

on the immovables, but upon what immovables? I think upon the immovables of the debtor, out of which, and which only, the creditors have a right to be paid their claims such as they are, unless some law is found to extend this. The funeral expenses, the expenses of the last illness, claims of builders, servants' wages, are all mentioned in Art. 2009 C. C. If such had existed in the present case, could it be pretended that they should come out of contestant's share or out of the property of the debtor? I think there could be no doubt in such cases. But have we any law fixing and determining what costs should be paid by the contestant? Our code of procedure, C. C. P. 729, declares that after the law costs, such claimants as contestant are collocated deducting such debts as they may be bound to pay and as have become payable in consequence of the sale of the immovable and the costs mentioned in the preceding article—C. C. P. 728. Are these amongst those enumerated? Plaintiff says under Sub. Sect. 6. Recently in the case of *Beaudry & Dunlop*, the Court of Appeals restricted the privilege of attorneys, that is for costs, to the costs of suit in the Superior Court, and rejected their claims for costs in the Court of Appeals and the Privy Council. These are costs incurred either in the Court below or in Appeal, upon proceedings incidental to the seizure and necessary to effect the sale of the immovables. In the first place it is not upon this ground that the plaintiffs claimed and were allowed their privilege, and in the second place, I do not think this applies to the present case, but these proceedings, namely the proceedings referred to in Sub-Sect. 6, are incidental to the cause in which the immovables are sold, that is, the incident must be either in the court below or in appeal, and if they could be allowed, they would come before not after, the costs of suit, as in the report complained of. Claiming under this provision is an afterthought of plaintiffs. Then come costs of suit as in Art. 606, C. C. P., which are not contested. I was much struck with Mr. Justice Casault's remarks in *Quebec Law Reports*, Vol. 13, page 302, *Langlois v. The Corporation of Montminy*. He says "Qu'on n'oublie pas qu'il s'agit d'un privil-

"ége, que les privilèges n'ont pas d'autre existence que celle que leur donne la loi (C. C. 1983,) et que, quelque faveur que puisse en général, ou dans des cas particuliers, mériter une créance, elle ne peut jamais être privilégiée, si la loi ne lui donne pas expressément ce caractère." Aubry & Rau, vol. 3, page 124, and Laurent, vol. 29, page 317.

I do not think these costs are such as are mentioned in Art. 728, C. P. C., and that when Art. 2009, C. C. gives the privilege, it is on the immovable of a debtor, and not on that of a third party, and consequently, I think that the contestation should be maintained, and the report altered so as to give the contestant his $\frac{1}{2}$ after taking out the costs of suit and report.

If contestant had filed his opposition à *fin de distraire*, he would not have been liable to any costs, and would have had his $\frac{1}{2}$ as owner. The opposition à *fin de conserver* gives him the money represented by his $\frac{1}{2}$, except as modified by Art. 729 C. P. C.

Judgment maintaining contestation of items 5 & 6, and giving contestant $\frac{1}{2}$ of the sum awarded plaintiffs, (opposants) by same items, as the owner of $\frac{1}{2}$ realty sold.

Hall, White & Cate, for Plaintiffs.

Camirand, Hurd & Fraser, for Contestant.

COURT OF QUEEN'S BENCH—MONTREAL.*

Opposition en sous-ordre—Moneys deposited in hands of prothonotary—C. C. P. 753.

Held:—Affirming the judgment of *MATHIEU, J.*, M. L. R., 2 S. C. 143, but resting the decision on other grounds, that where moneys have been attached by garnishment and deposited in the hands of the prothonotary to abide the result of a contestation, and subsequently, by a final judgment, the said moneys have been declared to be the property of the contestant, and the prothonotary, by a judgment of the Court has been ordered to pay the same to the contestant, such moneys cannot be claimed by an opposition *en sous ordre*, there being no longer any suit pending in which such opposition could be

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