BLACK v. KENNEDY

[1875-83] Man.R. *temp*. Wood 144

Manitoba Queen's Bench, Wood C.J., 1877

Indian--Indian Reserve--Mortgage on land in Reserve--Ejectment thereon-- Hab. fac. poss.-- Liability of Sheriff to execute.

A mortgage made by an Indian living on a Reserve of land in the Reserve is void, and judgment in ejectment recovered thereon is also void, and a Sheriff is not bound to execute a writ issued theron.
Mandamus is not the proper proceeding to compel a Sheriff to execute a writ. A motion for a Rule should be made.

MOTION for a mandamus to the Sheriff of Manitoba, commanding him to execute a writ of *habere facias possessionem* issued on a judgment in ejectment. A summons for the writ had been granted by Betournay, J., which was now moved absolute.

The facts of the case were that the defendant was an Indian, and lived upon a piece of land forming part of the Indian Reserve in the Parish of St. Peter's, in the County of Lisgar, where or upon which he resided prior to the setting apart of the Reserve. This Reserve was set apart for the Indians, known as the St. Peter's Indians, or Prince's Band of Indians, in or about the year 1871. Subsequently, and in or about July, 1873, the plaintiff took from the defendant, then and now residing on the land in question, a mortgage, or some deed of conveyance in the nature of a mortgage, of the parcel of land in question, and under this deed brought an action of ejectment in this Court against the defendant for the recovery of possession of the land. The defendant appeared by attorney, and the case was tried at the October Assizes, 1876, before Betournay, J., and resulted in a verdict for the plaintiff. It appeared that the Court was not informed that the defendant was an Indian and the land part of the Indian Reserve. On this verdict, in December, 1876, judgment was entered, and in the month of January, 1877, a writ of *hab. fac. pos.* and *fi.fa.* for costs was issued and delivered to the sheriff to be executed. The sheriff, on going to execute the writ, found out the true state of facts, viz., that the defendant was an Indian residing on the land in question in the Indian Reserve. Thinking he had no power or authority to execute the writ, he declined doing so, and informed the plaintiff's attorney of his resolution. The plaintiff now applied for a mandamus.

WOOD, C.J.--This certainly is a novel application. The execution and return of a writ of *habere facias possessionem*, are, as a rule, governed by the same principles, and fall within the same category as ordinary writs of *fieri facias*. The practice and procedure in cases of this kind may be found in Chitty's Archbold *(a)* 12th Ed., pages 593 to 640.. The common and ordinary course is, if the sheriff do not return the writ within a proper time in that behalf, to obtain a rule or order for him to do so. In the case of a writ returnable immediately after execution, strictly speaking, the writ may not be returnable until executed; yet, the Court, or a Judge, may order a sheriff to return what he has done upon it, or to answer why he has not, or does not, execute it; and so in a certain sense to make a return of the writ *(b)* Lewis v. Holmes, 10, Q. B. 896.. If the sheriff does not return the writ according to its exigency he may be ruled, and if he obey not the rule he may be attached (c) Chitty's Archbold, pp. 627, 628, 632.. If the return be false, or not sufficient in law on the face of it, ulterior proceedings may be had and taken according to well settled principles of practice. I cannot see why a departure from the normal mode of procedure should have been adopted in the present case.

I am disposed to think, without going into the merits of the case, I should be inclined to refuse this application, and leave the plaintiff to the ordinary remedies of enforcing a return to the writ, and the taking of such proceedings theron, if any, as he might be advised. But, perhaps, now that the matter is before me, even in this exceptional manner, it is better that I should shortly express an opinion upon the merits of the case.

By 34 Vict. cap. 13, 32-33 Vict. cap. 6 (D) intituled, "An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, chapter 42," was extended, and was made applicable to Manitoba. The Statute 31 Vict. cap. 42, was, therefore, in full force in Manitoba, when the transaction arose, and the mortgage covering the land in question, was executed; and the rights of the mortgagee, the plaintiff, under it must be controlled by, and be subject to the provisions of that Act. The Indian Reserve, of which the said lands form part, was set apart, located, and defined, long prior to the making of this mortgage.

By reference to the latter Act, I find by section 6, that, "All lands reserved for Indians, or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act."

By section 8 no release or surrender of lands reserved for the use of the Indians, or of any tribe, band or body of Indians, or of any individual Indian, shall be valid or binding except on condition that such release or surrender shall be assented to by the chief or a majority of the chiefs of the tribe, band or body of Indians, assembled for that purpose, at a meeting to be held in the presence of the Secretary of State, or of a duly authorized officer from the Governor-General; and the fact of the assent to such release or surrender must be certified to by the Secretary of State or other officer duly attending in that behalf; and by section 10 no release or surrender of any such lands to any party other than the Crown, shall be valid. Section 15 defines who are Indians. The defendant is clearly within the definition.

Section 17 is as follows :--"No persons other than Indians and those intermarried with Indians, shall settle, reside upon or occupy any land or road or allowance for roads running through any lands belonging to or occupied by any tribe, band or body of Indians; and all mortgages or hypothecs given or consented to by any Indians or any persons intermarried with Indians, and all leases, contracts and agreements made, or purporting to be made, by any Indians or any person intermarried with Indians, whereby persons other than Indians are permitted to reside upon such lands, shall be absolutely void."

I have examined the mortgage given or consented to by the defendant in this case, and not only as a mortgage is it within this Act, but as a contract and agreement it is equally within the express words of the Act, and under the provisions thereof must be *absolutely void*.

Then follow sections which provide that any encroachment upon any lands reserved for the use of Indians may be visited with the most summary and sharp proceedings; and finally by section 28 it is enacted "that in all cases of encroachment upon any lands set apart for Indian Reservations or for the use of the Indians, not hereinbefore provided for, it shall be lawful to proceed by information in the name of Her Majesty in the Superior Courts of Law or Equity, notwithstanding the legal title may not be vested the Crown" -- provisions sufficient I should imagine, to make both the sheriff and the plaintiff pause before attempting to execute a writ of *hab. fac. pos.* by turning off or expelling an Indian from land on which he was residing in and forming part of an Indian Reserve, and putting the plaintiff into the possession and occupancy of the same. I do not well see how the sheriff could do this without subjecting himself to the penalties imposed by the statute; and even if he had placed the plaintiff in possession and occupancy of these lands, the plaintiff and those holding under him might, under the Act, have been summarily ejected and expelled from the Reserve *(d)* Secs. 18 to 24., and the sheriff be obliged to execute these warrants of ejectment and expulsion.

The Act 39 Vict. cap. 18 (D) intituled "An Act to amend and consolidate the laws respecting Indians," passed on the 12th of April, 1876, repeals 34 Vict. cap. 13, but substantially re-enacts it, and collects and consolidates into one Act all the then existing statutes relating to Indians, with some modifications and some additional provisions; but it in no respect changes or alters the provisions of 34 Vict. cap. 13 to which I have referred.

I may remark that this statute was passed before this action was brought. Section 66 is as follows:-- "No person shall take any security, or otherwise obtain any lien or charge, whether by mortgage, judgment, or otherwise, upon any real or personal property of any Indian or non-treaty Indian within Canada, except on real or personal property subject to taxation under section sixty-four of this Act: Provided always, that any person selling any article to an Indian or non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid."

The exception provided in section sixty-four is as follows:-- "No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the Reserve or special Reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

In whatever way the matter is viewed under the statutes to which I have referred, the lien or charge of the plaintiff on the lands covered by his mortgage, and in question in this application, is absolutely void, and the judgment obtained thereon is of necessity equally void. In fact the whole

proceeding to judgment and the judgment itself is *coram non judice*.

I must therefore discharge this summons with costs. If the plaintiff thinks he has any reasonable grounds for this application, I reserve him leave to move in next term to rescind my order and for a rule for a writ of mandamus.

Summons discharged.