ATKINS v. DAVIS

(1917), 38 O.L.R. 548 (also reported: 34 D.L.R. 69, 11 O.W.N. 377)
Ontario Supreme Court, Appellate Division, Meredith C.J.O., Maclaren, Hodgins and Ferguson JJ.A., 7 February 1917

Indian--Enforcement of Judgment against--Property of Resident on Reserve-- " Person"—Indian Act, R S.C 1906, ch. 81, secs. 2(c), 102.

The word "person," as used in sec. 102 of the Indian Act. R.S.C. 1906, ch. 81 is not to be read with the restricted meaning, "an individual other than an Indian", given in sec. 2 (c), for the context otherwise requires.

Where judgment was recovered by an Indian against an Indian upon a promissory note made by the defendant Indian to person not an Indian, who endorsed and transferred it to the plaintiff Indian, it was held that the latter was prevented from enforcing his judgment against the defendant Indian by seizure and sale of his goods and chattells on the Reserve upon which he resided.

AN appeal by the plaintiff from the judgment of the County Court of the County of Brant in favour of the defendant in an issue directed to try the question whether sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, had the effect of preventing the plaintiff from enforcing a judgment against the defendant by seizure and sale of his goods and chattels upon his premises or dwelling place in an Indian Reserve. Both the plaintiff and the defendant were Indians, and the judgment against the defendant was recovered in an action upon a promissory note made by him to the order of one Thompson, not an Indian, who endorsed and transferred it to the plaintiff.

January 11. The appeal was heard by **MEREDITH, C.J.O., MACLAREN, HODGINS**, and **FERGUSON, JJ.A.**

H. Arrell, for the appellant, referred to sec. 102 of the Indian Act, and argued that, reading that section in connection with sec. 2 (c), the plaintiff, who was an Indian, was not prevented from enforcing against the defendant, who was also an Indian, a judgment upon a promissory note made by him to a person who was not an Indian, who subsequently transferred it to the plaintiff. He cited *Bryee* v. *Salt* (1885), 11 P.R. 112.

W. A. Hollinrake, K.C., for the respondent, the defendant Parry Davis, argued that the payee of the note could not give the plaintiff, his endorsee, any higher right than he had himself, and that the word "person" in sec. 102 should be interpreted to mean "any person, " whether an Indian or not.

A. M. Harley, for the defendant Sarah Davis, who was not a party to the appeal, took no part in the argument.

February 7. The judgment of the Court was delivered by **MEREDITH, C.J.O.:--** This is an appeal by the plaintiff from the judgment, dated the 15th November, 1916, of the County Court of the County of Brant, pronounced after the trial of the action without a jury on the previous 3rd October.

The question for decision is, whether or not sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, has the effect of preventing the appellant from enforcing his judgment against the respondent by seizure and sale of his goods and chattels on the Reserve upon which the respondent resides.

Both parties are Indians, and the judgment against the respondent was recovered on a promissory note given by him to a man named Thompson, who is not an Indian, who endorsed and transferred it to the appellant.

Section 102 provides that: "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 under the last three preceding sections: provided that any person selling any article to an Indian or non- treaty Indian may take security on such article for any part of the price thereof which is unpaid. "

There are three classes of property which are, by the sections referred to, subject to taxation, viz.: (1) real property held by the Indian or non-treaty Indian in his individual right under a lease or in fee simple, or personal property, outside of the Reserve or special Reserve; (2) real property of an Indian acquired under the enfranchisement clauses of Part I. of the Act, after it has been declared liable to taxation by proclamation of the Governor in Council published in the Canada *Gazette*; (3) land vested in the Crown or in any person in trust or for the use of any Indian or non-treaty Indian

or any band or irregular band of Indians or non- treaty Indians, with certain exceptions which for the purposes of the appeal it is unnecessary to mention.

Section 103 provides that: "Indians and non-treaty Indians shall have 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 . . . "

Section I04 provides that: "No pawn taken from any Indian or non-treaty Indian for any intoxicant shall be retained by the person to whom such pawn is delivered; but the thing so pawned may be sued for and shall be recoverable, with costs of suit, in any court of competent jurisdiction by the Indian or non-treaty Indian who pawned the same."

And sec. 105 provides that: "No presents given to Indians or non-treaty Indians, and no property purchased or acquired with or by means of any annuities granted to Indians, or any part thereof, and in the possession of any band of such Indians, or of any Indian of any band or irregular band, shall be liable to be taken, seized or distrained for any debt, matter or cause whatsoever."

The appellant contends that, read in connection with clause (c) of sec. 2, which provides that, unless the context otherwise requires, "person" means an individual other than an Indian, sec. 102 provides that "no individual, other than an Indian, shall take . . .;" and that, as the appellant is an Indian, the prohibition does not extend to him.

The draftsman of the Act evidently supposed that, unless provision were made for Indians suing for debts or in respect of wrongs and for the performance of obligations contracted with them, they could not do so; and the provisions of sec. 103 are therefore found in the Act; but there is nothing which says that property which cannot be seized as provided by sec. 102 can be levied upon under an execution issued on a judgment which an Indian has recovered.

It is reasonably clear that, in some instances at least, as the draftsman must have thought was the case, the word "person" is not used in the restricted sense mentioned in clause (c) of sec. 2. The word is used in sec. 104, and it can hardly have been intended that its provisions should apply only where a person other than an Indian had obtained a pawn for an intoxicant. So, too, the provisions of secs. 129, 130, 131, and 132, cannot have been intended to apply only to individuals other than Indians. Again, if in sec. 136 "person" has this restricted meaning, all that would be necessary to avoid the effect of the prohibition which it enacts would be to have the boat in charge of an Indian, and, so far as the section is concerned, an Indian might have charge of the boat from or on board of which intoxicants might be supplied to Indians with impunity.

Coming back to sec. 102, if the contention of the appellant is to prevail, there would be nothing to prevent its provisions from being evaded. All that would be necessary for a non-Indian having a claim against an Indian to do would be to transfer it to an Indian, and so to convert a claim, a judgment upon which could not be enforced upon the property which sec. 102 in effect declares shall not be taken in execution, into one a judgment upon which could be so enforced.

If Thompson, who held the promissory note upon which the judgment was recovered, had given it to the appellant, the respondent would have had no answer to the latter's action upon it, and judgment must have gone against him.

I cannot conceive that it was intended that that should be possible, and I am forced to the conclusion that the context requires that the word "person," as used in sec. 102, is not to be read with the restricted meaning which clause (c) of sec. 2 would otherwise give to it.

I would affirm the judgment and dismiss the appeal with costs.