DOUGLAS v. MILL CREEK LUMBER COMPANY LIMITED

[1923] 1 D.L.R. 805 (also reported: [1923] 1 W.W.R. 529, 32 B.C.R. 13)

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts JJ.A., 9 January 1923

Appeal IIC -- Woodman's lien for wages -- Judgment in County Court--Appeal--Amount necessary to give jurisdiction.

Under sec. 116 (a) of the County Court Act, R.S.B.C. 1911, ch. 53, there is no appeal from a County Court judgment under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243, where the individual claims are below $100, although for purposes of convenience and economy they may have been consolidated for trial, and the consolidated amount exceeding that sum.

[*Gabriele v. Jackson Mines* (1906), 15 B.C.R. 373, followed.]

Indians I -- Right to claim lien under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243.

Under the Indian Act, R.S.C. 1906, ch. 81, Indians and non- treaty Indians are given the right to sue for debts due them or to compel the performance of obligations contracted with them. This right is given without qualification and there is nothing in the Woodman's Lien Act, R.S.B.C. 1911, ch. 243, or in the County Court Act, R.S.B.C. 1911, ch. 53, excluding this right.

Logs and Logging -- Woodmen's Lien for Wages--Affidavit in support of claim--Requisites of.

Where an affidavit on which a claim under the Woodman's Lien for Wages Act is based has been sworn before the plaintiff's solicitor and is afterwards sworn before another commissioner it is not necessary to re-write the jurat or add the prefix "re" where the name of the claimant is struck out and it is resigned both as to the claim and the affidavit verifying it. It is not necessary that the form in Schedule "A" of the Act be strictly complied with, but something must be set out which shews that the claimant comes within the class entitled to a lien under the Act.

APPEAL by defendants from a County Court judgment in regard to nine claims under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243. Affirmed except as to one claim.

Chas. Wilson, K.C., for appellant; *E. A. Dickie*, for respondent.

MARTIN, J.A.:--This is an appeal by the defendants from a judgment of the County Court of Vancouver, declaring that nine separate claimants for a lien under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243, against two swifters of cedar logs of the defendant company, are entitled thereto. Only five of the claims are "for the sum of one hundred dollars or over," to quote sec. 116 (a) of the County Court Act, R.S.B.C. 1911, ch. 53, which allows an appeal from judgments upon claims for that amount, and it is objected that no appeal lies here against the judgment in favour of those claims which are below $100, in accordance, it is submitted, with the decisions in *Gabriele v. Jackson Mines* (1906), 15 B.C.R. 373; *Gillies Supply Co. v. Allan* (1910), 15 B.C.R. 375; and *Boker v. Uplands Ltd., Vannatta v. Uplands Ltd.* (1913), 12 D.L.R. 133, 12 D.L.R. 669, 18 B.C.R. 197, because though there is only one judgment the claims are individual and the adjudication thereupon is separate though for purposes of convenience and economy they may have been consolidated for trial. But the appellant submits that these decisions do not apply to this case because sub-sec. (d) of 116 allows an appeal in "interpleader, replevin, or attachment proceedings, when the subject-matter shall equal or exceed one hundred dollars," and it appears that here the first four claimants on January 20, 1922, joined together in issuing one writ of attachment under secs. 10 and 13 against the two swifters of cedar logs in question, and the sheriff seized the logs which were later released by order of the Court, on February 1, 1922, by consent of all the present nine claimants, after the sum of $900 had been paid into Court; after the seizure the five later claimants began one action by writ of summons in the ordinary way (sec. 8) joining their claims under sec. 32, and when the two sets of claims came on for trial they were tried together by consent and one judgment given as aforesaid.

It must be conceded that apart from the attachment proceedings the claims below $100 are not appealable according to our said decisions, and the question is, does the fact that the "subject-matter" was attached before the ordinary proceedings alter the principle? After careful consideration I am unable to take the view that it does; I apprehend that a mechanic's lien for the "work or service" he does upon the "subject-matter" of his employment is upon the same plane as the lien for "labour or service" that the woodman acquires upon the logs or timber he is working on, and I am unable to take the view that because (to meet the case of the removal of the logs) an additional and speedy remedy of attachment is provided so as to secure the subject-matter pending the hearing, thereby the principle of appeal from individual claims is altered; and hence I

am of opinion that we have no jurisdiction to entertain the four appeals from claims under $100, and as to them the appeal should be dismissed.

This leaves five claims to be considered, *viz.*, those of Achill Mack, Moses Antone, Bobbie Baker, Moses Williams and Ellen Joe. These claimants are Indians living on the Capilano Reserve, Burrard Inlet, and several objections are taken to the statements to support their liens, as required by secs. 4 and 5 of the Act. The first objection which merits attention is that the *jurat* of the affidavits verifying the statement have not been sworn anew, but assuming such to be the case, still the affidavits were in fact received and acted upon by the Judge below under sec. 62 of the Evidence Act, R.S.B.C. 1911, ch. 78, and though he did not direct a memorandum of his reception to be made on the affidavit as he "may" do under said section, yet that provision is, in my opinion, merely directory and would only go to the surer proof of the fact of reception in case that were disputed.

With respect to the statement of the claimants' residence, as required to the form in Schedule A; the claimants are all Indians, and they are stated to be "of North Vanconver, Capilano Reserve, in the Province of British Columbia," which is a proper address for such persons.

The required statement of the "kind of logs and timber . . . . and where situate" is satisfied by the statement that they are "composed of two swifters of cedar saw logs or bolts now situate at North Vancouver, in the Province of British Columbia, marked 40j"; there could be no practical difficulty in identifying such logs so marked and boomed in the water in that locality.

As to the "name and residence" of the owner of the logs not being stated; it is to be observed that the form only requires it "if known," and here as the name of the company is given without more it is to be presumed that its "residence" was not known to the deponent.

As to the "name and residence of the person upon whose credit the work was done," that is stated thus: "which work was done for Chief Mathias Joe, William Baker, and Isaac Jacob at North Vancouver in the Province aforesaid." This may well be read as meaning that said persons are "at" that place, and is therefore sufficient.

It is now well established that in cases of this sort at least a substantial and not a meticulous compliance with the statute is what the Court will require, the test being, were the parties concerned misled in the circumstances? This general principle has recently been applied to caveats by the Manitoba Court of Appeal, in *Union Bank of Canada v. Turner* (1922), 1 D.L.R. (n.s.) 790, [1922] 3 W.W.R, 1138.

There is, however, one objection of a substantial kind to the lien of Ellen Joe, *viz.*, that though sec. 5 requires the "nature of the debt, demand or claim" to be "set out briefly," and the form requires "a short description of the work done for which the lien is claimed," yet there is a total lack of anything of that kind, all the information given of the "work" being: "To two months and ten days at $70 per month . . . $160." Now while "any person performing any labour or service" is given a lien by sec. 3, and the definition of a person in sec. 2 is extended to include "cooks, blacksmiths, artisans, and all others usually employed in connection with such labour and services," yet there must obviously be something to shew the "nature" of the claim, *i.e.*, in what capacity the "labour or service" was performed, so that an interested inquirer could inform himself from the face of the claim if it *primâ facie* can be founded on the Act. It is impossible, however, to tell from the language here employed what was the "nature" or "description" of the work upon which the claimant founds her claim, and therefore I am constrained to find that the statement does not comply substantially with the statute and hence the lien ceased to have any validity as provided by sec. 4.

As to the merits, I am of opinion that the claims have been sufficiently found.

There remains one general objection to the claims of all the plaintiffs, that as they admittedly are unenfranchised Indians, from the said Capilano Reserve, they cannot maintain these actions. And it is submitted that though sec. 103 of the Indian Act R.S.C. 1906, ch. 81, confers upon Indians "the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them," yet it does not extend to the obtaining of a lien upon property which belonged to some person other than the one who employed them to work. But this is a misconception of the situation because the lien was conferred by sec. 3 of the Woodman's Lien for Wages Act, and though Indians are wards of the Crown yet they are also citizens of Canada and entitled, unless prevented by legislation, to enjoy civil rights in common with their fellow citizens, whether such rights are acquired at common law or by statute. No one would contend that an Indian was not entitled to a possessory lien at common law for the value of his work upon an article given to him to repair, such as a fish net, and I see no difference in

principle between that lien and a statutory lien upon logs got out of the woods by his labour. In order to preserve his right as a lien holder under the statute, he is required (secs. 4-7) to record his lien by filing a statement in the County Court within 30 days, and to "enforce the same by suit" in that Court within 30 days thereafter, which he may do, as already noted, by writ of attachment or by writ of summons, giving particulars of his claim, and the case proceeds to trial in the usual way. If his claim for wages be against the owner of the logs he may obtain a judgment against him *in personam* as well as in establishment of his lien--secs. 8, 23, 26, 31, but only the latter remedy against the owner where he was not employed by him.

The judgment and lien are enforced "by sale under the execution" (sec 9), and even though no lien is declared yet the plaintiffs may obtain judgment as in an ordinary case.

It will thus be seen that all these proceedings are founded upon the debt that is due to the claiming lien holder--and it is the existence of that debt and the necessity for suing upon it which enables him to obtain satisfaction of his lien or other appropriate judgment to recompense him for his "labour or service" according to the facts established at the trial; hence it becomes manifest that he is within the scope of said sec. 103 in the assertion of his rights to sue for his debt and in so doing obtain also the benefit of his statutory rights as a lien holder.

It follows that the appeal Is dismissed save as to the claim of Ellen Joe as to which it is allowed.

GALLIHER, J.A.:--This is an appeal from Grant Co. Ct. J., who gave judgment in favour of certain unenfranchised Indians who had performed services in connection with the taking out of timber for the Mill Creek Co. who had let the contract to the defendants Chief Mathias Joe, William Baker and Isaac Jacob.

Four of these plaintiffs, Achill Mack, Moses Antone, Moses Joseph and Bobbie Baker took attachment proceedings under the Woodman's Lien Act, R.S.B.C. 1911, ch. 243, and the re-maining plaintiffs brought action in the County Court.

Two swifters of logs were seized under the attachment proceedings, and then all the claims were consolidated and tried in one action, and judgment given, setting out the respective amounts found due each of the claimants.

The Mill Creek Co. whose property the logs were, and in order that they could market same, paid $900 into Court and called upon the claimants to establish their claims. The logs being released the matter went on to judgment as above stated.

Mr. Dickie took the preliminary objections that all claims under $100 are not appealable. That point was settled by the Old Full Court in *Gabriele v. Jackson, supra*, with which I agree. This excludes from appeal the claims of William Billy, $48.08, Moses Joseph $76.17, Gus Douglas $21.08, and Dominick Charles $88.03, and as to the amount awarded to them by the trial Judge, the judgment stands.

As to the balance of the claims, Achill Mack $187.98, Moses Antone $118.70, Bobbie Baker $228.78, Moses Williams $115.74 and Ellen Mathias Joe $160.

Mr. Wilson for the appellants the Mill Creek Lumber Co.. objects first:

That unenfranchised Indians cannot claim a lien under the Act, and if they can it can only be established by making the Crown a party. I cannot assent to either of these submissions.

Under the Indian Act, Indians and non-treaty Indians are given the right to sue for debts due them, or to compel the performance of obligations contracted with them. (sec.103). This right is given without qualification and there is nothing excluding this right in the Woodman's Lien Act, or in our County Court Act.

But Mr. Wilson says an Indian is not a person within the Act.

Our Woodman's Lien Act, sec. 3, says: "Any *person* performing any labor, service, etc., shall have a lien, etc.," and the word "person" thereon referred to is defined in sec. 2, as follows:--
"'Person' in sec. 3 of this Act shall include cooks, blacksmiths, artisans, and *all others* usually employed in connec- tion with such labor and services."

No exclusion there, but rather in inclusion in the words "all others," etc.

Since the hearing Mr. Wilson has (by leave) cited the following cases: *Atkins v. Davis* (1917), 34 D.L.R. 69, 38 O.L.R. 548, and *Re Caledonia Milling Co. v. Johns* (1918), 42 O.L.R. 338. Neither of these cases, as I read them are in point here.

Mr. Wilson then takes exception to the affidavits filed. With regard to these affidavits, three of them, Achill Mack, Moses Antone and Bobbie Baker were originally sworn before their solicitor, and afterwards sworn before Charles M. Woodworth, a commissioner on the date on which the writ of attachment was issued, *viz.*, January 26, 1922.

Mr. Wilson's first objection to these affidavits is that a new jurat should have been written out or the prefix "re" placed before the word "sworn."

I notice that the name of the claimant in each was struck out and re-signed both as to the claim and the affidavit verifying same, and in my opinion where that is done it is not neces- sary to re write the jurat or add the prefix "re." And further, the trial Judge is by sec. 62 of the Evidence Act, empowered to receive these affidavits. This Mr. Wilson does not contest, but says that a memorandum that they were so received should be endorsed on the affidavit. That provision I consider directory. Mr. Wilson takes the further ground that all these affidavits are defective.

Section 5 of the Woodman's Lien Act, is as follows:--

"Such statement (referring to the statement in sec. 4) shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant as near as may be, over and above all legal set-offs or counter-claims, and a description of the logs or timber upon or against which the lien is claimed and may be in the form in Schedule "A" to this Act, or to the like effect."

First, supposing there had been no Schedule "A", I would hold that sec. 5 had been complied with. That schedule is no doubt given as a guide and if it has to be strictly followed then in one or two particulars, especially as to residence it has not been so followed.

I attach no weight to the objection that the amounts are incorrectly stated in this case.

Now, there may be Acts where the very wording of the Act compels us to adopt a strict construction and require strict compliance, but I do not regard this as one of them, and in dealing with the objections *seriatum*, in all cases except Ellen Mathias Joe, I would hold (a) sufficiently stated; (c) sufficiently stated; (d) sufficiently stated; (e) sufficiently stated, leaving only (b) that the residence of the owner is not stated, and with regard to that even Schedule "A" says, state if known. In the case of Ellen Mathias Joe, the nature of the debt, demand or claim (following the words of the statute) is not stated--I take it something must be set out which shews that she comes within the class entitled to a lien and this is not done. As stated, the services rendered might have been entirely outside the contract.

I am of course considering these cases under the wording of this particular Act.

The only remaining point argued was as to the sufficiency of proof of the claims, and I think that sufficient.

In the result the appeal succeeds as to the claim of Ellen Mathias Joe and is dismissed as to the others.

McPHILLIPS and EBERTS, JJ.A. agree in dismissing the appeal except as to the claim of Ellen Joe, which is allowed.

Appeal dismissed with variation; claim of Ellen Joe allowed.