"Condamne le défendeur à payer au demandeur la dite somme de $3,582.87, avec intérêt," etc.

In appeal, CARON, J. *ad hoc*, (*diss.*) was of opinion to confirm the judgment, on the grounds stated therein. His Honour referred to the case of *McDonnell & Goundry*, 22 L. C. J. 221, in support of his view.

The majority of the Court were for reversing the judgment. The following opinion was by RAMSAY, J. This case appeared to me at first to be one of extreme simplicity, but now with elaborate reasoning, questions of practice, precedents of this Court said to be contradictory of the decision rendered in this case, and citations from codes, it assumes another aspect.

The action was brought to recover one instalment of purchase money due on a deed of sale by respondent to appellant, with interest. The defence to the action was that the deed of sale contained the clause of *franc et quitte* save one incumbrance which respondent bound and obliged himself to remove and to have the discharge enregistered. This has not been done. Respondent says that this clause meant "that the vendors should pay off the said mortgage as soon as it was practicable or possible so to do;" and that it was not practicable so to do because by a deed which appellant knew the existence of, the incumbrance—a constituted rent—was substituted and that the substitution was not yet open.

Of course every deed that stipulates a condition means that the condition must be possible, that is, not physically impossible, or contrary to law and good morals. But the undertaking to pay off a *bailleur de fonds* claim is not impossible. By itself it is perfectly possible, although the person undertaking may be unable from some act of his own to perform the obligation. Frothingham *s'est fait fort* to pay off the claim and he was bound to do it. If however it were otherwise, I think the repayment of the *rente constituée* is not rendered impossible even for Mr. Frothingham—that is, there is not even a relative impossibility. The authority of Pothier is clear and precise. See Const. de Rente, No. 51, cited at the bar, and No. 91, where the doctrine is repeated. It is true the object of the law, to prevent the loan of money at interest, was the cause of this strict doctrine, and the usury laws being done away with, it may perhaps be said that the cause of the law having disappeared, the law also has ceased. But I don't think the *brocard* can be so applied, as to create an embarrassment of this kind. It might perhaps have been argued that the deed from MacKenzie to Frothingham constituted a *rente viagère*, but both parties seem to agree that it created the substitution of a *rente constituée*, and they are probably right. For my part I don't think it would affect the case as it comes before the Court.

There was another point made at the argument, and as it seems to have been the one on which the judgment of the Court below turned, it is right to notice it. It was said that appellant had plenty of security in his hands even after he paid this instalment. It is not a question of security but of contract. Respondent promised to remove the encumbrance, he cannot now tell appellant that he wanted something else, with which he ought to be satisfied. I therefore think the judgment must be reversed in so far as it maintains the action for the instalment.

By the second plea there is a claim by appellant for damages for failure on the part of respondent to fulfil his bargain, which, it is prayed, may be set off against the balance of purchase money due. That is rather a contradictory conclusion. Defendant says he won't pay the instalment because it is not due owing to the omission of plaintiff, in one plea, and in another he says he will pay it provided he may do so by offering damages to be paid as a set off. There is another objection, I don't think the liability is proved. Respondent had a certain thing to do, he was only pressed to do it when Lewis refused to take the deed, and then the damage was done. I would, therefore, reject the demand of damages by the plea.

It has been said by the learned Judge who dissents, that the first plea of the appellant should have been pleaded as a preliminary plea, and he quotes article 120, 2ndly, C. C. P. That article only says that such a plea *may* be pleaded as a dilatory exception,—a disposition we are not likely to interpret by turning "may" into "must."

Allusion has been made to two cases of *Goundry & MacDonnell*, and it is contended that we there held that where there was the clause of *franc et quitte* the vendor could re-