McKinnon v. Van Every.

Contract with Indian—Interpretation of Statutes—Repealing acts.

A debt contracted by an Indian while Con. Stat. Can. cap. 9 was in force, cannot now be sued for under 32 33 Vic. cap. 6.

[Chambers, Dec. 10, 1870—*Galt, J.*]

This was a summons, calling upon the plaintiff and the Judge of the County Court of the County of Haldimand, to show cause why a writ of prohibition should not issue to restrain any further proceedings on aplaint brought in the First Division Court of the County of Haldimand to recover a debt contracted (while the Con. Stat. Can., cap. 9, was in force) by the defendant, who was admitted to be an Indian, within the provisions of that statute (now repealed), and of 32 33 Vic. ch. 6.

——— shewed cause, citing *Ellis* v. *Watt*, 8 C. B., 614; *Zohrab* v. *Smith*, 5 D. & L., 635.

Harrison, Q.C., supported the summons, and cited 13 14 Vic., ch. 74, sec. 53; C. S. Can., cap. 9; 31 Vic., cap. 42; sub secs. 14, 33. 32; 32 Vic., ch. 66. sec. 23; *Jaques* v. *Withy*, 1 H. B. 65; *Hitchcock* v. *Way*, 6 A. & E. 943; *Rex* v. *McKenzie*, R. & R., C. C., 429.

Galt, J.—It is admitted by the learned Judge in his very clear argument in this case, to which I am much indebted not only for a statement of the facts, but for a reference to the authorities, that so long as Con. Stat. Can., cap. 9, was in force, this suit could not have been maintained, but he is of opinion that the repeal of that statute has the effect contended for by the plaintiff.

The 2nd section was—"No person shall take any confession of judgment or warrant of attorney from any Indian within Upper Canada, or by means thereof, or *otherwise however* obtain any judgment for any debt or pretended debt unless" etc., referring to circumstances which it is not pretended exist in the present case. It is contended that, although when this debt was contracted there was no remedy for its recovery, yet that now a judgment may be obtained by reason of the repealing statute.

The learned Judge, in his argument, says:—"As to the objections founded on the statute relative to Indians, the case of *Jaques* v. *Withy*, 1 H. B. 65, cited on behalf of the defendant, decides that a debt declared illegal by a repealed Act, and contracted during its operation is not legalized by its repeal. *Hitchcock* v. *Way*, 6 A. & E. 943, also cited, decides that the law as it existed when the action was commenced must decide the right of the parties unless the legislature express a clear opinion otherwise. If the debt contracted in this case had been prohibited by the statute then in force it is probable that it would have been within the decision referred to, and that the present cause of action being founded on an illegal consideration might have been avoided on this ground, but by Con. Stat. Can., cap. 9. the remedy only was prohibited, and not the debt, and the prohibition being removed, as I think it has been for reasons hereinafter stated, the debt remains subject only to the provisions of statute now in force. See *Surtees* v. *Ellison*, 9 B. C. 752."

With every respect for the opinion of the learned Judge, I am obliged to say that I differ from him in the construction to be put on the cases of *Hitchcock* v. *Way* and *Surtees* v. *Ellison*. The former was an action against the acceptor of a bill of exchange by a *bonâ fide* holder, *brought to issue before* the passing of Stat. 5 and 6 Wm. 4, ch. 41, but tried afterwards. It was held that the defendant might avail himself of statute 9 Anne ch. 14, and was entitled to non-suit if he proved the bill to have been given for a gaming consideration. When the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties unless the legislature by the language used shew a clear intention to vary the mutual relation of such parties. The matter in dispute, it will be observed, in that case was whether an Act of Parliament, passed after a suit has been commenced, would without express words deprive a defendant of a defence which he was entitled to urge but for the passing of the Act, and it was held it would not.

In the present instance the plaintiff insists that although when this debt was contracted there was a positive prohibition against his obtaining a judgment against this defendant, the repeal of that enactment enabled him to do so now, although there are no words used which would show that such was the intention of the legislature. I must say that the above case appears to me to establish the contrary doctrine. It is true that Lord Denman, in giving judgment, refers to the commencement of the suit as determining the rights of the parties, but it must be borne in mind that this was said as regarded pleadings, not as respected the right of action, and it would be singular if no remedy existed when the debt was contracted, and in fact where such remedy was actually prohibited, that the repeal of such prohibition should have an *ex post facto* operation, and enable the plaintiff to obtain a judgment for a debt contracted during the existtence of the prohibition

It is not necessary for the decision of this case to express an opinion as to what the rights of parties giving credit to Indians are under the present law, but I think it very doubtful whether even now a judgment can be obtained against an Indian. The case of *Surtees* v. *Ellison*, *ubi sup.* appears to me decisive against the plaintiff. It was an action brought by the assignees of a bankrupt against the sheriff of Durham. At the trial it appeared that before and in the year 1823 the bankrupt had carried on business as a seed merchant, and during that period had contracted a debt of £100 to the petitioning creditor, but he had not actually carried on business after that time. In 1826 the 6 Geo. IV. cap. 16 was passed, repealing the laws previously in force relating to bankrupts. In 1827 the bankrupt committed an act of bankruptcy by keeping house, and a few days afterwards the sheriff made the seizure complained of. For the defendant it was contended that the commission could not be supported, inasmuch as there was no trading after 6 Geo. IV. cap. 16 was passed. In giving judgment on the rule to enter a nonsuit, Lord Tenderden, C. J., says: "The rule for entering a nonsuit in this case must be made absolute It has been long established that when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as