TOTTEN V. WATSON

(1858), 15 U.C.Q.B. 392

Upper Canada Queen's Bench, Robinson C.J. , McLean and Burns JJ., 1858

Sale of land by Indians --13 & 14 Vic., ch. 74.

The 13 & 14 Vic, ch. 74, which prohibits the sale of land by Indians, applies only to lands reserved for their occupation, and of which the title is still in the crown, not to lands to which any individual Indian has acquired a title.

EJECTMENT for the north half of lot 24 in the 16th concession of Rawdon.

Defence for the whole.

At the trial at Belleville, before *Hagarty*, J., it was shewn that the crown, on the 30th of June, 1801, issued a patent to Captain John Desorontyon, a Mohawk chief, living on the Bay of Quinté, for 1200 acres of land, including the hundred acres in question. He had three sons, John, William, and Peter. John died intestate before his father, but leaving lawful issue, his eldest son and heir, William John. Afterwards the patentee died intestate. His son William had died before the eldest son John, leaving no issue. Peter survived his father.

In 1856, William John, the grandson and heir of the patentee, being the eldest son of his eldest son John, conveyed by bargain and sale to the plaintiff, William Totten, for a consideration of £7 10s. He was examined upon the trial, and said the price was named by himself, and that he was quite satisfied with it. He had never been in possession of the land, nor so far as he knew had his father or grandfather. The deed was read to William John, before he signed it, and he had before sold the other half of the lot at the same price. The plaintiff had been in possession of the 100 acres long before he took this deed.

It was objected against the plaintiff's title, that the grantor, William John being an Indian, was prevented by statute 13 & 14 Vic., ch., 74, from disposing of his land.

And it was proved that the same William John who made the deed to the plaintiff in 1856, had on the 20th of July, 1842, executed a conveyance by bargain and sale of 1000 acres of land, including the 100 acres in question in this action, to one Cuthbertson, for a consideration expressed of £100.

William John swore upon the trial that he was imposed upon when he was got to execute that deed in 1842: that Cuthbertson, who was his cousin, never gave him any consideration for the land; and that he was persuaded that the paper he signed was merely an authority to Cuthbertson to look after his land for him.

On the other hand, a subscribing witness to the deed, and the attorney in whose office it was executed, swore that William John knew well the nature of the deed that he was executing.

The land was proved to be worth at the time of the trial about nine hundred dollars.

It was left to the jury to find-1st. Whether William John knew what he was doing when he executed the deed to Cuthbertson, or whether he was imposed upon by the grantee, and made to execute an instrument which was represented to him to be of a different kind from what it was. 2ndly. Whether it was a voluntary deed, without consideration. 3rdly. Whether when that deed was executed there was any one in possession, holding adversely to William John. 4thly. Whether the deed made by William John to the plaintiff in 1856, was a voluntary deed, or made for value.

The jury found, that William John was imposed upon, and did not know what he was doing, when he signed the conveyance to Cuthbertson: that he received no value from Cuthbertson for the land: that no person was in possession holding adversely to him at the time; and that there was value given to William John by the plaintiff for the conveyance which he took from him.

It appeared that in 1842, if not before, some squatters had gone upon the land, who were succeeded by some one else, and after several others had been in possession the plaintiff bought out the last person some years before he took out his deed, and cultivated the land, and had about forty acres cleared.

A verdict was rendered for the plaintiff, and both parties agreed that upon the evidence and the finding of the jury. the court should direct a verdict for either party, according to their opinion of the right.

Jellett obtained a rule *nisi* to enter a verdict for defendant, to which *Henderson* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The only question to be determined is whether the statute 13 & 14 Vic., ch. 74, secs. 1 & 2, affects this case. That enacts "That no purchase or contract for the sale of land in Upper Canada, which may be made of or with the Indians, or any of them, shall be valid, unless made under the authority and with the consent of her Majesty, her heirs or successors, attested by an instrument

under the great seal of the province, or under the privy seal of the governor thereof for the time being."

If we construe this provision by itself and literally, it will extend to the deed made by William John, an Indian, in 1856, to the plaintiff, of land which the crown had granted by patent to his grandfather, in his natural individual capacity, and which the grandson took by descent, as any other subject of the Queen in this Province would do. But if we look at the scope and intention of the statute, we find much reason to conclude that this enactment could only have been meant to extend to what are understood by the term "Indian lands;" that is, lands which the crown had reserved for the occupation of certain Indian tribes, but of which the title is still in the Queen: and not to land which an individual Indian has either acquired by purchase, devise, or inheritance, or by grant from the crown made to himself as an individual.

In the case of The Queen v. Baby, in this court (12 U.C.R. 346), we had occasion to consider this point, though it was not necessary that we should determine it. In this case we are called upon to do so. The conclusion we come to, on a view of the whole act, is that it is not meant to extend, and does not extend, to any but Indian lands properly so called. If the enacting part of the first clause stood alone, it would clearly take in this case, for it would extend literally to all lands in Upper Canada that any Indian might attempt to sell; and we should find it not difficult to suppose that the legislature might possibly have intended to protect the Indians to that extent, for they are a helpless race, much exposed, from their want of education and acquaintance with business, and the intemperate habits of many of them, to be taken advantage of in their dealings with white people.

But the title and preamble of the act, one of its provisions in the second clause, the third clause more especially, and also the 4th, 5th, 10th, 11th, and 12th clauses, contain strong evidence, we think, that the act, as it regards the protection of the Indians in the possession and enjoyment of their land, concerns only such lands as Indians are merely permitted to occupy at the pleasure of the crown, and not lands of which a title has been made by letters patent to any individual Indian.

From the earliest period the Government has always endeavoured, by proclamation and otherwise, to deter the white inhabitants from settling upon Indian lands, or from pretending to acquire them by purchase or lease; but it has never attempted to interfere with the disposition which any individual Indian has desired to make of land that had been granted to him in free and common soccage by the crown. Very few such grants have been made, and only to leading persons among the Indians, who, like the patentee in this case, Captain John, had been treated by the crown as officers in their service, and who, it might be assumed, had sufficient intelligence to take care of their property.

In the last session of parliament, an act was passed for the further protection of the Indians, 20 Vic., ch. 26, which confirms us in the opinion we have expressed. We refer particularly to the first section of that act.

The postea, in our opinion, should go to the plaintiff.

Rule discharged.