GEOFFRIES v. WILLIAMS (alias WELL)

(1958), 16 D.L.R. (2d) 157 (also reported: 26 W.W.R. 323)

British Columbia County Court, Swencisky Co. Ct.J., 16 September 1958

Indians-Garnishment I B, D--

Whether garnishment lies against Reservation Indian with respect to debt owed latter--Indian Act (Can.), ss. 87, 88(1)--Since the enactment in 1951 [c. 29] of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, a debt owing to a Reservation Indian is subject to attachment in garnishment proceedings brought by his judgment creditor and this is so in spite of s. 88(1) of the Act which provides that "subject to this Act, the real and personal property of an Indian situated on a reserve is not subject to attachment". The 1951 amendment provides that "all laws of general application in any province are applicable to Indians in the province, except to the extent that such laws are inconsistent with [the Indian] Act" and, as a result, the British Columbia *Attachment of Debts Act*, R.S.B.C. 1948, c. 20, under which the garnishment proceedings were brought, is applicable to Reservation Indians, and their property, in the absence of any specific exemption in the *Indian Act*.

Semble, also, that as the debt owing to the Indian, which was the subject of the garnishment, was an ordinary debt, its *situs* was the residence of the debtor and consequently was not "personal property *situated* on a reserve" within the provisions of s. 88(1) [*Armstrong Growers Ass'n v. Harris*, [1924], 1 D.L.R. 1043, 1 W.W.R. 729, 33 B.C.R. 285, expld & distd]

APPLICATION for payment out of monies paid into Court pursuant to garnishing order.

J. R. Nicholson, for plaintiff.
H. G. Castillou, for defendant.

SWENCISKY CO.CT.J.:--The facts are that the defendant is an Indian and member of the Squamish Band. He felled and bucked a quantity of timber on the Cheakamus Indian Reserve pursuant to a permit duly issued. He entered into an agreement to sell to R. & H. Rustad Logging Co. Ltd. of 1115 West Pender St., Vancouver, B.C., the felled and bucked sawlogs estimated at 1,500,000 ft. board measure. The plaintiff obtained a judgment against the defendant and issued a garnishing order against R. & H. Rustad Logging Co., which paid the money involved into Court. An application was made before me in Chambers for an order for payment out to the plaintiff of monies paid into Court by R. & H. Rustad Logging Co., pursuant to the terms of a garnishing order after judgment.

The defendant opposes the application on the ground that the money owing by R. & H. Rustad Logging Co. to the defendant was "personal property of an Indian or a band situated on a reserve" within the meaning of that expression as found in s. 88(1) of the *Indian Act*, R.S.C. 1952, c. 149, which reads as follows: "88(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian" and by reason thereof is not subject to attachment.

Counsel for the defendant relies very largely on the decision of our Court of Appeal in *Armstrong Growers' Ass'n v. Harris*, [1924] 1 D.L.R. 1043, 33 B.C.R. 285. It will be necessary to examine this decision carefully and the amendments that were made to the *Indian Act* subsequent to the above decision. The Court consisted of Macdonald C.J.A., Martin, Galliher and McPhillips JJ.A. It is to be noted that Galliher J.A. based his decision on the technical ground that the person named as garnishee was improperly described. His decision is therefore of no help on the question before me. Martin J.A. dissented from the majority decision and would have allowed the appeal. His judgment is consequently directly in favour of the plaintiff in the case before me. Macdonald C.J.A. at p. 1044 D.L.R., p. 287 B.C.R. says: "The wheat while on the Reserve would not, I think, be subject to taxation, nor to process of execution, and I am of opinion that the language of the Act does not render the proceeds of it subject to taxation." If the *Indian Act* had not meanwhile been amended, then such judgment would clearly support the position taken by the defendant. McPhillips J.A. at p. 1046 D.L.R., p. 289 B.C.R. states: "It is clear that the property of an Indian is not subject to any form of attachment if it be not taxable--and in the present case unquestionably no case has been made out to shew that the moneys or property in question are subject to taxation." The question of whether the chose in action, with which I am dealing, is or is not taxable is not an issue before me. The only issue with which I have to deal is whether or not the chose in action (the debt owing by R. & H. Rustad Logging Co. to the defendant) is "situated on a reserve" as set out in s. 88(1) of the Act.

It is necessary to consider the question of the *situs* of a chose in action by way of debt. If the *situs* of an ordinary debt, as opposed to specialty debt, is the residence of the creditor, then I would have to hold that the debt was "situated on a reserve". If, on the other hand, the *situs* is the residence of the debtor, then I would have to hold that the debt is not "personal property of an Indian situated on a reserve". Clearly, the debt owing by R. & H. Rustad Logging Co. to the defendant is an ordinary debt. I adopt the statement of the law expressed by Atkin L.J. in the case of *New York Life Ins. Co. v. Public Trustee* (1924), 93 L.J. Ch. 449 at pp. 462-3, wherein he states: "Now, one knows that, ordinarily speaking, according to our law, a debtor has to seek out his creditor and pay him; but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was, because that it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt .... but the ordinary rule in respect of a debtor is that the debt is situate where the debtor resides, because there the debt can be enforced against him by process of law." Similar law is pronounced in *Com'r of Stamps v. Hope*, [1891] A.C. 476 at pp. 481-2, which decision has been consistently followed by the Courts. Some taxation statutes specify where, for the purposes of the particular Act, personal property shall be deemed to be situated. But the *Indian Act* has no such special provision.

I indicated earlier that if the *Indian Act* had not been amended the decision in *Armstrong Growers' Ass'n v. Harris*, *supra*, would be binding upon me and would determine the matter. However, in 1951 [c. 29] the Indian Act was revised and very material changes were enacted. I have particular reference to s. 87 which was added, and reads as follows: "87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

Clearly the provisions of our provincial statute, the *Attachment of Debts Act*, R.S.B.C. 1948, c. 20, apply to Indians and personal property of Indians unless made specifically exempt under any provision in the *Indian Act*. I do not find any such provision.

Counsel for the defendant cited the cases of *Feldman v. Jocks* (1936), 74 Que. S.C. 56, and *Crepin v. Delorimier et Autres, et Banque Canadienne Nationale* (1930), 68 Que. S.C. 36, but such cases are readily distinguishable and no longer of any force in view of the changes that have been made in the *Indian Act*.

In my view there is nothing in the *Attachment of Debts Act*, which is inconsistent with the *Indian Act* so far as the matter before he is concerned. Decisions which support the plaintiff's application are to be found in *Avery v. Cayuga* (1913), 13 D.L.R. 275, 28 O.L.R. 517; *Campbell v. Sandy*, 4 D.L.R. (2d) 754, [1956] O.W.N. 441; and *Pope v. Paul*, [1937] 2 W.W.R. 449.

Counsel for the defendant also argues that if the legal effect of the amendments to the *Indian Act* passed in 1951 is to take away some of the benefits previously enjoyed by Indians, then such is beyond the power of the Government of Canada to enact and is therefore *ultra vires*. In support of this argument he refers to the terms of union of the Province of British Columbia with Canada wherein it was provided that the Dominion Government should follow a policy as liberal as that hitherto pursued by the British Columbia Government. If counsel for the defendant intended to challenge the legality of the *Indian Act* as enacted in 1951, he would have to follow the procedure set out in the *Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66, s. 9. There was nothing before me to indicate counsel for the defendant had carried out the necessary preliminary steps to entitle him to question the legality of the *Indian Act* as enacted in 1951. However, even if he had laid the foundation, there is nothing in the material before me to indicate that prior to union the Province of British Columbia had treated Indians any more generously than is authorized by the *Indian Act* as enacted in 1951.

For the above reasons, the plaintiff is entitled to succeed in his application. An order will go for payment to the plaintiff of the monies paid into Court by the garnishee, R. & H. Rustad Logging Co., pursuant to the garnishing order after judgment.

Plaintiff is also entitled to costs of the application.