

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Chaudière Gold Mining Company of Boston v. Desbarats and Others, from the Court of Queen's Bench for the Province of Quebec: delivered 29th July, 1873.*

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Present:

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court of the Province, which dismissed the Appellant's action.

The action was brought by them, as vendees of mining property in Lower Canada, on an alleged warranty of title, not against Foley, their immediate vendor, but against the Respondents as the representatives of Foley's vendor, George Desbarats, who was, as they allege, liable as *arrière-garant* (remote warrantor), by virtue of Article 126 of the Code of Civil Procedure.

The case was decided upon a demurrer to the declaration, and consequently upon the facts disclosed in it.

The Appellants are there described as "The Chaudière Gold Mining Company, of Boston, in the State of Massachusetts, one of the United States of America, a body politic and corporate, duly incorporated under the laws of the said State of Massachusetts, for the purpose of and now actually carrying on the business of a mining company there, and

at the township of Watford, in the county of Dorchester, and elsewhere, in the Province of Quebec."

The declaration sets out a deed of sale of the 24th November, 1863, whereby, for the price of 20,000 dollars, Desbarats sold to Foley some lots of land which are stated to have been assigned to him by several persons described as "original grantees of the Crown;" but the deed at the same time discloses that patents from the Crown had not then been obtained. The declaration then sets out a deed of sale, of the 25th November, 1863, from Foley to the Appellants, whereby, for the price of 200,000 dollars, Foley sold to the Appellants the same lots of land, but by a description which not only does not state that the patents had not been issued, but from which it might be implied that they had been granted.

Desbarat's deed of sale contains an express warranty of a limited kind. Foley's deed has a warranty in different terms. It is proposed to refer more particularly to these warranties hereafter.

The declaration then alleges that the lands were Crown lands, which had not been granted to any person at the date of the deeds, and that neither Desbarats nor Foley had ever got "the titles or patents to the lands," and avers that the lots were afterwards granted by Letters Patent of the Queen to McGreevy, by whom the Appellants were evicted.

It was contended, on behalf of the Respondents, that, by the law of Lower Canada, corporations could not acquire land or an interest in it without the license of the Crown, and, as a consequence, were not competent to maintain an action on a real warranty against a remote warrantor. It was further contended that if this were not so, Desbarats had given an express warranty, which excluded the implied general warranty against eviction, and that this limited obligation gave no title to Foley, or to the Appellants as his vendees, to maintain this action.

For the Appellants it was answered that the disabling law did not apply to trading corporations, whether foreign or domestic; and, further, that if it did embrace them, such corporations were not incapacitated from acquiring, but only from holding lands, and that in either view their action was maintainable; and it was denied on their part that

the ordinary legal warranty against eviction arising upon contracts of sale was excluded by the terms of Desbarat's deed.

In the view their Lordships take of this case, it will not be necessary for them to determine the status and rights of foreign corporations in Lower Canada, or to what extent, if at all, they differ from corporations established in the Colony.

The law of the province deals liberally with foreigners. By the Civil Code, Article 25, aliens have the right to acquire and transmit moveable and immoveable property in the same manner as British-born or naturalized subjects; and by the Code of Civil Procedure, Article 14, foreign corporations may appear in all judicial proceedings in the Colony.

Whatever may be the effect of these Articles, it is sufficient to say that the Appellants cannot be in a higher or better position than a Colonial Corporation would be; and their Lordships, therefore, without further reference to the above distinction, will proceed to consider the principal question discussed by the Judges in the Courts below, viz., the capacity of mining or trading corporations to acquire lands in the Colony.

By the old law of France and her Colony, before the Edicts of Louis XV, issued in 1743 in the Colony, and in 1749 in France, corporations might acquire lands, but could not hold them without license from the Crown, if required to give them up. But these Edicts, which appear to be substantially to the same effect, incapacitated corporate bodies from acquiring as well as holding lands.

This distinction is very clearly stated by Pothier, "Traité des Personnes," Tit. 7, Art. 1.

He says: "Dès avant l'Edit de 1749, les communautés n'étoient pas à la vérité incapables d'acquérir des héritages; mais si elles pouvoient les acquérir, elles n'étoient pas en droit de les retenir toujours. Elles pouvoient être obligées de vuidier leurs mains de ces héritages, soit par les seigneurs, de qui les héritages acquis par elles relevoient; soit par le Procureur du Roi, à moins qu'elles n'eussent obtenu du Roi des lettres des amortissemens, qui les rendissent capable de posséder et retenir ces héritages, en indemnisant les seigneurs."

He then explains that the right of the King to oblige Corporations "à vuidier leurs mains de ces

héritages" was founded on reasons of public policy, and that of the seigneurs on their title to receive profits upon mutation of the lands on death and otherwise. Pothier further says: "L'Edit de 1749 a rendu les communautés absolument incapables d'acquérir aucuns héritages, comme fonds de terre, . . . . Les choses qu'il est défendu par cette loi d'acquérir, ne peuvent être acquises à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce," . . . .

The prohibitory force which the learned author ascribes to the Edict seems to be amply justified by the terms of it.

It was not denied by the counsel for the Appellants that Pothier had properly declared the effect of the Edict upon the Corporations with which it dealt; but they contended that these were religious and eleemosynary bodies only, and that modern trading corporations were not within its scope. There can be little doubt that the main object of the Edicts was to discourage the excessive endowment of religious houses, but the Edict of 1743 has words large enough to include secular bodies also. Article 1, after enumerating particular Corporations, has the general description, "autres corps et communautés ecclésiastiques ou laïques." And the prohibition to acquire lands contained in Clause 10 is directed against "autres gens de mortmain" as well as religious bodies.

It was argued that trading corporations could not be deemed "gens de mortmain," because their lands were not withdrawn from commerce, and were alienable. But the withdrawal of lands from commerce was only one, and not the main, reason of the law of mortmain, which was founded, as plainly appears from Pothier, not only on considerations of public policy, but on the loss to the Lords of their seignorial rights.

Their Lordships, however, cannot consider it to be their duty, at this day, to construe the language of the Edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity.

Tit. XI of the First Book of the Code, which treats of "Corporations," in terms includes every kind.



Art. 364 states: "Corporations are subject to particular disabilities, which either restrain or prevent them from exercising certain rights, powers, privileges, and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character or they are imposed by law."

The disabilities arising from the law are stated in Art. 366, as follows:—

"1. Those which are imposed on each Corporation by its title, or by any law applicable to the class to which such Corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

The Article refers, not to the Edict, but "to the general laws of the country respecting mortmain;" and their Lordships think that it declares the disabilities which attach by the general law of mortmain to all Corporations without distinction.

It may be here observed that this view of the Code is affirmed by the majority of the Judges in the Court of Queen's Bench in the present case, and is not denied by the two dissenting Judges. Mr. Justice Badgley refers to the Code in his judgment as follows:—

"Whatever doubts might have existed heretofore as to the prohibitive application of the old law with reference to merely trading Corporations, they have disappeared since the promulgation of the Code, which has declared those old law prohibitions to be and to have been our provincial law. The terms of the Code Article are too plain for a doubtful construction, and in their generality embrace all corporations (secular, lay, or trading), and subject them all to the same disqualifications to acquire real property, without the Royal or legislative permission first had and obtained."

These observations on the declaratory force of the Code are entitled to great weight, from the fact that Mr. Justice Badgley was one of the Judges who, in a case relied on by the Appellants (*Kierzkowski v. Grand Junction Railway Company*, 4 Lower Canada Jurist 86), expressed an opinion

that trading corporations were not "gens de mort-main." In that case, however, the Railway Company had legislative powers to purchase lands, and the question arose incidentally in an action for seignorial dues. Whatever may be the worth of the opinions expressed in that case, the higher authority of the Code must now prevail.

Their Lordships, for these reasons, think the Court of Queen's Bench was right in holding that the Appellants were incapable, without the license of the Crown, which it is not averred they possessed, to acquire any title to the lands sold to them by Foley. But before considering the effect of this disability on their right to maintain the present action, it will be convenient to advert to the nature and extent of the warranty upon the sale by Desbarats to Foley, of which the Appellants are seeking to avail themselves.

By the law of France prevailing in the Colony a warranty against eviction is implied in contracts of sale, but it is permitted to derogate from it by contract. Pothier says:—"Le droit commun des contrats de vente qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne concernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par conventions particulières." ("Traité du Contrat de Vente," Part II, chap. 1, sect. 2, Art. 7.)

The author then gives instances of Conventions having this effect; one of them being: "Celle par laquelle le vendeur stipule qu'il ne sera garant que de ses faits."

The Code of Lower Canada, in effect, embodies this law.

Article 1506 declares that the warranty to which the seller is obliged in favour of the buyer, is either legal or Conventional.

Legal warranty is defined in Article 1508, and includes warranty against eviction by reason of any right existing at the time of sale.

Articles 1507, 1509, and 1510, declare the manner in which this warranty may be excluded or diminished, as follows:—

Art. 1507. "Legal warranty is implied by law in the contracts of sale without stipulation. Nevertheless, parties may, by special agreement, add to the

obligations of legal warranty, or diminish its effect, or exclude it altogether."

Art. 1509. "Although it be stipulated that the seller is not obliged to any warranty, he is, nevertheless, obliged to a warranty against his personal acts. Any agreement to the contrary is null."

Art. 1510. "In like manner when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk."

By the deed of sale Desbarats expressly bound himself and his heirs to warrant and guarantee Foley against all mortgages, debts, and dowers whatever. There is no other express warranty. The terms of transfer are limited to the rights and interests Desbarats had, or could demand in the subject-matter of the sale.

It is evident that the eviction by the Crown is not a breach of the express warranty given by Desbarats. His liability for this eviction must, therefore, be founded, if it exists at all, on legal warranty.

It was insisted on the part of the Respondents that the legal warranty was excluded by the conventional warranty, upon the ordinary rule of construction, *expressum facit cessare tacitum*.

It is true that the conventional warranty of Desbarats does not contain the word "only," or other equivalent expression; but it seems to be a reasonable, if not a necessary, implication from the insertion of a limited conventional warranty, that it was the intention of the parties to exclude the larger legal one, and this implication is strengthened by the peculiar form of the conveyance, and by the disclosure in the deed of the fact that patents had not then been granted by the Crown; a disclosure which was not made in the conveyance by Foley on his sale to the Appellants, for a price which was an enormous increase on that he had paid to Desbarats.

There appears, then, to their Lordships to be strong ground for holding that the legal warranty was excluded on Desbarat's sale; and that no action could have been maintained by Foley against Desbarats upon an eviction by the Crown; and if this is so, none can be maintainable against him by

the Appellants for such eviction, even if they had been under no disability; because, in suing Desbarats as a remote warrantor, they can have no greater remedy against him than their immediate warrantor, Foley, to whose rights they are in effect subrogated by the operation of Article 126 of the Code of Civil Procedure.

It is not, however, necessary to rest the decision on this ground, because, assuming the legal warranty not to have been excluded on the sale by Desbarats to Foley, their Lordships think that the legal disability to purchase lands under which the Appellants are placed prevented them from acquiring the right to resort to it. Such a right can only spring from a valid sale, and the sale from Foley to them being invalid, by reason of their incapacity to purchase, the consequential right to sue Desbarats on a legal warranty could never arise. Whatever may be the case, as between Foley and the Appellants, it is evident that Desbarats, who was not a party to that sale, is not estopped from asserting its invalidity.

The Chief Justice of the Court of Queen's Bench was of opinion that, although the Appellants might be under a legal disability to purchase, the action was maintainable against Desbarats for the price as upon a failure of consideration. But this opinion appears to have been given upon the erroneous assumption that Desbarats had received the price paid on the sale by Foley, viz., 200,000 dollars, from the Appellants.

The right to restitution of the price is independent of warranty, and can be enforced, as it appears to their Lordships, only between the immediate parties to a sale.

Art. 1510 of the Code declares this right:—  
 “In like manner, when there is a stipulation excluding warranty, the seller in the case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk.”

By the terms of this Article it is only when warranty is excluded that this obligation to return the purchase-money as between the immediate parties to the sale arises; and it cannot, therefore, be within Article 126, C.P.C., which is confined to the case of warranties.



Their Lordships in deciding this Appeal are dealing only with the action brought under this Article against Desbarats, and not with the rights (if any) which the Appellants may have against their immediate vendor Foley, either on his express engagements or for restitution of the price paid to him.

One other point remains to be noticed, viz., the contention on the part of the Appellants that although it is not averred in the Declaration that the license of the Crown had been obtained, the grant ought, upon demurrer, to be assumed until the contrary was shown by plea. Their Lordships cannot agree in this view. On the face of the Declaration the Appellants were incorporated by the law of a foreign State, and were, according to what has been already decided, under a legal disability by the general law to acquire lands in Canada. Assuming that this disability might have been removed by a license from the Crown, it appears to their Lordships that it was for the Appellants to show it, since this license was essential to confer on them the legal capacity to purchase and to maintain the action. The grant also, if obtained, would be a fact peculiarly within their own knowledge, and ought, according to a reasonable rule of pleading, to have been averred by them.

This pleading point, it may be observed, is entirely beside the substance of the case; for there can be no doubt that, if a license had been really granted, the Appellants would have applied and been allowed to amend their Declaration and aver its existence.

In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this Appeal with costs.

