ALVA MARTINDALE, *ès-qual. et al*.....APPELLANTS; 1892

AND *June 3.

DAME SUSAN M. POWERS... .....RESPONDENT. 1893

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *Mar. 1. *May 1.

Quality of plaintiff—General denegation—Succession—Acceptation of by minor subsequent to action—Art. 144 *C. C. P.—Don Mutuel—Property excluded from but acquired after marriage.*

Held, 1st., affirming the judgment of the court below, that the quality assumed by the plaintiff in the writ and declaration is considered admitted unless it be specially denied by the defendant. *A défense en fait* is not a special denial within the meaning of art. 144 C. C. P.

2nd. The acceptation of a succession subsequent to action and *pendente lite* on behalf of a minor as universal legatee has a retroactive operation.

3rd. Where by the terms of a *don mutuel* by marriage contract a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father the deed of donation having been resiliated for value, it was held that by reason of the resiliation the husband had acquired an independent title to the farm and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz.: $5,000; and that after the husband's death the wife (the respondent in this case) was entitled until a proper inventory had been made of the deceased's estate to retain possession of the farm. Taschereau and Gwynne JJ. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court.

This was an action brought by Alva Martindale in his quality of tutor to the minor child James Curtis

* PRESENT:—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) Q. R. 1 Q. B. 144.

1892

MARTIN-DALE v. POWERS.

Martindale, universal legatee of his grandfather Curtis Martindale, and by Eli Martindale in his quality of curator to the substitution of property created by the last will of the late Curtis Martindale, claiming from Susan M. Powers widow of the late Curtis Martindale for the minor child and the substitution a certain farm being cadastral lot no. 2,414 of the township of Stanbridge.

Susan M. Powers, the respondent, pleaded 1st. a general denial and 2nd. a special plea that under the terms of a *don mutuel* by marriage contract she was entitled to retain possession of the land until paid the amount due to her, viz.: $5,000.

The facts as disclosed by the pleadings and the evidence are as follows:

Two years prior to his marriage with respondent Curtis Martindale, who was then a widower, had made a donation of the farm in question to his son John Martindale, under the usual terms of supporting his father during the remainder of his natural life, and with the condition that in the event of the son predeceasing the father the title should revert to the latter. Under this agreement John Martindale and his family went to reside with the father, Curtis Martindale, upon this farm, but some months prior to respondent's marriage with the father, Curtis Martindale, the son, John Martindale, had bought a farm for himself from a Mrs. Whitman, on the opposite side of the highway from the farm in question in this case, and had removed with his family to the Whitman farm, and was living on it. On the 11th December, 1869, and prior to the execution of his marriage contract, a notarial document was executed between Curtis Martindale and his son John, which recites in the first place the terms of the donation deed and then declares that as Curtis Martindale has proposed

to said John Martindale to occupy and cultivate said land (i. e. the original home farm) and to take the management of the stock &c., the said John Martindale agrees to pay to said Curtis Martindale $200 yearly in lieu of support, taxes, maintenance, &c., and as security therefor he mortgages his own farm, i. e. the farm he had bought from Mrs. Whitman, and upon which he was then living. The agreement goes on to recite that even if said John Martindale should at any time thereafter be called upon to resume the cultivation of the land, he should be exonerated from the care of horses, cows, &c., belonging to Curtis Martindale.

Then by marriage contract dated the same 11th December, 1869, Curtis Martindale settled upon his wife, (present respondent) the property, real and personal, of which he might die possessed to the extent and value of $5,000 "save and except therefrom the farm and personal property thereon now in the occupancy of John Martindale."

On the 9th December, 1870, the deed of donation to John Martindale was for valuable consideration resiliated and $900 were paid to him by Curtis Martindale for improvements, &c.

Curtis Martindale died 27th March, 1885, having previously to wit, on 10th November, 1888, made his last will whereby he named as his residuary legatee, without designation of any specific property, the eldest of his own four sons who might be living at the time of the testator's decease, and his widow took possession of all his property including the farm claimed by the appellants.

There was no special plea specifically denying the status of the plaintiff, but oral evidence was given to prove the status which was objected to.

1892

MARTINDALE v. POWERS.

It was admitted that no inventory had been made of the deceased's estate.

Racicot Q.C. and *Amyrauld* for appellants. The qualities and status of the plaintiffs *ès-qualités* and of the minor child James Curtis Martindale as well as the defendant herself as mentioned and described in the writ of summons, and all the other allegations of the plaintiff's declaration, not having been specially denied are deemed by law to be admitted by defendant. *La Banque Union* v. *Gagnon* (1); *Reinhardt* v. *Davidson* (2); *Gibeau* v. *Dupuis* (3); *Bain* v. *City of Montreal* (4).

But moreover there is sufficient evidence in the case of the status of the minor child as the courts below have found as a matter of fact.

On the principal question on this appeal viz., as to the farm reserved in the marriage contract, we contend that the intention of the parties as expressed by the stipulation in the marriage contract was that the said farm and the movables should be absolutely reserved from the *don mutuel*, and that as the farm claimed is shown to be the farm reserved from the *don mutuel* in the marriage contract it is not material whether it came into the hands of the testator by virtue of the resiliation of the donation to his son John under some of the provisions of the donation, or by virtue of the voluntary resiliation made of said donation as was actually done.

The *don mutuel* in the marriage contract of $5,000 to be taken by the survivor out of the property left by the predeceased is a donation *à cause de mort*, assimilated to a particular legacy, and the respondent survivor cannot retain the property claimed, as her right is simply to get $5,000 out of the estate. Art. 757 C.C.

(1) 15 Q. L. R. 31;
(2) 15 R. L. 42;
(3) 18 L. C. Jur. 101;
(4) 8 Can. S. C. R. 252.

1892

MARTIN-DALE v. POWERS.

Respondent at death of Curtis Martindale was left in possession of his whole estate, movable (moneys, claims, goods and chattels, &c.,) and immovable. She has appropriated the whole of the movable estate which was of considerable value without any inventory and she cannot retain the farm claimed by appellants *ès-qualités* without accounting for what she has got already and irrespective of the amount of the balance due her and of the value of the farm.

Baker Q. C. for respondent. Having denied each and all the allegations of the declaration the appellants were bound to prove the status of the minor child from the registry o civil statu .

The exclusion of the property from the *don mutuel*, if it applies to the farm in dispute, had its *raison d'être* only by reason of one of the above circumstances happening; the parties cannot be presumed or held to have contracted with reference to the unforeseen case of a voluntary resiliation of the deed of donation, and the acquisition by Curtis Martindale of the property by onerous title.

On the 9th December, 1870, after the marriage, the father and son resiliated the deed of donation, the father paying the son $900 to indemnify the latter for moneys advanced and labour done and performed in improving the premises and a mutual acquittance and discharge of all obligations up to that date was given.

The renunciation by Curtis Martindale of the sum of $200 per annum, and the payment by him of $900 to his son, impoverished and reduced his estate by so much and diminished respondent's chance of being paid her marriage settlement at the time of his decease.

By the deed of 9th December, 1870, there was an interversion of title and Curtis Martindale became the proprietor of that farm, not in virtue of any condition of said original donation but by an onerous title,

1892

MARTIN-DALE v. POWERS.

which was not in existence at the date of the marriage contract, and stands therefore *quoad* that contract entirely in the light of a distinct and new acquisition secured at the cost of the estate settled upon respondent by the marriage contract, and must be held liable for the stipulation and effect of that contract.

The reasons for the exclusion which existed at the time of the contract have disappeared. The property belonged to Curtis Martindale in the same manner as if he had acquired it from a stranger and passed to respondent in virtue of her marriage contract. If appellants wanted to get possession they should have had made an inventory and until that is done respondent is entitled to retain possession.

THE CHIEF JUSTICE:—Curtis Martindale, a widower, the testator under whose will the plaintiff claims (in the quality of tutor of James Curtis Martindale, a minor) married in 1869 the respondent and defendant Susan Powers, under a contract of marriage by which community was excluded, and *don mutuel* to the extent of $5,000 was stipulated. Previous to this, in 1867, Curtis Martindale had made a deed of donation of a farm to his son John Martindale. By the clauses and stipulations of this deed of donation the son John Martindale was to work the land; the donor, Curtis, was to live on it; the produce was to be equally shared, and Curtis, the donor, was to furnish half the seed. On the eve of the marriage, by a deed executed before the same notary as the marriage settlement and dated the same day, 11th December, 1869, the deed of 1867 was modified by providing that Curtis should work the farm himself, and that John, instead of working the farm and giving his father half the produce, should pay him $200 a year. For the payment of the annuity thus stipulated for John hypothecated a

1893

MARTINDALE v. POWERS.

The Chief Justice.

farm which he had acquired by purchase, not from the testator but from the widow Whitman. The marriage settlement expressly excluded from the *don mutuel* the farm and personal property described as being "now in the occupancy of John Martindale, of the said township of Stanbridge, yeoman, one of the sons of the said Curtis Martindale, which said property both real and personal is not included nor intended to be included as forming any part or parcel of the said sum of $5,000."

The first question is whether this exclusion or exception applies to the farm which was the subject of the donation by Curtis to John or to the Whitman farm, which John had hypothecated to his father to secure the annuity of $200 under the deed of the 11th December, 1869, varying the original deed of donation. Mr. Justice Tait held that the exception applied to the farm in the donation deed. Chief Justice Lacoste and Mr. Justice Hall, though they decided the case in the respondent's favour upon another and distinct ground, held that the exception did not refer to the donation farm but to the Whitman farm.

Subsequently the testator made his will which contained this provision under which the plaintiff claims :

> As to the residue or remainder of my property whether real or personal, movable or immovable, money, notes of which I may die possessed or seized of, I will and bequeath the same and every part thereof unto the eldest of my four sons, Ari, John, Eli and Alva Martindale, who may be living at my demise, and for such son of my said four sons above named to use and enjoy the same during his natural life; and after his death to be transmitted unto his lawful issues from generation to generation, in the direct line as far as the laws of this Province will allow.

Subsequently to the marriage and on the 9th December, 1870, the testator for the consideration of $900 bought out John altogether as regards the farm previously given him.

1893

MARTIN-DALE v. POWERS.

The Chief Justice.

The present is a possessory action to recover the excepted farm. The pleas were the general issue, and a special plea which however does not conclude to the dismissal of the action but merely prays imposition of terms in the defendant's favour.

The following points arose:

1. It was said that the quality of the minor represented by the plaintiff was not proved, in that it was not proved by legal evidence that he was the eldest grandson at testator's death, the oral evidence of Ari not being legal proof. The courts below answer this by holding that the quality not being specifically denied it must be taken to be admitted, the general issue not being a sufficient denial. In this I concur. Then it was said that no acceptation of the succession on behalf of the minor as universal legatee (or legatee by title universal) was proved, and in fact it appeared that there had been no acceptation until after the action. The Court of Queen's Bench answers this objection by showing that the want of acceptation was a relative not an absolute nullity, and that the acceptation subsequent to action had a retroactive operation, for which proposition the Chief Justice refers to authors who establish this to be the law.

2. The next question is: What property was intended to be excepted as the farm described as being "in the occupancy" of John? Was it the donation farm, the old homestead, or was it the Whitman farm? I cannot agree that it was anything but the former as the first judge, Mr. Justice Tait, held it was; but both the judges whose notes we have, the Chief Justice and Mr. Justice Hall, seem to think the exclusion was intended to apply to the Whitman farm though they do not say this clearly.

3. Then comes the main point on which the Court of Queen's Bench decided, reversing Mr. Justice Tait.

What was the effect of the re-purchase for $900 by the testator from John, carried out by the deed of 9th December, 1870? The Court of Queen's Bench hold that, granting the exception did refer to the homestead, it was a new purchase, a new acquisition of an onerous title, just as if John had sold to a stranger and the lands had gone through half a dozen hands, and had then been re-purchased by the testator, in which case it would be just the same as if it had been a piece of land in which the testator had never had any previous interest. I think the Court of Queen's Bench were right in this which was their *ratio decidendi.*

The appellants further say that the judgment appealed from is *ultra petita* as the special plea does not conclude to the dismissal of the action. The plain answer is that the general issue does so conclude.

The appeal must be dismissed with costs.

FOURNIER J.—Le 11 décembre, 1869, feu Curtis Martindale avait fait avec Susanne Powers, son épouse, intimée en cette cause, un contrat de mariage contenant, entre autres conventions matrimoniales, la suivante:

That whatever property the said Curtis Martindale and Susan Powers now have or that they shall or may hereafter acquire, both real and personal, upon decease of one of them, the same shall belong to the survivor of them, for and to the extent of the sum of $5,000, current money of this province, in sole and absolute property forever (save and exempt therefrom the farm and personal property thereon now in the occupancy of John Martindale, one of the sons of the said Curtis Martindale, which said property, both real and personal, is not included not intended to be included as forming any part or parcel of the said sum of $5,000, anything herein contained to the contrary in anywise notwithstanding).

Au décès de Curtis Martindale sa veuve, l'intimée, a pris possession de toutes ses propriétés, comprenant la terre et la maison dans laquelle vivait le dit Curtis Martindale lorsqu'il s'est marié et dans laquelle il a vécu avec elle jusqu'à son décès.

1893

MARTIN-DALE v. POWERS.

Fournier J.

Curtis Martindale est décédé le 27 mars 1885, ayant préalablement fait son testament le 10 novembre 1883, instituant pour son légataire résiduaire le fils aîné de ses quatre enfants qui serait vivant à l'époque de son décès.

La déclaration en cette cause allègue que James Martindale, enfant mineur, âgé d'environ sept ans, fils d'Eli Martindale, remplit la condition du testament et se trouve en conséquence le légataire résiduaire désigné, et réclame par l'action prise en son nom par son tuteur, Alex. Martindale, la terre et la maison dans laquelle a vécu Curtis Martindale, et dont sa veuve, l'intimée, a pris possession en vertu de son contrat de mariage.

L'intimée répond à cette action qu'elle a droit à ces propriétés en vertu de la clause ci-dessus citée de son contrat de mariage avec le testateur, dans lequel il a été stipulé que le survivant des deux époux prendrait dans la succession du prédécédé des propriétés mobilières et immobilières au montant de $5,000.

Elle a aussi allégué que l'identité du mineur réclamant n'avait pas été suffisamment établie et qu'il n'a pas été prouvé légalement qu'il soit le fils légitime de Elie Martindale. Elle a de plus positivement nié que la propriété qu'elle détient soit celle qui a été exclue du don mutuel par son contrat de mariage.

Il est vrai que la preuve de la filiation du mineur n'a pas été faite en la manière ordinaire par la production d'un acte de baptême. Elle consiste dans un certificat du secrétaire-trésorier donné en vertu de la 39 Vict. c. 20 et de la 50 Vict. c. 7. L'intimée n'ayant point soulevé d'objections spéciales à cette preuve il n'est pas nécessaire de décider dans la présente cause de la force probante de ce certificat, que les Statuts refondus de la province de Québec (art. 5784) semblent avoir mis au rang des actes de l'état civil.

1893

MARTIN-DALE v. POWERS.

Fournier J.

L'appelant ayant pris dans la déclaration la qualité de tuteur à James Curtis Martindale, enfant mineur d'Eli Martindale et d'Alma Gardner, cette qualité doit être censée admise dans notre pratique, à moins qu'elle ne soit spécialement niée. L'art. 144 C. P. déclare que tout fait dont l'existence ou la vérité n'est pas expressément niée ou déclarée n'être pas connue est censé admis.

L'intimée a aussi soulevé l'objection que le tuteur n'était pas autorisé, lors de l'émanation de l'action, à accepter le legs pour le mineur. L'autorisation, il est vrai, donnée par le conseil de famille, à accepter pour le mineur la succession de son grand'père, n'a été donnée qu'après l'institution de l'action.

Ce défaut d'autorisation n'est pas considéré comme une nullité suffisante pour faire renvoyer l'action ; il suffit qu'elle soit donnée pendant l'instance.

Au mérite la question unique est de savoir si la propriété dont l'intimée est en possession est la même que celle qui a été exemptée par le contrat de mariage de l'effet du don mutuel. L'intimée croyant que cette clause doit encore avoir son effet s'est efforcée de nier que ce fut la même propriété et a prétendu que c'était une autre qu'elle n'a pu indiquer ; mais en dépit de ses dénégations il est clair que c'est la même. Par son acte de donation à John Martindale Curtis Martindale s'était réservé certains droits sa vie durant avec droit de retour de la propriété dans le cas où son fils le prédécéderait. La prétention que la propriété exclue serait celle qui a été achetée par John Martindale de la veuve Martindale est insoutenable, parce que Curtis Martindale n'a jamais eu de droits sur cette propriété qui ne lui a jamais appartenu et ne lui appartenait pas dans le temps du contrat de mariage. L'exclusion eut été une absurdité palpable, mais il avait des raisons d'exclure l'autre sur laquelle il n'avait qu'un droit de retour et que

1893

MARTINDALE v. POWERS.

Fournier J.

d'ailleurs il avait donnée à son fils. Il était raisonnable de l'exclure ne fut-ce que pour prévenir son épouse qu'elle ne devait pas compter sur cette propriété dans laquelle il vivait alors.

Il est évident par le témoignage de l'intimée qu'elle a parfaitement compris que la propriété qu'elle occupe est celle qui a été exclue du don mutuel par le contrat de mariage. Mais par suite des transactions faites entre Curtis et John Martindale cette clause d'exclusion n'a-t-elle pas cessé de s'appliquer à la propriété en question? Cette propriété avait d'abord été donnée par Curtis à son fils John Martindale le 1er septembre, 1867, à diverses charges et obligations et entre autres, à celle de faire vivre son père et de pourvoir à ses besoins.

Le jour même du contrat de mariage, 18 décembre, 1869, par acte passé par le notaire qui a fait le contrat de mariage, la donation fut modifiée en par le donataire consentant à payer à son père une rente de $200, au lieu des charges et obligations stipulées en la dite donation.

Jusqu'à présent la propriété réclamée est demeurée sujette à l'exclusion du don mutuel, mais en est-il de même après l'acte de résiliation de la dite donation?

Le 9 septembre, 1870, durant l'année qui a suivi le mariage, Curtis et son fils John Martindale ont, par acte authentique, résilié et annulé l'acte de donation de la susdite propriété et déclaré qu'il serait considéré annulé de même que s'il n'avait jamais existé et que la terre y désignée, savoir: la moitié sud du lot n° 4, dans le 4me rang des lots du township de Stanbridge était redevenue la propriété du dit Curtis Martindale, ses héritiers et ayant cause.

Cette résiliation fut faite pour bonne et valable considération, savoir: pour la somme de $900 pour indemniser le dit John Martindale des améliorations et réparations faites sur la dite propriété, sur laquelle

somme il reconnût et confessa avoir reçu celle de $200 dès avant l'exécution du dit acte, et quant à la balance de $700 elle fut déclarée payable en la manière stipulée au dit acte, avec hypothèque sur la propriété indiquée au dit acte.

Par cet acte de résiliation Curtis Martindale a obtenu un titre complet et parfait de la dite propriété qu'il avait d'abord donnée à son fils et dans laquelle il ne s'était réservé qu'un droit de retour au cas où son fils le prédécèderait. Ayant acquis un droit absolu à la dite propriété pendant la durée du mariage, cette propriété est partant devenue sujette à l'effet de la clause du don mutuel qui s'étend à toutes les propriétés mobilières ou immobilières qui pourraient être acquises par les conjoints pendant la durée de leur mariage.

L'exclusion a donc cessé d'exister et la propriété doit être considérée comme une nouvelle acquisition faite par Curtis pendant le mariage et se trouve partant sujette au don mutuel.

Il est vrai cependant que la femme n'a droit à ces propriétés que jusqu'à concurrence du montant de $5,000 qui forme le don mutuel. Mais comme il n'a pas été fait d'inventaire il n'est pas possible de décider si les propriétés dont l'intimée est en possession valent plus que le montant du don mutuel. Il n'a été fait aucune preuve pour établir ce fait. Le demandeur *ès-qualité* avant d'exercer son action aurait dû plutôt faire faire inventaire. Il aurait alors pu constater si l'intimée avait en sa possession plus que la somme à elle due, et la cour aurait pu adjuger en conséquence ; mais dans l'état où est la cause la cour, en lui accordant ses conclusions, courrait le risque de déposséder inutilement l'intimée, à laquelle, probablement, après inventaire, il faudrait restituer les mêmes propriétés.

Par tous ces motifs je suis d'avis que l'appel doit être renvoyé et l'action renvoyée avec dépens.

1893

MARTINDALE v. POWERS.

Taschereau J.

TASCHEREAU J.—The questions raised by the respondent as to the status of the appellant, and as to the want of authority of the appellant's tutor to accept the legacy in question, have been determined against her by both courts below, and relate to questions of practice and pleading upon which we, as a general rule, do not interfere with the rulings of the provincial courts. I would, moreover, add in this case that the respondent's contentions on these two points are unfounded. As to the proof of appellant's status, by the pleadings the only fact put in issue and specially denied by the respondent is the identity of the farm reserved in the marriage contract from the operation of the *don mutuel à cause de mort* therein contained, with the farm left by the late Curtis Martindale at his death, and sought to be recovered in this cause by appellant.

Now, the qualities and status of the appellant and of the minor child, James Curtis Martindale, as well as the defendant herself, as mentioned and described in the writ of summons, and all the other allegations of the appellant's declaration, not having been specially denied are deemed by law to be admitted by defendant.

As to the acceptation by the tutor of the legacy in question with the authorization of the family council I deem it quite sufficient, if it was necessary at all, though made *pendente lite.* Demolombe (1) is explicit on this point:

> Le tuteur est le mandataire général du mineur, et il a qualité pour agir en son nom toutes les fois qu'il est de l'intérêt du mineur qu'on agisse. Les formalités et les conditions auxquelles la loi a soumis ce mandat ont été introduites dans le seul intérêt du mineur et elles ne doivent pas être retournées contre lui. Elles ne concernent pas les tiers ; ceux-ci sans doute sont fondés à opposer au tuteur une fin de non-recevoir résultant du défaut d'autorisation ; ils sont fondés à refuser d'aller plus loin et d'engager la lutte judiciaire, mais voilà tout. La mesure de leur intérêt est la mesure de leur droit ; et il suffira au

(1) Nos. 687 et 715.

tuteur pour détruire toute objection de la part des tiers d'obtenir du tribunal un délai afin de se procurer l'autorisation du conseil de famille.

Mais l'autorisation même postérieure effacerait la nullité ou plutôt l'irrégularité des procédures antérieurement faites.

I am clear, with the two courts below, that the respondent cannot have the appellant's action dismissed upon these two grounds.

Upon the real merits of the case I am of opinion that the Superior Court's judgment which maintained the appellant's action was right, and that the Court of Appeal was in error in reversing it.

The point taken by the respondent upon the identity of the farm claimed by the appellant with the farm excluded from the *don mutuel* in the marriage contract seems to me untenable. That Curtis Martindale could have intended to exclude the Whitman farm from this donation is a proposition that cannot seriously be contended for. Why exclude that Whitman farm? It never belonged to him; he had no claim whatever to it. I have no doubt that, as found by the Superior Court, the farm excluded is the farm now claimed. And the Court of Appeal in its formal judgment does not find the contrary, but bases its conclusion to dismiss the appellant's action upon the ground that as the farm now claimed by the appellant reverted back to his father by the restitution of September 9th, 1870, which the court holds is an onerous title, therefore the exception in the marriage contract has no effect, and the farm consequently passed to the respondent. I cannot assent to that proposition. That is reading out of the marriage contract the exception or reservation it makes in clear terms. The respondent may possibly have some rights against her husband's succession. That we have not here to determine, one way or the other. But she has, in my opinion, no title to the home farm itself. A farm was clearly excluded from

1893

MARTIN-DALE v. POWERS.

Taschereau J.

her *don mutuel.* That farm, I say, is and cannot be any other but the home farm. Now this home farm clearly belonged to Curtis Martindale at his death, and consequently by his will passed to his son, the appellant. I have no doubt on the case, and would allow the appeal.

GWYNNE J.—By the deed of September, 1867, Curtis Martindale gave and granted, with warranty, to his son, John Martindale, the S. ½ of lot no. 4, in the 4th range of the township of Stanbridge, together with all the live stock and implements of husbandry and all other personal property enumerated in a schedule annexed to the deed, to have and to hold unto and to the sole use of the said John Martindale, his heirs and assigns, forever, subject to certain reservations and conditions therein contained; and first and expressly upon condition that the said John Martindale should till and cultivate the said tract of land during the natural life of the said Curtis Martindale, and account for and deliver to the said Curtis the equal undivided half of all the crops which should be raised and gotten from the said land, and one equal moiety of all the butter and cheese that might be made thereon, and one equal moiety also of all the live stock that might be raised from the stock mentioned in the said schedule, yearly and every year during the lifetime of the said Curtis; and upon condition further that in addition to the above, the said John Martindale should support and maintain the said Curtis as well in sickness as in health, in all things becoming his rank and condition for and during his natural life; and it was agreed that the said Curtis and the said John should bear and pay, in equal shares, all taxes and assessments on the said property, and also all costs and charges for keeping the implements of husbandry on the farm in good order;

and that each should supply one half of the seed necessary for the cultivation of the said farm from year to year. To the fulfilment of all of the above conditions upon the part of the said John, to be performed during the lifetime of the said Curtis, the said John bound himself if he should survive the said Curtis, but it was thereby provided, covenanted and agreed by the respective parties to the said deed, that in case of the death of the said John happening before the death of the said Curtis, the widow or heirs of the said John should not be held to the performance of anything therein contained towards the said Curtis, and that the said tract of land, together with the personal property mentioned in the said schedule, should revert to and become the property of the said Curtis, save and except such buildings as the said John might have erected on the said land, which buildings or improvements should belong to the heirs or legal representatives of the said John Martindale. During the year 1868 John Martindale worked the farm under the terms of the above deed, and lived in the dwelling-house upon the farm with his father, who by the deed had reserved to himself during his life certain rooms therein. In the year 1869, and prior to the month of September in that year, John Martindale, together with his wife, moved to a neighbouring lot in an adjoining concession on lot 5, in the 5th range of lots in Stanbridge, which he had purchased from his aunt, a Mrs. Whitman. Upon the 6th of September, 1869, he entered into an agreement with one Curtis Murray, with the consent of the said Curtis Martindale, testified by the latter being a party to and signing the said agreement by which it was agreed as follows:—

John Martindale, by and with the consent of his father, Curtis Martindale, does hereby agree to let his farm, known as the south half of lot No. 4, in the fourth range of lots, in the township of Stanbridge,

1893

MARTINDALE v. POWERS.

Gwynne J.

to Certes Murray, to work and carry on at the halves, for the term of two years, commencing on the 10th day of March, in the year of our Lord 1870, and to continue two years therefrom, unless one of the said parties should be dissatisfied, in which case said Murray is to leave at the end of one year. Said Martindale agrees to put on said farm eight cows, but reserves one of said cows for the use of his father, if he requires it, in which case he, the said John Martindale, agrees to pay the said Murray one half the expense of keeping said cow. Also he agrees to put on five sheep; said Martindale agrees to put on two brood mares, to be used on the farm, with one double wagon and double harness, together with all the necessary implements of husbandry for carrying on the said farm. Said John Martindale agrees to let said Murray have the use, for the first year, of one half of fifty acres of land which he owns on lot No. 5, in the 5th range of lots in Stanbridge, for pasturing two horses and building a portion of the line fence on the said piece of land; said Martindale reserves a newly stocked piece of meadow in the south field, said meadow supposed to contain three or more acres for his father to mow, for his own use, if he chose to do so. He reserves also the north part of the horse barn (the part for putting the hay in), to put his hay, and the south part of the stable for his colt; he reserves the south part of the dwelling-house, known as the old part, for his father. Said John Martindale and Murray are each to have two yearling heifers pastured on the farm the first summer, and if said Murray keeps the farm more than one year the two heifers belonging to Martindale are to be wintered on the farm with the cows if they are with calf, but not otherwise. If the brood mares should have colts the first year they are to belong to Curtis Martindale and John Martindale, but if they should raise colts the second year they are half to belong to Murray and half to Curtis Martindale. Each of the said parties to furnish one half of the seed sown or planted on the said farm, together with one half of the salt for the stock and dairy, and one half of the butter tubs. Said Murray is to put on one cow for his family use, which is to be pastured on the farm, but not wintered. Said Murray agrees to carry on said farm in a good husbandlike manner, and to deliver to Curtis Martindale one equal half of all crops grown and harvested on said farm by measure or weight, together with one half of the butter, pork, and all other products of the farm and dairy. It is agreed between the said parties if the said farm does not produce sufficient hay to winter the stock of the farm, that Curtis Martindale shall reduce the stock by selling such stock as he may think proper. Said Murray agrees that at whatever time he leaves said farm he will leave the buildings and all tools of the farm in as good condition as he finds them, save and except the natural wear of said pro-

perty. Each of the said parties is to pay one half of all the taxes for which said farm is liable during the two years, and keeping the farming tools in order. Said Murray agrees to move on to the farm on the twentieth day of September, in the year of our Lord, 1869, and to take charge of the stock and dairy, and to have one half of the profits of the dairy for taking care of the stock up to the 10th day of March, in the year of our Lord, one thousand eight hundred and seventy.

Each of the said parties John Martindale, Curtis Martindale and Murray signed that agreement. Now it is to be observed that this agreement does not divest John Martindale of the estate in the lot vested in him by the deed of September, 1867. The agreement of September, 1869, only modifies the provisions of the former agreement as to the personal working of the farm by John Martindale authorizing him to substitute Murray in his place for the limited period and to the extent and upon the terms prescribed in the agreement without in any manner prejudicing John Martindale's title and rights under the deed of September, 1867. It might be that before the 10th of March, 1870, John Martindale and Murray might mutually agree to put an end to their agreement, in which case equally as after the expiration of the two years or one year, as the case may be, as mentioned in the agreement, John Martindale's liability to Curtis for the working of the farm under the deed of September, 1867, would continue in full force. In the interval between the 6th September, 1869, and 10th March, 1870, the only clause of the agreement of the 6th September, 1869, in actual operation was the last whereby Murray agreed to move on to the farm on the 20th September, for the purposes in that clause mentioned, and his possession under that clause until the 10th March, 1870, would be only in right of, and as the servant or substitute of, John Martindale in whom the estate in the property was still vested by the deed of September, 1867. Now in

1893

MARTINDALE v. POWERS.

Gwynne J.

this state of things the instrument of the 11th December, 1869, by and between John and Curtis Martindale was executed, and thereby after reciting the deed of donation of September, 1867, and the terms therein contained upon which John Martindale had bound and obliged himself to till and cultivate the farm during the life of Curtis, and after reciting further that,

> The said Curtis Martindale hath proposed and offered unto the said John Martindale to occupy and cultivate the said tract of land and to take management of the stock belonging to the same with the horses that are mentioned in the said schedule (annexed to the deed of donation) and that said John should pay unto the said Curtis Martindale yearly, and every year so long as he the said Curtis Martindale shall live, the sum of $200 per annum, in lieu of all support and maintenance as well as payment of taxes and all other obligations expressed to be done and performed by the said John Martindale towards the said Curtis Martindale, in and by the said foregoing deed of donation : And in case the said John Martindale should at any time hereafter be called upon to cultivate the said tract of land and farm mentioned in the said foregoing deed of donation, the said Curtis Martindale doth hereby agree to feed the cows and horses reserved in the said foregoing deed of donation out of the undivided crops raised upon the said farm, and that the said John Martindale be exonerated from the care of the said cows and horses, in case he may at any time hereafter be called upon to resume the cultivation of the said tract of land and farm mentioned and described in the said foregoing deed of donation.

To all which the said John Martindale did thereby consent and agree to accept the said conditions. It was witnessed that the said John Martindale did thereby promise and oblige himself to pay unto the said Curtis Martindale, for and during his natural life, the sum of $200 per annum for each and every year in lieu of support and maintenance as mentioned in the foregoing deed of donation, and that the first such annual payments should become due at the expiration of one year from the day of the date thereof, and from thence annually during the natural life of the said Curtis Martindale, any thing in the said foregoing deed of

donation contained to the contrary in anywise notwithstanding. The deed also contained the following clause :—

> And for surety for the payment of the said sum of $200 per annum, the said John Martindale doth hereby specially mortgage and hypothecate the west half of lot No. 4, in the 4th range of Stanbridge with all the buildings thereon.

There can I think be no possible doubt that the lot here intended to be mortgaged is the lot conveyed to John Martindale by the said deed of donation and that the word "west" half was inserted by inadvertence for the word "south" half. The west half would be composed of the north-west and south-west quarters of which latter John was possessed as part of the south half conveyed to him by the deed of donation; to the north-west quarter he had no title, and it is obvious that he intended to mortgage half of lot 4, in the 4th range, which therefore must be the south half to which alone he had title. Now in relation to this instrument it is to be observed that it does not divest John Martindale of the estate in the farm vested in him by the deed of donation. It merely suspends and modifies certain of the conditions and obligations imposed by that deed upon John in connection with his tilling and cultivating the farm and taking care of the live stock, &c., &c., &c. It does not profess to annul these obligations wholly, but merely to suspend and modify them, for the instrument expressly contemplates that John might at some future period be required to resume those obligations, in which event certain modifications are agreed upon, and it provides for the annual payment by John to Curtis of $200 in lieu of and substitution for the maintenance and support in sickness and in health, which, by the deed of donation John was obliged to render to his father over and above his share in the crops raised upon the farm and in the produce and

1893

MARTINDALE v. POWERS.

Gwynne J.

increase of the live stock, &c., &c., &c. John's right to erect buildings and to make improvements upon the farm is unaffected, in fact his legal estate as the proprietor of the farm is untouched, save in this that Curtis accepts from John a mortgage upon the farm in security for the payment by John to Curtis during his life of the said annuity of $200.

Upon the same 11th December, 1869, but after the execution of the above instrument of that date, the marriage contract under consideration was prepared by and executed before the same notary who had prepared the above instrument of that date between John and Curtis Martindale and the said deed of donation. The clause in the marriage contract under which the question in this case arises is as follows:—

But it is however hereby expressly declared, stipulated, covenanted and agreed by and between the said parties that whatever property the said Curtis Martindale and Susan Marie Powers now have or that they shall or may hereafter have, both real and personal shall, upon the decease of one of them, belong to the survivor of them for and to the extent of $5,000, current money of this province, in sole and absolute property forever (save and except therefrom the farm and personal property thereon now in the occupancy of John Martindale of the said township of Stanbridge, yeoman, one of the sons of the said Curtis Martindale, which said property both real and personal is not included nor intended to be included as forming any part or parcel of the said sum of $5,000, any thing herein contained to the contrary in anywise notwithstanding.

The contention of the respondent is that the land mentioned in the deed of donation cannot be the farm mentioned in the clause of exception and reservation in the marriage contract, upon the suggestion that it was not then "in the occupancy of John Martindale," and so did not conform to the description of the farm mentioned in the marriage contract—that the lot which John was in possession of and living on in the 5th range was the only one in his occupancy, and that it alone answered the description of the farm in the

marriage contract; that this must be regarded as the farm intended in the exception and reservation in the marriage contract, or that the exception and reservation must be void for uncertainty. If we should hold that the lot of land in the 5th range, which John had purchased from his aunt, Mrs. Whitman, was the lot of land or farm which, by the marriage contract, was excepted and reserved from the operation thereof, we must construe the exception as being of property in which Curtis Martindale had then no interest whatever, nor, so far as appears, any contemplation of acquiring, or that he might acquire an interest therein at any future period. So construed, the exception and reservation of that lot would be utterly senseless. It is not possible, therefore, to construe the language used as referring to that piece of land, and as the evidence shows that Curtis had no interest in any land other than that which he had in the south half of lot no. 4, in the 4th range, in virtue of the instruments of the 1st September, 1867, and the 6th September and 11th December, 1869, which latter was executed immediately before the execution of the marriage contract, the exception must be absolutely void unless it can apply to that lot of land. The question, therefore, simply is:—Is the description given of the farm intended under the words "now in the occupancy of John Martindale" so inapplicable to the south half of the said lot no. 4 that it cannot apply to the only farm to which it could reasonably apply? And, in my opinion, it clearly is not, for upon the 11th day of December, 1869, when the marriage contract was executed, it is clear that John was the proprietor of the said south half lot, subject to the mortgage thereon which upon that day he executed in favour of Curtis in security for the annuity of $200 thereby made payable to Curtis during his life, and the possession which Murray then had of the farm

1893

MARTINDALE v. POWERS.

Gwynne J.

1893

MARTINDALE v. POWERS.

Gwynne J.

under the agreement of the 6th September, 1869, being under John, and for John, and as his substitute, with the consent of Curtis, to fulfil the stipulations and obligations which had been incurred by John in the deed of donation, the draughtsman of the marriage contract, with perfect propriety, might refer to the farm as then in the occupancy of John, who was the proprietor of the land in title, and in occupation of it through his servant and substitute, Murray. I am of opinion, therefore, that there can be no doubt that the farm referred to in the marriage contract as excepted and reserved from the operation thereof is the farm mentioned in the deed of donation, which was not at all inaccurately referred to as being, on the 11th December, 1869, in the occupancy of John. Neither can there be, in my opinion, any doubt that the land so designated must still be held to be excepted and reserved from the operation of the marriage contract. At the time of the execution of that contract Curtis Martindale could only have acquired the legal estate in and title to that piece of land by one or other of three ways, namely:—1st. By foreclosure of the mortgage for non-payment of the $200 per annum, in security for which it was executed; or, 2nd. by surviving John; or, 3rd. by resiliation of the deed of donation by mutual agreement, which is the mode by which Curtis Martindale, in December, 1870, did become seized of the land. Now, there is nothing in the marriage contract qualifying the mode by which Curtis should acquire title to the farm in order that it should be excepted from the operation of the marriage contract; and it cannot be maintained as a proposition of law that the exception was only to prevail in the event of Curtis acquiring title by survivorship. What is excepted is the farm itself if Curtis should be seized of it at the time of his death, regardless of the mode by which Curtis might

acquire title to it. The fact that by the deed of resiliation Curtis covenanted to pay John $900 for improvements cannot operate to prevent the exception having effect in accordance with its terms. That sum would seem to be payable to John's estate if the title of Curtis had accrued by survivorship. But however that may be, effect must be given to the exception and reservation of the farm from the operation of the marriage contract under the circumstances in which the title of Curtis thereto has accrued equally as if his title had accrued by foreclosure of the mortgage or by his surviving John.

In all other respects I concur in the judgment of the Court of Queen's Bench at Montreal, as delivered by the learned Chief Justice of that court. This appeal must, therefore, in my opinion, be allowed with costs, and the judgment of the Superior Court restored.

As to the evidence of Mr. Rice to the effect that—

> On the morning of the day on which the marriage contract was made Curtis Martindale came to him and said he had taken his farm back from his son John that morning so that he could give the defendant security upon it for her contract; that he was going to give her a contract for $5,000, and give her security for it upon the property he had just taken back from his son John.

Besides that this evidence was inadmissible, Mr. Rice would seem to have been labouring under a misconception of the conversation which he said had taken place eighteen years previously, for it is plain that Curtis had not taken back the farm from his son on the morning of the day on which the marriage contract was made, but that, on the contrary, he had only suspended and modified the stipulations and conditions in the deed of donation as to John's tilling and cultivating the farm, and had accepted a mortgage on the farm executed by John to secure the $200 per annum thereby agreed to be paid to Curtis in lieu of and substitution for maintenance. It was not until the month

1893

MARTIN-DALE v. POWERS.

Gwynne J.

of September, 1870, when the deed of resiliation was executed, that Curtis took back the farm. These observations, however, have no bearing on the case, except in answer to an imputation of bad faith in Curtis in his having, while professing to intend to give the defendant security upon the farm as a marriage portion, in point of fact excepted and reserved that farm from the operation of the contract.

SEDGEWICK J. concurred with Fournier J.

Appeal dismissed with costs.

Solicitors for appellants: *Racicot & Amyrauld.*

Solicitors for respondent: *Baker & Martin.*