

1878
(18)

STUART V. BALDWIN.

Will—Construction—Power to sell—Ore severed from the land—Law of Quebec—Effect of upon the rights to such ore—Case stated under Imp. Stat. 22 & 23 Vic. c. 63—"Bona fide possessor" of land.

Replevin for iron ore taken from land in the province of Quebec. It appeared that R., the patentee of the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th of May, 1873, to E. S., who conveyed to the plaintiff on the 31st of May.

Held, that under 36 Vic. ch. 20, sec. 40, O., E. S. clearly had power to sell to the plaintiff.

Before the execution of this deed the ore in question had been severed from the land, but the deed purported to convey not only the land, but all iron and other ores which might have been at any time severed from the land. *Held*, that the ores passed by this conveyance: for though a chattel, and the conveyance would not, except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee, as *cestui que trust*, had authority from the heir as trustee to dispose of it.

The land was situate in the province of Quebec, and a case was sent, under the Imperial Statute 22 & 23 Vic. ch. 63, for the opinion of the Court of Queen's Bench there. That Court decided, thereupon, that the deed by the administrator passed the land and ores to the plaintiff: that defendant had no title sufficient to defeat it: that a certain judgment, set out in the case, recovered by the defendant against the plaintiff there, had no effect upon the plaintiff's title; and that the plaintiff by their law could maintain an action for both the land and the ore, before the ore was removed from that province, but not for the ore until the title, if in dispute, had been established by a petitory action to which the action for the ore would be incident. *Held*, that the inability to sue for the ore there, except as incidental to the right to the land or after it had been determined, formed no reason why our Court here should not adjudicate with respect to the ore.

Remarks as to the meaning of the term *bona fide* possessor of land; and *Quære*, whether the defendant could claim to be so.

REPLEVIN for iron ore.

Pleas, *non detinet*, and goods not plaintiff's.

Issue.

The cause was tried at the Fall Assizes, at Ottawa, 1875, before Patterson, J., without a jury.

The ore was taken from lots 12 and 13, in the 6th range of the township of Hull, in the Province of Quebec.

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