by the arithmetical process of subtraction. Where land is taken for railroad purposes, witnesses acquainted with the land and its value may state their opinions as to its value immediately before taking the same and immediately thereafter, and the amount of damages done to the land by such taking. *Curtis v. Railroad*, 20 Minn. 28; *Sherwood v. Railroad*, 21 Minn. 127.

The amount of the damages could be ascertained from the best accessible evidence. In the circumstances, a view would have conveyed but an unsatisfactory impression. Opinions of witnesses, derived from observation, are always admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained. *Hardy v. Merrill*, 56 N. H. 227, 241, and cases cited.

Exceptions overruled.

BINGHAM, J., did not sit.

THOMPSON v. THE ANDROSCOGGIN RIVER IMPROVEMENT COMPANY.

In grants from the state, nothing passes except that which is expressed, or which is matter of necessary intendment, in order to give effect to the manifest intention of the grant.

The public are entitled to the reasonable use of a natural aquatic highway; and if a riparian owner is injured thereby, he is not entitled to compensation.

A legislative grant of authority to make improvements within a limited location for the purpose of facilitating the navigation of a public river, does not, by implication, confer the power to affect injuriously property outside the location, without making compensation therefor.

Whenever the acts of an agent will bind the principal, his declarations respecting the subject-matter will also bind him, if made in regard to a transaction in which he is then engaged.

CASE, to recover damages occasioned by the flowing of the plaintiff's land on the Androscoggin river, below the defendants' dams. Ver-

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