LITTLE ET AL. V. KEATING

(1842), 6 U.C.Q.B. (O.S.) 265

Upper Canada Queen's Bench, Robinson C.J., Macaulay, Jones, and Hagerman JJ., 1842

Indian lands--Form of conviction by commissioners.

Commissioners appointed under 2 Vic. ch. 15, to receive information's and inquire into complaints that may be made to them against any persons for illegally possessing himself of the lands mentioned in the statute, must shew upon the face of a conviction by them under that act that the lands of which illegal possession had been taken had been actually occupied and claimed by some *tribe or tribes of Indians*, and for the cession of which no agreement had been made with the Government. A conviction alleging that the party convicted had unlawfully possessed himself of *Crown Lands* is bad, as they have no general jurisdiction over such lands.

This was an action of trespass *quare clausum fregit*, the declaration alleging an expulsion of the plaintiffs, and the spoiling of their goods, to which the defendant pleaded not guilty. On the trial it appeared that the plaintiffs were residing on Walpole Island, in the township of Sombra, in the Western District, in the house in question, and were occupying some lands held by them with it; that on the 11th of May, 1840, the sheriff of the Western District, with the defendant and others, entered and expelled them, under a writ dated 17th April, 1840, under the hands and seals of William Jones and the defendant, as commissioners, appointed by commission, under the great seal, to carry into effect the provisions of the statute 2 Vic. ch. 15, passed "for the protection of the lands of the Crown in this province from trespass and injury." The writ recited a conviction of one Shepherd Collock, upon the complaint of the Indian Chiefs, before these two commissioners, for unlawfully "possessing himself of *a portion of the Crown lands* in the township of Sombra," and that he still continued unlawfully to occupy the same: and that they had adjudged that he should remove within thirty days after notice to be served upon him: that, on the 6th of March, he had been served with such notice: that the period had expired, and he had not removed, and they commanded the sheriff to eject and remove Shepherd Collock from the said lands and tenements. The date of the convention was not recited in the writ, but on its production it bore date the 29th of February, 1840, and stated that Collock, being duly summoned, was upon the complaint of the Indian Chiefs, pursuant to an act, &c., &c., convicted before them, Commissioners duly appointed, &c., "for that he had before then lately unlawfully possessed himself of a portion of the Crown lands in said Western District, being part of Walpole Island, in the township of Sombra, and still continued unlawfully to occupy the same;" and they adjudged, ordered and directed that Shepherd Collock should remove from the occupation and possession of the said lands, &c., within thirty days after notice should be served upon him. A notice of action was proved, signed, "John Prince, Sandwich, W.D.," directed to the defendant. The plaintiffs proved they were in possession of the premises, under a lease for a year, dated the 21st of February, 1840, from Collock to them. For the defendant it was contended that this lease was fraudulent; that the plaintiffs were the sons- in-law of Collock, residing with him, and not his tenants, and that Collock was in the house, and was removed with the others, when possession was given to the defendant in person. Mr. Jones, for the defendant, stated that

Walpole Island had always been appropriated for the Indians; that he had known it since 1816; that he was a Government agent, and in that capacity leased Indian lands with the sanction of Government; that he looked upon Collock as a mere squatter, an he also stated he had heard of a surrender, and seen a deed of Walpole Island. Upon this evidence it, was contended that the defendant was not a trespasser, but was justified under the conviction; but the plaintiffs urged that the statute was not applicable to their case; that they were tenants paying rent; that their possession was acknowledged and sanctioned by Government; that they could not be summarily ejected; and that at any rate, as it had not been shewn that a notice had been served either on Collock or them, according to the second section of the act, the proceedings were illegal, and that the recital by the Commissioners in their warrant to the sheriff of the notice having been given could not be received as evidence of that fact, as the defendant contended; and the judge being of opinion with the plaintiffs on this latter point, the jury found a verdict for the plaintiffs or £17 10s. 0d., the question of the possession being in them or Collock, on 11th of May, 1840, having been left to them.

A rule *nisi* for a new trial having been granted, on the ground that the verdict was contrary to law and evidence, for misdirection and excessive damages; and counsel having been heard in Trinity term, the court now gave judgment.

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

The question arises upon the plaintiffs case. They proved clearly an act of trespass, entitling them to considerable damages if not justified, and there is no room therefore for interposition on the ground of excessive damages, if no legal justification appeared. It remains then to in- quire whether a good justification was made out. The defendant, it is clear, intended to act within the authority given by the provincial statute 2 Vic. ch. 15, being one of the commissioners appointed under that statute, the tenth section of which gives to such Commissioners the same privileges as justices of the peace have, of pleading the general issue and giving the special matter in evidence. All therefore turns upon the sufficiency of the defence, which he did in fact make out by evidence. Several objections were taken to it, but there is one ground on which it appears to us the defence must necessarily fail. It was not brought out distinctly at the trial, if at all, but it is of that nature that we cannot with any propriety overlook it, because it lies at the foundation of the whole proceeding. The defendant shews a writ made by himself and W. Jones as Commissioners, directed to the sheriff of the Western District, and commanding him to eject and remove Shepherd Collock from the occupation of certain lands and tenements. He accompanied the sheriff when he proceeded to execute this writ, was present when the plain- tiffs were dispossessed, and therefore entered himself into possession as receiving it from the sheriff under the writ. I cannot but remark, in passing, that it would have been far better if the commissioners to enforce this statute had been persons wholly unconnected with the objects of the proceeding; for though all, I dare say, was well intended, there is an apparent impropriety in the defendant acating in a double capacity, first judicially in giving the power to remove the occupant of the land, and then as a kind of trustee for other parties, taking possession under a writ which he had himself signed. It subjects the proceedings of parties so acting to injurious surmises, and is likely to enhance the damages against them, if they make a false step; and besides, it occasions confusion in applying to them the protection given by the statute. For instance, if in this case the writ should be found good upon the face of it, it cannot be a protection to this defendant, who received possession under it and acted in some measure in aid of the sheriff, unless it appears to

be supported by a valid proceeding which authorized its issuing, because it was this defendant and another who made the writ, and he cannot be protected by a writ which he himself gave. Now it need hardly be said that this defendant and Mr. Jones can have no general authority to issue their writ to the sheriff, commanding him in a summary manner to dis- possess any one of the land he may he living on. They assert that they have authority given to them under the statute 2 Vic. ch. 15, to act as Commissioners for the purposes of that act, in which there is an inconsistency between the title and preamble, all the enacting clause. The former indicate that the legislature meant to afford a summary remedy for dispossession intruders on any of the ungranted lands of the Crown, but the enacting clauses do not extend so far; they only gave power to appoint Commissioners "to receive informations, and to inquire into any complaint that may be made to them or any of them against any person for illegally possessing himself of any of the aforesaid lands, *for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto.*" It may become a question hereaftrer whether these words extend only to lands in which the title of the aboriginal inhabitants has never been extinguished, or whether they embrace also lands which the Crown has acquired by purchase from the tribes first inhabiting them, and which have been after- wards reserved by the Government for the occupation of other Indians, or, as the case is in some instances, of the same tribes from whom the land had been acquired. It is clear, at least, that the provisions extend only to such lands as some tribe or tribes actually occupy or claim title to. Now it does not appear on the face of the conviction that the land of which Shepherd Collock was to be dispossessed was land of this description; it states upon *"the complaint of the Indian Chiefs,"* (naming no one, and not saying whether upon oath or not) pursuant to the act, he was convicted, "for that he had before then lately unlawfully entered upon and possessed himself *of a portion of the Crown lands in said Western District, being part of Walpole Island, in the township of Sombra, and still continued unlawfully to occupy the same,"* and they direct that he shall be removed within thirty days after notice served on him. But it is very clear that the Commissioners have not a general power to remove trespassers upon the Crown lands, either in the township of Sombra or anywhere else. There is a limited jurisdiction, confined to a particular object, and to be exercised only under certain circumstances, and they must shew that the case in which they have acted was within their jurisdiction. If this conviction would authorize any one to dispossess the occupant of Crown lands in the township of Sombra, it would equally have authorized the dispossessing of an occupant of a town lot in Sand- which belonging to the Crown, if it had specified such land, for there is nothing in the conviction, any more than in the writ, to shew it to be Indian land. We cannot conjecture that it is, because the complaint was made by Indian Chiefs, nor can we tell judicially whether Walpole Island be land occupied and claimed by Indians or not; so far as we might conjecture, we should conclude otherwise, for it is said to be in the township of Sombra, and generally speaking Indian lands are not surveyed and divided into town- ships, though in some cases they have been. But it is quite clear that in a case like this whatever is necessary to give jurisdiction, must be certainly shewn. and not left to be taken by intendment. The proceeding is a rigorous one, and properly intended to be so in cases to which the statute applies, but we must see that the case in which it has been adopted is one of those cases,--2 Wils. 382: Stra. 261; 1 Burr. 603, 613; 1 T. R.241; 4 Burr. 2283; 1 East, 64, 679; 10 Co. 76; Cro. Car. 395; 2 Lev. 131; Hardw. 478, 480. This is not shown here in any way, and for want of that the conviction can afford no de- fence. The case in 13 East 139 is clear on this point. The court says there, "*we can* intend nothing in favor of convictions, and we *will* intend nothing against them." As the defence must fail on this point, it is not necessary to go into the

other objections which have been taken to the commissioners' proceedings. I will therefore only say, without meaning to be bound by any opinion that I may now express, that it is my present impression that it was necessary for this defendant to show that the notice to remove had been given, which is required by the second clause of the act. It seems to me that the recital of such fact in the warrant was not sufficient; the defendant's right to give such a writ must appear otherwise than out of his own mouth, to use the words of the court in Rex v. Johnson (Stra. 261). Upon this ground chiefly the case went against the defendant at the trial, and I think that upon this point also the justification failed. The plaintiffs at the trial seemed disposed to rely mainly upon the fact, that, even on the merits, Collock, against whom the writ issued, was not an intruder, for that he had entered and had been in possession by permission of a public agent of the Government, paying rent. How far they made this appear we need not examine, for if the plaintiffs' right of action had rested on that ground only, I apprehend they must have failed, because the eleventh clause of the statute gives an appeal to the Court of Chancery, and makes the decree of the Vice-Chancellor final. In 2 B. & P. 392, the court say, "It has been determined by all the judges of England, that when a statute provides that the judgment of commissioners appointed thereby shall be final, their decision is conclusive, and cannot he questioned in any collateral way;" and such is the case clearly when an appeal lies from the conviction of justices to the quarter sessions, an inferior jurisdiction to the Court of Chancery. If the parties here were dissatisfied with the decision of the Com- missioners on the facts, their course was to appeal as the act directs, and if they have done so, they are concluded by the order on that appeal.

Rule discharged.