WILLIAMS v. JOE

[1973] 5 W.W.R. 97

British Columbia County Court, Cashman Co.Ct.J., 25 April 1973

Executions -- Order for delivery of chattel -- Application of M.R. 647 to County Court proceedings.

In an action for the return of a stump puller and parts plaintiff obtained interlocutory judgment; he now sought an order that execution be issued for the delivery of these items; alternatively, if the property could not be found, for an order that the Sheriff distrain upon defendant's property. The motion was brought under M.R. 647.

***Held*, M.R. 647 was applicable to proceedings in the County Court and plaintiff was entitled to the order sought, whether or not there had been an assessment of value; *Hymans v. Ogden*, [1905] 1 K.B. 246 applied.**

[Note up with 11 C.E.D. (2nd ed.) *Executions*, s. 2.]

J. C. Davie, for plaintiff.
No one, contra.

25th April 1973. CASHMAN CO. Ct. J.:--This is an action for the return of a stump puller and parts taken by the defendant in the month of February 1972. No appearance has been filed and interlocutory judgment was entered on 31st January 1973.

The plaintiff now seeks an order that execution be issued for the delivery of the stump puller and parts and further, and in the alternative, if the property cannot be found, for an order that the Sheriff distrain upon the defendant's property.

The motion is supported by an affidavit, which states that the stump puller and parts are believed to be somewhere in the Cowichan Indian Reserve No. 1 and that furthermore both the plaintiff and the defendant are Indians within the meaning of the Indian Act, R.S.C. 1970, c. I-6.

This motion was brought pursuant to O. 48, R. 1, M.R. 647, which reads as follows:

"1. Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of delivery, the Court or a Judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed (if any), and that if the property cannot be found, and unless the Court or a Judge shall otherwise order, the Sheriff shall distrain the defendant by all his lands and chattels in the Sheriff's bailiwick, till the defendant deliver the property; or, at the option of the plaintiff, that the Sheriff cause to be made of the defendant's goods the assessed value (if any) of the property."

At the conclusion of the hearing of the motion I asked learned counsel for the plaintiff to obtain some authority for making such order, which material is now in hand.

Upon being satisfied that the order should be made, I directed that the order issue in the terms set forth in the notice of motion.

I now assess reasons for so doing, as there do not appear to be any cases decided in British Columbia under this Rule.

The first question is whether the Rule applies to proceedings in the County Court. The County Court Rules, 1968, make the Supreme Court Rules applicable to causes and matters in the County Court, save and except for certain Supreme Court Rules which are specifically excluded by R. 2 of the County Court Rules. Marginal Rule 647 does not appear to be one of those specifically excluded. Rule 3 of the County Court Rules provides as follows:

"3. In the event of a conflict between these Rules and the Rules of Court of the Supreme Court of British Columbia, these Rules shall govern."

I am unable to find any County Court Rule that appears to conflict with M.R. 647.

As previously mentioned, there do not appear to be any cases decided in British Columbia under this Rule. However, counsel for the plaintiff has referred me to the English case of *Hymas v. Ogden*,[1905] 1 K.B. 246, a decision of the English Court of Appeal. That case decided that a County Court judge had jurisdiction to order a warrant of attachment, under the English Rules. At p. 250 Collins M.R. sets out the meaning of the applicable English Rule which, except for some words not found in the British Columbia Rule, appears to me to be identical in words and in substance to the British Columbia Rule. The learned Judge says as follows:

"It was, however, contended that by obtaining a warrant of delivery the plaintiff lost the remedy by attachment to enforce the order to deliver up the dog. I do not think that the obtaining the warrant of delivery had that effect. The judgment in the action was not an alternative judgment, but the very essence of the matter was the obligation to hand over the dog, and that obligation was not affected by the issue of the warrant of delivery. It was further said that cases shewed that it was a condition precedent to the making of an order for delivery of a chattel that its value should be appraised. If that was ever the law it was a highly technical matter which has been cured by Order XLVIII., r. 1, of the Rules of the Supreme Court. The reason for the rule in its final form is explained in a note to the rule in the Annual Practice, where it is said that the addition of the words 'if any' after the words 'upon paying the value assessed,' appears to make the rule applicable whether the value of the property has been assessed or not. The rule, therefore, gets rid of any difficulty as to the assessment of value that might have existed previously in cases where there was no desire to take money in lieu of the chattel which was detained from the owner."

The words added to the English Rule are not in my opinion such as to give cause why this reasoning should not be adopted in construing M.R. 647.

The Indian Act appears to allow an order such as this to issue as between Indians. If the action were between a non- Indian and an Indian, I might be inclined to have some doubts as to whether such an order could be made, which would have the effect of authorizing a trespasser upon an Indian reserve by the Sheriff.

However, I am satisfied that, in the circumstances of this case, such an order can be made.