1918
*Nov. 19, 20.
1919
*Feb. 4.

THADÉE DUCHAINE (DEFENDANT). . APPELLANT;

AND

THE MATAMAJAW SALMON CLUB (PLAINTIFF)..... } RESPONDENT.

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

Fishing right—Riparian owner—Personal servitude—Real right—Perpetual or temporary—"Profit à prendre"—Registration—Articles 405, 479, 2172 C.C.

Under Quebec law, the grant of fishing rights by a riparian owner confers no title to the bed of the river in which this right is exercised. Such right is one of enjoyment only, essentially temporary in its nature and does not endure beyond the life of the grantee. Idington and Cassels JJ. dissenting.

The right to catch fish *in alieno solo* cannot be assimilated to the "profit à prendre," a term found in the common law of England but unknown to the civil law of France and Quebec. Idington and Cassels JJ. dissenting.

Per Anglin and Mignault JJ.—The renewal of the registration of a right to fish after the official cadastre was put in force, was not required by article 2172 C.C.: *La Banque du Peuple* v. *Laporte.* 19 L.C. Jur. 66. followed. Brodeur J. *contra.*

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, District of Rimouski, and maintaining the plaintiff's action.

The material facts of the case are fully stated in the judgments now reported.

Ferdinand Roy K.C. and *Charles Angers K.C.* for the appellant.

John Hall Kelly K.C. for the respondent.

IDINGTON J. (dissenting).—I think this appeal should be dismissed with costs. Agreeing, as I do in

*PRESENT:—Idington, Anglin, Brodeur and Mignault JJ. and Cassels J. *ad hoc.*

the substantial parts thereof with the reasons of Mr. Justice Pelletier in the court below, I need not elaborate or needlessly repeat or indicate in detail minor matters of little importance wherein I might differ therefrom. I only desire to make clear in connection therewith my own point of view.

It seems to me this appellant's argument fails, as I have so often had occasion to remark in other cases, to recognise what the parties concerned in the several transactions in question were engaged in, or to realize the nature of the business they were about.

If we would first fully comprehend the facts relevant thereto and then seek for the relevant law properly applicable thereto, we should have some hope of reaching a correct conclusion.

We have presented here an exchange deed whereby one Blais ceded to Sir George Stephen all the rights of fishing in the river Metapedia opposite a certain lot, and got therefor from him an irregularly shaped but definite piece of land, bounded as described and a right of drainage thereof or therefrom.

I should have much preferred to have been told something of the value of that so given rather than much of that elementary law which is assumed as of course to be applicable.

If one knew the value of what was so given, then he might be able to appreciate properly what the parties in truth intended by a deed which may possibly be of doubtful import.

Seeing that Sir George Stephen, 18 months later, for then he had become Lord Mount Stephen, sold what he had got from Blais together with the like rights on three other lots got from another man for thirty-five thousand dollars according to the deed in the record and I am inclined to suspect it was not a

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Idington J.

mere personal right for the life of Mount Stephen that was being bargained for.

This circumstance, of course, is of no value in aiding in the interpretation or construction of an ambiguously worded deed. I only use it to illustrate the possibilities that lay in an accurate and yet comprehensive knowledge of the basic facts in question and the need, or at least desirability, of being seized thereof.

If the said deed from Blais was only intended and can only be held in law to convey a personal right of use, then it is clear no more can be claimed.

But because such rights or personal servitudes do exist in law and cease with the life of the grantee that is no reason for holding and determining that in law a proprietor of land, or river, or stream, is restricted to the limitations of such a personal grant in bargaining for the sale of a fishery to whomsoever he pleases. There is no prohibition in law against his dismembership of his property in any way or shape he chooses. Some prohibitions against the creation of a particular form of tenure which has been found to work injuriously to society in general have been enacted in divers countries.

I am unable to find any such prohibition in this country or in the law of Quebec in relation to an owner dealing in any way he sees fit with the proprietorship of the whole or part of a private stream non-navigable and non-floatable as the one in question is.

The sole question in this appeal save that of the possible want of conformity with the registry laws, is whether or not Blais intended to convey and did convey rights of fishing in perpetuity.

It is difficult to say why, if he did not, the exchange deed should contain the following:—

Au moyen de quoi les parties se déssaisissent respectivement de ce que dessus par elles cédé en échange et en contre échange et s'en saisissent réciproquement, ainsi que leurs représentants légaux.

But for the mode of thought which appellant's factum presents I should have said there could be no doubt of the reciprocal intention which this evidences by each grantor to vest in the other a right of property in perpetuity and hence that Sir George Stephen was getting something much more than a personal servitude.

As to the registration question which only becomes important by virtue of holding that it was a *jus in re* that passed to Stephen, I may add to what has already been said below, that it does not occur to me that the widow Blais purchased or sold to appellant "the same property" (that is within the meaning of art. 2098 C.C.) as appellant now claims when he attempts to reach out and become possessed of the fishery gone forever to another.

The article, so far as necessary to consider herein, reads as follows:—

2098. All acts *inter vivos* conveying the ownership of an immovable must be registered at length, or by memorial.

In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.

Registration has the same effect between two donees of the same immovable.

All he got was what the curator of the Blais bankrupt estate had acquired and was authorized to sell, and that was bereft of the rights of fishing. He could sell no more than the insolvent possessed and passed to him.

And the purpose of that conveyance was made evident by the express exceptions made in the first paragraph descriptive of the properties being passed, which reads as follows:—

1919

DUCHAINE v. MATAMAJAW SALMON CLUB

Idington J.

Mais sauf les parties déjà aliénées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais.

This exception is used again in the deed from Mr. Blais to the appellant and hence he never got anything more than the curator had.

What can it mean but the exception of that right of fishing which is now in dispute?

And why, if anything else, is the like exception not made in regard to the next three parcels conveyed by the same deed to her?

More than that it is to me most significant that the notary drawing it should have thought of an emphyteusis or such like form of lease. True that does not, perhaps, with absolute accuracy in all the details express the legal nature of what was given Sir George Stephen, but much more accurately than does the personal servitude conception of which we have heard so much.

The draftsman hit more nearly the mark by the whole phrase

par baux emphytéotiques ou autrement avant la faillite

than anything we have heard argued as being expressive of what the parties concerned had in view.

The late Chief Justice of Quebec, in his judgment, seemed to assume that for all practical purposes the appellant had failed and hence he leaves in doubt the result of the distinction he makes.

His opinion is, therefore, not necessarily in conflict with the conclusions reached by Mr. Justice Pelletier, which in light of the formal judgment of the court must be held to have been concurred in by others and, I suspect, by all.

I cannot see why we should reverse a result so accordant with common sense and good law as I conceive to be the correct interpretation and construction of the deeds in question.

ANGLIN J.—I have had the advantage of reading the judgments to be delivered by my brothers Brodeur and Mignault, and I concur in their opinion and the reasons on which they base it that the grant of fishing rights to Sir George Stephen (now Lord Mount Stephen), although effectively assigned to the respondent club, cannot endure beyond his lifetime. If this case had arisen in one of our provinces where the English law of property prevails I should probably have reached the same conclusion as my brothers Idington and Cassels. But I share my brother Mignault's view that this case must be determined by the civil law of the Province of Quebec and that recourse to English authorities dealing with fishing rights *in alieno solo* as *profits à prendre* is apt to be more misleading and confusing than helpful. At all events English cases cannot properly be invoked as authorities until it is first established that the principles of the English law bearing upon the subject under consideration are the same as those of the civil law of Quebec. That may not be assumed.

Unlike the *profit à prendre* of the English law—a term which, notwithstanding its obvious Norman origin, is unknown to the civil law of France and Quebec—the right of fishing in streams non-navigable and non-floatable, which belongs to the riparian owner, whose title extends to the middle of the stream, *MacLaren* v. *Attorney-General for Quebec* (1), cannot be severed in perpetuity from the alveus of the river of which it is *une dépendance indivisible*; Fuzier Herman Rep. Vbo Pêche Fluviale, Nos. 25 and 26. An indefinite grant of fishing rights in such a stream must therefore be treated either as a lease (*Bourgeois* v.

(1) [1914] A.C. 258; 15 D.L.R. 855; 46 Can. S.C.R. 656; 8 D.L.R. 800.

1919
DUCHAINE
v.
MATAMAJAW SALMON CLUB
Anglin S.

Bourdin) (1), or as creating a restricted usufruct or *une servitude personelle et à titre de droit d'usage restreint*; 6 Baudry Lacantinerie et Chauveau (1905) "Des Biens," pp. 806-7. It can never constitute a real servitude. 3 Aubry et Rau (5 éd.), 109-10. Compare Fuzier Herman, Rep. (1902), Vbo Pêche Fluviale, Nos. 114-118, 125, 127. Indeed there is some authority for the view that the right created is not even a personal servitude but a mere right of enjoyment—a restricted use or usufruct. 44 Pand. Fr. Vbo Pêche Fluviale, No. 131. Planiol (Droit Civil vol. 1. p. 527 (1901)) makes this statement:—

> Il est généralement admis que le droit de chasse et le droit de Pêche, qui ne peuvent pas constituer des servitudes prédiales, peuvent être établis, non-seulement au moyen d'une location, mais comme droits réels au profit d'une personne; ils forment alors une sorte particulière d'usages viagers. Aubry et Rau, II., p. 61 texte et note 5; Demolombe T. XII, No. 686; D. 91, 2, 48.

But whether it be regarded as purely a right of enjoyment (restricted usufruct or use) or as a personal servitude, the right of fishing (*séparé du fonds*) is essentially temporary (*viager*) and, if no shorter term for its duration be fixed by the instrument creating it, must come to an end with the life of the person on whom it is conferred. Pothier (Bugnet), vol. 1, Introduction au Titre XIII "Des Servitudes Réelles," art. 1, Nos. 1 & 2; 4 Huc, Nos. 165 & 253. The French legislation of 1898 which established the rights of riparian owners in the alveus of non-navigable and non-floatable streams in nowise affected the indivisibility of the right of fishing from the property (*fonds*). Labori, Rep. Enc. Supp. vol. 2 Vbo. Pêche Fluviale, No. 3, p. 514.

No doubt the concession of the fishing rights now held by the respondent club carries with it as an

(1) D. 85. 1. 348; S. 85. 1. 223.

accessory such enjoyment of the bank and bed of the stream belonging to the grantor as may be necessary to their exercise. Arts. 459, 552 and 1499 C.C. No grant of the alveus is therefore necessarily implied in the conferring of these fishing rights and as none is expressed in the deed to Sir George Stephen none passed by it. Mr. Justice Pelletier conceded that unless the grantee took title to the alveus he acquired merely *un droit d'usage*.

Although the issues raised by the defendant's plea are confined to averments of the non-transferability of the right granted to Sir George Stephen, that that right existed only as against the grantor and does not bind transferees of his property, who took title without reservation, and that it cannot affect them because not duly registered, the argument of counsel for both parties was chiefly addressed to the nature and duration of the right granted to Sir George and both seemed desirous that we should determine these questions with which the provincial courts had dealt. Moreover, one of the *considérants* of the judgment of the Superior Court which declared that the plaintiffs held

a real right or right of property in the nature of a *profit à prendre*

was not explicitly set aside by the judgment of the Court of King's Bench. I say this in explanation of my discussion of an issue not directly raised on the pleadings and perhaps not necessarily involved in the disposition of the present action.

With my brother Mignault, I fear that such confusion and uncertainty as to titles would result from any departure from the construction put upon art. 2172 C.C. by the judgment of the Court of Queen's Bench in *La Banque du Peuple* v. *Laporte* (1), that we should not now hold that renewal of registration of the

(1) 19 L.C. Jur. 66.

1919

DUCHAINE v. MATAMAJAW SALMON CLUB

Anglin J.

rights asserted by the respondent was required by that article.

Nor does the statute of 1881 (44 & 45 Vict. ch. 16) in my opinion affect it. That Act is intituled,

> An Act to provide for the registration of customary dowers and servitudes in certain cases not provided for by law.

The grant of the right of fishing to Sir George Stephen, because a restricted right of use or usufruct rather than a servitude, is probably not within the Act at all. It is certainly not a real servitude and therefore not within sec. 5 prescribing original registration of real servitudes. Notwithstanding the striking difference of the language in section 7, which has to do with renewal of registration, I cannot but think that it also was intended to deal with real servitudes only. The use of different terms in the same statute to describe the same subject is an all too familiar instance of unskilful draftsmanship.

In my opinion while the judgment maintaining the action should be upheld it should be modified by inserting a declaration that the rights of the respondent will terminate on the death of Lord Mount Stephen.

BRODEUR J.—Il s'agit dans cette cause de savoir si le droit de pêche jusqu'à l'eau médiane dans la Rivière Métapedia vis-à-vis le lot "C" du premier rang de Causapscal est la propriété du défendeur appelant ou du demandeur intimé.

En 1890, Lord Mount Stephen achetait d'un nommé R. A. Blais, qui était alors propriétaire du lot "C" ce droit de pêche. Cet acte de vente était enregistré.

En 1892, il vendait ce droit de pêche au "Restigouche Salmon Club;" et cet acte de vente était également enregistré.

En 1905, le "Restigouche Salmon Club" cédait à son tour plusieurs droits de pêche au "Matamajaw Salmon Club," l'intimé en la présente cause, et entr'autres, les droits de pêche qui avaient été acquis par Lord Mount Stephen vis-à-vis du lot "C."

Ce dernier acte fut enregistré, mais par une erreur assez singulière, la partie de l'acte qui décrivait le droit de pêche du lot "C" ne fut pas transcrite.

Dans l'intervalle, savoir en 1899, le cadastre avait été fait et mis en force dans cette division d'enregistrement suivant les dispositions des articles 2166 et suivants du Code Civil.

Le Club Matamajaw n'a renouvelé l'enregistrement de son titre d'acquisition qu'en juin 1915, c'est à-dire plus d'un an après que le défendeur appelant eût acheté la propriété en question (le lot "C") et eût régulièrement fait enregistrer son titre.

En 1905, savoir plusieurs années après avoir cédé son droit de pêche à Lord Mount Stephen, R. A. Blais faissait cession de ses biens; et ses curateurs vendaient à Madame Blais toute la propriété "C" sans en exclure les droits de pêche; et, en 1914, Mde. Blais vendait à l'appelant en la présente cause la même terre, sans en exclure non plus les droits de pêche. Ces titres étaient régulièrement enregistrés.

Nous avons alors à décider si le défaut de renouvellement de l'enregistrement du titre d'acquisition des droits de pêche fait perdre à l'intimé ces droits au bénéfice du défendeur appelant.

Afin de décider cette question, il faut déterminer quelle est la nature d'un droit de pêche dans un cours d'eau qui, comme la Rivière Métapédia, n'est ni navigable ni flottable.

Le demandeur intimé prétend que c'est un droit de propriété absolu qui peut être aliéné à perpétuité et

1919
DUCHAINE
v.
MATAMAJAW SALMON CLUB
Brodeur J.

dont il n'est pas nécessaire de renouveler l'enregistrement.

Le défendeur appelant, au contraire, prétend que c'est un droit d'usufruit ou de servitude personnelle qui s'éteint à la mort de l'usufruitier et dont l'enregistrement après la mise en force du cadastre doit être renouvelé.

La Cour Supérieure a maintenu l'action du club, mais n'en a pas accordé cependant toutes les con-, clusions. En effet, il demandait à être déclaré non seulement propriétaire du droit de pêche, mais aussi du lit de la rivière; et il n'a obtenu gain de cause que pour le droit de pêche. Comme il n'y a pas eu d'appel quant à la propriété du lit de la rivière, il y a sur ce point *res judicata.*

La Cour d'Appel n'a pas accepté les motifs du jugement de la Cour Supérieure, mais elle en a tout de même confirmé le dispositif en décidant que le droit de pêche concédé à Lord Mount Stephen était transférable et que le renouvellement de l'enregistrement du titre n'était pas nécessaire. Mais la cour n'a pas cru devoir décider si ce droit de pêche pouvait être transféré à perpétuité ou s'il était simplement viager; ou, en d'autres termes, s'il constituait un droit de propriété ou un droit d'usufruit.

Les juges de la Cour d'Appel étaient évidemment divisés sur ce dernier point; car le regretté Juge-en-Chef, Sir Horace Archambeault, était d'avis que c'était un droit d'usufruit, qu'il était viager, et qu'en conséquence il ne devait subsister que pendant la vie de Lord Mount Stephen. L'Hon. Juge Pelletier était d'opinion, au contraire, que la vente à Lord Mount Stephen était une aliénation de propriété immobilière comportant la cession d'un droit de co-propriété dans le lit de la rivière.

Les autres juges n'ont pas écrit d'opinion sur cette importante question.

J'en suis venu à la conclusion que le droit de pêche est un droit d'usufruit; et, en celà, je concours dans l'opinion exprimée par Sir Horace Archambeault; mais je diffère cependant d'avec lui sur la nécessité du renouvellement de l'enregistrement.

Il m'est alors impossible de me rallier aux vues de l'Honorable Juge Pelletier. D'abord, le demandeur ayant accepté le jugement de la Cour Supérieure sur la question de la propriété du lit de la rivière, et, cette question étant définitivement jugée, la Cour d'Appel ne pouvait plus le déclarer co-propriétaire du lit de la rivière. De plus, les droits d'usufruit, d'usage et d'habitation sur des immeubles donnent à leurs détenteurs le pouvoir d'en recueillir les fruits; et dans l'exercice de ces droits, ils sont obligés de passer sur la propriété. Il ne s'ensuit pas, cependant, qu'ils aient des droits de propriétaire dans la nue-propriété. Demolombe, vol. 9, No. 526. Fuzier Herman, vol. 3, verbo Pêche No. 25.

Une personne qui a le droit de cueillette de certains fruits ou bien le droit de couper du bois dans une forêt a bien des droits d'usufruit ou d'usage; mais ces droits ne sauraient lui donner un titre à la propriété de l'immeuble sur lequel elle a ces droits de cueillette ou de coupe. A raison de cela, je ne puis partager l'opinion de l'honorable Juge Pelletier.

Voici maintenant, suivant moi, les principes qui doivent nous guider dans la décision de cette cause.

Les droits que nous avons sur ou dans une chose se divisent en trois grandes catégories; ou a sur les biens ou un droit de propriété, ou un simple droit de jouissance, ou seulement des servitudes à prétendre (art. 405 C.C.).

1919

DUCHAINE
v.
MATAMAJAW
SALMON
CLUB

Brodeur J.

Un immeuble comprend les cours non navigables ni flottables qui les traversent; et s'il est simplement riverain d'un de ces cours d'eau, alors il comprend le lit de ces cours d'eau jusqu'à l'eau médiane (usque ad medium filum aquæ). Ce principe est formellement admis par les parties en cause.

Le droit de propriété d'un immeuble situé sur un de ces cours d'eau comprend par droit d'accession tous les fruits du lit de la rivière (art. 409 C.C.) parmi lesquels se trouvent, suivant moi, le droit de pêche.

Proudhon, au vol. 2 de l'Usufruit, p. 457, après avoir déclaré que les fruits naturels sont ceux que la terre produit spontanément et que le produit des animaux entre dans la même classe, ajoute:—

> Ainsi le produit des ruches à miel, celui d'une garenne, celui d'un colombier, la pêche d'un étang sont également des fruits naturels aux termes de la loi.

Certaines expressions relevées dans les auteurs français ont contribué à créer dans cette cause beaucoup de confusion et une certaine incertitude, parce qu'on n'a pas toujours tenu compte de la législation qui régissait la matière à l'époque où ils écrivaient. Un court résumé de cette législation pourrait nous être utile pour bien comprendre ces auteurs et la portée de leurs expressions.

Avant la révolution française, les seigneurs avaient, en général, sur les cours d'eau non navigables ni flottables, soit un droit de propriété, soit au moins un droit de haute justice. La révolution a supprimé ces droits comme entachés de féodalité (Dalloz, Répertoire Pratique, vbo. Eaux, No. 677). Mais le Code Napoléon, qui devenait en force quelques années plus tard, évitait de dire à qui ces cours d'eau appartiendraient; et alors les auteurs se sont divisés: les uns prétendant que les cours d'eau étaient *res nullius*; d'autres

disant qu'ils appartenaient aux propriétaires riverains; d'autres enfin désignant l'Etat comme propriétaire.

En 1898, on a mis fin à cette différence d'opinion en décrétant que les lits des rivières appartiendraient aux riverains par droit d'accession.

La question était tranchée: mais elle a dans tout le siècle dernier donné lieu à beaucoup de discussions.

Le droit de pêche dans les cours d'eau avait été réglé par la loi de 1829, qui avait décrété qu'il était une dépendance de la propriété riveraine. La situation était assez peu claire. Vous aviez, en effet, le lit de la rivière qui, jusqu'en 1898, était généralement reconnu comme *res nullius*, tandis que le droit de pêche était un accessoire de l'héritage riverain. La situation était plus claire dans la province de Québec comme je le démontrerai plus loin.

Je remarque que l'Honorable Juge de la Cour Supérieure déclare que le droit de pêche doit être considéré comme un droit réel de propriété de la nature du *profit à prendre du sol.*

L'expression *profit à prendre* du droit anglais ne se trouve pas dans nos lois et il est toujours dangereux de recourir à une législation étrangère pour déterminer les principes de notre propre législation. D'ailleurs, le *profit à prendre* du droit anglais serait une servitude (Halsbury, vol. 11, p. 336) et l'enregistrement d'une servitude, ainsi que son renouvellement, sont requis par nos lois. Il vaut donc mieux alors se baser sur notre jurisprudence et notre loi dans les cas surtout où les lois étrangères sont différentes. Voyons notre loi.

Cette question de savoir si les lits des rivières non-navigables appartenaient aux propriétaires riverains avait été tranchée dans la province de Québec par la décision de la Cour Seigneuriale qui avait déclaré que

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB

Brodeur J.

les héritages bordant les cours d'eau non-navigables ni flottables s'étendaient jusqu'au milieu de ces cours d'eau. Questions 28 et 30.

Dans une cause de *Boswell* v. *Denis*, jugée par la Cour d'Appel en 1859 (1), il avait été décidé que les rivières non-navigables et non-flottables sont la propriété privée des propriétaires riverains et que ces derniers ont le droit exclusif d'y faire la pêche. Vide *Tanguay* v. *The Canadian Electric Light Co.* (2); *McLaren* v. *Attorney-General* (3).

Ces décisions consacrent le principe que le propriétaire d'un immeuble riverain est en même temps le propriétaire du lit de la rivière; et, comme accessoire, en tant que propriétaire du lit de la rivière, il a la propriété du dessus et du dessous (arts. 409 & 414 C.C.) et a droit aux fruits qui s'y trouvent, et notamment au poisson. Il pourrait vendre et aliéner le lit de la rivière; et alors le droit de pêche, comme accessoire, passerait à l'acquéreur. Ce serait là une aliénation à perpétuité.

Mais si, comme dans le cas actuel, il ne concéde que le droit de pêche, alors il ne dispose que d'un droit accessoire, que d'une partie des fruits que la propriété produit; mais il demeure toujours propriétaire du fonds. C'est un droit d'usufruit qu'il cède à un tiers; et ce dernier doit en jouir conformément aux droits des usufruitiers.

A ce sujet une question se présente de savoir si un usufruit peut toujours durer.

L'usufruit est le droit de jouir d'une chose dont un autre a la propriété. Il n'y a pas de doute que, dans l'ancien droit français et sous le Code Napoléon, l'usufruit prend fin par la mort de l'usufruitier.

(1) 10 L.C.R. 294. (2) 40 Can. S.C.R. 1.
(3) [1914] A.C. 258; 15 D.L.R. 855.

Nos codificateurs nous déclarent qu'ils ont suivi l'ancienne jurisprudence française et les règles adoptées par le Code Napoléon (DeLorimier, vol. 3. p. 584); et ils nous renvoient pour l'étude des principes qui gouvernent cette matière à Marcadé, aux Pandectes françaises et à Maleville.

Ces auteurs nous enseignent comme principe élémentaire que l'usufruit est essentiellement temporaire.

Marcadé, au volume 2, no. 545, p. 529, dit:—

L'usufruit finit souvent avant la mort naturelle de l'usufruitier; mais il ne peut jamais durer audelà et ne peut pas être transmissible aux héritiers de cet usufruitier. C'est qu'en effet l'usufruit anéantissant pendant sa durée la propriété du bien * * * ne pouvait pas être permis perpétuellement ou pour une trop longue durée. En conséquence, le Code, conformément aux principes de l'ancienne jurisprudence et du droit romain, ne l'autorise que pour la durée de la vie de l'usufruitier; et l'usufruit qu'on aurait constitué pour une personne et ses héritiers n'en serait pas moins restreint à la vie de cette personne.

Nos codificateurs, en rédigeant l'article 479 C.C., se sont guidés sur le Code Napoléon; mais il ont ajouté trois mots qui ont donné lieu à une divergence d'opinion.

Le Code Napoléon dit (art. 617):—

L'usufruit s'éteint par la mort naturelle et par la mort civile de l'usufruitier; par l'expiration du temps pour lequel il a été accordé.

Le Code civil de Québec dit (art. 479):—

L'usufruit s'éteint par la mort naturelle de l'usufruitier *s'il est viager*; par l'expiration du temps pour lequel il a été accordé. * * *

Ces mots "*s'il est viager*" ne veulent pas dire que l'usufruit est perpétuel s'il n'y a pas de date fixée, car cela serait absolument contraire à la nature de l'usufruit. Mais les codificateurs ont probablement eu en vue la discussion qui se faisait alors en France sur la portée du Code Napoléon quant au droit du créateur de l'usufruit de fixer une date qui dépasserait la vie de l'usufruitier. Mais je crains que l'addition des mots

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Bordeur J.

"*s'il est viager*" n'ait pas rendu la situation plus claire. De fait, les commentateurs de notre Code sont également partagés d'opinion. Langelier, vol. 2, p. 228 et Mignault, vol. 2, p. 624. Ces commentateurs sont cependant unanimes à dire que s'il n'y a pas de temps de fixé pour la durée de l'usufruit, il s'éteint à la mort de l'usufruitier.

Suivant mon opinion, le droit de pêche accordé à Lord Mount Stephen étant un droit d'usufruit ne doit pas dépasser sa vie. Il en serait autrement si le lit de la rivière avait été vendu en même temps. S'il y avait eu un terme stipulé, la question pourrait se présenter de savoir s'il durerait même après sa mort, pourvu que le terme ne fût pas expiré. Il n'est pas nécessaire de décider ce point parce qu'il ne se présente pas. La référence dans le contrat à ses représentants légaux ne saurait avoir pour effet de rendre l'usufruit perpétuel, vu que ce serait une stipulation contraire aux principes élémentaires qui régissent la matière. Marcadé, vol. 2, p. 524.

Le droit de pêche étant un droit d'usufruit accessoire du lit de la rivière, il s'ensuit qu'il ne peut être perpétuel; et dans le cas actuel il s'éteindra au décès de l'usufruitier.

Mais je vais plus loin; et je suis d'opinion que ce droit ne peut pas être invoqué contre l'appelant parce que l'enregistrement de l'acte d'acquisition n'a pas été renouvelé.

Pothier, Edition Bugnet, vol. 1, p. 312, dit:—

> Il y a deux principales espèces de servitudes; les personnelles et les réelles.
>
> Les droits de servitudes personnelles sont ceux qui sont attachés à la personne à qui la servitude est due, et pour l'utilité de laquelle elle a été constitutée, et finissent par conséquent avec elle. Les droits de servitudes réelles qu'on appelle aussi servitudes prédiales sont ceux qu'a le propriétaire d'un héritage sur un héritage voisin, pour la commodité du sien. On les appelle réelles ou prédiales parce qu'étant

établies pour la commodité d'un héritage, c'est plutôt à l'héritage qu'elles sont dues qu'à la personne.

Les servitudes personnelles requièrent et une personne pour en jouir et un fonds servant. Dans le cas de servitudes réelles il faut et un fonds dominant et un fonds servant (art. 499 C.C.).

Je me fais concéder le droit de passer sur une propriété sans que j'aie de propriété dans le voisinage; c'est là une servitude personnelle. Je suis propriétaire d'une terre et pour l'exploiter j'ai besoin de passer chez mon voisin; c'est là une servitude réelle, parceque mon fonds devient le fonds dominant; et comme la servitude est établie pour son usage, il devient perpétuel sans enregistrement dans le cas où il serait apparent (2116a C.C.).

Notre code ne parle pas des servitudes personnelles. Il a été entrainé dans cette voie à la suite des rédacteurs du Code Napoléon qui, au sortir de la révolution, n'osaient pas mentionner le nom de servitudes personnelles.

Tout de même, les servitudes personnelles existent dans notre droit, comme elles ont continué d'exister dans le droit français; et parmi ces servitudes personnelles se trouvent les droits d'usufruit, d'usage et d'habitation.

Baudry Lacantinerie, après avoir dit qu'il y a deux espèces de servitudes, les réelles et les personnelles, dit au No. 431, Des Biens:—

> La servitude personnelle est celle qui existe sur une chose au profit d'une personne déterminée. Attachée à la personne elle meurt avec elle et parfois avant elle. La servitude personnelle est donc temporaire. . . . La servitude réelle est celle qui existe sur un fonds au profit d'un autre fonds. La servitude réelle crée un rapport entre deux fonds, aussi de sa nature est-elle perpétuelle comme les fonds dont elle est inhérente.
>
> [Notre code indique trois servitudes personnelles: l'usufruit, l'usage et l'habitation.]

Au No. 1070, il dit:—

1919
DUCHAINE
v.
MATAMAJAW SALMON CLUB
Brodeur J.

En pratique, la difficulté s'est élevée à l'occasion des droits de chasse et de pêche.

Ces droits peuvent, sans aucun doute, être établis comme droits personnels et faire l'objet d'un bail; c'est même l'hypothèse la plus habituelle. Mais rien n'empêche, croyons-nous, de les consentir comme servitudes personnelles, et à titre d'usages restreints.

Laurent, au vol. 7, no. 147, dit:—

Il ne peut y avoir d'autres servitudes personnelles que celles que le Code maintient sous le titre d'usufruit, d'usage et d'habitation.

Aubry & Rau, 5ème édition, vol. 3, p. 110; Duranton, vol. 4, p. 292; Pardessus, vol. ler, no. 11; Demolombe, vol. 9, p. 626; Marcadé, art. 686, Nos. 1 & 2; Toullier, vol. 3, No. 382, énoncent tous le même principe.

Ces servitudes personnelles d'usufruit, d'usage et d'habitation doivent-elles être enregistrées, et leur enregistrement doit-il être renouvelé?

Par l'article 2172 C.C., il est déclaré que l'enregistrement de tout droit réel sur un lot de terre doit être renouvelé après la mise en force du cadastre. La Cour d'Appel en 1874 a décidé dans une cause de *La Banque du Peuple* v. *Laporte* (1) —

That the renewal of registration of any real right required by art. 2172 of the Civil Code has reference only to hypothecs or charges on real property and not to the rights in or to the property itself.

Cette cause avait été décidée par une majorité de la Cour seulement et elle n'a pas paru avoir été accueillie bien favorablement, car on voit qu'on a refusé de la suivre dans les causes de *Poitras* v. *Lalonde* (2), et de *Despins* v. *Deneau* (3).

La législature est elle-même intervenue en 1881 pour déclarer que l'enregistrement des servitudes réelles, contractuelles, discontinues et apparentes devrait être renouvelé. Statuts de Québec, 44 & 45 Vict. ch. 16, sec. 15. Dans la section 7 du même statut, on a

(1) 19 L.C. Jur. p. 66. (2) 11 R.L. p. 356.
(3) 32 L.C. Jur. p. 261.

décrété formellement que dans les deux ans de la mise en force du cadastre et dans les deux ans de l'adoption de cette loi, l'enregistrement de toute servitude conventionnelle doit être fait et renouvelé.

La disposition de l'article 5 de ce statut de 1881 a été incorporé dans le Code Civil par les Commissaires de la Refonte des Statuts en 1888 et forme maintenant l'article 2116a C.C. La section 7 qui avait trait à la servitude conventionnelle n'a pas été reproduite dans le code. Mais par contre elle n'a jamais été rappelée et elle est encore en force (S.R. Québec, 1888, Appendice A. p. X).

Toute servitude conventionnelle doit donc être enregistrée et on doit en faire le renouvellement lorsque le cadastre devient en force.

Il était donc du devoir de Lord Mount Stephen ou du club intimé de renouveler l'enregistrement de son droit de pêche. Alors Duchaine, qui a un titre valable à toute la propriété lot "C" peut invoquer ce défaut de renouvellement et réclamer qu'il est propriétaire de toute la propriété, y compris le droit de pêche ou le droit d'usufruit qui avait été originairement cédé à Lord Mount Stephen.

L'appelant doit donc réussir à faire renvoyer l'action du demandeur intimé.

Son appel devrait être maintenu avec dépens de cette cour et des cours inférieures.

MIGNAULT J.—This appeal raises very important questions of law which have received my most serious consideration. A short statement of the facts concerning which there is no dispute, will be more intelligible if presented in chronological order.

By a writing dated the 22nd April, 1889, Joseph Pinault sold to Rodolphe Alexandre Blais

1919

DUCHAINE v. MATAMAJAW SALMON CLUB

Mignault J.

tous les droits, titres, intérêts et réclamations qu'il a et peut prétendre tant en loi qu'en équité, ou qui pourraient lui écheoir et appartenir à l'avenir dans et sur tout le terrain ci-après désigné, situé dans le comté de Rimouski, contenant en superficie 90 acres, plus ou moins, et consistant en le lot lettre "C" dans le premier rang du canton Causapscal.

This lot "C" fronts for a distance of four or five acres on the Metapedia river, admitted to be a non-navigable and non-floatable river, and it is common ground between the parties that, under the law of the Province of Quebec, the title of the owner of this lot extends to the centre of the stream.

On 6th September, 1890, Blais and Sir George Stephen, Baronet (now Lord Mount Stephen), entered into a deed of exchange before Napoléon Michaud, notary, whereby, in exchange for a certain piece of land, Blais ceded to Sir George Stephen

tous les droits de pêche dans la rivière Métapédia vis-à-vis le lot du cédant, situé au premier rang du canton Causapscal et connu sous la lettre "C," tel qu'il appert au plan de John Hill, Ecr., arpenteur, lequel reconnu véritable par les parties et signé d'elles et de nous dit notaire *ne varietur* reste annexé aux présentes pour en faire partie et y avoir recours en tout cas de besoin, avec droit par le dit Sir George Stephen de passer sur le dit lot, tant à pied qu'en voitures, pour l'exercise du dit droit de pêche.

At the close of this deed of exchange it is stated:

Au moyen de quoi les parties se dessaisissent respectivement de ce que dessus par elles cédé en échange et contre-échange en s'en saisissant réciproquement, ainsi que leurs représentants légaux.

It should be observed, however, that this general clause does not really add anything to the rights of the parties under this deed, for they must be held to have stipulated for themselves, their heirs and legal representatives, unless the contrary is expressed, or results from the nature of the contract (art. 1030 C.C.). Whether the rights in question would go to the heirs of Sir George Stephen, in other words, whether their duration is restricted of the li e of Sir George Stephen, is the principal question invo ved under this appeal.

This deed of exchange was duly registered on the 1st October, 1890.

By deed passed before M. de M. Marler, notary, on the 3rd March, 1892, and duly registered on the 20th March, 1892, Lord Mount Stephen sold to the Restigouche Salmon Club, a body politic and corporate, among other things:—

All the fishing rights in the said river Metapedia opposite the lot letter "C" in the first range of the township of Causapscal and the rights of passage over said lot acquired by the vendor under a deed of exchange between him and Rodolphe-Alexandre Blais, passed before N. Michaud, notary, on the 6th of September, 1890, registered in the said registry office on the 1st of October following, under No. 3918.

By indenture made in duplicate on the 31st May, 1905, the Restigouche Salmon Club sold to the Matamajaw Salmon Club Ltd., the respondent, among other things, the above described fishing rights, the sale being made without warranty of any kind, the purchaser accepting the lands, property, fishing rights and rights of way, easements, privileges and franchises at its own risk and without recourse against the vendor for restitution of money for any cause.

This deed was registered on the 6th November, 1905, but in transcribing it the clause relating to the fishing rights opposite lot "C" was omitted, although the deed itself was entered in the index to the immovables. The Restigouche Salmon Club having—to satisfy a requirement of its charter—obtained the approval of the Lieutenant-Governor of the Province of Quebec in Council of its purchase of the fishing rights from Lord Mount Stephen, entered into a deed with the respondent, dated 10th June, 1915, J. A. Dorais, notary, whereby it confirmed its sale to the respondent of 31st May, 1905, and so far as necessary sold these rights to the respondent. This deed was duly registered on 16th June, 1915.

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Mignault J.

Prior to the last mentioned deed, Rodolphe Alexandre Blais had become insolvent, and Messrs. Lefaivre & Taschereau had been appointed curators to his estate, and on the 30th December, 1905, the curators sold with judicial authority, by deed passed before M. P. Laberge, notary, to Dame Laura Brochu, widow of Raoul Mathias Blais, among other properties, lot "C" du cadastre officiel du rang sud du canton de Causapscal, tel que le tout est actuellement, circonstances et dependances, mais sauf les parties déjà alienées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais.

This deed was registered on the 27th January, 1906.

On 25th April, 1914, by deed before the same notary, the appellant, described as being a farmer residing in the parish of Saint Gédéon du Lac Saint Jean, purchased from Mrs. Blais the above mentioned lot "C,"

mais sauf la partie de la dite terre déjà vendue à Joseph Brassard et les parties louées à Xavier Bacon, Joseph Simard, N. Fiché et fils et un nommé Benoit et leurs représentants.

It does not appear whether these parts of lot "C" were those described in the deed to Mrs. Blais as

les parties déjà aliénées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais,

nor does it appear what emphyteutic leases had been granted. The appellant alleges that this deed was registered on 2nd June, 1914.

The appellant, having by a protest served on the respondent on 15th June, 1916, disputed the latter's right to fish opposite his property, the respondent instituted this action against the appellant praying for a declaration that the respondent is the sole legal and lawful proprietor of all that part of the Metapedia river that fronts upon and flows on, over and opposite lot "C," and of the bed thereof, which forms part of

said lot, and for a declaration that the respondent is the owner of the fishing rights therein and that the appellant be condemned to give up the possession thereof to the respondent.

The appellant contested this action, alleging that Sir George Stephen had acquired no more than a personal servitude, not assignable, and which could only be set up against R. A. Blais. He admitted that he had fished and allowed others to fish opposite his lot, but asserted that he had the right to do so, being the owner of the bed of the stream to the middle thereof. He also claimed that the respondent's title could not be set up against him for want of proper registration and also because its registration had not been renewed since the official cadastre came in force.

The evidence shews that there is a valuable salmon pool in the Metapedia river opposite lot "C." The membership of the respondent's club is restricted to ten members, but each member has the right to bring one guest. The fishing lasts continuously from 1st June to 15th August.

The Superior Court (Mr. Justice Roy) maintained the respondent's action, holding that the fishing rights acquired by Sir George Stephen were real rights and rights of ownership

de la nature d'un profit à prendre du sol sur lequel coulent les eaux.

The learned judge also holds that the registration of the respondent's title did not require renewal after the official cadastre came into force, and that the sale from Sir George Stephen to the Restigouche Salmon Club had been properly registered. The judgment, therefore, grants the prayer of the respondent that it be declared owner of the fishing rights in the river Metapedia opposite lot "C" and condemns the appel-

1919

DUCHAINE v. MATAMAJAW SALMON CLUB

Mignault J.

lant to restore the possession of these rights to the respondent, with costs.

On an appeal by the appellants to the Court of King's Bench, the latter court confirmed the judgment of the Superior Court for the reason that the fishing rights sold by Blais to Sir George Stephen were assignable, that the deeds of sale by the latter to the Restigouche Salmon Club, and by that club to the respondent, were legal and valid contracts, and transferred the said fishing rights to the Restigouche Salmon Club and to the respondent, and that the registration of these deeds of sale did not require to be renewed after the official cadastre was put in force in this registration division.

I have carefully read and considered the learned and elaborate opinions of Mr. Justice Roy in the trial court and of Mr. Justice Pelletier and Sir Horace Archambault Chief Justice in the Court of King's Bench.

Mr. Justice Roy, as I have said, held that the fishing rights in question were real rights and rights of ownership

de la nature d'un profit à prendre du sol sur lequel coulent les eaux.

May I say, with deference, that, notwithstanding its French name, there is nothing similar, in the law of the Province of Quebec, to the *profit à prendre* of the common law of England, which is defined as the right to take something off the land of another person, or the right to enter the land of another person and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. It is considered as an interest in land and may be created for an estate in perpetuity. Halsbury, Laws of England, verbis Easements and Profits à Prendre, Nos. 656, 665, 667.

May I add that the use of such a term, in connection

with a controversy arising under the law of Quebec, is confusing even though it may be thought that there is a certain analogy between one right and another. There are, of course, real servitudes in the Quebec law, but they can be granted only in favour of an immovable and not of a person, and whether the right acquired by Sir George Stephen could or could not be considered as a *profit à prendre* under the law of England, it is certain that it is not a real servitude under the Quebec law. To assimilate it, therefore, to the *profit à prendre* is, to say the least, misleading.

Art. 405 of the Civil Code describes the rights which can be acquired with regard to property in the Province of Quebec.

> 405. A person may have on property, either a right of ownership, or a simple right of enjoyment, or a servitude to exercise.

The right acquired by Sir George Stephen must be brought under one of these three heads. I am of the opinion that it is not a right of ownership. Sir George Stephen purchased no part of the river bed, although he could, no doubt, make use of it in so far as necessary for the exercise of his right of fishing, but this is a mere right of enjoyment. He did not acquire a right of servitude, by which art. 405 means a real servitude, for that is

> a charge imposed on one real estate for the benefit of another belonging to a different proprietor (art. 499 C.C.).

The only remaining real right (*jus in re*) which he could acquire is the right of enjoyment, and this is the very most that can be found in his title.

I am not unmindful of the fact that Sir George Stephen and his assigns have the right to pass over lot "C" for the exercise of their fishing rights. But this is a mere accessory of the latter rights, and is not a real servitude, for it is a right acquired by a person and not by an immovable, and thus does not come

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Mignault J.

within the definition of art. 499 C.C. for want of a dominant property.

In the Court of King's Bench, Mr. Justice Pelletier expressed the opinion that Sir George Stephen acquired from Blais a sort of co-ownership with the latter in the river bed, because the fishing rights could not be exercised without using the bed of the river, but the answer seems to be that Sir George Stephen could use the river bed by virtue of the right of enjoyment granted him, so that it is not necessary to treat him as being a co-owner with Blais.

Chief Justice Archambault, on the contrary, expressed the opinion that what Sir George Stephen acquired was a right of usufruct. This would bring it under the second species of rights mentioned by art. 405 C.C., the right of enjoyment, and I agree that this wide term, right of enjoyment, would comprise any right obtained by Sir George Stephen, which, of course, excludes the right of ownership on the one hand and the right of real servitude on the other. The grant to a person of fishing rights in a non-navigable and non-floatable stream, by a riparian owner whose title extends to the centre of the stream, confers, under the authorities, a restricted right of use or usufruct (Baudry Lacantinerie, Biens, No. 1074; Pandectes Françaises, verbis Pêche Fluviale, No. 131; Fuzier Herman, verbis Pêche Fluviale, Nos. 114, 115, 118; Aubry et Rau, 5 ed., vol. 3, p. 110), which Demolombe (vol. 12. No. 686) calls "un usage irrégulier," but such a right is not and cannot be a real servitude. (See the same authors and an interesting decision, with regard to hunting rights, of La Cour de Cassation in Sirey, 1891, 1, 489; Dalloz, 1891, 1, 89, with special reference to the "rapport" of conseiller Sallantin and the "conclusions" of the avocat général Reynaud contained in the judg-

ment.) There is no doubt that a right of usufruct can be restricted to certain fruits or products of a property by the title granting it (Demolombe, vol. 10, No. 265).

But the important question that dominates the whole controversy, and which was argued at great length at the hearing by both parties is this: Granting that Sir George Stephen acquired a right of enjoyment or of usufruct, will this right last beyond the life of Sir George Stephen? A further question is whether this right is one that could be assigned.

I have no doubt that it was an assignable right, for a right of enjoyment, other than the right of use and habitation (arts. 494 and 497 C.C.), can be assigned to others. See art. 457 C.C. for usufruct and art. 1638 C.C. as to the contract of lease.

But I am equally convinced that it was essentially a temporary right, for the right of enjoyment, as distinguished from the right of ownership or the right of real servitude, cannot be granted in perpetuity.

If we take the type and the most important form of the right of enjoyment, the right of usufruct, it is entirely elementary to say that it is essentially a temporary right, and if no other term be specified, it ends at the death of the usufructuary.

Art. 479 C.C. says:—

> Usufruct ends with the natural death of the usufructuary, if for life; by the expiration of the time for which it was granted. * * *

The words "if for life" do not mean that unless the usufruct be created for the life of the usufructuary, it will last for ever. The Code evidently contemplates that the usufruct may be created for life or for a term. In the former case, it ends with the life of the usufructuary, in the latter case, on the expiration of the term, and the reasonable construction of this article is

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Mignault J.

that if no term for its duration be fixed, usufruct ends with the life of the usufructuary.

This is shewn by art. 481 C.C. which states:—

A usufruct which is granted without a term to a corporation only lasts thirty years.

The reason for this is evident. A corporation has generally a perpetual existence and succession (art. 352 C.C.), and therefore the law fixes a term in the silence of the contract for the duration of the usufruct.

Where it is granted to a person, then unless a term be expressly stipulated, and it cannot be stipulated in perpetuity, the usufruct does not extend beyond the life of the usufructuary.

The whole policy of the law is against the indefinite duration of such a right.

Toullier, one of the earliest commentators of the Code Napoléon, says, in his second volume, No. 445:—

Si l'usufruit pouvait être pour toujours séparé de la propriété, elle ne serait plus qu'un vain nom, et deviendrait parfaitement inutile. On a donc voulu qu'il ne pût être perpétuel, et qu'il s'éteignît par divers moyens, les uns tirés de la nature des choses, les autres de la disposition de la loi.

And Huc, one of the most recent of the commentators, gives the reason why all rights of enjoyment are necessarily temporary.

Tout démembrement de la propriété portant sur le *jus utendi* et le *jus fruendi* est essentiellement temporaire, car s'il était perpétuel il serait destructif du droit lui-même de propriété, ainsi réduit à n'être qu'un vain mot. Commentaire du Code Civil, vol. 4, No. 240.

This has always been the law, and from the time of Rome, the institutes of Justinian declaring expressly *finitur autem usufructus morte usufructuarii.*

Pothier, in his treatise on Dower, No. 247, says:—

L'usufruit de la douairière s'éteint par toutes les manières dont s'éteint celui de tous les autres usufruitiers.

1o. Il s'éteint par la mort naturelle de la douairière: finitur usufructus morte usufructuarii. Inst. tit. de Usufr., s. 4.

Also Guyot, Répertoire, Vo. Usufruit, vol. 17, p. 402:—

La propriété ne serait qu'un vain nom et qu'un droit illusoire, si elle était toujours séparée de l'usufruit; les lois ont prévénu cet inconvénient, en attribuant à plusieurs causes l'effet de les réunir et de les consolider.

La première est la mort de l'usufruitier.

My conclusions, therefore, on this branch of the case are:—

1. That Sir George Stephen acquired under the deed from Blais no rights of ownership over the bed of the river.

2. That he did not acquire a servitude over the bed of the river, nor did he even get a real servitude of passage over any part of lot C.

3. That he obtained from Blais a right of enjoyment or usufruct, which right will come to an end when he dies.

The mere sale of fishing rights, or of hunting rights, confers no title to the river bed or land where these rights are exercised, but only the right to use the same for the purpose of fishing or hunting, which is nothing more than a right of enjoyment, and therefore essentially temporary in nature.

So far, therefore, as the respondent's action merely claims the right to fish and seeks to prevent the appellant from interfering with this right, its action is, in my opinion, well founded, but the appellant's right to resume full possession of the river and its bed opposite lot "C" at the death of Lord Mount Stephen should be carefully safeguarded, which was not done in the courts below.

I have not yet dealt with the defence of the appellant based on the alleged lack of proper registration of the sale from the Restigouche Salmon Club to the respondent in 1905, and on the failure of the latter to

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Mignault J.

renew the registration after the official cadastre was put in force.

I am, however, of the opinion that this defence fails. The imperfect registration of the respondent's title from the Restigouche Salmon Club is immaterial, because, long before the appellant purchased lot "C," the sale from Lord Mount Stephen to the Restigouche Club was duly registered, and the respondent is entitled to avail himself of this registration as against the appellant.

And as to the failure to renew the registration, it suffices to say that ever since the decision, in 1874, of the Court of Appeal in the case of *La Banque du Peuple* v. *Laporte* (1), it is settled law in the Province of Quebec that the renewal of registration of any real right, required by art. 2172 of the Civil Code, has reference only to hypothecs or charges on real property and not to rights in or to the property itself.

The appellant has referred us to a statute passed by the Quebec Legislature in 1881, 44 & 45 Vict., ch. 16, which requires the registration of customary dowers created before the Civil Code came into force and of real, discontinuous and unapparent servitudes. He especially insists on section 7 of the statute ordering the renewal of the registration of conventional servitudes affecting any lot of land.

It seems to me sufficient to answer that the right acquired by Sir George Stephen was not a conventional servitude but a right of enjoyment, as to which right no question of the necessity of renewal of registration can arise in view of the decision in the case of *La Banque du Peuple* v. *Laporte* (1). To dispute now the authority of *La Banque du Peuple* v. *Laporte* (1), which,

(1) 19 L.C. Jur. 66.

as I have said, is settled law in Quebec, would imperil a great number of vested rights which rest on the authority of this decision. The statute of 1881 is, therefore, without application in this case, and I do not feel called upon to express any opinion as to the construction of section 7.

On the whole, my opinion is that the appeal should be allowed to the extent of declaring in the judgment that the fishing rights now exercised by the respondent in the Metapedia river, between the middle of the stream and lot "C," in the first range of the township of Causapscal, and also the right of passage over lot "C," will come to an end at the death of Sir George Stephen, now Lord Mount Stephen. As this was the principal question discussed before this court, I would give the appellant his costs here. I would also give him his costs before the Court of King's Bench, because he was right in appealing from the judgment of the Superior Court, the latter judgment treating the fishing rights as being rights of ownership. In the Superior Court, I think the appellant should pay the respondent's costs for the reason that he illegally interfered with the respondent's fishing rights, and thus forced the latter to take proceedings against him.

CASSELS J. (dissenting).—I have carefully considered the reasons for judgment of the trial judge and the reasons for judgment of Mr. Justice Pelletier and the other judges in the Court of King's Bench.

I have also had the benefit of a perusal of the opinions of my brother judges, Mr. Justice Brodeur and Mr. Justice Mignault.

The case is of such importance that I have deemed it necessary to give extra consideration to it. A num-

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Cassels J.

ber of titles to valuable properties are dependent upon the decision to be arrived at in this case.

With considerable diffidence, having regard to the knowledge of the French law possessed by my learned brothers from the Province of Quebec, I have come to the conclusion that the judgment in the court below should not be disturbed.

Mr. Justice Mignault, in very carefully prepared reasons, has set out in a clear manner the facts of the case. It is unnecessary for me to repeat them.

I have come to the conclusion that the reasons of Mr. Justice Pelletier in the court below are correct and I agree with the conclusions he has arrived at.

The owner of the lots has title to the bed of the river to the middle of the stream. The river is neither navigable nor floatable. This, I think, is beyond question having regard to the present state of the law in the Province of Quebec.

I think also there is no question as to the right of the owner of the bed of the river to separate the right of fishing from the right of the soil. The law of the Province of Quebec in this respect is similar to the English law. In the reasons for judgment of the trial judge, the language of Sir W. J. Ritchie, of Sir Henry Strong and of Gwynne J., in the case of *The Queen* v. *Robertson* (1) are quoted.

The late Chief Justice Sir W. J. Ritchie, at p. 115, states:—

> A right to catch fish is a profit *à prendre*, subject no doubt to the free use of the river as a highway and to the private rights of others.

He states, at p. 124:

> Unquestionably the right of fishing may be in one person and the property in the bank and soil of a river in another.

Sir Henry Strong puts it as follows at p. 131:—

> It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so

(1) 6 Can. S.C.R. 52.

much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement but is strictly a right of property.

Gwynne J. states at p. 68:—

The right of fishing, then, in rivers above the ebb and flow of the tide, may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person, and the right of fishing in the waters covering that bed may be wholly in another or others.

The late case *The Attorney-General for British Columbia* v. *Attorney-General for Canada*, decided by the Privy Council (1) is to the same effect.

In the Lower Canada Reports of Seigniorial question, vol. A, at p. 69a, is the answer to the following question:—

On seigniories bounded by a navigable river can the seignior legally reserve the right of fishing therein?

The answer of the court is as follows:—

On seigniories bounded by a navigable river or stream the seignior could have reserved to himself the right of fishing therein.

I find no difference between the law of the Province of Quebec and the law of England in this respect. I am quite in accord with the view of my brother judges that when a question has to be decided arising in the Province of Quebec and governed by the laws of the Province of Quebec such a case should be decided by the laws of that province; but I fail to see why the decisions of the courts of England or of the United States should not be referred to as guides to arriving at the correct interpretation of such laws.

The reasons for judgment of Mr. Justice Pelletier are so clear and the citations of authorities both in the judgments of the trial judge and of Mr. Justice Pelletier so ample that it would be a mere repetition to repeat what these learned judges have so clearly expressed.

(1) [1914] A.C. 153; 15 D.L.R. 308.

1919
DUCHAINE
v.
MATAMAJAW
SALMON
CLUB
Cassels J.

It is conceded that the grant to Sir George Stephen was not a mere personal grant. All agreed that the grant extended at all events to the life of Lord Mount Stephen.

It is not a personal right, it is a right capable of assignment.

The point in litigation is whether or not this right is a mere right of usufruct terminable on the death of Lord Mount Stephen or whether it is an estate vested in him and his heirs capable of transmission. I agree with Mr. Justice Pelletier that the estate is not one in usufruct but that it is a conveyance of property. I also agree with him that the exclusive right of fishing carried with it the right to the soil or bed of the river during the term of the fishing season.

I refer to one or two additional authorities in support of this proposition.

The case of *Tinicum Fishing Co.* v. *Carter* (1), was decided by the Supreme Court of Pennsylvania. It is stated:—

> That a fishing-place may be granted, separate from the soil, may be considered as settled in this State.

On page 39, the following statement of the law occurs:—

> If the easement consists in a right of profit à prendre, such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross, it is treated as an estate and may therefore be for life or inheritance.
>
> * * *
>
> A right to take fish is a *profit à prendre in alieno solo.* It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes or capstans for the purpose of drawing the seine and the occupancy of the bank at high tide as well as the space between high and low water marks as far as may be necessary and usual. The grantee in the nature of things must have exclusive possession for the time he is fishing and for that purpose; the grantor at all other times and for all other purposes.

(1) 61 Penn. St. 21, at p. 38.

And in Massachusetts, in the Supreme Court, a case of *Goodrich* v. *Burbank* (1), deals with the question. The judgment of the court is as follows:—

> In the case of rights of *profit à prendre* it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenent thereto, but if granted to one in gross they are treated as an estate or interest in land, and may be assignable or inheritable.

In *Muskett* v. *Hill* (2) it is pointed out

> that a right to hunt and carry away game is a grant and held to be an assignable right.

So in Brooms' Legal Maxims, 8th ed. (1911), p. 367, it is stated:—

> That by the grant of fishing in a river is granted power to come upon the banks and fish for them.

Citing Shep. Touch. p. 98.

I refer to those authorities in addition to the authorities cited in the courts bleow as confirming the propositions mentioned by Mr. Justice Pelletier in his reasoned judgment.

I think the question of whether *profit à prendre* is known to the law of the Province of Quebec or not is a mere question of language. The fact exists that the right in this particular case, by whatever name you choose to call it, is a right of property. It is a right that passed by the grant and became vested in Sir George Stephen and his heirs and assigns as a right of property and not a mere right of enjoyment.

It has always been held that a right granted by the King of France to the seigniors in Lower Canada of fishing in the St. Lawrence was something greater than a mere right during the lifetime of the seignior.

A number of valuable rights have been granted in the River St. Lawrence. It has never been doubted that these rights extended beyond the life of the

(1) 12 Allen (Mass.) 459, at p. 461. (2) 5 Bing. N.C. 694.

1919
DUCHAINE
v.
MATAMAJAW SALMON CLUB
Cassels J.

seignior, nevertheless it never could be suggested that the soil of the river was vested in the seignior. If the decision of this court is to the effect that the granting of the fishing rights in question to Lord Mount Stephen is a mere right of personal enjoyment during the life of Lord Mount Stephen, by reason of its being only a right of usufruct, a number of rights which have heretofore never been questioned would be destroyed.

I am unable to arrive at such a conclusion as I have stated. I am of opinion the right in question is not one of usufruct but one of property and capable of being transmitted.

I think the judgment of the court below should not be interfered with. This appeal should be dismissed and with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Charles Angers.*
Solicitor for the respondent: *John Hall Kelly.*