

did not reside within the province, they should be ordered to give security for the payment of costs.

**PER CURIAM.** The plaintiffs obtained judgment against the defendant and seized certain goods and furniture which his wife claims to be hers, and the plaintiffs contest her opposition.

The opposant has moved that the contestants be required to give security for costs, and that the proceedings be stayed until they do so.

Article 29 of the C. C. provides that every person not resident in Lower Canada, who brings or institutes any action, suit, or proceeding in its courts, is bound to give the opposite party security for the costs which may be incurred in consequence of such proceeding.

As to whether, under this article, a plaintiff contesting an opposition is bound to give security for costs, opinions seem to be divided, and judgments have been given both for and against. After examining the various judgments on the point which have been reported, I prefer to follow the opinion of the late Mr. Justice Smith, in the case of *Morrill & McDonald*, 8 L. C. J. 40, that he is not bound to do so.

The article of the C. C., already cited, is taken from sec. 68, of ch. 83 of the C. S. L. C. which provided that "in all actions, oppositions, and suits prosecuted before the courts in Lower Canada, by any person residing without Lower Canada, the defendant, or other party concerned, may demand security for the payment of his costs in case the plaintiff or prosecutor should fail in his action, opposition, or other suit." Under this section it is clear that an opposant could be compelled to give security for the costs incurred in consequence of his opposition, but that he could not require security from any party contesting his opposition. The article of the Code, although not reproducing the exact words, was intended, as appears from the report of the codifiers, to reproduce the provisions of this section.

Any stranger, or rather any non-resident, seeking to establish a right in our courts, is required by our law to give security to the party against whom he claims such right,

and this applies to an intervener and to an opposant, as well as to a plaintiff. But, once a right has been judicially recognized, it seems to me that our law does not require security to be given for the costs, direct or incidental, to be incurred in enforcing such right.

I find the following authorities on this point:—

Sirey, Codes Annotés, article 16, No. 7: l'étranger poursuivant une expropriation forcée n'est pas tenu de fournir la caution *judicatum solvi*. Poncet, Traité des Actions, No. 173: il en est de même s'il ne fait que poursuivre l'exécution d'un titre paré, c'est-à-dire revêtu de la formule exécutoire; car il ne s'agit plus pour lui de réclamer un droit litigieux, mais d'exercer un droit acquis.

In this case, the plaintiff's right has been judicially recognized, and they are seeking to enforce it. It is the opposant who is now seeking to establish a right which the plaintiffs contest. They occupy the same position as a defendant who denies a right claimed against him, and who, not seeking, but resisting, is not bound, and should not be called upon to give security. Then again, the end sought by the contestation is the enforcing of a right which has been judicially recognized, and the costs are incidental to the execution of the judgment obtained.

I am of opinion that the opposant is not entitled to security from the plaintiffs, and I reject the motion.

Motion dismissed.

*D. R. Barry*, for opposant.

*C. P. Roney*, for plaintiffs contesting.

#### SUPERIOR COURT.

MONTREAL, Feb. 12, 1886.

Before JOHNSON, J.

TANSEY V. GRAHAM.

*Libel—Private and public capacity—Expression of opinion by an elector of a public man.*

The libel complained of was contained in a letter written by the defendant during an epidemic of small-pox, representing that the plaintiff was a cipher on the Board of Health of Montreal.