1908

*Feb. 20, 21.
*March 23.

ALPHONSE RIOUX (PLAINTIFF) ..... APPELLANT;

AND

THE SAINT LAWRENCE TERMINAL COMPANY (INTERVENANTS), AND ALPHONSE LAUZIER (DEFENDANT) ..... RESPONDENTS.

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

Title to land—Sale—Construction of deed—Reservation of growing timber—Rights of vendor and purchaser—Resolutive condition.

A deed of sale of wild lands to be used for agricultural purposes clearly expressed certain specific reservations and contained, in addition, a clause as follows: "Et de plus la présente vente est faite à la condition expresse que le dit acquéreur n'aura pas le droit de couper, enlever ou charroyer aucun bois sur le terrain ci-dessus vendu autrement que pour son propre usage pour faire des bâtisses sur le terrain, des clôtures, et du bois de chauffage; il est, en conséquence, convenu que si l'acquéreur coupait du bois en violation de la présente clause, les vendeurs auront droit de demander la résiliation des présentes et de reprendre possession des immeubles ci-dessus vendus sans rien payer à l'acquéreur pour les améliorations qu'il pourra avoir faites. Et tout bois coupé en violation des présentes deviendra, aussitôt coupé, la propriété des vendeurs, car tel est la convention expresse des parties et sans laquelle les présentes n'auraient pas eu lieu."

Held, that, in the absence of any contrary intention expressed in the deed, the title to the lot of land sold passed absolutely to the purchaser with the exception of the special reservations.

Held, also, that the clause in question had not the effect of reserving to the vendors all the timber standing upon the land sold, nor can it be construed as giving them the right (without rescission upon breach of the resolutive condition) to re-enter on said land for the purpose of removing stumps or second growth timber.

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

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Rimouski, which maintained the intervention of the respondents and dismissed the appellant's action with costs.

The appellant acquired the lands in question in this cause from one Belzil, whose *auteur,* one Fortin, had purchased the property, in 1885, from King Brothers, then owners of the Seigniory of Matapédiac within which the lands are situated. After the sale to Fortin, the vendors, in the exercise of the stipulations in the deed of sale, had cut and removed the merchantable timber from the land. The respondents subsequently purchased the seigniory from King Brothers and, in 1905, sent their foreman, Lauzier, with a gang of men, to the lot of land in question, and caused them to enter upon the same for the purpose of cutting and removing the stumps of the merchantable timber which had been previously cut, and of cutting and taking away certain other timber then growing upon the land. The present action was thereupon brought by the appellant against Lauzier for a declaration that the plaintiff was the sole owner of the land with the timber thereon, to enjoin Lauzier from cutting the timber, and for $120, as damages, for the value of the timber already cut by him, as alleged, in trespass upon the property. The defendant pleaded that the entry and cutting of the timber by him was by the express orders of the company, respondents, who were the owners of the timber, and they intervened in the action and took up the *fait et cause* of the defendant, claiming that they were owners of the timber so cut and of all other timber on the lands, and that they had the right to cut and remove it as the successors

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

in title of King Brothers who had reserved the same in the deed to Fortin, subject to the exception of what might be required for the construction of farm buildings and fences thereon.

The clauses of the deed in question are quoted and the questions at issue on the present appeal are stated in the judgments now reported.

L. P. Pelletier K.C. for the appellant. The clause in the deed by which the timber is sought to be reserved to the vendors is incompatible with the essence of a contract of sale of lands for agriculture purposes and contrary to law: art. 378 C.C.; the whole contract must be construed together in the sense in which it can produce the effect it was intended to have and against the vendors: arts. 1014, 1019 C.C.

Under art. 378 C.C. the wood formed an integral part of the immovable itself so long as the trees remained attached to the ground by their roots. Fortin acquired this immovable as it was then constituted and, in order that the ownership of any part of it should have remained vested in King Bros., an express and unequivocal reservation was necessary; after all the other express reservations contained in the deed, it would certainly have been stipulated had it been contemplated by the parties, but there was none made. The deed contains merely a prohibition to cut and haul away the wood and such a prohibition can no more logically be construed into a reservation of the ownership of the wood in favour of King Bros. than a prohibition to alienate could be taken to mean a reservation of the ownership of the immovable. No special reservation of the ownership of the wood was made and this prohibition does not constitute one.

This view is supported by the wording of the clause itself: "all wood cut contrary to these presents will immediately become, as soon as cut, the property of the vendors." See 25 Demolombe, *n.* 27; 10 Duranton, *n.* 518; 1 Guillouard, "Vente," *nn.* 198-203; 1 Troplong, "Vente," *n.* 260; 4 Aubry & Ran., p. 360, sec. 354, notes. Future growth could not have been contemplated in a sale of land for agricultural purposes; the plough and the mowing machine would prevent new growth.

A reservation of the ownership of the timber would have been null as contrary to law and to public policy. This lot is situated in a seigniory of which King Bros. were then seigniors and the deed is their original grant as such seigniors, made nearly forty years after the abolition of seigniorial tenure. The special court held under the Seigniorial Act of 1854 decided—and its decision is *res judicata* for all parties according to sub-section 9, section 16 of that Act(1)—that seigniors had no right to reserve the merchantable timber on the lots they granted and that such clauses in their grants were null and void as contrary to public policy (2). This was admitted to be the law before the abolition of seigniorial tenure and we have also the positive text of the statutes, 18 Vict. ch. 3, sec. 14, and 19 Vict. ch. 53, sec. 18.

Since the abolition of seigniorial tenure not only are all grants by the seignior presumed to be made *en franc-alleu roturier,* in absolute and unrestricted ownership, but any stipulation to the contrary is declared null and void. See also arts. 1062, 1080 C.C.

The respondents have failed to prove their right to cut the timber on appellant's lot, and, the prohibition

(1) 18 Vict. ch. 3. (2) Quest. Seig. vol. A, p. 80*a*.

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

not being a reservation of the ownership of this timber, the intervention should be dismissed. If the prohibition is to be construed as a perpetual reservation, it should be declared null and void as contrary to law and public policy. If it means a reservation of the first growth of timber and if such a reservation be held valid, then it should be declared extinct, as the first growth has long since been removed. At all events the appellant is entitled to restrain all parties from cutting any timber on the lot which would leave him without a sufficient quantity for building, fencing and heating purposes because the respondents had gone and were going beyond this restriction.

We also cite *Morel* v. *Lefrançois*(1); *Bury* v. *Murray*(2); *The United Shoe Machinery Co.* v. *Brunet*(3), and art. 970 C.C.

Lafleur K.C. and *Wainwright* for the respondents. The *habendum* in the deed is limited in such a manner as to negative an absolute conveyance in fee. Among other reservations the ownership of the timber is reserved to the vendors, there is a resolutive condition imposed for voluntary removal, and a penalty for involuntary destruction of it.

The surest method of determining the true meaning of an agreement is to follow the possession, or the interpretation which the parties themselves have given to the deed by the manner in which they have executed it. Dumoulin, Cout. de Paris, s. 46, *n.* 23; 6 Toullier, No. 320; 16 Laurent, No. 504. The appellant by his acquiescence and that of his *auteurs* is estopped from

(1) 38 Can. S.C.R. 75. (2) 24 Can. S.C.R. 77.
(3) Q.R. 27 S.C. 200.

pleading that the clauses in question do not constitute an express reservation of the wood. See cases cited in Coutlée's Supreme Court Digest, at pages 538 *et seq.*

The existence of a real right in wood or trees attached to the soil, distinct from the real right in the *fonds* or realty itself, is in accordance with the law of France, and, consequently, with that of the Province of Quebec. Perrin et Rendu, Dict. des soustruct, 11, 919 *et seq.*, 6 Laurent 252. Trees or hedges, planted on the land of another, are susceptible of immovable possession separate from the land on which they are and hence can give rise to the possessory action; 2 Aubry & Rau. 185, 124; 1 Garsonnet, Proc. Civ. 574, *n.* 133; Rousseau et Laisnez, *vo.* Action possessions, *n.* 72.

The terms of article 414 C.C. merely establish a presumption of law, which can be destroyed by simple presumptions to the contrary. *Habert* v. *Habert*(1); Baudry-Lacantinerie et Chauveau, *n.* 331; Fuzier-Herman, Rep., *vo.* "Accession," *n.* 72 *et seq.;* 6 Laurent, *n.* 246.

The interpretation appellant seeks to put on the clause in question is unreasonable, because, if it was not a reservation and he became the owner of all the wood, but able to use only that part for which he had personal need for the purposes mentioned, the absurd conclusion is that, with this exception, all the timber was to remain uncut and unused in perpetuity. This would also make the clause practically non-effective.

The expression *"tout bois coupé en violation des présentes deviendra la propriété des vendeurs"* was evidently to guard King Brothers against two possible

(1) 10 Leg. News 283.

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

dangers: (1) Fraudulently procuring the cutting of the timber and claiming ownership upon the plea that it was no longer part of the realty, but a movable on his land; and (2) a claim for labour upon wood improperly cut. The deed, as a whole and in view of what precedes cannot have the meaning which appellant seeks to give it.

The issue that the clause is contrary to public policy is not pleaded and, after twenty years of acquiescence and many years of the exercise of their contractual rights in this respect by the vendors throughout the seigniory, it is now too late to raise the question, in an appellate court.

If the clause is a prohibition rather than a reservation, and even if a perpetual prohibition results there would be nothing contrary to public policy. 23 Am. & Eng. Encycl. of Law, p. 455. There can be nothing here in any sense "injurious to the public."

We deny that the reservation could only apply to the first cut of timber and that, consequently, the stumps remained the property of the vendee. No property in the wood was transferred, the property itself was reserved and not merely the right to cut. The vendors owned the standing trees and their branches as well as the trunk, and also the stumps. Cutting off the upper portion of the trunk did not destroy their right in the remaining stump, any more than the removal of the branches destroyed their right of property in the trunk itself. So long as any part of their property remained they were entitled to take it, according to their commercial requirements. The wood in the stumps was commercial wood in 1885 and is so to-day, and its value relatively the same. If all the wood was not removed on the first or second cut, that constituted no abandonment of what remained.

We also rely upon the decisions in *Williams* v. *Châteauvert* (1); *McCormick* v. *Simpson* (2); *Cadrain* v. *Theberge* (3); and *Breakey* v. *Bilodeau* (4).

THE CHIEF JUSTICE.—On the 22nd of September, 1885, King Bros., now represented in these proceedings by the intervening party, the St. Lawrence Terminal Co., sold to one Fortin, from whom the appellant acquired, two pieces of property described in the deed of sale as lots 62 and 64, at the place called Cedar Hall in the Seigniory of Matapédiac, and the appellant and his *auteurs* have been in possession as proprietors since that date.

The purchase price was one dollar an acre, which was liable to be increased under certain circumstances to two dollars an acre. The sale was made subject to certain charges, obligations and reservations enumerated in the deed, such, for instance, as the reservation of land bordering on Lake Matapédiac; the property on both sides of certain streams and all water-powers, mines, minerals and quarries to be found on the property. The charges and obligations mentioned are connected with the maintenance of roads, fences and drains and the settlement of squatters' claims. The deed of sale contains, in addition, this clause, the construction of which has given rise to the present appeal:

Et de plus la présente vente est faite à la condition expresse que le dit acquéreur n'aura pas le droit de couper, enlever ou charroyer aucun bois sur le terrain ci-dessus vendu autrement que pour son propre usage pour faire des bâtisses sur les terrains, des clôtures et son bois de chauffage; il est en conséquence convenu que si l'acquéreur coupait du bois en violation de la présente clause, les ven-

(1) 4 Rev. de Jur. 148.
(2) [1907] A.C. 494.
(3) 16 Q.L.R. 76.
(4) Q.R. 30 S.C. 142.

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

The Chief Justice.

deurs auront le droit de demander la résiliation des présentes et de reprendre possession des immeubles ci-dessus vendus sans rien payer à l'acquéreur pour les améliorations qu'il pourra avoir faites. Et tout bois coupé en violation des présentes deviendra, aussitôt coupé, la propriété des vendeurs, car telle est la convention expresse des parties et sans laquelle les présentes n'auraient pas eu lieu.

In the Superior Court, it was held that this provision constituted a reservation in favour of the vendor of the property in the standing timber, subject to a right in the vendee to take so much as was necessary for building purposes and for fences and firewood. On appeal the judgment of the Superior Court was confirmed, Blanchet and Lemieux JJ. dissenting. We are without the notes of the majority in appeal.

I cannot agree with the conclusion reached below. Undoubtedly, by the sale, the property in the standing timber passed to the purchaser (1), unless a contrary intention can be gathered from the words of the clause above quoted; and, as I read it, no such intention is expressed. That clause merely contains a condition subject to which the sale is made. It is, what is well known under the Civil Code, a resolutive condition; this is a condition upon the realization of which the sale of the property may be rescinded (2). The sale made subject to such a condition produces all its effects, that is to say, the property with all its accessories passes; but if the event subject to which the sale is made happens then the sale may be set aside.

La condition résolutoire est celle à la réalisation de laquelle est subordonnée la résolution d'un droit; ainsi l'obligation sur condition résolutoire * * * existe immédiatement et produit tout de suite ses effets. Beaudry-Lacantinerie "Des Obligations," vol. 2, p. 13.

In the present instance, the event on the happening of which the sale may at the instance of the ven-

(1) Art. 414 C.C. (2) Art. 1079 C.C.

dor be rescinded is the cutting or carrying away by the purchaser of standing timber for any purpose other than those mentioned in the condition and this is not complained of. The property was sold admittedly to a settler, who immediately entered into possession, for agricultural purposes and necessarily it must be presumed that both parties intended that the timber would be cut down and this appears clearly from that other clause in the deed which provides that if in the process of clearing any merchantable timber is destroyed (*détruit*), then the purchase price is to be increased to $2 an acre. That is the penalty to be imposed for wanton destruction; but from this it is not to be inferred that in clearing the land for the purposes for which it was acquired the settler was not to cut down any timber. The intention was only to prevent its wanton destruction. The whole deed has to be examined so as to gather the substance of the agreement the parties intended to make. Apt words were found to make clear the intention of the vendor to reserve the water powers, mines, minerals and quarries as well as the land bordering on the lake and rivers; and if it was intended to reserve the property in the standing timber the same expressions could have been used for the purpose.

In my opinion the words of this clause of the deed are so clear that, were it not for the opinion expressed by the learned trial judge, I would have said that it was susceptible of but one meaning. The property passes with the standing timber, but if the purchaser cuts this timber for purposes other than those specified then the property does not revert to the vendor, he merely reserves to himself the right, which he may or may not exercise, to ask for a *résiliation* of the deed and to re-enter into the possession of the pro-

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

The Chief Justice.

perty. It is also provided that such timber as may be cut in violation of the terms of the deed is to become the property of the vendor. If the intention was to reserve the wood, why was it necessary to stipulate that the timber would become his when cut?

I have not overlooked the reference to *Williams* v. *Châteauvert*(1), upon which the trial judge relies, but I cannot see what bearing that case could have on the question at issue here. If I have properly construed this contract and understood the agreement made between the parties, the defendant, Lauzier, was a trespasser upon the plaintiff's land and is liable for the value of the timber cut in trespass; and I would allow the appeal and maintain the plaintiff's action with costs on both issues. *Vide McCormick* v. *Simpson*(2).

DAVIES J.—The substantial question in issue and to be determined on this appeal is as to the right of the company, respondents, the now proprietors of the ungranted part of the Seigniory of Lake Matapédiac, to cut the timber still remaining upon the farm of the appellant, which at one time formed part of that seigniory, whether in the form of stumps from which trees had already years ago been cut and taken away or of growing trees known as second growth.

On the 22nd December, 1885, Messrs. King Bros. of Quebec, the then owners of the seigniory, sold this lot to Joseph Fortin, appellant's *auteur*. The deed among other things provided as follows:

> And, moreover, the present sale is made on the express condition that the said purchaser should not have the right to cut, remove or cart away any wood on the land hereinabove sold, otherwise than

(1) 4 Rev. de Jur. 148, at p. 154. (2) (1907) A.C. 494.

for his own use, for the erection of buildings on the land, fences and as firewood; it is, in consequence, agreed that, if the purchaser cuts wood in violation of the present clause, the vendors shall have the right to demand the rescission of these presents and to take possession of the immovables hereinabove sold, without paying anything to the purchaser for the improvements which he may have made. And all wood cut in violation of these presents shall become, as soon as cut, the property of the vendors, for such is the express agreement of the parties, without which these presents would not have been executed.

Further on in the deed there is this provision:

This sale is, moreover, made for the price and sum of one dollar *per* arpent in superficies, provided that the said purchaser *does not destroy commercial wood in clearing the said lots of land*, otherwise the price of sale of the said lots will be two dollars an arpent in superficies. It is agreed by these presents that the vendors, alone, shall determine whether or not the commercial wood has been destroyed either in part or wholly, on the said lots Nos. 62, 64, 73 and 74 thus sold.

The respondents' contentions, which were maintained by the Superior Court and by a majority of three to two in the Court of King's Bench, were that by the terms of this deed the property in all the wood growing or being on the land sold remained in King Bros., the grantors, and that the clause above quoted amounted to an express reservation of such wood. That this reservation was subject to the right of the grantee settler to use such of the wood as he might from time to time require for the special purposes specified, viz., the erection of buildings and fences on the land and for firewood, provided it had not previously been cut and removed by the grantor, and that, should the grantee settler seek to act as owner of the wood, the vendors might cancel the deed, take possession as their own of any wood improperly cut by the grantee settler without recompense for his labour or, in the alternative, might charge him an extra dollar an acre for the land.

1908

RIOUX
v.
SAINT LAWRENCE TERMINAL CO.

Davies J.

We are, unfortunately, without any notes of the reasons of the majority of the Court of King's Bench for confirming the judgment of the Superior Court and must conclude that they meant to adopt the construction put upon the deed by that court.

I agree with the conclusions reached by the minority judges, Blanchet and Lemieux JJ., though I do not agree with all of their reasoning.

I adopt the construction of the much debated clause in the contract submitted, as the true one, by the appellant.

By the terms of the deed the land and all the trees upon it would pass, of course, to the grantee, and, unless the prohibition to cut trees other than those required for the erection of buildings or fences or for firewood is to be held to amount to an absolute exception out of the grant of the trees, the property in the trees passed to the grantee.

In terms plain and clear the provision is a prohibition simply against the use of a part of the property granted in ways which the grantee would otherwise be justified in using it, but it does not profess to be an exception out of the grant and cannot, in my opinion, be construed to be such.

I think, considering the circumstances surrounding the issuing of the deed and the internal evidence of the document itself which clearly contemplates and speaks of the grantee clearing the land, that the intention is clear to give the lands to the grantee as a settler or occupier to reclaim the same as a farm from the wilderness, while at the same time imposing certain specified limitations upon his user of the wood.

Any wood required for buildings or fences or firewood is not within the prohibition as I construe it,

even if commercial wood. These trees would necessarily be required by the grantee if he was "to clear the land" as contemplated, and I do not in any view of the case concede the right to have been retained by the proprietor of the seigniory even to cut and take away all of the commercial wood on the farm sold regardless of the requirements of the settler, with respect to such wood as was necessary for buildings, fences and firewood. It would be indeed a singular and strange construction of the clause which on the proprietor's own shewing contemplated and conceded the right of the purchaser to cut all the wood necessary for these purposes to say yes, but that right is subject to my prior one to denude the land if I please of all trees and wood, and leave the pioneer grantee nothing for the purposes essential to a settler, as contemplated by the deed itself. Such a construction might, it seems to me, operate to defeat the very objects the parties to the deed had in view as they appear from the internal evidence of the deed itself. The land was sold to him to be cleared as a farm. Provision was expressly made for wood for the pioneer's necessary purposes in building dwelling houses, barns and fences and in using firewood. These certainly are unquestionable rights which the partial prohibitory clause against cutting commercial wood must be read as subject to. In any construction open with respect to the clause it must be read as only a partial restriction and subject to the grantee's paramount right to cut and take the necessary wood required for the necessary purposes for which the farm was clearly sold to him.

The proprietor even on the assumption that he had the right to cut reserved in himself would, I conceive,

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

Davies J.

exercise it at his peril and would not be justified in so exercising it as to denude the land of all wood and so deprive the settler of the special wood required by him for the purposes specified in the deed.

Now if the prohibition is a partial one only, as I take it must be conceded, on what principle is it to be construed as an exception of the trees out of the deed? Surely if any such intention existed there were not wanting apt and appropriate words to express it.

But it is said such a construction necessarily flows from the use of the prohibitive words. I do not see why. I can see other meanings and other reasons much more reasonable and material than the one suggested by respondent.

The appellant suggests two, one in the fact that the purchase money was remaining unpaid as a charge upon the land and as the wood was then the more valuable part of it the prohibition was necessary as security to the grantor for the price for which the land was sold. The other was that King Bros., being themselves large lumbermen, wished to have in their own hands the control of the lumber and exclude rival lumber firms from competing with them on their own seigniory and so prohibited their grantees from selling to others. These are not unreasonable suggestions, and probably both had their influence in causing the insertion of the clause in question.

The grantor, on the assumption of the clause being valid, retained thus practically under his own control the commercial timber used by lumbermen. The grantee could not sell to others. His rights would be confined to cutting all such timber as was required for the purposes of the farm and to clear the farm, and if he desired to sell he must treat with his grantor alone.

But whether these suggestions are adopted or not, the proper construction of the language used does not amount to an exception of the trees out of the grant. That it does not I would conclude from the absence of any words of exception and from a reasonable construction of the very words of the prohibition, and I find such a conclusion strongly supported by the words defining what is to follow a breach of the prohibition, namely,

all wood cut contrary to these presents shall *immediately become, as soon as cut, the property of the vendors.*

If it was his property before as being excepted out of the grant such a declaration would be unnecessary and useless.

For these reasons I conclude that the clause does not reserve the property in the trees in the grantor, and that the prohibition even if valid generally, on which I am not called on to express any opinion, does not apply to stumps of trees which had already been cut and carried away as was stated many years ago by the grantor, and the cutting of which stumps by the company, respondents, gave rise to this action.

The exercise at this time of such a right involves necessarily a right of property in the trees and a right to have the stumps in the ground till such time as required by the grantor and practically denies to the grantee the right to do the very thing the deed on its face contemplated he would do, namely, clear up his land and make a farm out of a wilderness.

Once it is conceded that the prohibitory clause does not amount to an exception out of the grant of the property in the trees then to get at its real meaning as a prohibition upon the grantee's rights as such

1908

RIOUX v. SAINT LAWRENCE TERMINAL CO.

Davies J.

we must construe it with respect to the conditions existing at the time the deed was passed. In this view it certainly did not prevent the grantee entering upon the land he bought and cutting down the trees necessary for dwelling house, barns, fences or fire-wood. By parity of reasoning it would not operate to prevent him *bonâ fide* clearing up the land for farming purposes and in doing so necessarily clearing it of trees and stumps. Subject to this he was prohibited from cutting, but more especially from selling the timber or cutting the same for sale.

If, as I have held, the clause did not reserve to the grantor a property in the trees, this action is maintainable.

I would, therefore, allow the appeal with costs here and in each of the courts below, reversing the judgments of those courts and awarding the plaintiff, appellant, damages as proved.

IDINGTON J. concurred in the judgment allowing the appeal with costs.

MACLENNAN J. agreed in the opinion stated by Davies J.

DUFF J. concurred with the Chief Justice.

Appeal allowed with costs.

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

Solicitors for the respondents: *MacMaster, Hickson & Campbell.*