Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Charles Leclère and others v. *Jean Louis Beaudry, from the Court of Queen's Bench for Lower Canada (Appeal side); delivered* 1*st March*, 1873.

Present:

LORD JUSTICE JAMES.
SIR BARNES PEACOCK.
LORD JUSTICE MELLISH.
SIR MONTAGUE SMITH.

THE late M. Pierre Leclère, the Appellant's testator, having obtained judgment against a Mr. Short for 50*l.*, the price of a piece of ground, part of an orchard in Montreal, he had sold to him, the Sheriff seized the ground in execution. The Respondent (Beaudry) filed an opposition to the seizure as purchaser of the interest of persons entitled to a share of the orchard under a deed of gift, and he sought to annul a previous sale made to Pierre Leclère himself, as well as the subsale by Leclère to Short.

The Court of Queen's Bench, by a majority of Judges, affirmed the decision of the Judge of the Superior Court, which in effect annulled the sale to Leclère, and whether this sale ought to stand is the principal question in this Appeal.

By the deed of gift referred to, dated the 14th May, 1827, Madame Castonguay, a widow, gave to her son François Xavier Castonguay, to take effect as an immediate gift, the enjoyment and usufruct during his life of lands in Montreal, including the orchard in question, and after his death she gave the property, in substitution, to his legitimate children. She further declared that, in case the donee died without children, the enjoyment and usufruct should

go (" seront reversibles") to his brothers and sisters, or any of them during their lives; and that if, at her son's death, all his brothers and sisters should be dead (the event which happened) the property " retournera et appartiendra," to their legitimate children *per stirpes* (" par souches").

Power was given to the donee to sell the orchard for a rent charge, if it should be judged by experts to be advantageous to the succession. This power under which the sale in question was made, is in the following terms:—" Que le dit donataire pourra vendre à constitution de rente seulement, le tout ou partie du terrain complanté d'arbres fruitiers, si par experts et gens à ce connaissans c'est jugé avantageux pour ses enfans."

It is probable that the suitability of the land for building purposes was the motive for giving this power to the institute. Two conditions are annexed to its exercise:—(1.) That the sale shall be for a rent charge (" à constitution de rente"); and (2) that it shall be declared by experts to be advantageous to the succession. It may be observed that both appear to have been complied with.

F. X. Castonguay, the institute, died childless in 1861, having survived all his brothers and sisters. Two brothers, Jean Baptiste and Benjamin, left children. His sister Josephte married Leclère, and there were seven children of this marriage. Benjamin died before the deed of gift of 1827, leaving three sons, and the Respondent (Beaudry) in 1857 purchased their expectant interest (one-third) in the substitution. He, afterwards, in 1862 purchased the share (one twenty-first) of one of the sons of Leclère and his wife Josephte. By virtue of these purchases (subject to a question to be hereafter considered), Beaudry became entitled to question the validity of the sale to Leclère, made by virtue of the power in the deed of gift of 1827.

The following are the circumstances under which this sale was made, so far as they appear to be material.

In 1844, F. X. Castonguay, the institute, desiring to exercise the power of sale, filed a petition in the Court of Queen's Bench, stating this desire, and that, with reference to the condition requiring experts to certify that the sale would be advantageous, he considered the experts should be nominated by

him, and a person representing the substitutes; he, therefore, prayed the Court to nominate a council of the family to appoint a tutor to the substitution for that purpose.

In pursuance of an order made on this petition a family council met and appointed Joseph Castonguay to be tutor.

The tutor having refused to name an expert, in September 1844, F. X. Castonguay brought a suit against him praying for a declaration of his right to sell, if experts certified that it would be advantageous to the substitutes, and that the tutor should be ordered to nominate an expert. The Court ordered the parties to appoint experts who were to report to the Court, and they were appointed accordingly, and made a report to the Court that a sale would be advantageous to the succession.

The right to sell was still disputed by the tutor, but, upon the hearing of the canse the Court on the 13th October, 1847, after referring to the report of the experts and considering ("considerant") that F. X. Castonguay had then the right to exercise the power "en observant les formalités requises," adjudged and decreed that he had the right to sell, an estimate being first made of the value by experts to be named by the parties, or if not, by the Court.

The effect of this judgment is one of the principal questions for consideration. It it so far in favour of the Appellants that it declares the condition imposed by the donor, viz., the certificate of experts that the sale was advantageous, to have been complied with, and that the donee had then the right to sell. But it was insisted on the part of the Respondent that the Court imposed as conditions, not merely a new valuation by experts, but all the formalities required upon a judicial sale, without which the sale would be, it was contended, a nullity.

The tutor having appealed against this judgment it was affirmed with costs, after a long delay, in 1857.

The tutor again refusing to appoint an expert, the Court appointed one for him. These experts reported that the value of the Orchard was 5,000*l.*, and their report was confirmed by the Court on the 20th June, 1857.

It was afterwards thought to be better to sell the orchard in lots, and, on the 24th July, 1857,

F. X. Castonguay petitioned the Court to appoint an expert for the tutor so to value it The tutor appeared, and having submitted himself to the Court, the same experts were again appointed. They valued the orchard, as divided into twenty lots, and made the aggregate value, 5,000*l.* as before.

Their report was filed on the 30th July, 1857, but no application was made either to confirm or reject it, and no further proceeding prior to the sale, was taken in the suit.

Pending these proceedings, F. X. Castonguay, by a deed of the 22nd April, 1857, sold his life interest in the usufruct to Leclère, and one Garceau, whose rights Leclère afterwards acquired. By another deed of the 15th May, 1857, reciting that subrogation had been omitted in the deed of sale, Castonguay declared that Leclère and Garceau should be subrogated in all his rights under the deed of gift, and the judgments of the 13th October, 1847, and on the Appeal, and might exercise them in his name, consenting to do all acts necessary to give them entire possession of the rights ceded to them by the deed of sale.

It was after the usufruct for the life of F. X. Castonguay became thus vested in Leclère, that the purchase by him of the corpus of parts of the orchard, which is now impeached, took place.

The orchard was sold on the 1st September, 1857, at an auction held at the Court House. All the lots were sold, and a price realized much in excess of the valuation, viz., in all 6,442*l.*

Leclère was the highest bidder for six lots, which, after being put up separately, were offered in one lot. They were knocked down to him for 1,000*l.* These lots had been valued at 1,300*l.*, and Leclère afterwards agreed to pay that sum for them. All the lots were sold "à constitution de rente," calculated at 6 per cent on the purchase-money.

On the 14th September, 1857, F. X. Castonguay conveyed by deed of sale these six lots to Leclère. On the 2nd November, 1857, Leclère sold one lot to Short, as stated in the outset, for 50*l.* in addition to the rent-charge; but this sum really represented a profit of 30*l.* only (20*l.* having been paid by Leclère for commuting the seignorial rights) and was not payable for five years.

The above purchase by Leclère of the six lots is impeached by Beaudry in the proceedings which give occasion to the present Appeal, on the grounds, first, that the sale was fraudulent and collusive, and not a *bonâ fide* execution of the power of sale; and, second, that the requisite formalities required upon a judicial sale not having been complied with, the sale is void as against the substitutes.

As to fraud, the judge of the Superior Court. (Mr. Justice Monk) came to the conclusion that it had not been established. He says, "As to frauds being set up by Beaudry as having been practised by Leclère, they have not been proved. There was looseness in his proceedings, and irregularity in the particulars referred to, but no such intention as is imputed to him." The three Judges who formed the majority in the Court of Queen's Bench do not dissent from that opinion, and their Lordships are satisfied with it.

The principal objections urged at their Lordships' Bar on this part of the case were based on the deed of subrogation, by which Leclère was subrogated in all the rights of the donee. It was contended that the power of sale was a trust for the benefit of the substitutes, which could not be delegated, but this their Lordships think is not its true nature. The settlor gave this power to her son the donee, who was the principal object of her bounty, for his own benefit, as well as that of his successors. She guarded the substitution by two conditions, viz., by requiring the sale to be for a rent charge, and a previous report of experts. In so far as the power of sale affected the usufruct, Leclère had, after the transfer to him, a beneficial interest in the exercise of it, and to that extent the subrogation was protective of his own rights. The execution of the power, no doubt, remained with F. X. Castonguay, and he, in fact, did exercise it by authorizing and joining in the sale, and executing the deeds of conveyance.

No authority in Canadian law was cited to show that the alienation of the usufruct by Castonguay, and the subrogation of his rights in Leclère, rendered the execution of the power by the former invalid. Upon principle, there is no reason it should be so. It might be very much to the prejudice of the substitution to hold that powers of this kind were

extinguished upon a sale of the usufruct, which the grévé is competent to make, or that its subsequent execution should be considered necessarily to indicate fraud. In an analogous case arising in England it was held that the power was not extinguished, and that its subsequent exercise was not evidence of *mala fides*. (See Alexander v. Mills, L.R., 6 Ch. App. 124).

No doubt Leclère took the most active part in the management of the sale, but F. X. Castonguay concurred in all that was done, and had separate legal advisers to whom the conditions of sale were submitted. Nothing unusual or objectionable has been pointed out in these conditions, and it appears the usual and full publicity was given to the sale.

Evidence was given of negotiations between Leclère and a Mr. Simpson, with a view to establish that Simpson was prevented from bidding by a promise from Leclère to sell to him after the auction, but the proof on this point is quite inconclusive ; and, on the other hand, there is much evidence to show that Leclère exerted himself to obtain a good sale, and to counteract the efforts of Beaudry himself to prejudice it. There is satisfactory evidence that the sale was well attended, and that the biddings were fairly conducted.

Although some of the circumstances in the case are undoubtedly such as to rouse suspicion, and the attention of their Lordships has been properly called to them, they do not think it necessary to comment further upon the facts, particularly after the finding of Mr. Justice Monk already referred to, from which the majority of the Judges in the High Court expressed no dissent, and in which Mr. Justice Badgley strongly concurred. The latter learned Judge says :—"The general charges of fraud and connivance alleged against Leclère are entirely without foundation."

Their Lordships therefore consider that the sale cannot be annulled on the ground that it was a dishonest one.

Its validity was next impeached on the ground that the formalities required by law had not been observed.

The objections on this head are, that the second report of the experts was not homologated, and that the subsequent proceedings in the conduct of

the sale were taken without the further sanction of the Court.

Their Lordships consider that these objections cannot prevail, unless it can be shown that it was necessary for the due execution of the power that the sale should take place under the authority of the Court. But the Counsel for the Respondent failed to establish to the satisfaction of their Lordships that, by the law of Canada, the exercise of powers of this kind require judicial sanction, and all the judges below were of the contrary opinion. Notwithstanding, however, this opinion, it was held by the Judge of First Instance (Mr. Justice Monk) and by the majority of the Judges in the Court of Queen's Bench, contrary to the opinion of Mr. Justice Badgley, and that of the Chief Justice Duval (who concurred with him) that the grévé having once applied to the Court, was bound to act to the end under its directions. It will be seen that the Judges declare even this opinion with great doubt and hesitation.

Mr. Justice Monk says: "As to the question of the homologation of the second report, the Co rt finds difficulty in holding it to be necessary, 'à peine de nullité.' It is not easy to see why an action was necessary at all by François Xavier Castonguay. The donation gave a right to sell a 'constitution de rente,' after the report of experts was made, and why should he bring a suit? Nevertheless, he did sue, and the Court ordered the sale after c rtain formalities; it homologated the first report, and if the donee took legal proceedings he was bound to carry them out, and have the second report homologated also, and the new terms and conditions of sale sanctioned by the Court. This is the opinion I have arrived at."

The opinion of Mr. Justice Caron, in which Mr. Justice Drummond and Mr. Justice Loranger concurred, is to the same effect. That learned Judge says in substance, that being of opinion the donee could sell the property without having recourse to judicial authority, he at first thought the erroneous proceedings which had taken place could not injure the sale, since they ought to be regarded only "comme un simple surplusage;" but that on reflection he thought that, the donee having sought and obtained a judgment, the conditions which it imposed ought to have been followed.

Mr. Justice Badgley speaks without doubt. He says, "It is conceded on all hands that François Xavier had full and sufficient authority by the deed to make a valid sale without recourse to proceedings at law, but desirous *ex cautela* to give the assurance of law to his power by a declaratory judgment in favour of his right, he was advised to institute a suit at law for this purpose, which required a representation of the substitution to be Defendant in the suit, against whom the judgment might be rendered 'contradictoirement.'"

It appears from the statement of the proceedings already given that the suit arose in this way: F. X. Castonguay, desiring a tutor to the substitution to be appointed for the purpose of naming an expert on their part to make the declaration required by the deed of gift, applied to the Court. This was apparently done to obtain the nomination of an expert which should be beyond question. But the tutor having, when appointed, refused to name an expert, and disputed the right to sell, Castonguay took further proceedings to procure a judicial declaration of his right to sell. The Court made this declaration of his right by their Decree of the 13th of October, 1857, but annexed a condition, not required by the donor, that a valuation should be made by experts. It is not necessary to consider whether this condition was rightly imposed, because it was complied with, and the report of the experts homologated. Besides this condition the "consideration" of the judgment contains the words "en observant les formalités requises," and it was argued that this clause made it necessary to observe all the forms required on judicial sales. Their Lordships consider this is not so. They think it very doubtful whether it was competent for the Court to impose new conditions upon the sale not required by the donor, and none, in fact, are specifically imposed by the Decree, except that requiring a valuation. They think that the "consideration" can at most be regarded as directory only, and not as imposing conditions which rendered the sale void, if not complied with. It may be granted that the formalities referred to not having been observed, the sale cannot have the quality of a judicial act; but if, as their Lordships think, the sale did not require judicial sanction, it cannot be annulled for the absence of it.

It is unnecessary to say whether, even in the case of a sale requiring judicial authority, the non-observance of the usual formalities, would, before the introduction of the code, have been of itself a sufficient ground for annulling it; for their Lordships agree with the first impression of the Judges below, that in this case, the authority of the Court was not required.

A further objection was, that the tutor to the substitution ought to have been consulted in the management of the sale, and particularly as to the conditions of sale.

It was not in their Lordships' view established by the argument at the Bar that the appointment of a tutor was essential to the valid exercise of the power of sale; and it appears to them that, at the most, the tutor was only necessary for the purpose of having the experts duly appointed.

Article 951 of the Code of Lower Canada, which was assumed to be declaratory of the former law, was relied on; but that Article does not relate to sales made in virtue of a power contained in the settlement. Such cases appear to fall within Article 952, which is in these terms:—

"The grantor may indefinitely allow the alienation of the property of the substitution, which takes place in such case, only when the alienation is not made."

The French law applicable to the province does not appear to require the appointment of a tutor where the alienation is allowed by the grantor.

M. Thévenot D'Essaule in "Traité des Substitutions" (1266), speaks of the tutor to the substitution as a novel introduction. After referring (1272) to two cases which do not comprehend the present, he says (1273):—

"Hors ces deux cas fixés par l'ordonnance, nos tuteurs à la substitution ne sont guère nommés que pour mettre le grévé en état de faire juger ses prétentions contre les substitués dont le droit n'est pas ouvert. C'est un personnage qui a été imaginé pour donner au grévé un adversaire," &c.

It is evident that the appointment here spoken of being for the purpose of providing an adversary, where a judicial decision on some claim of the grévé in opposition to the substitutes is sought to

be obtained, the rule is not applicable to the case of a sale in exercise of a power, where, as already shown, no action and no judicial sanction were required.

It has already been pointed out that the appointment of the tutor was originally applied for in this case to name an expert on the part of the substitutes. It, no doubt, appears that when the tutor declined to nominate one, he was treated as an adversary against whom, as representing ths succession, the suit was continued to obtain a declaration of the right of the grévé to sell. But if neither a suit nor judicial authority for the sale were necessary, their Lordships think the fact of the tutor being made an adversary in a needless suit cannot render his participation in the actual sale essential to its validity.

Their Lordships have therefore come to the conclusion that none of the objections made to the sale can be maintained. In doing so, they are glad to be spared the necessity of setting aside a sale which the family itself has not objected to, at the instance of a stranger who purchased an interest at a low price, on the speculation that he might succeed in annulling it.

A question arose on Beaudry's title, viz., whether the children of Benjamin, one of the brothers of the donee, were, in the events which happened, entitled to a share under the deed of gift. Benjamin was dead at the time of the gift, but four of his brothers and sisters were then living. These all died before the donee, but two of the four left children; and the question is, whether the children of Benjamin are entitled to one-third, as the grandchildren of the donor, or are excluded by the terms of the donation.

The conclusion to which their Lordships have come on the principal matter in the Appeal makes a decision on this question unnecessary, but since it has been fully argued, they desire to say they agree with the judgment of the majority of the Court of Queen's Bench in favour of the Respondent on this point.

They think in the events which have happened, viz., the death of F. X. Castonguay without children, having survived all his brothers and sisters, that all the grandchildren of the donor became en-

titled to share (" par souches "). The literal terms of the ultimate limitation would include the children of Benjamin, although he died before the donor; and their Lordships do not find in the context such evidence of an intention to exclude them, as would justify a construction different from that which the ordinary and natural meaning of the language imports.

In the result their Lordships will humbly advise Her Majesty that both the judgments of the Courts below ought to be reversed, and that the opposition filed by the Respondent to annul the seizure ought to be dismissed, and that he ought to pay the costs occasioned by such opposition in both the Courts below.

He must also pay the costs of this Appeal.

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