Yukon Territory Trial

8 W.L.R. 557

Jones v. Okada

Dugas, J.

Judgment: June 1, 1908

Counsel: *F.G. Crisp*, for plaintiff.
J.A. Clarke, for defendant.

***Dugas, J.*:**

1 On 1st April, 1905, the defendant bought from the plaintiff one 40-horse power boiler complete, with mountings, one Laidlaw-Dunn No. 6 duplex pump, and 1,300 feet (more or less) of 6-inch hydraulic pipe, then situate at the mouth of Last Chance on Hunker creek, for $1,700; the proprietorship therein to remain in the plain tiff until paid, according to the deed of sale, though the possession was to be given immediately to the defendant.

2 There was a proviso by which the plaintiff would have the right, in default of payment, "to distrain therefor upon the said goods sold, and by distress warrant to recover by way of rent reserved as in the case of demise of the said chattels, so much of the said sums due." I cite word for word.

3 The defendant having failed in the payment of some of the instalments, the goods were seized through one Lowden, acting as bailiff for the plaintiff. Evidently some payments had been made under this sale.

4 On 27th April, 1907, the defendant acknowledged himself to be indebted to the plaintiff in the sum of $500, with interest at 9 per centum from 1st March, 1907, and mortgaged the same goods to secure the payment of the said sum with interest, "to be paid by instalments of $200 on the 1st July, $200 on the 1st August, and $100 on the 1st of September, then following, with interest as aforesaid," the goods being released by the said plaintiff to the defendant by a writing signed by him the same date and indorsed on the mortgage of 1st April, 1905. This release could be perfected only upon an order to Mr. Lowden, the bailiff who had seized the goods.

5 The defendant, having failed in his payments, is now sued for the recovery of $524.25, as representing the capital and the interest thereon to the date of the institution of the action.

6 Several defences were set up, fraud, misconception by the defendant, he being a foreigner, and the rest, but these have been abandoned by the defendant, who now stands purely and simply upon the plea that the plaintiff, at the time of signing the second mortgage, having undertaken to release the goods, did not do so, or, at all events, in such a way as to put the defendant in immediate possession thereof.

7 The defendant, all through his evidence, has affirmed that when signing the second mortgage he did not owe the $500, and that he agreed to bind himself to that amount only because he was in absolute need of an immediate possession of the pipe, which would have helped him to take advantage of the April and May water to work with advantage on his claim. He says that, although he did not owe that sum, he was quite willing to pay it, as $500 would have been nothing to him if he could have worked his claim at the proper time.

8 It appears that when the plaintiff made the seizure under the first mortgage this pipe was removed. The defendant seems to have had some suspicion as to where, but not in a way certain; yet at the trial it was proven that out of the 820 feet only of pipe which ever existed, instead of 1,100 or 1,300 as the two mortgages mentioned, 350 feet were in the possession of Wilson & Townsend, miners, on the same creek, and the balance (about 470 feet) in that of Lowden, the bailiff who acted for the plaintiff, and who was using it.

9 The defendant swears that he, immediately after 27th April, 1907, not receiving the pipe in question, or rather not having any means of having it delivered to him, as he did not know who had the possession or the control of it, came purposely to Dawson 2 or 3 times about the beginning of May, 1907, to see the plaintiff and obtain some means through him of becoming in possession of the pipe. Every time the plaintiff, according to what the defendant says, told him that he would see to their immediate release, and, in one instance, told him that he would give an order to Lowden to that effect.

10 Lowden is examined, and, on his first statement, he declares that he only received the order to deliver those goods in the latter part of May. The defendant says that he saw him for the first time only at the beginning of June. About this I believe it can be said that they are about in accord, as a few days does not make much difference at that period.

11 By all the facts in the case I am induced to believe that it was only at that time that Lowden so met the defendant, although afterwards he says that it was between 6th and 12th May. It being so, I can understand that the defendant, having no more object in obtaining the possession of the pipe, consented to allow Lowden to retain possession of the same for his own use.

12 The testimony of Lowden is somewhat contradictory, and, on that account, I must take the evidence given by the defendant as giving the real facts and real dates. In no way is the defendant contradicted as to his visits to Jones in Dawson 3 times from 27th April to 3rd or 4th May, and his insistence about obtaining immediate possession of the pipe. Mr. Jones was here, and was not examined as a witness, and, therefore, that part of the evidence of the defendant has to be taken as representing the true facts.

13 Later on part of the pipe was found by the defendant to be in the possession of Wilson & Townsend. How it came into the possession of Wilson & Townsend we do not know exactly, though Lowden was asked to permit them to use them.

14 I am forced to admit that the fact of giving a consent to Lowden to continue using a portion of the pipe which he had, and the charging of $20 to Wilson & Townsend for the use of what they had, weakens, to a certain extent, the position of the defendant, as that shews that, even after the delays for delivery and at a time when, according to his own affirmation, they were of no more use to him, he still continued to hold himself as the proprietor thereof under the mortgage.

15 While this action was pending the plaintiff had the same goods seized and sold; there is an admission to that effect; and

he recovered on the sale $300. In view of his negligence to have those goods which were under his control delivered at a proper time, I think that he was at fault, and that, the goods having been sold for his benefit, this action should be dismissed; I would say with costs if the defendant had not given that consent to Lowden and received the $20 from Wilson & Townsend; but, on that account, there will be no costs in his favour. Taking this view of the case, the counterclaim is also dismissed without costs.