

PRINCE v. TRACEY

(1913), 13 D.L.R. 818 (also reported: 25 W.L.R. 412)

Manitoba King's Bench, Prendergast J., 27 September 1913

1. INDIANS (§ 1--2)--STATUS--BRITISH SUBJECTS WITH CIVIL RIGHTS, LIMITED HOW.

Indians in Manitoba are British subjects enjoying full civil rights as such, except as specially limited by statute.

2. MAXIMS (§ 1--21)-- "NOSCITUR A SOCIIS"--"PRODUCE" IN INDIAN ACT, CONSTRUED.

The word "produce" in the phrase "grain, root crops, or other produce" embraced in sec. 39 of the Indian Act, R.S.C. 1906, ch. 81, is, under the maxim *noscitur a sociis*, limited to the meaning which it shares with its antecedents "grain" and "root crops" and should not be taken to cover "wild hay."

ACTION by an Indian to set aside a mortgage executed against his property under a power of attorney obtained by alleged false representations and fraud.

Judgment was given for the plaintiff.

C. P. Fullerton, K.C., for plaintiff.

R. B. Graham, for defendant.

PRENDERGAST, J.:--The plaintiff is an Indian, the defendant Helen Maude Tracey, a spinster, and the defendant George N. Tracey, a trader, and the action is brought to have declared null and void a mortgage on the plaintiff's land, purporting to have been made by George N. Tracey as plaintiff's attorney in favour of Helen Maude Tracey, to secure the sum of \$250 and interest thereon--the grounds being fraud and false representation by George N. Tracey in procuring the power of attorney under which he executed the said mortgage.

William Frank, a real estate agent, who subsequently purchased the land in question from the plaintiff, was made a defendant to recover from him a balance of the purchase price which he withholds owing to the registration of the said mortgage against the property. The defence of the two defendants Tracey is, that on January 4, 1908, the plaintiff being indebted to George N. Tracey in the sum of \$250, executed a power of attorney authorizing him to execute a mortgage on lands of which he was about to receive patent to secure payment of the said indebtedness, and that on April 9, 1908, he consequently executed to Helen M. Tracey a mortgage for the said amount covering the land in question for which patent had in the mean time issued to he plaintiff. The defence also sets forth that the said mortgage has since been assigned by Helen M. Tracey to George N. Tracey. I may say at once that George N. Tracey did not receive any money from Helen M. Tracey, who is his sister, the mortgage having been made in her favour, as he says, merely for the sake of convenience as he was advised that he could not make it to himself.

As to the power of attorney, of which a certified copy was produced, James Moody, the subscribing witness thereto, swears that he saw the plaintiff sign the same. The document reads in part as follows:--

Whereas I, Henry Prince, am . . . entitled to a patent from the Government for certain lands. . . . And wheras I am indebted to George N. Tracey . . . in the sum of \$250 and I have requested the same George N. Tracey to grant me a certain extension of time for payment of the said indebtedness . . . and interest thereon at 12 per cent. . . .

Now therefore I appoint . . . George N. Tracey, my true and lawful attorney for me and in my name, place and stead, as soon as the patent shall have been issued, to sign, seal and deliver a mortgage of all the lands covered by the said patent . . . to such person . . . as shall advance me by way of loan . . . the amount of my indebtedness and all interest tbereon. . . . My said attorney is authorized to receive the proceeds of such mortgage loan . . . and also to give such promissory notes as collateral to the said mortgage as may be necessary . . . or to sell all or any of the real estate . . . either by public auction or private sale . . . and also to execute to the purchasers all deeds of grant, agreements of sale, etc.

And for all and every of the purposes aforesaid to grant unto my said attorney full and absolute power . . . to do all acts and things necessary . . . and also to commence, institute and prosecute all actions, suits and other proceedings. . . . The plaintiff says that in July and August of last year, he agreed with George N. Tracey on three separate occassions to put up for him on St. Peter's Indian

Reserve ten tons of hay at \$2 a ton, of which on each occasion he received one half or \$10, being \$30 in all, the balance payable when the hay was measured by Tracey which the latter was bound to do upon notice that the hay was put up. The plaintiff says he put up the hay and called several times on Tracey to come and measure it. Having received from Tracey in the last days of December a letter saying that he did not want the hay, he says he went to see him on January 4, 1908, and that Tracey told him that "the man he had sold it to had gone back on it." The plaintiff then said, "What am I to do?" and Tracey answered, "You can give me security on your land and when you sell it you will pay me. I don't want any money now." The plaintiff then signed a document, which is the power of attorney in question. The plaintiff says, "I signed a paper which he said was security for what I got." He says he signed only one paper, and Moody's evidence seems rather to support that. He says that all that he had got from Tracey was the \$30 above mentioned, then \$4, and finally \$1, at the time of signing, or \$35 in all. He says:--

It was at Moody's store, at night. . . . He didn't read the paper over and he gave no explanation except that he said. "Give me security and when you sell your land you can pay me."

He also says, whatever that may mean:--

I knew there was a security, that is all; but I didn't know the nature of the security.

George N. Tracey's version is that, after he bought the hay at \$2, the price of it went up and that on January 4, following, on the occasion referred to, which was at Moody's store, he sold the 30 tons back to the plaintiff at \$8. He says he then took from the plaintiff a promissory note for \$250 and had him sign the power of attorney after explaining to him the contents of the document. As to how the \$250 was made up, the defendant is very indefinite. There was, of course, \$240, being for the 30 tons at \$8; but he says he had also advanced a little to the plaintiff besides the \$30, and that he gave him a little more at the time of settling. He says, on examination for discovery (questions 131 and 132):--

I took the note for \$250, and gave him the difference on what I owed him on the hay, the difference between \$240 and \$250 in money right then. . . . It was only small . . . between \$8 and \$12, somewhere there.

Assuming Tracey's version to be correct, this reselling of hay at \$8 a ton to the same Indian from whom he had purchased it at \$2 seems, of course, very harsh and excessive-- more so when one considers that he did not have as much trouble about it as to go and measure it or look at it and that he withheld for nearly six months from this man one-half of the \$2 per ton, in order that, as he says, he wouldn't run chances and if a fire occurred, the loss would not be his. That he made the same bargain with thirty other Indians that same fall, involving some \$13,000, as I understood him to say, only seems to shew a deliberate design to systematically take advantage of the well-known improvidence of that class of people. It is true that the plaintiff speaks very good English, is able to read and write and does quite a little business in Selkirk in the way of laying sidewalks, moving houses and building small bridges. He, moreover, states that at one time he was willing to settle for \$50. But besides the above direct statements of the plaintiff and Tracey, there are other considerations which lead me to believe that the former's contention is right. First of all, Tracey keeps no books to shew his numerous transactions of last summer with the St. Peter's Reserve Indians. Nor was he able to produce the \$250 note which he says the plaintiff signed. Apparently, Moody only saw the plaintiff's execute the one document in his store. I might believe that Tracey, as he says, left with a firm of solicitors in Winnipeg, certain papers connected with this suit which have since been lost; but there is nothing but his word as to there being a promissory note among them. Then, Tracey would, unmistakably, convey the general impression that it was the plaintiff who took the initiative in the matter of purchasing the hay back, which would make it more believable that he was taking it back at an advance; but Tracey's own letter of December 19 (exhibit 2), is very fair evidence that this was not so, as well as of the truth of the plaintiff's testimony to the effect that Tracey told him that the man who was to buy it had gone back on it, and that he, the plaintiff, could have it to sell it, without mention of an advance in price.

Finally, assuming that the hay was sold back at \$8, Tracey has not made out at all how the \$250 was arrived at. I am fully satisfied that this amount does not take into account the \$30, being the second half of the purchase of the 30 tons at \$2 which he owed the plaintiff. It is preposterous to say, on the face of his own evidence, that he had paid that to the plaintiff in small advances prior to January 4. He says himself that he was particular to provide in his written agreement (also not produced), that he was to pay the plaintiff the second half of the purchase price only on taking delivery, so as not to run the risk of a fire. His evidence as to the amount which he paid to the plaintiff at the time of settling, I take to be purposely indefinite and evasive, and it is impossible to say whether the \$8 or \$12 which he mentions was all paid on January 4, or whether some of it had been paid before. Tracey realized, I am sure, that to make quite plain what advances he had already made to the plaintiff, would have amounted to a confession that if there was such a sum as \$250 mentioned at all, the \$30 which he owed on the first purchase was not taken into account.

I find as a fact that at the time of the settlement, January 4, the plaintiff owed Tracey \$35 only, and that the power of attorney which the latter took was altogether different from the security which the plaintiff was led to believe he was signing at the time.

On the other questions raised, I would only say that, subject to the special statutory limitations, Indians are British subjects enjoying full civil rights as such, and I am also of opinion that the words "grain, root crops or other produce" in secs. 38 and 39 of the Indian Act, on the principle *noscitur a sociis*, should not be taken to cover wild hay.

There will be an order declaring the mortgage null and void and vacating the registration thereof, with costs to the plaintiff.

Judgment for plaintiff.