HUNTER v. GILKISON

(1885), 7 O.R. 735

Ontario Queen's Bench, Wilson CJ., Armour and O'Connor JJ., 7 March 1885

Indian lands - Trespass-Indian superintendent-Jurisdiction-Conviction-Discharge on habeas corpus-Action for malicious prosecution..

***Held,* that the defendant, who was a Visiting Superintendent and Commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian reserve in the County of Brant.**

***Held,* also, that the discharge of the plaintiff form custody on *habeas corpus* was not a quashing of his conviction of the above charge; and that the conviction remaining in force, and the defendant having had jurisdiction, that action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been so; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause.**

The statement of claim was, that plaintiff was a farmer, and defendant the Visiting Superintendent and Commissioner of Indian Affairs for the Brant and Haldimand Reserve: that on 12th July, 1884, at the city of Brantford, in the county of Brant, the defendant assaulted the plaintiff and gave him into the custody of a constable, and caused him to be imprisoned in the common gaol at Brantford, aforesaid, for the space of seven days: that on 12th July, 1884, at the city of Brantford, in the county of Brant, the defendant maliciously, and without reasonable and probable cause assaulted the plaintiff and gave him into the custody of a constable, and caused him to be imprisoned in the common gaol at Brantford, aforesaid, for the space of seven days, whereby, &c.

Defence: Not guilty by statute (R.S.O., ch.73, Public Act, sec.11; 16 Vic. ch. 180, Public Act, sec. 9; 43 Vic. ch. 28, Dom. Public Act, sec. 27; 44 Vic. ch. 17, Dom. Public Act, sec.12; 45 Vic. ch. 30, Dom. Public Act, sec. 3.)

Issue.

The cause was tried at the last Fall Assizes at Brantford, by Rose, J., with a jury.

The plaintiff was arrested and committed to the common gaol of the county of Brant, on the 12th July, 1884, under the following warrant:

WARRANT OF COMMITMENT.

CANADA,
Province of Ontario,
County of Brant.
To Wit:

To all or any of the constables or other peace officers of the county of Brant, and to the keeper of the common gaol of the said county.

Whereas James Hunter, late of the township of Tuscarora, was this day convicted before the undersigned, J.P. Gilkison, Visiting Superintendent of Indian Affairs in and for the said county of Brant, for that he did on the 22nd February, 1883, in the township of Tuscarora, an Indian Reserve in said county of Brant, remove cordwood from said Reserve, contrary to the Indian Act of 1880, Wm. Wedge being the informant; and it was thereby adjudged that the said James Hunter for his offence should forfeit and pay the sum of fifteen dollars, and should also pay the sum of six dollars and seventy-five cents for costs in that behalf ; and it was thereby further adjudged that if the several sums should not be paid forthwith the said James Hunter should be imprisoned in the common gaol of the county of Brant, at the city of Brantford, in the said county, and there kept at hard labour for the space of thirty days, unless the said several sums should be sooner paid ; and whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, but the said James Hunter hath not paid the same or any part thereof, but therein hath made default. These are therefore to command you the said constables or peace officers, or any of you, to take the said James Hunter and him safely convey to the common gaol at Brantford, aforesaid, and there deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said common gaol to receive the said James Hunter into your custody in the said common gaol, there to imprison him and keep him at hard labour for the space thirty days, unless the said several sums shall be sooner paid, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal this 7th day of April, in the year of our Lord 1883, at Brantford, in the county of Brant, aforesaid.

Fine…….	$15 00
Costs per C..	6 75
Extra C …….	2 00
	$23 75

J.P. Gilkison,
Vis. Supt. and Comm.,
Indian Affairs.

It was admitted that the plaintiff was released on a writ of *habeas corpus,* and the following order was put in :

IN THE HIGH COURT OF JUSTICE,

QUEEN'S BENCH DIVISION.

THE QUEEN V. JAMES HUNTER.

IN CHAMBERS,

BEFORE THE HON. MR. JUSTICE ROSE.

Upon the application of the above named James Hunter, upon reading the writ of *habeas corpus* directed to the keeper of the common gaol for the county of Brant, dated 16th day of July, instant, commanding him to produce before this Court the body of the said James Hunter, and upon reading the return thereto, and the affidavit of Valentine Mackenzie, and the copy of the information annexed, and the warrant of commitment, it is ordered that the said James Hunter be forthwith discharged out of the custody of the sheriff and keeper of the common gaol for the county of Brant.

(Signed) JOHN E. ROSE, J.

It did not appear for what particular cause the detention of the plaintiff was held to be illegal.

Notice of action was put in and proved, in which it was stated the plaintiff would " cause a writ of summons to be issued out of the Queen's Bench or Common Pleas Division of the High Court of Justice."

The defendant put in an exemplification of a commission, dated the 9th of March, 1864, appointing him and others commissioners under and for the purposes of the Act, Consol. Stats. of U.C., ch 81, and he swore that this commission had never been revoked, that it was the commission under which he had always acted, and that he was a visiting Superintendent-General and commissioner of Indian Affairs.

The plaintiff was asked, "Could anything have been made out of your goods and chattels?" and to this he answered, "Yes." The defendant said that he did not think that he made any enquiry before he signed the warrant whether the plaintiff had any goods and chattels out of which the fine might have been levied.

Evidence was given on both sides as to whether or not the warrant was sealed at the time it was issued.

The learned Judge left two questions only to the jury: 1st, whether the warrant was sealed; and 2nd, what amount of damages the plaintiff had sustained. The jury found that the warrant was sealed, and that the plaintiff's damages were $500.

The learned Judge gave judgment, dismissing the action, with costs.

December 11, 1884, *Mackenzie,* Q.C., moved to set aside the said judgment, and to enter judgement for the plaintiff, on the ground that the defendant in his pleadings did not bring himself within the Act R.S.O. ch. 73, and having failed to shew himself a public officer or one empowered to do the act complained of, could not therefore invoke, nor was he in any event entitled to the protection of that Act: that the obligation to quash the conviction before action, which the Act created, contemplated a cause of action arising out of an act of a Justice of the Peace, and applied only to the quashing of a conviction of a Justice of the Peace within the meaning of the Summary Convictions Act, 32-33 Vic. ch. 31, and such obligation presupposes the making or framing of an instrument that should conform substantially in its tenor to tone or other of the forms in that behalf which are appended to the Act: that the so-called conviction of the plaintiff under the circumstances must be taken to have been that recited in the commitment, which being, as so recited, defective, the release of the plaintiff on the *habeas corpus* operated to quash: that the recitals in the commitment of the style and authority of the convicting justice and committing person disclosed no jurisdiction so to convict or commit, and conveyed no assurance that the locality where the offence was committed was within the jurisdiction either of the convicting justice, or of the person so committing ; that it did not appear that the commitment was signed within the jurisdiction, or was executed by the constable therein, or that the plaintiff was detained in a place of confinement within the jurisdiction of the person so committing : that the nature of the defendant's jurisdiction as a justice of the peace prescribed by the Indian Act, 1881, was opposed to the common law conception of the office : that the evidence showing that at the time the plaintiff was delivered into the custody of the gaoler the commitment bore not seal, and that the defendant was at such time made acquainted with the circumstance, he was liable to trespass: that the commission put in by the defendant at the trial, even if unrevoked, could afford him no protection in the doing of the act.

McKenzie, Q.C., supported the motion. The defendant is not protected by the Statute R.S.O. ch. 73, he not being a justice of the peace within the meaning of the *Act relating to the duties of justices of the peace out of sessions with regard to summary convictions and orders.* Defendant could not sit in sessions, and the office of a justice of the peace obviously demands the performance of functions *in* sessions, as well as *out of* sessions. In any event, the act was not the act of a justice of the peace, but arises out of the exercise of the power of commitment claimed to be given to the defendant under section 27 of the Indian Act of 1880. The defendant failed to show himself a public officer, or one empowered to do the act complained of. He put in at the trial a commission under the great seal vesting him with authority in respect only of transactions connected with the Act by virtue of which the commission issued. The commission became revoked by the operation of the Act of 1868 regulating the bureau of the Secretary of State, and the defendant is not helped by reference, or cannot appeal for indemnity, to any clause of the

Interpretation Act, the manner of appointment having been altogether readjusted. The defendant, in any case, could not shew his authority by evidence extrinsic to the commitment, and this recites no authority which could protect him. See *McLellan v. McKinnon,* 1 O.R.219; *Dickinson's* Quarter Sessions, p. 889. The office of a justice of the peace is not attached to the person The Indian Act, apparently, assigns no territorial limit to the jurisdiction of its appointees as *ex-officio* justices of the peace. Even if there were a necessity for quashing the conviction, the release of the plaintiff on a *habeas corpus,* the commitment founded on and reciting a bad conviction, operated to quash it: *Chany v. Payne,* 1 Q.B. 712; *Charter v. Greame,* 13 Q.B. 216. The conviction is bad on many grounds: 1. Cordwood is not comprehended in the different descriptions of wood enumerated in the section under which the proceedings were had: *Regina v. Caswell,* 33 U.C.R. 303. 2. It does not negative the possession by the plaintiff of a license, or that the offence was not the act of an Indian of the band: *Paley* on Conv. 17. 3. It does not allege the quantity of, or value of, the wood removed: *Charter v. Greame,* 13 Q.B. 216: *Paley* on Conv., 239. In imposing a penalty of $15 the adjudication does not accord with either of the states of things which might arise under the section. It imposes imprisonment at hard labour: *Regina v. Washington,* 40 U.C.R.221. The commitment is likewise bad on many of the same grounds; and besides it does not appear to have been signed within the jurisdiction, or direct a committal to the proper quarter. It does not set forth a sufficient style and authority in the defendant.

Robertson, Q.C., contra. The defendant is the Commissioner of Indian affairs at Brantford, and as such is *ex-officio* a justice of the peace, (Consol. Stat. U.C. ch. 81 sec. 9) within the county within which for the time being he may be resident or employed as such commissioner. He has also all the powers of a police magistrate. The defendant's commission, although dated in 1864, was continued under confederation: see B.N.A. Act, sec. 129. He gave evidence at the trial that his commission is still in force. He is also an Indian Agent. The warrant of commitment recites that plaintiff was convicted before defendant. This warrant was issued by defendant for the purpose of enforcing the conviction. As to jurisdiction, it is of no consequence: he acted *bona fide.* Plaintiff cannot bring an action against a Justice for any thing done in discharge of his duty under a conviction until the conviction is quashed: R.S.O. ch. 73, sec. 4, as amended. It is said he had no power to enforce the conviction, that it could only be enforced by the Superintendent General of Indian Affairs; but though the Superintendent General can issue his warrant in case of default, the convicting Justice is not deprived of his undoubted right to enforce his conviction. The Summary Convictions Act, (32-33 Vic. ch. 31, D.) authorizes any justice of the peace, before whom a complaint is made *"in relation to any matter over which the Parliament of Canada has jurisdiction,"* (sec.1,) to issue his warrant, &c., and establishes the procedure for enforcing &c. This was such a matter, and defendant having been seized of the case had authority to enforce the conviction. The argument and cases cited for plaintiff might be applicable if this was a motion to quash the conviction, but not to this case. Until quashed the conviction protects the Justice for any thing done by him under it. The defendant was appointed under the old law, and no one having been appointed in his stead under the new law, he had all the powers which he had under the old law. That being so, see Consol. Stat. Ch. 81, sec. 20, under which defendant had all the power to commit &c.

March 7, 1885. ARMOUR, J.-By Consolidated Statutes of Upper Canada ch. 81, under and for the purposes of which the defendant was appointed a commissioner, it is provided that "the commissioners and all acting under their authority shall respectively have the same privilege and protection in respect of any action or suit brought against them for any act by them done in the execution of their office that justices of the peace, sheriff's, gaolers, or peace officers respectively have:" sec. 17; and that "the said commissioners, and each of them, and the different superintendents of the Indian Department, either now in office or hereafter appointed, shall, by virtue of their office and appointment, and without any other qualification, be justices of the peace within the county within which, for the time being, they may be respectively resident or employed as such commissioners or superintendents:" sec 19. So much of this Act as related to Indians, or Indian lands, was replaced by the Act 39 Vic. ch. 18 sec. 99, D.; but the provisions above quoted were preserved, and are R.S.O. ch. 27, secs. 17 and 20.

The Act 39 Vic. ch. 18 was amended by 42 Vic. ch. 34, and was repealed by 43 Vic. ch. 28, sec. 112, O.

The Act 43 Vic. ch. 28, as amended by 44 Vic. ch. 17, and by 45 Vic. ch. 30, was the law in force when the conviction in question was made.

By the Act 43 Vic. ch. 28, sec. 2, sub-sec. 11, the term "agent" includes a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general.

By the Act 43 Vic. ch. 28, sec. 27, as amended by 45 Vict. ch. 30, sec. 2, which is the section under which the conviction in question was meant to be made, the conviction is to be before any stipendiary magistrate, police magistrate or any two justices of the peace.

By the Act 44 Vic. ch.17, sec. 6, D.: "Any one judge, judge of sessions of the peace, recorder, police magistrate, district magistrate, or stipendiary magistrate, sitting at a police court or other place appointed in that behalf for the exercise of the duties of his office, shall have full power to do

alone whatever is authorized by the Indian Act, 1880 (43Vict.ch.28), to be done by a justice of the peace, or by two justices of the peace;" and by sec. 12, "Every Indian Commissioner, Assistant Indian Commissioner, Indian Superintendent, Indian Inspector, or Indian Agent, shall by *ex officio* a justice of the peace for the purposes of this Act."

By the Act 45 Vic. ch. 30, sec. 8, "Wherever in the Indian Act, 1880 (45 Vic. ch.28), or in the Act passed in the 44th year of Her Majesty's reign chaptered 17, amending the said Act, or in this Act, power is given to any stipendiary magistrate or police magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian agent shall have the same power as a stipendiary magistrate or a police magistrate has in respect to such cases."

The term Indian agent as above used includes, as we have seen, a commissioner and a superintendent, and the defendant was a commissioner and superintendent, and could therefore convict alone under 43 Vic. ch. 28, sec. 17.

The defendant was also, by virtue of his being a commissioner and a superintendent, *ex officio* a justice of the peace, not only by virtue of 44 Vic. ch. 17, sec. 12, but also by virtue of the R.S.O. ch. 27, sec. 20, and as such was entitled to the protection of the R.S.O. ch. 73.

The defendant, in making the conviction in question, acted in the *bona fide* belief that as a justice of the peace he had the power to make it (it was not contended that he acted maliciously); and whether, therefore, he acted without jurisdiction, or in excess of it, he is equally entitled to such protection.

Being entitled to such protection, this action was not maintainable against him until the said conviction had been quashed either upon appeal or upon application to one of the Superior Courts of Common Law.

But it is contended that the fact that the plaintiff was discharged upon *habeas corpus* from custody under the warrant of commitment issued upon this conviction, was *ipso facto* a quashing of the conviction, and *Chaney v. Payne,* 1 Q.B. 712, and *Chester v. Greame,* 13 Q.B. 216. were cited in support of this contention; but these cases have nothing to do with it , nor could they, for the convictions in them were made before the passing of the Act 11 & 12 Vic. ch. 44, which for the first time provided that no action should be brought until the conviction had been quashed.

They decided another point altogether, fully discussed in *Regina v. Bennett,* 3 O.R. 45.

The Judge, upon return to the writ of *habeas corpus,* has nothing before him but the commitment, and I think it would be going too far to hold that in such a case the conviction which was not before him would be quashed by the discharge of the prisoner from custody under commitment.

The discharge might take place because the commitment was not warranted by the conviction which was recited in it, or because it was in itself defective, as was said to have been the case here.

In my opinion the conviction in this case was not quashed by the discharge of the plaintiff from custody under the commitment, and the judgment of the learned judge must be affirmed, and the motion dismissed, with costs.

WILSON, C.J.- I understand the principal question to be, whether the defendant, who is a Visiting Superintendent and Commissioner of Indian Affairs for the Brant and Haldimand Reserve, had as such Superintendent and Commissioner authority to act as a justice of the peace in and for the county of Brant, or at any rate to act as a justice of the peace in and about this particular matter, a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in Tuscarora, in the county of Brant.

The commission to the defendant was given under the authority of the Consol. Stat. U.C. ch. 81.

The offence is one which is against the terms of the second and thirtieth sections of that Act. The whole of that Act, so far as relates to Indian lands, was replaced by the 39 Vic. ch. 18, sec. 99, D. A provision at the end of that section is, "And this Act shall be construed not as a new law, but as a consolidation of those hereby repealed, in so far as they make the same provision that is made by this Act on any matter hereby provided for."

By sec. 3, sub-sec. 10, the term "Superintendent-General" means the Superintendent-General of Indian affairs.

Sub-section 11: The term "agent" means a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general.

By the 43 Vic. ch. 28, sec. 112, the Indian Act of 1876 is repealed. There is the like provision at the end of that section that there is at the end of the Act of 1876: "And this Act shall be construed not as a new law, &c." And by section 2 of the Indian Act of 1880, sub-section 11, "the term "agent" includes a commissioner, &c.", as in the Indian Act of 1876 sec. 3, sub-sec. 11.

The Act of 1880 is the Act still in force, but it has been amended by the 44 Vic. ch. 17, sec. 6, which authorizes among other persons police magistrates to act under the Indian Stature of 1880, and to do alone whatever is authorized by that Act to be don by one or two justices of the peace; and such police magistrate, &c., by section 7, shall have jurisdiction, under the Act of 1880, over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction, is situate. And by section 12, "Every Indian

commissioner, assistant Indian commissioner, Indian superintendent, Indian inspector, or Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act."

Then the 45 Vic. ch. 30, sec. 3 enacts that, "Whenever in the Indian Act of 1880 or in the 44 Vic. ch. 17, or in this Act, power is given to any stipendiary magistrate or police magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian agent shall have the same power as a stipendiary or a police magistrate has in respect to such cases."

I think the defendant had jurisdiction as a magistrate and that he had jurisdiction over the offence; and I have no doubt the discharge of the plaintiff from custody was not a quashing nor equivalent to a quashing of the conviction in this case; in fact the plaintiff was discharged from custody upon the supposed ground which turned out not to be the fact, that the warrant of commitment was not under seal.

The conviction remaining still in full force, and the defendant having jurisdiction, the action should have been on the case, while it has been brought for a trespass, and if the form of action had been right, the allegation of malice and the want of reasonable and probable cause had not been proved; and the judgment was rightly rendered for the defendant.

I am of opinion, therefore, the order *nisi* must be discharged, with costs.

O'CONNOR, J., concurred.

Order nisi discharged, with costs.