WILLIAM FRASER ..... APPELLANT;

AND

J. B. POULIOT, *ès-qualité*..... RESPONDENT.

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*June 7.

*Dec. 12.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Prohibition to alienate in a purely onerous title void—Art. 970 *C. C. L. C.*, 18 *Vic., ch.* 250.

By 18 *Vic.*, ch. 250, *W. F.* and his brother were authorized to sell certain entailed property in consideration of a non-redeemable rent representing the value of the property. On the 7th September, 1860, *W. F.*, the appellant, and *E. F.*, assigned to their brother, *A. F.*, a piece of land forming part of the above entailed property, in consideration of a *rente foncière* of six pounds, payable the first day of October of each year. The deed was registered and contained the following stipulation: "But it is agreed that the assignee cannot alienate in any manner whatsoever the said land, nor any part thereof, to any person without the express and written consent of the assignors under penalty of the nullity of the said deed." The property was subsequently seized by a judgment creditor of *A. F.*, and appellant opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate.

Held,—On appeal, affirming the judgment of the Court below, that the deed was made in accordance with the provisions of 18 *Vic.*, ch. 250, and being a purely onerous title on its face, the prohibition to alienate contained in said deed was void. Art. 970 C. C. *L. C.*

Query: Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), rendered on the 8th March, 1878.

* PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

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The respondent, under a judgment obtained by him against *Alexander Fraser*, on the 9th February, 1856, seized an immovable property, lot No. 3, as belonging to the said *Alexander Fraser*, and which lot, forming part of the Seigniorial Domain of the Seigniory of *Rivière du Loup*, had been bequeathed by the late *Alexander Fraser* to the said appellant and his brother *Edward Fraser*, charged with a substitution in favor of their children. The appellant and his brother *Edward Fraser* fyled against this seizure an opposition, to prevent the sheriff from proceeding to the sale of the property. The grounds of this last proceeding were, that the immovable property seized had been granted *à titre de bail à rente foncière*, to the said *Alexander Fraser*, by the said *William* and *Edward Fraser*, under the condition that the said grantee should not part with it, or with any part thereof, in favor of any person soever, without the express consent in writing of the said grantors, under penalty of the nullity of the said grant, and that therefore the said immovable property could not be seized and sold without the consent of the said grantors.

The sale, or *bail à rente foncière*, was made for divers considerations, amongst others, for an annual rent of £6; it was registered on the 12th of September, 1860, and it contains the following stipulation: "It is agreed that the grantee cannot alienate in any way the said lot or any part thereof to whomsoever, without the express and written consent of the grantors, under pain of nullity of the present deed."

The said respondent contested the said opposition and pretended that the said clause could not be enforced and was not legal. The Court of original jurisdiction to wit: the Superior Court sitting in and for the district of *Kamouraska* dismissed the opposition. Appeal having been instituted from this judgment to the Provincial Court of Appeal for the Province of *Quebec*, the last

Court confirmed the said judgment on division of three against two. Against this last judgment this appeal is now instituted.

Mr. *Langlois*, Q.C., for appellant :—

The point to be decided in this case depends entirely upon the interpretation to be given to the statute, 18 *Vic.*, ch. 250, which grants to the appellant and to his brother the power to sell and concede in lots the "Domaine" of the Seigniory of *Rivière du Loup*, notwithstanding the entail. The lot in question, worth six or seven thousand dollars, was sold by the appellant to his brother for an irredeemable ground rent of only £6, and it is clear that the clause prohibiting the grantee from alienating the lot in question was part of the consideration. The contract was really more one in the nature of a donation than of a sale, and, as such, was contrary to the provisions of the statute. The learned Chief Justice of the Court of Queen's Bench relied on Art. 970 C. C. and says : "The prohibition to alienate things sold or conveyed by *purely* onerous title is void." But this article cannot apply to this case, because I submit we have clearly shown that the property in question was not conveyed by a *purely* onerous title.

[FOURNIER, J. :—Can we give to an authentic deed a different character than that which it purports to have ?]

The deed does not express on its face the actual consideration, and therefore appellant can give extrinsic evidence which is consistent with the deed. The evidence clearly shows that the parties had an interest in stipulating such a clause, as well on account of the entail in favor of their children, as to prevent their having as a neighbour, instead of their brother, a stranger with whom they might not agree.

The appellant had the right to insert the condition that the lessee should not alienate, and this clause will

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not have its effect, if the sale of the property under execution cannot be prevented.

Moreover, as our Civil Code came into force on the first of August, 1866, and the date of the deed containing the stipulation giving rise to this case is the 7th Sept., 1860, Art. 970 can only be considered as the ruling of the codifiers upon a point of law. By referring to their remarks on this article, we are far from being satisfied that the article in question was, in their opinion, the existing law.

The learned counsel then cited *Fafard* v. *Bélanger* (1), *Bourassa* v. *Bédard* (2).

Mr. *Pouliot* for respondent:

The statute 18 *Vic.*, ch. 250, gave the right to the appellant and his brother to alienate, free from all substitution, any piece of land in their seigniorial domain at *Rivière du Loup*, but respondent contends that, independent of the statute, the sale made was a valid sale under Art. 949 C. C. Because, it might occur that the institute would eventually become the absolute owner of the property substituted, for instance, by the pre-decease of the substitute. The law affords ample protection to the substitute. See Art. 710, C. C. P. But, as I have said, the sale in this case, being *un bail à rente foncière perpetuelle et non rachetable*, made for divers considerations, amongst others, for an annual rent of £6, was expressly authorized by the statute, and to contend that it is a nullity is to contend that appellant was guilty of fraud. No fraud has been proven, and, if it existed, surely it is not the appellant who can claim any advantage therefrom, his children being the ones to complain when the substitution may open. For the present, the appellant must stand by his own act.

Now, the appellant has endeavored to change the

(1) 4 L. C. R. 215. (2) 14 L. C. R. 251.

nature of the deed by establishing a supposed verbal agreement; this evidence was objected to, and the court declared it illegal and inadmissible. See Art. 1234 C. C.

It is also urged that the prohibition to alienate is a part of the consideration for which the lot in question was granted. But such a condition is invalid when the deed is a purely onerous one, and all the judges agree in saying that there is no doubt that the title of *Alexander Fraser* is a purely onerous one. The case of *Tourangeau* v. *Renaud* (1) is in point.

This case was decided in the first instance by the Superior Court, and subsequently brought to the Privy Council in *England;* and a disposition made by a testator, by which he prohibited his children to alienate, for the space of twenty years only, the bequeathed property, was declared null, being contrary to public order and made without consideration; and yet this case was much more favorable than the one now under consideration, since the restriction was only for a limited time. From the appellant's mode of reasoning, it would seem that any one desirous of maintaining the prohibition inserted in the above mentioned testament could well say that it was made for laudable reasons of foresight and prudence, e. g. through fear that the legatees might abuse the right of property thus conferred upon them, or to secure them means of existence for a certain period.

Mr. *Langlois*, Q. C., in reply.

RITCHIE, C. J.:—

Mr. *Langlois*, who argued this case on the part of the appellant, stated frankly that the simple question is, whether the deed is an onerous or a gratuitous deed, if onerous he admitted the appeal fails—to use his own expression. Now, it is clear, I think, beyond all dispute,

(1) 12 L. C. Jur. 90.

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that this deed on its face creates a purely onerous title, with nothing whatever to indicate to the contrary, that the deed was in whole or in part, gratuitous, which deed, so on the face of it being onerous, I think, the appellants, the grantors, cannot gainsay in this proceeding in any way, and as to which the prohibition to alienate is null. One of the grounds taken is, that it has been alleged that the property was of a larger value than the monetary rent fixed in the deed would represent. As I understand the law in the province of *Quebec*, that evidence ought not to have been received at all, because in a proceeding of this kind it was not open to grantors to destroy the effect of this official instrument which they had made under this statute; but, if this transfer is, by reason of inadequacy of price or want of consideration, in derogation of the right to sell under the statute, and in derogation of the rights of the substitutes, and thus the grantors have not acted in good faith as against them, then they, the grantors, cannot set up such their bad faith to defeat their own deed valid on its face against their own grantee. But the substitutes may possibly, when the substitution shall be opened, contest the transaction. In the meantime, as against the appellants, I think the deed must stand, and therefore the decision of the Superior Court, confirmed by the Court of Queen's Bench, was right, and both those judgments should be affirmed.

STRONG, J., stated that he concurred in the judgment of *Fournier*, J.

FOURNIER, J.:

La substitution créée suivant les formes légales par le testament d'*Alexandre Fraser*, en date du 11 février 1833, a d'abord été ouverte en faveur de *Malcolm Fraser*,

son fils ; puis après son décès sans enfants, elle l'a été en faveur des Appelants qui, par le même testament, étaient, dans ce cas, appelés à remettre les mêmes biens à charge aussi de substitution en faveur de leurs enfants.

Les Appelants, comme grevés de substitution, ne pouvaient aliéner les biens substitués que sous la condition résolutoire inhérente à leur titre,—mais pour des raisons d'intérêt public énoncées dans le préambule de l'acte 18 *Vic.* ch. 250, ils ont obtenu la faculté d'aliéner le domaine de la seigneurie de la *Rivière-du-Loup* aux conditions suivantes :

La 1er section valide les concessions qui avaient déjà été faites de partie du domaine. La 2e sec. autorise les Appelants *William* et *Edouard Fraser* à vendre et aliéner conjointement par lots et portions le domaine de la dite seigneurie,—pourvu toujours que cette vente soit faite pour une rente foncière non rachetable, ou pour une rente constituée. La 3e sec. déclare que les dits *William* et *Edouard Fraser* ne pourront recevoir et placer le capital des rentes constituées sans le consentement du tuteur à la substitution.

Conformément aux pouvoirs qui leur étaient ainsi conférés, les Appelants ont, par acte en date du 7 septembre 1860, concédé à *Alexandre Fraser*, en considération d'une rente annuelle de £6 courant un terrain faisant partie du domaine en question, situé dans le village de *Fraserville*, paroisse de *St. Patrice* de la *Rivière-du-Loup.*

Cet acte a été enregistré le 12 septembre 1860. Outre la rente annuelle, cet acte contient les réserves et charges suivantes :

" 1o De toutes les bâtisses qui se trouvent présentement sur le terrain sus-baillé, pour les enlever aussitôt que le preneur le requerra, si ce n'est celle occupée par *Honoré Sirois* que les bailleurs ne seront tenus d'enle-

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ver qu'à l'expiration du bail consenti par le dit *William Fraser* à ce dernier. 2o Droit de redresser la dite avenue, en prenant sur le terrain sus-baillé l'étendue de terrain nécessaire, sans diminution du prix du présent bail, et sans indemnité en faveur du premier, pour l'étendue de terrain ainsi prise, de laquelle avenue ils jouiront en commun, et qu'ils entretiendront chacun pour moitié. 3o De tout le terrain occupé par l'église anglicane. 4o Du droit de communication sur le dit terrain pour l'exploitation de leur moulin à farine et autres industries qu'ils pourront pratiquer sur la dite rivière.

"Ce bail fait à charge par le preneur qui s'y oblige : 1o de faire mesurer, chaîner et borner le dit terrain, et d'en fournir un procès-verbal aux bailleurs à ses frais. 2o De leur fournir copie des présentes dûment enregistrées aussi à ses frais. 3o D'enclore le terrain et le tenir clos et de répondre à tous devoirs de voisin auxquels il peut être tenu, sans que les bailleurs y soient tenus comme voisin ordinaire. 4o De leur payer en leur bureau, au dit lieu de la *Rivière-du-Loup*, le premier octobre chaque année, et dont le paiement se fera le premier octobre de l'année prochaine, la somme de six louis courant de rente foncière, pour ensuite continuer le dit paiement à pareille époque chaque année, au paiement duquel prix de fermage le dit lot de terre sus-baillé demeure spécialement hypothéqué en faveur des bailleurs de fonds."

Cet acte contient de plus la stipulation suivante qui fait le sujet de la difficulté en cette cause :

"Mais il est convenu que le preneur ne pourra aliéner d'aucune manière le dit terrain, ni aucune partie d'icelui à qui que ce soit, sans le consentement exprès et par écrit des baillenrs, à peine de nullité du présent acte."

La question que soulève cette clause est de savoir si

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dans l'acte de concession dont les conditions sont énoncées plus haut, la prohibition d'aliéner imposée au concessionnaire *Alexandre Fraser*, est légale.

Le Code Civil, art. 970, contient à ce sujet la disposition suivante: "La prohibition d'aliéner la chose "vendue ou cédée à titre purement onéreux est nulle." Cet article est donné comme étant conforme à l'ancien droit, d'après lequel la validité de cette clause doit être décidée parce qu'elle est contenue dans un contrat antérieur au code.

Le principe énoncé aussi clairement qu'il l'est dans l'art. cité, n'étant pas susceptible de doute, il ne reste donc pour en faire l'application à cette cause qu'à déterminer le caractère de l'acte de concession. Est-il à titre purement onéreux? La simple lecture de l'acte suffit pour en convaincre. Il ne contient que des réserves, des conditions et charges onéreuses. On n'y trouve pas une seule expression qui puisse dénoter de la part des Appelants la moindre intention de faire un acte de libéralité en faveur du concessionnaire. D'ailleur si telle eût été leur intention ils n'auraient pu le faire, car les Appelants, comme grevés de substitution, ne pouvaient pas disposer de cette propriété à titre gratuit directement ni indirectement. De plus, ils en étaient empêchés par le statut qui les autorise à ne vendre ou concéder qu'à des conditions onéreuses afin de protéger les droits des appelés à recueillir plus tard les biens substitués. Leur acte de concession est donc à sa face, ce qu'il devait être d'après le statut, un titre onéreux.

Mais pour lui enlever ce caractère et le faire accepter comme fait à titre gratuit pour une partie, afin de faire maintenir la prohibition d'aliéner, les Appelants ont allégué que par convention verbale "il avait été con-"venu entre les parties que le preneur remettrait à "demande le dit terrain aux bailleurs qui voulaient s'y "bâtir chacun une maison, et que sans cette convention

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"les dits opposants n'auraient pas baillé pour un prix si "modique un terrain valant plusieurs milliers de pias- "tres." Un témoin a été entendu pour en faire la preuve, mais la preuve testimoniale de toute convention tendant à contredire un acte authentique est interdite, art 1234 C. C. "Dans aucun cas la preuve testimoniale ne peut "être admise pour contredire ou changer les termes "d'un écrit valablement fait." Cette preuve doit nécessairement être rejetée et l'acte doit subsister dans toute son intégrité.

Les Appelants ont aussi attaqué la validité de leur acte en prétendant qu'ils n'avaient pas le droit de le faire à raison de la substitution dont ils sont grevés. Ils commettent en cela une double erreur : d'abord parce que le statut ci-dessus cité a été passé spécialement à leur demande pour les autoriser à faire un acte de la nature de celui dont-il s'agit, et ensuite parce que sans ce statut un pareil acte serait valable pour au moins leur vie durante et ne serait dans tous les cas sujet à révocation que par l'événement de l'ouverture de la substitution en faveur des enfants des bailleurs. Ils se plaignent aussi que la concession n'a été faite que pour un prix modique, tandis que le terrain est d'une valeur beaucoup plus considérable. Cela se peut, mais ce n'est pas une raison suffisante pour revenir contre leur propre acte. Le contrat ayant été valablement fait, il ne peut pas être anéanti par la volonté d'une seule des parties,—il ne pourraient l'être que du consentement de toutes les parties—ou sur une contestation régulière entre elles pour quelques causes légales,—et encore dans le cas où son annulation n'interviendrait pas avec les droits acquis par les tiers.

Il se peut que les intérêts des appelés aient été lésés dans cette transaction, mais comme leurs droits ne sont encore qu'une espérance de recueillir les biens substitués si la condition arrive, ils seront toujours à temps

lors de l'ouverture de la substitution en leur faveur pour se faire remettre dans les droits que leur assurent la substitution et le statut en vertu duquel l'acte en question a été passé.

Pour ces motifs je suis d'opinion que la prohibition d'aliéner contenue dans cet act est nulle et que le jugement de la Cour du Banc de la Reine doit être confirmé avec dépens.

HENRY, J.:

I concur in the judgment which has just been read. The statute was passed barring the rights of the substitutes, and to enable the parties to convey to purchasers clear and full title of the premises. They did not pursue the course pointed out by the statute, but made transfers, reserving certain rights to themselves. Under these circumstances, I think the terms and the intention of the statute were not pursued, and that, having done so, and not having gone according to the statute, there is no person who could claim under the Act, or take any advantage of the reservations in the transfers except the substitutes themselves. I do not think it is in the mouth of these parties to say they shall take advantage of a provision, under the impression that they have made a gratuitous gift. A gratuitous gift and the principles applicable to it are not at all applicable where there is an onerous grant. In one case the party is supposed to have the right to annex conditions to what he freely gives away. In the other, where there is a consideration, no matter how small, it partakes of all the conditions of an onerous grant, and therefore I do not think it comes within the rule which allows a party to take possession of the property again on some condition, such as that stated in this case. Therefore, I think the judgment of the court below should be confirmed and the appeal dismissed.

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GWYNNE, J.:—

I entirely concur in the judgments delivered by the learned judge of the Superior Court, and by the learned Chief Justice of the Court of Queen's Bench in appeal. It is admitted, by the learned counsel for the appellant, that if the article 970 of the Civil Code applies, the case must fall to the ground.

The points urged in support of the appeal are: Firstly, That this case does not come within article 970, because, as is contended, the property in question has not been conveyed by *purely* onerous title, but for a consideration partly pecuniary and partly gratuitous. The gratuitous consideration (which it is contended sufficiently appears upon the deed) consisting in a desire to benefit a brother: and the interest relied upon to shew that the prohibition to alienate was not without cause consisting in the entail in favor of the children of the *Bailleurs* under the will of *Alexander Fraser*, deceased, and in the interest which the *Bailleurs* had to have their brother as a neighbour instead of a stranger. Secondly, conceding the title of the grantee in the deed of concession to be a *purely* onerous title, still (the deed having been executed before the Civil Code came into force) that this case is not to be governed by article 970, but by the old law, which, (as is contended) was different, and which, (as is also contended,) did not make a prohibition to alienate things conveyed by *purely* onerous title void, unless, in addition thereto, the *défense d'aliéner* was *sans cause*, and it is contended that here it was not *sans cause*, for the reasons suggested in the first objection.

This objection appears to amount simply to this, that article 970 announces new law, and that the old law did not avoid the agreement not to alienate in a case like the present, for the reasons suggested. In support of this contention, certain remarks of the codifiers in their report made under the act have been quoted, for

the purpose of establishing that their intention was to create new law by this article 970. And thirdly: that the article 970, though not given as new law, is to be regarded as no more than an affirmation of the previously received maxim that a *défense d'aliéner pure et simple et sans cause* was without effect, and so that this case is to be governed by the application of that maxim which, as is contended, authorized the *défense d'aliéner* in this particular case, for the reasons above suggested. This objection seems to be much the same as the previous one.

Now, assuming the article as here suggested, an *affirmation* of the previously received maxim, that, as it seems to me, is equivalent to construing it as *declaratory* of what the old law was, and this is the light in which the articles of the code which are not stated to be alterations or amendments of the old law are to be regarded. In this view, article 970 must be read as declaring that, by the old law, the prohibition to alienate things sold or conveyed by *purely* onerous title is void.

In this view the remarks of the codifiers relied upon could not alter the character of the article, if, which I do not think to be the case, the remarks, as quoted, can fairly be said to afford evidence that the article was not intended by them to be declaratory of the existing law.

The case, however, as it appears to me, must be wholly regarded in the light of the statute 18 *Vic.*, ch. 250, and, so regarding it, *cadit questio.*

The grounds of opposition relied upon are, that the opposants had no right to convey the land to the defendant as they did, because that they were charged with a substitution in favor of their children by the will of *Alexander Fraser*, deceased, and further that it was never intended that the said deed of conveyance should be seriously what it purports to be, but that on the contrary it was agreed between the opposants and the defendant,

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that the defendant should give up the land to the opposants whenever they should desire it.

That the opposants had no right whatever to execute the deed of concession so as to bind the substitutes otherwise than in virtue of the statute, is admitted; indeed it is so declared in the Act of Parliament.

The deed upon its face purports to be in precise accordance with the provisions of the statute. It is admitted upon all hands, that the opposants, by executing this deed which, but for the statute, they had no power to execute, are estopped from asserting that it was executed in fraud of the statute, or that it was not intended to be real. Upon the same principle they are equally estopped from asserting that there was any secret agreement to avoid the deed; and as the statute only contemplates and authorizes the execution of a deed *purely* onerous, they are estopped from saying that this is not such a deed, or that part of the consideration was gratuitous, or that they had an interest reserved entitling them at their pleasure to avoid the deed and to demand a surrender of the land. They are estopped, in fact, from contending, that the deed does not take effect in the plain sense in which it is expressed, or that it is not in every respect a good and valid deed having its force in virtue of the statute, and conclusively binding upon them, and from asserting any interest in the land in derogation of the plain terms of the deed, which are that the defendant shall enjoy the land as perpetual proprietor at an irredeemable ground rent; the deed must therefore be held as conveying, by force of the statute, perfect title to the defendant indefeasible by the opposants. All the grounds, therefore, of the opposition urged are removed. It may be that the substitutes may, when substitution opens, assert their rights, if the deed was executed under the circumstances and for the consideration which the opposants

now desire to contend, but are estopped from contending; but in such case, their rights would not be affected by this forced judicial sale.

If these considerations were not sufficient to uphold the judgments appealed from, the 10th paragraph of the defendant's contestation, and the point there raised, would have, as it seems to me, to receive much consideration before judgment could be rendered in favor of the opposants.

Appeal dismissed with costs.

Solicitors for appellant: *Langlois, Angers, Larue & Angers.*

Solicitors for respondent: *Larue & Pouliot.*