

immense quantity of sense and experience the criminal law of England contains, notwithstanding some undeniable defects in substance and defects of form which can hardly be exaggerated.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, July 7, 1882.

Before TORRANCE, J.

THE CONSOLIDATED BANK OF CANADA V. THE TOWN OF ST. HENRI et al.

Execution—Sale super non domino.

This was an action to set aside a sale made by the Sheriff of Montreal upon a warrant of the Mayor of St. Henri, for taxes due on certain property there situate, of which the defendant, William Henderson, was described in the proceedings as the known proprietor, and he was made defendant in the proceedings to recover taxes, as appeared by the Sheriff's deed. The property was seized by the Sheriff on the 19th May, 1880, and was sold to Thomas R. Johnson, as the last and highest bidder, for \$341, on the 29th July, 1880, and a deed was subsequently executed on the 6th August, 1880. The plaintiffs sued to have this deed set aside as having been made *super non domino, et non possidente*, Henderson not having been the proprietor or in possession of the property, *animo domini*, for several years. Plaintiffs alleged that they were proprietors and in possession of the property by deed of sale, dated 13th June, 1878, duly registered 27th of the same month, for \$9,000, from Fulton, the assignee of Henderson's insolvent estate, he having become insolvent by deed of assignment to James Tyre on the 28th of July, 1875, and which assignment was duly registered on the 8th of September, 1875, and the estate afterwards duly transferred to Fulton.

The defendant Johnson specially denied registration of the deed of assignment or transfer thereof, in reference to said land, and plaintiff's possession or any act of ownership, such as payment of taxes, and also any notification of change of title. He alleged good faith in purchasing and the liability of the municipality of St. Henri to guarantee his title, and that he was entitled to receive from plaintiffs the amount by him disbursed in the purchase of the lots, and no offer was made to him by plaintiffs

declaration, &c. The corporation defendant pleaded want of notice to them of the sale, the want of registration of the alleged deed of assignment, and the want of right of the assignee to convey title; also that plaintiffs never had possession; and the corporation were authorized by their charter to cause the lands to be sold by the Sheriff as was done.

PER CURIAM. It is necessary first to settle whether the plaintiffs have a *locus standi* here—whether they had a title by the deed from the assignee Fulton. Non-registration of the title of the assignee is alleged. I am satisfied that plaintiffs held by a good title. The assignment to Tyre was duly made by Henderson the insolvent and then registered. Fulton then took his place by resolution of the creditors, and the sale was, by the Court, ordered on the 7th March, 1878, on the petition of plaintiffs, and the order directed to Fulton as assignee. It was sufficient. Next, have the plaintiffs forfeited their rights by subsequent proceedings?

The sale sought to be set aside was made by the Sheriff under 40 Vic. cap. 29. S. 384 says: "The Sheriff shall be bound to execute such warrant (warrant for sale) by observing the same formalities and with the same effects as in the case of a writ *de terris*." C. C. P. 632 says: "The seizure of immovables can only be made against the judgment debtor, and he must be, or be reputed to be, in possession of the same *animo domini*." Let us now turn to the ordinance 25th Geo. III., cap. 2, sec. 33. "The sale by the sheriff * * shall have the same force and effect as the *décret* had heretofore"—*i.e.*, after the observance of the formalities prescribed. What, then, is the effect of the *décret* referred to? Pothier, *Droit de Propriété*, says (n. 252): "Lorsque c'est un héritage ou autre immeuble qui a été saisi réellement et vendu par décret solennel sur un possesseur qui n'en était pas le propriétaire, l'adjudication par décret ne laisse pas de transférer le domaine de propriété à l'adjudicataire, faute par le propriétaire de s'être opposé au décret avant qu'il ait été mis à chef." This rule is to be applied with some qualification, and explanation De Hericourt, *De la vente des immeubles par décret*, cap. iv., sec. 1, discusses the question whether there are cases where the seizure which is not made upon the proprietor can be valid. "C'est une règle constante dans notre jurisprudence que l'on ne peut saisir réellement un immeu-