

RE CALEDONIA MILLING CO. v. JOHNS

(1918), 42 O.L.R. 338 (also reported: 14 O.W.N. 1)

Ontario High Court, Middleton J., 4 March 1918

Division Courts--Jurisdiction over Indian--Order for Committal under Judgment Debtor Procedure--Contempt of Court--Execution--Division Courts Act, secs. 190 et seq.--Indian Act, sec. 102--Exemption--Powers of Provincial Legislature--British North America Act, sec. 91 (24).

The provisions of secs. 190 et seq. of the Division Courts Act. R.S.O. 1914, ch. 63, relating to the imprisonment of debtors, are not intended to apply to Indians.

An Indian who has no property other than what is, by virtue of sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, exempt from seizure under execution, cannot be committed to gaol by a Division Court Judge, after examination as a judgment debtor, even though the Judge be of opinion that the Indian has sufficient means and ability to pay the debt: the Indian Act preventing the judgment creditor from taking the assets of the Indian in execution, they cannot be reached indirectly.

There can be no contempt in withholding that which is by law exempt from seizure: and the person of an Indian--a ward of the Dominion Government and subject to the legislation of the Dominion Parliament by the British North America Act, sec. 91 (24)--cannot be taken in execution under a provincial statute.

MOTION by the defendant in a Division Court action for an order prohibiting further proceedings against him, as a judgment debtor, in the Division Court, on the ground that he was an Indian owning no property outside of his reserve.

February 5. The motion was heard by MIDDLETON, J., in Chambers.

A. L. Baird, K.C., for the defendant.

H. Arrell, for the plaintiffs.

March 4. MIDDLETON, J.:--On the 4th March, 1917, judgment was pronounced against the defendant in the Division Court for \$164.22 and on the 23rd November he was examined as a judgment debtor, and on the 12th December the Division Court Judge, being of opinion that the defendant had sufficient means and ability to pay the debt, though his property was not liable to seizure by reason of the provisions of sec. 102(1) 102. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation. . . . of the Indian Act, R.S.C. 1906, ch. 81, made an order for his committal to gaol for 40 days.

This motion was then made for prohibition, the defendant not being taken into custody, by arrangement, pending the hearing of the motion.

The Dominion statute prevents the execution creditor taking the assets of this Indian in execution; but the Division Court Judge in effect says, "Unless you voluntarily give to the judgment creditor that which is by law exempt from seizure under the judgment, you must undergo imprisonment." This is in effect getting at exempt assets in this indirect way.

If the proceedings are in any way regarded as based on contempt, there can be no contempt in withholding that which is by law exempt from seizure.

If the proceedings are in the nature of execution against the person--then the execution creditor is again in trouble. The Indian Act has not given any right to take the person of an Indian in execution. Certain of his property may be taken: but the Indian is, by the British North America Act, sec. 91 (24), subject to the legislation of the Dominion, and is a ward of the Dominion Government, and cannot be taken under the laws of the Province.

I would not construe these provisions (sec. 109 et seq.) (1) By sec. 191, "if it appears to the Judge, by the examination of the party or by other evidence that he . . . (e) had, when or since judgment was obtained against him, sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court, in which the judgment was obtained, ordered, without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered, the Judge may order him to

be committed to the common gaol of the county in which he resides or carries on business, for any period not exceeding 40 days." of the Division Courts Act, R.S.O. 1914, ch. 63, as intended to apply to Indians. I cannot think that the Province intended to confer upon the Division Court Judge any power, directly or indirectly, to interfere with Indians.

For these reasons, the prohibition must be granted. Costs may be set off *pro tanto* against the debt.