OWENS V. THOMAS

(1856), 6 U.C.C.P. 383

Upper Canada Court of Common Pleas, Draper C.J., Richards and Hagarty JJ., 1856

Execution of deed by an illiterate person.

Where a blind and illiterate person, an Indian, had been induced to put his mark to a chattel mortgage without its being read over to him, although he desired such reading; ***Held***, not a sufficient execution.

TROVER for horses, &c.
Pleas--1. Not guilty. 2, Not possessed. The plaintiff purchased a pair of horses from one Tracy, and they were delivered to him. He paid $140; the whole price was $270, the balance was to be paid in three months, or in sums of $20 or so at a time. Tracy afterwards came to him with a paper to sign. The plaintiff is an Indian, speaks English but occasionally required an interpreter. He was sworn to be *"a blind man,"* and also to be illiterate. According to the evidence of the subscribing witness to plaintiff's putting his mark to this paper, and of all the other persons present at the time the plaintiff desired to have it read over to him; but Tracy refused to read it, saying it was of no consequence; it was nothing to do him any harm; it was merely to shew when the three months would be out. The subscribing witness (who appeared only to be able to write his name, but read writing), also asked to have it read; but Tracy said it was of no use, and when plaintiff put his mark to it neither he nor the subscribing witness knew anything about the contents. It was a chattel mortgage under which Tracy took away the horse, for which this action is brought, the other having died soon after plaintiff bought them. Tracy was called as a witness for the defence. He said it was agreed at the time of the purchase that the mortgage should be given, and that he had explained the nature of it to the plaintiff as well as he knew how; but he admitted it was not read to him. After taking away the horse Tracy sold him to the defendant. Another witness who went with Tracy to the plaintiff's partly as an interpreter, said he had read over the mortgage himself, and had asked the plaintiff if he had agreed to give a mortgage: that plaintiff said he had partly. This witness did not read it to him, but cautioned him against it, and to be very careful when he did sign it, as he thought it too stringent. It was not signed in his presence.

The jury found for the defendant.

In Easter Term *M. C. Cameron* obtained a rule *nisi* for a new trial, on the ground of the reception of improper evidence, and for misdirection. The objection was that this mortgage should not have been received in evidence, or left to the jury.

DRAPER, C. J., delivered the judgment of the court.
In Manser's case (2 Coke's Rep. 3), it was resolved that if a man be bound to make a deed, he is not bound to seal and deliver any writing tendered to him, unless somebody be present who can read the deed to him if he requires it; and there with accords Throughgood's case (2 Coke's Rep. 9).--See Shuller's case (12 Coke's Rep. 90.) And the law is thus stated in Shepherd's Touchstone, 56, "If the party that is to seal it be a blind or an illiterate man and desire to hear it read, it must be so, for if such a man be to seal a deed and he desire to hear it, or to hear the contents of it read or declared to him first, and it be not done and he afterwards seal and deliver it, this is no good deed." In Bennet v. Wade (2 Atk. 327), Lord *Hardwicke* relieved against a deed, among other reasons, because neither the rough draft nor the engrossed deed were read to the grantor before he executed it, treating this as a badge of fraud.--Rex v. Lonquor (1 N. & M., 576.)

Upon the facts shewn, I think there should be a new trial without costs. There was a request to have the deed read, which was not complied with. The only explanation given of its contents was by the mortgagee himself, and he does not detail in his evidence what that explanation was, but says he explained it as well as he knew how, while some of the witnesses prove his telling the plaintiff the deed would not do him any harm, and saying in reply to the request of a third party to have it read, that it was of no consequence, or some such expression. When to this is added the fact sworn to, that the plaintiff is blind, illiterate, and that the presence of an interpreter was deemed necessary by the mortgagee, it leaves no doubt in my mind that the case ought to be submitted to another jury.