OREGON SUPREME COURT DECISIONS

Long and Hewitt v. Hoedle, et al, Marion County.

Decided, December 26, 1911.

A. W. Long and J. A. Hewitt, respondents, v. Chas. Hoedle, Geo. Sakuler, and John Koeneke, defendants, George Sakuler and John Koeneke, appellants. Appeal from Marion county. The Hon. Geo. H. Burnett, judge. Argued and submitted Dec. 14, 1911. A. O. Condit, for respondents. Carey F. Martin, for appellants. McBride, J. Reversed and new trial ordered.

This is an action to recover on a promissory note. Defendants answered, denying the execution of the note. They introduced some testimony tending to show that the instrument was a forgery.

Among other instructions the court gave the following: "The plaintiffs allege this was for a valuable consideration; that is a presumption of the law. But this is a disputable presumption, and may be overcome by other evidence." The court further instructed the jury:

"It is presumed that the private transactions about this note have been fair and regular, and that is a disputable preumption, and may be overcome by other evidence. These are pieces of evidence which the plaintiffs are entitled to rely upon: that the transaction of taking the note was fair and regular. But the defendants would be entitled to show that the contrary was true."

McBride, J. Where the execution of a note is denied, there is no presumption in favor of the fairness or regularity of the transaction, and the instruction given was misleading and erroneous: Sears v. Daly, 43 Or. 346, and cases there cited.

No error appears in other rulings made and excepted to on trial. The judgment is reversed and a new trial ordered.

Mr. Justice Burnett took no part in this decision.

Nutt v. Isensee, Multnomah County.

Decided December 26, 1911.

N. G. Nutt, respondent, v. Wm. Isensee, appellant. Appeal from Multnomah county. Hon. W. N. Gatens, judge. Argued and submitted December 19, 1911. V. K. Strode and F. E. McGinnis, for respondent. (Also Mark O'Neill, on brief). A. T. Lewis and (E. S. J. McAllister, on brief) for appellant. McBride, J. Affirmed.

This is an action for damages for personal injuries. The complaint alleges, in substance, that in June, 1909, plaintiff was employed by defendant as a common laborer in defendant's blacksmith shop; that while so employed he was directed by defendant to operate a machine, called a "Shears and Punch;" which was antiquated, defective, and worn out; that its parts were loose and insecure; its keys, bolts and rivets so insecurely fastened as to be dangerous and unsafe while in operation; and particularly that an iron key was left by defendant without being securly fastened to the main machinery; that these defects were known to defendant but were unknown to plaintiff; that at the date mentioned, while plaintiff, under defendant's direction, was attempting to operate the machine, the key loosened from its position and was projected from its place with great force, striking plaintiff in the face and eyes, and severely injuring him.

The answer is a general denial, coupled with a plea of assumption of risk and contributory negligence.

Defendant's counsel requested the following instructions, which the court refused:

"2. The court further instructs you that the injury to plaintiff's chest, testified to by Dr. Rockey, cannot be considered in this case as an element of damages, but said testimony may be considered an element in determining the credibility of the plaintiff's testimony."

"3. The court instructs you that if you believe from the evidence that the plaintiff had knowledge of the defective condition of the shears and punch while he was using it, and if you further believe that he was a man of ordinary or average intelligence, he cannot recover although you find that the defendant knew of the defective condition of the machine."

"5. The court instructs you that if you believe from the evidence that in operating the punch when pressue is applied the key or plat could not, from the nature of the machine, fly out, then, in that case, you must find for the defendant."

"6. The court instructs you that machinery often gets out of order, that it is not negligence on the part of defendant to work the shears and punch without the pin is in the key or plate, if you believe from the evidence that when pressure is applied the key or plate could not fly out.

"7. The court instructs you that if you believe from the evidence that plaintiff inserted a wedge or a flat piece of iron in the machine to make the punch go deeper and it was the wedge that flew out and struck the plaintiff, or that both wedge and plate flew out at the same time and that the wedge inserted in the machine was the cause of the injury, then plaintiff cannot recover."

Counsel also requested the following instruction, which the court gave, interpolating therein the words, "provided the old machine be a reasonably safe one," which are included in brackets: "The court instructs you that every employer has the right to choose the machinery to be used in his business, and to conduct that business in a manner most agreeable to himself. He may select the appliances and run his shop with old or new machinery just as he may ride in an old or new carriage or navigate an old or new vessel, and he is not obliged to change his machinery from old to new in order to secure the greater safety of his employes (provided the old machine be a reasonably safe one) and an employe who enters his service with the knowledge of circumstances attending his employment cannot complain of his master's customs or habits, nor recover for injuries in and resulting from that particular service."

Counsel excepted to the instruction as amended.

The testimony of Dr. Rockey, referred to, was introduced by defendant and was to the effect that about two weeks after the injury plaintiff visited him professionally, in regard to an alleged injury to his chest, which he claimed to have received while working in defendant's shop, as the result of having been struck by a half-moon shaped piece of iron which projected from a machine he was operating. It does not appear that counsel, at the time the testimony was introduced, attempted to limit its effect to any particular purpose but introduced it generally.

Plaintiff had a verdict and judgment for $300 and defendant appeals.

McBride, J. We have carefully examined the record in this case and find it free from any material error. Without consuming space in the reports by a discussion of the testimonial in detail, it is sufficient to say that, in our judgment, there was testimony tending, in some degree, to sustain the allegations of the complaint and, therefore, the court did not err in its refusal to sustain a motion for a nonsuit. It is true that the testimony was contradictory but the jury was the judge of its value and effect.

There was no substantial error committed in the refusal of the court to give defendant's requested instruction No. 2, relating to the effect to be given to Dr. Rockey's testimony. The court in its general charge expressly told the jury that plaintiff's recovery must be limited to the particular injury alleged in the complaint and the instruction requested amounted merely to a repetition of the same instruction in different language. We are of the opinion that the subject was sufficiently covered by the instructions given.

Instruction No. 3, requested by defendant, does not correctly state the law. It is not sufficient to defeat a recovery that plaintiff should have known that the machine was defective. He must also have known or had reason to believe that the defect was a probable source of danger. As said by Justice Lord in Roth v. N. P. L. Co. 18 Or. 205, "it is to be borne in mind that there is a difference between a knowledge of the facts and a knowledge of the risks which they involve. One may know the facts, and yet not understand the risk; or, as Mr. Justice Byles observed, 'A servant knowing the facts may be utterly ignorant of the risks.'"

To the same effect is Johnson v. O. S. L. Ry. Co., 23 Or. 94.

There was no error in the court's modification of requested instruction No. 4. Taken in connection with the general charge, the law is correctly stated. Request No. 5 is substantially covered by the general charge. Request No. 6 was properly denied. It was not the business of the court to instruct the jury that "machinery often gets out of order," etc. The jury was considering the evidence in regard to the machine operated by plaitiff and, as to it, there was no evidence that such machines are liable to often get out of order, but there was no evidence that such machines are liable to often get out of order, but there was strong evidence tending to show that, with ordinary care and attention used in fastening the key or friction plate to the machine, it was not likely to get out of position or fly off.

The last instruction requested is sufficiently covered in the general charge, which was admirable and covered all the issues. A party is not entitled to have an instruction given in language suggested by himself if the substance of it is covered by other instructions framed by the court.

In this case the court was exceedingly fair to the defendant and we are sure that no instruction, refused or given, resulted in any substantial injury, and the verdict of $300 seems to us to have been based upon exceedingly moderate estimate of plaintiff's injuries.

The judgment is affirmed.

McCoy and McCoy v. Huntley, Wheeler County.

Decided, December 26, 1911.

G. J. McCoy and H. R. McCoy, respondents, v. Charles Huntley, appellant. Appeal from the decree of the circuit court for Wheeler county. The Hon. H. J. Bean, judge. Argued and submitted Oct. 30, 1911. Pendleton Term. W. H. Wilson (and H. H. Henrricks, on brief) for respondents. Jay Bowerman, for appellant. McBride, J. Affirmed.

This is a suit to restrain defendant from diverting and using more than one-half of the waters of Pine Creek in Wheeler county.

Plaintiffs, whose land adjoins that of defendant lower down the creek, claim in substance by their complaint, that in 1883 William Clarno, their predecessor in interest, appropriated 30 inches, miner's measurement, of the waters of Pine creek for the purpose of irrigating his land, and that such appropriation was prior to any appropriation by defendant; that defendant in the years 1903, 1904, 1905 and 1906, during the season of low water, diverted all the water of the creek upon his own land, without plaintiffs' consent and refused to turn back into the stream any portion of the water so diverted, but used it unnecessarily and wastefully, and suffered it to sink upon his own land, leaving plaintiffs without water for irrigation or for domestic purposes. It is alleged that one-half of the water of the creek used all the time, or all of the water used alternately, week about, upon the land of plaintiffs and defendant, is sufficient for the needs of each.

A preliminary injunction was issued defendant to alternate with plaintiffs in the use of the water week about until the final hearing. The defendant answered, claiming a prior appropriation by himself and continued use by him of all the water of Pine creek in the dry season when necessary, and denied a wrongful diversion or wasteful use.

Upon the hearing, the court, after viewing the premises, found for the plaintiffs and decreed to them the right to alternate week about with defendant in the use of the water, and from this decree defendant appals. Other facts appear in the opinion.

McBride, J. It appears from the testimony that the land occupied by plaintiffs was originally settled upon about the year 1871 by Harrison Huntley, a brother of defendant, and that about the same time defendant settled upon the lands now occupied by him. While the testimony is not clear, we conclude that the first appropriaion was made for the purpose of irrigating the Harrison Huntley tract, that is to say, a small portion of it, and later the land of defendant. Pine creek, at that time, was a stream running near the level of the adjoining land, and it is probable that a portion of the land to some extent was sub-irrigated by the natural percolation of the waters of the stream. Later a cloud burst or a succession of such deepened the channel, so that the water in the stream is from 10 to 20 feet deep below the level of the adjoining land and subirrigation is not possible, and irrigation by means of dams is much more difficult than when the place was first settled. For a time the two Huntleys used the same ditch and there does not seem to have been any scarcity of water on either place for several years. In 1879 it transpired upon survey that the land occupied by Harrison Huntley was a school section and he conveyed his possessory rights to Charles Huntley who, on January 14, 1879, received a deed from the state to the lands now occupied by plaintiffs. In 1880 Charles Huntley conveyed a portion of this tract by warranty deed to W. Lair Hill, N. H. Gates and Frank Clarno, and in 1882 conveyed the remainder of the tract to Hill and Gates by warranty deed. Plaintiffs deraign title from Hill, Gates and Clarno. We do not think that the evidence indicate a prior appropriation by defendant. And as water, in the arid parts of the state, is the life of the land, we believe that Hill, Gates and Clarno took the land in view of the tillable improvements upon it, including the ditches and water facilities placed there by Harrison and Charles Huntley, and that the right to use the water, as Harrison and Charles had theretofore used it, became and was appurtenant to the land.

It not appearing that Charles Huntley ever did any act which notified plaintiffs or their grantees that he intended to claim the right to constantly divert and use all the waters of the stream, or to deny their right to use the same share that had been employed beneficially while he and Harrison Huntley occupied the land, the statute of limitations would not attach from the mere fact that at times defendant used all the water of the creek since such was his privilege unless the grantors of plaintiffs were in need of it. Nor is adverse users as such specifically pleaded, the defendant making his case upon prior appropriation, which he has failed to prove. We see no reason why, even in cases involving prior and subsequent appropriations of water, the courts cannot require the appropriators to alternate in the use of the water. The time when water may be used recklessly or carelessly has passed in this state. With increasing settlement water has become too scarce and too precious to justify any but an economical use of it. An appropriator has only the right to use so much as his needs require and at the time his needs require. And if these are satisfied by a use of the whole flow every other day, or every alternate week, he ought not to be heard to complain. It is evident that from some cause or from a variety of causes the waters of Pine creek are diminishing in volume at the point where the parties to this controversy are residing. It is now probable that to divide the water, without alternating, would injure both parties. A test, since the preliminary order was made in this case in 1906, indicates that by the method adopted, both parties can raise good crops and both prosper.

It must be conceded that there is a paucity of authority on the subject of requiring rotation in the use of water between appropriators. The remedy has frequently been applied in cases of dispute between riparian proprietors and it is difficult to discern any difference in principle between the rights of a riparian proprietor and those of an appropriator in the beneficial use of water. The trend of the later decisions is to apply this method where practicable.

In Helphery v. Perrault, 12 Idaho 451, the court observes:

"Rotation in irrigation undoubtedly tends to conserve the waters of the state and to increase and enlarge their duty and service, and is, consequently, a practice that deserves encouragement in so far as it may be done within legal bounds." In Wiggins v. Muscupieabe Land & Water Co., 113 Calif. 182, which is cited with approval in Hough v. Porter, 51 Or. 318, the court required riparian proprietors to rotate in the use of water and in Becker v. Marble Irr. Co. 15 Utah 225, which was a suit between appropriators, the court applied the doctrine of rotation.

The weight of evidence indicates that there is no material difference in character between the lands of plaintiffs and defendant and if defendant is unable to produce as good crops on his land as plaintiffs are producing with the same quantity of water upon double the acreage, it must be attributed to his methods of farming and irrigation, rather than to the lack of water. The decree is affirmed.

Bean, J., took no part in this decision.

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