

deur de ses conclusions contre le dit René Dupré et ses représentants, avec dépens de la Cour Supérieure et de cette Cour de Révision contre le demandeur, distraits à Messieurs Longpré et David, avocats des dits mis en causes par reprise d'instance.

"L'honorable juge Papineau ne concourt pas dans ce jugement."

Judgment reformed.

*Beïque & Co.* for the plaintiff.

*Longpré & David* for the Carmélites et al.

#### COURT OF REVIEW.

MONTREAL, JUNE 30, 1882.

MACKAY, PAPINEAU, JETTE, J. J.

[From S.C., Montreal.

LESAGE V. PRUDHOMME.

*Petitory Action—Pleading—Wrongful possession by defendant.*

The case was inscribed by the defendant, in revision of a judgment of the Superior Court Montreal, Rainville, J., Jan. 31, 1882.

MACKAY, J. The plaintiff has succeeded in the Court below in an action petitory, and the defendant complains. Two pieces of land are claimed by the plaintiff; the first is of one arpent in front by like depth, at St. Antoine, with buildings; the second is a quarter of an arpent front, by twenty-five arpents in depth, also with buildings. The plaintiff claims as representing all the three children who were surviving when J. Bte. Lesage died in 1877. He was plaintiff's father, and left by will these lands to his children who would be alive at his death. The declaration charges defendant with having usurped possession of the lands from the time of the death of J. B. Lesage.

The defendant pleads a *défense au fond en fait*, accompanying it with four pages of new matter. By this he pleads that the plaintiff's title is not perfect, for J. B. Lesage left a son Joseph surviving him; that J. B. Lesage and his wife gave Joseph, by donation, those lands on the 16th October, 1850, that it is false that the defendant has seized the *propriété* of the lands referred to; on the contrary, that he has since the death of Jean Bte. Lesage only continued to occupy à *titre précaire*, administering the lands as during the lifetime of Jean Baptiste; that during his administration he has received and paid out monies, but that his expenditures have exceeded

his receipts, of all which he is ready to render an account à *qui de droit*, and particularly to the *vrais héritiers* of Jean Baptiste and his wife, for whom defendant is continuing to administer, he says. He does not ask for a judgment declaring him entitled to retain the lands; he does not ask to be put *hors de cause*. He does not name those for whom he is administering precariously. He asks for the dismissal of the action, with costs.

Ordinarily in actions petitory the defendant pleads general issue; sometimes he contests and claims the property adversely to plaintiff; sometimes does not affect any ownership but asks to be put out of the cause, alleging his possession to be merely precarious, and naming the person for or under whom he is holding. Not so has the defendant pleaded.

The plaintiff made a motion to have all the special matter in the *défense en fait* struck out as irregular, a *défense en fait* being a negative plea, not affirmative as here. The motion was held to be improper procedure. When, later, the plaintiff answered the *défense en fait* as she did, by a long special answer, perhaps she did wrong again. (See vol. 6 Quebec L. R., page 13.) The Court below has been compelled, upon the pleadings as formulated, to find that one Joseph Lesage, brother of the plaintiff, once lived and has not been proved dead; that, therefore, it may be said that J. Bte. Lesage left four children surviving him, and not merely three, as plaintiff by her declaration alleged. It also finds that the donation was made to Joseph as alleged, but that it was never really followed by tradition or any taking of possession, by Joseph; but that, on the contrary, the donors have always since been in possession and Joseph absent from the country, and that defendant is retaining the property without any right. Treating Joseph as *co-légataire* for one-fourth, it pronounces for plaintiff for less than she asks—that is, it adjudges plaintiff to be owner for three-quarters of the lands in question, and the defendant is ordered to quit.

All the equities, and the law too, are on the side of the plaintiff. The defendant writes himself down in his own deposition as a bad kind of usurper. On the death of Jean Baptiste, who survived his wife, the defendant came to Montreal and consulted a lawyer, who advised him to take possession of these lands, and therefore