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*Nov. 2, 3.
*Dec. 10.

JAMES A. McNAUGHTON (PLAINTIFF) .... APPELLANT;

AND

MURDOCH IRVINE AND OTHER (DEFENDANTS) ..... } RESPONDENTS;

AND

S. M. ADAMS AND OTHERS ..... (MIS-EN-CAUSE)

APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Litigious rights—Retrait—Absolute tender—Conditional tender void —Arts. 1576, 1582, 1583, 1584 C.C.

The debtor wishing to exercise the *retrait* of litigious rights must make an unconditional tender of the amount owed to the buyer in payment of "the price and incidental expenses of the sale, with interest, etc." (Art. 1582 C.C.).

A tender of that amount by the debtor to the buyer so made that it would be paid to him upon his signing a deed of sale of the property acquired, is not valid within the terms of Art. 1582 C.C.

The sole effect of the *retrait* is that the debtor assumes the bargain (*le marché*) of the buyer of the litigious right, so that the debtor is merely substituted for and subrogated to the buyer; therefore, the buyer is not bound to sign a deed of sale, as, in doing so, he would subject himself to legal warranty of the rights sold (Art. 1576 C.C.).

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining the respondents' plea, by which they exercised the *retrait* of litigious rights in answer to appellant's action claiming ownership, and asking for the partition, of a certain property.—Appeal allowed with costs.

The material facts of the case and the questions in issue are fully stated in the judgment now reported.

St. Laurent K.C. for the appellant.
Kelly K.C. for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Court of King's Bench confirming, Mr. Justice Allard *dissentiente* and Mr. Justice Flynn *dubitante*, the judgment of the Superior Court, D'Auteuil J., which gave effect to the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

respondents plea of litigious rights and dismissed the appellant's action.

The facts which gave rise to this litigation are as follows:

David Kaine and his wife Sarah McDonald, it is alleged, were married in Ireland. They came to Canada and settled in Restigouche in the county of Bonaventure, Lower Canada, where their two children, David Kaine, whom I will call David Kaine, Jr., and Margaret Kaine, who subsequently married John McNaughton, were baptized, the former when aged nine months on the 13th of July, 1851, and the latter when aged eight months on the 7th of August, 1853. The filiation and legitimacy of these two children are proved by their acts of birth, inscribed in the registers of civil status (art. 228 C.C.), and of which copies are in the record. It is objected that there is no proof of the marriage of David Kaine, Sr., and Sarah McDonald, but they lived together as man and wife for some thirty years and had undoubtedly the status of married people. I do not think the respondents have any interest to deny the marriage of Kaine, Sr., and Sarah McDonald, for their title to the property comes through David Kaine, Jr., and any title of the latter must have been as heir-at-law of his father and mother, for, as I will show later, he had no title by prescription. David Kaine, Sr., and Sarah McDonald must also be presumed to have married under the matrimonial regime of community of property, nothing to the contrary having been shewn (art. 1260 C.C.). David Kaine, Sr., died on the 14th of November, 1880, and Sarah McDonald on the 13th of October, 1894.

It is alleged that David Kaine, Sr., acquired in 1868 the immovable property here in question, the east half of lot 17, first range, river Metapedia, township of Restigouche, which I will hereafter call the property, under a location ticket, but that this location ticket has been lost. However, on the 15th and 16th of March, 1893, two letters-patent granting the property were issued to David Kaine, Sr., and all the courts have held that this was a grant to David Kaine, the husband of Sarah McDonald (although he was then deceased), and not to his son David Kaine, Jr. Apparently the latter had not advised the Crown Lands department of his father's death, and the letters

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patent would naturally issue to the father, if, as is alleged, he was the holder of the location ticket of 1868. I will, like the courts below, take it as sufficiently established that David Kaine, Sr., was the owner of the property, which fell into the community between his wife and himself, and on his death intestate he left an undivided half of it in his succession. The other undivided half belonged to Sarah McDonald as having been common as to property with her husband, and on her death intestate was also left in her succession. The two children, David, Jr., and Margaret, were the sole heirs of their father and mother, and took the immovable, first as to one half and subsequently as to the other half, in undivided ownership.

On the 26th of November, 1913, David Kaine, Jr., entered into a contract of sale with Sherman Moreland Adams, whereby he purported to sell this property to the latter for $200, declaring that it belonged to him

in virtue of good titles and by thirty-four years of peaceable possession.

He also declared that the property was entirely free from all mortgages and incumbrances whatever. In my opinion, his only title was as heir to his father and mother and extended solely to an undivided half of the property although he purported to sell the whole.

On the 20th of August, 1920, Margaret Kaine, authorized by her husband, John McNaughton, by a writing under private seal, in consideration of the sum of one dollar, sold to the appellant, James McNaughton, all her

right, title and interest in and to this property.

At the time she entered into this contract, Margaret Kaine, as heir of her father and mother, was owner of one undivided half of the property.

S. M. Adams, on the 2nd of September, 1920, sold this property, as if he owned the whole, to the present respondents for $1,000.

The appellant's action was begun on the 30th of April, 1923, by a writ of summons, which was served on the respondents on the 28th of May, 1923. David Kaine, Jr., and Adams were made parties to the case. David Kaine, Jr., contested the action, but his plea was dismissed by the trial court, and as he has not appealed, there is no necessity to consider the position he took.

The appellant's declaration, which is a very long one

containing no less than 67 paragraphs, can be shortly summarized by saying that the appellant asks to be declared owner of an undivided half of the property, and prays that it be partitioned between him and the respondents, with the usual conclusions of an action in partition. He also claims from the respondents $3,000 for his share of the fruits derived from the property.

The respondents in their plea deny most of the averments of the declaration. They allege that the letters patent were issued in favour of David Kaine, Jr., and not David Kaine, Sr.; that Margaret Kaine could not sell the property because it belonged to Adams who subsequently sold it to the respondents, and moreover she sold not the property but only her rights therein which the appellant knew were litigious and had been repudiated by Adams; that the possession of the respondents and that of Adams and David Kaine, Jr., form a total of 44 years, all of which had the necessary requisites for the purpose of prescription; that, if what the appellant states is true (which they deny) then David Kaine, Sr., died intestate and before inheriting the property the appellant and his authors were obliged to cause to be registered a declaration under art. 2098 C.C., and not having done so the transfer set up by the appellant is without effect.

Then follows what the respondents term a "special plea," which is set up "without prejudice in any way to the foregoing." It alleges that the rights acquired by the appellant from Margaret Kaine were to his knowledge litigious rights. The respondents declare that, without prejudice to their foregoing plea, they take advantage of art. 1582 C.C., and,

in order to become wholly discharged towards the plaintiff, they are willing to pay him the price he paid for said litigious rights or property, and all incidental expenses of sale with interest

from date of acquisition, which they calculated at $207.02, subject to completing it, if necessary, and they deposit this sum in court. They add that they annex to their plea

a deed of sale to be signed by plaintiff, and they call upon plaintiff to execute same on his being paid by the court the above amount.

The respondents' conclusions are as follows:

Wherefore defendants pray that act be granted of their declaration that they wish to avoid all litigation by paying the aforesaid sum for the aforesaid reasons to plaintiff; that they call upon plaintiff to sign the deed annexed to this plea; that if plaintiff fails so to do, that the deposit of

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said sum and said deed have the same effect as if the deed were signed by plaintiff, and that said action be therefore dismissed, and in the event of plaintiff further continuing the present action, that it be dismissed with all costs against the plaintiff.

The deed of sale annexed to the plea is an ordinary deed of sale by the appellant to the respondents, in consideration of $207.02 to him paid at or before the signing and delivery of the deed, of

all rights, title and interest in that certain lot, piece or parcel of land and premises situate and lying in the township of Restigouche, known and distinguished as being the east half of lot No. 17 of the first Matapedia range, * * * the whole as conveyed to the said James McNaughton in virtue of a certain deed bearing date the 20th August, 1920, made between himself and Margaret Kaine.

In order properly to discuss the questions involved in this appeal, it has seemed preferable to refer in some detail to the position taken by the respondents in their plea. It is obvious that the respondents cannot, on the one hand, contest the claim of the appellant that he is owner of an undivided half of the property, and, on the other hand, at the same time force him to relinquish his bargain on the ground that the right acquired by him was a litigious one (Baudry-Lacantinerie et Saignat, Vente et Echange, no. 940). The appellant contends that this is precisely what the respondents have done by their plea; the latter say that what was alleged in the first part of the plea was merely to shew the litigious character of the right sued on, and they point to their conclusions to demonstrate that the special plea of litigious rights was not a subsidiary but a principal plea.

Before expressing an opinion on this point, it will be convenient to cite the three articles of the civil code which deal with the *retrait de droits litigieux.*

1582. When a litigious right is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it.

1583. A right is held to be litigious when it is uncertain, and disputed or disputable by the debtor, whether an action for its recovery is actually pending or is likely to become necessary.

1584. The provisions contained in article 1582 do not apply:

(1) When the sale has been made to a coheir or coproprietor of the right sold;

(2) When it has been made to a creditor in payment of what is due to him;

(3) When it has been made to the possessor of a property subject to the litigious right;

(4) When the judgment of a court has been rendered affirming the right, or when it has been made clear by evidence and is ready for judgment.

In order to be litigious, the right sued on must be "uncertain and disputed or disputable by the debtor"; in the French version of art. 1583, "incertain, disputé ou disputable." The feature that should be emphasized here is the uncertainty of the right; the fact merely that it may be disputed, however frivolously, by the debtor does not suffice to make it litigious. The French code (art. 1700) applies a different test and considers a right litigious

dès qu'il y a procès et contestation sur le fond du droit.

Article 1584 C.C. differs from art. 1701 of the French code in that its fourth paragraph is not found in the latter. The intention of the codifiers, as stated by them in their report, was to extend art. 1701 by the addition of this paragraph.

Mr. Saint-Laurent, on behalf of the appellant, argued that inasmuch as the transfer in question was made by Mrs. McNaughton (Margaret Kaine) to her own son, the appellant, these articles do not apply. He cited some old French decisions which distinguish between a transfer to a relative and a sale to a stranger.

It is of course obvious that what is contemplated here is a right acquired under an onerous title and not by way of gift. In the cases referred to, the transfer was considered as an *avancement d'hoirie* and, as such, not subject to the *retrait*. Apart from such a case, I would not think it permissible to introduce into the articles of the code a distinction which is not justified by their language, the more so as a relative as well as a stranger may purchase a litigious claim as a speculation. Where the claim is litigious within the meaning of article 1583 and is acquired under an onerous title, the law presumes that the purchaser, to use the expressions of Pothier, was an "acheteur de procès" and that his motive was "l'amour des procès." It is as to such purchasers that, subject to art. 1584, the *retrait* is allowed quite irrespective of their relationship to the seller.

Coming now to the present case, the only way the respondents could exercise the *retrait* was

by paying to the buyer (the appellant) the price and incidental expenses of the sale, with interest, etc.

(art. 1582 C.C.). This called for a tender of the sum involved. Have the respondents fulfilled this condition?

By their special plea, as stated above, they made a tender of $207.02, to be paid to the appellant on execution by him of the deed of sale annexed to the plea. This was not an

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absolute but a conditional tender, and unless the appellant signed the deed of sale he could not obtain the amount tendered. The learned trial judge, in his judgment, held that the appellant was not obliged to sign this deed, and only after the judgment (and if the respondents acquiesced in the elimination of the condition under which their tender was made, which they were not bound to do) was the tender available to the appellant in payment of the amount due him under art. 1582.

Objection to the respondents' tender as being conditional was taken by the appellant in his factum before this court and also at the hearing. The respondents strongly contended that this objection comes too late. They also stated that the point was not taken in the courts below. I am inclined to think, however, that there must have been some question in the trial court as to the claim of the respondents that the appellant was bound to sign the deed of sale in their favour as a condition of obtaining the amount tendered, for in an express *considérant* of the judgment the trial judge decided that he was not "en droit tenu de signer tel acte." The objection to the tender is apparent on the face of the record, the appellant's factum gave ample notice to the respondents that the point would be raised, and I think, we cannot disregard a question of law which is suggested by the mere reading of the respondents' special plea. There is nothing in the circumstances of this case or in the position taken by the appellant at the trial to show that he acquiesced in the tender as conditionally made by the respondents: *Mile End Milling Co.* v. *Peterborough Cereal Co.* (1).

It is scarcely necessary to say that the appellant was not bound to sign this deed of sale. Had he signed it, he would have subjected himself to legal warranty of the rights sold (art. 1576 C.C.). I cannot escape the conclusion that the respondents entirely misconceived what is incumbent on a debtor who seeks to defeat a claim of litigious rights by exercising the *retrait de droits litigieux*. The effect of the *retrait* is that the debtor assumes the bargain (*le marché*) of the buyer of the litigious right, so that the debtor is substituted for and subrogated to the buyer. The latter con-

(1) [1924] S.C.R. 120.

veys nothing to the debtor, who merely takes his place and obtains a discharge from the claim by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day the buyer paid it. Certainly the debtor cannot demand that the buyer sell him the litigious rights under a deed importing legal warranty.

There is no possible doubt on this point. Pothier, Vente, no. 597, says:—

> Le débiteur, en remboursant le cessionnaire, est admis à prendre son marché. L'achat que le cessionnaire avait fait de la dette litigieuse est détruit en la personne de ce cessionnaire, et passe en celle du débiteur, qui est censé avoir lui-même racheté sa dette du créancier, et en avoir transigé avec lui pour la somme portée en la cession.

To the same effect, Aubry & Rau, 5th ed., vol. 5, p. 247, note 14 *bis*, say:—

> L'exercice du retrait n'opère pas une rétrocession au profit du retrayant, mais il a pour effet de substituer rétroactivement ce dernier au retrayé. Le cessionnaire est censé n'avoir jamais été créancier, et par suite tous les droits qui avaient pu prendre naissance de son chef sur l'objet cédé s'évanouissent.

I am further of opinion that the respondents really contested (*au fond*) the claim of the appellant that he had acquired the ownership of an undivided half of the property. They allege that the letters patent were granted to David Kaine, Jr., and not to David Kaine, Sr., with the consequence that Margaret Kaine, according to them, never acquired the ownership of an undivided half of the property as heir of her father and mother. They say that the property belonged to David Kaine, Jr., he having acquired it by virtue of his possession dating back over 34 years previous to November 5, 1913, which possession

> had all the necessary requisites to prescribe the ownership thereof,

and to that possession they add their own and that of S. M. Adams, making 44 years. They also set up that no declaration of inheritance having been made by the appellant and Margaret Kaine, as required by art. 2098 C.C., the transfer made by the latter to the former is without effect. Their special plea of litigious rights is made "without prejudice in any way to the foregoing."

The respondents claim that in their conclusions they have merely asked to be allowed to exercise the *retrait*. But here again they insist on the appellant signing the deed of sale annexed to their plea as a condition of receiving the amount tendered, and they pray, in the event of the appel-

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lant continuing the action, that it be dismissed with costs.

There is the further circumstance that, at the trial, the respondents adduced evidence to shew that David Kaine had acquired the ownership of this property by prescription. That was indeed the purpose of the greater part of their testimony, so much so that the trial judge refused to tax in their favour five witnesses (over and above the five allowed them on a single point) called by them on this question of prescription. So to the end of the trial the respondents persisted in contesting the appellant's title to the rights acquired by him.

The result is that this case comes well within the fourth paragraph of art. 1584 C.C. The trial judge, on the evidence and on this claim of prescription set up by the respondents, found as follows:

> Considérant que David Kaine mis en cause a possédé le dit immeuble depuis la mort de son père en 1880, en commun avec sa mère jusqu'au décès de cette dernière, le 13 octobre 1894; qu'après la mort de sa mère il a paru le posséder seul jusqu'à la vente à Adams le 26 novembre 1913; et qu'il a continué à le posséder ainsi durant les deux années suivantes.

The time during which David Kaine, Jr., possessed the property jointly with his mother cannot be counted for the purposes of prescription. This brings us down to 13th of October, 1894, date of the death of Mrs. David Kaine, Sr., for the beginning of any possession that can be claimed on behalf of David Kaine, Jr. The writ was served on the respondents on the 28th of May, 1923, so that, adding to the possession of David Kaine, Jr., that of Adams and of the respondents, less than thirty years elapsed from October 13, 1894, to the date of service. As a consequence, the plea of prescription is not made out. No prescription of ten years under art. 2251 C.C. was alleged, nor could it be in the absence of ten years possession by the respondents and Adams before the institution of this action.

The objection of the respondents to the appellant's title founded on art. 2098 C.C. would equally apply to the title they obtained from David Kaine, Jr., heir for one-half of his father and mother. Article 2098 C.C. does not say that the transfer by an heir who has not registered a declaration of transmission by succession is void, but states that its registration is without effect so long as the right of the acquirer has not been registered. The respondents derive their title from David Kaine, Jr., whose only right came

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by succession from his father and mother. The appellant gets his title from Margaret Kaine, who also inherited her share from her parents. As I have said, if art. 2098 C.C. is an obstacle for the appellant, it is equally so for the respondents. My opinion, however, is that neither as to the one nor the other is the failure to register the transmission a cause of nullity of the transfers on which they rely, and at any time the required declaration of transmission can be registered, which will give effect to the registration of their transfers.

The right of the appellant, to borrow the language of the fourth paragraph of Art. 1584 C.C., which refers to the particular demand in litigation, or the action wherein the *retrait* is sought to be exercised, *Brady* v. *Stewart* (1), has therefore been made clear by evidence and is ready for judgment. This is in no small degree due to the contestation of his claim by the respondents, and it is now established that David Kaine, Jr., and his successors in title never acquired the whole of this property by prescription. If the right transferred to the appellant was ever litigious within the meaning of art. 1583 C.C., it was not so when the case was ready for judgment after the trial, and up to that moment there had not been made a valid tender to the appellant in order to exercise the *retrait*. The trial court, in my opinion, should not have dismissed the appellant's action.

In his factum, the appellant practically admits that he is not entitled to demand a share of the fruits and revenues of the property on account of the possession in good faith of the respondents (Art. 411 C.C.), but contends that he can claim a half share of the amount received by the respondent for pulpwood cut and removed from the property, this not properly being fruits of the property. Edward Irvine says that he sold from the property about 72 cords of pulpwood at $18 per cord, making in all $1,296. But Irvine also states that he did not make out of the fruits of the land, pulpwood, crops and everything, enough to pay for the work he put on it. I am not therefore disposed to allow this claim.

I have deemed it unnecessary to refer to many questions

(1) [1887] 15 Can. S.C.R. 82.

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discussed with great learning by the judges of the Court of King's Bench. What I have said suffices to dispose of the case. Nor do I think it requisite to do more than mention a point discussed by Mr. Justice Howard, as to some uncertainty in the description given to the property by the letters patent. If there be a cloud on the title, it would affect the claim of the respondents as well as of the appellant, but it seems to me that there is no possible doubt with respect to the identity of the property which the parties took under the grant from the Crown.

I would therefore allow the appeal with costs here and in the Court of King's Bench and grant the prayer of the appellant for a partition of the property. The plea of the respondents in the trial court should be dismissed with costs of their contestation of the action, including the costs of *enquête* attributable to this contestation. The other costs of the action, as well as the costs of the partition, should be borne by the appellant and the respondents in equal shares.

Appeal allowed with costs.

Solicitors for the appellant: *St. Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondents: *Kelly & Lévesque.*