THE LAURENTIDE PAPER COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

ALEXANDER BAPTIST (DEFENDANT) ..... } RESPONDENT.

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*Feb. 21, 24.
*Oct. 27.

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

Sale of standing timber—Registration of real rights—Ownership—Distinction of things—Movables and immovables—Priority of title.

A deed of sale of the right, during twenty years, to cut and remove standing timber, with permission to make and construct such roads and buildings as might be necessary for that purpose, does not affect the title to the lands on which the trees are growing but merely conveys the personal right to the timber as and when cut under the license. The registration of such a deed, in conformity with the provisions of the Civil Code of Lower Canada respecting the registration of real rights, is unnecessary and, if effected, cannot operate to secure to the vendee any right, privilege or priority of title in or to the timber as against a subsequent purchaser of the lands. *Watson* v. *Perkins* (18 L.C. Jur. 261) distinguished.

The judgment appealed from (Q.R. 16 K.B. 471) was affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing that of Cannon J., in the Superior Court, District of Three Rivers(2), and dismissing the plaintiffs' action with costs.

The action of the plaintiffs was accompanied by a seizure in revendication of 12,500 pine logs, cut by

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) Q.R. 16 K.B. 471. (2) Q.R. 16 K.B. 471-473.

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The Belgo-Canadian Pulp & Paper Co., the defendants, whose *fait et cause* was taken up by the present respondent, their warrantor, as defendant in warranty. The plaintiffs' claim to the logs seized was based upon a deed of sale to them, in 1888, from a former proprietor of the lands in the Township of Radnor from which the logs had been taken, of the right, during twenty years from the 25th of January, 1887, of cutting all "soft wood" which was to be found thereon, with permission to make all necessary roads and erect all necessary buildings upon the said lands for the purpose of their operations in cutting and removing such timber. The deed to the plaintiffs was registered at length in the office of the registrar of deeds for the County of Champlain, within which the lands mentioned were situated, and, subsequently, by a series of conveyances the said lands were vested in the defendants. The learned trial judge declared the attachment in revendication valid, held that the plaintiffs were the owners of the logs seized and condemned the defendants to return them to the plaintiffs or pay them the value thereof. This judgment was reversed by the judgment now appealed from.

The questions at issue on the appeal to the Supreme Court of Canada, so far as material to this report, are stated in the judgments now reported.

T. Chase-Casgrain K.C. for the appellants.

G. G. Stuart K.C. for the respondent.

THE CHIEF JUSTICE.—I agree entirely with the Chief Justice of the Court of Appeal that there is little to add to the admirable judgment of the late Mr.

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Justice Bossé, who spoke for the majority of that court. I accept his reasons and adopt his conclusions. The case is reported at full length in the Quebec Official Reports(1). In view of the very exhaustive and able presentation of appellants' case I venture, however, to say that the judgment in *Watson* v. *Perkins* (2), so much relied upon by Judges Trenholme and Cross, who dissented below, and pressed upon us at the argument here, is of very little assistance in this case. There the question at issue was the rights of the holder of a timber license with respect to timber cut in trespass on limits bought from the Crown, and, as Mr. Justice Bossé points out, those rights are settled by a special provision of the statute regulating the sale and management of Crown lands under which the limits were bought. Here the point to be determined is the rights acquired under a deed passed between two private individuals conveying the right to cut timber and the construction of which is governed by the general rules of law found in the Civil Code.

Briefly the facts are:

On the 25th January, 1887, the appellants, through their agent, Forman, bought from one Reynar, in the words of the deed,

> the right of cutting all soft wood (*la coupe de tout bois mou*) which is to be found (here follows a description of the lots on which the soft wood is to be cut) with the right to make all necessary roads and buildings for such purpose (*to-wit, said cutting*) on all the aforesaid lots; for the said Forman to have and cause the said cutting during the period of twenty years from the date of these presents.

Subsequently Reynar sold the same lots to one Vallières under whose title the respondent holds. The question at issue is: What is the character of the title

(1) Q.R. 16 K.B. 471. (2) 18 L.C. Jur. 261.

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given by Reynar to Forman? Did the purchaser, Forman, now represented by the appellant, acquire or take, under the terms of his deed I have just quoted, a title in the land, *"un droit dans la chose," "jus in re,"* or merely a license to cut not all the standing timber, but the trees of soft wood to be found on the lots mentioned, which when cut and removed became his property? In other words, can it be gathered from the words of the contract that the vendor intended to sell growing timber which might remain on the land, drawing nutriment therefrom for the benefit of the purchaser during twenty years, or did he acquire a right or license to cut a certain portion of the timber then standing, which right was to be exercised at any time during twenty years?

The principle of construction applicable here is, in my opinion, well expressed in Pandectes Françaises, *vo.* "Biens," No. 135:

> Le caractère mobilier ou immobilier des biens faisant l'objet d'un contrat se détermine par le point de vue auquel les ont considéré les parties contractantes et par la destination qu'elles leur ont attribuée.

As to the nature of the title I am, applying this principle, clearly of opinion that the vendor intended merely to grant a license to cut the standing trees which would become the property of the vendee only after severance; that he never intended to convey and the purchaser never intended to acquire a title in the land.

Pothier in his "Traité des Choses," No. 52, says:

> L'action qui naît de la vente des fruits pendants par les racines, ou d'un bois sur pied pour le couper, est une action mobilière; car quoique ces choses fassent partie de la terre, et soient immeubles pendant qu'elles y sont cohérentes, néanmoins les ayant achetées pour les acquérir seulement après que, par leur séparation du sol, elles seraient devenue meubles, l'action que j'ai *"tendit ad quid mobile,"* et par conséquent, est une action mobilière.

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And in this opinion all the modern French commentators on the Code Napoléon, from which art. 378 of the Quebec Civil Code was taken, concur. I might add that the jurisprudence in France is to the same effect. It will be found collected in Fuzier-Hermann, *vo.* "Forêts," No. 400; and in the same work, *vo.* "Ventes," No. 41. See also Dalloz, Rec. Pér., 78, 2, 261.

There is a case in appeal reported in Dalloz, Rec. Pér., 97, 2, 101, relied upon here which would appear to give some support to the appellants, but this judgment has been much criticized (see reporters' note) as a departure from the accepted rule of law and has not been since followed by the *Cour de Cassation,* as will be found on reference to Dalloz, Rec. Pér., 99, 1, 246, reported also in S. V., 1900, 1, 398. This case formally decides that the movable or immovable character of the thing sold is to be determined chiefly by the intention of the parties and the purposes to which the object of the sale is to be put.

Baudry-Lacantinerie, "Des Biens," No. 49, says:

> Les parties contractantes considèrent les objets incorporés au sol dans l'état où ils se trouveront quand la mobilisation prévue sera devenue effective. Le contrat, dans la pensée des parties, a pour objet non pas un immeuble, mais un meuble; on traite en vue et sous la condition d'un évènement qui doit amener les choses à l'état mobilier. Tel est le principe reconnu par la jurisprudence et consacré dans la formule; le caractère mobilier ou immobilier se détermine avant tout par le point de vue auquel les ont considérés les parties contractantes et par le but qu'elles leur ont assigné.

Here clearly the property in the trees did not vest in the buyer before severance. It was not intended that the purchaser should acquire the trees to remain in the soil deriving therefrom the benefit of further vegetation. What he wanted for the purposes of his business and what he acquired was not the standing

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tree, but the right or license to cut the tree and convert it into logs or lumber. The right to make new roads and to use existing ones, limited as it is by the deed to the cutting of the timber, helps us to gather the intention of the parties. The purchaser did not acquire the standing tree but the logs and timber into which the tree was to be converted and for this purpose exclusively he could make and use roads to give him access to the property. If the timber was left standing at the expiration of 20 years, the right to cut ceased, and if troubled in his possession in the interval the purchaser would have no right whatever to bring the "action en réintégration." See Fuzier-Hermann, *vo.* "Ventes," 127, and *vo.* "Forêts," 1357; 5 Laurent, No. 429.

2 Marcadé, No. 346, at page 343, says:

> Enfin, dans le cas même d'inhérence parfaite et perpétuelle au sol, les produits peuvent encore se trouver meubles dans un certain sens. Ainsi, quand les grains, fruits ou bois sont vendus séparément du sol, c'est là une vente de meubles, et l'acheteur n'a qu'un droit mobilier. Ces objets, en effet, ne sont vendus que comme produits, comme choses distinctes du sol, et en tant que devant être séparées de lui; dans la réalité, ils sont immeubles, mais ils sont cependant vendus comme meubles; l'acheteur achète des choses encore immeubles, mais sous la condition et avec le droit de les mobiliser. (Cassat. 19 vendém. an 14, 25 févr. 1812; 5 oct. 1813; 24 mai 1815; etc.)

Mr. Casgrain, in his factum here, raises an interesting question as to the rights of the purchaser of the cut against the subsequent purchaser of the land from his vendor and refers to an opinion expressed by Lyon-Caen in a note to be found at the foot of a judgment reported in Dalloz, 78, 2, 261, where it was held:

> Par suite, dans le cas de vente faite à deux acquéreurs successifs, au premier, de la coupe du bois, et au second, de la forêt entière (sol et superficie) l'acquéreur de la coupe ne peut se prévaloir de son droit contre l'acquéreur de la forêt, alors même que son contrat aurait une date certaine antérieure à celle de la second vente.

To this judgment, there are two foot-notes, in one of which it is argued by Lyon-Caen that the second purchaser takes the property subject to the rights acquired by the first. The criticism of the judgment is thus expressed:

Ainsi l'équité proteste contre la solution formulée dans les motifs de l'arrêt rapporté; et nous estimons que le droit est ici d'accord avec l'équité. Sans doute l'article 1141 c. civ. ne règle dans ses termes que le conflit qui s'élève entre deux acquéreurs successifs d'un même meuble; mais il doit être étendu au cas où, par exception, la chose successivement vendue est meuble par rapport au premier acquéreur et immeuble par rapport au second. En effet, d'après l'enseignement des jurisconsultes les plus autorisés, l'art. 1141 n'est qu'une conséquence de la maxime: "En fait de meubles, possession vaut titre," maxime érigée en disposition de loi par l'art. 2179 c. civ., et qui signifie que, relativement aux meubles, le fait de la possession constitue du possesseur un titre irréfragable de propriété (Aubry et Rau, *op. cit.* t. 2, § 174, p. 55, et § 183, texte et note 2). Or, la propriété, une fois légalement constituée, est, de son essence, un droit réel, absolu, opposable aux tiers. L'acquéreur, une fois mis en possession réelle et effective de la coupe, et qui en est devenu par cela même propriétaire, ne saurait donc en être évincé sous prétexte que, dans une vente passée postérieurement avec un tiers, cette coupe a été considérée comme un immeuble dont la propriété n'est point acquise par la seule possession.

On the other hand, in another note to the same judgment, the conclusion reached by the Cour de Cassation, to the effect that the purchaser of the right to cut (*droit de coupe*), would have no claim against the subsequent purchaser of the property, is approved of in the following words:

Dans l'intervalle de la vente à l'exploitation, l'acquéreur ne peut donc être investi que d'un droit personnel en vertu duquel il peut contraindre le vendeur à lui laisser exploiter la coupe. Si telle est la nature du droit que la vente de la coupe confère à l'acquéreur il faut en conclure, avec l'arrêt rapporté que ce droit n'est pas opposable à celui qui a postérieurement acquis du même vendeur la forêt elle-même, sol et superficie. C'est, en effet, un principe élémentaire de notre droit que, sauf les rares exceptions résultants de dispositions formelles de la loi (c. civ. 1743, et 2091), celui qui n'est investi que d'un droit personnel, c'est-à-dire le créancier, ne peut l'exercer que contre la personne obligée à la prestation, c'est-à-dire contre le

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débiteur et que spécialement les ayants cause à titre particulier du vendeur d'un immeuble ne sont pas tenus des obligations personnelles qu'il a pu contracter relativement à cèt immeuble. V. conf. Demolombe, *op. cit.* t. ler, nos. 183, et suiv.; Laurent, *op. cit.*, t. 5, No. 432.

The Chief Justice.

At the very most, therefore, this reference given us by Mr. Casgrain shews that the text writers are not agreed in their interpretation of the law and, under such circumstances, we would not be justified in setting aside the apparently well settled jurisprudence of the French courts on this point.

It will not be necessary, in my view of this case, to consider the other interesting questions raised. I entirely concur in what Mr. Justice Bossé says as to the effect of the sale by Vallières.

DAVIES J. concurred in the judgment dismissing the appeal with costs for the reasons stated by the Chief Justice.

IDINGTON J.—I incline so much to hold as correct the opinion expressed by Mr. Justice Bossé in the court below that the right in question here, which is expressed in the document giving it as follows,

> the right during twenty years from the twenty-fifth of January, eighteen hundred and eighty seven, of cutting of all wood (*la coupe de tout bois mou*) which is to be found,

was a mere personal obligation, that I might well be content merely to say that by reason of so failing to find clear error I would dismiss the appeal.

I, however, have given a great deal of attention to the interesting questions arising before us and the very full argument had relative to the nature of the right in question, if not a mere personal obligation.

It was contended before us that the right to cut was in the nature of a superficies and therefore not within the requirements of the "Registry Act" and amendments thereof, rendering it imperative that there should be registration.

I assume, for argument's sake, this latter part of the contention may be correct, but do not express any opinion on the point whether or not a right of superficies is within the "Registry Act" or amendments thereof.

I do not, however, agree that this right (so limited as to time) to cut was at all in the nature of a superficies.

I read the right as expressed in the last few words as made relative to timber *then to be found.*

The origin, in the civil law, of the right of superficies, does not indicate that such a right as cutting existing wood was within the scope of its original operation. It indeed seemed rather confined to the case of buildings. Sohm puts it thus:

> Superficies stands to houses in the same relation as emphyteusis to agricultural land. Superficies in Roman law is a perpetual lease of building land, subject to the payment of an annual rent (solarium). On the land thus leased the superficiary erects a house. He builds it with his own materials. By the rules of accession, therefore, the ownership of the house vests in the owner of the soil; *superficies solo cedit.* A superficiary, however, has a real right, for himself and his heirs, to live in the house and to exercise the rights of an owner therein for the specified term of years (say, ninety-nine years) or forever, as the case may be. Hence the legal position of the superficiary is the same as that of the emphyteusis.

There does not seem much resemblance in this bargain in question here to anything in the nature of an emphyteusis and yet that is what several authors have, as this one I cite, compared the right of superficies to.

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Granted that in some authors on French law there is a recognition of the extension of superficies to trees or the right to cut trees, it must conform in such cases to the fundamental elements upon which a right of superficies rests or by which it may be recognized.

I have been unable to find, however, a single authority in the cases in Quebec upon which such like right to cut trees as here in question has been treated otherwise than as a personal obligation or a servitude.

The following are some of the Quebec authorities that have referred to the matter of such a right as a servitude: *Croteau* v. *Quintal*(1); *Archambeault* v. *Archambeault*(2).

In *Watson* v. *Perkins*(3) a license to cut was referred to as a servitude and by one learned judge as a superficies. But the peculiarities of the government renewable license, such as in question there, is clearly distinguishable even if from one point of view it could be looked at as a superficies.

Then the case of *Cadrain* v. *Theberge*(4) has no resemblance to this case even if beyond question rightly held to be a case of right of superficies.

The jurisprudence of Quebec would seem to indicate that such a right has there, when of a permanent nature, been uniformly looked on as a servitude.

If a servitude of any kind some one of the several amendments to the "Registry Act" must, I think, cover it. Such is their scope and purpose.

I think the appeal should be dismissed with costs.

(1) 1 L.C. Jur. 14.
(2) 15 L.C. Jur. 297.
(3) 18 L.C. Jur. 261.
(4) 16 Q.L.R. 76.

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MACLENNAN and DUFF JJ. agreed in the judgment dismissing the appeal with costs for the reasons stated by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Casgrain, Mitchell & Surveyer.*

Solicitors for the respondent: *Martel & Duplessis.*