WILLIAM F. POWELL (DEFENDANT)...APPELLANT ;

AND

THOMAS J WATTERS (PLAINTIFF)...RESPONDENT.

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*Oct. 12.

Dec. 9.

ON APPEAL FROM THE SUPERIOR COURT OF LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Title to lands—Deed, form of—Signature by a cross—19 *V. c.* 15 *s.* 4 (*Can.*) *—Registry laws—Litigious rights — Acquiescence — Evidence — Commencement of proof—Warrantor impeaching title—Arts.* 1025, 1027, 1472, 1480, 1487, 1582, 1583, 2134, 2137 *C. C.*

Where the registered owner of lands was present but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof.

The conveyance by an heir at law of real estate which had been already granted by his father during his lifetime is an absolute nullity and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands and whose title is registered.

Writings under private seal which have been signed by the parties but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence.

The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given.

Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possesssion and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the judgment of the Superior Court of Lower Canada sitting in Review at Montreal (1), which affirmed the judgment of the Superior Court, District of Ottawa, maintaining the plaintiff's action with costs.

The plaintiff claimed title and possession of certain mining rights and also 40 tons of mica, excavated by the defendant and lying at the pit's mouth. The defendant alleged that plaintiff was a purchaser in bad faith of litigious rights; that defendant owned by good title and by prescriptive possession; that the deeds on which plaintiff relied were absolute nullities, and that the defendant held in good faith, and, if evicted, was entitled to retain the mica extracted, as representing fruits and revenues, on paying a rate per ton. A last plea made the usual claim for improvements made under mistake of title.

The defence of litigious rights was accompanied by a tender and deposit of $1,000, the amount paid by plaintiff, and prayed that defendant might be subrogated in all his rights. This plea was dismissed and by the final judgment the trial court declared plaintiff owner of the mining rights and entitled to possession of the mica, on paying the cost of output.

Both parties claimed title through the late Maurice Foley, the Crown patentee. Plaintiff relied on the following chain of title:—1. Original indenture under private seals before one witness, executed 14th November, 1872, at Hull, Province of Quebec, and registered on the 16th of the same month, whereby Maurice Foley leased to T. P. French the mining rights in question for 99 years. The consideration was a yearly payment of one shilling and a royalty of six per cent on the output. The signatures of the parties were attacked

(1) Q. R. 12 S. C. 350.

that of Maurice Foley being made with a (×) cross:—2. An indenture under private seals before one witness, executed 25th November, 1873 (registered 31st December, 1873), at Ottawa, in Ontario, whereby Maurice Foley leased the same mining rights for ninety-nine years on somewhat modified terms to T. P. French. The original of this document was lost, but the signatures were also attacked, that of Maurice Foley appearing to have been made with a (×) cross:—3. Maurice Foley died on the 16th of April, 1874, Michael Foley being his sole heir; T. P. French died on the 18th November, 1890, and his son and daughter succeeded to his title:—4. An original indenture, under private seals, in presence of two witnesses, executed October 28th, 1892, at Toronto and Ottawa, registered 28th September, 1893, whereby the heirs French sold all their rights to plaintiff.

The defendant relied upon, 1—An indenture of sale under private seals before one witness, from Michael Foley as sole representative of his father, conveying the same mineral rights to Pierce Mansfield, dated 9th January, 1875, registered 1st February, 1875, the original also said to be lost; and 2—An indenture, under private seals, dated 26th September, 1892, at Ottawa, whereby Pierce Mansfield sold said rights to defendant, signed and sealed in the presence of two witnesses, and registered in due course.

The farm on which the mines exist always remained the property and residence of the Foley family, who only parted with the minerals, but neither Maurice nor his son Michael ever prospected for minerals subsequent to the purchase by T. P. French. French worked a baryta mine in 1874, 1875, and 1877, and claimed the mineral rights from 1872 until his death in 1892, and this active exercise of title was continued by his heirs. In 1878 there appeared to have

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been a contract made whereby Michael Foley agreed with T. P. French to get out 100 tons of phosphate. The defendant's vendors do not appear to have exercised continuous or even isolated acts of ownership, but there was some proof of an indefinite character that T. P. French was present at the passing of the deed by Michael Foley to Mansfield, although it does not appear that he assented to the deed. On the other hand, at a later date French appeared to have warned Mansfield not to buy from Michael Foley, as the mines were not his to sell. Defendant however took possession of the mines and got out the mica which was seized on the institution of the plaintiff's action.

The $1,000 deposited with the plea as to purchase of litigious rights was seized while in court for costs due the plaintiff's attorney (*par distraction des frais*), and a portion paid to him under an order of the court.

Geoffrion Q.C. for the appellant. The plaintiff's title rests on two indentures which do not bear the signature of the vendor, but only his alleged cross, and executed in presence of but one witness. These deeds do not constitute a *commencement de preuve par ecrit*, capable of supplement by parol evidence of identification or execution; they are absolute nullities incapable of legal registration which, having nevertheless been registered, were properly ignored by defendant. Arts. 2134, 2137 C. C.; C. S. L. C. c. 37 ss. 56–58; *McKenzie* v. *Jolin* (1); *Neveu* v. *de Bleury* (2); *Querette dit Latulippe* v. *Bernard* (3). Cross-marks are not valid as signatures in deeds of land. The defendant's open and adverse possession was notice of the litigious character of the claim of French's heirs which plaintiff bought at his risk, and the latter at best can demand only restitution of the

(1) 5 L. C. R. 64.
(2) 6 L. C. Jur. 151.
(3) 1 Dor. Q. B. 69.

price tendered with defendant's plea. Arts. 1582 & 1583 C. C. *Brady* v. *Stewart* (1). The *vileté de prix*, shows that the plaintiff was speculating on the disputed title, trusting by litigation to secure a valuable mine with an output, in mica alone, of several thousand dollars per year for a few hundred dollars risked to obtain a colourable title. French abandoned his possession to Mansfield and acquiesced in the deed by Michael Foley to him, tacitly ratifying it by his presence at its execution without making objections.

Lafleur and *Aylen* for the respondent. There is no law in the province of Quebec requiring a document, otherwise available as a private writing or as a commencement of proof in writing, to disclose the presence of two subscribing witnesses, on pain of nullity. The statute, 19 V. c. 15, s. 4 (Can.) authorizes signatures of illiterate persons by a cross-mark. The *lex rei sitæ* rules, art. 6 C. C. See also *Trudeau* v. *Vincent* (2), and cases there collected in the judgment of Mr. Justice Davidson. The indenture of the 14th of November, 1872, between Maurice Foley and the late T. P. French, followed by registration, and by effective acts of possession and ownership, was a commencement of proof in writing, and is fully supplemented by the evidence. Arts. 1225, 1233 C. C. The seizin of heirs operates by law alone in the province of Quebec (3).

The appellant and his vendors had constructive notice of a prior title on file in the registry office at the time of their purchase, as well as actual notice of French's title. They were in bad faith from the beginning and no indemnity for improvements can be allowed. They were usurpers holding by violence; trespassers against the true owner of the mines. The

(1) 15 Can. S. C. R. 82. (2) Q. R. 1 S. C. 231.
(3) Arts. 606, 607 C. C.

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plea of litigious rights is based on defendant's own bad faith and violence, and there is no longer any deposit under the control of the court available to support the tender. The title was not in question in any pending litigation when plaintiff purchased. The trespasses and usurption by defendant and his vendors cannot form the basis of a plea setting up a purchase of litigious rights. Arts. 1583, 1584 C. C. *Chartrand* v. *City of Sorel* (1). After issue had been joined the appellant asked that the plea of litigious rights should be first heard. His motion was granted, a special trial had and the plea was dismissed on the ground that the title was clear, being only two removes from the Crown grant. The court ordered that the evidence taken at that trial should apply to the whole case. Other witnesses were then examined and the case heard upon the merits, the judgment on the plea of litigious rights approved and the action maintained.

The judgment of the court was delivered by

TASCHEREAU J.—The controversy in this case is upon the title to certain mines and minerals in the Township of Hull. The Superior Court and the Court of Review both held that the plaintiff, present respondent, is the rightful owner. The defendant now appeals.

The respondent's declaration alleges that by deed executed and registered on the 28th day of October, one thousand eight hundred and ninety-two, John McLean French and Anna Montague French sold to him, the said respondent, all the mines and minerals in question of which the said John McLean French and Anna Montague French had inherited from the late Thomas Patrick French, their father, who had acquired them by two deeds, one of the fourteenth

(1) Q. R. 7 S. C. 337.

day of November, 1872, and one of the 25th November, 1873, (registered respectively 16th November, 1872, and 31st December, 1873,) from Maurice Foley, the Crown's grantee. He then alleges possession under these conveyances, and trespass by appellant with usual conclusions *au pétitoire*.

The appellant met this action, first by a plea of litigious rights with tender and deposit, and second by a plea claiming title under a sale to him of 26th September, 1892, registered 4th October, 1892, by one Mansfield, who had purchased on 9th January, 1875, (registered on 1st February, 1875) from Michael Foley, the universal legatee of Maurice Foley, who died in 1874, the same Maurice Foley who had sold to French. These deeds of both parties are all in evidence or admitted.

It is found by the two courts below that up to his death in 1890, from the time of his purchase from Maurice Foley in 1872, or soon thereafter Thomas Patrick French had been in open and undisturbed possession of these mines; that his heirs had continued in possession up to appellant's trespasses in 1892; that neither Michael Foley nor Mansfield were ever in possession as owners, and that the pretended sale by said Michael Foley to said Mansfield in 1875 had never been acted upon. There is ample evidence to support these findings, and we cannot be expected here to reverse the concurrent determination of the two courts below thereupon, though the evidence is not all one way. I see that it is proved by Michael Foley, and not contradicted by Mansfield, that there was no consideration, nothing whatever, paid to him by Mansfield for that sale of 1875. This is strong corroborative evidence that the parties thereto did not themselves consider their dealing as a serious sale, or as a sale at all. Mansfield would then have got these

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mines as a gift, an assertion which I could not believe. French's presence at that dealing, whatever name be given to it, and whatever may have been the reasons for it in the parties' mind, is not by itself alone, unexplained though it be, evidence that he assented to it. There is direct, though negative, evidence to the contrary in the very fact that he was not a party to it. He may very well be assumed to have been asked to agree to it and to have refused, since he was, to the knowledge of the parties (presumed in law, if not actually), the registered owner, and he continued to claim ownership as he had always done since 1872, and remained in possession. That is far from an acquiescence, or a ratification which would entail a renunciation to, or a relinquishment of his rights, which, as held in the courts below, it would be unlawful to presume.

Then the sale by Maurice to French, leaving aside the registry laws, was perfectly valid without any writing at all, even as to third parties. Arts. 1025, 1027, 1472 C. C.; Sirey, Tables Dec. [1881-1890] "Vente," nos. 2, 4, 21, 80 to 84; Sirey, Code Ann. sous art. 1582, nos. 9, 60, 98 *et seq.* That being so, how could Michael Foley sell or cede to Mansfield that which he never had? His father, Maurice, cannot have left in his succession, or have bequeathed, what he had parted with in his lifetime. Michael Foley, then, sold what clearly did not belong to him. And such a sale is, in law, not only voidable, but void, radically null, of a nullity of *non esse*. Art. 1487 C. C. This is, no doubt, as to third parties, subject to the registry laws, art. 1480 C. C. But these do not add to Mansfield's title, as the sale to French is registered before his purchase.

If it was the land itself that had been sold by Maurice to French, and the sale registered, could Michael have hypothecated it in 1875 to Mansfield?

Could Mansfield, if it had been done, have brought an hypothecary action against French? It seems to me impossible to contend that any such action could have been maintained. This is the same question, or very nearly so, in another form, but I think it helps to show how groundless are appellant's pretensions to a title from Mansfield. Another form of testing appellant's rights: If Mansfield had bought this lot himself from Maurice or from Michael, would not the duly registered charge upon it created in favour of French, have remained in full force and effect? Would he not have acquired subject to French's duly registered rights?

Further, as at the time of this pretended sale in 1875 by Michael Foley to Mansfield, French was the registered owner. Article 2089 C.C., as to preference from priority of registration, has full application. Article 2098 C. C. also necessarily implies that when a deed conveying an immovable is registered, this conveyance may be invoked against any third party who has purchased the same from the same vendor. Now here, French and Mansfield derive their titles from the same person, for, in law, Maurice and Michael are one and the same person. Michael is, by the law of the province, the continuation of Maurice's personality, and, as such, the *garant* of French. If French and Michael Foley, or French and Mansfield, had gone to law about this title, it seems to me unquestionable that French's claim would have prevailed. And if so, the respondent, who holds under French, has a good title, and, *a converso*, the appellant has no title, because Mansfield had none. *Girault* v. *Zuntz* (1), Verdier, Transc. Hyp. nos. 306, 307, 308, 323, 326, 364, 365.

1) 15 La. An. 684.

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As to appellant's technical objections to the sales by Maurice Foley to French, they should have been specially pleaded, and it is because they were not, we must assume, that they are not noticed in the judgment of the Superior Court. However, they were noticed in the court appealed from to be dismissed, after an elaborate review by Davidson J., for the court, of the questions raised thereby. We do not think it necessary to add anything to it. It would require a very strong case indeed, one stronger than the appellant has been able to make, to justify us in upsetting a well settled jurisprudence, and one upon which it is obvious the validity of a large number of titles must depend. If not by themselves complete, these private writings certainly amount, by the law of the Province, to a *commencement de preuve par écrit*, as held by the Court of Review, and that is sufficient, upon the further evidence adduced, to uphold the sale to French. His vendor's legal representative admits the sale, and the registration with the possession completes the evidence.

If it had been necessary to pass upon the second of French's purchases from Maurice Foley, that of 25th November, 1873, of which the original writing is lost, I would probably have found more legality in the proof of it by the copy from the Registry Office, than the Court of Review seems to have. Arts. 1218, 1233 C. C. nos. 6, 7; Sirey, Code Ann. art. 1325, nos. 52, 54, 60, 77. However, both courts have rested the respondent's title upon the sale of the 14th November, 1872, and that being sufficient to dispose of the controversy between the parties, it is unnecessary for us to go further than the courts below have done.

Another ground perhaps upon which these objections to the sales by Maurice Foley to French might be disposed of, is that they are not open to the appel-

lant, because he holds under Michael Foley through Mansfield, and Michael Foley is, as representative of Maurice, French's *garant*, and respondent's *arrière garant*. Michael could not, any more than Maurice could have done in his lifetime, be admitted to invoke irregularities of a title of which he is the *garant*. "*Quem de evictione tenet actio eumdem agentem repellit exceptio.*" Pothier, Vante, 165 *et seq.* French and the respondent, if attacked by him on that ground, would meet him by the demand of a valid deed, if one was necessary. Can the appellant be in a better position than his vendor? *Non debeo melioris conditionis esse quam actor meus a quo jus ad me transiit.*

When sued *en garantie* by appellant (as he has been), could Michael Foley plead that French's purchase from Maurice of which he, Michael, is the *garant*, is not valid because of the irregularities upon which these objections are based? Or, take up the *fait et cause* of appellant, and plead these irregularities in answer to the respondent's action? Compare Troplong, Hypotheques nos. 524, 527, 530.

As to the plea of litigious rights, it does not seem to me to be a serious one, and it was rightly dismissed three times in the courts below. I am not sure if it comes up at all upon this appeal. To call Judge Gill's judgment rejecting it an interlocutory judgment seems to be a misapplication of that term. Was that not a final judgment on that issue? A final judgment upon the merits of that plea? If the court had maintained the plea, that would clearly have been a final judgment. Why a judgment dismissing it is not as final as to that issue is not evident to me. This is not the ordinary case of an interlocutory judgment. If it was given on a part only of the issues in the case it is due to a singular intervertion of the appellant's pleas. Instead of pleading to the merits of the action first, and his

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plea of litigious rights as a subsidiary one to be adjudicated upon only if he did not obtain the dismissal of the action upon his first pleas, he pleaded litigious rights first, and his answers to the merits of the action as subsidiary pleas. Then, upon his special application, by order of the court, the issue on the plea of litigious rights was first tried. No doubt, the respondant cannot complain if his adversary, diffident perhaps of his chances to get the action dismissed, was willing to pay him one thousand dollars without entering on the merits. But I do not see that by applying for a separate trial on this plea, the appellant got the right not to treat the judgment upon it as a final one on that issue, when adverse to him. After that judgment, the case went on to trial on the action, and that the same court could be asked again to pass upon an issue it had already tried and determined would certainly seem an anomaly. And if that could not be done, the merit of that plea is not now before us. If the Superior Court had dismissed the respondent's action upon the merits would, upon an appeal by him, the judgment in his favour upon the plea of a litigious right have been reopened? However, assuming the point to be still open to the appellant, there is nothing in it. He cannot be admitted to controvert a right theretofore uncontroverted, and upon the only ground of his own litigation, which, in law, is without any foundation, defeat the respondent's unquestionable rights. There was no controversy, no litigation spoken of, before the appellant's purchase from Mansfield. French's rights were neither uncertain and disputed, nor disputable, and they did not become uncertain, or disputed, nor disputable in law till the appellant disputed them in this case. It was he who bought for the purpose of litigation, as held by the Superior Court. His own purchase shows this by the fact that Mansfield, his

vendor, specially stipulated no warranty, and that he would not even be obliged to refund the price if appellant did not get the property.

According to appellant's theory, any trespasser might, by his sole act of trespass, hinder the sale of a property by one who has been in open and undisturbed possession as owner for ten, twenty, or more years. Then by Art. 1583, C. C. it is by the debtor that a right must be disputed or disputable to give it the litigious character necessary to oblige its assignee to surrender it. Is there any such thing in this case as a right disputed by the debtor? Has the law as to litigious rights any application, even if under the Quebec Code it applies to anything else than sales of debts and rights of action? Huc, Transmission des créances, nos. 615, 618.

I would hold this plea to be untenable Further, the deposit of $1,000 made with it is not now in court. The appellant, in his factum, says that it has been paid to the respondent himself for costs to which the appellant had been condemned. But that is an error, though I do not see that it would make any difference; it has been paid over to the third party, the *procureur distrayant*. 3 Baudry-Lacantinerie, Droit Civil, no. 650. However, this is without importance in this case. We are of opinion that the appeal must fail on the merits of both issues.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. R. Kenney.*

Solicitor for the respondent: *Henry Aylen.*