REGINA EX REL, GIBB v. WHITE

(1870), 5 P.R. 315

Ontario Chambers, Dalton Esq., 23 March 1870

Municipal election- Disqualification- Indians- Enfranchisement.

An Indian, who is a British subject, and otherwise qualified (in this case, by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving, as an Indian, a portion of the annual payments from the common property of his tribe.

[CHAMBERS, March 23rd, 1870.- MR. DALTON.]

O' Brien, for the relator, obtained a *quo warranto* summons to try the validity of the election of the defendant to the office of Reeve of the Township of Anderson, in the County of Essex.

The statement of the relator complained that Thomas B. White had not been duly elected to the office of Reeve of the Township of Anderson, and usurped the office under the pretence of an election held on the first Monday in January; and that Dallas Norvell, of Anderson aforesaid, merchant, was duly elected thereto, and ought to have been returned at the said election; and the following causes were stated why the election of the said T.B. White to the said office should be declared invalid and void, and the said Dallas Norvell be duly elected thereto, namely: that the said Thomas B. White was an Indian, and a person of Indian blood, and an acknowledged member of a tribe of Indians, and not in any way enfranchised or exempted from the disabilities of Indians, and as such was disqualified from holding the property qualification necessary to entitle him to such office, and that therefore he had not the necessary qualification, either of property or otherwise, and that the said Dallas Norvell was the only other candidate for the said office, and should be declared elected.

There appeared to be no dispute about the facts of the case. The defendant was born in Ontario, as was his father before him; he was the son of the chief of the Wyandottes, or Huron Indians, of Anderson; he was never "enfranchised" under our statute, and from time to time received his portion of the annual payments from the property of his tribe; he had for the last twelve years been engaged in trade- of late, rather extensively; he had been for some years the owned in fee simple of patented lands in Anderson, on which he lived; and these lands were not allotted to him from the lands of the tribe, but were acquired by himself: the value was beyond the necessary qualification.

Osler shewed cause.
O'Brien, contra.

Con. Stat. Can. Cap. 9; Con. Stat. U. C. cap 81; 31 Vic. (Can.) cap. 42; 32, 33 Vic. (Can.) cap. 6; Treaty and Proclamation in Public Acts, 1763 to 1834 [20], [32]: *Reg. v. Baby*, 12 U.C.R. 346; *Totten v. Watson*, 15 U.C.R. 395; *The Cherokee Nation v. The State of Georgia*, 5 Peters 60; 2 Kent's Com. 72, 73; 3 lb. 381, were cited on the argument.

MR. DALTON.- There is a marked difference between the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen. See the case in 5 Peters 1, 27, 58, 60: "The Act of Congress confines the descriptions of aliens capable of naturalization to *free white persons.* * * * It is the declared law of New York, South California, and Tennessee, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of the government, and consequently they can never be made citizens under the Act of Congress."- 2 Kent's Com. 72, 83.

In this Province Indians are subjects. Con. Stat. Can. cap. 9, so speaks of them (see preamble, and sec. 1, also the 16th section of the Act of last session). But authorities are needless for such a proposition. Chapter 9 (now repealed), was the Act in force for many years down to 1869, declaring the rights, and providing for the management of the property of the Indians; an its provisions have much to do with the present matter. The word *Indian* in that Act, (sec.1) is defined to mean only Indians, or persons of Indian blood, or intermarried with Indians, acknowledged as members of Indian tribes or bands, residing upon lands which have never been surrendered to the Crown, or which having been so surrendered, have been set apart, or are reserved for the use of any tribes or band of Indians in common, *and who themselves reside upon such lands.* But any Indian (sec.2) who is seised in fee simple in his own right of patented lands in Upper Canada, assessed to $100 or upwards, is excluded from the definition, and is not an Indian within the meaning of the Act. The Act goes on to provide means for the "enfranchisement" of the Indians, meaning the class so defined, and the apportioning to those enfranchised, of parcels of the lands of the tribe, to be held by such enfranchised Indian in severalty. And it confers certain immunities on the Indians, and subjects them to certain disabilities, always having

reference, as I understand, to the above description of the class to which the Act applies. If this Act were now in force, whatever effect it might have on the defendant's position to be within it, I suppose he would not be within it, for he does not live with the tribes on their reserved lands, but is the owner in fee simple of patented lands of greater assessed value than $100, not set apart from the lands of the tribe, but acquired by himself.

That Act however is repealed, and the Acts now in force are 31 Vic. ch. 42, and 32 & 33 Vic. ch. 6 of Canada. The only immunities or disabilities of an Indian now, whether enfranchised or unenfranchised, relate to the property he acquired from the tribe, and that no person can sell to him spirituous liquors, or hold in pawn anything pledged by him for spirituous liquors. But Indians may now sue and be sued, and have, except as above, so far as I can see, all the rights and liabilities of other subjects.

In *Totten v. Watson*, 15 U.C.R.392, the Court of Queen's Bench, in the time of Sir John Robinson, decided that the prohibition of sale of lands by Indians, applied only to reserved lands, not to lands to which any individual Indian had acquired a title; and from this case and sec. 2, cap. 9, Con. Stat. Can., it is quite plain that an unenfranchised Indian might purchase and hold lands in fee simple. The defendant then has the necessary property qualification. Being a subject he must have all the rights of a subject which are not expressly taken away; then why is he not qualified to be Reeve of a township? It is certainly for the relator to shew why. I think that he is qualified, and that judgment must be for the defendant with costs.

Judgment for defendant with costs.